Supplement to the trial of William Burke & Helen M'Dougal : containing the whole legal proceedings against William Hare, in order to bring him to trial for the murder of James Wilson, or Daft Jamie. With an appendix of curious and interesting information, regarding the late West-Port murders. Illustrated by a lithographic print of Mrs Hare and her child, as they appeared in the witness box / [William Burke].

Contributors

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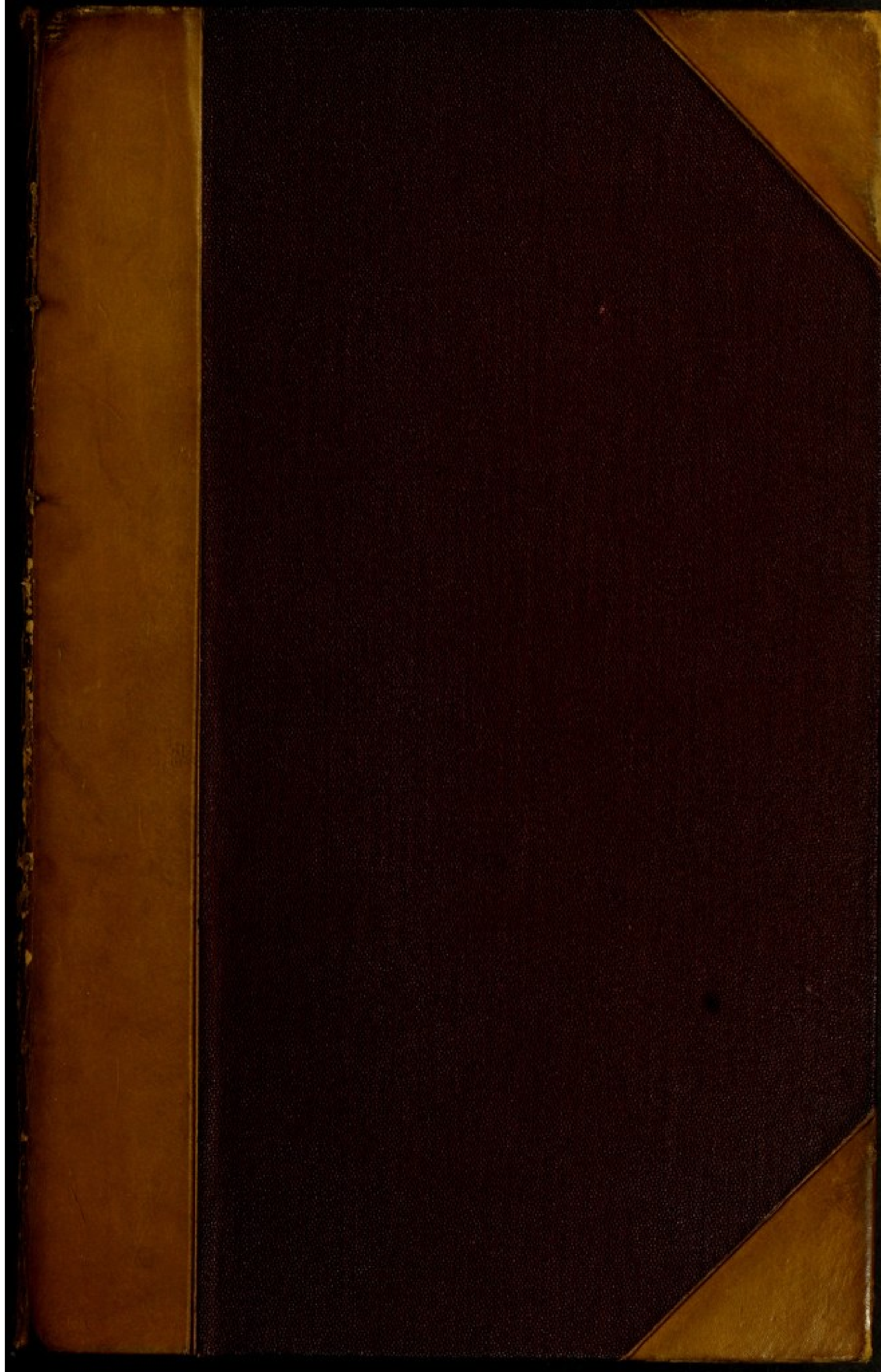

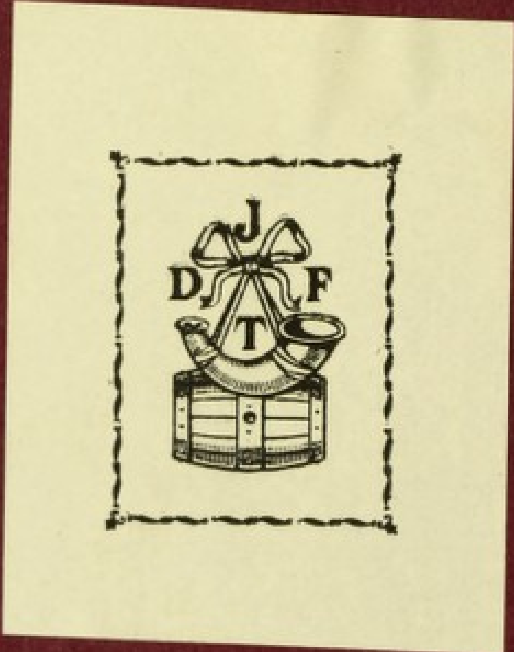
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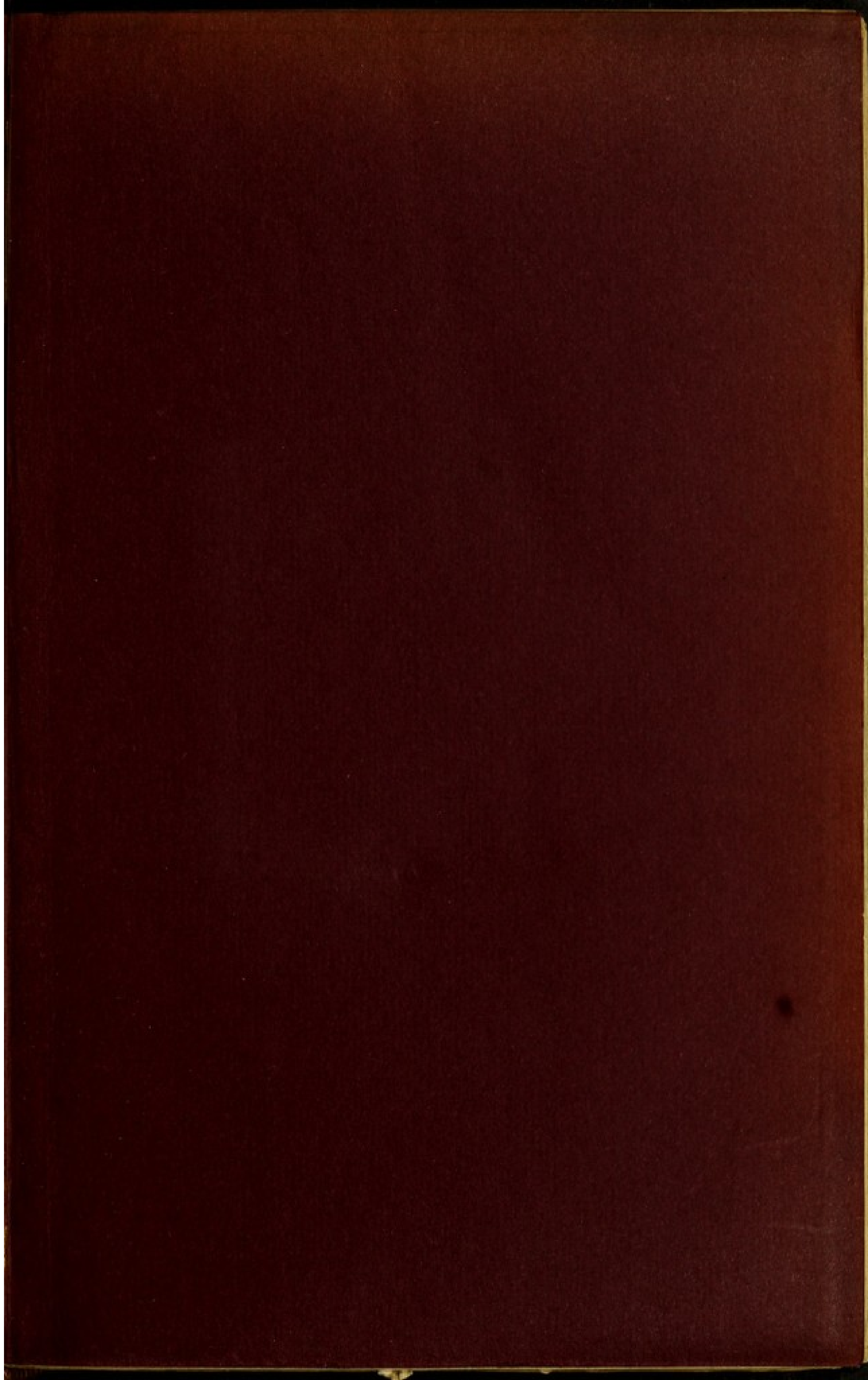
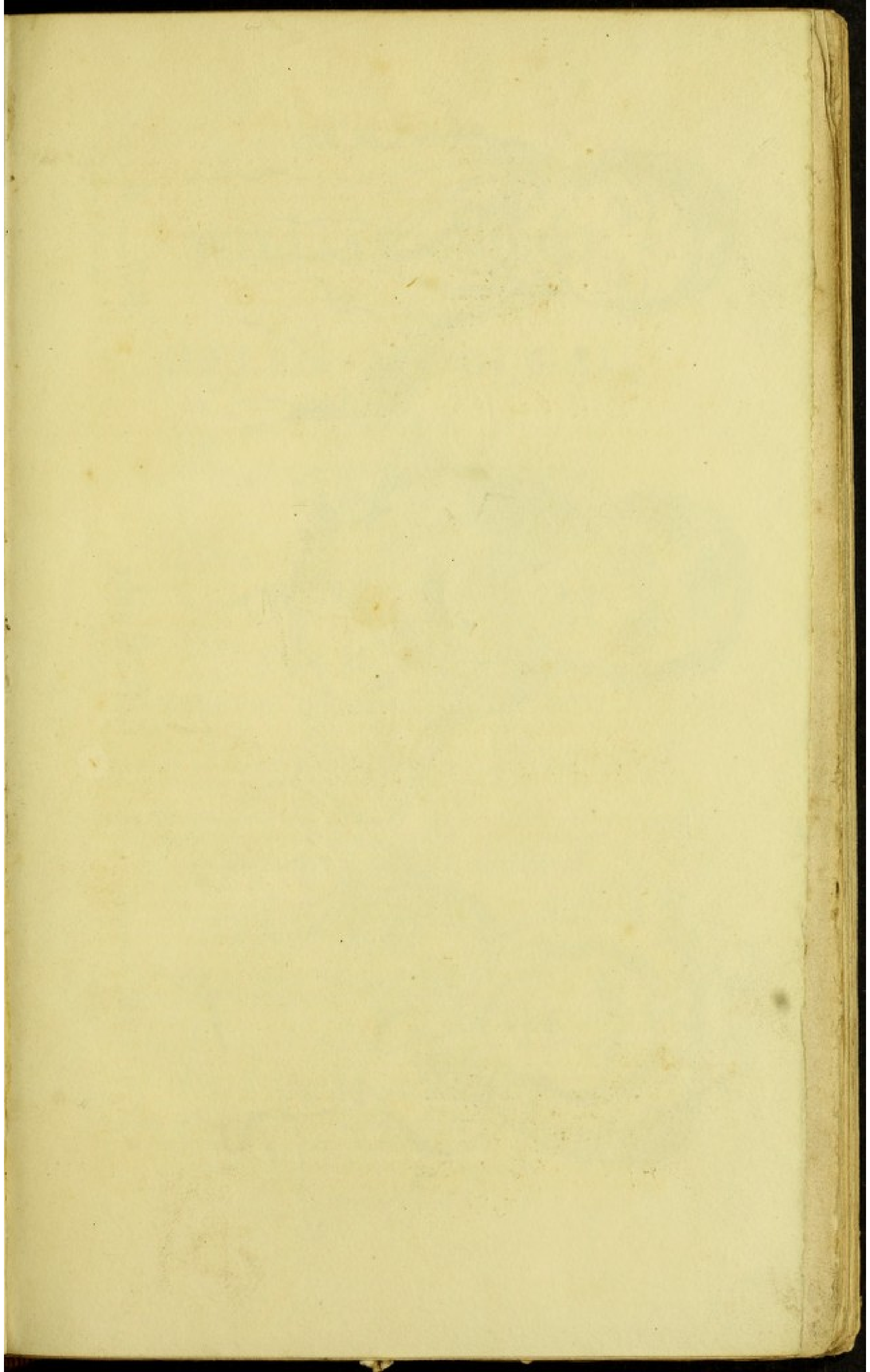
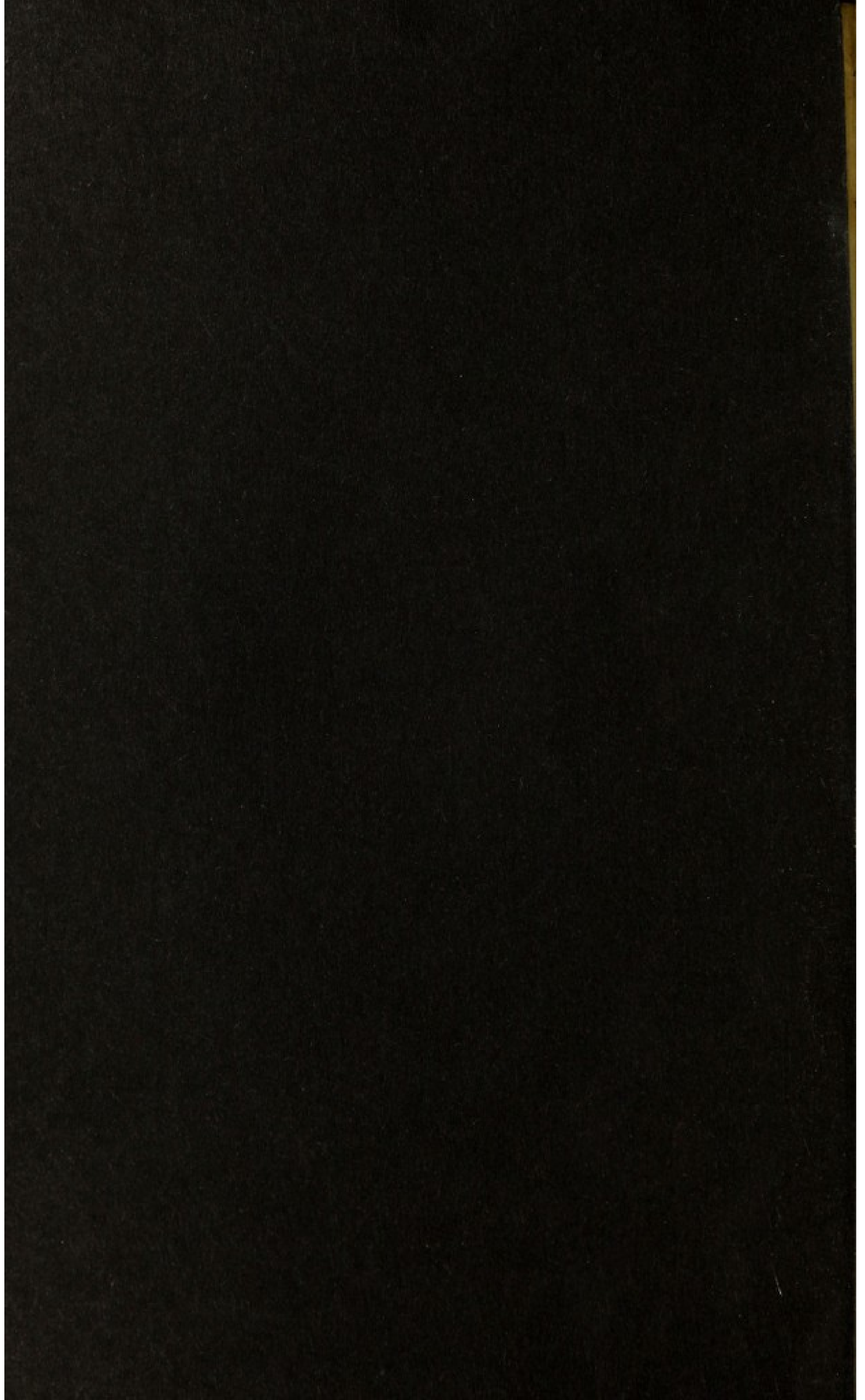


11) Famous Trials. J. B. Atlay pp 19-43

12) Gents Mag (1828) II 636 (1829) I 169.





SUPPLEMENT

TO THE TRIAL OF

WILLIAM BURKE & HELEN M'DOUGAL,

CONTAINING

THE WHOLE LEGAL PROCEEDINGS

AGAINST

WILLIAM HARE,

IN ORDER TO BRING HIM TO TRIAL FOR

THE MURDER OF

JAMES WILSON, OR DAFT JAMIE.

WITH

AN APPENDIX

OF

CURIOUS AND INTERESTING INFORMATION,

REGARDING THE LATE

WEST-PORT MURDERS.

ILLUSTRATED BY A LITHOGRAPHIC PRINT OF MRS HARE AND HER CHILD, AS THEY APPEARED IN THE WITNESS BOX.

EDINBURGH:

PRINTED FOR ROBERT BUCHANAN, 26, GEORGE STREET; WILLIAM HUNTER, 23, HANOVER STREET; JOHN STEVENSON, 87, PRINCES' STREET; AND BALDWIN & CRADOCK, PATERNOSTER ROW, LONDON.

MDCCCXXIX.

The Publishers beg leave to intimate, that the whole of the Opinions delivered by the Judges in this [illegible] and important Case, have been carefully revised by their Lordships; and that every effort has been made to render this Supplement—along with the Trial of Burke and M'Dougal,—a full and Authentic Record of the whole Legal Proceedings instituted relative to the West Port Murders.

Edinburgh,
[illegible]

ADVERTISEMENT.

The Publishers beg leave to intimate, that the whole of the Opinions delivered by the Judges in this Novel and Important Case, have been carefully revised by their Lordships; and that every effort has been made to render this Supplement,—along with the Trial of Burke and M'Dougal,—a full and Authentic Record of the whole Legal Proceedings instituted relative to the *West-Port Murders.*

Edinburgh,
20*th February* 1829.

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PRELIMINARY NOTICE.

IMMEDIATELY after giving their evidence on the trial of Burke, WILLIAM HARE and his wife were recommitted to the jail of Edinburgh, under a warrant of the Sheriff; where they were detained, either with the view of eliciting from them farther information relative to the atrocious transactions in which they had been engaged, or in the expectation of discovering some new case against them, upon which they might be brought to trial, without infringing the unqualified assurance of protection and indemnity given them by the Lord Advocate, as an inducement to turn King's evidence, in order to ensure the conviction of Burke. It would appear, that in the latter view, at least, the public prosecutor was unsuccessful; and, accordingly, it was ascertained, on the 19th of January, that the commitment on the part of the Crown would be instantly withdrawn.

In the meantime, the public mind being strongly excited by the horrid disclosures made upon the trial of Burke, the popular indignation, after his conviction, was next directed against his associate, Hare, whose evidence,—given with such levity and *sang froid*,—at once pointed him out as likely to have been the greater villain of the two, and as a monster so conversant with such atrocities, that his conscience, seared by his constant career in crime, felt no compunction for the enormities he had committed, but which, he rather seemed to look upon with callous indifference: Circumstances afterwards transpired, which greatly increased the rancorous feeling against Hare, as they tended to shew that he was not only the principal actor in these bloody and merciless scenes, but was the tutor and instigator of his convicted accomplice.

The public journals kept alive and fostered this natural, and laudable feeling, on the part of the people, and vigorously maintained the necessity of further disclosures; calling

upon the Lord Advocate to redeem the pledge he had given, that he would probe the matter to the bottom: Public vengeance would not be satisfied with the condemnation of Burke alone, and loudly demanded the sacrifice of Hare at the pale of justice: Great clamour was likewise raised, that the public prosecutor was impeding the course of the law, by permitting Hare to escape the punishment his crimes so justly deserved,—on the ground that having turned King's evidence for the trial of Burke, he could not be afterwards prosecuted for any of the other murders charged in his indictment.

There being, therefore, no chance of Hare being brought to trial by the Lord Advocate, and the public being dissatisfied at his thus escaping punishment, subscriptions were raised to enable the relations of James Wilson, better known by the name of *Daft Jamie*, to institute a private criminal prosecution, for the murder of that individual, against Hare, with the concurrence of his Majesty's Advocate. Accordingly, an agent was employed, and eminent counsel retained, to conduct the prosecution. A petition was presented to the Sheriff on the 16th January, by the private prosecutors, charging Hare with the murder of the said James Wilson, upon which he was examined, and thereafter detained a close prisoner in the jail of Edinburgh; and a precognition was immediately instituted.

On the 20th January, Hare (his wife having been liberated on the day previous,) applied to the Sheriff, by a petition, (which will be found embodied in the bill of advocation,) praying, *inter alia*, that his Lordship would recall the said warrant, and ordain him to be set at liberty; and also to interdict the aforesaid precognition from being further proceeded in. This petition was ordered to be served on Mr George Monro, solicitor, as agent for Janet Wilson, the mother of *Daft Jamie*, and parties were appointed to be heard on this application the day following; and all further proceedings were sisted in the meantime. On hearing Mr Jeffrey, as counsel for the private prosecutors, and Mr Duncan M'Neill, on the part of Hare, the Sheriff pronounced the following judgment:—' *Edinburgh*, ' 21*st January* 1829.—The Sheriff having resumed the con- ' sideration of the petition of William Hare, and having ' heard counsel for William Hare, and the respondents, Janet ' Wilson, senior and junior; In respect that there is no deci- ' sion, finding that the right of the private party to prosecute ' is barred by any guarantee, or promise of indemnity given ' by the public prosecutor, refuses the desire of the petition; ' but in respect of the novelty of the case, supersedes farther ' proceeding in the precognition before the Sheriff, at the in- ' stance of the respondents, till Friday next, at seven o'clock,

'in order that William Hare may have an opportunity of ap-
'plying to the Court of Justiciary.'

(Signed) 'AD. DUFF.'

'*Note.*—The application which has been made to the Lord
'Provost for liberty to see Burke, by the private prosecutors,
'is not before us, but remains to be disposed of by the Lord
'Provost.'

The following BILL of ADVOCATION, SUSPENSION, and LIBERATION, was accordingly presented to the High Court of Justiciary, on behalf of Hare, complaining of the Sheriff's decision.

MY LORD JUSTICE-GENERAL, LORD JUSTICE-CLERK, and Lords Commissioners of Justiciary,—Unto your Lordships humbly COMPLAINS and SHEWS your servitor, WILLIAM HARE, present prisoner in the tolbooth of Edinburgh,—That he has to complain to your Lordships of, and bring under your review, certain proceedings *in criminalibus,* adopted against him before the Sheriff of Edinburgh, on the application, and at the instance of two joint private prosecutors, Janet Wilson senior, and Janet Wilson junior, in virtue, and in consequence of which, they are in the course of leading an *ex parte* precognition against him before the Sheriff; and they have obtained from the Sheriff, a warrant, under which the complainer is confined by them a close prisoner, on a charge of murder, which they have made against him: And a petition presented by him for recall of the said warrant, and for liberation, and for stopping the said precognition, has been refused by the Sheriff; MOST WRONGOUSLY AND UNJUSTLY, as will appear to your Lordships, from a statement of the facts. The material facts are set forth in the said petition presented by the complainer to the Sheriff, which was of the following tenor:—'That,
'of this date, (10th November 1828), the petitioner was appre-
'hended on a warrant of your Lordship's substitute, granted on
'the application of the Procurator-fiscal of the county, and was
'committed to the jail of Edinburgh, a prisoner, on a charge
'of murder: That the petitioner was examined before the
'Sheriff-substitute of the county, in relation to various acts
'of murder alleged, or suspected to have been committed by
'William Burke, then in custody, and other persons: That
'in the course of these examinations, the petitioner was as-
'sured by the public prosecutor, that if he made a full dis-
'closure of all he knew relative to the several alleged mur-

'ders, which formed the subject of inquiry, no criminal pro-
'ceedings would be instituted against the petitioner himself,
'in relation thereto, whatever might be the circumstances of
'suspicion, or apparent participation or guiltiness appearing
'against him: That the petitioner was examined as a wit-
'ness, and without the caution and warning which it is
'the duty of the Judge-examinator to give to a party ac-
'cused, every time he is brought up for examination, and
'the petitioner made a full and true disclosure of all he
'knew, and gave every information he possessed, in relation to
'all the alleged murders, as to which he was examined; and
'this he did under the assurance of personal and individual
'protection above-mentioned: That one of the alleged mur-
'ders, as to which the petitioner was so examined, was that
'of a person described as James Wilson, commonly known by
'the name of *Daft Jamie;* and in relation to that murder, as
'well as in relation to all the others, the petitioner made a
'full and true statement, and gave every information he pos-
'sessed, whether relative to the alleged act of murder itself, or
'the means of obtaining or tracing any circumstances of evi-
'dence in relation thereto. And all this he did, relying on
'personal and individual safety, above-mentioned, and the
'compact and transaction thence arising, that in consequence
'of the statement and information thus elicited from, and pro-
'cured through, the petitioner, the said William Burke was
'indicted to stand trial before the High Court of Justiciary, in
'the month of December last, on a libel, setting forth three
'charges of murder, as to all of which the petitioner had been
'precognosced, as aforesaid: That one of these three charges
'was the foresaid alleged murder of James Wilson, *alias Daft
'Jamie*: That in the list of witnesses annexed to the said li-
'bel, the petitioner was included for the prosecutor, and he
'was cited to attend as a witness for the prosecution, in
'relation to all the charges therein contained. The libel
'was found relevant to infer the pains of law; and the public
'prosecutor having proceeded to lead evidence against William
'Burke and another prisoner, as to one of the charges, (being
'the murder of Mary Docherty), the petitioner was called,
'sworn, and examined as a witness for the prosecution. On
'that occasion, the petitioner stated many things in evidence,
'which he would not have stated, and could not have been re-
'quested to state, but for the perfect assurance of personal se-
'curity given him by the public prosecutor, not only as to the
'murder of Mary Docherty, but likewise from any prosecu-
'tion as to other murders charged in that indictment, and
'which was laid down and confirmed from the Bench at the
'said trial. It was then stated from the Chair of the Court,

'as the decided opinion of the whole Bench present, that the
'petitioner was fully protected by law against either trial or
'punishment for any of the charges contained in that indict-
'ment: That the public prosecutor, having obtained a capital
'conviction and sentence against William Burke, on the last
'charge on which evidence was led, has not thought it proper
'to proceed with any of the other charges, and probably never
'will: That notwithstanding the compact with the public
'prosecutor, under which the petitioner was induced to make
'disclosures of great importance to the public interest, and to
'the administration of justice, but which were calculated to in-
'volve himself in circumstances of suspicion and hazard,
'in which he could not otherwise have been involved; and
'notwithstanding the assurance of personal safety held out to
'the petitioner from the Bench, criminal proceedings have,
'within these few days, been instituted against the petitioner,
'at the instance of Janet Wilson, alleged sister, and Janet
'Wilson, alleged mother of the said James Wilson, alias *Daft*
'*Jamie;* but who, the petitioner is informed, and has reason to
'believe, do not truly possess these characters, and have pro-
'duced no evidence thereof. And he has been examined be-
'fore the Sheriff-substitute, as a party accused of that offence,
'and is now a *close prisoner* in the jail of Edinburgh, commit-
'ted for further examination as to that charge of murder:
'That under the circumstances above detailed, the petitioner
'is advised, that the proceedings thus instituted against him
'are incompetent, irregular, oppressive, and illegal, and that
'the warrant on which he is committed, at the instance of
'the said Janets Wilson, is illegal, and that he is entitled to
'immediate liberation: That the petitioner has been in-
'formed, that the said Janet Wilson, alleged mother,
'and Janet Wilson, alleged sister, have applied for, and
'obtained the authority of your Lordship to lead a pre-
'cognition, and examine witnesses, as to the petitioner's
'alleged guiltiness of the said charge; and that an *ex*
'*parte* examination of witnesses is actually going on, under
'the authority, and force of your Lordship's power and com-
'pulsitor, in absence of the petitioner, who is shut up a *close*
'*prisoner*, as aforesaid: That the petitioner has been advised,
'that this proceeding also is incompetent, irregular, and ille-
'gal, and highly oppressive and injurious.—May it therefore
'please your Lordship, to take into consideration the circum-
'stances above set forth; to recall the warrant on which the
'petitioner is committed, and ordain him to be set at liberty:
'Also, to put a stop to the precognition or examination of wit-
'nesses; and to ordain the same, in so far as it has already

'proceeded, to be delivered up to your Lordship's clerk, or to 'such other as your Lordship shall appoint, in order to the 'same being sealed and retained, to abide the future orders of 'your Lordship, or the other competent Judge, or Court; or 'to give such other relief in the premises, as to your Lordship 'shall seem proper.' On that petition the Sheriff pronounced the following deliverance: *—'The Sheriff having considered 'this petition; Appoints a copy thereof, and of this deliver-'ance, to be served immediately on Mr George Monro, solici-'tor, Supreme Courts, agent for Janet Wilson; and appoints 'to-morrow, at two o'clock afternoon, for hearing counsel or 'agents for the petitioner, and for Janet Wilson, in the Sheriff's 'office; and in the meantime, sists farther proceedings in the 'precognition at the instance of the said Janet Wilson.' And thereafter, of this date, † the Sheriff pronounced as follows:—'The Sheriff having resumed consideration of the petition for 'William Hare, and having heard the counsel for William 'Hare and the respondents, Janet Wilson, senior and junior; 'In respect that there is no decision, finding that the rights 'of the private party to prosecute is barred by any gua-'rantee or promise of indemnity given by the public prosecu-'tor, refuses the desire of the petition; but in respect of the 'novelty of the case, supersedes farther proceedings in the 'case before the Sheriff, at the instance of the respondents, 'till Friday night, at seven o'clock, in order that William 'Hare may have an opportunity of applying to the Court of 'Justiciary.'—'Note.—The application which has been made 'to the Lord Provost, to see Burke, by the private prosecu-'tor, is not before us, but remains to be disposed of by the 'Lord Provost.' The complainer has now to submit that judgment to review, and to pray your Lordships to afford him, by suspension and liberation, the relief and redress which the Sheriff has refused. The facts are so fully set forth in the petition above quoted, that the complainer does not consider it necessary to repeat, or to add to them, or to detain your Lordships with any lengthened argument,—more especially as he expects your Lordships will appoint parties to be heard orally on the present bill. The complainer may however state, in reference to the *ratio* of the Sheriff's judgment, the petition, 1*st*, That the private prosecutors themselves are perfectly aware that the public prosecutor was adopting proceedings, both as to William Burke, and as to the complainer, in relation to the alleged murder of James Wilson; but they gave no intimation of any intention on their part to insti-

* 20. January 1829. † 21. January 1829.

tute criminal proceedings against the complainer, till after the trial and conviction of Burke. *2dly*, That the ratio assigned by the Sheriff, viz.—'There is no decision, finding 'that the right of the private party to prosecute, is barred by 'any guarantee or promise of indemnity given by the public 'Prosecutor,'—supposing that ratio to be well-founded on fact, does not at all exhaust or dispose of the case; for the complainer's case arises out of circumstances, and is rested on principles which do not require to be supported by decisions, and, of which, the promise alluded to in the Sheriff's judgment, forms only a part.—Herefore, &c.

(Signed) DUN. M'NEILL.

Upon this bill, the following deliverance was given *:—

'The Lord Justice-Clerk having considered the foregoing 'bill of advocation, suspension, and liberation; Appoints the 'same to be intimated to George Monro, S. S. C., agent for 'Janet Wilson senior, and Janet Wilson junior, by delivering 'to him a full double of the said bill, and of this deliverance 'thereon; and ordains parties to be heard by their counsel on 'Monday next, at ten o'clock forenoon; and, in the meantime, 'sists further proceedings before the Sheriff in the precogni-'tion mentioned in this, the said bill.'

(Signed) 'D. BOYLE.'

Eo die.—9 P. M. Copy of this bill and above interlocutor served on me.

(Signed) GEO. MONRO.

On the same day, William Hare presented the following petition to the Sheriff, craving to be released from close confinement, and to be allowed to communicate with his counsel and agent.

Unto the Honourable, the Sheriff of the County of Mid-Lothian,

The PETITION of WILLIAM HARE, present prisoner in the Tolbooth of Edinburgh;

Humbly Sheweth,

That, of this date, † the petitioner was apprehended on a warrant of your Lordship, obtained at the instance of the public Prosecutor, on a charge of murder alleged to have

* 23. January 1829. † 19. November 1828.

been committed on the person of James Wilson, commonly called *Daft Jamie.* That, under the warrant, the petitioner was detained for examination, and having been examined, the warrant was afterwards withdrawn. That, on Friday of last week, the petitioner was again brought before your Lordship on the same charge, in virtue of a warrant granted by your Lordship on the application, and at the instance of Janet Wilson senior, and Janet Wilson junior, alleged mother and sister of the said James Wilson, alias *Daft Jamie ;* and, upon that occasion, the petitioner was examined by counsel and agent, who attended on behalf of the said private accusers, while the petitioner was not allowed the benefit of any such assistance and advice: And, thereafter, on the same day, the petitioner was again imprisoned for *farther examination*, in virtue of a warrant granted by your Lordship on the application, and at the instance of the said private prosecutors. That under this warrant, the petitioner has been kept a *close prisoner*, deprived of the power of taking out letters of intimation, under the statute 1701, and deprived of the power of communicating with his counsel and agent, with a view to his defence or liberation.

That this state of *close imprisonment*, is peculiarly oppressive and injurious to the petitioner, at present; because there has been presented, on behalf of the petitioner, to the Court of Justiciary, an application for recall of the warrant against him, and for his liberation. And it is of great importance to his interest in that matter, that he should have free communication with his counsel and agent. It is unnecessary, at present, to recite the grounds of that application. They are not unknown to your Lordship, as they were the subject of an application by the petitioner, to your Lordship, two days ago, upon which you sisted the proceedings against him, to allow him to apply to the High Court of Justiciary, which he has accordingly done: That the statute 1701, enacts severe penalties, in case of wrongous imprisonment, 'and furder 'discharges all closs imprisonment, beyond the space of eight 'days from the committment, under the pains of wrongous 'imprisonment, above set down:' That the petitioner's close imprisonment having commenced on Friday, last week, *i. e.* this day eight days, he has now undergone about the utmost extent of close imprisonment, which the greatest stretch of the statute could allow: That it is only in cases of extraordinary necessity, that the permission of the statute is acted upon to the utmost stretch; and in the general case, a committment for further examination, does not continue beyond four or five days: That in the petitioner's case, there is no

reason for indulging the prosecutors with the utmost stretch of the statute; and certainly there can be no reason for transgressing it. On the contrary, in the circumstances already stated, the ends of justice require that the petitioner should be instantly relieved from the state of close imprisonment, in which he has been now so long kept, and should be allowed free communication with his counsel and agent.

May it therefore please your Lordship, to consider what is above set forth, and to release the petitioner from the state of close imprisonment in which he is at present kept, and to give him such other relief in the premises, as to your Lordship shall seem proper.

According to justice, &c.

(Signed) DUN. M'NEILL.

Upon this petition the Sheriff pronounced this interlocutor : *—' The Sheriff having considered the within petition, and the ' bill of advocation, suspension, and liberation, produced; In ' respect that the time of the petitioner's close confinement ex- ' pires to-morrow evening, and that by deliverance of the Lord ' Justice-Clerk on the said bill of advocation, suspension, and ' liberation, all further proceedings in the precognition are ' sisted until Monday next, at ten o'clock, before which time, ' the time of the petitioner's close confinement will have ex- ' pired, grants the prayer of this petition, and releases the pe- ' titioner from the state of close imprisonment in which he is ' at present kept; and appoints intimation of this petition ' and deliverance to be made to George Monro, S. S. C., ' agent for Janet Wilson, senior and junior.

(Signed) ' AD. DUFF.'

' 23*d January* 1829.—Nine P. M.—Intimated the within pe- ' tition and deliverance to me,—but I understand Hare is not ' to see his counsel and agent till to-morrow afternoon.

(Signed) ' GEO. MONRO.'

The bill of advocation came to be advised by the whole Court, on Monday the 26th January,—and, on hearing counsel † for the parties, their Lordships pronounced the following interlocutor :—

* 23. January 1829.

† It is unnecessary to give the *viva voce* Pleadings of Counsel on this occasion, as the printed Informations contain the whole of the argument urged on either side of the Bar.

'EDINBURGH, *26th January* 1829.—The Lord Justice-
'Clerk, and Lords Commissioners of Justiciary, having con-
'sidered the bill of suspension, advocation, and liberation, for
'William Hare, and heard parties' procurators at great length
'thereupon; Appoint the said bill to be instantly intimated to
'his Majesty's Advocate; and appoint his Lordship to make
'such answer thereto as he shall think necessary, and therein
'to give such information to the Court as he shall deem pro-
'per, in regard to the situation in which the public prosecutor
'stands, in reference to the matters set forth in the said bill:
'And farther, ordain parties' procurators to give in Informa-
'tions upon the subject-matter of the said bill, and debate had
'thereon, this day; both parties to print and lodge their re-
'spective Informations with the Clerk of Court on or before
'Saturday next, at twelve o'clock noon, in order that the
'same may be recorded, and distributed to their Lordships.

(Signed) 'D. BOYLE, *I. P. D.*'

In obedience to the above order, the following Answers for the Lord Advocate, and Informations for the parties, were given in.

ANSWERS for Sir WILLIAM RAE of St Catherines, Bart., his Majesty's Advocate, for his Majesty's interest;

TO THE

BILL of ADVOCATION, SUSPENSION, and LIBERATION, for WILLIAM HARE.

THE respondent has not failed to observe the guarded terms in which this order is conceived, calling upon him only to give such information as he shall deem proper, and thus relieving him from the necessity of questioning the power, even of this Court, to require, in this shape, a disclosure of the grounds on which the public prosecutor has been guided in the exercise of his official discretion. Influenced, however, by those feelings of respect which the respondent has ever endeavoured to evince towards this High Court, he readily submits the following statement, in deference to their wishes, on so extraordinary a case.

The murder of Mary Docherty took place on the night of

Friday, the 31st October last; and, on the evening of the following day, William Burke, Helen M'Dougal, William Hare, and Margaret Laird, his wife, were taken into custody. On Monday, the 3d of November, Burke and M'Dougal were examined before the Sheriff. These persons, as your Lordships have had occasion to know, denied all accession to the crime.

On the 4th of November, William Hare and Margaret Laird were examined by the Sheriff. In the declarations then emitted by them, they both positively denied all accession to the murder, and stated that Docherty had not received any violence from any person in their presence.

Hare and his wife were again examined by the Sheriff on the 10th of November.

They were a *third* time examined, on the 19th of November.

At these examinations, they firmly persevered in their former denial.

The precognition having been completed, was laid before the respondent, in order to be finally disposed of. A month had now elapsed since the date of the murder; during which period, the four prisoners had been kept separately from each other, but no disclosure had been made by any of them, either as to the alleged murder, or as to the participation of any of the persons accused, in offering violence to the deceased. After repeated and most anxious consideration of this extraordinary case, it appeared to the respondent that the evidence, including the examination of Medical Gentlemen, was defective, both as to the fact of Docherty having been murdered, and as to who was the perpetrator of the deed. Conceiving it of the greatest importance, for the satisfaction and security of the public, that a conviction should be *ensured*, the respondent did not feel justified in hazarding a trial, on evidence which appeared to him to be thus defective. He well knew, from long experience, how scrupulous a Scottish Jury uniformly is, in finding a verdict of guilty, where a capital punishment is to follow; and he deemed it hopeless to look for a conviction, where the fact of a murder having been committed was not put beyond the possibility of question.

The only mode by which the information essentially awanting could be procured, was by admitting some of the accused persons as witnesses against the others.

Another consideration, of still greater importance, rendered this course indispensable. Some circumstances about this time transpired, which led the respondent to dread, that at least one other case of a similar description had occurred. In such circumstances, he felt it to be his imperative duty, not to rest satisfied without having the matter probed to the bottom, and

that he should, for the sake of the public interest, have it ascertained what crimes of this revolting description had really been committed,—who were concerned in them,—whether all the persons engaged in such transactions had been taken into custody, —or if other gangs remained, whose practices might continue to endanger human life. Compared with such knowledge, even a conviction for the murder of Docherty appeared immaterial. But such information could not be obtained by bringing to trial all the four persons accused. A conviction might lead to their punishment, but it could not secure such a disclosure.

After deliberately weighing all these matters, it appeared to the respondent then, as it does to him now, that in the exercise of a sound discretion, and in the performance of his public duty, embracing equally the interest of the community at large, and of the relatives of injured parties, he had no choice left but to follow that course which he adopted.

The only matter for deliberation, regarded which of the four should be selected as witnesses.

M'Dougal positively refused to give any information.

The choice, therefore, rested between Hare and Burke; and from the information which the respondent possessed, it appeared to him then, as it does now, that Burke was the principal party, against whom it was the respondent's duty to proceed. Hare was therefore chosen; and his wife was taken, because he could not bear evidence against her.

This course having been resolved upon, an overture was made to Hare, by the authority of the respondent, with the view to his becoming a witness; and the proposal which was so made *to* him (and which did not proceed *from* him) was accepted. He was, in consequence, brought to the Sheriff's office, on the 1st of December, for examination, when, by the authority of the respondent, he received an assurance from the Procurator-Fiscal, that if he would disclose the facts relative to the case of Docherty, and to such other crimes of a similar nature, committed by Burke, of which he was cognisant, he should not be brought to trial on account of his accession to any of these crimes.

This assurance had no reference to one case more than another. It was intended for the purpose of receiving the whole information which Hare could give, in order that the respondent might put Burke and all others concerned on trial, for all the charges which might be substantiated. In giving it, the respondent acted under the impression, and on the understanding, that when offences are to be brought to light, in the course of a criminal investigation, carried on at the public instance, such assurance altogether excluded trial at the instance of any

private party. In its nature, this assurance was thus of an unqualified description, and was calculated to lead the party to believe that the *possibility* of future trial or punishment was thereby entirely excluded. The assurance was so meant to be understood.

In consequence of this assurance, Hare emitted a declaration, detailing the circumstances connected with the murder of Mary Docherty, and with similar crimes, in which Burke had been engaged. Of these, the murder of James Wilson, and of Mary Paterson, or Mitchell, were two; and it was from the facts which Hare so detailed, that evidence was obtained from unexceptionable witnesses, of such a nature as enabled the respondent to bring forward those two murders, as substantive acts, in the same indictment which charged Burke with the murder of Mary Docherty. By this proceeding, the respondent conceived that he had fully satisfied not only the ends of public justice, but the rights and feelings of all those who were connected with the unfortunate individuals thus referred to.

In the indictment, William Hare and his wife were inserted in the list of witnesses, along with all those persons whose evidence the respondent had been able to obtain, in consequence of the disclosures which Hare had made. When the respondent entered the Court on the day of trial, it was his full intention to examine Hare and his wife as to each of the three murders set forth in the indictment. How he was prevented from so doing, the Court is already aware. Had Burke been acquitted of Docherty's murder, the respondent must, in the discharge of his duty, have proceeded to try him on the other two charges; and in proof of both, Hare and his wife must have been examined as witnesses. As it was, they were both adduced on the trial, and it was from the information obtained from Hare, on the assurance of immunity, that the respondent conceives he was enabled to secure a conviction.

The warrant of imprisonment against Hare and his wife, at the public instance, has since been withdrawn, in consequence of its having turned out, after the most anxious inquiry, that no crime could be brought to light in which Hare had been concerned, excepting those to which the disclosures made by him under the above assurance related.

In regard to the crimes so disclosed, whether they were included in the indictment against Burke or not, the respondent having, in the conscientious discharge of his duty, authorized the assurance to be given, which has now been stated, apprehends that he is legally barred from prosecuting either of those persons at his instance, and he will not make any such

attempt. He need not add that he should strongly feel such a proceeding, upon his part, as dishonourable in itself, unworthy of his office, and highly injurious to the administration of justice.

Having thus, in compliance with the order of your Lordships, given such information to the Court as he has deemed proper, in regard to the situation in which the public prosecutor stands, in reference to the murders set forth in the bill of advocation, the respondent has only to add, that upon perusing the said bill, he finds no statement in it which requires any answer on his part.

In respect whereof, &c.

WM. RAE.

INFORMATION for WILLIAM HARE, present Prisoner in the Tolbooth of Edinburgh;

In His Application for

ADVOCATION, SUSPENSION, and LIBERATION, against JANET WILSON, relict of the late JOHN WILSON, and JANET WILSON, her Daughter.

THE question now to be resolved is, Whether the Informant is protected from further *criminal process*, in order to *punishment*, for the murder of *James Wilson*, alias *Daft Jamie?* The FACTS and circumstances which have given rise to the question are these :—

Certain persons, of whom the said James Wilson was one, having been murdered, or supposed to have been murdered, in the course of the year 1828, and suspicion having fallen upon the informant, and upon William Burke, *criminal proceedings were instituted by the public prosecutor against them.*

On the 19th November last, a warrant to apprehend, and for examination, was obtained at the instance of the procurator-fiscal against the informant, as charged with the murder of the said *James Wilson;* and upon that warrant the informant *was apprehended and examined.* Similar proceedings were adopted against William Burke.

Thereafter, the public prosecutor being unable to obtain evidence, or a clue to evidence, by which the facts relative to the supposed murders might be brought to light, and the perpetrators, or some of them, brought to punishment, he gave the informant *unqualified assurance and promise that he would never be brought to trial* in regard to any of these murders, provided he should make a full disclosure of every thing he should be asked and knew in relation thereto. To this assurance and promise so given, both the Lord Advocate and procurator-fiscal were parties.

Under this assurance, and relying upon it, the informant *made a full and true disclosure* of every thing he knew in relation to the several alleged murders—*that of James Wilson being one.*

The information thus given by the informant exposed the facts, and opened up the most important sources of evidence in relation to the matters alluded to, and placed the informant himself, if it was yet competent to bring him to trial, in circumstances, to say the least, of *danger and difficulty,* to which he could not, by any means, have been exposed, but for the information so given by him under the assurance above mentioned.

Through the information thus obtained from the informant, William Burke was indicted and brought to trial at the instance of the public prosecutor. The indictment charged *three* murders, whereof the murder of *James Wilson was one.*

The list of witnesses appended to that indictment contained the names and designations of many witnesses, traced through the information given by the informant, who was himself likewise included in the list as a witness; and he was cited as a witness in regard to *all the three charges.* The citation to him was given by authority of a warrant for that purpose, issued by your Lordships on the application of the public prosecutor. The informant obeyed the citation.

On the 24th of December last, the diet of compearance having arrived, and the process being, as required by law, complete, and all concerned being in attendance, the libel against Burke was, by interlocutor of the Court, *found relevant* to infer the pains of law, *as to all the three* charges. The case was now in Court, and all the parties concerned were in Court, in the respective characters assigned them. William Burke was in Court as a defender; and William Hare, the informant, was in Court, as a witness for the prosecution;—and although the prosecutor proceeded, in the first instance, with one of the charges only, (being that relative to the murder of Mary Docherty), his right to proceed with the whole of the charges, on

that same indictment, was expressly found by the interlocutor of relevancy pronounced by the Court.

The prosecutor having proceeded to lead evidence as to that one of the charges last mentioned, the informant was *sworn and examined in Court* as a witness for the prosecutor. Relying upon the assurance that was given him, he answered *every question* put by the prosecutor, though plainly calculated to operate *against himself*, (if it was competent afterwards to bring him to trial as to any one of the other charges), by connecting him with Burke,—by exposing the manner in which the murders were perpetrated, and the bodies disposed of,—and by exposing sources of evidence, and various circumstances. But the informant, relying upon the assurance that he should not be brought to trial for any of these murders, did not farther consult his own safety, and did not hesitate to answer every question put to him by the prosecutor.

That trial issued in the *conviction* of William Burke for the murder of Mary Docherty, and the pronouncing a capital sentence upon him, which sentence has since been carried into execution. The trial was very tedious; and the prosecutor did not consider it necessary to follow out the other two charges to a conviction.

The informant retired from the proceedings of that day, in the unshaken confidence that he was free from trial or punishment. In that opinion, in so far at least as regarded any of the charges contained in the indictment against William Burke, he was confirmed *by the authority of the Court, by which the law was so laid down at the trial.* It is not wonderful if, since that period, the informant's lips have not been sealed by any apprehension of being yet brought to trial upon any of these charges.

During all these proceedings, the present private prosecutors, who were not ignorant of them, took no steps, and gave no intimation of any intention to take steps, against the informant. But, on the 16th of the present month of January, a warrant was obtained from the Sheriff of Edinburgh, at their instance, against the informant, *charging him with the murder of the said James Wilson.* Upon that warrant the informant was apprehended and examined. He was thereafter committed a close prisoner, for farther examination, upon the same charge, at the instance of the same parties.

The informant then presented an application to the Sheriff for recal of the warrant; but that application was refused.

He has now applied to your Lordships, not only to review the judgment of the Sheriff, by *advocation*, but also, according to the custom of this Court, to grant him letters of *suspension*

and *liberation.* Thus, your Lordships are not confined to the question, whether the Sheriff's judgement was, in the circumstances, such as became the committing Magistrate to pronounce; but the whole matter of the commitment is brought before the Supreme Criminal Court, by an application for *suspension* and *liberation.*

Such are the FACTS; and the informant is now to state the legal grounds on which he rests his application to your Lordships.

The informant, in one word, maintains, that on account of the promise and compact, whereby, under assurance of safety from trial or punishment, he disclosed to the public prosecutor all the information he possessed, and was made a witness, and examined on the trial of William Burke, he cannot now be tried in order to punishment for the murder of James Wilson.

But, as a hint was thrown out at the debate, that the present is not the most fitting time or shape to raise this question, and that the informant should remain quiescent, until an opportunity shall be afforded him of stating an objection in bar of trial, when criminal letters shall, at the convenience of the private prosecutors, be raised and called in Court, it is proper to state shortly the grounds on which the informant submits that this hint is entitled to no regard.

In the *first* place, the question which the informant has raised, is an incidental one; and at whatever time, or in whatever shape it may be taken up, it must be preliminary to the matter of trial. It must be considered, investigated, and disposed of completely, before the matter of trial can be at all entered upon. There is, therefore, no reason even of conveniency or expediency for postponing the one until the other shall be ready to be entered upon; and there is no rule or practice of Court to that effect. In the *second* place, the informant has a very material and legitimate interest, that the question should be considered *now,* in order that, if he is right in this question, he may be relieved from the serious burden of *preparation for trial.* He may also be permitted to remark, that the prosecutors can have no *legitimate* interest to postpone the discussion of this question. It cannot be disadvantageous to them, but the reverse, that the merits of the informant's objection to the proceedings against him, should be ascertained and disposed of, before they incur the expense, and undergo the labour of preparing their case for trial. In the *third* place, the informant, with confidence, submits that, if he cannot be

tried for the murder of Wilson, he cannot be kept in prison *in order to trial for the murder of Wilson*. There is no alleged reason or object for his imprisonment, except the intention to bring him to trial and punishment; and if that reason or object is not a legitimate one, the imprisonment or detention cannot be legal. The informant has an obvious interest and right to apply to be released from an imprisonment which he has such grounds for maintaining to be illegal. But that release, supposing him to be entitled to it, he may not obtain, and cannot enforce in less time than 140 days, that is to say, between four and five months, by the course suggested by the prosecutors, or by any other course than that which he has adopted. Finally, the course which the informant has adopted is, in truth, the *only* one by which he can enforce his liberation, or the discussion of his claim to liberation at all, unless by *demanding a trial*—the very thing he holds to be incompetent and illegal, or at least to be a proceeding which would expose him to dangers and hardships, to which, in the circumstances, he is not bound to submit, and cannot be legally subjected. Upon these plain grounds, the informant submits that he has chosen the proper time, and the proper shape, to bring his case before your Lordships.

Before entering upon the main grounds in argument, upon which the informant rests his claim for immunity from trial, it may be proper to dispose of another observation made by the prosecutors, in the course of the debate. It was more than once stated for them, with some degree of triumph, that the informant's plea necessarily rests upon an inversion of the ordinary presumption of law, which is for innocence—that the informant must begin by admitting or assuming that he was received by the public prosecutor as a witness, *socius criminis*, and, consequently, is guilty of the murder of James Wilson,—a matter of which the present private prosecutors allege that they are totally ignorant, and say nothing. The relevancy of this observation is not apparent; and the supposed dilemma into which it is intended to reduce the informant, is really one of the most harmless that can be imagined. Even if the informant should concede the point of participation in the murder of James Wilson, that would be no objection to his present plea, and could be no reason for deciding the present question against him. But, in truth, it is not necessary for the informant to make any such concession, or to assume any such state of the fact. It is enough that, by the disclosures he made, and the evidence he gave, under an assurance of perfect protection from the law against any future punishment or trial, he has placed himself in circumstances of suspicion

and danger, which render his defence difficult, burdensome, perplexing, and precarious. On the other hand, if the prosecutors do not accuse the informant of having been concerned in the murder of James Wilson—if they do not prefer such a charge against him—if they do not found upon his alleged guiltiness in the matter—why have they incarcerated him upon that charge? Why is he now detained a prisoner at their instance upon that charge? Why do they now oppose his liberation, and the recall of the warrant at their instance proceeding upon that charge? In short, *if they* do not charge the informant with the murder of James Wilson, there is an end of the question, and there is no occasion to go farther into the discussion—the warrant must be recalled, and the informant must be liberated forthwith. The prosecutors are here only in virtue of the assumption *by them*, that the informant was concerned in the murder of James Wilson; and *they* cannot be allowed to plead any thing inconsistent with that assumption, whatever may be permitted to the informant.

Having disposed of what may be called the preliminary matter introduced by the prosecutors, the informant shall now proceed to submit the grounds of his plea.

There were certain points conceded in argument; and it may be convenient, and tend to narrow the discussion, to state these in the outset as *postulates*.

1*st*, It was conceded, that it is the established law of Scotland, for which there is abundant authority and practice, (at what time, or in what manner introduced, is a different matter), that a *socius criminis*, who has been examined as a witness in a trial at the instance of the *public* prosecutor, and who has fairly answered all the questions put to him, cannot himself be brought to trial or punishment for the offence as to which he was so examined as a witness—that he is completely protected by the law against such trial or punishment: For instance, that the informant is protected by the law from any trial or punishment on account of the murder of Mary Docherty.

2*d*, It was conceded that this state of the law cannot be traced very far back; and that the admission of a *socius criminis* to give evidence at all, is not of very ancient origin; and that there is no positive statute to which the change in the state of the law, in these respects, can be referred.

3*d*, That this protection extends only to witnesses brought by the *public* prosecutor, and does not extend to witnesses brought by the party accused.

4*th*, That the law of England in this matter is different from the law of Scotland, and does not give any such absolute protection ; but that the party there giving evidence has an equitable claim for a royal pardon.

The rule of the law of Scotland, to the extent above-mentioned, being admitted,—and this rule having obtained its place in the law, at no very distant period, and without any positive statute,—it must be referable to some pre-existing principles in the law, by the operation and influence of which it must have been introduced and received. The informant shall endeavour to trace those principles, and to shew that they no less fully bear out the claim which he now makes for protection from trial or punishment.

This inquiry bears upon two branches of the law, which, more perhaps than any others, are distinguished by the regular and steady progress which they have recently made towards a more perfect state, accommodating themselves, by almost insensible degrees, but without resistance, to the progress of improvement, the change of manners, and the state of society and of police. The two branches of the law now alluded to are, that which relates to the admissibility of evidence, and that which relates to prosecution and punishment for crimes, especially as affecting the relative rights, powers, and interests of *public* and *private* prosecutors.

To the latter of these, it is important to attend carefully.

When an offence is committed against the law, *e. g.* when a murder is committed, *two* interests and claims arise,—1*st*, The interest of the *community* to maintain the law and police by *punishing* the offender, in order to 'deter others from committing the like crimes in all time coming ;'—2*d*, The narrower but more personal interest of the individual injured by the offence, to claim satisfaction for the injury done to him. It is unnecessary, in the present discussion, to go back to that imperfect state of society and government, where the interests of the community, in such cases, were left to be enforced by any member of the community who might choose to assume the right or task of vindicating them. It is not necessary to dwell upon the motives which wisely prompted a restriction of such right of prosecution to those who, from natural feelings and immediate interest, were most likely to be active in vindicating the rights of the community, and their own claims for satisfaction, to the exclusion of those who, from the wideness of their interest, were seldom likely to bestir themselves, except for the purpose of gratifying individual resentment, or indulging individual malice,—motives which every system of jurisprudence, as it advances towards perfection, tends to restrain, and, if

possible, to exclude. Neither is it necessary to enlarge upon that state of law in which the public and the private interests, being committed to the limited few last alluded to, were under no other control whatever,—the victim of their animosity or persecution being surrendered into their hands, to be dealt with at their pleasure.

Experience of the disadvantages of such systems, and the growth of wisdom and improvement in government and jurisprudence, have given rise to a far better system, in which the interests of the community are more effectually protected, and its claims more certainly enforced, while the grosser elements of malice and revenge are almost totally excluded. In this country, which boasts a system of criminal jurisprudence more perfect in principle and in practice than belongs to almost any other country, the interests of the community are, and, for a long time past, have been, committed to a *public prosecutor*, whose duty it is to watch over these interests, and to claim, on behalf of the community, the debt due to it by every one who is guilty of an infraction of the laws by which the community is governed, and to enforce that claim in the degree which the law permits, and which the interests of the community require. At the same time, this system is without prejudice to the legitimate right of the party injured to claim and to obtain satisfaction for the wrong done to him in his feelings or in his estate. Nay, there even yet remains to such private party a right to enforce the debt due to the community, in a certain form, and under certain restrictions, when the public prosecutor, to whom the interests of the community are entrusted, has neglected to interfere or to attend to those interests. This remnant of the former system is perhaps a wholsome check; and it may have been essential on the first institution of the office of public prosecutor, which brought along with it a restriction of, or an encroachment on, the powers which the community had till then committed, exclusively to the party injured; and, in cases of homicide, to the relations of the deceased.

The institution of the office of public prosecutor necessarily introduced a separation of the two distinct interests and objects connected with prosecutions for crime, the care of which had been previously committed to the same persons. The line of distinction thus introduced, has been every day becoming more and more marked, as the law and the administration of it have advanced in improvement. The public prosecutor watches over the interests of the community, in regard to prosecution for *punishment;* and he cannot be controlled or hindered by the private party. But the private party has an

absolute right to sue for composition or reparation for the injury done to his feelings or estate; and, in this suit, he cannot be controlled or hindered by the public prosecutor. An offence committed raises two interests; and the offender owes two debts, one to the community in the shape of *punishment*, to deter others from committing the like crimes; the other to the individual injured, as a *satisfaction* for the injury done. In regard to the first of these, the public prosecutor is the creditor, who acts for behoof of the community, with whose interest he is entrusted, and who prosecutes, *ad vindictam publicam*. It is his duty, and his right to take the steps most beneficial to the community, to avenge the wrongs done to the law and to the state.

It has already been said, that, in certain circumstances, and under certain restrictions, the private party injured may still assert the right and claim of the community for *punishment*. But it is a total mistake to assume, as the private prosecutors in the present case do, that the rights and privileges of the private party are as absolute, free, and unrestrained, as those of the public prosecutor. This position is true, only as to the private party's separate right to prosecute for assythment; but it is not true of the private party, when he comes forward to assert the rights of community as to punishment, and prosecutes *ad vindictam publicam*. The object of prosecution for *punishment* is declared, by the very words of style in *all* criminal libels, to be 'to deter others from committing the 'like crimes,'—an object avowedly of a public nature, for the interests of the community at large, and not of any particular individual, forming a part of that community. When the attainment of this object is the purpose in view, the law draws the most marked distinction between the public prosecutor and the private party. It places the greatest confidence in the public prosecutor, who appears as the representative of the whole community, to vindicate the rights of that community, —to maintain the law, and preserve peace and good order, without any personal or selfish motive, or feeling. It affords him *every facility* in the discharge of his duty, and the accomplishment of his object, consistent with JUSTICE TO THE PERSON ACCUSED,—an object which no good system of law will ever lose sight of, or regard as secondary. But, on the other hand, the law looks with great jealousy on a private party, who does not confine himself to his own proper and personal right of claiming reparation, but who comes forward to prosecute *ad vindictam publicam*,—who calls for the infliction of *punishment*, 'in order to deter others from committing the 'like crimes.'

Accordingly, since the first institution of the office of public prosecutor, every step which the law has made, has had for its object the placing criminal prosecutions for *punishment* under the more absolute direction of the public prosecutor, and the restraining of private parties from instituting such prosecutions, or interfering with the proceedings of the public prosecutor, for the public interest.

Thus, the law does not require the public prosecutor to find caution before he institutes his suit; but the private party is required, before he is allowed to prosecute *ad vindictam publicam*, to find caution that he shall faithfully discharge to the public the task he is about to undertake, and shall not compromise the interests of the community for any selfish object. Again, the law does not require the public prosecutor to give his oath of calumny; but it requires a private party who comes forward to prosecute *ad vindictam publicam* to give such oath, thereby affording a check against parties who pretend that their object is to vindicate the rights of the community, while, in truth, the object may be private and malicious. Again, the law does not subject the public prosecutor in expenses of process; but more than one statute has been passed for the purpose of subjecting in expenses a private party, who rashly or wantonly steps forward as the champion of the community. Again, the law does not exclude the right of the public prosecutor to adduce his own nearest relations as witnesses, or the nearest relations of the party injured, or even that party himself, the object of the prosecution for *punishment* being 'to deter others from committing the like crimes,'—a public object for behoof of the community at large, and not for the separate advantage or interest of any separate individual in it. Again, the law allows the public prosecutor to proceed in his prosecution by *indictment*, issuing from himself, without any bill or supplication to the Court, or any warrant from the Court. But a private party cannot so proceed. He must present an application to your Lordships, praying you to give him a criminal libel, and which criminal libel he cannot get unless the public prosecutor shall *concur* in the application,—so completely is the matter of prosecution for *punishment*, a matter in which the community at large has the real interest. Finally, the public prosecutor may, at any stage before sentence, *restrict* the capital pains of law to an arbitrary punishment; but there is no authority for holding that the private party can do so of his own mere act. Here the informant, in passing, may allude to the case of Colonel Charteris, which was referred to by the other side, as an instance of a prosecution by the private party being permitted to proceed after the public prosecutor had with-

drawn his concourse. The case of *Colonel Charteris*, even had it been without specialty, would scarcely have been held to fix the law. But that case was attended with specialties which excluded any general question as to the power of a private party to *raise* a criminal prosecution for punishment, without the concourse of the public prosecutor. In the *first* place, in the case of Colonel Charteris, the public prosecutor *had given* his concourse at the proper stage, and the private party, in consequence thereof, had obtained his libel, and was so far advanced with his cause before the public prosecutor withdrew his concourse. Consequently, the only question between the private party and Colonel Charteris was, whether the withdrawal of the concourse, or the attempt to withdraw the concourse, (for it may be doubted whether, if once given, it can be withdrawn, any more than the *fiat* of your Lordships to the bill, or the signet to the criminal letters), could destroy an action competently raised and insisted in by the private party who, having once got into Court, was truly *dominus litis*. But, in the *second* place, the case of Colonel Charteris related to a charge of *rape*, as to which there is a special statute, giving power to the woman's parents and relations to prosecute, although the injured party herself should consent to pass from any pursuit: and that statute was founded on. But whatever may be the state of the law as to the concourse of the public prosecutor, which is not here the proper subject of inquiry, it is certain that, in *all the particulars above enumerated*, and many others, the law draws a distinction between the public prosecutor and a private party, and *always in favour of the public prosecutor*.

The private prosecutors here are equally under mistake when they assume that the public prosecutor cannot do any thing which is to have the effect of preventing the private party from prosecuting for *punishment*. When an offence is committed, the duty of the public prosecutor is to proceed in the matter with a view to the interests of the community in relation to the wrong done, without regard to the effect his proceedings may have upon the power or right, if such exists, of a private party to come forward and prosecute for punishment. The interest of the community in the matter of *punishment*, is the paramount interest, and the only *ultimate* interest, which the law can regard; although different persons may, under certain circumstances, be permitted by the law to vindicate that interest. The public prosecutor, as being the person entrusted with the interest of the community, and as representing the community, has the *primary* right to take up the matter; and, having commenced proceedings for behoof of the community, he cannot be stayed or hindered, or impeded in his prosecution

for punishment, by any right or any interest which any private party can claim; and he may do, and daily does, many things which exclude the private party from demanding punishment.

For example, 1*st*, If the public prosecutor shall prosecute the offender, but shall fail to obtain a verdict, the private party cannot demand punishment as a separate debt due to him, or a separate right vested in him apart from the community. 2*d*, If the public prosecutor shall obtain a verdict against the offender, but shall restrict the pains of law, the private party cannot demand the full pains of law as a right belonging to him individually, which the community or its representative, the public prosecutor, cannot infringe upon. 3*d*, If the public prosecutor shall obtain a verdict against the offender, but shall not move for sentence, conceiving that the interests of the community have been sufficiently asserted by imposing upon the offender the burden and disgrace of trial and conviction, and shewing others that the law reaches the act, the private party cannot prosecute for punishment. 4*th*, If the public prosecutor shall prosecute one of two *socii*, and shall use the other as a witness on the trial, (in the doing whereof he cannot be controlled by any one) the private party cannot prosecute for punishment, the *socius* so used as a witness.

On the other hand, none of these proceedings on the part of the public prosecutor, acting for behoof of the community, can exclude or infringe upon the inherent personal right and interest of the private party to prosecute for *assythment* or *satisfaction*. That right belongs to him as an individual, not as a member of the community at large. He claims *that*, not 'to 'deter others from committing the like crimes,' but to solace *his own* feelings, and redress *his own* wrongs. That is not a matter of *punishment*, but of *satisfaction*.

In regard to the matter of *punishment*, properly so called, the right, if any, of the private party, is secondary, and yields to that of the community, asserted through its proper officer and representative. The private party cannot take a single step towards prosecution for *punishment* without giving notice to the public prosecutor, and applying for *his concurrence*; and if the public prosecutor shall even then take up the matter, the private party is superseded by the proper representative of the community coming forward to demand the debt of punishment, which can only be paid once, and which is due only to the community, whether the demand be made by the public prosecutor, or, failing him, by the private party, who, in certain circumstances, and under certain restrictions, is permitted by the community to assert its rights. In the first

instance, however, the public prosecutor is the proper representative of the whole community in demanding *punishment.* If he abuses his trust, he is responsible in the proper quarter.

When the door to the admissibility of evidence was not opened so wide as it now is—when many grounds of exclusion existed, which the improved notions of modern times have gradually and silently, but effectually, done away, *socii criminis* were not admitted as witnesses. The stain of character, and the bias of interest, were considered sufficient grounds for excluding them; and the state of crime, in regard to frequency, secrecy, and dexterity of perpetration, did not render the reception of them so often necessary towards the detection and punishment of some of the offenders. But, for a considerable time past, it has been found essential to the ends of justice to make use of *socii criminis,* in order to bring others to punishment. To secure the punishment of some, it was found necessary at times that the community should abandon its claim to the punishment of others. But the *necessity* in *particular cases,* was not the only recommendation of this system; certainty and rapidity of detection are far more important matters in criminal police than extent or severity of punishment. The obvious policy of sowing distrust among associated violators of the law, powerfully recommended to the community the advantages to be derived from abandoning its claim for punishment against some of the delinquents, in order to have the benefit of the information and testimony they could give to bring others to justice. It is manifest, however, that the community could not obtain the benefit of the information and testimony of any such person, without relinquishing the claim which the community had against him for *punishment*; because, by giving such information and testimony, he would be exposing himself to dangers, in case of trial, which would not otherwise have surrounded him, and to risk of punishment which might otherwise never have reached him. A *compact* was necessary between the community and the individual, whereby the community, to have the benefit of his information and evidence, surrendered and discharged the claim it had against him for punishment; and this for the double purpose, 1*st*, of leaving him in safety to speak out; and, 2*dly*, of discharging the interest, the existence of which would detract from the effect of his testimony. Accordingly, the practice of using *socii criminis* as witnesses is perfectly established; and that they are thereby absolutely and completely protected against *punishment or trial,* is also established, and is conceded in the present argument.

But *who* is to make the *selection* among the *socii?* Who is

to determine which of them is to be received as a witness, while the other is to be selected as the object for punishment,—as the individual who is to pay the debt due to the community? The *public prosecutor must make the selection.* It is *inherent in the nature and duties of his office to do so.* He represents the community,—he is entrusted with its interests in the matter of prosecution for punishment,—he must prepare his case in the manner most conducive to the interests of the public,—in the manner best calculated to insure the claim of the community, to exact payment of the debt from one or more of those who owe it. He must, therefore, judge, whether the interests of the community are to be best secured by prosecuting the whole of the debtors, or by taking the benefit of the information and evidence of one of them against the others;—a benefit which cannot be obtained except by discharging that one from the claim which exists against him. The *public prosecutor* then must *select;* and, in practice, he *does so* every day. He makes his selection *without controul of any one.* He does it upon his *own* responsibility; and it is admitted, that when *he* places a *socius criminis* in the witness' box, and uses his evidence against a prisoner, the act of the public prosecutor, thus done upon his own responsibility, in virtue of his uncontrolled, and, in this respect, uncontrollable power, as representative of the public interest, is binding upon the community,—is binding in law. The debt of punishment which the *socius* owed to the community, is, by this act and transaction of the *public prosecutor* representing the community, completely and for ever discharged,—no punishment can ever reach him,—he cannot be put on trial any where, by any one, in order to punishment.

In the present case, the public prosecutor having laid his hands upon certain persons as *socii,* and being unable, from defect of evidence, to make out a case against any of them, adopted the course which has now been described. He made his selection. He, as representative of the community, relinquished the claim of the community against one, in order to secure to the community the claim against the other. He assigned to one the place of *witness,* to the other that of *defender.* He, as representing the community, entered into a compact with the informant, whereby all claim against the informant for trial or punishment was discharged, and assurance of safety and protection was given to him; and the informant, in consideration thereof, made disclosures for the good and interests of the community.

This was a compact entered into by the informant, not with any private party, who could act only for his own personal or

peculiar interest, but with the representative of the community, acting for the public interest and good, for which all criminal law is created and administered, and, in particular, all prosecutions in order to *punishment*, are conducted. The representative of the public interest, considered it essential to that interest, to make this compact with the informant; and, on the other hand, the informant having made the compact, *implemented his part of it.* The compact *was acted upon:* The informant made disclosures, and pointed out witnesses, and sources of evidence, which have been published to the world: He appeared in the witness' box, and gave evidence in open Court. In short, he fulfilled his side of the agreement, as far as the public interest required; and he is willing to go through with it to the uttermost. But, by what he has done, he has *changed his own situation completely.* He has, in the event of his being put upon his trial, *surrounded himself with danger*, to which he could not have been exposed, and to which he would not have exposed himself, but for the compact by which he secured himself against trial; and, in return for that assurance, gave to the community the benefit which it wished to have.

In short, the compact *has been acted upon*, and *matters are not entire.* The informant *cannot*, to use the words of the Lord President, in the trial of Downie, '*be put back to his former* '*situation.*' He is, therefore, protected from trial. This is the true *principle* of the protection which the law gives to a witness, *socius criminis.* It is the result of a compact with the public, for the public interest. The public relinquishes its claim against the individual, in order to have the benefit of his information, and evidence to enforce its claim against another of the debtors. It cannot get the benefit of his information, without relinquishing the claim against him,—1*st*, Because he will not give the information, without such a stipulation; and, 2*dly*, Because the information or evidence given by him, cannot be considered equally pure, until the interest is discharged; and that interest can be discharged by the creditor entitled to enforce the claim, and by no other person. After the compact between the *socius* and the representative of the public interest is concluded and *acted upon, and matters are no longer entire, and the* socius *can no longer be put back to his former situation*, the public faith is pledged,—the compact cannot be resiled from,—the *socius* is *entitled* to the protection for which he stipulated; and more especially, this is the case when the compact has been acted upon in open Court, in presence of your Lordships.

That this is truly the principle to which the protection con-

fessedly given by law to a *socius criminis*, as matter of right, is to be traced—that it is truly a *compact* with the *public prosecutor*, for the public interest—appears from a variety of considerations. In the *first* place, That it is a *compact*, appears not only from what has been already stated, but is confirmed by the very authority relied on by the private party in this case, viz. the opinions expressed by the Judges in the case of Downie, that the protection does not hold, if the witness *refuses to speak*, *i. e.* refuses to implement his part of the compact. In the *second* place, That it is a compact with the *public*, appears from the circumstance, that the protection does not hold in the case of a witness called by the party accused, nor, in so far as any authority can be found, does it hold in the case of a witness called by a private prosecutor. It is the acting of the *public prosecutor*, for the interest of the public, that gives the protection.—(Burnett, p. 418.)

This compact is implied from the very act of examining the *socius* as a witness in Court; and justly so; because, in the *first* place, In a matter so delicate, it is to be presumed that no individual would be placed by the public in such a situation, except upon the understanding that the public had abandoned all claim for punishment, in consideration of the benefit it received from the information given by the individual. In the *second* place, Because the public prosecutor is presumed to bring forward his evidence in the state which entitles it to the greatest credibility; and is, therefore, presumed to have discharged the *interest* which created an objection to credibility. This is not the act of the Court; because the Court cannot discharge the claim or right of any party. The creditor in that claim can alone discharge it; and, in this case, the creditor is presumed to discharge it from the very act of bringing forward the witness. In such a case, though the Court is not, and cannot be any party to the compact, whereby the prosecutor discharges his claim against the witness, still the compact being judicially acted upon, the Court itself is witness to it. It has judicial knowledge of the compact; and it will, upon its own knowledge, maintain and enforce the observance of so sacred an agreement, if any attempt should be made to violate it. But the compact is not less sacred or binding, though made out of the presence of the Court, if the fact of the compact, and of its having been acted upon, shall be proved to the satisfaction of the Court. The principle is precisely the same. For instance, let the case be put of a *socius* examined as a witness in another court, in a prosecution at the instance of the public prosecutor, for a homicide; your Lordships are no parties to that proceeding, and are not witnesses

to it; but, on proof of it, you will protect the *socius*, should any attempt be made to violate the compact, by prosecuting him for punishment. In short, the compact having been entered into and acted upon, the *socius has secured his protection*, otherwise there would be no effectual protection at all; because the community having, through its public prosecutor, relinquished its claim, and extracted the information by which alone guilt could be brought home to the *socius*, might still enforce the claim for punishment, by allowing one of its members, the private party, to conduct the prosecution with the aid of that information so obtained; and that is, in fact, what is now attempted; though, in this instance, without collusion on the part of the public prosecutor.

In the present case, the compact was acted upon, not only by the informant disclosing every thing he knew, and pointing out all the sources of evidence, which the very indictment against William Burke, and the list of witnesses thereto appended, disclosed and made accessible to any one who might have the disposition and the right to avail himself of it; but the compact was farther acted upon by the informant appearing and answering every question put to him in the witness' box. The force of this fact is not elided by saying that no questions were then put to him as to the particular case of *James Wilson*, and that what he then spoke will not afterwards be proved against him. In the *first* place, He had already disclosed all he knew as to the case of *James Wilson*,—he was cited as a witness in that case,—it formed one of the charges in the indictment then in Court; and it was by no breach of compact on the part of the informant—by no fault of his, that his evidence did not relate specially to the case of Wilson. The evidence *did relate to facts common to all the cases in the indictment*, and which would materially prejudice him should he be put upon his trial for the murder of Wilson; and the list of witnesses procured through the informant, and given to the world, related to the case of Wilson. In the *second* place, The protection which belongs of right to a witness *socius criminis*, is a *total exemption* from trial for the crime, and is not limited to prosecution at the instance of any particular party, or in any particular court, or merely to abstaining from proving against him upon trial, what he said when examined as a witness.

The informant, then, is within the *principle* of the rule which protects a witness *socius criminis* from trial. He has entered into a compact with the representative of the public interest,—that compact *has been acted upon*,—the informant has made disclosures, and given information, both preparatory to

trial, and in the witness' box, which would *injure him* in his defence, if he should now be put upon his trial,—matters *are no longer entire.* He has *implemented* his part of the compact; and all that he demands is, that there shall be no *breach of the public faith* towards him,—that he shall not be put upon his trial, when it is *now no longer possible that he can have a fair trial.*

Having thus endeavoured to shew, that the principles upon which the law gives protection to a witness *socius criminis*, and which are admitted to be founded in ' humanity, justice, ' and policy,' bear out the claim which the informant now makes for immunity from trial, he begs the attention of your Lordships to the only *direct authority* recorded upon this point. It is not wonderful that there should be a scarcity of direct authority upon the subject; because, in the *first* place, it is believed that this is the very first attempt ever made to commit such a gross violation of faith and justice. In the *second* place, although there may have been many cases in which a *socius criminis*, cited as a witness to several acts charged in the same indictment, was examined only as to one, it not having been found necessary to proceed as to more, and where it has been laid down from the Bench, and acquiesced in by all parties having interest, that such witness was absolutely protected by the law from prosecution for punishment as to all or any of the charges contained in that indictment, and that his evidence was not tainted by the interest which a different state of circumstances could have induced,—still no record of these authorities is preserved; because we are very scanty in reports; and, indeed, until very recently, we have not seen any thing like an attempt at a regular system of reports of the proceedings in criminal trials. This is a thing much to be regretted, for many reasons. But there is one case fully reported, which contains the most direct authority on the point now under discussion: It is the trial of William Burke,—the very trial which has given rise to this discussion; and the authority to be referred to relates to the very matter of this informant's protection from trial and punishment.

In that trial, the counsel for the prisoners, in addressing the jury, argued an objection to the credibility of the informant, on the ground that he was himself liable to prosecution and punishment for the two other charges contained in that indictment, and, consequently, had a direct and material interest to convict the prisoners, and destroy the evidence by which those charges could be established against the informant himself. This point was argued with great zeal; and no small portion of the defence of the prisoners was rested upon it. It was a legal ob-

jection to the credibility of the witnesses, and, if well founded in law, was of great importance to the case. Upon it depended the degree of credit which the jury should give to two of the direct witnesses in the cause. The point being raised in this *the most important shape in which it could have been raised*, and in the stage most efficacious for the prisoners, as no reply to the argument could then be put in, it became the *duty* of the Court to consider the objection well, and to direct the jury as to the law applicable to it. Now, observe how the Court laid down the law on that point, as announced by the presiding judge in his charge to the jury :—' It has been further argued ' that *Hare* and his wife were placed in the situation of be- ' ing themselves exposed to be tried for other charges of ' murder, and indeed for *the other two charges contained in the* ' *present indictment ;* hence that they have a clear interest to ' throw the blame of the actual perpetration of the crime on the ' prisoners, and represent themselves as comparatively or com- ' pletely innocent. But here, gentlemen, I feel it necessary to ' state to you, *as the decided opinion, both of myself and my* ' *brethren now present*, that, whatever may be the case with ' regard to *other* murders, or other crimes, the witnesses in ' question are as *fully protected by the law*, in relation to *all* ' *those contained in the present indictment*,—that is to say, a- ' gainst either *trial* or punishment for them,—*as if they had* ' *been entirely free from any concern in their perpetration.* These ' persons are called on to give evidence on the whole of the ' charges contained in the indictment. Eventually, and at a ' subsequent diet, they *may* still be examined in relation to ' the other two; and, therefore, so far as the plea of interest ' is rested on the *alleged danger* to which they are exposed, ' it is *entirely and thoroughly without foundation.* The *public* ' *faith has been pledged to these persons*, wicked and criminal ' as they may be, and certainly are; *and it must, at all ha-* ' *zards, be kept sacred.*'

Nothing can be more clear and express than this,—nothing can be more consistent with the principles, or with the result for which the informant is contending. The Court declared that the public faith was pledged, and must, at all hazards, be kept sacred; and the legal result was declared to be the perfect protection of the informant from trial, in order to punishment. It is not limited to trial at the instance of the *public* prosecutor; nor could it, if so limited, have supported the legal conclusion of the Court, that the objection of interest rested on alleged danger, was groundless. The protection from trial, for any of the charges in that indictment, was declared to be full and complete.

It is impossible to conceive any authority more directly applicable to the case in hand, or partaking more of all the characters which give weight to any authority. If the informant had been able to cull such a passage from the report of the charge of the presiding Judge, in any case tried years ago, the application of the authority, and the influence of it upon the present question, could not have been disputed or resisted. But surely the *recentness* of the authority can never be argued, as detracting from the weight of it, but the reverse. The circumstance that it related to the *very question* of the informant's liability to trial, as to the identical charge for which he is now attempted to be brought to trial, cannot be held to detract from the weight of the authority, or from the applicability of it, but the reverse; or if it excludes the possibility of any specialty, or any separate element. It is worthy of notice, too, that the law was thus laid down in the *most important* part of the whole proceedings in the trial,—it was laid down in the direction of the Court to the Jury, on a point of law affecting the credit which they were to give to certain witnesses in the cause; and it is not assuming too much to say, that the *verdict of the Jury* may have depended, and, in all probability, *did depend, upon the circumstance of the law being so laid down;* and, consequently, that *the life of the prisoner then under trial, and which has now been forfeited, rested upon that point.* This, too, was the law promulgated, not by *one* Judge sitting at circuit, unaided by the counsel of any of his brethren,—it was the deliberate opinion of a quorum of the Supreme Criminal Court,—of *three* of your Lordships' number, who not only concurred therein, but who sat there to give the law, which the presiding Judge *could* only dispense, in conformity with *their* opinion. Such, then, *was* the law on *the 25th of December last;* at least, such was *then* laid down and acted upon as law by the Supreme Criminal Court,—by *three* of your Lordships' number, when *the life of a prisoner was at stake.*

An attempt was made by the other party at the debate, to point out an inconsistency between the law thus expressly laid down in the charge to the Jury, and the legal *inferences* to be deduced from the proceedings in a previous part of the trial, when certain questions were put to the informant by the counsel for the prisoners. It is only necessary to attend to those proceedings, to see that your Lordships were not guilty of the inconsistency which is ascribed to you. When the witness was introduced, it is true, he was desired to speak only to the case of Docherty; but it will be in the recollection of your Lordships, that this warning was given at the desire of

the counsel for the *prisoners.* Afterwards, when the examination in chief of the prosecutor was concluded, a course of examination was commenced on behalf of the prisoners, *avowedly not cross*, to the examination in chief, but intended to test the claim of the witness to credibility, by asking him 'to reveal 'his whole life and conversation;' and, in particular, to ask him 'whether he had ever been guilty of, or concerned in, 'any *other* murder.' Your Lordships held, that though the question might be put, the witness was not bound to answer it; and the informant has no objection to hold, that the principle of this decision may have been, that the question, if answered, might lead the witness to criminate himself, in regard to matters as to which he had *no protection.* But observe the *nature* of the question, and the *quarter from whence* it proceeded. In the *first* place, the question and whole inquiry was confessedly not limited to the matter set forth in the indictment,—it was intended to ask the witness 'to reveal his whole life and con-'versation.' The witness might have been concerned in murders not set forth in the libel,—not embraced in his compact with the public prosecutor; and the question was, in no respect, limited to the matters as to which he was protected. It was so framed, as to embrace, to use the words of Lord Mackenzie, 'other crimes than *those* in reference to which 'he has been brought forward.' In the *second* place, this *unlimited* question *proceeded from the prisoner;* and it is undisputed law, that there is *no protection* to a witness, relative to what he shall say when examined by the *prisoner*, as to crimes in relation to which the public prosecutor has not made him a witness. It is plain, therefore, that there is no inconsistency in the proceedings; and that the law, as laid down in the charge to the Jury, is not at variance with any authority which can be found in the report of that trial, or of any *other trial.*

The principles of law, and the direct and recent authority now stated, are sufficient, it is submitted, to govern this case.

Even if the principle of law and the authority referred to, had been less plain and satisfactory than they are, the informant might, with great confidence, have rested his case on the principles of '*humanity, justice, and policy*,' which are said, on the other side, to be at the foundation of the rule of law, which secures protection to a witness, *socius criminis*, and which, indeed, pervade, and are interwoven with, every part of the criminal law of Scotland, and may legally be appealed to in the absence of any other guide. Every thing adverse to these principles, and certainly every *novelty* adverse to them,

must be repugnant to the spirit of the law. The proceedings which the informant now resists are of this character; while the prayer he has preferred to your Lordships, is plainly in unison with those great principles which are at the foundation of our criminal code, and are intermingled with the administration of it. Your Lordships have before you the case of a prisoner who has had the misfortune to be accused by the public prosecutor of acts of murder, of which he may have been innocent or guilty. Let it be taken either way. Suppose him to be, as his adversaries describe him, a delinquent polluted by crimes of the blackest die—one of a fraternity who conspired against the lives of the lieges, and who carried on the work of blood with a secrecy and a success which the firmest cannot hear without trembling, or the hardiest without horror—let the prosecutors describe his character and his crimes in any language they please—still, in his case, as in every other, *justice* must be observed, and the law must be administered in the spirit of *humanity*, and with a view to future consequences. If he has really been a member of such a conspiracy as is alleged, the greater is the benefit which he has conferred upon the public, by laying open all the hidden acts and secret ramifications of that confederacy, and the greater the danger to which, in the event of trial, he has exposed himself, by giving any information or any evidence whatever in regard to any of its transactions and deeds. But he made a compact with the representative of the interests of the public; and he has given to the public, by their representative, the benefit of all his knowledge of these transactions, in consideration of the community having released him from all claim for punishment. This compact having been acted upon,—every information which the informant possessed, having been drawn from him,—he having been publicly called upon to appear as a witness in regard to the very murder now under consideration,—he having been placed in the witness' box, and having publicly given evidence in relation to a part of those proceedings, to which he is said to have been accessary, and having thereby publicly connected himself with the chief actor, whose conviction he ensured; and having exposed the system, and laid open the sources of evidence, and thus furnished the means of bringing himself to trial, if that were competent,—borne down with difficulties, and surrounded by perils, by which he would not otherwise have been environed, —the strength of his defence impaired or taken away—is it consistent with humanity, or justice, or policy, that two individual members of the community, who all the while lay

by without giving notice of such intention, should now come forward, to violate public faith, and to turn the information given for the benefit of the public against the life of him who gave it, in reliance on the compact he had entered into with the public prosecutor? Every principle of *humanity*, of *justice*, and of *policy*, is opposed to such a proceeding. There is no precedent,—there is no authority for such a proceeding. The informant acted in the belief that he had secured his protection. The public prosecutor acted in the belief that he was entitled to secure, and had secured to him, that protection, and had done so for the ultimate benefit of the public, in securing the conviction and punishment of an offender. If both parties erred in their notions of the law, they erred in common with a quorum of your Lordships' number, discharging the most important duty of the Supreme Criminal Court. If the law is now, for the first time, to be declared against that understanding and opinion, let the operation of this new declaration be confined to *future* cases,—but let not this new state of things—this alteration of a deliberate judgment of the Supreme Court, operate to the prejudice and injury of the informant, *when matters are, in respect to him, no longer entire.* To do otherwise, would be productive of no good object. The ends of *justice would not be thereby promoted.* The *public faith would be broken*, and, above all, the informant COULD NOT NOW HAVE A FAIR TRIAL. These considerations give him a sufficient claim to the interposition of your Lordships to prevent farther proceedings against him.

In respect whereof, &c.

DUNN. M'NEILL.

INFORMATION for Janet Wilson, Senior, and Janet Wilson, Junior, Mother and Sister of the late James Wilson, generally known by the name of 'Daft Jamie,'—*Respondents ;*

AGAINST

William Haire, or Hare, present Prisoner in the Jail of Edinburgh, and accused of the Murder of the said James Wilson,—*Petitioner.*

As an introduction to the legal argument about to be submitted to your Lordships, it is unnecessary to state any thing farther in detail, than that the prosecutors have reason to believe that James Wilson, of whom they are the nearest of kin, was cruelly murdered in the month of October last, and his body sold to a surgeon for the purpose of dissection, and that the perpetrator of this murder was William Hare, now a prisoner in the tolbooth of Edinburgh. Certain facts had come to the knowledge of the prosecutors which led them to form that conclusion. It was understood that the prisoner Hare had been examined as a witness for the Crown on the trial of William Burke for the murder of a woman of the name of Docherty or Campbell, and that he had been subsequently committed on a charge for another murder said to have been perpetrated in the neighbourhood of Stockbridge. The prosecutors were, in the meantime, anxious to have the circumstances investigated relative to the disappearance and death of their relation, with a view of bringing the murderer to trial, if it should be found that the deed had been perpetrated by the individual whom they suspected, and had good reason to believe was guilty of the crime. They accordingly applied to the Sheriff (Jan. 16, 1829) for a warrant for the detention of William Hare in jail, with a view to his examination and committal, if there were just cause found against him, until liberated in due course of law. The warrant was accordingly granted, and the prisoner, upon examination, emitted a declaration, after which he was committed for farther examination. Several witnesses were precognosced before the Sheriff, and the agent for the prosecutors was proceeding in his precognition, with the view of indicting the prisoner for the alleged crime, when a petition was presented to the Sheriff, which, after reciting that the prisoner had been examined before the Sheriff of the county in relation to various acts of murder, alleged or suspected to have been committed by Wil-

liam Burke, then in custody, and other persons, proceeded in the following terms :—' That in the course of these examina-' tions, the petitioner was assured by the public prosecutor, ' that if he made a full disclosure of all he knew relative to ' the several alleged murders, which formed the subject of in-' quiry, no criminal proceedings would be instituted against ' the petitioner himself in relation thereto, whatever might be ' the circumstances of suspicion, or apparent participation, or ' guiltiness appearing against him. That the petitioner was ' examined as a witness, and without the caution and warning ' which it is the duty of the judge-examinator to give to a party ' accused every time he is brought up for examination. And the ' petitioner made a full and true disclosure of all he knew, and ' gave every information he possessed in relation to all the al-' leged murders, as to which he was examined; and this he ' did under the assurance of personal and individual safety ' above-mentioned. That one of the alleged murders as to ' which the petitioner was so examined, was that of a person ' described as James Wilson, commonly known by the name ' of ' Daft Jamie;' and in relation to that matter, as well as ' in relation to all the others, the petitioner made a full and ' true statement, and gave every information he possessed, ' whether relative to the alleged act of murder itself, or the ' means of obtaining or tracing any circumstances of evidence ' in relation thereto; and all this he did, relying on the as-' surance of personal and individual safety above-mentioned, ' and the compact and transaction thence arising. That in con-' sequence of the statement and information thus elicited from, ' and procured through the petitioner, the said William Burke ' was indicted to stand trial before the High Court of Justici-' ary in the month of December last, on a libel setting forth ' three charges of murder, as to all of which the petitioner ' had been precognosced as aforesaid. That one of these three ' charges was the foresaid alleged murder of James Wilson, ' alias ' Daft Jamie.' That the petitioner was included in the ' list of witnesses for the prosecution annexed to the said libel, ' and he was cited to attend as a witness for the prosecution, ' in relation to all the charges therein contained.' The peti-tion continued to state, that the libel was found relevant to in-fer the pains of law, and the public prosecutor proceeded to lead evidence against William Burke, and another prisoner, ' as to one of the charges, (being the murder of Margery ' Docherty)', and that he, Hare, was sworn and examined as a witness.

These are the facts detailed in the petition, upon which the question now to be discussed is raised. The prosecutors do not

think it necessary to go more into its merits, because they are mixed up with argument. The prayer is in the following terms:—'May it therefore please your Lordship, to take in- ' to consideration the circumstances above set forth; to recal ' the warrant on which the petitioner is committed, and to or- ' dain him to be set at liberty; also to put a stop to the precog- ' nition or examination of witnesses; and to ordain the same, ' in so far as it has already proceeded, to be delivered up to ' your Lordship's clerk, or such other person as your Lordship ' shall appoint, in order to the same being sealed and retained ' to abide the future orders of your Lordship, or other compe- ' tent Judge of Court; or to give such other relief in the pre- ' mises, as to your Lordship shall seem proper.' Upon this petition counsel were appointed to be heard, and the Sheriff thereafter pronounced the following judgment:—(21st January 1829.)—'The Sheriff having resumed consideration of the pe- ' tition for William Hare, and having heard the counsel ' for William Hare, and the respondents, Janet Wilson, se- ' nior and junior; In respect that there is no decision, finding ' that the right of the private party to prosecute, is barred by ' any guarantee or promise of indemnity given by the public ' prosecutor, refuses the desire of the petition; but in respect ' of the novelty of the case, supersedes farther proceedings in ' the precognition before the Sheriff, at the instance of the re- ' spondents, till Friday night at seven o'clock, in order that ' William Hare may have an opportunity of applying to the ' Court of Justiciary.'

This judgment was brought before this High Court by bill of advocation; and the prisoner, at the same time, applied for suspension and liberation, in common form.

The grounds of his application to your Lordships are the same stated in the prisoner's petition to the Sheriff.

He, in the *first* place, founds upon his examination before the public prosecutor, and the pretended agreement upon which he disclosed those facts which he states to have been in his precognition, relative to the various murders with which Burke was charged; and,

2dly, He founds upon his examination as a witness upon the trial of William Burke, for the murder of Margery Docherty, or Campbell, as affording him an indemnity not only against prosecution for another and a different murder, but as vesting in him such a personal right to indemnity, as to entitle him not only to an immediate liberation from jail, but to have the authority of your Lordships interponed, to prevent any precognition as to his alleged guilt.

The pleas thus maintained on the part of the prisoner

lead to the discussion of grave and important questions of law.

The prosecutors are, in the *first* place, obliged to support their title in the present prosecution, and to show the constitutional right which, according to the law of Scotland, they possess, of bringing the individual to justice, whom they conceive guilty of the atrocious crime by which they have been injured.

But, 2*dly*, the prosecutors are anxious to contest the doctrine of indemnity upon which the prisoner has founded, and to show that he is stretching far beyond its legal limits, the indulgence granted by the Court of Justiciary to those who are examined before it as *socii criminis*.

I. The right of the private party to prosecute is not controllable by the public prosecutor, and is independent of him.

The prosecutor states this as a fundamental and constitutional principle of the criminal jurisprudence of Scotland. It is not an antiquated right, as stated by the counsel for the prisoner, but is recognised by the latest authorities, and is consistent with the most fundamental principles of our practice. It would be detaining your Lordships by a useless and unprofitable parade of authority, to show, that in no very late periods of our law, the right of prosecution was considered as inherent in the private party; and that, even when the more scientific, and the wiser, and the more legal plan of a public prosecutor was devised, his proceedings were not prejudicial to, but correctory of the proceedings of the private party. Mackenzie observes, in referring to the act 1587, cap. 77, and a prior enactment, 1436, that pursuits at his Majesty's instance are only *subsidiary*, and that from these acts 'two things may be concluded, 1*st*, 'That of old it was doubtful if the King could pursue private 'crimes without an accuser;—2*dly*, That pursuits at his Ma-'jesty's instance for private crimes are yet only subsidiary, 'and allowable if parties be silent or collude,' &c.—(Burnet, p. 296.)

Mr Burnet states the original practice, and the manner in which it now subsists, in the clearest terms; and it is quite sufficient for the prosecutors to quote them, in order to establish the proposition upon which the first part of their argument is founded:—'In many cases, indeed, long after the insti-'tution of King's Advocate, we find it objected that he could 'not prosecute without the concurrence of the party injured, 'or his kinsmen. This, at all events, is clear, that the proper

'and original form of prosecution with us, was in the name of 'the private party injured, who accordingly prosecuted not 'merely for reparation and redress to himself as an individual, 'but for punishment and for reparation to the public; and 'hence it was that this form of prosecution continued, and '*still subsists with the same effect, and to the same conclusions* as 'to the full pains of law, as a prosecution at the instance sole- 'ly of his Majesty's Advocate.'—(Burnet, p. 297.)

Baron Hume states the right of the private party as at present existing, to be as strong in every respect as that of the public prosecutor; and his opinion on such a question must have been founded upon the most decided authority.—'First 'of all, it is to be noted, that the title of the private party em- 'braces, in every instance, the full pains of law, not only the 'private interest of damages, *solatium*, and expenses, but the 'same high and personal conclusions of corporal or other chas- 'tisement, wherein the Lord Advocate, for the interest of His 'Majesty, might insist. Thus, in case of homicide, a libel at 'the instance of the wife, or the kinsmen of the deceased, is 'as good towards inflicting the highest vengeance of the law 'on the body of the culprit, if he is found to be a murderer, 'as it is in a case of culpable homicide for recovery of the as- 'sythment or pecuniary consideration which is then due to the 'kindred.'—(Hume, Vol. II., c. 5, p. 115.)

It is therefore a matter of law, as fixed by these authorities, that while the right of the private prosecutor was originally considered as paramount to that of the public, it even now subsists as equal to it, so far as the right to prosecute and the penalties of the law are concerned.

There can, therefore, be no question in this High Court, as to the title of the prosecutors. They state themselves to be, and in a question of relevancy, their statement must be received as correct, 'the nearest kinsmen of the deceased demanding 'the vengeance of the law on the body of the culprit, if he is 'found to be a murderer.'—(Hume.) Their right therefore to prosecute, being as fully recognised as that of the public prosecutor, and held to be commensurate with the crimes of which they have reason to accuse the prisoner, it is for him to establish that the constitutional right thus shown to exist, can be interfered with or taken away without the remission of the Crown, or the acquittal of the jury.

The prosecutors may here observe, that, legally speaking, there are only two situations in which a prisoner can actually plead indemnity in bar of trial. They are:—Previous Acquittal, by a jury, of the crime of which he is charged; or Remission by the Crown. These are the two constitutional modes

of freeing an accused party from the consequences of alleged crime. The first clears the individual of the accusation made against him by the verdict of his peers, and the second frees him of the legal taint, as well as of the punishment which conviction would otherwise attach.

Either of them is an effectual bar to trial, whether at the instance of the public prosecutor or of the private party. The latter may indeed have his action of damages for the injury he may have sustained, because the right of the Crown to pardon, cannot interfere with patrimonial interest; but, in so far as the pains of law are concerned, these are effectually remitted.

The point which the prosecutors are anxious to establish, and which they feel confident, is the sound and constitutional law upon the subject, is this, that whatever may be the nature of the private arrangement between the public prosecutor and the criminal, and whatever may have been his inducement to give up the right of calling upon the criminal to answer at the bar of justice, for the crime of which he is guilty, that arrangement cannot deprive the private party of his right to insist for the full pains of law. If the law contemplated the power of the public prosecutor to deprive the private party of his right to prosecute by arrangements to which the latter is no party, it had better declare at once, that the private instance shall be at an end, because it virtually would be so. In every case where the public prosecutor wished to protect a criminal, and shield him from the effects of crime, an arrangement, under the pretence of a precognition and searching for evidence against a third party, might at once be made; and, if the doctrine maintained on the part of the prisoner be correct, that would prevent all prosecution at the instance of the individual injured.

This is a question of law, and not of motives. It is no answer to say, that in the present age, the high officer who discharges the duty of public prosecutor, is not likely to be tainted by partiality or corruption. Bad men live in all ages; and though the danger may now be less than in former periods, yet the history of this country has shown too many instances of corruption even in the highest offices, for us to assume as an indisputable proposition, that no one likely to prostitute his high office, will ever be placed in it. The prosecutor says, this cannot be assumed; and it would be much better to invest the Lord Advocate with the power of entering a *nolo prosequi*, and thus put an end to the right of private prosecution, than take away that constitutional right under the semblance of a legal principle, which, if supported, infallibly goes the

length of putting into the hands of the Lord Advocate, the power of controlling, and of effectually putting an end to, every attempt at bringing an alleged criminal to justice, at the instance of those who hitherto have been considered by the law as having a right and title so to do, except in those cases of indemnity which have been already pointed out.

The assertion of the prosecutors is, that their legal right to investigate the circumstances attending the death of their near relation, and to indict the accused party if they shall find sufficient ground to do so, cannot be interfered with by the proceedings of the public prosecutor, in circumstances over which they have no control. They say, that this doctrine must be held, because it flows as a necessary and irrefragible consequence from the constitutional right of prosecution, which has been proved to exist. If the right be in the private party, how can it be wrested from them, by the communications which pass between the criminal and a third party, over whom they have no control, but to whom, on the other hand, the law gives no power of depriving them of that right of demanding justice and vengeance which it has vested in them?

The propriety of maintaining that safeguard of the rights, and the prosecutors may add, the liberties of the people, which our ancestors wisely committed to those who might have a more peculiar and immediate interest in vindicating injured law, and bringing the criminal to punishment, is well pointed out by Mr Burnet. But, before quoting his words, the prosecutors will only further observe, that although the right of popular accusation may not be altogether defensible, yet that is a wise and a wholesome provision, which, restricting the right to that of the party injured, affords some check to the power of a public prosecutor, and prevents him from being able to stifle all inquiry, where private reasons might influence his conduct.

After stating that a public accuser in crimes was introduced for the purpose of preventing offences from going unpunished, Mr Burnet continues:—' This seems the principle on which ' private as well as public prosecutions are founded; and ' while one operates as check upon the other, to prevent on ' the one hand, the feelings of humanity, and a wish to *com-* ' *pound* the crime, which may sometimes actuate the individual, ' and on the other, the partiality and undue bias which may ' sometimes actuate the public accuser from interfering with ' the interest of public justice, both conspired to the same end, ' the *securing the punishment of offenders.* It is, indeed, the ' union of these two modes of prosecution, that constitutes the

'pre-eminence of the criminal jurisprudence of Scotland, and 'distinguishes it from that of most other countries of Europe. 'It is by preserving both in due vigour, that public justice is 'effectually secured; that the remissness or partiality of the 'public accuser is on the one hand guarded against, and the 'too great lenity and forbearance of the individual corrected 'on the other. Hence it is, that with us no prosecution can 'in any instance be stiffled, and the feelings of the individual 'or kinsman outraged, by a denial of justice; while, in other 'countries, the *nolumus prosequi* of the public accuser, stops in 'many cases any process at the instance of the party injured, 'and his rarely interfering to prosecute in his own name, 'occasions in many instances a remissness in the execution 'of the law.'—(Burnet, p. 298.)

The learned author here distinctly lays down, not only that the right of the private party has not been taken away by the power vested in the hands of the public prosecutor; but that it exists to its fullest extent, and operates as a legal, and constitutional, and effectual check, against any exercise of his powers, to prevent the prosecution of crime, whether that may arise from partiality to the accused, or any other less definable motive. But it may be necessary to observe how this private right has been exercised.

In point of form, it is required that the Lord Advocate should grant his concourse to a prosecution before the High Court of Justiciary. This form, however, is established, not for the purpose of showing that his permission to prosecute is necessary, but for the purpose of showing that there is a public injury to be vindicated, as well as a private party to be satisfied. Accordingly, the Lord Advocate has no right to refuse his concourse. If he should refuse, he can be *compelled* to grant it, for this very reason, that it is not in *arbitrio* of him to deprive the private party of his legal right. The law was so stated by Lord Alemore, on the complaint of Sir John Gordon against his Majesty's Advocate, June the 21st, 1766. Sir J. Gordon had complained against the Lord Advocate, for refusing to prosecute at *his instance.* The Court found that he was not bound to do so; and Lord Alemore observed, 'had the Advocate refused his concourse, he might have been '*compelled* to give it, for every one is entitled to justice, but 'he cannot be forced to prosecute.'

The same doctrine is laid down by our authorities. Mr Burnet observes,—'It is understood that his Majesty's Advo-'cate cannot refuse his concourse, and may be compelled to 'give it, in all cases where the complaint of the private party

'is founded on a known and relevant *point of dittay*, and as to
'which he has, *prima facie*, a *title* to insist. On the other
'hand, such concourse his Majesty's Advocate may refuse in
'cases that are clearly of an opposite description,—a power
'which seems to result from the nature of his office, and from
'what seems to have been in part the principle on which such
'concourse was originally deemed necessary.'—(Burnet, p. 306.)
Baron Hume states the law to the same effect. After mentioning the cases in which the Lord Advocate might refuse his concourse, where the charge is palpably absurd and incompetent, he continues:—' On the other side, certainly, the Lord
'Advocate is not the absolute and unaccountable judge on
'such occasions, but is subject to the control and direction
'of the Court, who will oblige him to produce and to justify
'the grounds of his refusal to concur. Nay, more, except in
'such extraordinary situations as those above supposed, which
'cannot be the subject of any difference of opinion, *he shall
'not even be allowed to engage in any inquiry concerning the
'merits of the case*,—the propriety of the prosecution,—the
'form of the action,—the sufficiency of the title, or the like,
'but shall be ordained to comply straightway, leaving the
'discussion of those matters for the proper place and season,
'after the libel shall be in Court.'—(Hume, Vol. II. p. 123.)

It is only, then, where a prosecution is *absurd*, or palpably *incompetent*, that the Lord Advocate can refuse his concourse. He is not to be a judge, says Baron Hume, ' as to the propriety
'of the prosecution, the form of the action, or the sufficiency
'of the title.' These are subjects to be discussed and decided by the proper tribunal, when the case comes into Court. If these authorities are to be held as stating what is the law, then the informants assume this as an incontrovertible proposition, that the mere precognition of the accused, however that may tie up his own hands as public prosecutor, could not be sustained as a sufficient reason for the Lord Advocate's refusing to give his concourse to the private party who thought fit to prosecute.

There is one decision of the Court which carries the right of the private party still farther. In the noted case of Colonel Charteris, who was tried for a rape at the instance of the woman's husband, the Lord Advocate's concourse was formally withdrawn, at the calling of the libel. The want of the concourse was then pleaded in bar of trial; but, after a full argument, the trial went on at the instance of the private complainer, as for the full pains of law.—(Hume, Vol. II, p. 124.)

These authorities, and the rules of law upon which they are founded, sufficiently establish the proposition with which

the informants set out. They establish, that the right of the private party is perfectly independent of that of the Lord Advocate; and that it cannot be interfered with by any arrangement into which that high public officer may think it necessary to enter, or any circumstances in which he may find himself placed.

If the Lord Advocate has entered into any compact of the nature alleged with the prisoner, that may be a sufficient reason for his Lordship applying to the proper quarter for pardon, and for remission of the crime with which he is accused. With that neither the private party, nor the Court, has any thing to do; nor can it come into discussion in the present case, or have the slightest effect upon the legal argument.

It is now necessary to request the attention of your Lordships more particularly to the grounds upon which the prisoner has applied for liberation. He sets forth,—1*st*, That he is entitled to release and indemnity, in consequence of having been examined by the public prosecutor, upon a promise of safety; and, 2*d*, From having been examined as a witness upon the trial of William Burke, for the murder of Mary Campbell, or Docherty.

Now, as to the first ground of application, the informants conceive that they have already stated what must be sufficient to prove, that if the Lord Advocate can be compelled to give his concourse to the prosecution, then, *a fortiori*, no private arrangement he can enter into with the party accused, can interfere with their right to prosecute. It is humbly thought, that as to this part of the case, there can be no difficulty. Suppose that the prisoner were at this moment incarcerated at the instance of the Lord Advocate, would your Lordships hold it to be a good ground of interference, and liberating the prisoner from all inquiry and prosecution at his instance, that he had been examined and precognosced in manner stated in the bill of suspension? But if your Lordships would not control the right of the Lord Advocate, or interfere with him, *ab ante*, in the exercise of the functions of his office, much less can these proceedings interfere with the right of a third party recognised by law, in the manner that the right of private prosecution is.

But the prosecutors may leave this part of the case, because, if the prisoner is not *indemnis* by his examination in Court, *multo magis*, he is not so by a private examination.

The point now to be argued, is as to the effect to be given by the Court, to the fact of the prisoner having been examined as a witness in Court upon the trial of Burke. The prosecutors here state their second proposition.

II. The *socius criminis* is only protected by the indulgence of the Court, with regard to the particular crime as to which he gives evidence.

It is well known, and therefore it is unnecessary to quote authority upon the subject, that formerly a *socius criminis* was not received as an evidence in the criminal courts of this country, because of the interest which he was supposed to have in establishing the guilt of the individual accused, and thus freeing himself from imputation of the crime. Of course, it followed, that at this time the witness was liable to prosecution for the offence, although he gave evidence upon the trial of another accused of it. The practice which has lately crept in, of affording an indemnity to the witness, and protecting him by the interposition of judicial authority from all question, for the crime as to which he has given evidence, does not appear to have been recognised, until subsequent to the case of Jameson, in 1770.

But, before quoting the circumstances of that case, it may be observed, that perhaps it might have been better, both constitutionally and legally, if the indemnity had not been acquired; and, if every case had been left to be considered according to its peculiar circumstances, by the prosecutor and the Court, as affording ground for an application for pardon, to that constitutional source, in which the power of pardon is vested. It is possible to conceive many cases, in which, according to the present rule of practice, much difficulty might arise. All these are guarded against by the wise and salutary rule of the law of England:—'By the practice most 'usually adopted, accomplices are admitted to give evidence 'for the Crown, under an implied promise of pardon, on con- 'dition of their making a full and fair confession of the truth. 'On a strict and ample performance of the condition, to the 'satisfaction of the Judge presiding at the trial, (although 'they are not of right entitled to pardon), they have an 'equitable title to a recommendation for the King's mercy.'—(Russel on Crimes, Vol. II. p. 598.)

But without recurring to this point, farther than to say, that it gives reason to doubt whether it would be consistent with constitutional principle to carry the right of indemnity farther than it has hitherto been supported by authority or practice, the informants would request the attention of your Lordships to this fact, that, in the year 1770, no such right, on the part of the witness, was established. The case of Jameson, which then took place, is thus reported by Mr Burnet:—It will be observed, that the report of the case is contained in

a note upon the text of that learned author's work, in which he states it to be '*now* held, that the very act of calling and 'examining an accomplice as a witness on the part of the 'Crown, goes far to operate as a discharge or acquittal to 'him from all prosecution for that crime,'—(page 417);—a passage in which, it will be observed, the doctrine is not directly laid down, that the witness is discharged of the crime, but merely that his examination may *go far* to operate as an acquittal from the crime as to which he is examined. The note is in these words:—'In the case, accordingly, 'of Macdonald and Jameson, in August 1770, when the objection of a witness having been *socius criminis* was fully debated, the prosecutor, in answer, did not say that the witness, by being examined, would thereby be exempted from 'prosecution, but only that he might hope for impunity; 'while the usage, at that time, of granting special pardons to 'accomplices, for enabling them to give evidence, confirms 'what has been stated. At what period a different rule came 'to prevail does not appear.'—(Page 418.)

Baron Hume conceives, that the practice may have commenced from the rule introduced by 21st Geo. II. c. 25, as to a particular offence. It was declared by that statute, that in all trials in Scotland for theft of cattle, it should not be a good objection to any of the prosecutor's witnesses that he was *socius criminis*, and that such witness should not be liable to prosecution on account of his accession to such offence.—(Hume, Vol. II. p. 354.)

Here was a law passed as to a particular offence, and indemnity given to the witness with regard to that offence. If the ordinary maxim, *exceptio firmat regulam*, had been attended to, the predecessors of your Lordships might have hesitated, before they extended the rule applied by statute to the particular case specified. But the *exception* seems to have been taken as the *rule;* and accordingly, in the discussion which took place in the case of Smith and Brodie, in 1788, where it was stated as an objection to a witness, that he had received a promise of pardon if he would give evidence against the prisoners at the Bar, for a crime of which he was alleged to have been a *socius*, the Court ruled that the objection was not maintainable, because the very act of calling him in Court relieved him of the penalties which the law would otherwise attach to the offence of which he was guilty.

It will be observed, however, that the witness was to be *called* in Court, and that the indemnity merely extended to the case as to which he was examined.

The doctrine maintained on the part of the prisoner is, that

he is relieved, not only from the consequences attaching to his participation in the crime as to which he has been examined, but also as to others, in regard to which the same parties may have been implicated, but which have not been the subject of trial. This argument extends the doctrine of indemnity much farther than it has yet been carried.

For the question underwent grave discussion; and the practice, as then followed by public prosecutors, and recognized by the Bench, is distinctly stated by the learned Judges in the case of Downie, who was tried for high treason in the year 1794. The discussion arose upon certain questions being put to a witness of the name of Aitcheson, tending to criminate him. The danger had been pointed out by the counsel for the prisoner, to which the course of the examination might lead, as the witness might confess that which was sufficient to convict him of the crime of treason.

The Lord President of the Court stated his own practice in criminal cases, and that, when he was Lord Advocate, he understood that he could not, after making use of a *socius criminis* as a witness, bring him to trial for the *same* crime: But he requested to be informed as to the law of England; and then proceeded to say, that if he was assured 'that the wit-'ness runs no risk of being prosecuted himself, being virtually 'or expressly liberated from the charge, so far as he himself 'may be concerned, in consequence of his being called as a wit-'ness, and *speaking out the truth in this trial*, it will be my 'duty to tell him, that he is bound to speak out the whole 'truth, and that he is in safety to do so.'—(STATE TRIALS, Vol. XXIV. p. 32.)

The observations of the Lord Chief Baron are of material consequence, because he states the practice:—'I served a good 'many years as prosecutor in this country, and I always un-'derstood, when I brought a *socius criminis* as a witness, that 'my hands were tied up from the prosecution of him for any 'thing spoken at the Bar. But if he would not speak out, I 'thought myself at liberty to prosecute him for any thing he 'did not speak out: A person being brought to the Bar, and 'not speaking, should that protect him from trial for any of-'fence, when he is only protected for what he shall speak 'upon the trial?'

Lord President.—'I am of the same opinion. If he refuses 'to speak, he is not a witness,—he may be put back to his 'former situation.'

Lord Advocate.—'What the honourable Judge has stated is 'perfectly right, and the law.'

Lord Eskgrove.—'I never knew an attempt made by the

'prosecutor, to bring afterwards to trial for the same crime, 'any person who had been examined as a witness upon that 'crime to which he had been accessary, and who had not re-'fused to give evidence, but had given evidence. I had con-'ceived a notion in my own mind, that if such an attempt 'should be made, the Judges who are to determine upon the 'law of the land, as it strikes them, would not suffer a person 'so circumstanced to be subjected to a trial, and consequently 'that it is not optional in the public prosecutor to bring him 'to trial or not, for that the Court would interfere and pre-'vent such trial proceeding, although that case has not yet oc-'curred. I therefore think there is no place for the objection 'in his, (Aitcheson's), case; and, with respect to any other 'witnesses, I am of the same opinion with your Lordships; it 'is not competent for the prisoner's counsel to object, although 'the witness himself may decline to answer to questions tend-'ing to criminate himself; but if he chooses to answer and 'give evidence, I conceive he will be secure against any future 'prosecution.'

Lord Swinton, and the other Judges who were present, concurred in the opinions then expressed.

The doctrine laid down by the whole of these learned Judges, is this, that for what the individual told in Court as a witness, he could not afterwards be questioned; but, so far from their glancing at the idea of an indemnity afforded by previous precognition, they distinctly state, that if the witness, after being put in the box, refuses to answer, he would not have been entitled to any protection; and that they, as public prosecutors, would not have considered their hands tied up.

It will be observed, that all this specially refers to the peculiar case as to which the witness is examined. There is not the least shadow of authority that the doctrine, as laid down by these Learned Judges, would have been applicable to a charge as to which the witness was not examined. On the contrary, the informants may use the language of Lord Chief Baron, and say, that as to such charges, the hands of the public prosecutor would not have been tied up.

The case of Dreghorn, in 1807, (Burnet, App. No. 21.) is next to be referred to. The question here was as to indemnity from trial before a court-martial, of an individual who was examined before the High Court of Justiciary. An objection was taken to a witness adduced, that he was a party in the affray which had given rise to the trial, and that the Court could not protect him from the consequences of his evidence. The Lord Justice-Clerk, (Hope), in stating his opinion, which was against the objection, observed, that as the prosecution 'had

'been brought by the officers of the Crown, every thing must
'so far yield to the consequences which followed by law from
'such provocation; and one of them is, that a witness examin-
'ed in the circumstances here occurring, must be ever after-
'wards freed from any prosecution *for the matter as to which*
'*he gives evidence.*'

After some hesitation, the other Judges agreed in the opinion expressed by his Lordship, and repelled the objection, upon the ground that the '*examination* of the witness afforded him an 'indemnity as to any after trial.' As the question arose upon the competency of examining the witness, and requiring him to give evidence on a trial in open Court, and long after all proceedings in the way of precognition had been concluded, it is manifest, that the *examination* here spoken of could not possibly mean the private examination to which the witness might have been previously subjected by the prosecutor.

There is here no extension of the rule of practice. The witness is not held to be *indemnis,* except after examination in open Court; and it necessarily follows, that the indemnity can only extend as far as the crime in regard to which he has been examined.

These are all the authorities which the informants can find upon the subject, with the exception of a single *dictum* of the Lord President, when presiding upon the special commission at Dumbarton, in the year 1820. On that occasion, a question was put to a witness, which the counsel for the prisoner thought might criminate him, and he requested the Court to caution him as to the answer to be given. Upon that occasion, it was observed by the Lord President, 'there is one thing you need 'not distress yourself about. A witness brought here cannot 'be prosecuted *for what he has said.* That is part of the law 'of Scotland.'—(Trials for High Treason, Vol. II., p. 506.)

It will be observed, that the docrine in all these cases is carefully guarded in its application to what is said in Court, or to the peculiar crime, with regard to which the trial has been proceeded.

The informants, therefore, state, as a substantive proposition, that the Court has not hitherto acquired the power of interposing between an alleged criminal and the course of justice, in those cases where he has not given evidence before it, as to the peculiar crime charged. There is no authority for carrying that interposition farther; and, without recurring to the question of expediency, it may be observed, that it is difficult to reconcile the claim of indemnity as matter of right, with the fact, that an indulgence of the Court, not recognized by statute, or founded upon any precise law, must be extended

far beyond its ordinary limits, before the plea can be sustained.

But the informants having stated the general principle, must now approach the *res gestæ* of the present case. They must be fresh in the recollections of your Lordships, and afford a distinction of the utmost importance. The indictment against Burke charged *three* different acts of murder, to establish which, the names of certain witnesses, of whom the suspender was one, were thereto appended. At the trial an objection was taken to the relevancy of the indictment, upon the ground of the pannel not being obliged to answer to three separate charges at once; and the Court are aware that the Lord Advocate, after debate, declared that he would go to trial only upon one charge; and the Court therefore remitted the pannels, with that charge as found relevant, to the knowledge of an assize,—reserving to the public prosecutor afterwards to proceed against Burke on the other two charges therein contained.

The interlocutor pronounced by the Court was in the following terms:—'The Lord Justice-Clerk, and Lords Commission-
'ers of Justiciary, having considered the indictment against Wil-
'liam Burke and Helen M'Dougal, pannels, and having heard
'parties' procurators at great length upon the relevancy there-
'of, 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 there-
'upon stated that he means to proceed at present with the third
'charge in the indictment against both pannels,—therefore re-
'mit 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, reserving to
'the public prosecutor afterwards to proceed under this in-
'dictment against the said William Burke, upon the other two
'charges contained therein.'

Burke, the pannel, and his wife, were therefore put upon trial as to this *one* charge, which your Lordships are aware had no connection with the individual as to whose death the informants are anxious to investigate. It is therefore certain, that the counsel for the Crown could not have proceeded to put one single question, as to the other charges which might have been contained in the indictment. They were to all parties as if never made. The Crown could not examine, nor the Jury convict, as to one of them. However, generally, the witnesses cited in support of the indictment might have been examined

previous to the restriction of the charge, they were after that merely witnesses as to the crime of murdering Margery Campbell, or Docherty; and it is not known to the Court, nor to any one, whether they could have stated a single circumstance as to any other of the alleged murders previously contained in the indictment. Accordingly, it will be observed, not only that the witness was specially warned by the Judge who swore him, and the presiding Judge, that he was only to answer questions relative to the charge which had gone to trial; but when the counsel for the prisoner did, on the cross-examination, put questions leading to a detail of the other murders charged, the prisoner was told that he need not answer, because he was not protected with regard to these crimes.

After administering the oath to the prisoner, who was brought forward as a witness upon the trial alluded to, Lord Meadowbank stated to him,—' Now, we observe that you are ' at present a prisoner in the Tolbooth of Edinburgh, and from ' what we know, the Court understands that you must have ' had some concern *in the transaction now under investigation.* ' It is therefore my duty to inform you, that whatever share ' you might have had in *that* transaction, if you now speak ' the truth, you can never afterwards be questioned in a court ' of law.'—Lord Justice-Clerk :—' You will understand that ' you are called here as a witness regarding the death of an ' elderly woman of the name of Campbell, or M'Gonegal. ' You understand, that it is only *with regard to her* that you ' are now to speak ?' To this question the witness replied, by asking,—' T'ould woman, Sir ?'—Lord Justice-Clerk,—' Yes.' It cannot be denied, that the witness was informed by these learned Judges, that he could only be questioned as to the particular charge then under trial, regarding the death of Docherty. But what is, perhaps, of still greater importance, it will appear that he was not permitted to answer questions which might otherwise have been of importance to the individual then upon trial, upon the ground that he would not be protected.

The question arose upon an objection taken by the Lord Advocate, to a question put by the counsel for the prisoner, upon the ground that he was not bound to speak to any of the cases, excepting the one under investigation; and, before the discussion, Lord *Meadowbank* observed,—' I have to state this, that ' the witness is brought here to be examined on the matter be- ' fore the Court; and he cannot, in any circumstance that ' may be disclosed in that evidence, be examined on a cross- ' examination,—he cannot be called on to answer other mat- ' ters, because the Court cannot protect him.'

After the competency of the question, the same learned Judge observed:—' Even our law goes no farther than to protect
' witnesses from being subject to prosecution, on account of
' matter immediately and inevitably connected with the sub-
' ject of the trial, in the course of which they are examined.
' I understand it, therefore, to be admitted, that if the ques-
' tion proposed were entertained by your Lordship, the wit-
' ness must be told that he is not bound to answer it: because
' it is beyond the competency of this Court to afford him pro-
' tection against being afterwards questioned for the perpetra-
' tion of crimes, which did not form the proper subject of in-
' quiry in the present investigation.'

His Lordship afterwards continues,—' We may be involved
' in an inquiry into the circumstances connected with the
' other murders in this indictment, which are *not now the sub-
' ject of this trial*, and which your Lordships, by your inter-
' locutor, have precluded from being the subject of trial at
' present, and before this Jury.'—(Trial, p. 102.)

Lord Mackenzie.—' I agree, in the first place, that the wit-
' ness has no protection beyond the case in which he has been
' called as a witness. I have no idea that, by confessing either
' ultroneously, or on his examination, or cross-examination,
' other crimes than those, in reference to which he has been
' brought forward to give evidence by the public prosecutor,
' he could acquire any right to impunity for those crimes, or
' even security that his own words might not be used in evi-
' dence for his conviction of those crimes.'

Lord Justice-Clerk, after stating that it was necessary to warn the prisoner, that he need not answer any question which might criminate himself, and the witness might avail himself of this warning, continues,—' If this witness does so avail
' himself, it cannot affect his credibility,—when we told him
' in the outset to-day, that it was only to this case he was to
' speak, and to no other,—and that nothing he said in this
' particular case could have any effect against him.'

His Lordship afterwards observes:—In the first place, my
' view of this matter is, that he *is not bound to answer any
' question except as to the murder of this woman.*'

The counsel for the pannel afterwards put a question to the witness, as to a murder committed in his house in October last, one of the murders contained in the indictment as charged against Burke, and the identical murder of which the witness is now accused. Taking advantage of the warning which he had received from the Court, and proceeding upon the principle that he could not be protected, with regard to that particular murder, the prisoner *refused* to answer.

To continue the narrative: Upon the wife of the prisoner, Hare, being placed in the witness box, she was addressed by Lord *Meadowbank*, who observed,—' We understand that you ' are implicated in a charge of the crime of murder, for the ' murdering of an old woman of the name of Docherty. It is ' my duty to tell you, that for any thing *connected with that* ' *murder, you can never be brought to trial*, if you speak the ' truth. You are bound to speak nothing but that to which ' you are sworn to speak, *not to the other murders.'*

It is understood that this is a correct account of the proceedings upon this trial, and they establish these indisputable facts :—

1*st*, That the witness was examined as to no other murder than that of Docherty or Campbell. And,

2*dly*, That he was distinctly warned that he was not bound to answer any question, with regard to the other murders contained in the indictment,—because, as to any other murder except that under investigation, he was not protected by the Court.

This is a question of fact. It does not admit of argument; and unless the prisoner is ready to contest the statement in point of fact, now made, it must be conceded, that except in regard to the peculiar case stated, no investigation took place, and no question was asked.

But the circumstances attending this part of the trial are direct authority in favour of the argument now maintained by the informants. The Court thought it necessary to warn the witness, that he need not answer any question, except one applicable to the particular case of murder then under investigation, because it could not protect him. But the investigation was limited to the case of Docherty,—that was the case tried. The question asked as to the murder of Wilson was *not* answered,—the prisoner availing himself of his right to refuse to answer; and if there is any truth in a syllogism, it follows, that as the case of Wilson was not then tried, the prisoner cannot now demand the protection of the Court for any thing that took place upon that trial.

The present question therefore stands thus: Hitherto a witness has only been protected from trial for the particular crime as to which he has given evidence. The prisoner has given none as to the crime of which he is now accused, and, therefore, he has not been placed in that situation which entitles him to the protection of the Court.

But it is right to try the doctrine advanced on the part of the prisoner, by adverting to the different situations in which, if good, it may be pleaded. If a *socius criminis* is called as a

witness, but the diet is deserted against the pannel, and he is dismissed from the bar without trial, are your Lordships prepared to hold, that the mere placing his name in the list of witnesses is a sufficient claim to indemnity, and might be pleaded in bar of trial against the Lord Advocate?

Or, suppose that, in the present case, the pannel Burke had been served with three separate indictments upon the three charges of murder made against him, and that the name of the prisoner had been included in the list of witnesses upon the first, but not on the other two indictments; would your Lordships have been prepared to hold, that all investigation, either at the instance of the Lord Advocate, or of the private party, was so illegal, as to require your instant interference, by a sentence of suspension and liberation, if commenced as to those crimes charged contained in the last indictments?

But the prisoner says that he was ready to give evidence as to the murder of Wilson, and therefore kept his compact with the public prosecutor.—*Quomodo constat* that this is true?—*Quomodo constat* that he would have said one word as to that matter, or might not have placed himself in the same situation in which Lord Chief Baron Montgomery states a witness might be placed, of refusing to answer, and, therefore, being liable to prosecution?

In short, the doctrine that has been established by practice seems to be this, that for what he has said on examination, the Court may protect the witness, by granting him indemnity; but that they are not presumed or understood to know, or listen to any thing, which has not taken place before them in Court, and during trial. The high office of the Judge entitles him to protect a witness brought before him, with regard to the facts to which he speaks, and the purposes of justice may require that this power should be granted; but the Judge knows nothing of what takes place out of Court; he knows nothing of any precognition before evidence is given, or any compact that may exist between the public prosecutor and the witness; and as the exemption has been hitherto limited to the peculiar crime under investigation, it may be matter of deep consideration, whether a power of pardon, not granted by statute, nor arising *ipso jure*, should be stretched beyond those limits to which it has hitherto been confined.

It is another and a different question, whether circumstances in a peculiar case may not entitle a criminal, however atrocious, to a pardon? But the prerogative of pardon is constitutionally vested in the Crown; and it may, at least, be questioned, whether the public interest is not best maintained, by

allowing that right to remain in the quarter, where the law and the spirit of the constitution has placed it.

Without detaining your Lordships farther, the informants submit, that the present bill of suspension should be refused.

In respect whereof, &c.

E. DOUGLAS SANDFORD.

EDINBURGH, 2d FEBRUARY 1829.

The Court met for advising the papers in this very important case:—

PRESENT,

The LORD JUSTICE-CLERK, (BOYLE.)

Lords GILLIES.	Lords MACKENZIE.
PITMILLY.	ALLOWAY.
MEADOWBANK.	

Counsel for Hare.

Mr DUNCAN M'NEILL.
HUGH BRUCE.

Counsel for the Private Prosecutors.

Mr FRANCIS JEFFREY.
THOS. HAMILTON MILLER.
E. DOUGLAS SANDFORD.

Counsel for the Crown.

LORD ADVOCATE, (RAE.)
Mr SOLICITOR-GENERAL, (HOPE.)

Mr ROBERT DUNDAS,
ARCHIBALD ALISON,
ALEXANDER WOOD,
} *Advocates-Depute.*

Lord Justice-Clerk.—My Lords, you will now proceed to give your opinions upon this case; and I may state, that we owe thanks to the learned gentlemen for the able pleadings, both oral and written, and for the dispatch with which these Informations have been prepared.

Mr JEFFREY rose, and spoke as follows:—It is not my intention, my Lords, to resume the argument which was formerly urged on this side of the Bar, and which has been so fully stated in the printed information now in the hands of the Court; but I trust your Lordships will indulge me with a few words—[LORD JUSTICE-CLERK—Certainly]—especially as the case has been brought to a definite point, by the precise and unequivocal statement in the case for the suspender, and the detail of facts contained in the answers of the Lord Advocate. The whole argument, when resolved into its principles, comes exactly to this, that the public prosecutor is entitled, on behalf of the Crown, to enter into a compact with accomplices whom he may think proper to adduce as witnesses, or with whom he may have held previous communications, and that to this compact your Lordships are bound to give effect. Is it meant to be maintained, however, that your Lordships have no power over such a compact? Have the Court no judicial discretion over the terms of such an agreement, and does it rest with the Lord Advocate, and not with the Court, to decide on its validity and effect? In this case, it seems to be taken for granted, that the Court must interpose its authority to any paction which the public prosecutor may think fit to make;—and yet, the claim to immunity is rested on the act of the Court, in admitting the witness. This does not seem very consistent; and yet, if the Court is to exercise *any* controul, it may, in every case, refuse to sanction the previous compact, and judge for itself of every claim to immunity that is made in its presence. No pretension, however, of this kind, has ever been asserted; and, therefore, the argument just comes to this, that the Lord Advocate is *per vias aut modos* substantially invested with the Royal Prerogative of pardon. Take the case of a murder committed, of which a number of persons are accused, one of whom is also accused of various other crimes, as rape, fire-raising, and housebreaking,—and suppose the Lord Advocate, in the exercise of a sound judicial discretion, and in order to let in light upon these atrocities, guarantees to that individual an immunity from the consequences of all the crimes in which he has been engaged,—is it meant to be maintained that a sufferer by fire-raising, for example, is to be precluded, years afterwards, from obtaining redress, by reason of a compact entered into in regard to other offences? In the exercise of a sound discretion, of which no one but himself is to judge, the Lord Advocate may promise a plenary indulgence for any crime, committed or to be committed; but have the Court, I ask, no controlling power over such a discretionary exercise of official duty, upon the part of his Lordship, and are they bound

to ratify every arrangement of this sort, into which he may think proper to enter? I am stating extreme cases, for they are best calculated to bring out the principle. But, with great submission, if such a doctrine is to be maintained, it will just come to that with which I set out,—namely, that his Lordship is invested with the absolute prerogative of pardon,—a prerogative which, as your Lordships know, is not intended to be exercised, even by the Sovereign, in the shape of arbitrary and capricious interposition, but for the purpose of furthering the general ends of justice; and this extraordinary pretension is asserted without a vestige of principle, or a title of authority to support the claim which is now put forward. In order to explicate a case, it is not only to its immediate result that we must look, but to every thing to which it may lead, and to the remotest consequences that may flow from it.

Mr M'Neill.—I have nothing to state in addition to what was formerly urged at the Bar, and is now contained in our printed information.

The Court then proceeded to deliver their opinions *seriatim.*

Lord Gillies.—The Court owes a debt of thanks to the Counsel on both sides, not only for the very great ability with which this case has been argued, but also for the punctuality with which the order of Court has been obtempered. The papers are drawn with great care, and reflect much credit on both my learned friends. This case is brought before us by a bill of advocation, suspension and liberation. It originated in a warrant for the detention of William Hare, with a view to his examination and committal, if there were just cause found against him, until liberated in due course of law. A petition was then presented to the Sheriff; and it may be proper to attend to the prayer, which is in the following terms:—'May 'it therefore please your Lordship to take into consideration 'the circumstances above set forth; to recal the warrant on 'which the petitioner is committed, and to ordain him to be 'set at liberty; also to put a stop to the precognition or examination of witnesses; and to ordain the same, in so far as 'it has already proceeded, to be delivered up to your Lordship's clerk, or such other person as your Lordship shall appoint, in order to the same being sealed and retained, to abide the future orders of your Lordship, or other competent 'Judge of Court; or to give such other relief in the premises, 'as to your Lordship shall seem proper.' Upon this petition the Sheriff, after hearing counsel, pronounced the following

judgment :—' The Sheriff having resumed consideration
' of the petition for William Hare, and having heard the
' counsel for William Hare, and the respondents, Janet Wil-
' son, senior and junior ; In respect that there is no decision
' finding that the right of the private party to prosecute is
' barred by any guarantee or promise of indemnity given by
' the public prosecutor, refuses the desire of the petition ; but,
' in respect of the novelty of the case, supersedes farther pro-
' ceedings in the precognition before the Sheriff, at the in-
' stance of the respondents, till Friday night at seven o'clock,
' in order that William Hare may have an opportunity of ap-
' plying to the Court of Justiciary. ' The question before us
then is, whether we are to affirm this judgment, or to reverse
it, and grant the prayer of the petition ?—a question of con-
siderable importance, and by the admission of both parties, an
open and undecided question.

The facts out of which this question has arisen are but too
well known. In the beginning of November last, it was dis-
covered that various murders had been committed in this
place, unexampled and alarming from their atrocity, and still
more from their peculiar object, which was such as to intro-
duce a system of crime, and to render indiscriminate murder a
trade, profitable in proportion to the number of its victims. They
were not committed from motives of revenge, nor even as the
means of perpetrating robbery, or concealing crimes, but to
render the human body itself an article of cold-blooded traffic.
These crimes attracted the attention of his Majesty's Advocate ;
he instituted an inquiry ; and of his proceedings we have now
a distinct, satisfactory, and authentic account. Indeed, all of
us are much indebted to the wisdom and prudence of that high
officer. When this scene of horrors was first disclosed, it must
have been the wish of every mind, that all persons concerned,
directly or indirectly, in such atrocities, should be brought to
condign punishment. That this feeling existed as strongly in
the mind of the Lord Advocate, as in any of us, I firmly believe.
But he had the good sense not to give way to it. He wisely
thought, that the great object was to *ensure* the punishment of
two, or even of one of the guilty, rather than that the whole
should escape from justice. And the result fully justifies his
conduct ; for, by his wisdom and prudence, the law and justice
of the country have been rescued from the stain which must
have attached to them had such crimes escaped without pun-
ishment. From this indelible disgrace he has saved the coun-
try. With a degree of prudence and foresight, which, after what
has since happened, cannot be too much commended, he thought
it right to come prepared with an accumulation of proof and

evidence, such as, in no other part of the world perhaps, could have been thought necessary. With this view, and for the reasons so well stated by himself, he caused the proposition to be made to Hare,—the proposition of becoming evidence, coupled with an assurance, 'that if he would disclose the 'facts relative to the case of Docherty, and to such other 'crimes of a similar nature committed by Burke, of which he 'was cognisant, he should not be brought to trial on account 'of his accession to any of these crimes.' And, whatever may be the judgment on the present question, I think this assurance was properly given; *first*, Because the Lord Advocate could not foresee that a private party would choose to prosecute; *secondly*, Because his intention must have been to examine Hare as a witness in each case in which he promised impunity, and so bring it within the practice of the Court; and, *thirdly*, Because, above all, he was entitled to pledge his responsibility for a pardon or remission. In this respect, he was in the same situation with the prosecutor in England.

In this state then the trial comes on. The indictment charges Burke with three murders; and Hare is in the list of witnesses, and might have been examined as to one or as to all the three. But an objection was stated to the indictment, on the ground of an accumulation of charges, (I only speak from the record, not having been present at the trial); and after hearing a very full argument, your Lordships pronounced a special interlocutor in the following terms:— 'The Lord Justice-Clerk, and Lords Commissioners of Justiciary, having considered the indictment against William 'Burke and Helen M'Dougal, pannels, and having heard 'parties' procurators at great length upon the relevancy 'thereof, 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 pannels' '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, reserving to the public prosecutor afterwards to 'proceed under this indictment against the said William 'Burke, upon the other two charges contained therein.'— This interlocutor finds the *whole* indictment relevant; but the *only* charge remitted to the Jury, and the *only* one of which

a proof could be led, was that which related to the murder of Docherty. So far the record. As to the other proceedings in the trial, it would be unbecoming in me to speak. I was not present; and the information I have obtained, is derived from sources perhaps inaccurate, and most probably defective and imperfect. For these reasons, in so far as the proceedings at the trial, (other than the record), are founded on as of importance, I would have wished that I had not been called upon to deliver my sentiments before hearing those of your Lordships who were present upon that occasion. To this part of the case, therefore, I will not venture to address myself, farther than to mention two remarks. 1. There is an *apparent* inconsistency in the opinion of the judges, as given in the report; I say apparent, being convinced that it must be only apparent, and that it may by your Lordships be explained and reconciled. I shall only add, that the explanation attempted in the Information for Hare, does not to me appear to be at all satisfactory. 2. I may venture to observe, with reference to the credibility of the witnesses, that the opinions expressed to them, and the admonitions delivered to them at the time of their examination, are of more importance than the actual state of the law. These witnesses could not know how the law stood; they must have taken it as explained to them; and, therefore, upon the supposition, which I am far from stating as a true supposition, that those explanations were at variance with the law, the credibility of the witnesses in the minds of the jury, should have been weighed according to the former, and not according to the latter. On a question put to him, if Hare is told that the Court can or can not protect him in answering it, the credit due to him, so far as the situation of safety or of peril in which he stands is a test, must be regulated by the information so given him, whether the same be agreeable to law, or otherwise. In short, in this respect, the impression on the mind of the witness, when examined, as to what the law is, is of more importance than the actual law itself.

I now willingly quit this part of the case, especially as I think that the proceedings at the trial cannot preclude or be held as decisive of the question at present before us. On this I shall proceed to state my opinion, which I do with the greatest deference, and the most sincere respect for the opposite opinions expressed, if any such were expressed, at the trial, as may be expressed now.

The question is, whether we are entitled, and have powers, by law, to quash the proceedings against Hare by Wilson's relations, in consequence of what took place at his precognition,

or at the trial of Burke? And, *first*, I conceive, that, in the general case, the legal right and title of the private party to prosecute is clear and indisputable. I mention this only because, in the information for Hare, it is represented as a sort of antiquated and discountenanced privilege, rather than a well ascertained and clearly defined right. There is an admission on the subject in these terms:—'Nay, there even yet remains 'to such private party a right to enforce the debt due to the 'community, in a certain form, and under certain restrictions, 'when the public prosecutor, to whom the interests of the 'community are entrusted, has neglected to interfere, or to 'attend to those interests.'—p. 9. This very limited, and guarded admission, may be contrasted with the authorities cited in pages 5 and 6 of the paper for the Wilsons. Mackenzie, in referring to the act 1587, cap. 77, and a prior enactment, 1436, observes, that pursuits at his Majesty's instance are only subsidiary; and that, from these acts, 'two things may be 'concluded,—1*st*, That, of old, it was doubtful if the King 'could pursue private crimes without an accuser;—2*dly*, That 'pursuits, at his Majesty's instance, for private crimes, are 'yet only subsidiary, and allowable, if parties be silent or col-'lude,' &c. Mr Burnet states the original practice, and the manner in which it now subsists, in the clearest terms:—'In 'many cases, indeed, long after the institution of King's Ad-'vocate, we find it objected, that he could not prosecute with-'out the concurrence of the party injured, or his kinsmen. 'This, at all events, is clear, that the proper and original 'form of prosecution with us, was in the name of the private 'party injured, who accordingly prosecuted, not merely for 'reparation and redress to himself, as an individual, but for 'punishment and reparation to the public; and hence it was 'that this form of prosecution continued, and still subsists, with 'the same effect, and to the same conclusions as to the full pains 'of law, as a prosecution at the instance solely of his Majesty's 'Advocate.' Baron Hume states the right of the private party, as at present existing, to be as strong, in every respect, as that of the public prosecutor. 'First of all, it is to be noted, 'that the title of the private party embraces, in every instance, 'the full pains of law, not only the private interest of dama-'ges, *solatium*, and expenses, but the same high and personal 'conclusions of corporal, or other chastisement, wherein the 'Lord Advocate, for the interest of his Majesty, might insist. 'Thus, in case of homicide, a libel at the instance of the wife, 'or the kinsmen of the deceased, is as good towards inflicting 'the highest vengeance of the law on the body of the culprit, 'if he is found to be a murderer, as it is in a case of culpable

'homicide for recovery of the assythment, or pecuniary con-
'sideration which is then due to the kindred.' Again, after stating that a public accuser in crime was introduced for the purpose of preventing offences from going unpunished, Mr Burnet says:—'This seems the principle on which private, as
'well as public prosecutions, are founded; and while one ope-
'rates as a check upon the other, to prevent, on the one hand,
'the feelings of humanity, and a wish to *compound* the crime,
'which may sometimes actuate the individual,—and, on the
'other, the partiality and undue bias which may sometimes
'actuate the public accuser from interfering with the interest
'of public justice; both conspired to the same end—the secur-
'ing the punishment of offenders. It is, indeed, the union of
'these two modes of prosecution, that constitutes the pre-em-
'inence of the criminal jurisprudence of Scotland, and distin-
'guishes it from that of most other countries of Europe. It is
'by preserving both in due vigour, that public justice is effec-
'tually secured,—that the remissness, or partiality of the pub-
'lic accuser, is, on the one hand, guarded against,—and the
'too great lenity and forbearance of the individual corrected,
'on the other. Hence it is, that with us no prosecution can,
'in any instance, be stifled, and the feelings of the individual
'or kinsman outraged, by a denial of justice; while, in other
'countries, the *nolumus prosequi* of the public accuser stops, in
'many cases, any process at the instance of the party injured;
'and his rarely interfering to prosecute in his own name, oc-
'casions, in many instances, a remissness in the execution of
'the law.' But why resort to authority on such a point? It is the daily practice for private parties to prosecute; and lately, almost all prosecutions for forgery were at the instance of the Banks, with the concourse of the public prosecutor. Even in a case of murder, I may mention the well known trial of Captain M'Donough, in December 1802. I am old enough to have been counsel in that case. A prosecution was instituted,—the most eminent counsel were retained, and appeared for the prisoner,—and I state, with a distinct recollection of the subject, that no objection to the right of the private party to prosecute was ever so much as hinted at. On the contrary, it was admitted to be as sacred, and as indisputable, as that of the Lord Advocate. But while my learned friend, Mr M'Neill, denies this, he admits, in the most unqualified terms, the right to sue for damages. 'The pub-
'lic prosecutor (says he) watches over the interests of the
'community, in regard to prosecutions for *punishment*; and
'he cannot be controlled or hindered by the private party. But
'the private party has an absolute right to sue for composition

' or reparation for the injury done to his feelings or estate; ' *and in this suit he cannot be controlled or hindered by the public prosecutor.*' This admission I think true; but I am not sure that Hare's counsel was aware of the consequences to which it leads. His Lordship cannot hinder the private party to sue for a composition or reparation. But Hare requires your Lordships to quash the whole proceedings, by which the right of Wilson to an assythment may be controlled and defeated. Were he to plead on a remission, that of itself would found a claim for an assythment; but it may not so easily be obtained if these proceedings are quashed.

With regard to assythment, it is not easy to say when and how it is due, and by what means it is made effectual. There are but few cases on the subject, and none of them are mentioned in the informations. I have looked into the authorities. however, and find that it has been given in these situations:—1. When a remission was pleaded. 2. Where the party was convicted of murder by the sentence of a Court-martial, but only sentenced to be cashiered. 3. Where the party was fugitated. The first occurred in the case of Key *v.* M'Neil, Feb. 15. 1717; the second in that of M'Harg *v.* Campbell, Kilberry, July 29. 1767; and the third in that of Stuart *v.* Lord Fife, July 1767, where an assythment was found due by the donatory of the estate which had escheated to the King in virtue of the outlawry. These two last cases occurred in the Court of Session, and in the last proof was offered but not allowed, the outlawry being held sufficient. Perhaps, it may be said here, that the pursuers may go to the Court of Session, or the Jury Court, and prosecute for assythment; but there is no precedent for such a proceeding; and the regular and natural course is to originate it in this Court. The proceeding now going on, however, might have terminated in laying the foundation for a prosecution for assythment; and yet this is to be defeated by the public prosecutor, who is admitted to have no power to control or hinder a claim of assythment,—and most justly so admitted, for no pardon can affect it. But it may be said, that in those cases where exemption from trial is acknowledged, by the *socius* being examined at the trial, the assythment is in like manner defeated. But there is here an obvious distinction. In the supposed case there *is* a trial for the murder, and if that terminates in a capital conviction and execution, the private party is held to be satisfied; if in a pardon, he gets assythment from the person tried; if in an acquittal, there can be no claim for it, and the presumption must be that murder has not been committed by the prisoner or witness.

cf. 124.

Here, however, the avowed object, and only avowed object, is to bring Hare to trial for murder. And the title and right to prosecute being clear, the question is, if we have legal powers to prevent the trial. Is there any law by which, in consequence of Burke's trial, where Hare was not examined as a witness in regard to Wilson's murder, this clear and unquestionable right in the abstract can be defeated?—This is a dry, and, in its practical result in this case, a very unimportant question of law. In the information for Hare, we are not favoured with any precedent in point; but we are desired to look at the principles on which the admitted practice, under different circumstances, when there has been a trial for the murder, and the *socius* has been examined, is founded, and to apply and extend those principles to the present as an analogous case; and humanity, justice, and policy, are said to bear out the claim. These are fine sounding words, and, in the abstract, very good things; but to apply them, or to entrust judges with power to apply them to a particular case, may not be so easy or so safe. To require a Judge to decide on principles of humanity, justice, and policy, is to require him to decide on what he *thinks* humane, just, and politic; in other words, to pave the way for the most arbitrary and despotic procedure. Upon the principles of humanity, as I have already stated my opinion, immunity should be given; but because I *think* this, does it follow that I, or this Court, have power to give it? This is the true question. Let us now attend to the history and progress of our law on this subject.

Anciently a *socius* was not admissible, (this was the *general* rule at least), and had no immunity. Then comes the act of Parliament, 21 Geo. II. c. 34; and this is most important, as the only statutory law on the point. By that statute, which narrates the theft, and masterful seizure of cattle in the Highlands, and the expediency of preventing the recurrence of this offence, it was declared not to be a good objection to a witness, 'that he was himself *particeps*, or *socius criminis*; nor shall 'the evidence, (it is provided), given by such witnesses, be 'made use of against himself; nor shall be liable to be pro'secuted for his accession to the offence which he shall, as a 'witness, give evidence, that the same was committed by the 'prisoner or pannel on whose trial he shall be adduced, or 'that such prisoner or pannel was art and part thereof; any 'law or practice to the contrary, notwithstanding.' Now, 1*st*, It is an incontestible inference from this statute, that previously an accomplice was not considered admissible:—2*d*, It confines the admissibility even to a particular class of crimes:

—3*d*, It declares his immunity in these only partially, viz.—*first*, that the evidence he gives shall not be made use of against him; and, *second*, that he shall not be tried for the offence, if his evidence prove the guilt of the prisoner. Here, then, is a resting place; and we see distinctly how the case stood in 1748.

Twenty-eight years after, that is, in 1770, the case of Jameson occurred. This case is thus reported by Mr Burnet:—It will be observed, that the report of the case is contained in a note upon the text of that learned author's work, in which he states it to '*now* (in Mr Burnet's time,) held, that the very 'act of calling and examining an accomplice, as a witness on 'the part of the Crown, *goes far* to operate as a discharge or 'acquittal to him from all prosecution for that crime;'—a passage, in which it will be observed, the doctrine is not directly laid down, that the witness is discharged of the crime; but merely that his examination may *go far* to operate as an acquittal from the crime as to which he is examined. The note is in these words:—'In the case, accordingly, of Macdonald and 'Jameson, in August 1770, when the objection of a witness 'having been *socius criminis*, was fully debated, the prosecu-'tor, in answer, did not say that the witness, *by being examin-'ed, would thereby be exempted from prosecution, but only that 'he might hope for impunity*; while the usage, at that time, of 'granting special pardons to accomplices, for enabling them to 'give evidence, confirms what has been stated. At what pe-'riod a different rule came to prevail, does not appear.'

At this time, all the length gone was to admit the *socius* in cases not specified in the statute. This was an extension of the law, but it was the only extension, for the power of the Court to screen the witness from trial, is not hinted at.

Next, and only eighteen years after, comes the case of Brodie, which I remember, though I was not present at the trial. There was no very authentic account of the trial. Two rival publications appeared, under the auspices of Mr Creech, and Mr Æneas Morrison, and *one* of them only contained the dictum of the Lord Justice-Clerk. If accurate, it is curious to see how, in eighteen years, the law should have been so much altered. But attend to Downie's trial in 1794. This is, in fact, an English case, but the opinions given refer to Scottish law, and Scottish practice.

The Lord President of the Court stated his own practice in criminal cases, and that, when he was Lord Advocate, he understood that he could not, after making use of a *socius criminis* as a witness, bring him to trial for the same crime; but he requested to be informed as to the law of England, and

then proceeded to say, that if he was assured 'that the wit-
'ness runs no risk of being prosecuted himself, being virtu-
'ally or expressly liberated from the charge, so far as he
'himself may be concerned, in consequence of his being call-
'ed as a witness, and speaking out the truth in this trial, it
'will be my duty to tell him, that he is bound to speak out
'the whole truth, and that he is in safety to do so.'

The observations of the Lord Chief Baron are of material consequence, because he states the practice:—'I served a 'good many years as prosecutor in this country, and I always 'understood, when I brought a *socius criminis* as a witness, 'that my hands were tied up from the prosecution of him for 'any thing spoken at the Bar. But if he would not speak 'out, I thought myself at liberty to prosecute him for any 'thing he did not speak out; a person being brought to the 'Bar, and not speaking, should that protect him from trial 'for any offence, when he is only protected for what he shall 'speak upon the trial?'

Lord President.—'I am of the same opinion. If he re-'fuses to speak, he is not a witness,—he may be put back to 'his former situation.'

Lord Advocate.—'What the honourable Judge has stat-'ed is perfectly right, and the law.'

Lord Eskgrove.—'I never knew of an attempt made by 'the prosecutor to bring afterwards to trial for the same crime, 'any person who had been examined as a witness upon that 'crime to which he had been accessary, and who had not re-'fused to give evidence, but had given evidence. I had con-'ceived a notion in my own mind, that if such an attempt 'should be made, the Judges who are to determine upon the 'law of the land, as it strikes them, would not suffer a per-'son so circumstanced to be subjected to a trial, and, conse-'quently, that it is not optional in the public prosecutor to 'bring him to trial or not, for that the Court would interfere, 'and prevent such trial proceeding, although that case has 'not yet occurred. I therefore think there is no place for the 'objection in his (Aitcheson's) case; and, with respect to 'any other witnesses, I am of the same opinion with your 'Lordships; it is not competent for the prisoner's counsel to 'object, although the witness himself may decline to answer 'to questions tending to criminate himself; but if he chuses 'to answer and give evidence, I conceive he will be secure 'against any future prosecution.'

This then was the law in 1794, thirty-five years since, from which it appears that a *socius* was safe; first, if he was *examined* as a witness; and second, if he *spoke out*. Such un-

questionably, is the amount of the opinions of Sir Islay Campbell, the late Chief Baron Montgomery, and Lord Eskgrove. According to Burnet, this law continued much the same in his time. Calling as a witness, says he, *goes far* to operate a discharge or acquittal to him from all prosecution for that crime in regard to which he is examined.

We come now to very recent times. The case of Dreghorn, and many others, in which the undoubted *practice* has been to inform a witness on his examination, that he cannot be tried for the offence or charge of which he is expected to give evidence. This practice is *a great extension* of the act of Parliament. Whether it was warrantable at first, I should *humbly* doubt; but now it is too long established, and too *generally prevalent*, to be called in question. But does this practice avail the accused here? By the acknowledged practice, the act of Parliament is extended to all cases, and to all *socii* examined, whether they spoke out and gave evidence or no, instead of being limited to those who do speak out and give evidence, as provided by the act of Parliament.

But here a much greater, and, I believe, a *new* extension is required, viz. that protection is the right of *socii not examined at all*, in regard to the offence with which they are charged, and where there has been no trial for that offence. This is a great extension indeed, but altered circumstances are said to justify it. And, first, of the precognition and promise of the Lord Advocate. This *per se* is surely not sufficient. Can we hold that a *promise* of pardon by the Lord Advocate is equivalent to a pardon by the Crown; nay, much more; for the one leaves assythment and gives claim to it, which the other takes away? But then he was cited as a witness to the indictment containing this charge, and the indictment was found relevant. True, but *this charge* was *not* remitted to a Jury, nor could be subject of proof by the prosecutor. This is said to be a distinction of no consequence. I cannot bring myself to think so. In *all* the authorities, Campbell, &c. to which I have referred, they *all* think the examination *essential*. But above all, attend to the act of Parliament, the only one we have;—it introduces and enforces this distinction, and only gives impunity to him who has been examined, and *not* to him who may have been cited and not examined. It is said Hare was ready and willing to give evidence, and so I believe. But this we *cannot know;* and, at any rate, an examination as witness, which *alone* by law, even as extended by practice, gives indemnity, did not take place.

If general considerations of humanity, or justice and policy, shall still be urged, I must make another answer to them.

These considerations are just as strong, and must operate as powerfully in England as here. But in England the Courts do not assume a power, because they are, or think they are, to make a humane exercise of it; and we are, I think, in the same predicament. The intended exercise of the power may be salutary, but this cannot give the power. The redress is lodged, however, in England in safer hands, in the Crown.

But there is one consideration which I have not yet noticed, viz. the dangerous power to screen from crimes. This is a fair argument, though at present of no practical force; and certainly a powerful argument. If it is said that the Lord Advocate has only to bring on the trial and examination to give impunity; the answer is, that by trial the nature of the case, and his improper conduct, (if it be improper), will be exposed to the public.

The Lord Advocate may, no doubt, get a pardon for the witness in such circumstances. But it is one thing to apply for, or obtain a pardon from the Crown, and another thing to have power to give a legal exemption from trial to a criminal, merely by citing him as a witness.

This is a new case; and I am not conscious, and have no recollection, of any such in practice. The argument of the prisoner, however, just comes to this:—Our predecessors have extended, or stretched the law so far; and therefore we, in virtue, or in consequence of that stretch, are entitled to stretch it still farther. This has always seemed to me a most dangerous doctrine, and I have always humbly thought it one which the Court should reject and discountenance to the utmost.

Lord Pitmilly.—I have paid every attention in my power to the consideration of the important and interesting question now before us.

In delivering my opinion upon it, I must begin by observing, that I entirely concur in the remarks so eloquently and forcibly made by Lord Gillies, on the conduct of this case; and I shall not repeat or add to what has been already said on that topic.

My next remark is, that I do not think it necessary or proper to notice the proceedings when Hare was under examination, because I was not present, being obliged, by indisposition, to retire from the Court, and to leave it to those who had this painful duty to perform.

I shall have occasion to notice, in the course of my observations, some other points which were touched on by my Brother; but, at present, I hurry to the consideration of the ques-

tion now before us, which is, whether we should put a stop to the proceedings at the instance of the private party, or should follow a different course. If I cannot say that I concur in the view taken by Lord Gillies, it was at least a great satisfaction to me, to hear his Lordship declare that 'the practical result is unimportant:' There are, in fact, two roads to the same object; and, if principle were not involved, I should be happy to travel with such a companion as Lord Gillies.

In forming an opinion on this interesting question, it is necessary to attend, *first*, to the situation, in the general case, of a *socius* who has been called and examined as a witness; and, *secondly*, to the situation of the suspender, Hare, both with reference to the prosecution at the instance of the public and of the private party.

And, *first*, in considering the nature and degree of protection afforded to a *socius* who is a witness, we cannot expect to derive much advantage from the older authorities.—The general tendency of the old law was to exclude accomplices, except in particular cases. In this we differed from the practice of the Courts in England, for there they were always admitted. —Phillips, I. 37. We followed an opposite practice, and we cannot look for rules as to protection, drawn from times when the accomplice was excluded. It is only after the rule was reversed, and *socii* were admitted in every case, reserving the question of their credibility to the Jury, that we are to look for the conditions of the protection afforded them, and to expect, as the system was matured gradually, and in the course of practice, that these conditions would be evolved and defined. The progress of our law in this respect, as in almost all others, has been gradual, as indeed appears to have been the case also in England,—witness the old doctrine there of *approvement*.

It is necessary to keep in view the grounds and reasons of the tendency of our practice to reject the testimony of accomplices, in order to see what was to be guarded against when the testimony of *socii* came to be admitted.

Now, in the *first* place, there is no doubt that, in the earliest periods of our law, bad character operated in part as a ground of exclusion;—indeed, there were many objections to admissibility, to be judged of by the Court, which now go by the credit of the witness alone, and are consequently reserved for the Jury. Among these infamy was one; but the distinction between *infamia juris* and *infamia facti*, has existed long,—indeed ever since 1671; and hence the latter could not remain the ground of inadmissibility.

But, *secondly*, interest formed a ground of exclusion; and this continued to influence the Court and the lawyers much

later than the time of Sir George Mackenzie. Mr Erskine's Treatise on Crimes is not accounted so good an authority as that part of his work which relates to civil matters; but I quote the following passage, in evidence of the general understanding on the subject at the time when the work was published, (1773), and also of the grounds upon which it rested. '*So-* '*cii criminis,* (says this author), or associates in the same 'crime, are not admitted to bear testimony against one an- 'other,—not so much because they are accounted infamous, 'as because they have an obvious interest in the event of the 'suit,' &c.—Book IV. c. 4, § 96. He states exceptions to this general rule, however, and, among others, the act 21 Geo. II. c. 34.

As interest then was a ground of exclusion, it is necessary to attend to the progress of the law in removing that objection.

The only general statutory enactment on the subject is the 21st Geo. II. c. 24. But this statute, when duly attended to, will, I think, appear to be chiefly and only useful in tracing the history and progress of the law, and I cannot concur with my brother in holding it as a 'resting place.' For, *first*, it was made for punishing particular crimes; and, *secondly*, it formed no general rule even as to these crimes. Accordingly, there is another section of the act, not noticed by counsel, which makes very different provisions, from the section to which reference has been made by counsel and by Lord Gillies. Section 20 provides, that, 'It shall not be allowed to be a 'good objection to any witness, produced for proving such 'libel or indictment, that he was himself *particeps* or *so-* '*cius crminis,* nor shall the evidence given by such witness 'be made use of against himself, nor shall he be liable 'to be prosecuted for his accession to the offence, which he 'shall, as a witness, give evidence that the same was com- 'mitted by the prisoner or pannel, in whose trial he shall be 'adduced, or that such prisoner or pannel was art and part 'thereof; any law, custom, or usage to the contrary notwith- 'standing.' But section 21st provides, that 'it shall and 'may be lawful and competent to produce as witnesses other 'persons present who may also have been guilty of offending 'against the said act; but the evidence given by such witness- 'es shall not be made use of, or given in evidence against 'themselves, upon any prosecution for any penalty inflicted by 'the said act;' thus implying that there may be prosecution, but that the evidence of a person so situated cannot be used against himself. Historically then, this statute is of great weight and authority in the argument, and it must regulate the

practice in the two particular cases for which it makes provision; but it cannot be held up as fixing the general law of Scotland, with regard to the admission of accomplices as witnesses in all cases whatever. If we were to be guided by it in cases to which the terms of it do not apply, we should be at a loss to know, by which of the two enactments, so different from each other, we ought to be regulated.

The next notice we have of this question is in the trial of M'Donald and Jameson in 1770, and there, as Mr Burnet says, p. 418, all that was promised was, that the witness might *hope* for impunity if he spoke the truth. As to Lord Chief Baron Montgomery's remark in Downie's case in 1794, it is merely a statement of his practice when he was Lord Advocate, and therefore is just a repetition of the principle laid down in the case of M'Donald and Jameson.

But the law was authoritatively laid down, and for the first time explained to a witness, in the case of Smith and Brodie in 1788. It is a mistake to suppose, however, that any new doctrine was broached upon this occasion; the only thing new was the fact of making an explanation of the law to the witness. There were then on the Bench Lord Justice-Clerk Braxfield, and Lords Hailes, Eskgrove. The judges on that occasion were only declaring the law, and this was the first time the declaration was made to the witness; which circumstance was the only novelty that occurred. I have read both reports of the trial, that published by Mr Creech, as well as that published by Mr Morrison, and I do not find any material discrepancy between them on this particular point. I see the Lord Advocate states the law, which the Dean of Faculty, (Mr Erskine), does not deny, but rests upon specialities, putting his objection on the distinction between the situation of the individual witness with whom he had to deal, and the common case of an accomplice.

But I do not rest on that case alone. Our practice has never varied since, and has been followed in at least a hundred instances; and surely if a train of practice can regulate any proceeding, the point in question must be considered firmly fixed by the law as then laid down, and since observed, without a single deviation, in every subsequent case in which a *socius criminis* has been brought forward as a witness.

And here, I cannot avoid remarking, that the objection, in point of principle, to this practice, is by no means so formidable as it has been represented to be. Is the objection to this on principle? There is a great error in placing the protection which a *socius*, taken as a witness by the public prosecutor,

receives, on the same footing, in all respects, as the immunity which an offender obtains as grace and favour by Royal pardon. For what is the progress of the former? *First*, The accomplice is to be selected and induced to speak; and this with us must lie with the prosecutor, who is *dominus litis:—Secondly*, He comes forward in the eye of the Court, to perform his promise. In the nature of things, the prosecutor is the party who must arrange, and the Court must judge of this transaction.

The practice in England has been referred to. But there, if I do not misunderstand it, although a pardon from the Crown is resorted to, as the form of securing protection to the witness, the 'practical result' is nearly the same as with us, and the Court takes a very efficient part in bringing about the protection. The best information on this subject is to be found in Lord Mansfield's speech, in Mrs Rudd's case.—(Cowper and Leach, i. 118.)—'There is besides a practice, which, indeed, 'does not give a legal right, and that is, where an accomplice, 'having made a full and fair confession of the whole truth, is, 'in consequence, admitted a witness for the Crown, and his 'evidence is afterwards made use of to convict the other of'fenders. If, in that case, he act fairly and openly, and dis'cover the whole truth, though he is not entitled of right to 'a pardon, yet the usage, the lenity, and the practice of the 'Court is, to stop the prosecution against him; he having an 'equitable title to a recommendation for the King's mercy.' In that case, eleven of the twelve Judges assembled to deliberate and determine whether Mrs Rudd had 'an equitable 'title to a recommendation for the King's mercy.' They thought she had not, and she was accordingly tried and acquitted. But, if they had come to an opposite conclusion, we may venture to say, she would have been protected from trial.

There is, indeed, a case mentioned by Lord Mansfield, (Leach, p. 121,) where the trial was stopped.—'I am appris'ed, (says his Lordship,) of the case of an accomplice upon 'a trial before Mr Justice Gould, the circumstances of which 'were as follow:—An accomplice made a fair and full dis'covery, to the satisfaction of Mr Justice Gould, who tried 'the other offenders. The other witnesses who were called 'upon the trial, proved the identity of the accomplice, by the 'description of his person, but failed as to the identity of the 'other offenders; and the Jury, because they doubted of the 'guilt of the others, acquitted them. The counsel on the part 'of the prosecution then contended, that the accomplice ought

'to be tried; but Mr Justice Gould, under the circumstances
'of the case, was of a contrary opinion, and I think very
'rightly.'

Blackstone gives a beautiful description of the Royal prerogative of mercy; but in another part, (B. IV. c. 25,) when writing of this practice, his words are:—'It hath been usual 'for the Justices of the Peace, by whom any persons charged 'with felony are committed to jail, to admit some one of their 'number to become a witness against his fellows; upon an 'implied confidence, which the Judges of Gaol Delivery have 'usually countenanced and adopted, that if such accomplice 'makes a full and complete discovery of that and all other 'felonies, to which he is examined by the Magistrates, and 'afterwards gives his evidence, without prevarication or fraud, 'he shall not himself be prosecuted for that or any other previous offence of the same degree.' No doubt pardon is obtained, but the substratum of the immunity, is the recommendation of the Court.

I ought not, perhaps, to have said so much with regard to the English practice. Our own practice, by which we ought to be regulated, has ever since 1788, at least, been confessedly firm and undeviating.

I come now to consider the case of Hare. And *first*, with reference to the public prosecutor. It is needless to say much on this part of the case; for, on *the point of fact*, the statement of the Lord Advocate is most satisfactory; and I have no doubt the time will soon arrive, when every candid person will be convinced that his Lordship's conduct, in this delicate case, has been as wise, firm, and judicious, as it has been honourable and becoming the high situation he holds. But, in *point of law*, is it not equally clear, that the Lord Advocate, after using Hare's information generally, and his evidence as to Docherty, could turn round and say, 'I did not examine you 'as to Wilson?'

Look next at the right of the private party. Mrs Wilson's plea on this part of the case, is rested upon two separate and independent grounds, which must be kept quite distinct; *first*, Her plea is rested on general grounds; and, *secondly*, On grounds arising from special circumstances.

The general ground is stated thus, under a separate head, (Information, p. 5.):—'The right of the private party to prosecute is not controllable by the public prosecutor, and is independent of him.' Now, if this hold good in the present case, it must apply to all cases. Try it, however, in other cases; if it fails in any, it cannot be good here. It is a general

rule, and as such must be taken *per se*. Now, it is needless to touch on the various instances in which the public prosecutor controls the private party, such as his acknowledged right to restrict the libel, which has grown in practice, and is recognized by the Legislature. For, in the very particular instance now under discussion, it is admitted that he may control in a certain case; it is admitted that a *socius* is protected as to the particular crime respecting which he gives evidence; in short, it is admitted that Docherty's relations could not prosecute Hare for his concern in the murder of that unfortunate woman. And why, but because the public prosecutor has examined Hare, and thus controls the right of the private party.

This establishes the prosecutor's power of controul, and suggests an answer to what was said by my learned Brother, in regard to assythment. For, in the *first* place, our attention was not called to it, nor is the case put upon it in the respondents' information;—*secondly*, Sure I am that he will be a bold man who reads the case of M'Harg *against* Campbell, and Stewart *against* the Earl of Fife, and who will say that the right of assythment is cut off;—and, *thirdly*, The relatives of Docherty have as good a right, and are as well entitled to assythment from William Hare, as those of Wilson; and it would be unjust and iniquitous if they were not. But the relatives of Docherty cannot prosecute, because it is admitted, that, in every case where a *socius* is examined, the private party cannot prosecute. Mrs Wilson, therefore, is only *in pari casu*.

Having discussed Mrs Wilson's argument on the general grounds stated for her, I come now to consider her plea rested on the particular circumstances of the case.

It is said, that as Hare was not examined in Wilson's case, there is no protection. The parties are driven to this narrow point, that because he was not examined as to the particular case of Wilson, he has no immunity.

And the argument is illustrated, by putting a different case from that which actually occurred,—the case of three indictments;—the case supposed is, that the Lord Advocate had raised three separate indictments, one for the murder of Mary Docherty,—a second, for the murder of Mary Paterson,—and a third, for the murder of James Wilson;—that only the last mentioned of these three indictments had been called in Court;—and that Hare had been examined in that single case as a witness. In the supposed case, I agree with Mr Jeffrey in thinking, that the case of Hare would have been equally favourable, *in point of fact;* but it would evidently have been very different, *in point of form*. The Court would have known nothing of him, as a witness in the case of Wilson. And, there-

fore, I should have thought, if the supposed case had happened, that, on the facts being afterwards explained to us by Hare, in the event of an attempt by Wilson's mother to bring him to trial, we might, with propriety, have stopped the proceedings, and given an opinion that he had an equitable title to a recommendation for pardon. In short, such a case would have furnished an instance, in which I humbly think the course recommended by Lord Gillies, though new in our practice, would have been proper.

But the case which has occurred is a different one; and while the case put in illustration by Mrs Wilson's counsel, is not analogous, there is an analogous case, and one unfortunately which has occurred not unfrequently. The case I refer to is, when different acts of the same description of crime are included in the same indictment, and where only one of them is insisted in. Suppose, for example, a person is charged with eight or ten different acts of robbery in the same indictment, and an accomplice is brought forward and examined as to one of them; and suppose the first fact so clearly proved, that the public prosecutor stops short and rests contented; would it be permitted, or possible for the private party to come forward and insist upon proceeding with the cases not tried? I hold that it would not; and I lay it down as a proposition, which it is impossible for any man to dispute, that the *socius* would be protected, and that the private party could not try him as a criminal upon any of the charges, in regard to which the public prosecutor could not insist against him.

I have little more to say concerning the matter now before us. I feel intensely for the relations of Wilson: I sympathize also with the public desire to bring a great criminal to justice. But I feel more for the security of the law; and I hold no consideration so important, as that public faith, pledged by a responsible officer, and sanctioned by the Court, in pursuance of uniform practice, should be kept inviolate, even with the greatest criminal. After all, however, there is no great difference between us. There are two roads to the same object, and the practical result is the same. If I thought there was a defect of legal right, I would approve of a recommendation, but I prefer following our own usages and analogies.

Lord Meadowbank.—Ever since this question was first presented for the consideration of your Lordships, it has appeared to me to be one of infinite importance in whatever point of view it be taken;—whether as affecting the life and liberty of the complainer,—the consistency of your Lordships' judgments,

and their consequent respect with the country,—or the powers of the first law officer of the Crown, entrusted to him for the public interest of the King and of the realm. I have, my Lords, however, at no time considered it to be attended with difficulty; and I have never seen reason for thinking that the view in which it occurred to me in the course of the trial of Burke, was at all doubtful. On the contrary, the opinion which I then expressed to your Lordships when you referred to my brother and myself as to the situation in which the complainer stood when he gave his evidence relative to the murder of Docherty, founded upon the general impressions of the law, which I had acquired during a pretty long practice in this Court, has been entirely and fully confirmed by the arguments I have heard from the Bar, and the researches I have since made into books of authority and the records of this Court. In making this investigation, I assuredly felt, my Lords, that it was incumbent upon me to divest my mind, as much as in the nature of things it was possible to divest it, of all feeling of prejudice and partiality,—and it is with the entire conviction that I was enabled so to do, that I am now prepared to lay before your Lordships the grounds on which I am satisfied that the instruction given by your Lordship to the Jury, in point of law, with reference to the position in which the complainer stood when he gave his evidence, was as sound and impregnable as any that ever was delivered from the chair of this Court.

I am free, however, to acknowledge, that had I arrived at a different conclusion, it would have been to me, as I am sure it would have been to your Lordship and my brother, Lord Mackenzie, a source of deep humiliation and of endless regret; for I must have felt, not merely that we had thereby exposed ourselves to the imputation of ignorance, where our sacred duty required we should be informed,—but that through this great and unpardonable mistake, a jury had been sent to weigh and consider the legal effect due to evidence on which the life of a human being depended, under an impression unfounded and erroneous. Hence, my Lords, I for one felt most deeply anxious that, if possible, the points now under consideration had been determined before the execution of that wretched criminal, who has so recently expiated his cold-blooded and barbarous atrocities on the scaffold; for had I been taught by a solemn judgment of this Court, that the law respecting the immunity of the complainer, as laid down by your Lordship, was erroneous,—nay, had I come to entertain a suspicion to that effect myself, I should have deemed it my bounden duty to have called upon your Lordships to have interposed betwixt

that miserable convict, how guilty soever he unquestionably was, and the consequences of a verdict made up and returned under impressions of the law in that case so unjust and unfounded. Your Lordships will not doubt, therefore, that it has been the greatest relief to any mind to have discovered no ground for doubting the solidity of the law as it was then expounded.

In approaching the consideration of this question, the first point on which your Lordships are called to form a judgment, is, whether the present application has been made at a competent time, and in a competent form.—And upon this branch of the subject, I shall be extremely short. Indeed, except for the apprehension entertained by Lord Gillies, that the Court, by determining now that the complainer cannot be tried for the murder of Wilson, the right of the private party to assythment may be thereby cut off, I understand neither of my brethren to have expressed a doubt as to the complainer having a legal right to obtain at present the judgment of your Lordships, finding that the warrant against him is either legal or contrary to law. Now, upon the question respecting the right of assythment, concurring entirely with the views taken, and the judgment given by Lord Pitmilly, I shall not detain your Lordships longer than to state, that I have no doubt that the public prosecutor, by no compromise whatever, whether made extrajudicially, or by producing a *socius criminis* in Court as a witness, can, in any respect whatsoever, encroach upon the rights of the private party to reparation, whether in the name of damages or assythment; and so I am sure it is laid down in the books, though I am unable at present to say where, from the matter not having been before mooted in the arguments before the Court. With respect to any other ground for doubting the competency of the application in its present form, I have been unable to discover it; for, assuming the statement of the complainer to be true, as given in his paper, (and which, having been read by my Lord Gillies, it is unnecessary for me to resume it,) confirmed, as it now is, by the authoritative account of the public prosecutor, the right and interest which the complainer has to apply to your Lordships for liberation seems to be unquestionable. I shall only observe, in a word, the statement on which this issue is to be tried, is, that from the face of the warrant on which he is incarcerated, it appears that it was granted against him for an offence for which he is no longer amenable to the criminal law of the country. Hence, he says that your Lordships are bound to discharge that warrant, and set him at liberty; and, my Lords, if you are of opinion that the proposition, in point

of law, is well founded, the result contended for must necessarily follow; for he would then seem to me to be in the same position as an individual incarcerated on a charge of witchcraft, which is not cognizable in our tribunals,—or of one charged with a crime appearing from the warrant to have been committed beyond the jurisdiction of this Court,—or of one who had tholed an assize for the crime of which he was accused,—or who had obtained the King's remission,—or having obtained letters of slains from the private party, was, nevertheless, imprisoned at his instance;—in all which cases, I should think it beyond a doubt, that your Lordships would be bound to entertain an application for relief, and, on being satisfied of the facts as stated, to discharge the warrant of imprisonment. Indeed, were your Lordships of a different opinion, the act 1701, founded on the declaration of grievances, and providing that all warrants should bear, upon the face of them, the cause of commitment, would be altogether a dead letter; and the subjects of the realm, without redress, would be exposed to those dangers, against which our ancestors thought they had secured protection, by opening a direct road for relief to this Court, the legal and impartial guardian of the liberty of the subject.

There is still, my Lords, another matter in some measure also preliminary to the main subject of discussion, to which it is incumbent upon me to direct the attention of your Lordships, especially as I shall have occasion afterwards to lay considerable weight upon it, in arriving at a conclusion as to one of the chief points brought under our consideration. This, my Lords, regards the admissibility, in the ancient law of this country, of a *socius criminis* to give evidence respecting the perpetration of crimes, in the trial of offenders. And here, it being my misfortune to differ, not merely from the admissions of the parties at the Bar, and the deliberate opinion of Mr Baron Hume, but even with the judgments of my two learned brethren who have already spoken, I must feel most deeply the difficulties under which I labour, in submitting to your Lordships an opposite view of the question. One thing your Lordships may be assured of, that, under such circumstances, and against such a weight of authority, I should not have done it lightly. Indeed, nothing short of the conviction of the sacred duty incumbent on me, in so important a case, to state the opinion, and the whole opinion, which I have conscientiously formed respecting it, would have induced me to proceed to assert to your Lordships, with great deference, but firmly, and without hesitation, that, as far as I have been able to discover, after as

anxious and diligent an inquiry, as the shortness of the time would admit of since these papers were put into your Lordships' hands, I can see no reason for doubting that, at times as remote as details of criminal procedure in this country are to be found, *socii criminis*, or accomplices, have been admitted in order to give evidence against the accused. No doubt some decisions may perhaps be found, though I am only aware of one (that mentioned by Mackenzie, referred to in the pleadings) in which a *socius criminis* has been rejected; but there are contradictory decisions to be found in all Courts; and fortunately for the subjects and law of this realm, many of the judgments given in the time of Mackenzie will be found to be solitary, and to receive no support from decisions pronounced at periods both more remote and recent. In hazarding this opinion, however, it is some satisfaction to me that, if I differ from my brethren upon this matter, I do so with high authorities in the law, with Lord President Campbell, Lords Justice-Clerk Braxfield and Eskgrove, and, above all, with Lord Hailes, who, in a matter of antiquarian law, is perhaps equal to any authority, or all the authorities that could be mentioned, living or dead.

In establishing the proposition I have undertaken to make out, your Lordships will at once be sensible, that it is necessarily incumbent upon me to have recourse for evidence to trials at a very remote period, and in many of their particulars of most questionable authority. But however unjust such cases may be in the *principles* which they exhibited, however iniquitous, tyrannical, and oppressive they may have been in their results, they are equally authoritative in establishing a matter of practice and proceeding, as trials the most impartial and the most legally conducted. Accordingly, my Lords, while I appeal in support of the proposition, that it was usual in criminal proceedings to admit the evidence of *socii criminis* to nearly the oldest trial which has met the eyes of the public, —that of the Regent Morton,—it is far from my intention to give any approval of the gross and scandalous iniquities that were there exhibited, in order to achieve the disgrace of that iron-hearted and despotic statesman. It is sufficient for my purpose to state, that it appears, that the only proofs which was then brought against him were the depositions of William Powrie, George Dalgleish, John Hay, and John Hepburne of Bowtoun, *socii criminis*, together with the declaration of Nicolas Hubert, or Paris; and that, upon considering that evidence, the verdict of the assize was exclusively founded. The very year subsequent to this trial, a similar point appears to have been ruled in the Court of Session, in a case not altogether of a

civil nature, (the name of which I have omitted to take down,) in which your Lordships will find the doctrine expressly stated and admitted, 'quod in criminibus quæ non possunt committi 'sine sociis *admittuntur socii*.'

The next case confirming the same doctrine, that I have observed, is that of the trial of the persons implicated in the Gowrie conspiracy. From a note in the State Trials, (page 1365), it appears that, upon the evidence of 'Henderson and 'other witnesses, Cranstoun and Craigingelt were panelled 'before the Justiciary at Johnstoun; and, upon clear testi-'monies, and on their own confession at the bar, (which they 'also adhered to on the scaffold), they were both executed;—'only alleging that they did not know of the design to murder 'the King, but that they intended to force the King to make 'great reparations for the late Earl of Gowrie's death, and 'that this Earl of Gowrie was to be made a great man.' Now, the Henderson above-mentioned, your Lordships will find to have been included in the summons of treason against John, Earl of Gowrie, Alexander Ruthven, Henry Ruthven, Hugh Moncrieff, and Peter Eviot, for High Treason. On the summons being called, it appears that Mr Thomas Henrison compeared for the said Andrew Henderson, and produced the writ following:—'It is our will, and we command you, that upon 'sight hereof, ye delete Andrew Henderson, chamberlain to 'umquhill John, Earl of Gowrie, his name furth of the sum-'mons of treason and forfaulture, raised and executed against 'him, for being art, part, redd, counsel, and counselling, of 'the late treason conspired by the said umquhill Earl, his 'umquhill brother and accomplices, against our persons, and 'as you will answer to us hereupon; keeping this presents for 'your warrant. Subscribed with our hand at Holyrood-house, 'the 9th of November 1600. *Sic subscribitur*, Jacobus R.'

His name was accordingly delete from the summons; and in the trial which afterwards proceeded, and, as your Lordships all know, was conducted with more than ordinary form and solemnity, the Duke of Lennox, and the Earl of Mar, the Abbot of Inchechaffrey, and a great many other persons of quality having been examined, were the depositions of Craigingelt and Cranstoun read according to the usual form, when witnesses were not forthcoming themselves, (and both of these had suffered death as accomplices), and Henderson himself, the accomplice, without any remission whatever, was examined fully, and at great length, with regard to the subject of the trial, which your Lordships know ended in the conviction and attainder of the accused.

The next case I have observed, is one mentioned by Hume,

viz. that of Smith, in which Faw and Wilson, both alleged to be *socii criminis*, were admitted, as it is stated by Mr Baron Hume, after an objection made to their admissibility.

About the same time as this last decision was pronounced, your Lordship will find, in nearly the whole of the trials that took place in this Court towards the end of the 17th century, *socii criminis* the chief witnesses against the prisoners; and although no doubt many of these cases, and even some of those that happened after the Revolution, may contain matter which would not be of authority now with your Lordships; still they go to establish, as a matter of fact, that, whether legally or illegally, accomplices were admitted as evidence for the prosecution in criminal trials. In many of those cases, also, it must be admitted, that remissions from the Crown seem to have been granted to such witnesses at this particular period. But such remissions granted before sentence proceeded, in all cases, your Lordships are aware, upon the admission of the party having been guilty of the crime remitted; and as, in no case, it did more than merely grant protection to the individual against prosecution criminally for the offence so admitted, every one of those cases, and they are almost innumerable, affords unanswerable examples of a *socius criminis* being deemed an admissible witness more than a century and a half ago. For your Lordships are not to be told, that at that time the King's remission had no power to take away any *infamia juris*; (Mackenzie, Part II. tit. 26.—No. 6. Dirleton's Doubts, p. 224.—Stewart's Answers.) and, therefore, the remission neither was, nor could be, any thing but a mere protection against trial.

Sometimes, in the course of the 18th century, it will no doubt be found, that counsel did sometimes plead, (as both counsel and parties will constantly be found to plead untenable propositions), that *socii criminis* were inadmissible witnesses by the law of Scotland; but there is not one instance that I can find, in which such a plea ever was sustained by the Court, from the beginning of that century down to the case of Smith and Brodie, of which I am immediately to speak. On the contrary, in the year 1770, we find the objection to have been stated in the case of Jameson, and expressly repelled. In the case of Fairly, mentioned by Hume, in 1775, a bill of advocation, founded upon a similar objection, was refused; and in the case of Smith and Brodie, your Lordships will find that some of the ablest lawyers who ever sat upon the Bench held it as clear, that the objection of *socius criminis* had no place as an objection to a witness in the law of Scotland. And here, my Lords, it is proper to state, that not thinking it fit

to rest my knowledge of what passed upon that occasion merely upon the unauthorized publications which issued from the press at the time, I went to the record, and I there find it laid down by the public prosecutor, who at that time was Sir Ilay Campbell, in the minute upon which the judgment of the Court proceeded, 'that no doubt the witness is a *so-* '*cius criminis*, being concerned with the pannels in the crime 'for which they are under trial; but however this may affect 'the credibility of the witness, yet it does not by no means af- 'fect his admissibility, *as is well known in the practice of this* '*Court*, which practice is of the most salutary consequences. 'That in cases where numbers are concerned in the same crime, 'the public prosecutor must certainly have a power of selec- 'tion which to bring to trial, and which to call as evidence.' Accordingly, my Lords, upon this statement of the law it was that the Court repelled the objection of *socius criminis*, after mature deliberation, in that trial, which occupied much attention at the time, and was deemed to be one of great and public importance. And upon that occasion, it appears from a note preserved by Burnet, that Lord Hailes expressed himself in the following terms, adverting to what Sir George M'Kenzie says of the usage being to reject *socii criminis*,— 'that this assertion of Sir George M'Kenzie was, like many 'others in his work, neither founded on principle nor fact, 'and that there were instances in his day where *socii crimi-* '*nis* were admitted.' The truth of this assertion of Lord Hailes, I hope I have established to the satisfaction of your Lordships, from the authorities I have quoted, many of which occurred in the state trials towards the close of the seventeenth century, and during M'Kenzie's own time. And it does not appear that one of the eminent lawyers then on the bench expressed a doubt of the justice of the opinion of Lord Hailes.

Accordingly, a very few years afterwards we find that Sir Ilay Campbell, Lord Chief Baron Montgomery, (himself Lord Advocate at the time the objection was repelled, in the case of Jameson), and Lord Eskgrove, did, one and all of them, in the judgments they delivered in the case of Downie, afford the most conclusive evidence of their understanding that the admission of *socii criminis* as witnesses was of ancient and inveterate practice.

As to the opinion of Erskine upon this subject, as quoted by Lord Pitmilly, I shall say nothing, because every one knows that part of his work to be of no authority whatsoever. But in this case it is more particularly of none, as he seems to have been utterly ignorant of the decision solemnly pronounced, only three or four years before his work was published, in

this Court, repelling, in the case of Jameson, the very plea of *socius criminis*, which, in the passage referred to, he states to be one universally recognized in the law of Scotland.

Indeed, my Lords, I have never been quite able to understand how, according to our forms, the objection of *socius criminis* could be regularly stated to the *admissibility* of a witness. For many a day the objection of *infamia facti* has not been entertained; and, therefore, even the admission that a witness was charged with an offence of which he was not convicted, could not, in consistency, ever have been received to his admissibility, however the circumstance might be taken to affect his credibility. But, observe farther, that in all these cases where the objection could occur, the person under trial had denied, not only his own guilt, but the *corpus delicti*; how, therefore, under such circumstances, he could competently allege as an objection to any witness, not only that he was his own associate in the commission of a crime with which he denied having any connection, but also that he had been engaged in the commission of a crime, the very existence of which he was disputing, I acknowledge I have been at a loss to discover.

I can very well understand that it might be a ground of objection to allege that the witness came into the box under promises of immunity from the public prosecutor, contingent upon the nature of the evidence which he was then to give. But that is an objection altogether separate and independent of that which I am at present considering; and to which I shall afterwards have occasion to address myself, when I come to that part of the question which refers to the powers of the public prosecutor, in selecting the parties to be tried, and those who should be taken as witnesses, as well as the effect of his adducing a *socius criminis* to give evidence in the trial of an offence. At present, it is sufficient, with reference to this part of the case, to submit it to be clearly established, from a train of practice running through a period of upwards of two centuries and a half, that *socii criminis* have been admissible witnesses in the law of Scotland; and, as was stated by Lord Eskgrove in the case of Downie, ‘ in every country which has a regular constitution and ‘ Government, *socii criminis* are admissible witnesses in trials ‘ for crimes, and in many cases justice could not be done, nor ‘ the greatest criminals convicted, without the aid of such ‘ evidence. ’

This being the opinion I have formed as to the admissibility of an accomplice as a witness, I acknowledge that without

going farther, and without ever having recourse to the support of precedent, I should have presumed that at all times, and under all circumstances, the examination of a witness must have operated *ipso facto*, as an immunity to him from subsequent prosecution for the crime respecting which he was called upon to give evidence. In truth so irreconcilable to all sound reason would it be to hold, either that no such immunity was thereby obtained, or that there was not created an equitable right as in England, to a pardon, (of which last doctrine observe there is no appearance of there having been any existence in the law of Scotland), that I cannot imagine how any *socii criminis* ever could have been examined. No man is bound, upon any principle whatsoever, to give testimony against himself; and therefore, if no such immunity had arisen, the witnesses in all the cases that have occurred, instead of giving evidence, must necessarily have been silent; and, at all events, so utterly destructive would the practice have been to the principles which have for upwards of 140 years regulated the admissibility of witnesses in this Court, that I am persuaded had the idea ever been entertained, that a person so made use of could afterwards himself have been prosecuted for the same offence, your Lordships would have found, that persons in that predicament, instead of being admitted, would have been uniformly rejected.

But, my Lords, the apparent and manifest expediency and justice of extending such immunity to accomplices, whose evidence has been employed with a view to the conviction of offenders, will not, of themselves, afford to your Lordships satisfactory grounds for determining how the rule came to be established; and this the more especially, as your Lordships are well aware that there are, by the law of this country, two classes of prosecutors, public and private, whose rights and privileges may be so materially encroached on by the exercise of the principle to which I am referring.

It does therefore appear of importance, that your Lordship should most particularly attend to the history and to the rights of these prosecutors, in order more distinctly to determine how a person made use of by the public as a witness, should, by that proceeding, be himself exempted from future question, for the offence respecting which he has been examined.

And here, my Lords, I have no occasion to dispute that there is, in the law of Scotland, as stated by Lord Gillies, a right in the private party immediately aggrieved by the commission of an offence, to pursue the perpetrator not only for re-

paration, but for the public punishment of the offender. Indeed, I entirely concur with his Lordship in what he stated upon that subject, and in the approbation he afforded to the passage respecting the rights of the private prosecutor, which he read from the treatise of Mr Burnet. Farther, I can have no hesitation in expressing my most earnest and anxious hope that the rights of private prosecution should ever continue, as by law established, to be a salutary control upon the public prosecutor, and to afford additional security for the rights and liberties of the people.

But my learned brother omitted to advert to this most material circumstance, as affecting the rights of the private prosecutor, that at all periods, and under all circumstances of the law of this country, his rights and his privileges have never been unlimited, but were even, in times the most remote, subject to the effectual control of this Court, or the Court of the High Justiciar which preceded it, and which at one time had the power of rendering them altogether nugatory and abortive, while prosecutions for the interest of the King, as representing the public, were regulated by different principles, and subjected to very different rules.

In order, however, fully to understand the different situations of private and public prosecutions, it humbly appears to me to be important, that your Lordships should keep in recollection the original constitution of this Court, or rather of the High Justice Court, in which the trial of all crimes anciently took place.

Your Lordships are aware, that it appears from many ancient statutes, that the Court in which the High Justiciar sat was, not only in theory, but in fact, the Court of the King; and that, in all proceedings, the Sovereign either was himself actually present, or held to be present. This appears from a statute of David II., passed in a Parliament held at Scone, by which it was ordained that the King should hold an 'Iter Justiciariæ per totum 'Regnum *in sua propria persona.*' To the same effect is a statute passed in the year 1488, and another in 1491, c. 10.; and again, by the act 1526, c. 7, it is ordained, that 'na Jus-'tice Aires be holdin na part, without *our Soverane Lord* and 'his Justice be present.'

Now, at this time, and for long after, your Lordships well know, that all public prosecutions were instituted by the authority of this Court; and so it is expressly laid down by Mr Hume, who states, 'That after information had been taken 'in the several counties, under the brieve of dittay, in the 'manner formerly detailed, the Lord Justice-Clerk, *at the* '*command of the Justiciar*, made up from those materials, what

'was then called the *Portuous Roll and Traistis;* that is, a
'roll of the names of the delinquents, and a file of the suitable
'indictments against them. And with the same officer it lay
'to expede the necessary precepts towards the trial of those
'charges, and to issue his orders to the *Crowners*, (for we had
'this office formerly, though now long disused), to arrest the
'delinquents, and lay them inward, or take surety for their
'appearance. Now, in performing this service, whether with
'a view to the ordinary Justice Ayres, or to trial in particu-
'lar diets at Edinburgh, the Justice-Clerk acted substan-
'tially *for his Majesty's interest, and that of public justice and*
'*example.*'

When such was the form of proceeding, it is therefore obvious that there was vested in this Court a power, (and a power which was continually and perpetually exercised), of determining in all public prosecutions, which accused persons should stand in the situation of 'pannels,' and which *(socii criminis* being admissible) in the situation of witnesses. This power of selection, your Lordships will observe, was exercised either actually or virtually under the personal or implied orders of the Sovereign; and the necessary result of HIM who had the power of pardoning, selecting one individual for trial, and another to give evidence, must have been equal to the most express declaration, that while the one party should be tried in order to punishment, the other should go free. Accordingly, at this time, I find no appearance of actual remissions having been granted to persons adduced as witnesses, either as preliminary or subsequent to their giving evidence. And the case I formerly referred to, of Henderson, the *socius criminis* in the trial of Gowrie, confirms the supposition that none such was required; for there all that was done was, that Henderson's name was erased from the summons of treason, in order that he might give his evidence first against Cranstoun and Craigingelt, and then against Gowrie and the others, which he accordingly did, without obtaining any farther pardon or remission, than that which was implied by his having been received as a witness.

Now observe, my Lords, what at this time was the actual situation of a private prosecutor. He could not of his own authority commence any criminal prosecution, however great the injury he might have suffered, and call upon the Court of the Justiciar to try and punish the offender. That power was utterly denied him. The forms that were required to be observed, and which at that time, were effective and substantial, enabled this Court itself, and alone exercising the powers of a public

prosecutor, not merely to controul, but to extinguish the rights of the private party to prosecute criminally.

For your Lordships know well, that before the doors of the Court were opened to him at all, the private party was compelled to apply by bill of supplication to the Court, praying that they would ordain their officer to expede criminal letters under their own signet, as the fundamental step of the process. This did not then pass as mere matter of course, but *causa cognita;* and if the Court saw reason so to do, the supplication would unquestionably have been rejected.—From the different situations in which we thus find the private and public prosecutions placed, your Lordships are aware that there is a distinction in our practice between indictments and criminal letters,—the one form being alone available to the public prosecutor, who can raise it by his own authority alone, and the other competent to the private, who can do so merely when permitted by your Lordships.

Now, when such was the form of proceeding, is it possible to doubt, that if the Court, acting under the special orders of the Sovereign, had, either in the preparation of the process, or in the actual trial ordered to be brought by itself, given either an express or virtual and implied promise of immunity to a *socius criminis*, it would have sanctioned that very individual being brought to trial, when that sanction it was empowered to withhold? On the contrary, is it not to be inferred that it would, upon a supplication for trial being offered by a private party, have at once refused to grant warrant for criminal letters, thereby extinguishing at once, and for ever, all power in that private party, in so far as the question of punishment was concerned, the right of subjecting the person to whom the King, through them, had promised exemption from the risk and trouble of a public trial.

In order to make myself clearly understood, let it be supposed that at the time I speak of, the case now under consideration had occurred; that Burke had been 'dilaited' by orders of the Court, and put upon his trial; while Hare, under a promise from the King, acting by the Justiciar and his officers, had been made use of in the manner which we know, and which the Lord Advocate admits he made use of him on this occasion; must not your Lordships be satisfied, that if the present incarcerator had come forward with a bill praying for criminal letters to issue against Hare, the Court, by every principle of justice and fair dealing, was bound to have rejected that supplication, and dismissed the complaint? And THAT, most assuredly, it must be presumed they would have done.

Whether the case can be treated in a different manner *now*, and under our present form of procedure, is next to be considered.

And in this inquiry it is necessary that your Lordships should attend to the origin of the great and important change which took place in these forms, and how, and to what extent, the duties, which had hitherto been exercised nominally by the Justice-Clerk, but effectually under the direction of the Court itself, came to be transferred to his Majesty's Advocate, who had hitherto only appeared as counsel for the pursuer, that was, for the King and the public. This change seems to have been effected soon after the statutes 1579, chap. 78, and 1587, chap. 77, were passed; the latter of which directed, that the Advocate and Treasurer 'should persecu slaughters and 'otheres crimes, althocht the partys be silent or wald utherways 'privily agree.' These statutes, as well as the utter incongruity of the Court being at one and the same time prosecutor and judge, produced the effect of vesting in the office of Lord Advocate, those powers generally, which had formerly belonged to, and been exercised in the name and on behalf of the King through the medium of the officer of his own Court. No limitation in the transference of these powers, in any respect, was made, as far as appears, either from practice or statute; and your Lordships will infer that, if certain powers were necessary for explicating the functions of prosecutor when vested in the Court, the same must necessarily have been transferred to the Lord Advocate, who was thereafter to discharge the same duty to a similar effect, on behalf of the Sovereign and the public. Accordingly, it is not a little curious to observe how completely this appears to be confirmed by the subsequent practice of the Court.

Previously to the power of prosecution being transferred from the Justice-Clerk, it was obviously impossible for private parties to compel, either the Court or its officers, to 'dilait' or indict any offender. Their remedy was that which I have before pointed out, of applying for criminal letters. Accordingly, your Lordships find that after the Lord Advocate came to be public prosecutor, in no case was it ever held that he could be required to afford 'his instance' to the private party. Neither could the Court be called upon to interpose their authority, to the effect of compelling the Advocate to adopt that measure; for had such a power been reserved to the Court, when the right of instituting prosecutions, through the medium of the Justice-Clerk, was abolished, it would, in effect, have been to have retained the right which they possessed before, and of which it was

the policy of the law to discharge them, of determining in each case, what prosecution should be raised, or what abandoned. But while the right of the Advocate, who had become the public prosecutor, was thus left in the same situation as that in which it had been possessed by the officer who had preceded him in the discharge of the function under the direction of the Court, the right of the private prosecutor was left in no worse condition than it had been before. Previously, he had to prefer his complaint, in the first instance, to the Court, which, *causa cognita*, granted or refused his supplication for criminal letters; but this, too, was obviously an incongrous right to be exercised by the judges who were to try the case, when it could possibly be avoided; and, therefore, the power of judging, in the first instance, whether the criminal letters ought to issue, was transferred to the public prosecutor. Hence, we find that the concourse of his Majesty's Advocate came to be required as a necessary adjunct to every supplication, before the Court could be called upon to grant the warrant for criminal letters, the fundamental step of the process.

But as the granting or refusing the prayer for criminal letters, had always been a judicial, and not an arbitrary or a ministerial act, so the Court retained the power upon cause shewn, of compelling the prosecutor to grant his concourse. This appears accordingly to have been the opinion of Lord Alemore, in the case of Gordon, referred to in the papers, when he said, that if the prosecutor had refused to grant his concourse, he '*might*' have been compelled to have given it. The controul of the public prosecutor, in the *fundamental stage* of the proceedings, over the right of the private, (subject, however, to the power of this Court,) is therefore undeniable. But farther still, and in like manner, we find, that in all stages of the cause, the Lord Advocate has uniformly exercised the right of controling the private party, in every thing in which punishment was concerned. This, your Lordships will find, by examining the form of the letters of slaines, as given in Kaimes, from which it appears, that while the private party could effectually bind himself to the accused, that he should never 'be called, persewed, be way of deed or otherwise,' he could not discharge him from the risk of a prosecution at the instance of the public prosecutor; and that he was therefore obliged to conclude with a humble application to the Crown, to grant a pardon and remission. And the same thing appears again, from the power of restricting the libel, which, your Lordships are aware, has always been competent for the public prosecutor, at any time before the return of a verdict, (though it is only within a few years that the right of doing so,

after the return of the verdict, has been acknowledged,) while this right never was believed to have belonged to a private prosecutor. Accordingly, the distinction and the power of control I am speaking of, is well pointed out, in a case referred to by Burnet; although I find from the record, that it is both misstated and misunderstood by that author. He says,—'Nay, 'we find that even the power of restricting to an arbitrary 'punishment, belongs to, and has been frequently exercised 'by, the private party; and so it was found in the case of Glen '*v.* Hunter, 20th Dec. 1725.' Now, on looking to the record, I find that Mr Burnet has omitted a most important part of the procedure; of which the following is an accurate account:—The prosecution was raised at the instance of Mr James Glen, advocate and Provost of Linlithgow, for the crimes of riot and mobbing, &c., and on the act 1 Geo. I. entituled, an act to prevent tumults, &c., the contravention of which, in the particulars stated, inferred a capital punishment. In the course of the proceedings, the following minute appears:—'Mr James Glen of Longcroft, Provost of Linlith-'gow, private pursuer, judicially consents to the restrict-'ing that part of the lybel, in relation to the act of Parlia-'ment, *Primo Georgii*, anent the letting and hindering the 'reading the proclamation against mobs and ryotts, to an ar-'bitrary punishment.'

(Signed) 'JAMES GLEN.'

'His Majesty's Advocate-depute; In respect the private 'pursuer has restricted the lybel to an arbitrary punishment, 'and that he has no reason to believe facts can be proved a-'gainst the forenamed pannels, to infer the punishment of the 'act *Primo Georgii* lybelled, entituled, an act to prevent tu-'mults, &c.; but from the information of the private pursuer, 'he judicially consents to the restriction of the same.'

(Signed) 'CHARLES ERSKINE.'

'The Lord Justice-Clerk, and Commissioners of Justiciary, 'in respect of the above consents of the private pursuer, and 'Advocate-depute, restrict the libel upon the above mention-'ed act of Parliament, to an arbitrary punishment.'

From this, it is manifest, that it was held that the public prosecutor, though only giving his concourse, had a control of the proceeding in the trial, at the instance of the private party; and that his consent, as in this case, was deemed indispensible to carrying into effect the motion of restriction, even of the *dominus litis*.

The only one case which has been, or I believe can be quot-

ed in opposition to this doctrine, is that of Colonel Charteris, mentioned in the argument for the parties, in which, after the Lord Advocate had stated his wish to withdraw his concourse, the private party was allowed to go on with the prosecution of the libel, and actually succeeded in obtaining a verdict; but this proceeding cannot, I think, be held to affect my view of the question in any particular; for, in the *first* place, the indictment was laid upon a special statute, so framed as to have rendered the concourse of the public prosecutor altogether unnecessary even in the fundamental stage of the process; and that under it, the bill for criminal letters might competently have been presented to your Lordships' predecessors, and the warrant for them granted without that form being required. But, in the *second* place, it was quite absurd to attempt to withdraw the concourse after the case was in Court. The concourse must be given to the first *step* of the process, and before the case was in Court,—its object, your Lordships know, being to prove that the public prosecutor had *considered the bill*, and not only held it to be a case for the entrance of which the doors of the Court should be opened; but, also, that he had been placed in a situation to watch over its progress and its issue. But after the signet of the Court had moved,—the criminal letters had been issued,—judicial proceedings had commenced,—and issue had been joined,—it was obviously as irregular and as incompetent for him to attempt to put an end to the suit, as it would have been, in the original form of procedure in this Court, for the Justiciar, after having issued his *fiat* for raising criminal letters under his signet, to have stopped the proceeding before himself, by ordering that *fiat* to be cancelled.

From all this, I apprehend, that there is not only no reason for doubting, but, on the contrary, it is established, that in so far as powers of prosecution were concerned, the Lord Advocate came in the place of the Justice Court and its officers, and that he was necessarily vested, and has been held to have been vested, with all the powers which were possessed by those who preceded him, and which, in fact, were indispensibly necessary for the effectual and beneficial exercise of that part of his official function. Among these, the most important was the power to fix upon the persons who should be subjected to trial, and upon those who should be examined to establish the offence. Yet without the power of securing the latter against farther question and hazard, the right of selection itself must have been altogether ineffectual and nugatory. Accordingly, without going farther back, this power your Lordships will find to be fully acknowledged in the deliverance of the Court in the case of Smith and Brodie, following upon the minute of his Majesty's

Advocate, as well as in the judgment of their Lordships referred to by Lord Pitmilly. Again, it was recognised in the judgments of the Court in the case of Downie in 1794, and of James Spiers in the year 1820, which merit more particular attention.

In the former of those cases, which has been already referred to, your Lordships will find, that Lord President Campbell, in the very outset of his judgment, expressly recognises this power. 'It sometimes happens,' says his Lordship, 'that 'witnesses are adduced to give evidence upon facts of a cri- 'minal nature, between parties *who have no authority or power 'to discharge the prosecution before a Court of criminal jurisdic- 'tion*, if any such shall arise out of the facts thus meant to be 'given in evidence. In such a case, and where the question 'put tends to draw an answer which may criminate the wit- 'ness himself, I understand it to be the duty of the Judge to 'give notice to the witness that he is at liberty to decline mak- 'ing an answer to the question, on account of the effect which 'it may have against himself; not that the answer, if made, 'could be used as evidence elsewhere, but that it might lay a 'foundation for his being prosecuted, by giving information of 'his own guilt.—But, with respect to the proceedings in 'Courts of criminal jurisdiction, which I had occasion to be 'well acquainted with, as public prosecutor for several years, 'I know that it is common, and often necessary, to admit ac- 'complices to the crime as witnesses against the prisoner, 'otherwise crimes would too often go unpunished. But I al- 'ways understood it to be a settled rule, that his Majesty's 'Advocate, prosecuting for the King, could not, after making 'such use of an accomplice, or *socius criminis*, bring the wit- 'ness himself to trial for the same crime.'

Now, in the first part of the above passage, the Lord President obviously recognises a power in some one, to discharge a criminal prosecution, and this could only be the public prosecutor; for your Lordships are not to be told, that no such power was ever acknowledged to reside in any private party whatsoever, whose power is entirely limited to extinguishing his own private right of prosecution. To the same effect is the judgment of Lord Chief Baron Montgomery, and of Lord Eskgrove. No doubt their Lordships more particularly refer to the case of persons examined as witnesses in Court. But it was then the case of a witness who was offered to be examined in Court that was before them, and of course their attention and their observations were necessarily more directed to that precise position of the party than to any other.

But observe, my Lords, what was actually done in that case.

The law of England, we are informed, holds that an examination in Court, does not *ipso facto* exempt a witness from trial. The case of Downie, however, was brought under the law of England and its proceedings, and their effects could not be regulated by any other principles than those recognized in that law; and therefore, the witness ought, if immunity could not be secured to him, to have been fairly warned, and assuredly could have been so warned, of the predicament in which he stood, and been informed that he was not bound to speak out or to say any thing to criminate himself. But no such thing took place; on the contrary, the Lord Advocate, (Dundas), came forward and stated, that, 'the present witness 'Aitcheson, being a Scotchman, and residing within the 'county of Edinburgh, he can only be tried in this county, 'and by a jury of this county; *as public prosecutor for Scot*'*land, I explicitly declare in this Court, that it is not my inten*'*tion, and I never will bring Aitcheson to trial for any accession* '*to the crime of treason charged against this prisoner, so far as* '*the witness may have been accessory to it, previous to this trial.*' Upon this assurance, and without any other protection whatsoever than this bare promise of immunity given him by the public prosecutor, the witness is put into the box, sworn to speak the truth, and the whole truth, and examined as to matters by which he would have been himself inculpated in the crime of treason, and for which he would have been liable to prosecution by the law of England, except for the security which the promise of the public prosecutor afforded him.

Now, my Lords, I apprehend it to be quite impossible to figure any case recognising in a more authoritative manner, the unlimited power of the public prosecutor to stipulate for immunity from punishment, in consideration of a *socius criminis* agreeing to give evidence. For the immunity here acknowledged, must have been altogether independent of the examination in Court, as by the law under which he was to be examined all such effects of examination were rejected.—It rested entirely upon the power of the public prosecutor to give it, which if the Court did not hold it to be clear and undoubted, he had the power to do, their allowance for putting Aitcheson into the box, without warning of any kind, would have been an act of the most gross and intolerable unfairness and oppression. And, accordingly, my Lord, we find that the same thing again took place before the last Commission of Oyer and Terminer, in the case of Spiers. In that case, a person of the name of John Fraser, being called as a witness, stated, before being sworn, that he had been imprisoned for four months upon a charge of treason, and that he wished to 'know whether I appear

'here as a principal or a witness. I do not know that I may 'not yet be brought to trial.' After this statement, some discussion took place upon the liability of a witness to trial after being examined in Court, during which, the Lord Justice-Clerk stated, 'At Dumbarton it was said by the Lord President, that on no account could the public prosecutor prosecute any individual he brought into the box as a witness.'

Some doubt seems to have been expressed of this doctrine, as applicable to a trial depending on the principles of the law of England; but the Lord Advocate having followed the course which had been pointed out and adopted by his predecessor, and given an assurance that there was no intention to try the witness, Fraser was called, and the Lord Chief Baron Shepherd, than whom there can be no higher authority, either in a matter of law or of fair dealing, and who I am sure would rather have laid down life than have willingly or even incautiously misled the person to whom he was addressing himself, on that or any other occasion, informed him.—'You 'understand you are brought here as a witness, and that you 'are to speak the truth, THE WHOLE TRUTH, and nothing but 'the truth.'

Upon this, it appears that the witness put the question, 'And that I am not to be considered as a principal any longer?' to which Mr Hope, Advocate-Depute, replied, '*certainly not*;' and in the same emphatic terms, the Lord Chief Baron rejoined, 'CERTAINLY NOT.' Here then again, your Lordships have a second instance of a witness being fully assured of immunity from all risk of criminal prosecution by the highest authority in the law, and by solemn judgment given in one of the most important cases that could occur, upon no other authority than the promise of the public prosecutor, thereby recognising his power to give complete assurance to a *socius criminis*, who would not have been exempted from the risk of trial by the mere fact of his having been examined as a witness, that he could no longer be subjected to prosecution.

In opposition to all this weight of authority, more than I almost recollect to have seen bearing uniformly, and without interruption, in one direction, and to one conclusion, there can be nothing, as far as I have been able to see, brought forward, but arguments deduced from analogy and inference; *first*, from the fact, that occasionally remissions from the Crown itself having been granted to witnesses before examination, the right of granting immunity to *socii criminis*, cannot be held to have resided in any other quarter;—*secondly*, from the undoubted fact, that the principle of the law of England only recogni-

ses such a power to reside in the Sovereign;—and, *thirdly*, from the supposed declaration of the Legislature upon this subject, to be gathered from the provisions of the statute of the 21st Geo. II. cap. 34, it is to be presumed, that, at common law, a *socius criminis* could not, by any act on the part of the prosecutor, be protected against subsequent accusation.

The inference to be drawn from the first of these three considerations, seems, however, by no means to follow from the fact which is admitted; for your Lordships will recollect, that remissions in favour of persons who were called as witnesses were not, at least in general, required, till after a period when, by the infamous and profligate conduct of those by whom Scotland was governed immediately before the Revolution, all confidence in public men was utterly destroyed, and no one could reasonably have relied upon an assurance from any of the King's servants, or upon any thing short of a recognition of their immunity under the Royal signature. In fact, if I recollect rightly, remissions of this description do not appear till the period when, not only to the eternal infamy of themselves, (which would have been nothing), but to the dishonour of the country to which they belonged, and which had the disgrace of submitting to their rule, Lauderdale and Rothes, and others of high name, had, in the face of this Court and of the world, pledged themselves, upon their solemn oaths, to a deliberate and downright falsehood, for the wretched and miserable object of obtaining the ruin and the death of a covenanting clergyman, (Mitchell, if I forget not, he was called,) to whom, in the name of their Sovereign, they had promised mercy. Who, during such times, can be expected to have ventured upon a confession, on the bare assurance of immunity from the public prosecutor, himself subordinate to the perjured miscreants I have mentioned? Or how can the fact of men, placed in such predicaments, requiring the hand and seal of the King to secure their safety, be alleged as affording evidence in opposition to the inveterate practice of an opposite description, to which I have called the attention of the Court?

Secondly, with respect to the analogy drawn from the law of England, I shall say nothing farther, than that it has never been considered as of authority in this Court; and even if it were directly opposed to the views I have taken, I should not think myself entitled to place any reliance upon it, in forming my judgment at present. But, *secondly*, as it seems to me, the provisions of that law upon this subject are opposed to our own, more in appearance than in fact,—both equally effecting the same result, by different means;—and, *thirdly*, it is perhaps possible, that the very circumstance of cri-

minal prosecutions being there generally conducted, at the suit of the private party, may have led to the establishment of the principle, that the employment of the *socius criminis* as a witness did not, *ipso facto*, confer upon him an immunity,— just in the same way a private prosecutor, with us, is without that power, except in the special case provided for by the statute of George II., to which I have now to call the attention of your Lordships.

With respect, then, to the inference which has been drawn from that statute, I shall content myself with observing, in the *first* place, that concurring in the views respecting its enactments, so luminously laid down by Lord Pitmilly, in so far as they went, I shall not venture to repeat any part of what was so well stated by his Lordship;—but, *secondly*, I must observe, further, that the provisions of that statute seem to me altogether to refer to the case of a *socius criminis*, examined in a prosecution raised at the suit of the private party, who, it has never been pretended, could, at common law, give any assurance of indemnity to his witness, and whom I think it was the policy of that act to induce to prosecute. Indeed, unless I have utterly misunderstood the whole of the authorities to which I have referred, it is impossible for me, upon any just principle of interpretation, to put a different construction upon this statute;—for if either the examination in Court, or the assurance of the public prosecutor, was sufficient to secure the *socius criminis* against subsequent prosecution, then the same rule was applicable to the cases contemplated in that statute as to all others, and, of course, the enactment was superfluous and unnecessary, which cannot justly be presumed.

Accordingly, in confirmation of this view of the statute, your Lordships will find, that in none of the many cases in which the objection to *socii criminis* has been urged in a prosecution *at the instance* of the Lord Advocate, since it was passed, has this statute ever been referred to, either at the Bar or on the Bench, as having any connection, directly or indirectly, with the general principle; although it is quite clear, that if the opinion upon this subject expressed by my learned Brother, Lord Gillies, is correct, it is hardly possible to suppose that it would have escaped the attention of those personages of consummate ability by whom the objection was urged, or of those by whom it was repelled. Nay, your Lordships will observe, that although, as appears from the Treatise of Erskine, that the statute had not escaped the knowledge of the Bar at the time, when the case of Jameson occurred, in the year 1770, it is not once mentioned, from the beginning to the end of the long argument, which it appears from the record of the Court was then maintained.

I shall take leave of the whole of this part of the subject, therefore, by merely observing, that no stronger proof could be adduced in support of the views I have had the honour of submitting to your Lordships, than the fact that, in the whole history of the criminal law of this country, there is not one instance to be found, in which a person who has either been examined in open Court, from which an obligation of immunity, upon the part of the public prosecutor, was to be implied, or who could allege that he had received, in return for his making an ample confession of his participation in the crime, a positive assurance to the same effect, ever having once been brought to trial before your Lordships, or your predecessors.

In holding, therefore, that the public prosecutor has the right of selecting his witnesses, and either in the course of a precognition, or by an examination in this Court, granting them security from future punishment, in consideration of their enabling him to prosecute with effect other and more flagrant delinquents, I confidently reject the imputation of either creating a new law, or stretching from analogy an old one. In no case have I ever considered myself as entitled so to do, and far less in the exercise of my duties in this Court, where the lives and the liberties of the subject are so immediately involved in the judgments of your Lordships, and where I must ever think you are imperatively required to act upon fixed, established, and recognized principles.

At the same time, it does not appear to me, upon the other hand, that I have any right to regulate my opinion by those views of policy and expediency which have been so broadly taken, and so strongly relied upon, even were I perfectly satisfied, (which I certainly am not), that there are not substantial grounds for questioning their accuracy and justice. Being quite clear, that, for centuries, the right in question has belonged to the office of public prosecutor, I certainly should not feel myself entitled, upon views of that description, to stretch forth my hand to abridge it. But, indeed, when I consider the indispensable necessity that there often is for an immediate investigation into crimes,—the perpetrators of which might remain concealed and go unpunished, if a power such as this did not reside in those entrusted in behalf of the public, with the duty of bringing offences to trial,—I must have the greatest doubt, if, from a speculation into fanciful and far-fetched cases, which, in all human probability, can never occur, it would not be dangerous to encroach upon a power which, as far as I have discovered, has never been abused, or alleged to have been abused, even in the worst of times.

Should the period, however, arrive, when the high public officer in question shall be guilty of prostituting his office, in the manner supposed, for the sake of granting an indemnity where it ought not to have been conferred, your Lordships are aware, that as the process of assythment, which he cannot discharge, would secure publicity to the act, equal to the most open proceeding in this Court, he would be as much exposed to a complaint to the King and Council, or impeachment in the Parliament of the kingdom, as if the witness had been brought forward and examined in open Court, which it is allowed, upon all hands, would now secure him an immunity.

Upon the whole, therefore, I trust that I have satisfied your Lordships that there is sufficient evidence, that *socii criminis* were at all times admitted as evidence in the law of Scotland. *Secondly*, that the ancient forms of proceeding enabled those originally intrusted with the power of raising prosecutions in behalf of the public, to select the parties to be tried, and the parties to be made witnesses, and to secure to the latter complete fulfilment of any promise of indemnity they might find it necessary to make them. *Thirdly*, That this power being exercised by the Court through the controul over the private prosecutor, which it possessed, came, under different forms, to be transferred to the public prosecutor, when he acquired the right to which I have referred. And, *lastly*, That while this is proved by the whole tenor of our practice invariably exhibiting one clear and uniform principle to that effect, —the right has been confirmed by judgments and precedents, following each other in an uninterrupted series, during a long period of years.

In this situation, it is unnecessary for me to enter particularly, or at length, into what occurred at the trial of Burke, with respect to the present complainer, because I am most clearly of opinion, that had the latter never been examined upon Burke's trial, yet, after the admission made by the public prosecutor, that upon 'an assurance, that if he would disclose the facts relative to the case of Docherty, and to such other crimes of a similar nature committed by Burke, of which he was cognizant, he should not be brought to trial on account of his accession to any of those crimes,' he emitted a full declaration of all that he knew, it was quite impossible for your Lordships to have allowed him to be put upon his trial at the suit of any prosecutor whatever. At the same time, I am free to acknowledge, that had Hare not been examined as a witness on the trial, but had only been cited and put in the list of witnesses, *and had not come forward and alleged that any such promise had been given him as that admitted by the public*

prosecutor, I should never have held that either the public or private prosecutor was barred from putting him on his trial. It was upon a consideration of the whole facts, taken together, as they occurred upon that trial, viz.—upon the three cases being included in one indictment,—upon the *socii criminis* being cited to give evidence upon the whole of them,—upon the avowal of the Lord Advocate that his wish was to go on with the trial of all three,—and upon their subsequent examination, without any application from the public prosecutor to put them upon their guard, that they were only called to give evidence respecting one of the offences, and might still be made responsible for the others,—that I held that a promise of immunity given by a party, according to Sir Ilay Campbell, 'who had au-'thority and power to discharge the prosecution,' was to be implied, by which the public prosecutor, and all others, were to be barred from afterwards putting the life of the complainer or his wife in hazard, for any thing done concerning these proceedings. Accordingly, my Lords, it was upon this principle, and without hesitation, that I concurred in its being laid down to the Jury, as our decided opinion, 'that whatever might be the 'case with regard to other murders, or other crimes, the witness-'es in question are as fully protected by the law in relation to 'all those contained in the present indictment,—that is to say, 'against either trial or punishment for them, as if they had 'been entirely free from any concern in their perpetration.'

To that opinion I still most firmly adhere, and it has been utterly beyond my power to discover any inconsistency whatsoever betwixt that direction in point of law, and any thing else that occurred upon the trial, as the same appears from the printed account of it, which I am bound to say gives, according to my recollection, a fair and sufficiently accurate representation of the proceedings. The opposite opinion I suspect, is entirely founded upon a mistake as to the nature and extent of the question, which it was thought legal by the majority of the Court to put to the witness, provided that he was duly warned of his being under no obligation to answer it. But that question, your Lordships will find, related not to the murder of Wilson, or the murder of Paterson, the two other murders mentioned in the indictment, besides the murder of Docherty, but to murders generally, on account of which we had no evidence, from which we could infer any assurance of immunity against being tried, either express or implied, and from which his examination could, upon any principle, protect him. On the whole, therefore, I am clear, that this warrant ought to be discharged, and the complainer ordained to be set at liberty.

It is with the utmost regret that I have felt myself obliged to detain your Lordships at so very great length, but the importance of the question, and the principles on which my opinion rested, called upon me to state fully the view I have taken of the case.

And even now I cannot conclude, without joining with both my brethren, in paying my tribute of approbation to the manner in which this case has been argued, upon both sides of the Bar. I have seldom seen equal talent displayed, and I have never had occasion to witness more patient or profound investigation into any case, that has been here submitted for our judgment. In fact, this feeling operated so strongly on my own mind, that being compelled to differ from my learned friends at the Bar, as to the justice of some of those admissions, which, upon both sides, they thought it incumbent upon them to make, confidence in my own opinion was considerably shaken; and it was not, till after repeatedly considering the subject, and finding that I was as often confirmed in my opinions, that I deemed it to be my sacred duty to deliver this judgment to your Lordships.

With respect, again, to the conduct of the public prosecutor, in so far as it relates to the investigation of these deplorable and atrocious proceedings, it is quite unnecessary for me, after what has fallen from both my brethren, (and in whose opinion all of your Lordships, I am confident, concur,) to say more than this, that there is no one who will divest himself of prejudice and passion,—no one who will consider how infinitely important it was, that at least one conviction should be obtained, on account of these barbarous murders,—no one who will calmly peruse the evidence given in the case of Burke and M'Dougal, and remember that after all, that wretched woman was acquitted by the Jury, who will not be entirely satisfied, that the conduct of the public prosecutor has been throughout, as completely regulated, not only by a full sense of the duty he owed to the public, but by sound discrimination and judgment, as in the proceedings now before your Lordships, it has exhibited the most perfect decision, dignity, and fairness.

Lord Mackenzie.—As was to be expected, great part of what I had noted as the grounds of my opinion, has been anticipated. But I think it better to run the risk of being tedious, by some repetition, than not to express myself fully and explicitly in a case of this nature.

I think this case is sufficiently before us. The complainer having been apprehended, on a warrant by the Sheriff, for the mur-

der of James Wilson, and a precognition, under the Sheriff's authority, having been ordered relative to that murder, presented a petition for liberation, and for stopping that precognition, on the ground that he held a legal protection from all prosecution for that crime. This being refused by the Sheriff, he has brought the case here, by advocation; and at the same time, in due form, craved suspension and liberation. I think this entitles him competently to our judgment, in the same way as if he had, under similar procedure, pleaded a previous pardon, or indemnity by statute, or a previous acquittal. If he can make out his case, there seems no doubt that we can competently, and are bound to order his liberation, and discharge further criminal procedure against him for this matter,—*i. e.* all the procedure which is the subject of this advocation and suspension.—A difficulty has been raised as to the respondents' claim for assythment. I do not see how that applies. The claim of assythment is of a civil nature. It cannot authorize apprehension of the party upon whom it lies, or the taking of a precognition criminally, under the Sheriff's authority. Nor is it mentioned in these proceedings, which are simply criminal, and insisted on with a view to punishment only, without any claim for assythment, or for security to pay assythment. If, then, we are satisfied that the party is not liable to any punishment, but protected legally from any criminal prosecution, we must, I think, grant what is prayed for in this application.

My Lords, I consider this a question of great importance, not to the public only, but to the complainer. I am not relieved from this feeling, by the possibility or probability of a pardon, in case Hare should be prosecuted and condemned. It is enough to say that he pleads this protection, to save him from the danger of a capital sentence. The chance of a pardon is no answer to him, any more than it is an answer to any man who defends his life in this Court. Any pannel may be pardoned, if his defence be overcome; and the better his defence, the better his chance of pardon. But that cannot hinder his right of calling for your Lordships' judgment, as fairly, nay as favourably, as if, on condemnation, he were instantly to be led from the Bar to the gallows.

The question then is, whether he has a sufficient protection to entitle him to such judgment in his favour?

This question seems to me to resolve into three points:—

I. The *first* is, whether, in the law of Scotland, there be any right of protection existing in favour of persons who have been called, and brought into Court as witnesses by his Ma-

jesty's Advocate? If there be no such right, then it follows that this man Hare is still liable to be prosecuted, by his Majesty's Advocate, not only for the murder of James Wilson, but for that of Docherty, notwithstanding all that took place at the trial of Burke for that murder. I have not, however, heard that maintained. The argument for the respondents was not, I think, carried so far. And when I consider the practice of this Court, I am not surprised that this was not argued. What had been the practice anciently, does not appear with certainty. This only seems pretty certain, from the expressions of Sir James Stewart, who was eighteen years Lord Advocate, in the reigns of King William and Queen Anne, that in these reigns the practice of calling *socii criminis* as witnesses, under some form of indemnity, existed. And there can be little doubt but that the practice of calling *socii criminis*, under some form of indemnity, continued to prevail. It is also sufficiently clear, that, at least previous to the noted trial of Brodie and Smith, the opinion had come to be entertained, that the King's Advocate, by the very act of calling a *socius criminis* into Court as a witness, did give him an implied assurance of protection, which the Courts were bound, in fair procedure, to enforce in his favour. Accordingly, in that case,—a case of much celebrity,—a trial of two men, one of them a man previously in a respectable rank of life, for house-breaking, a capital case in law, and so insisted in,—two accomplices, Ainslie and Brown, were admitted as witnesses; it being, at the same time, expressly stated by the Court, that they had thereby an immunity from prosecution. I cannot doubt such were the proceedings in that case. The printed reports were not only published at the time, one of them by a juryman, who could not possibly be mistaken on this point, to which the attention of the jury must have been particularly called, but they are referred to by Mr Hume, who must have written, if not at the time, yet not long after; for the first part of his commentaries on criminal law was published in 1797, only nine years after. The record of Court, too, though it does not contain the words of the Lord Justice-Clerk, yet does contain the argument of the Lord Advocate, implying the same doctrine. In the same case, Sir Ilay Campbell was Lord Advocate, Erskine and Wight were counsel for the pannels, and Macqueen, Lord Justice-Clerk, with four other Judges present, two of them being Lords Eskgrove and Hailes. Though we may not now be able to explain the precise grounds on which the opinion of the Court was founded, he must have more self-confidence than I can venture to assume, who will say, that amongst such men, the opinion was adopted without grounds

at all, or without tenable grounds. This solemn decision, in a celebrated case, was fully acted upon. Brodie and Smith were convicted and executed. Brown and Ainslie, the *socii*, remained free from prosecution, for any matter contained in that indictment. This was in the year 1788. It was followed by a constant, uninterrupted, uncontradicted, incessant, and most numerous, as well as most important and notorious series of similar proceedings, in conformity to that case, extending from the date of it down to the present day. I know not, nor believe, that in any one instance where the Lord Advocate has thought that taking an accomplice as King's evidence, was an expedient measure, he has ever been prevented from doing so by the state of the law, or that it was ever done without an explanation from the Court, that an immunity from prosecution was the consequence, or without actual enjoyment of that immunity following. In one trial for treason, a proceeding under the law of England, some discussion seems to have taken place, as to the possible effect of the *socius*, when called as a witness, refusing to give evidence. There is certainly an opinion there expressed, that if the *socius* refused to give evidence, he lost his protection. And why not? Refusal to give evidence would evidently be, in substance, equal to a refusal to appear as a witness. It would be a breach of the condition on which remissions had been, and the indemnity in our practice was granted, *i. e.* that the *socius* should be a witness. I cannot see that the opinions in that case go farther. And it is particularly worthy of observation, that neither the Lord Justice-Clerk, nor any Judge, says, that the report generally received of the case of Brodie was erroneous. I cannot see that there was any thing like a decision, or even expression, contradictory to the tenor of the practice of the Court. Accordingly, the nature of that practice is stated by Mr Hume, who published, as I have already observed, in 1797, not long after the date of that case, and who says:—'A *socius criminis*, (so it is now 'held), though not so creditable a witness as one who is 'liable to no such imputation, still cannot be more infamous '*in jure*, with relation to this than any other trial; and in 'all other trials, he is a lawful witness, since he has not had 'any mark of infamy impressed on him by the sentence of a 'Court of law. The risk of bias also, from his fear of the 'prosecutor, is obviated, if it shall be held, which is now the 'established opinion, and was delivered for law from the 'Bench, in the noted case of Smith and Brodie, that, by the 'very act of calling him as a witness, the prosecutor discharges 'all title to molest him for the future, with relation to the 'matter libelled. Thus, the witness, when this has been ex-

'plained to him, is absolutely free to tell what story he has a 'mind.' But it is quite needless to appeal to any law-writers on such a subject. Your Lordship has sat in this Court now no small number of years, and most of the other Judges, either in that or other capacities, have had pretty long acquaintance with its practice. I would ask, whether any one of your Lordships ever saw one case, where a *socius criminis*, thought by the Lord Advocate a necessary witness, was not called and admitted; or where a witness, known to be a *socius criminis*, was brought forward, who was not admitted upon an explanation of his consequent indemnity? Not one of the forty years since Brodie's case, I am confident, has passed, without judicial recognition of this rule of law in important cases. And as this practice has been uncontradicted here, so has it been unchallenged and unaltered by Parliament. It has always been quite public, and highly important,—perfectly known to Parliament, but never by Parliament changed or censured. Some cases of great importance, I allude particularly to trials for sedition, were the subject of much attention in Parliament, from the opposite views of them taken by our great parties at the time. But nothing was done in disapproval of this part of the procedure, though in these trials, *socii criminis* had been admitted, (as Mr Hume notices,) in conformity to the usual practice. In short, if it be possible, by a tract of judicial practice, to establish any thing, I think this point is established. And, therefore, I think that it is altogether out of our power to hesitate in holding that Hare has a protection.

II. The *second* point is, whether the immunity from prosecution acquired by *socii criminis*, produced as witnesses by the Lord Advocate, affects the private party, having originally, under the law of Scotland, right of prosecuting for the crimes which the Lord Advocate is barred from prosecuting? Now again, on this point, I must observe, that if it be determined in the negative, then Hare is still liable to be prosecuted, not only for the murder of Wilson, but for that of Docherty. For no doubt, she, as well as the poor creature Wilson, must have relations, some of whom would zealously come forward, or at any rate might be found out, and by encouragement, be brought forward to lend their names to a prosecution. In this way then, it seems impossible for the respondents, if they maintain the negative in this question, to avoid contending that Hare, after giving, upon public and solemn assurance of indemnity, that evidence, on which most materially the murder of Docherty was proved to have been committed, and Burke was convicted, might next day have been prosecuted himself,

for the very share in that crime to which, as King's evidence, he had sworn. Nay, this is not all. For if the indemnity of the witness is against the King's Advocate only, not against the private prosecutor, then there seems to be no reason why he should be protected in the question with that private prosecutor even, from the operation against himself, of the very evidence given by him. For the one has always accompanied the other, and rests upon the same foundation. Is it to be said then, not only that Hare, after giving his evidence for the Crown, in the trial of Burke, for the murder of Docherty, might have been that very day served with criminal letters for his share in this murder, but have had that murder, and his own share in it established, by his own words as a witness being proved against him, and that no other witnesses would have been necessary to convict him, than a competent number of the Jury who tried Burke, or of the Judges who heard the evidence in that trial? I must own my mind recoils from such a supposition, from the very idea of such judicial treachery. And yet, I see not how it can be avoided, unless we admit that the protection of a *socius criminis,* obtained by his appearance as a witness, in a prosecution by the Lord Advocate, operates also against the private prosecutor. But in truth, I think it very clear, that this must be admitted. For it appears not contrary, but agreeable to the analogy of our law. It is true, that by the law of Scotland, there is a right of private, as well as public prosecution for crimes, and that not for reparation only, but for punishment,—a right of which I rather think the Information for Hare speaks too lightly. But then it is just equally true, that unless the private party, having title to prosecute, come forward in time to prevent it, the King's Advocate, raising an indictment in his own name alone, comes to have full power of accusation vested in him. He represents the King, who represents the nation, including in this respect the private avenger himself, who must be held to have trusted his right of vengeance, as well as that of the public, to this great officer. Accordingly, it seems that, in general, those ways by which a party obtains protection from punishment by the act of the Lord Advocate, do avail against the private prosecutor, who has not previously come forward: Thus, if the King's Advocate is dilatory, or inaccurate in proceeding, after apprehension of the criminal, who thereby obtains final liberation on the act 1701, that criminal is as safe from private, as from public prosecution,—though the private prosecutor may be absolutely blameless,—may be absent, abroad, on a sick-bed, *non compos,* or a pupil. The intimation

ordered by that statute is, to—'His Majesty's Advocate, or pro-
'curator-fiscal, and party appearing by the warrant to be con-
'cerned, *if any be within the kingdom.*' So that it is manifest, that in many cases prosecuted by the Lord Advocate, there can be no information to any private *party*, particularly in cases of murder. Yet, the act provides,—'that if the Lord Advocate
'failzie, the process shall be deserted *simpliciter*, the party im-
'prisoned to be for ever free from all question or process for
'the foresaid crime or offence:' So, if the Lord Advocate draw the indictment erroneously, in respect of time, place, or circumstance,—or if he omit necessary witnesses, (as, for instance, by not calling necessary *socii criminis*), or cite them erroneously, or examine them insufficiently, or allow them to be present in Court, or suffer them to be disqualified by improper communications, or in any other way fail in his prosecution, and the criminal is acquitted,—it cannot be denied that his acquittal is as valid against the private party, who might have prosecuted, as against the King's Advocate: So, if the Lord Advocate restrict the indictment to an arbitrary punishment, or depart from part of it, this avails the criminal equally against the private prosecutor: So, if the King's Advocate decline to move for judgment after conviction. In short, I have heard not one case referred to, in which the contrary was ever found, in any respect, numerous as have been the instances of such complete or partial exemption from punishment by the act of the King's Advocate. I do not absolutely say there may not be such cases, but I do not recollect to have heard any case stated, in which it was argued such a thing could happen, except the case of indemnity to a *socius criminis* giving evidence. I cannot see anything, therefore, contrary to the general principles of our law, in holding that a private party, having a right to prosecute a *socius criminis*, who stands back and allows the King's Advocate to bring that *socius* before the Court as a witness, is bound, by the consequence of that procedure, as well as by the Lord Advocate's procedure, under the act 1701, or in the conduct of a prosecution against that *socius*. But it is very little necessary to go into argument on this point. For, in truth, all the authority by which it is established that a *socius criminis* appearing as King's evidence, has protection against the King's Advocate, equally establishes that he has protection against the private prosecutor. In the case of Brodie, the words of the Lord Justice-Clerk, Macqueen, were, that 'no-
'thing he' (the witness) 'had *done*, or could say, respecting
'that matter,' (*i. e.* the matter libelled), 'could militate
'against him *in any way*.' It is plain this applies to the dan-

ger of prosecution from the party, as well as from the King's Advocate. And the very same form of declaring the law, has been substantially followed, I believe, in every case since that time, where there had been a *socius criminis* produced as a witness. The words of Mr Hume shew it, and it is in a great measure known to your Lordships personally. Nor is this all. I believe the present to be the very first case in which an attempt has ever been made by the private party to bring to trial a King's evidence. Yet, in almost all cases, there must be some private party originally entitled to prosecute, since the party injured himself has the right, if he survive; and in murder, or culpable homicide, the relations have it. The total absence of such prosecutions is, therefore, conclusive as to the understanding of the law, and the nature of the practice, so that I really see no room for doubt on this point.

III. It only remains to consider the question, whether there be any thing in the special circumstances of this case, by which the protection or indemnity of Hare is defeated or excluded, in regard to part of the indictment, on which he was cited as a witness, and particularly, in relation to the murder of Wilson?—a question which, after what I have said, I must think, stands in the same situation, whether the party alleging such defeasance or exclusion be the Lord Advocate, or the private prosecutor.

In considering this, I am not much inclined to rest weight on the theory of the origin of this protection. I certainly cannot adopt that theory, which supposes this protection to have been derived from the statute 20 Geo. II. c. 34. For that is a very special statute, made with reference to the state of the country at the time (1748,) a few years after the Rebellion of 1745; and it contains not one clause only, as has been noticed by the counsel, but two clauses respecting *socii criminis*. The first is section 20, which relates to bands of Highland cattle-lifters, a sort of thieves at that time viewed with peculiar displeasure, because they were *rebellious*, as well as rapacious; and it provides, that such persons being *socii criminis*, may be made witnesses; but that the indemnity shall obtain only in case the *socius* 'shall, as a witness, give evidence that the same 'was committed by the prisoner or pannel, or that the said 'prisoner or pannel was art and part thereof.' This harsh provision was founded on jealousy of the attachment of these Highlanders to each other. It was thought, I have no doubt, that if any one of the band was once sure of his own safety, there would have been little chance of getting any thing out of him against his fellows. And, accordingly, the

Legislature made a very sharp bargain with these clan-witnesses. The next clause, section 21, relates to another sort of men, not then in favour, viz.—Nonjurors, *i. e.* persons present at unlicenced Episcopal meeting-houses. These persons are exposed to be called as witnesses, in cases where they were *socii criminis;* and the protection afforded to them is only that the evidence given by them shall not be used against themselves. And in neither clause is there any limitation to witnesses brought forward by the King's Advocate.

It seems quite certain, that *socii criminis*, under the practice now established, never were subjected to either of these limitations; and sufficiently certain, that the indemnity under that practice, was never extended to witnesses for private prosecutors. From the first appearance of that practice, the indemnity was complete, and had no dependence on the nature or effect of the evidence given, and it was limited to King's evidence. It is, therefore, not only impossible to suppose that this act, so expressly limited both as to place and crime, was extended to all places and all crimes, but it is plain, that the extension of it would not have formed the existing practice.

I should rather think more probable the theory which Mr Jeffrey suggested, that the older practice had been to provide the witness with a previous remission or indemnity, on condition of his giving evidence; and that, in the end, it came to be held, that the production of the *socius* as a witness, on the part of the King's Advocate, implied that he had such indemnity; and rendered him, in fair procedure, entitled to the benefit of it. I see that Sir James Stewart, who was, as I formerly mentioned, eighteen years Lord Advocate, in the reigns of King William and Queen Anne, says,—' *Socii criminis* being often necessary, if they be first either purged or ' indemnified, are in use to be admitted witnesses.' Sir James seems not satisfied as to the propriety of the practice, but he could not be mistaken as to its existence. Mr Erskine alludes to the same practice in both his works. And Mr Burnet notices the ' *usage* of special pardons to accomplices, for enabling them to give evidence.' Considering the existence of this previous practice, and the nature of that practice which succeeded it, I certainly think that the theory I have mentioned is more probable than that one deriving the practice from the statute.

If, however, we are to give weight to that theory, the question now considered would be solved at once. For undoubtedly, under the practice of previous remission or indemnity, to which Sir James alludes, Hare would have been freed, at least from all that was in the indictment, and at least as soon

as he was put in the witness-box. And on this theory he ought to have the same benefit from the implied or virtual remission or indemnity.

But, be the theory of the origin of this practice what it may, this, at least, appears to me plain, that the protection of the *socius criminis* under this practice, is of the nature of a judicial arrangement or *quasi* contract, by which, on the one hand, the King's Advocate, as representing his Majesty and the public, does, by production of the witness, judicially extinguish the right of penal prosecution for the matter in which the witness is produced; and, on the other hand, the *socius criminis* is deprived of his right to decline answering, and is bound to give evidence, however it may criminate himself in that matter. Such I conceive to be obviously the true nature of the constitution of this right of protection. The protection plainly does not depend upon the explanation that is generally made by the Court to the witness. That may easily be omitted; for the fact of any witness being a *socius criminis*, does not appear on the indictment, and may not be known to the Court. Nor does this explanation enter the record; nor is its form that of an act of the Court, constituting right. It is not even made by the presiding judge, but the judge who swears the witness. The omission of it could never deprive the witness of his protection. As little does the indemnity depend on the nature of the evidence given by the witness generally. It takes place, and has, provided he does not refuse to give evidence, been explained to him before he gives evidence at all. It was perfectly understood in the case of Brodie, distinctly explained there, as well as in every case since, that the witness was safe in speaking *the truth*,—because, whatever his evidence should be, he was equally free from punishment. The only doubt ever was, in case of his refusal to give evidence.

Such being the nature of this proceeding, the question arises next, whether this, like all other parts of criminal procedure, must not, in all cases, have an interpretation and effect, such as is fair and just, particularly towards persons whose lives are in jeopardy? I can have no doubt of this. I cannot conceive that this effect can be denied to any judicial procedure that is legal, whatever may have been its origin. I repeat, then, I can have no doubt of this generally, and none, certainly, that it must apply to the wretched man Hare, as well as to others. If, as is said, (and in one instance, at least, it is but too difficult to refuse assent to it,) *he* has forgotten that he bore the form and nature of a man; Yet we must not forget it. He has still the rights of a British subject; and we are bound, by our oaths of office, to say that he shall not suffer in-

justice here; that he shall not be defrauded of his life by the effect of any procedure before us.

I ask, then, abstracting from the circumstance that the trial of the three acts of murder charged against Hare was divided by the Court, whether, in case the Lord Advocate, after bringing forward Hare to give evidence in the indictment against Burke, had stopt in his proof, after establishing the murder of Docherty, he, (or the private prosecutor, which is the same thing,) could have taken advantage of this to deny the protection of Hare, in respect to the two other acts of murder charged in that indictment? I cannot have the least doubt that this could not have been done. It would have been clear, that the *quasi* contract of indemnity was constituted before the witness gave any evidence at all, by his production as a witness on the part of the Crown; and that the measure of his indemnity must be taken from the matter in respect to which he was produced to give evidence,—*i. e.* the indictment, not the questions which the Lord Advocate, in his discretion, thought proper to ask, or the conclusions for which he might choose to insist: That the Lord Advocate might limit his prosecution, if he pleased, in some respects; but that it would be gross injustice to allow him to limit it to the effect of taking away the effective protection of his witness.

If this would have been clear, I am not able to see how it can make any difference, in material justice, that the particular course was adopted which actually was followed. It was competent for your Lordships to direct various courses for trying the indictment against Burke. It might have been tried by one Jury, at once returning a verdict on all the charges; or by one Jury returning a verdict on each charge separately, after hearing evidence on that charge; or by two Juries, of which the first returned a verdict on two, and the other on one charge; or by three Juries, each hearing evidence, and returning a verdict in reference to one charge only. This last mode was adopted. But still this, as well as any of the others, was a mode of *trying that indictment*; for the indictment was not thrown out, but found relevant; and the whole proceeding was to be on it alone. In it only was, and once only stated, the major proposition of the libel,—the clause of art and part,—the conclusion for punishment,—the notice of productions,—and the list of witnesses.

Hare, then, even if he had been fully acquainted with the course that was taken, might have said, that still the indictment must afford the measure of his protection; that he was entitled to expect, that, by whatever mode of procedure, this

indictment was to be exhausted, that he had nothing to do with the number of juries or verdicts; and that, at any rate, the Lord Advocate could not stop in the trial of the indictment, so as to prejudice his protection.

But in fact, (and this applies particularly to the question of fair dealing,) he was never made acquainted with this arrangement, or had the least hint that it made any change in the extent of his own indemnity. If he had been made to entertain even a doubt on that subject, he would assuredly have kept his mouth fast shut. Not being insane, if he had believed himself in danger of being tried for murdering, and supplying the surgeons with two bodies, murdered by him for that purpose, he would never surely have given evidence that he had previously done so on one occasion, and was intimate with another murderer of that horrid sort. But he had no such warning. It is true he was told to speak only to the murder of Docherty; but that intimation, made solely for fear of prejudice to Burke, must have been understood by him as meant only *in the first place*,—not at all as implying that he was not afterwards to give evidence in respect to the other charges, from which at the time, indeed, the Lord Advocate had formed no intention of departing. Standing thus called, and thus unwarned, he gave evidence which amounts to a *semiplena probatio* against him, if he should be tried for the murder either of Wilson or Paterson,—evidence which most materially served to convict Burke, (being most important, in reference to the *corpus delicti* in particular); but which, at the same time, implicated himself in the most fatal manner, unless he was protected in all the cases as King's evidence. After he did this, could it possibly have been conceived to be consistent with fair dealing,—with just procedure,—if the Lord Advocate had turned round upon him, and told him, that as Burke was convicted of one murder, and could suffer death but once, he would stop the course of the indictment against that person, and, in reward for the public service he had done, he, the Lord Advocate, would now turn the remaining charges in the indictment against him, already a confessed murderer for the surgeons, whose conviction must therefore be easy! Would that have been tolerable? If it had been done, might not this wretched man truly have said, that he was as much cheated out of his life, as ever was wild animal in the snare of the warrener? I do think, if the Lord Advocate had attempted such a thing, your Lordships would have rejected it with reprobation. You would have said, unanimously, that as the established practice (a practice which you had no power to change) caused the indemnity of witnesses to take place by a judicial arrangement,

made under your authority, you must be bound, by the universal and eternal rules of justice, to prevent an oppressive and fraudulent abuse of this part of your own procedure. I know well the Lord Advocate neither has done, nor will do this: I know he will do nothing but what is just and honourable; but the supposition is decisive of the present question, because the respondents can have no right to do what he could not have done. I respect the motives of the respondents, one of them particularly. She is the mother of poor Wilson, and cannot be expected to weigh fairly the rights of one whom she views as the murderer of her son. But we at least must look on them more calmly, and are, I think, bound to say, that she has no right of prosecution, if the King's Advocate be barred. Your Lordship will observe, I am not founding upon mere extrajudicial transactions. Nor do I found my opinion upon what took place in the Court, after the discussion about the question by the pannel's counsel was put respecting *other murders.* I do not care, therefore, what was said by either counsel or Judges on that occasion. Before that question was put, the indemnity of Hare was complete. For, before that question was put, he had been brought forward as a witness in the indictment, and had given his evidence for the Crown. At the same time, I may say that I do not conceive that the present question was at all in view at that discussion, or the opinions given upon it. Mr Cockburn did not say that he wanted to put questions respecting the murders of Wilson and Paterson, and that he was entitled to go that length, because, to that extent, the witness was protected. Nor did the Lord Advocate make any counter statement in reference to them. Mr Cockburn, I suspect, sought what he obtained,—a declinature to answer; and, therefore, broadly put the question, as to ' other murders, ' expressly saying, that he meant to ask the witness to reveal his whole life and conversation.

On that form of question the discussion followed, and opinions were given, in which, it may be, that the peculiar situation of the witness, in relation to the murders of Wilson and Paterson, was forgotten; but certainly there was no intention on my part, or, I believe, on the part of any of your Lordships, to give an express opinion that he had no protection as to these. The complainer quoted some words of mine, as if they pointed at an opposite opinion. I had not formed such opinion, and did not use those words with that intention; nor do I think they imply it. But neither am I conscious of having had any opinion formed, that there was not protection as to those charges. According to my recollection, the point of distinction

was not at all considered. It escaped attention, from the way the matter was put to us, and that is all that can be made of it. I do not consider myself at all pledged by any thing which took place then. Nor did I feel so pledged when you started the point, and asked our opinions, before charging the Jury. Accordingly, I then felt bound to agree with your Lordships' opinion, and did concur in it. The delivery of that opinion I do certainly consider as of weight. It was solemnly given as direction to the Jury. Still, however, one *dictum* of this Court, particularly without express argument on the point, is not sufficient to tie us up absolutely; and if I was now satisfied that it was wrong, I should not hesitate to admit this error; and would certainly not repeat it now, to the prejudice of the respondents' rights. But ampler discussion and consideration have only confirmed in me that opinion. The more I look to the practice of this part of our legal procedure, and to the great principles of general justice, that can never be lost sight of in considering the effect of any transaction, particularly a judicial one, the more I think that this wretched man has acquired a right to immunity in all the three cases that were charged in the indictment against Burke. Remembering, as we must do, the dreadful evidence he gave, it is impossible to contemplate his escape without pain,—a pain always felt, in some degree, in every case where an accomplice in a great crime, is, however necessarily, taken as evidence for the Crown, but never, I believe, felt more strongly than in the present. I sympathize in that feeling. But I feel not less strongly that this man, however guilty, must not die by a perversion of legal procedure; a perversion which would form a precedent for the oppression of persons of far other characters, and in far other situations, and shake the public confidence in the steadiness and fairness of that administration of criminal justice, on which the security of the lives of all men is dependent.

Lord Alloway.—I agree with every thing that has been stated by my brethren, with regard to the ability with which the debate has been conducted by my friends at the Bar; and I may also state, that never since I sat in this Court, nor at any former period, have I ever heard opinions delivered by the Court, of greater research, or greater talent. I certainly, as an individual, have received the greatest benefit from them, in point of information; and many of the acute observations of my brother, Lord Mackenzie, have made a considerable impression upon my mind. But, with all the profound respect I have for the opinions of your Lordships, and with all the pain I feel in differing from the opinions of the majority of my

brethren, it is my bounden duty to express whatever my opinion is, and the reasons upon which it proceeds. At this very late hour, I should be sorry to take the wide range which my consideration of this subject might have required; and I am most anxious to confine myself to as few observations as possible, since the opinion I entertain has been so well expressed by my learned brother, Lord Gillies, who spoke first, and in whose opinion I so entirely concur, that in going over the same reasoning, I should only weaken the powers and effect of his Lordship's argument. I entirely concur in what has been stated by all your Lordships, with regard to the conduct of the Lord Advocate, as stated in his Lordship's answers. I think his conduct has been manly and candid, and has been regulated by the soundest discretion, for the public interest. I think that the circumstances of this case, which he has made known to us, sufficiently authorized and justified the judicious measures which he had adopted for the discovery and punishment of the most atrocious offences which ever disgraced this country; and, indeed, this is strongly confirmed by the verdict, by which the charge against M'Dougal was found not proven. But, as shall be afterwards noticed, he has the power of redeeming his pledge, without calling upon the Court to exercise powers, which many may think new, and at variance with legal principles. It has, with great eloquence, been maintained, upon the part of Hare, that since the establishment of a public prosecutor, for the public interest, the rights of the private prosecutor have ceased;—that it now remains with the respectable officer holding the appointment of public prosecutor to pursue, *ad vindictam publicam*;—and that nothing is, or ought to be left to the private prosecutor, but private or pecuniary reparation; —and that to discountenance all private prosecutions, they are attended with restraints or fetters, to which the public prosecutor is not subject,—such as an oath of calumny,—the finding of caution,—the risk of being subjected to expenses in case of failure,—independent altogether of the great advantages which the public prosecutor enjoys, by being entitled to examine the nearest relatives of the injured party, and even associates in the offence, with impunity. All this is true; but, from these circumstances, in a Court of Law, I draw a very different conclusion. All the restraints and burdens imposed upon private prosecutors, demonstrate, that the right of prosecution is vested in them. These restraints are all introduced, lest the warm feelings of individuals injured, should carry them farther than the security of the individuals accused might warrant. All these are wise and wholesome restraints

upon private prosecutors, which do not apply to the public prosecutor, to whom, on account of his elevated situation, and his being unsuspected of individual interest, there was no occasion to apply them. But one and all of these restraints, imposed by law upon private prosecutors, demonstrate, that under these safeguards, private prosecutors have an unquestionable right of prosecution for all offences, in which they have a peculiar and individual interest, just as general and unlimited as the public prosecutor has. And, therefore, every restraint to which the private prosecutor is wisely subjected by law, distinctly substantiates the right of the private prosecutor to pursue, *ad vindictam publicam*, every offence in which he is interested, just as much as the public prosecutor himself. We, as a Court of Law, are not sitting here to determine what is most expedient, and most advantageous: this belongs to the Legislature alone, and not to a Court of Law. My opinion, that a private prosecutor has an undoubted right to prosecute to the highest doom, every offender who has injured him, and for the punishment of all offences in which he has an individual interest, is founded upon the authority of every Institutional Writer upon the criminal law of Scotland,—upon a variety of statutes,—upon the decisions of this Court, and upon the practice of the country. I should have thought the opinion of all our Institutional Writers upon this subject, without one single authority to the contrary, would have been sufficient to prevent the contrary doctrine from being maintained, chiefly upon the ground of expediency and advantage to the public. Indeed, our older writers shew, that the private party was the chief prosecutor, and that the public prosecutor was only subsidiary. But I wish not to go into authorities, when the subject has been so universally laid down by our latest and most approved writers on the subject,—by Baron Hume, Vol. II. p. 115, whose last edition was published in 1819, only ten years ago, and by Mr Burnet, p. 296, published in 1811; and the last of whom, after agreeing with Mr Hume, and laying down the universal right of private parties to prosecute for the punishment of all offences in which they were individually interested, mentions that this right still subsists with the same effect, and to the same conclusions, as to the full pains of law, as a prosecution at the instance solely of his Majesty's Advocate.—*Burnet, p.* 297. Indeed, Mr Burnet speaks of the union of these two modes of prosecution, as constituting the pre-eminence of the criminal jurisprudence of Scotland,—that it is by preserving both in full vigour, that public justice is effectually secured; that the remissness and partiality of the public prosecutor is, on the one hand, guarded against, and the too great lenity and forbearance of the indivi-

dual corrected on the other; and he imputes it to this cause, that in this country no prosecution can, in any instance, be stifled, and the feelings of the individual or kinsman outraged by a denial of justice; while, in other countries, the *nolumus prosequi* of the public prosecutor, stops in many cases any process at the instance of the party injured. Thus, upon this great constitutional question of the right of the private prosecutor, Mr Burnet seems to rest not only the pre-eminence of our criminal jurisprudence, but the certainty of all offenders being prosecuted *ad vindictam publicam.* I am most ready, as an individual, to pay the just tribute of applause to the Lord Advocate, and the gentlemen who assist him in the administration of criminal justice in this Court. Ever since I was a member of it, I have seen nothing to blame, but, on the contrary, every reason to praise the singularly humane and mild manner in which the criminal business is conducted. I have never seen any serious doubt thrown out as a plea for the prisoner, without its receiving the most candid discussion upon the part of his Lordship; and if a doubt remained, the instant abandonment of the case left an example of moderation to his successors. But, as my brother, Lord Meadowbank, has depicted the unjust proceedings both of the Court and of the prosecutors in former times in glowing colours, we cannot forget that there were evil times when the most atrocious conduct took place with regard to the prosecution of offenders. And who can say that bad times may not again occur in this country? I am, therefore, most anxious that every constitutional right, especially that of private prosecution, which has been handed down from our ancestors, as the great check and security for the punishment of offences upon which our institutional writers have placed such importance, shall be preserved, and be transmitted unimpaired to our posterity. My brother, Lord Meadowbank, in his very learned statement, seemed to conceive, that in early times, before the appointment of a public prosecutor, the preparation of the trial, both as to culprits and witnesses, must have been in the hands of the Justice-Clerk, and of this Court. But this certainly proceeds upon a mistake. The Justice-Clerk, although now for a great length of time at the head of this Court, then sat at the table as a clerk, and issued all the executorial of the law, in the same way as the person bearing a deputation from him now does; and I could hardly conceive a greater outrage upon all criminal jurisprudence, than that the Court who was to try the case had the means of preparing the evidence, and selecting the culprits who were to be tried before them. But, dreadful as the representations of many of our old trials have been, and disgraceful as they are

to the country where they took place, I do not think that the High Criminal Court ever stood in this situation. After the appointment of the Lord Advocate, as public prosecutor, I also conceive, that his Lordship's view is equally erroneous; because, instead of the Lord Advocate, as the public prosecutor, being the sole person for selecting the culprit and the witnesses, long after his appointment, we find repeated statutes giving encouragement to private prosecutors, and we find repeated judgments, in the most important trials, at the instance of individuals. For, although the Lord Advocate is mentioned as public prosecutor in the act 1579, c. 78, yet, in the course of the 17th century, there are two different acts encouraging private parties to prosecute criminally, and which shew the universal practice in that respect. The act 1612, c. 4, enables the parents or nearest of kin to prosecute for the offence of rape, even although the criminal endeavour to protect himself by the subsequent consent of the woman ravished. And by the act 1671, c. 26, it is provided, that although in the case of conviction of the thief, the stolen goods belonged to the Crown, yet that they shall, from that time, belong to the person from whom they were stolen, provided the owner pursue the thief *usque ad sententiam*. And we well know, that during that period, criminal prosecutions were chiefly at the instance of private prosecutors. This is expressly mentioned by Burnet, p. 297, although the concourse of his Majesty's Advocate was added in order to secure any interest which the Crown might have. And, in the 18th century, in 1723, a trial occurred in the case of Charteris, at the instance of a private party, for a capital crime, with the concourse of his Majesty's Advocate; and the concourse having been withdrawn immediately before the party was proceeding to trial, informations were ordered to the Court upon the relevancy of the charge at the instance of the private prosecutor. In that case, argument was maintained by the most eminent lawyers then in Scotland, upon the same ground with the plea stated in Hare's information; yet the Court found the libel relevant. It appears that the offender in that case had obtained a remission; but being called upon by the Court to say whether he founded upon it, he, at that time, waved the privilege arising in a great degree from it; and the proof having failed, in consequence of which a special verdict was brought in, the pannel was subjected in £300 of damages and costs. No doubt is entertained, either by Burnet or Hume, that the Lord Advocate may be compelled to give his concourse. Sir Thomas Hope, who had refused his concourse to an action of reduction-improbation, because he conceived the interest of the Crown was to support

the deeds attempted to be improved, was obliged by the Court to give it, although his right to appear for the Crown, upon the other side, was reserved. And in the case of Sir John Gordon, Maclaurin, p. 258, it was found, that the Advocate might refuse his instance; although, as strongly expressed by Lord Alemore, in that case, if the Advocate had refused to give his concourse, he might have been compelled to give it, for every one is entitled to justice.—*Maclaurin*, p. 298.

And we have had many instances, even in the most recent periods, of prosecutions for the highest offences, at the instance of the private party, with the concourse of the public prosecutor, and many of the accused persons were not only convicted, but executed. In 1803, no less than five persons were tried for their lives, at the instance of the nearest relations of the persons killed by the military in a riot at Aberdeen. In that case, the Lord Advocate refused to prosecute, and no person could compel him; but he could not refuse his concourse; and Colonel Mackenzie, Captain M'Donach, and three other persons, were in this way exposed to the peril of their lives, without a single objection being stated (as Lord Gillies, who was counsel for one of them, has mentioned) to the relevancy of the libel. And, besides, every one remembers, that until within these few years, all the prosecutions for forgery were at the instance of the banks, with concourse of the public prosecutor; and in the only case reported, that of the Royal Bank, with concourse of his Majesty's Advocate *against* Young, that person was executed.—*Maclaurin, p.* 122. I cannot conceive, therefore, how a doubt could be started, that it was the right of the private prosecutor to prosecute for a criminal offence, by which he had been injured, and that this right exists at this moment, in the same vigour that it ever did in the law of Scotland, and can neither be stifled, controlled, nor affected by the right of the public prosecutor, although the most ample means remain in his power for keeping the faith which, with the highest discretion, he may have pledged in favour of any offender.

This leads me to consider the situation of a *socius criminis*, and the nature of the protection which can be afforded him, either by this Court, or by the Lord Advocate. I differ from the view which has been taken by my learned brother next me, (Lord Meadowbank), as to what was formerly the law of Scotland, and the protection which *socii criminis*, when examined, could obtain. I can see no reason to doubt the opinions of Hume, of Burnet, of Mackenzie, and our older lawyers; and I must even reject the opinion of Lord Hailes, much as I respect it, in speaking of Mackenzie being inaccurate or

ill-founded on this subject. With great deference, Sir George Mackenzie, who acted for a great length of time as Lord Advocate, at a period when there was a most lamentable number of trials, and for the most serious offences, is a better authority upon this subject than Lord Hailes can be, nearly a century afterwards. I cannot conceive that, with regard to the rules and principles of his own conduct, and the practice of the law at that period, Sir George Mackenzie is not the most competent authority. Indeed, the admission of a *socius*, as taken notice of by Lord Meadowbank, in the atrocious trials referred to, and which his Lordship himself admits were so very bad, could hardly be received as any authority. I am afraid, that if these horrible periods were to be ransacked, there would not be wanting the most numerous instances of oppression and injustice, directly in the face of all law; and, therefore, I cannot conceive that these cases can weigh against the united opinions of all our writers, ancient and modern, so fully confirmed by the practice of the Court. I rather agree with Baron Hume in tracing the change that began to take place in our law, to the act 21st Geo. II. Mr Erskine also refers to it; and I really cannot help thinking, that this statute of itself is a complete refutation of the theory which my learned brother, (Meadowbank), has supported with such ingenuity. In 1748, when that act passed, could any person have entertained the notion, that it was competent in Scotland to examine a *socius criminis*, or that he had any indemnity for criminating himself when he was so examined, when it required a special statute, *first*, for examining him, and, *secondly*, for preventing his being again tried for what he had said as a witness? No doubt the statute is confined to particular offences; but certainly the principles of it might have applied to all offences; and although it is impossible to doubt that a general statute should have been obtained, applying these enactments to all crimes whatever; yet, as Mr Hume observes, it may have laid the foundation for a practice in the Court, consistent with this principle. But a statute passed in 1748, is at this moment in *in viridi observantia*. No statute passed since the Union can be obsolete; and it seems to have been utterly impossible that this Court could grant any protection beyond the indemnity granted by the act. Now, the indemnity granted by the act could only apply to the case of the witness when examined in a trial; and it is impossible to apply it, either to any private agreement, which may have been entered into between the public prosecutor and the witness, to any thing which may have passed on a precognition, or to any thing but what had been stated by him as a witness on that trial. This, I conceive, is the

highest extent to which the protection by this act could be extended. The first case we have is in 1770, that of Jameson, only 22 years after the passing of the act, in which the notions of the Court were certainly not very clear or distinct. In Smith and Brodie's case, however, 18 years afterwards, I admit that the Court did give a much more clear opinion; and, although the opinions delivered by the very first Judges in Scotland, as applicable to the law of Scotland, in 1794, in Downie's case, seem to leave great doubt upon the subject; yet as 40 years have run from the decision in Brodie's case, which has since been confirmed by many others, I am willing to assume, that by the practice of this Court, a protection has been held out, that nothing stated by a witness on a trial shall be held to inculpate himself, or that he could be tried for the same offence as to which he had given testimony. But I cannot conceive that any protection could be held out by the Court beyond that granted by the statute, or that a court of law could give a protection beyond what the statute provided, although, in practice, it might be extended to other crimes than those contained in the statute. As 40 years have therefore elapsed since the trial in the case of Smith and Brodie, in which a clear opinion was given by the Court with regard to this protection, I am willing to hold that, by the practice of the Court, a complete protection and immunity has been held out to the witness against his being tried for whatever he has uttered as a witness criminating himself. Holding this to be the case, therefore, I conceive that Hare might have a protection as to the murder of Campbell, he having been a witness against Burke and M'Dougal in their trial for that murder. But my doubt is, how far, by his being examined as a witness on that trial, he could have any protection in the case of the murder of James Wilson, or in the case of any other trial for murder, in which he was not examined as a witness, and could not have been examined, no such trial having ever taken place. It is very true that Burke was accused, in one indictment, of three acts of murder; but there was only one of these acts, that as to the murder of Docherty or Campbell, sent to trial. The interlocutor of relevancy certainly applied to the whole indictment; but the trial was confined entirely to the third charge, for the murder of Docherty or Campbell. With regard to the two other charges contained in the indictment, as to the alleged murders of Wilson and Paterson, it is quite clear that no trial either did, or could take place, although the Lord Advocate might, upon that indictment, have afterwards proceeded to the trial of those other two charges of murder. Indeed, they seem to have stood precisely in the same situation as

if there had been separate indictments, upon which an interlocutor of relevancy had been pronounced, and which afterwards might be tried or not, as the public prosecutor thought fit. As I was not present at the trial, it is impossible for me to judge of the printed account of it. One of my brethren, (Meadowbank), seems to admit that it is pretty correct, while Lord Mackenzie has altered the statement, as represented to have been made by him, and I have no doubt he has done so most accurately. But still I must entertain doubts how far this Court, as a Court of Law, could give any protection to Hare, as a witness, with regard to those two charges, as to Wilson and Paterson, or any other cases in which Burke never was tried. And I conceive, that as it is only by a person being examined as a witness in a particular trial, that the Court can extend its protection to the crime as to which he has been examined, this cannot be extended to cases in which he was not examined, and as to which the Court must be totally ignorant. With regard to any crimes not contained in the three acts charged in the indictment, I conceive it would be impossible to claim any protection, at least from this Court, as a Court of law. And upon the same ground, although this protection extends to the case of Docherty, in which he had been examined, I cannot conceive how it can be extended to the other cases as to which he was told not a question could be put to him, and in consequence of which he declined to answer every question that was put to him with regard to any other murder, and particularly the murder which had taken place in his own house, in October. It is surely not enough that a libel has been executed, containing three charges, and that a person has been cited as a witness on the indictment, to give any protection as to the cases which were not tried. Supposing that the private party had discovered evidence to accuse any of the witnesses cited to prove the indictment as to Wilson or Paterson, of being art and part in either of these murders, and who had never been examined at all as to Docherty, could they have pleaded the protection of this Court, or an exemption from trial, because their names had been in the list of witnesses in the indictment, containing those charges against Burke, but which had never been tried? Upon the same ground, I conceive, that although Hare was examined on the trial of Burke and M'Dougal, as to the murder of Docherty, he unquestionably was never examined, nor was one question put to him, nor could it have been put to him, with regard either to Wilson or Paterson, without his being told that he was not bound to answer it; and he accordingly declined to

answer all such questions. As Hare was therefore examined as a witness with regard to the case of Campbell alone, I do not see how this could give him any privilege or protection in the case of Wilson or Paterson, or as to any other offences in which he was not examined. For if I understand the trial at all, as it has been printed, it was entirely confined to the murder of Campbell, and it was not competent to put a question to him in relation to Wilson or Paterson. And therefore, giving every possible effect to the statute 21st Geo. II, and to every thing that has been stated by our institutional writers, Hume and Burnet, and to the decision in the case of Smith and Brodie, which has been followed in practice since that time, I can find no authority for this Court extending its protection beyond the case in which the person pleading it had been examined as a witness Indeed, if the Court can extend this protection so as to prevent all investigation whatever by the private party, either in consequence of an agreement with the public prosecutor, or with regard to other cases not tried before them, it would confer upon the public prosecutor, or upon this Court, powers which the Crown, the great fountain of mercy, does not possess. I have already stated, that I conceive that the Advocate is bound to fulfil his pledge, and preserve his faith, even to the greatest criminal that ever existed;—and his Lordship has the most ample means in his power of doing so, in the most constitutional manner, by procuring a remission from the Crown, or a pardon, for which he cannot in vain apply. By acting in this manner, the rights of all parties might be preserved: for, by a variety of statutes, the Crown cannot grant a remission or pardon, without subjecting the party to find caution for the assythment. These statutes are mentioned by Baron Hume, Vol. I, p. 280; and cases are, unfortunately, found in our books, where the parties not being able to find caution for the assythment, were actually executed. This happened in the case of Dunn, mentioned by Hume in a note, Vol. I, p. 280. This tends to shew the serious nature of assythment, by our law, which is totally different from the civil claims of reparation, which may be applied to every case where an injury has been sustained, and even to the case of a party acquitted of a crime. But assythment can only be claimed, in the *first* place, where the pannel is found guilty of culpable homicide. If he were found guilty of murder, no assythment can be claimed. And, *secondly*, it is due when the sentence or proceedings are prevented by a remission, or a pardon. And assythment cannot be claimed in any other circumstances. It is shewn by Maclaurin, p. 59, that a remission, so late as the year 1717, was held equivalent to an ad-

mission of the fact, and that the party could not thereby be deprived of his assythment. In the case of Malloch, who was convicted of murder, but was pardoned from some exception taken to the verdict, the Court found the pardon did not remove the claim for assythment due *ex delicto*,—Maclaurin, p. 126. And the civil court, in that case, refused a *cessio bonorum*, as the assythment was a punishment due *ex delicto*. I shall not go over the other cases, so well stated by Lord Gillies, except to make a single remark on the case of Leithhall. In that case there had neither been a trial, remission, nor pardon. But Abernethy of Mayen, the person accused in this indictment, had escaped, and sentence of fugitation upon the indictment, for murder, had been pronounced against him. The question was, whether this fugitation afforded such *prima facie* evidence of murder, as to warrant assythment against Lord Fife, the donator of the escheat, or whether it only amounted to a contempt of the Court? It was there maintained, that in Campbell's case, the Court had been almost unanimously of opinion, that an assythment could not be claimed, either where a capital punishment had been inflicted, or where the criminal had not been brought to trial. It was clear, that the Court of Session could not admit a proof of murder, nor had it ever done so. The Court at first found, by the narrowest majority, that no assythment was due, but afterwards found assythment due. And Mr Hume, in considering the question of assythment, thinks this a most doubtful authority. And I certainly entertain the same doubts, as fugitation did not afford the same evidence of guilt, as either a remission or pardon necessarily did. Of course, if the Court do alter the Sheriff's judgment, either they, or the Lord Advocate, by this means, can deprive this party, and every private party whatever, of assythment. Yet, the King, as the sole fountain of mercy, could not, by granting a remission or pardon, exclude the assythment. So that, in this way, by the stopping of all procedure, this Court may have the power of placing individuals in a situation which the Crown itself, by a pardon or remission, could not do. The Lord Advocate may redeem his pledge by a remission or pardon,—but neither of these could deprive a private party of those rights of prosecution, which he unquestionably enjoys. Assythment arises only when a crime has been committed, and has been proved or admitted by a remission or pardon. But how can this be proved, if all investigation is instantly stopped? No assythment can take place in the case of Burke. There the vengeance of the law has had its full effect, and Hare may be protected by the practice of this Court; but I doubt much how far this Court has any

right to stop the private party in a prosecution in a case in which Hare has not been examined as a witness.

Lord Justice-Clerk.—My Lords, We are called upon, on the present occasion, to decide an important question in the criminal law of Scotland, and one that deeply affects the practice of this Court, in a material department of that law. And considering its importance, both in a general point of view, and as it regards the interests of the parties, none of us can regret that we have allowed it to be discussed in the fullest and most deliberate manner, and with very able assistance from both sides of the Bar.

We are now to decide, whether the prayer of the bill of advocation, and suspension and liberation, presented to us in the name of William Hare, is a legal and competent one, and ought to be granted? He prays for immediate liberation, and a stay of all farther proceedings in the precognition commenced by the respondents against him, as guilty of the murder of James Wilson, their near kinsman, upon the ground that, in consequence of the facts set forth in the bill, these respondents are not, by law, entitled to bring him to trial for that offence.

As to the objection that this application is not made in the proper time, it humbly appears to me, (with my brother on my right hand) to be ill-founded. Because, if it is not competent for the respondents to bring the prisoner to trial, it is manifest that he has a direct interest to insist for immediate liberation from that legal detention and confinement to which persons accused of capital crimes, for which they must answer in this Court, are necessarily subjected, as well as to have the precognition against him entirely quashed.

In considering this question, it is proper to attend, in the *first* place, to the situation in which the prisoner, Hare, actually stands at the present moment;—*2dly*, to the legal consequences that follow from that situation.

Now, as to the *facts* upon which he relies,—they are to be found set forth in the bill of suspension,—in the manly, straightforward, and explict statement contained in the answers of the Lord Advocate, put in at the desire of the Court, and which, I agree with all your Lordships, do him so much honour,—and in the actual examination of Hare, as a witness on the trial of Burke, under the indictment charging him with *three* acts of the crime of murder, including that of James Wilson, the individual now in question.

From the statement of the Lord Advocate, it is placed beyond all doubt, that with a view to the public interest alone,

he resorted to the course therein detailed. And considering the atrocious, extraordinary, and unexampled nature of the crimes to which his attention had been called,—the infinite importance of avoiding the risk of the escape from punishment of all who *then* appeared implicated in these crimes,—and the immense advantage of a public example from a conviction,—he did exercise a wise and sound discretion, in betaking himself to the evidence of Hare and his wife, and giving the assurance stated in his answers.

It, moreover, appears to me, that the propriety and wisdom of the conduct of the public prosecutor, in regard to the important and delicate duty he had to perform, have been most fully evinced by the result of the trial and conviction of William Burke. If, instead of following the course he did, he had indicted *Hare* and his wife, along with the other prisoners, for the murder of Docherty, (the public prosecutor having *then*, according to his own statement, no sufficient information regarding the murders of Wilson and Paterson,) and had failed to obtain a verdict, against the certainty of which not being the case, no one will venture to give an opinion,—it may be considered what would then have been the feeling of the public in regard to such a proceeding.

Keeping the above circumstances in view, and attending particularly to the nature and structure of the indictment exhibited against Burke and Macdougal, charging the single crime of murder in the three specific acts against Mary Paterson, James Wilson, and Mrs Docherty, or Campbell, all alleged to be perpetrated in the same way, and with the same *intent*, viz. for the sale of the bodies for dissection, in the list of witnesses subjoined to which, Hare and his wife were included,—the interlocutor of the Court finding the *whole* indictment relevant to infer the pains of law, but, upon the motion of the prisoners, allowing the separation of the charges, and the trial then to proceed as to the murder of Docherty alone,—the subsequent direction, at the desire of the prisoners, given to Hare, to confine his statement to the case of Docherty,—the examination which he then underwent, both for the prosecution and the prisoners, is to be carefully attended to.

To those who heard, or have read an accurate account of that examination, it must be manifest, that though directed to speak only to the particular act of the murder of Docherty, *Hare* did swear to circumstances that have a most direct tendency, not only to criminate himself, but to establish a guilty connexion with Burke, whose guilt in the murder of Wilson, as laid in Hare's own house, is specifically charged in the indictment. He swears to his having become acquainted with

Burke about a year ago,—to his being familiar with the term '*shot*,' and what it meant, and its having frequently been used by Burke,—to the manner in which Docherty's body was sold,—and to his having got money, through Burke, for bodies, on other occasions, though they had had no quarrels about it. It is impossible, therefore, for any man to deny, that though, in reference to certain questions, he did, under authority of the Court, (which shall be noticed more particularly hereafter), decline making answers, in the language of his own information, 'Hare did surround himself with dangers from 'that examination.'

It remains, then, to be considered, what are the legal consequences of a person in Hare's situation being so dealt with;—*first*, in regard to the public prosecutor himself; and, *secondly*, in regard to the private parties in this case.

While it appears to me, that according to the long and established usage of the criminal law of Scotland, it is the undoubted privilege of his Majesty's Advocate, who prosecutes for the interests of the whole of the community, to select from those suspected of crimes, and to use, as witnesses, such persons, whose evidence he deems material to the ends of public justice, and to assure them, that upon giving evidence, he will never bring them to trial for their concern in the transactions as to which they are examined,—it is now a fixed principle of law, that the fact of the *socius criminis* having been examined, and given evidence, operates an entire immunity from any prosecution or trial on account of that transaction.

It is no doubt true, that it appears, that at an early period in our law, the objection to the admission of a *socius criminis* to give evidence in a criminal trial was generally sustained; though in regard to one species of crime, viz. *forgery*, it seems, even according to *Mackenzie*, and other writers, always to have been disregarded. And I see also, in a civil case, in January 1582, that of the *Stranger Flemings* v. *Burgesses of Edinburgh*, that *socii criminis* in regard to *acts of piracy*, though objected to, were received. Other important instances of the admission of accomplices, have this day been pointed out to your Lordships.

In the progress of society, however, and the increase of crimes, many of which it became obvious could never be detected without resorting to their evidence, *socii criminis* came to be acknowledged as admissible witnesses, in regard to all crimes. This progress in our law will in no degree appear surprising, when it is recollected how gradually only the many

objections formerly sustained against witnesses,—from their sex,—being domestic servants,—and in other situations, as laid down by Mackenzie, and other early writers,—came to be disregarded.

In reference, however, to the objection arising from the supposed interest of accomplices to screen themselves at the expense of others, and in order to place them in the same attitude as other witnesses, except as to the *credit* due to their testimony, which must always remain for consideration, it came to be a question, how such objection could be obviated; and it certainly appears, that formerly, in some cases at least, this was accomplished by the grant of an express remission of the crime. We see, accordingly, in the case of Nicholson of Tillicoultry, 7th December 1696, that the Lords demurred to the receiving *socii* as witnesses, unless the objection were removed by a remission, as was practised in the case of Salton's forfeiture: And on this scruple the Lord Advocate *superseded to insist* for some time, according to Lord Fountainhall.

But that the actual grant of remission was not always adopted, even during a great part of the last century, seems manifest from the case of Young, tried for forgery before the Court of Session, at the instance of the Royal Bank, with concourse of the Lord Advocate, 3d July 1750, where the objection to a *socius criminis*, (the most dangerous of the persons concerned in the crime, as noticed by Kilkerran,) *was taken and repelled;* but in order to affect his credit, he was allowed to be asked by the pannel, whether he had the promise of *a pardon*, to which he deponed in the negative; and there is no indication, from the Report, that a remission had either then been obtained, or was directed to be procured.

While accomplices must have continued to be received in other cases, the question of their *admissibility* was not again discussed, till the case of Macdonald and Jameson in 1770, when it does seem, that in answer to the objection, it had not been argued, that by being examined, the accomplice would *be exempted* from prosecution, but only that he might hope for impunity.

It is unnecessary to inquire, whether the answer that was thus made proceeded upon a correct assumption *of the usage and practice of the Court* at its date, or not; it only appearing that the objection was repelled, as the point came to be solemnly argued eighteen years thereafter, by the first abilities of the Bar, and the matter finally set at rest, by the solemn and deliberate judgment of the Court. This occurred in the noted trial of *Smith and Brodie*, in August 1788. I refer to the edition published by Mr Morrison, the agent for Smith, which does

not materially differ from that of Mr Creech; and the trial itself is referred to by Baron Hume. In that case, an objection was taken to the admissibility of Andrew Ainslie, an avowed accomplice, and whose evidence, along with that of another person in the same situation, was so decisive of the guilt of the accused. The objection was farther coupled with the allegation, that a bargain was made by the Sheriff with Ainslie, *to procure him his Majesty's pardon*, on condition of his accusing the pannels. The opinion of the Court was unanimous in repelling the objection,—and so clear was the law held to be, that the Lord Justice Clerk would hardly say a word upon it; but, in delivering his opinion, Lord Eskgrove, after adverting to the special circumstances of *the alleged bargain*, expresses himself in these words:—' I am likewise of opinion, that these do not go to his ' admissibility; for your Lordships will observe, that Ainslie ' cannot possibly be under any temptation now to accuse the ' pannel, in consequence of that bargain. If I understand the ' law, my Lords, the calling any person as a witness on a trial, ' is completely departing from any right to indict that person ' himself, as being guilty of the crime concerning which he ' is called as a witness.'

A more solemn adjudication, of any point of law, never was given on any occasion whatever. It has accordingly been held to settle the law ever since; and has been followed in innumerable instances, in this Court, and on all its circuits.

The fact is, that it appears from the record, which I have examined, that seven years prior to its date, in the noted trial of Dunn and Kay, before my Lords Justice-Clerk Miller and Gardenstone, for the robbery of Provost Hutchison of Ayr, *Henry Miller*, an avowed accomplice, and who had taken an active part in the crime, was, without objection, examined as a witness for the Crown, and gave most important testimony in the case, which terminated in the capital conviction of the pannels,—their counsel being a gentleman who was ' no granter ' of propositions,' inconsistent with the law, and who was lately a Judge of this Court. There is no trace in the record, however, of any remission or pardon having been then founded on, in regard to that accomplice.

But the judgment of the Court, in the case of Smith and Brodie, is of more importance, from another circumstance, which occurred, in regard to another objection taken to the other accomplice, who was also adduced against the prisoners. The objection of being an accomplice was not renewed as to him; but it was specially objected, that John Brown, *alias* Moore, had been rendered infamous, by a conviction and sen-

tence pronounced at the Old Bailey. That objection was answered, by the production of the King's pardon *for that particular crime*, and thereby doing away the infamy created by it. The answer was sustained by the Court; and while their attention was thus called to the effect of the pardon produced, their opinions in declaring that none, in fact, was necessary, in regard to the objection to the *socius criminis*, and that the mere act of giving evidence established absolute immunity, must be held to have the most decisive effect.

Whatever, therefore, may be the law of England upon this point, as it is laid down in Philipps and Russell, and fully expounded by Lord Mansfield, in the case of Mrs Rudd, which, however, differs from ours more *in form* than *in substance*, there certainly can now exist no doubt as to the rule of the Criminal Law of Scotland. According to the law of England, where an accomplice gives evidence, though he is not at the moment assured that he is, *eo ipso*, secure from all future trial; yet he is held so completely entitled to his pardon, that the Judge will admit him to bail, and, if it is attempted to try him, will stop the trial, till he has an opportunity of applying for a pardon. In our law, on the other hand, it has been fixed by solemn decision, and impregnable usage, that the act of giving evidence in a criminal trial, does, *ipso facto*, secure the accomplice from all prosecution or question for the crime or transaction with regard to which he has given evidence.

How the principle came to be adopted and acted on by the Court, it is superfluous to inquire; but, as noticed by Baron Hume, it is most likely that it arose from attending to the enactment of the 21 Geo. II. chap. 34, sect. 20.—That act for repression of thefts and depredations of cattle in the Highlands, provides, That in all trials, therefore, 'it shall not be 'allowed to be a good objection to any witness produced for 'proving such libel or indictment, that he was himself *particeps*, or *socius criminis*, nor shall the evidence given by such 'witness be made use of against himself, *nor shall he be liable 'to be prosecuted for his accession to the offence*, which he shall, 'as a witness, give evidence that the same was committed by 'the prisoner or pannel, in whose trial he shall be so adduced, 'or that such prisoner or pannel was art and part thereof, any 'law, custom, or usage to the contrary, notwithstanding.'

Though aware of the succeeding clause which has been referred to by Lord Pitmilly; yet, seeing that such was the declared will of the legislature in reference to the security thus afforded to accomplices in this particular crime, it was by no means unlikely that, when it came to be established in practice, that accomplices were admissible in all crimes whatsoever,

and the objections that were formerly sustained came to be disregarded, the Court should have been led to apply the same principle, by at last declaring, *that the fact of giving evidence in a criminal trial, did of itself afford complete indemnity to the accomplice.*

That the authority of the decision in the case of Smith and Brodie is in no degree weakened by any thing that took place in the subsequent trial of Downie for High Treason in 1794, is obvious from attending to the language both of the *Bar* and the *Bench* upon that occasion.

Mr Clerk, counsel for Downie, then maintained, that, ‘ in ‘ the Scots criminal Courts, when a *socius criminis* is ad- ‘ duced as a witness for the Crown, he is told by the Judge that ‘ his evidence will not militate against himself: and even, that ‘ by giving his evidence, he is secured from any future prose- ‘ cution upon the facts to which it relates.’

The opinions of the Lords President and Chief Baron, though supposed in the passages referred to in the respondents information, to narrow the privilege of an accomplice, cannot, upon an attentive consideration of them, lead to any conclusion which can detract from the weight of the decision in the case of Smith and Brodie. These eminent persons, though conversant with the duties of public prosecutor, had not themselves sat as Judges in this Court. It is from those, therefore, that so sat, and whose minds had constantly been directed to the subject, that an exposition of the law of Scotland was chiefly to be expected. Accordingly, Lord Eskgrove, the senior Judge of this Court, then present, did give an able and luminous opinion upon the point, part of which only is recited by the respondents; but the whole of which it is particularly necessary to attend to.

His Lordship said,—‘ I think it fit to say a few words on ‘ this subject, as being the senior judge (now present) of the ‘ Court of Justiciary, in which Court I have sat nine years, ‘ and had before attended it ever since I came to the Bar. ‘ I never doubted that the law of Scotland now stands as it ‘ has been explained, both by your Lordship and the Lord ‘ Chief Baron. In this country, and I believe in every coun- ‘ try which has a regular constitution and government, *socii* ‘ *criminis* are admissible witnesses in trials for crimes; and, ‘ indeed, in many cases, justice could not be done, nor the ‘ greatest criminals convicted, without the aid of such evi- ‘ dence; accordingly, very few cases have been tried, at any ‘ time, of a complicated nature, in which many persons have ‘ been concerned, where *socii criminis* were not examined;— ‘ but I never knew an attempt made by the prosecutor to bring

‘ afterwards to trial for the same crime, any person who had
‘ been examined as a witness upon that crime, to which he had
‘ been accessary, and who had not refused to give evidence,
‘ but had given evidence. I had conceived a notion in my
‘ own mind, that if such an attempt should be made, the
‘ judges who are to determine upon the law of the land, as it
‘ strikes them, would not suffer a person so circumstanced, to
‘ be subjected to a trial; and, consequently, that it is not op-
‘ tional for the public prosecutor to bring him to trial or not,
‘ for that the Court would interfere and prevent such trial
‘ proceeding, although that case has not yet occured. [Here
‘ the public prosecutor has thought fit to bring, by *sub pœna*,
‘ to give evidence, a person who, in the language of England,
‘ is an associate in the crime; and if that person should say
‘ nothing after he is sworn, it would not prevent him from be-
‘ ing tried; but his giving evidence is the thing that must
‘ secure him. I did not, however, conceive, that the question
‘ now put to Mr Aitcheson could have led to the discussion of
‘ this point, because he formerly gave evidence in a case that
‘ was tried upon a charge for sedition, respecting what is
‘ called the British Convention, in consequence of having
‘ been told, that his giving evidence was to secure him
‘ from being tried for any crime, whether under the name of
‘ treason or sedition, arising out of his having been a member
‘ of the British Convention.] * I therefore think, there is no
‘ place for the objection in *his* case, and with respect to any
‘ other witnesses who may have been accomplices. I am of
‘ the same opinion with your Lordships: it is not competent
‘ for the prisoner's counsel to object, although the witness
‘ himself may decline to answer to questions, tending to
‘ criminate himself; but if he chooses to answer, and gives
‘ evidence, I conceive, he will be secure against any future
‘ prosecution.'—(State Trials, Vol. XXIV. p. 33).

It cannot fail to be here observed, how important this opinion is in the present question. It lays down in the most unqualified terms, that though brought forward as a witness in a trial for sedition, Aitcheson had an assurance of security against all trial, either for treason or sedition arising out of the proceedings of the British convention, as to which he had been examined; and which proceedings had, in fact, been brought forward in Downie's trial for high treason. This shows, in the clearest manner, that the security that is afforded to an accomplice when giving evidence, *is not to be narrowly or judaically interpreted.* If he fairly and openly answers the questions

* The passage within brackets, was omitted in the quotation of Lord Eskgrove's speech, given in the Information for the Wilsons.—Ed.

which are put to him,—if he readily discloses his connexion with the accused, and the transaction that is the subject of his trial,—if no attempt is made to keep back facts strongly militating against the witness himself,—and if such matters are disclosed as strongly bear upon other acts of the same crime, in which the parties have been engaged,—it is manifest, from the above opinion of my Lord Eskgrove, that the shield of the law is sufficient to protect such a witness effectually; and that it is contrary to the plainest maxims of justice and fair dealing, to allow him to be put into the jeopardy of trial for the concern he may have had in the transaction as to which he has given evidence.

That the same views of the law have subsequently been entertained and acted on by the Court, is demonstrated by the proceedings that took place *in the case of Dreghorn*, who was tried for murder in February 1807. I was myself the counsel for the prisoner, who took that objection, and was at first successful in persuading a majority of the Court, to reject a soldier, offered as a witness against the prisoner, upon the ground, that as he was himself implicated in the affray out of which the slaughter in question had originated, and was then in custody, by military authority, and liable to be tried by a court-martial, for a military offence, the Court could not protect him against the consequences of such prosecution; and, therefore, he was inadmissible as a witness, on the score of having a direct interest to criminate the prisoner. The like objection was renewed as to another witness; but having been fully debated, the majority of the Court concurred with the then Lord Justice-Clerk, in finding the objection was ill-founded; and declaring, that the fact of the witness having been examined on a criminal trial in this Court, was, of itself, sufficient to *protect him from any prosecution or trial, in any court whatsoever, on account of the transactions as to which he was examined;* and though a protest, somewhat irregularly, was attempted to be offered in Court, by Lord Cathcart, the Commander of the Forces, it was intimated, that while no such protest would be received, the warrant of the Court would be effectual for the entire security of the witness.

When this proceeding is fairly considered, it shews how strongly established our predecessors considered the protection of a witness in such a situation to be, and how broad and extensive in its effects, such protection truly is,—as the Court, in fact, directly negatived the power of another individual, and in a different tribunal, to molest by trial the witness who had been called on to give evidence in this Court.

It is unnecessary to notice how innummerable the cases are,

since we that are now sitting here have entered on office, in which the law so expounded has been declared and acted on; and the most solemn assurances given to accomplices, whose evidence went directly to affect the lives of pannels, that by the fact of their being called into Court, and giving evidence for the Crown, without any pardon having been produced, or directed to be applied for at the recommendation of the Court, they were for ever exempted from all prosecution, for any concern they may have had in the transactions that were the subject of investigation; and that the only risk they could run, was from their being guilty of perjury or prevarication.

It is a most important observation, as made by Lord Mackenzie, that though the rule and practice of this Court has been *notorious*, no man has ever called on the Legislature to interfere with them, as differing from the law of England. It can never be overlooked, that no instance has been, or can be pointed out, in which, when answering questions, an accomplice, though not coming up to the full expectation of the prosecutor, has been committed for the purpose of being himself tried; although instances of commitment for perjury or prevaricatiom, may often have occurred; which could only have arisen from the universal opinion, *that the rule of law was sacred and inviolable.*

It must farther be obvious, that this protection would, in reality, be in a great measure nugatory, were it to be held, that under an indictment, charging various acts of the same crime, it would be competent for the public prosecutor, after having availed himself of the evidence of an accomplice as to some of the acts, to stop short in his investigation of others, and then to turn round and prosecute the witness criminally. As such a proceeding would be contrary to the plainest principles of fairness and honesty, it would, undoubtedly, if attempted by any public prosecutor, be disallowed by the Court, as directly repugnant to the principles of the law, the witness having, in no respect, refused to perform, what he had been assured, would secure absolute safety.

There have not, however, been wanting cases, in which, if it had ever been supposed possible that the public prosecutor, after calling accomplices as witnesses, was still entitled to prosecute them for other acts arising out of the same transaction, as to which they had not fully given evidence, it might have been supposed desirable to resort to such a proceeding. On the 20th of March 1812, three persons were brought to trial in this Court, *charged in the same indictment with one act of murder, and ten acts of street robbery.* In support of the charges of robbery, all of which, and particularly *the 10th*, were

not investigated at the trial, three avowed accomplices were examined as witnesses. And while they gave most important evidence, as to the concert and arrangement of those concerned in the transactions of the last night of the year 1811, and the various assaults and acts of robbery committed upon the public streets of this city, in the participation of which they fully acknowledged their shares,—the trial having resulted in the conviction of one of the pannels of the murder, and all the three of *two* of the acts of robbery,—no attempt was ever made, nor did it enter into the imagination of the learned person now near me, who then represented his Majesty's Advocate, to turn round upon those notorious offenders and raise an indictment against them, either for the charges in that indictment, which were not *then* investigated, or for any other of the many acts of crime that were known to have been committed upon that memorable occasion; and, with regard to which, there was nearly as great an excitement in the public mind as on the present occasion. This case, therefore, affords a strong illustration of the practice that has followed, wherever it has been deemed necessary, as in the present case, to resort to the evidence of accomplices for the ends of public justice.

I have entered into the discussion of the state of the law upon this point, at so much length, for the purpose of shewing the situation in which a person, such as *Hare* is, now stands in relation to the public prosecutor.

It does not appear to me, however, that the protection which he enjoys from prosecution for any concern he may have had in any of the murders charged in the indictment raised against Burke and M'Dougal, either is, or can be, rested merely upon the compact entered into between him and those acting under the authority of his Majesty's Advocate. It is not the Lord Advocate who can be said to exercise the power of pardon, in such a case as this, without the accompanying fact of his afterwards adducing him as a witness. The compact with his Lordship, and the assurance the witness received, no doubt laid the foundation for what was afterwards perfected, by his being brought forward and examined as a witness in the trial, under the peculiar circumstances of an indictment, so knit together, and special in its nature, as that on which he was summoned to give evidence. His giving the evidence he did, in the presence of the Court, completed, in my opinion, his indemnity, and rendered it impossible for the public prosecutor, (if he could ever be supposed to be actuated by views and intentions directly the reverse of those which in reality influenced his conduct), to turn round, after the conviction of Burke, and indict the witness for his concern in either of the acts, the trial

of which had only been postponed at the earnest desire of the prisoners.

2*d*, If such, then, is the law in regard to his Majesty's Advocate, when prosecuting for the benefit of the whole community, it remains to be considered, whether the respondents, the nearest-of-kin of James Wilson, a person charged in the indictment against Burke to have been murdered by him in the house of William Hare, can, notwithstanding the examination of Hare as a witness, still bring him to trial for the murder of their relation.

Admitting, to the fullest extent, the right of a private party to prosecute for the murder of his near relation,—a proposition which cannot seriously be contested, though he must exercise his right under a variety of trammels from which the public prosecutor is altogether free,—it appears quite manifest, that if the right now claimed by the respondents is rested on the alleged inviolable privilege of private parties to prosecute for crimes, independently of all interference or attempt to compromise their privilege by the public prosecutor, by whose acts they cannot be affected;—that this plea must be equally available to the nearest of kin of Docherty, and who must also be entitled to bring Hare to trial for his share in that foul transaction. If the supposed unqualified right of private prosecution, unfettered and unrestrained by any proceeding of the public prosecutor, acting under the eye of this Court, is the foundation of the claim thus asserted, there is no possibility of escaping from the conclusion, that the right of the relations of Docherty is equally undeniable with that of the respondents.

It seemed, however, to be conceded, upon the part of the senior counsel for the respondents, that the relations of Docherty could not maintain their right to prosecute Hare for her murder; but this could proceed only from the admission, that the mere fact of his having given evidence for the Crown, had operated for him an entire exemption from prosecution.

If this then is undoubted law, it follows, necessarily, that by the public prosecutor having selected the accomplice, and used his evidence upon the trial, he did thereby necessarily deprive private parties of the right, which, but for his proceeding, they undoubtedly would have had to prosecute.

That this is an unquestionable abridgement of the right of private prosecution, which it is necessary to submit to for the ends of public justice, is demonstrated, by again reverting to the special enactment of the statute, 21st Geo. II., chap. 34. That act expressly provided, *that no person giving evidence, in*

regard to the crimes therein mentioned, shall be prosecuted for his accession to the offence, with regard to which he should give evidence. Now, if the possibility of the private party injured being entitled to prosecute criminally, notwithstanding the unequivocal terms of this enactment, had ever been supposed to exist, it is utterly impossible to conceive that the Legislature would have passed such an act, which was to affect the interests of the whole Highland population of Scotland. It would, in truth, be to suppose that the Legislature had lent itself to the formation of a snare for entrapping those who had come forward in reliance upon its own act. But, on the contrary, as it must be held that the true meaning of the act was to declare all criminal prosecution incompetent, it amounts to a positive declaration of the Legislature, that the right of private parties must bend to the interests of the public at large.

They are, however, made to bend, in other respects, to the same interests, as the public prosecutor has the undoubted right of restricting any indictment, at any stage of the proceedings, previous to pronouncing sentence,—a privilege that has arisen from usage alone. If, again, he has taken the lead, and raised an indictment, in which he happens to fail from the most purely accidental mistake or blunder, no subsequent trial for the same offence or criminal act, though attempted to be shaped as a different charge, can ever be instituted by the private party. Many other illustrations of this have been given by Lord Mackenzie, which I shall not repeat. There are no doubt private interests, in regard to which, it may justly be held, that the acts of the public prosecutor cannot interfere,—such as claims of assythment, and pecuniary reparation, arising out of criminal acts. These, it is held by our authorities, an actual pardon or remission cannot cut off; and, in the case of Linwoods *against* Graham and others, an action of that nature, in 1816, was actually raised against a person who had been acquitted on a charge of culpable homicide, and its relevancy not disputed. This is laid down by Mr Burnet, at p. 463, in terms which clearly shew the conviction of the learned author, that any idea of a criminal prosecution being competent at the instance of a private party against a *socius criminis* who had given evidence, was altogether out of the question.

But it has been well observed by my brother on my left hand, that the relations of Docherty have an equal claim to assythment as those of *Wilson;* and yet it is conceded they are debarred from prosecuting criminally.

If, then, the prisoner Hare is legally exempted from all

prosecution at the instance of the public prosecutor, for any accession he may have had to the three acts of murder charged in the indictment against Burke and M'Dougal, there seems no ground in law for maintaining, that he may still be prosecuted at the instance of the relations of either of the three parties alleged to have been murdered.

As to the *specialty* attempted to be founded on, as to his not having been examined with regard to the actual murder of *James Wilson*, it has already been sufficiently adverted to, in reference to the supposition of the Lord Advocate attempting to prosecute for that offence. The nature of the indictment,—the interlocutor, finding the whole charge relevant,—and the almost identity of the modes of slaughter and intent with which the *three* acts were perpetrated, and the general nature of Hare's evidence,—have already been pointed out, as demonstrating, that without a total departure from the fairness and justice that must ever characterize judicial procedure, it is impossible to deny that Hare did mix himself up with matter that had the closest affinity to the other acts, the trial of which did not proceed at the time.

It is further to be recollected, that in the list of witnesses there stand included various persons connected with the death of Wilson, the discovery of whom we have the assurance of the public prosecutor, was made through the information of Hare alone, who did also make such disclosures as led to the framing of that, and the other charges in the indictment. It is utterly impossible, therefore, to view Hare as a person who had not spoken out, or given *any evidence*, relative to the crime for which he is now attempted to be tried. He can, by no possibility, be replaced in the situation in which he formerly stood. *Things are no longer entire with regard to him*, as has been justly said. The public has derived the benefit that was expected from his evidence, by the conviction and execution of his guilty associate; and that public faith, that was pledged to him, in the face of the country, and confirmed by the intervention of the authority of this Court, must be preserved inviolate.

Such is the deliberate opinion that I have formed, after the most careful and anxious consideration of all that has been urged, both in speaking and in writing, upon this important question, and a careful review of the authorities that appeared to bear upon it. The same opinion I formerly delivered in a most important stage of the trial of Burke and M'Dougal, with the concurrence of my brothers, who were then sitting with me.

I am free, however, to admit, that notwithstanding this circumstance, it was my bounden duty to reconsider that

opinion, with all due attention to the able and elaborate argument that was offered against it by the respondents' counsel. I cannot, however, agree with them, that the opinion to which they objected, and were well entitled to object, was one of an *obiter*, or passing nature, and not to be considered of importance, at the stage of the trial when it was pronounced. It was, upon the contrary, delivered to the Jury, as the opinion of the Court, upon an objection urged in point of law, in the most earnest manner, by the counsel for the prisoners, and which, if well founded, must have gone to the destruction of the credit of the accomplices who had given evidence.

There can be no part of the duty of the Judge who presides at a criminal trial, more sacred, than that of expounding the law to a jury, in reference to such an objection; and it was necessary, therefore, that the opinion of the Court should be given in the most unequivocal terms. It was accordingly given to the purport and effect that is stated in the printed trial.

As no man can say what effect that statement of the law had upon the minds of the jury,—as it may, in fact, have led them to give such credit to Hare and his wife, as actually brought about their verdict against Burke,—and consequently that his fate had been decided by it,—I have no hesitation in declaring, that if I had, upon reflection, been convinced that I had committed an error, and delivered an erroneous opinion in law to the jury, I should have felt it to be my bounden duty, without the least regard to popular feeling or clamour, to have made such a representation to the Secretary of State, as might have led to an alteration of the sentence of the law upon Burke. The opinion however, which I did deliver, in my charge to the jury, so far from being shaken, has been strengthened and confirmed by all that I have since heard or read upon the subject.

I shall only add, that if the objection to the credit of the accomplices, upon the ground of their being actually liable to be tried for the two acts of murder contained in the indictment, —the trial of which had that day merely been postponed,—had been taken, as it ought to have been, when Hare and his wife were offered as witnesses, the point would have been fully argued, and solemnly determined by the Court. But as it was withheld till the addresses to the Jury, every one knows, that it could no otherwise have been disposed of than by delivering an opinion upon it to the Jury.

I have but one more word to add, with regard to the supposed inconsistency between the opinions expressed by myself and my brothers, in regard to a question proposed to be put to

Hare, and that which I delivered to the Jury. I must beg leave, however, to say, that when the real *res gestæ* are attended to, no such inconsistency can be found. I find from my notes, that the argument of the counsel 'was raised upon the 'question, *if Hare ever was concerned in the commission of* '*other murders?*' Upon the competency of that question the opinions of the Court were delivered; and these opinions must necessarily be viewed as having reference to the question actually proposed, and the injunction which the pannels' own counsel had themselves desired should be given to Hare, to confine himself to the case of Docherty. And I well recollect of putting it to the counsel, that the witness must be fairly dealt with, and of having stated, that if asked in regard to the cases of Wilson and Paterson, his whole statement must be given, whatever the consequences might be.

When the examination was resumed, I do not find that the question is put in the precise terms on which it had been argued; and it was only at a later period that Hare was asked, if there was a murder committed in his house in October last? But as to which the opinion of the Court was not delivered.

Whatever shade of difference may therefore appear in the opinions, regarding these questions, and that which was advisedly delivered in the charge to the Jury, and I am by no means surprised it has so struck some of your Lordships, must fairly be ascribed, either to the imperfections of the report of the trial, or to the course of proceeding that was adopted at the suggestion of the counsel for the prisoners.

I am, upon the whole, of opinion, that the prayer of the prisoner's bill ought to be granted; and that it would be directly contrary to the established practice of this Court, and the principles of our law, merely to suspend the proceedings against him, in order that a pardon should be obtained for his concern in the offences charged in the indictment upon which he was examined as a witness. Such would be the course adopted by the Judges of England; but respecting, as I do, that law, and its institutions, I do not, as a Scottish Judge, feel myself warranted to follow it on the present occasion.

My opinion is, that it would be equally incompetent to the first officer of the Crown, as it is to the private parties now before us, to institute any criminal procedure against Hare, steeped in guilt although he be, in reference to the facts contained in the indictment against *Burke*; and I can allow that opinion, in no degree, to be influenced, *civium ardore prava jubentium.*

The Court pronounced the following judgment :—

The Lord Justice-Clerk, and Lords Commissioners of Justiciary, having resumed consideration of the bill of advocation, suspension, and liberation, for William Hare, with the Informations given in for both parties, in obedience to the order of Court of the 26th January last, and Answers given in for His Majesty's Advocate, in compliance with said order; Pass the bill; advocate the cause; and in respect that the complainer, William Hare, cannot be criminally tried for the crime charged in the warrant of commitment, therefore, suspend the said warrant, and ordain the Magistrates of Edinburgh, and keepers of their Tolbooth, to set the said William Hare at liberty; and discharge all farther procedure in the precognition complained of; and ordain the said precognition, in so far as it has already been taken, to be delivered up to the Clerk of this Court, in order to the same being sealed up, to abide the farther orders of this Court, and decern.

(Signed) D. BOYLE, *I. P. D.*

Immediately after the Court had pronounced the above judgment, finding it incompetent to prosecute Hare criminally, the private prosecutors presented the following Petition to the Sheriff, narrating their intention to prosecute him civilly for an assythment, for the murder of *Daft Jamie*,—stating he was *in meditatione fugæ*, and craving his detention in Jail till he found caution *de judicio sisti*.

Unto the SHERIFF of the County of Edinburgh, the PETITION of Janet Wilson, Senior, and Janet Wilson, Junior;

Humbly sheweth,

That William Hare, presently prisoner in the tolbooth of Edinburgh, is a native of Ireland, is justly addebted and owing to the petitioners, in the sum of £500, or such other sum as shall be modified by the Court of Justiciary, or any Court competent, as an *assythment* due to them by the said William Hare, for having, the day of October last, or one of the

days of that month, in conjunction with the late William Burke, who was executed for the murder of Mary or Marjory Campbell, committed the crime of murder, upon the body of their near relative, James Wilson, and that they are informed, and have reason to believe, that the said William Hare, who is now in prison, but about to be liberated by warrant of the Court of Justiciary, is *in meditatione fugæ*, and about to leave Scotland, for the purpose of returning to his native country, and of defrauding the said petitioners of their just claim, and that the petitioners are ready to make oath to such belief.

May it therefore please your Lordship, to take the petitioners' oath, and upon their deponing to the verity of the said claim, and to their belief of the said William Hare's being in meditatione fugæ, *and to sufficient grounds of such belief, to grant warrant for bringing the said William Hare before you for examination; and thereafter, upon his* meditatio fugæ *appearing, to grant warrant for imprisoning him till he find caution to answer the said claim of assythment at the instance of the petitioners,* de judicio sisti et judicatum solvi, *in any action of assythment to be brought against him at the instance of the petitioners, within six months from the date of such caution.*

According to justice, &c.

E. D. SANDFORD.

Upon this application the Sheriff pronounced the usual deliverance; and thereafter, Daft Jamie's mother and sister gave the following oath of verity:—

At Edinburgh, the 2d day of February 1829.

In presence of George Tait, Esq., Sheriff-substitute of Edinburghshire,

Compeared Janet Wilson senior, and Janet Wilson junior, who being solemnly sworn and examined, depone, That what is set forth in the petition is true: That the said William Hare is justly addebted, resting, and owing to the deponents, the sum of £500 sterling, or such other sum as shall be modified

by the Court of Justiciary, or any Court competent, as stated in the petition: That the deponents are credibly informed, and believe in their conscience, that the said William Hare is in *meditatione fugæ*, and about to leave this kingdom, whereby the deponents will be defrauded of the means of recovering said sum: That the grounds of their belief are, that Hare was born in Ireland: That a short time ago he was imprisoned for examination, preparatory to a trial upon a charge of murdering James Wilson, of which they have no doubt he was guilty: That owing to certain circumstances, he has not been brought to trial for that offence, and there is reason to believe that he will speedily be liberated from custody; and owing to the prevailing belief of his guilt, and the popular indignation which has in consequence been raised against him, it is impossible that he can, with safety to his life, remain in Scotland, particularly as he has been suspected to be guilty of other murders; and, therefore, they have no doubt, that as soon as he shall be liberated from custody, which they believe will be this evening, he will use utmost and immediate exertions to escape from Scotland to Ireland. All which they depone to be truth, as they shall answer to God. And the said Janet Wilson, senior, depones that she cannot write.

(Signed) { JANET WILSON.
G. TAIT.

Thereafter, the following procedure took place:—

Edinburgh, 2*d February* 1829.

Compeared WILLIAM HARE, at present in custody, who being examined and interrogated, Whether he was concerned in killing James Wilson, otherwise called 'Daft Jamie?' declares, That he will say nothing about it. Interrogated, Where he was born? declares, That he will have nothing to say more about it. Interrogated, If he has any trade in Edinburgh? He remained silent. And being interrogated, Where he would go if he were to get out of Jail now? He remained silent. And being interrogated, If he is afraid that the mob would kill him if he got out? He remained silent. And being interrogated, If he means to go to his native country, understanding it to be Ireland? He remained silent. Interrogated, If he has any prospect of employment in Scotland, or what he would do if he remained in Scotland, and if he has any property? He remained silent. And being interrogated, Whether he can write?

declares, That he cannot. And the declaration being read over to him, and he being interrogated, Whether it is correctly taken down? He remained silent.

(Signed) G. Tait.

George Munro, for the petitioners, now moved the Sheriff, in respect of their oaths, and of the examination of the debtor, that his Lordship would be pleased to grant warrant of commitment, until caution was found, as prayed for in the petition. It was expressly set furth, that a debt was owing,—that the debtor was a foreigner, as well as a murderer, at least he was accused of the crime of murder,—and that he was about to fly from this country, in order to defraud the petitioners of their debt, or claim of assythment. The truth of the facts set furth in the petition were expressly sworn to by the petitioners: And farther, that they believe if the defender is liberated, (and there is no warrant against him,) that he will use his utmost and immediate exertions to escape from Scotland to Ireland. He also submitted to the Sheriff, that this is a very peculiar case, and did not, and could not, admit of distinct and *specific* proof of intention to fly; but the examination of the debtor himself was also of a peculiar nature, and, he submitted, was quite conclusive that this party, by his silence and unaccountable conduct, clearly shewed that he was a dishonest debtor. He would not even acknowledge his birth place, his prospects, or his intentions, far less whether he had any property. On these grounds, it was submitted that the Sheriff would grant warrant of commitment, *de judicio sisti*, if not, *judicatum solvi*. If it should have any weight with the Sheriff, that it was not proved that this party was a foreigner, proof of that fact was now offered; and he further offered to prove, that this person not only admitted that he was going to Ireland, but that he actually admitted that he killed Daft Jamie.

(Signed) Geo. Munro.
G. Tait.

The Sheriff allows to the petitioners a proof of all facts and circumstances, tending to shew that William Hare is *in meditatione fugæ* from Scotland, and to the said defender a conjunct probation; and to both parties a diligence against witnesses; and appoints the proof to proceed forthwith.

(Signed) G. Tait.

Compeared William Lindsay, at present a prisoner in the tolbooth of Edinburgh for trial, who being solemnly sworn,

purged of malice, partial counsel, and interrogated, depones, That he has known the defender Hare for two months back; and depones, That Hare told the deponent that he was by trade a labourer, and sold swine and herrings; and he did not say that he dealt in any thing else. Depones, That Hare told the deponent, that he was a native of Ireland, and said he had been several years in Scotland, and Hare said he was here two or three years before the King came: That he said two or three days ago, that he expected to be liberated, if the case was settled to-day, and he said that he would leave this and go home to Ireland immediately. All which he depones to be truth, as he shall answer to God.

(Signed) William Lindsay.
G. Tait.

Compeared John Fisher, head turnkey, Calton Jail, who being solemnly sworn, *ut antea*, and examined, depones, That Hare told the deponent that he was born in Ireland; and since the trial of Burke, he has said to the deponent, that he would go back to Ireland, on his liberation. All which he depones to be truth, as he shall answer to God.

(Signed) John Fisher.
G. Tait.

And it being stated to the defender, that if he intended to remain in Scotland, any witnesses whom he might wish to adduce to prove that fact might now be examined, he stated that he had no money, and he must go somewhere to get work: That he had now no domicile in this part of the country, and could not remain in Edinburgh: That he did not say positively that he would go to Ireland, but that he might go to Ireland; and he states that he does not know whether he will remain in Scotland, or whether he will go to Ireland or England in quest of employment, and therefore, he has no witnesses to prove that he intends to remain in Scotland, and he states that he cannot write.

(Signed) G. Tait.

Edinburgh, 2*d February*, 1829.

The Sheriff-substitute having resumed consideration of the petition, with the oaths of the petitioners, defender's declaration, proof adduced on the part of the petitioners, and whole procedure; Grants warrant to officers of Court to apprehend the therein-designed William Hare, and incarcerate him in the tolbooth of Edinburgh, the keepers whereof are hereby ordered

to receive him, and detain him, aye and until he finds sufficient caution, acted in the Sheriff-court books of Edinburgh, *judicio sisti*, in any action to be brought within six months from this date against the defender, in any competent court, for payment of the sum mentioned in the petition.

(Signed) G. TAIT.

The above warrant was afterwards withdrawn, and Hare was set at liberty on Thursday evening, the 5th February 1829, and he immediately fled to England.

to receive him, and detain him, ave and until he finds sufficient caution, acted in the Sheriff-court-books of Edinburgh, [illegible] in any action to be brought within six months from this date against the defender, in any competent court, for payment of the sum [illegible]

(Signed) Ro. Craig.

The above warrant was indorsed accordingly, and Hare was set at liberty on Thursday evening, the 5th February 1829, and he immediately fled to England.

WILLIAM BURKE AND HELEN M'DOUGAL.

24th December 1828.

The full details of the [illegible] of the Trial of Burke and M'Dougal, [illegible] the principal and most authentic [illegible] of the West Port Murders, and of the best commentaries upon those atrocious transactions, as they appeared in the public journals, would form a very interesting Appendix to this Trial, and the subsequent proceedings against Hare [illegible] circumstances [illegible] in the hope [illegible] instances possessing considerable variety [illegible] the leading features of this most extraordinary case. It may be observed, that no notice is taken of the subject anterior to the Trial.

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1. As the intense excitement produced by the discoveries made in the course of the late trial has in no degree subsided, and as the public mind is desirous to know every thing that can be gleaned respecting the West Port murders, or the actors in those horrid scenes, we throw together such scraps and sketches as we have collected, and which, at the present moment, can scarcely fail, we should think, to prove interesting to our readers. The following is, we believe, a correct account of the circumstances attending the apprehension of Burke and his infernal gang.

On Friday the 31st October [illegible] was seen begging about the West Port [illegible] near to Burke's house, to ask charity [illegible] chasing whisky. He [illegible] fit subject for his atrocious purposes, and endeavoured to decoy her

APPENDIX

TO THE

TRIAL

OF

WILLIAM BURKE AND HELEN M'DOUGAL,

24th December 1828.

The Publishers of the *genuine* edition of the Trial of Burke and M'Dougal having thought that a selection of the principal and most authentic accounts relative to the late West Port Murders, and of the best commentaries upon these atrocious transactions, as they appeared in the public journals, would form a very interesting Appendix to that Trial, and the subsequent proceedings against Hare,—the following most prominent circumstances and remarks have therefore been thrown together, in the hope that they will be found to contain (though in some instances possessing considerable similarity in detail) the leading features of this most extraordinary case. It may be observed, that no notice is taken of the subject anterior to the Trial.

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1. As the intense excitement produced by the disclosures made in the course of the late trial has in no degree subsided, and as the public must be desirous to learn every thing that can be gleaned respecting the West Port tragedies, or the actors in these horrid scenes, we throw together a few particulars which we have collected, and which, at the present moment, can scarcely fail, we should think, to prove interesting to our readers. The following is an authentic narrative of the circumstances attending the apprehension of Burke and his infernal gang.

On Friday the 31st of October, a little elderly woman was seen begging about the West Port: she entered the shop of Mr. Rymer, near to Burke's house, to ask charity, while Burke was there purchasing whisky. He seems to have immediately fixed upon her as a fit subject for his atrocious purposes, and endeavoured to decoy her

into his power. He asked her name, and what part of Ireland she came from; and upon receiving her answers, replied that he was from the same place, and that she must be a relation of his mother, whose name was Docherty. He then promised to give her breakfast; and they left the shop together, and were seen to enter Burke's house. She was afterwards seen in the house at different times during the day; and two lodgers, Gray and his wife, were sent to Hare's house, to make room for her, under the pretence that she was a friend newly come from Ireland. They were afterwards seen making merry, drinking and dancing in company with Hare and his wife, first in the house of Ann Connaway, and afterwards in Burke's. During the night, a great noise of quarrelling and cries of murder were heard in Burke's house; but the neighbours, knowing that two men and three women were in the house, and having frequently heard similar uproars, did not think much of it, nor interfere. One of them, however, had the curiosity to look through the key-hole, when he observed Helen MacDougal holding a bottle to the mouth of the woman Campbell, and pouring whisky into her mouth. Then all was quiet for a little. Shortly after this, however, the noise recommenced, and was again succeeded by silence. At this time, that is between eleven and twelve o'clock, the horrid deed was perpetrated.

In the morning, M'Dougal, who passed for Burke's wife, accounted for the absence of Campbell, or "the little woman," as they called her, as well as for the noise, by saying that the latter had, during the night, made too free with her husband, Burke, and that she had kicked her out of the house: and this seems to have allayed any suspicions. In the morning, the lodgers, Gray and his wife, returned to Burke's; but upon Mrs. Gray attempting to search about the bed, and the straw under it, for some articles she had left, she was ordered by Burke, with an oath, "to keep out from them." Burke afterwards left the house, desiring Broggan, a carter, who was there, to sit on a chair close to the straw, and not to stir from that position until he returned. Broggan, however, followed him in a short time; and M'Dougal, who appeared to be in liquor, started up from the bed asking for her husband, and afterwards quitted the house, leaving Gray and his wife sitting in it. Mrs. Gray then commenced searching for her child's stockings and cleaning the house; and from the suspicions which had been excited by Burke's conduct, she examined the straw, and found the murdered body, which her husband pulled out, and which they immediately recognised to be that of the woman Campbell. On going up the stair, they were met by M'Dougal, whom Gray informed of the body being found. M'Dougal, however, affected to pass it off as if the woman had died in consequence of a drunken frolic, and attempted to bribe them into silence by offering them money. She invited Gray and his wife to take a dram in a neighbouring public-house, where she, along with Hare's wife, hurriedly left them; and upon their return to Burke's, in two or three minutes afterwards, they called the people next door to come in, as they wished to shew them something; but upon examination the body was gone. They immediately lodged information at the police office, and a party of policemen were sent; but notwithstanding the most diligent search that could be made, the body could not be found,

nor the parties implicated. At this time a servant girl, who lived opposite, informed them that she had seen Burke and his wife, Hare and his wife, and the porter M'Culloch, going up the stair, the porter carrying a tea-box with the top stuffed with straw; and that she had laid her hand upon it and found it soft. Upon the return of the policemen, some time afterwards, Burke came in, it is supposed, to get some things previous to escaping. He was pointed out by Gray, and immediately seized. He seemed to wish to laugh it off, under the pretence that it was the lodgers who wished to do him an ill turn, saying that he defied all Scotland to charge him with any thing wrong. Mrs. Burke then came in, bawling out that she heard the police were after her husband about the old woman, but that it was all a drunken spree, and used a great many capers and dry laughs. She was also immediately taken into custody, and both were conveyed to the police-office.

There were still no tidings of the body, when it was suggested that the dissecting-rooms should be searched; and Lieutenant Paterson and Serjeant-major Fisher went on Sunday morning for that purpose. They were informed by Paterson, Dr. Knox's man, that only one body, which was shewn them, had been received, but from their not having seen Campbell, they could not identify it. Gray and his wife were sent for, who soon recognised it; and after procuring a warrant, it was conveyed to the police-office.

Early on Sabbath morning, instructions were received to apprehend Hare and his wife, and a party proceeded to his house about eight o'clock, and were informed that they were both in the house, and in bed. Upon informing him that Captain Stewart wished to speak with him upon the subject of the body that had been found in Burke's, Mrs. Hare, laughing, said, that the captain and the police had surely very little to do now to look after a drunken spree like this, repeatedly jeering and laughing. Hare then said to her, that he was at Burke's and had a dram or two, and likely they might be attaching some blame to them, but he did not care for Captain Stewart, and they had better rise and see what they had to say. They were both conveyed to the police-office, and immediately lodged in separate cells.

2. We observe it stated, that Hare has, since the trial, made important disclosures, in which he confesses having been concerned in no less than twelve different acts of murder, in some of which he was the principal, in others an accessary; and that he knew of another, though he was not in any way a party to the commission of it. We see no reason to question the correctness of this statement. The wretch is evidently disposed to be communicative, and, had he been permitted, we have little doubt that he would have revealed as much in the witness-box. But the public may expect still more astounding disclosures. We have learned from good authority, that Burke admits having sold in all (we shall not say to whom) from thirty to thirty-five *uninterred* bodies during the last two years. His counsel, indeed, assumed, in the course of the very able pleadings for the defence, that he was by trade a resurrectionist, a body-snatcher, one whose profession it was to furnish *materiel* for the dissecting-room; and arguing upon this assumption, they contended that the ordinary pre-

sumption arising from the fact of a dead body, with marks of violence upon it, having been found in the possession of the pannel Burke, could have no place in the case of an individual who pursued this disgusting traffic, and whose business it was to deal in dead bodies. But, as we stated on a former occasion, when the fact of these horrid atrocities having been committed first transpired, Burke was *not* a resurrectionist; and our reason for then hazarding this assertion was, that he was utterly unknown, either by appearance or name, to any of those who pursue this trade in what may now be called the *regular* and *legitimate* way, viz. by disinterment alone,—and that he could not, by possibility, have carried on such a traffic without being known to the other members of this infamous craft. They are all leagued together; they all know one another; and they suffer no interloper to interfere with their business, or to pursue it exclusively on his own account.—The circumstance of Burke's being unknown to them, therefore (which we learned from undoubted authority), we considered as almost decisive of the *mode* in which *he* had been accustomed to obtain or to *make* subjects; and, accordingly, the wretch has now admitted that he was *not* a resurrectionist—that neither Hare nor himself were ever by the side of a grave in a churchyard for the purpose of plundering it—and that the bodies they disposed of were bodies *which had never been interred.* If it be true then, as Burke now states, that in the course of the last two years, he sold to one individual from thirty to forty uninterred bodies, the conclusion is inevitable, that he and his associates must have committed *as many murders!!!* Nor are there wanting other circumstances tending to corroborate this terrific suspicion, to give it no stronger epithet. It has been remarked that numbers of the unfortunate females upon the town have lately disappeared, no one knew how. Natural deaths have become rarer among that class; and for some time past the interment of one of them has scarcely been heard of. Abandoned by the relatives and friends whom they dishonoured, and excluded from all notice or regard by the virtuous part of society, there was none to care for, and none to inquire what had become of them. Connecting this circumstance with the *exuviae* found in the den of murder occupied by Burke, we confess our conviction has been strengthened that the greater number of his victims were selected from this unfortunate and degraded class. The girl Paterson or Mitchell was one of them, but not the only one; and she was murdered in the house of his brother, Constantine Burke. In Burke's own house, however, there are still appearances visible, which must impress every one with a persuasion that others besides Docherty have been sacrificed under the same roof. Bloody straw in a corner, a heap of bloody clothes on the floor, and a pile of old boots and shoes, amounting to several dozens (for which the miscreant's pretended trade of a shoemaker can never account), seem to us strong indications that the den of the monster, now so justly condemned to die, has been the scene of manifold murders. Many persons have been to see this horrid place, and all have left it impressed with the same conviction. An eminent literary character, who also visited it, admits we understand, that even his imagination, with all its richness, fertility,

and power, could have pourtrayed nothing at all equal to the dreadful realities of Burke's residence. The robbers' cave in Count Fathom, loses all character for the horrible compared with it.

The conclusion to which all these circumstances lead is as obvious as it is appalling; and to strengthen it, we shall here introduce a statement which we lately received from a medical friend, and which may be relied on. About six months ago, the body of a female was offered for sale by some miscreants, probably of Burke's gang, to the assistant of a most respectable teacher of anatomy here. The ruffians offering it for sale were not known to him, and were no resurrection-men; but as a subject was required, he said he would take it, if it suited him when he examined it, and asked when they could fetch the body. They replied that they had it now, and that they would bring it to the dissecting-room in the evening, between nine and ten o'clock. At the appointed hour, accordingly, they made their appearance, accompanied by a porter, with the body in a sack. It was taken in, of course, and turned out of the sack, when it proved to be the body of a female, as had been stated by the ruffians—a woman of the town in her clothes, and with her shoes and stockings on. The assistant was startled, and proceeded at once to examine the body, when he found an enormous fracture in the back part of the head, and a large portion of the skull driven in, as if by a blow from the blunt part of a hatchet, or some such weapon. On making this discovery, he instantly exclaimed, " You d——d villains, where, and how did you get this body?" To which one replied, with great apparent *sang froid*, that it was the body of a ——— who " had been *popped* in a row (murdered in a brawl) in Halkerston's Wynd," and that if he did not choose to take it, another would. The assistant then proposed to them to wait till he sent for his principal, his intention being to have them detained; but not relishing this proposal, the ruffians, three in number, besides the porter, immediately withdrew with their horrid cargo, and, doubtless, soon found a less scrupulous purchaser. Such is the statement that has been made to us, accompained, at the same time, with an assurance that occurrences of this nature are, or at least have been, by no means rare.

Now, we ask, do not facts like these call loudly for investigation? We are satisfied that the public do not yet know a tithe of the truth, and that there are still hid more horrid things (if, indeed, that be possible) than those which have been revealed. An investigation of the most searching kind is due alike to the public, and to the teachers of anatomy themselves, many of whom are suffering most unjustly from the odium which the late disclosures are calculated to throw on the necessary and indispensable science which it is their business to teach, and which we know they have taught in a manner which, if known, would prove equally creditable to themselves and satisfactory to the country. All the anatomical teachers, therefore, and others who use *cadavera* for their classes, both within and without the University, ought to be examined as to the manner in which they are accustomed to receive their subjects. And, in particular, the students and assistants (during the last two sessions) of one gentleman whose name has unfortunately been too much mixed up with the late proceedings, ought to undergo an examination as to the quarter whence bodies were

procured—the state in which they were received—the *manner* in which they were dissected, &c. This we think indispensably necessary for the vindication of the teachers of anatomy themselves, as well as for allaying the excitement which at present exists in the public mind. Several of these gentlemen, we know, have acted with the most consistent and anxious scrupulosity in regard to the reception of subjects, and have admitted none into their rooms without a thorough knowledge of the *mode* in which they were procured, without being perfectly certain that they were disinterred bodies, which had died a natural death. But the public can have no authentic and satisfactory knowledge of this without a full and complete investigation; they can have no guarantee that every anatomical teacher in Edinburgh has not a Burke in his pay at this moment. The present impression on the minds of the people is, that one gentleman stands in the same relation to Burke that the murderers of Banquo did to Macbeth. This impression, we believe and trust, is ill founded; but the fact of its existence, which cannot be disputed, should induce him to demand an inquiry; and the other teachers ought also to demand it, in order to vindicate their reputation from the foul suspicions which attach to it in the popular mind. For the honour of a most respectable profession, for the public safety, for the character of the country, for the credit of its laws, and for the sake of humanity itself, the Public Prosecutor ought to interpose, and have this matter probed and sifted to the very bottom. It is not enough that one, or perhaps two, of the guilty instruments in this traffic of murder are brought to condign punishment; it is not enough that a portion of the horrid reality has been disclosed, or that the ministering demons in the work of carnage are detected and known; the public has a right to know the whole extent of the system, and all who have in any way been concerned in it; they have a right to know who are guilty, and who are innocent; and it is due to an honourable and useful profession that the latter should be completely vindicated from the foul and intolerable suspicions which have unjustly attached to them, and which are calculated to do equal injury to their reputation, their usefulness, and patrimonial interests.

3. In the *Sun* newspaper of Thursday last, there are some observations on the West Port tragedies, to which we think it necessary to direct the attention of our readers. From the date of them, it is of course evident that the London scribe, when he penned the remarks on which we are about to animadvert, could have known nothing further of the subject on which he writes than was to be gleaned from sundry paragraphs that from time to time appeared in the Edinburgh newspapers,—that is, in truth, nothing at all. But although he *must* have been in total ignorance of the facts, he is not the less positive that he knows all about the matter; and, accordingly, he favours us with some specimens of his ignorance, presumption, and talent for abuse, which cannot fail to amuse *our* readers.

"The Scotch character (quoth the Luminary) *is amusingly developed* in the comments made by the different Edinburgh and Glasgow papers on the subject of the late West Port murders. *Each journal seems to think its own honour implicated in the business,* and *hastens to prove,*

first, that Burke and his wife are both Irish ; and, secondly, that the idea of cutting people's throats for the sake of selling their bodies to anatomists, is far too original for the *inferior* conceptions of Scotchmen."

" The Scotch character is" much more " amusingly developed " in this paragraph than in any of the comments made by the Edinburgh or Glasgow papers ; for it bears to be an editorial lucubration, and as such must proceed from an exported Invernessian, who seems to be ashamed of his country, very probably because his country had some reason to be ashamed of him. It is false, however, that any Edinburgh journal ever dreamt " of its own honour being implicated in the business," or " hastened to *prove* that Burke and his wife (concubine) are both Irish." Our contemporaries, like ourselves, stated such facts as came to their knowledge, without ever imagining the nonsense which this blockhead thinks proper to ascribe to them ; in fact, they appeared much more anxious to express their horror of the crime than to " prove, " as the Solar scribe has it, what country was entitled to claim the " honour" of having given birth to the criminals. But it seems our brethern and ourselves also " hastened to prove that the idea of cutting people's throats for the sake of selling their bodies to anatomists, is far *too original* for the *inferior conceptions* of Scotchmen." We know of nothing, however, which we should not consider " too original for the inferior conceptions " of *one* Scotsman, whom we need not name, and whose talent for misrepresentation seems to be nearly on a level with the shallow petulance and presumption under the cloak of which he tries to hide his ignorance. This, however, is not the best of it.

" Further than his name (continues the Solar gentleman) there is nothing to prove that Burke is an Irishman."

Indeed ! Why, man, Burke himself has confessed it in his declaration, read at his trial ; and if the murderer had been silent on the point, his brogue would as certainly and inevitably have betrayed his country, as your Invernessian nasal drawl, with a little touch of the genuine Celtic accent engrafted thereupon, would have betrayed your northern origin and your Celtic descent. Burke *is* an Irishman, and so is Hare, and so is Hare's wife ; and so is the woman M'Dougal, Burke's concubine, though her name would indicate that some of her ancestors might have been Highland cousins to some of your own—a relationship which your " amiable bashfulness " will not, we trust, " prevent you from publicly claiming."

He proceeds—" With respect to the inferior conceptions of the Modern Athenians, what, let us ask, can equal the ingenuity of *Lord* Lauderdale's famous torture boot ?" Nothing, certainly, except it be the " ingenuity" of such a driveller as this, who fancied that there is any thing at all *ingenious* in putting a human leg in an iron hoop or ring, and driving in a wedge between them. A more brutal decree, or one betraying less of " ingenuity " was never fallen upon to inflict torture on a fellow creature. It might even have been invented by the blockhead who here calumniates his country ; it is not below even *his* " inferior conceptions ; " we consider the device on a level with *his* capacity : and, we believe, it was generally from among his countrymen that persons were sought for, and found to enact the part of exe-

cutioners in putting the heroic martyrs of the Covenant to this species of torture. The following is his concluding touch:—

"The West Port murder, judging from internal evidence, *is decidedly of Scotch origin.* There is a cool, methodical, business-like air about it, a scientific tact in the conception, and a practised ease in the execution, *which no* IRISHMAN *could ever yet attain!* An Irish murder is hasty, sudden, and impetuous—an English one, phlegmatic, cunning, mercenary—but it has been reserved for the Scotch, in this last unequalled atrocity, to blend the qualities of both English and Irish guilt, *with a scientific effrontery peculiarly and pre-eminently their own.*"

With an "effrontery" which is very far indeed from being "scientific," but which is nevertheless "peculiarly and eminently his own," it has been reserved for this blundering renegade to pronounce a series of murders, devised and perpetrated by Irishmen alone, as "decidedly of Scotch origin;" to talk of the "internal evidence" of a murder, while he is in ignorance of every thing concerning it, except the mere fact of its having been committed; to pander to the prejudices of the very lowest class of Englishmen by pouring out abuse upon Scotland; and to compromise the solid interests of his constituents, the highly respectable proprietors of the *Sun*, by venting libellous scurrilities against the country which had the misfortune to give him birth, and where that journal has hitherto been received with a degree of favour to which, not the talents of its editor certainly, but the activity of its reporters seemed to entitle it. But let that person look to himself. We know it is always renegade Scotsmen who are loudest and fiercest in abusing their country. Dr. John Macculloch is one of that class, and he has accordingly been served out in some measure proportioned to his deserts. If the editor of the *Sun*, therefore, has a mind to indulge farther in such disgraceful scurrilities, he had as well accustom himself *paullatim et gradatim* to stand a pretty vigorous application of the scourge.

4. In the report of the Lord Justice-Clerk's charge to the Jury, in Burke's case, his Lordship is represented as having stated something to the following effect: "They (the Jury) had been told of the Hares being concerned in other murders. With what murders they might be chargeable, he did not know; but to a certainty, they could not be libelled on either of the charges contained in the libel now under trial, and which had not been sent to the Jury." There must have been some mistake here. Indeed, the passage is inconsistent with itself; for there could be no libel "under trial," which had, nevertheless, not been sent to the Jury. As his Lordship, however, has been understood to have said that the protection of the Court extended to all the three charges of murder contained in the indictment against Burke and M'Dougal, and that the Hares could not be challenged for the murders of Paterson and Daft Jamie, any more than for the murder of Docherty, upon which alone Burke was tried, we shall take the liberty to throw together a few observations on this point, which is one of great interest and importance at the present moment.

Every one can easily imagine the objections that lie to the admissi-

bility of an accomplice as a witness against those with whom he has been concerned in the commission of a crime. With the Judges of former times, according to Sir George Mackenzie, these considerations had been of sufficient weight to determine them against receiving a *socius criminis*, except in the trial of such crimes as must have otherwise passed unpunished. If this rule ever obtained, however, it was soon infringed upon; and in process of time, the *socius* came to be admitted wherever there was a *penuria testium*. But it was only at a comparatively recent period that the nature of the protection afforded him was clearly defined. Before that time, he was in a great measure, if not altogether, at the mercy of the prosecutor; and consequently his evidence was liable to be influenced by what he knew was expected of him, and by his dependence on the prosecutor alone for an immunity from trial. The risk of this bias, however, is obviated; if it shall be held, which is now the established opinion, and was delivered for law from the Bench in the noted case of Smith and Brodie, " that by the very act of calling a *socius* as a witness, the prosecutor discharges all title to molest him for the future, *with relation to the matter libelled*."—Hume II. 354.

But to understand this authority properly, we must recur to the principle upon which the decision in question was founded. No witness is bound to answer a question tending to criminate himself, and whenever such a question is put, the Court will tell him so. But a *socius* cannot answer a question which might not have this tendency, were he unprotected; and hence, from the necessity of the case, protection is afforded him. This protection, however, can only apply to the evidence he actually gives, and the self-criminatory disclosures therein contained. Till he gives evidence there is no protection, and that protection is measured by the nature of his evidence. But he neither has nor can have any immunity or protection from trial for crimes in regard to which he was not called to speak at all.

Now, this is exactly the situation in which the Hares now stand. The Public Prosecutor has discharged all title to molest them in regard to the murder of Docherty, the only part of the libel against Burke which went to trial, because they gave evidence and criminated themselves in regard to that crime; but he has not discharged this title to pursue them for the murder of Paterson or Daft Jamie; and, accordingly, when Mr. Cockburn proposed to interrogate Hare in his cross-examination, concerning his connexion with the latter crime, the Court interposed, by telling the witness that he was entitled to decline answering such a question as tending to criminate himself, and as beyond the reach of the protection afforded him for his evidence in the case of Docherty. It was expressly stated from the Bench, that his answering the question put by Mr. Cockburn would implicate himself in the crime. And how else could he have been entitled to decline answering it? As a protected *socius*, he was bound to answer every question that should be asked him within the compass of that protection; and if it had extended to and included the murder of Jamie, which was included in the same charge, the obligation to answer would of course have been co-extensive with the protection. " The matter libelled" spoken of by Mr. Hume, therefore, can only

mean the "matter libelled" and sent to trial, and in regard to which the *socius* gives evidence.

But by the judgment of the Court on the objection taken to Burke's indictment, they virtually found that it was three indictments in one; for they ordered each of the charges to be tried in succession, giving to the prosecutor merely the option as to which of them he should begin with. The procedure ordered to take place was the same as if there had been three separate indictments. One of the charges was tried, and a conviction obtained; and there the proceedings stopped. Now, suppose there had been three indictments, and that he had been tried and convicted on one of them; where is the difference, we would ask, in point of principle, between the case supposed and what actually occurred? None whatever that we can discover. But had there been three separate indictments, it would never have been pretended that a *socius* giving evidence under the only one of the three brought under review, could be protected from all challenge as to the crimes contained in the others; and no more can it, with any shew of reason, be maintained, that Hare, who gave evidence in reference to the only one of the three charges which was tried, is secure from prosecution in regard to either or both of the other two, which were not tried. If the whole three charges had been tried at once, and Hare had been called upon to give evidence in reference to all of them; or if they had been tried successively, and Hare had been thrice produced as a King's evidence; then he would have been protected, and the prosecutor would have been discharged from all title to molest him with relation to the "matters libelled;" but, as it is, we repeat that he is only protected from challenge in regard to the murder of Docherty, and that he is as liable to trial for the murder of Paterson or Daft Jamie as he is for any other murder, or as he would have been had he never appeared in the box as a King's evidence at all.*

The hand of justice, in the trial of Burke and M'Dougal, has withdrawn the veil which concealed from public gaze scenes of blood and horror, which outdo in reality all the creations of the most gloomy and romantic imagination; which makes man blush for himself and his fellows, and will be referred to with shuddering interest by yet unborn generations. We see, at least, four wretches, "filled from the crown to the toe, topful of direst cruelty," divested of all the sensibilities of our nature, and reckoning the lives of human beings as of no higher value than those of the beasts of the field; take up the trade, and systematically pursue it, of butchers of their own kind. We see them luring their victims by a treacherous affectation of kindness to their dwellings, turned by them into slaughter-houses, and there coolly murdering them, for the sake of the profit to be derived from the sale of their bodies. Their slow and deliberate mode of murdering we cannot dwell upon, from a feeling of unutterable loathing. Compared with it, the bowl and the dagger lose half their horrors; because *it* pre-eminently supposes the most flinty and remorseless heart, and unflinching temper, neither of which is to be subdued or softened by those awful signals of agony which nature throws out when

* Taken from the "Caledonian Mercury."

struggling with a violent death, and which the most practised murderer recoils from, as too appalling to his conscience. Were it possible to distinguish between the four wretches, under whose feet the earth may be supposed to groan, we would say that the guilt of the women is the deepest and most revolting; because woman's nature is more remote than that of man from deeds of blood. To each of these women we may truly apply what was said of a female fiend of antiquity, *Nihil muliebre præter corpus gerens;* and, worse than the Brownrigs and others who have disgraced their sex, their names will descend to posterity, accompanied with unmingled execrations. Ever shall we regret that M'Dougal was not made to pay the penalty of her crime upon the gibbet. We cannot understand upon what principle she was acquitted; for her accession to the murder of the Irish woman, both before and after the fact, was proved and demonstrated beyond a doubt. It would be most dangerous to establish the principle that none but the direct *actor* in a secret murder should be held guilty of it. Justice, doubtless, demands that for the deaths of the many who have perished by these four monsters and their accomplices, more victims shall be immolated upon her altar. The public voice also calls for other sacrifices. The little that has been disclosed of the much guilt there is, is more than enough "to create a soul of *vengeance* under the ribs of death;" and it is vain to suppose that the angry, but most virtuous and holy, cry now raised by a whole people is to be appeased by the scanty offering which it has been decided is to be made to justice. No false delicacy—no dread of popular excitement ought to restrain the ministers of justice from exacting the blood of those by whom blood has been, and may yet be, so profusely shed; for, in proportion to the disgusting, revolting, and heart-sickening nature of their crimes, is there a necessity of purging the land of the monsters. Hare (whose appearance is an epitome of all that is mean, subtle, and ferocious), and his wife (whose aspect is much upon a par with his own), cannot, for technical reasons, be put upon trial for the murder of the Irishwoman; but there is no bar to their being tried for other murders; and sorry are we to say that there are other individuals, with respect to whom there is what lawyers call a *probabilis causa* for committing them. It is lamentable to think that the practice of a science, designed for the preservation of human life, should, through the avidity of any individual to possess *subjects,* have directly tended to encourage its profuse destruction; that the science should have stooped to a junction with the basest and most unhallowed ruffianism, and derived aid from acts which terribly violate the laws of both God and man. In purchasing the bodies which had come under the fell gripe of the Burkes and the Hares, there must have been an utter recklessness—a thorough indifference as to causes and consequences, which, in point of criminality, very closely borders upon *guilty knowledge.* These transactions have cast a stain upon the profession, which, for years to come, the fair fame of those who pursue it—(a fame resting not more upon their eminent skill than upon their acknowledged benevolence)—will not can obliterate. It is singular, that the only symptom we have yet discovered of the "march of intellect" among the lower orders, is certain recent discoveries in the art or science of crime. The most important of

these is the poisoning of people, for the sake of the money to be found upon them, and the strangling of them for the sake of the money to be obtained from the sale of their carcases ; with both of which our simple ancestors were perfectly unacquainted. That either, but the last especially, though of such prodigious wickedness, should be a *novelty* at the present day, greatly astonishes us.

We fully agree with the Morning Chronicle, that there are many men who would, and do commit murder for more trifling gains than are to be derived from the sale of a corpse. Not a great many years ago, an Irishman murdered a pedlar-boy in Eskdale Muir, he being covetous of the paltry gewgaws which the poor creature had in his box. About two or three years ago, an old Highlandman was savagely slaughtered in the uplands of Aberdeenshire ; the incentive to the crime being a desire, on the part of the murderer, to possess himself of a crown-piece. And much about the same time, a private soldier, travelling on furlough, was shot to death in the neighbourhood of Glasgow, by three ruffians, who were strangers to him, with a view to the contemptible booty they might find upon his person. Can it be doubted, then, that there are many miscreants, who, when they become possessed of Burke and Hare's fearful secret, will not hesitate a moment, if there is a prospect of impunity, to murder a fellow-creature, in order to convert or coin his body into ten sovereigns ? Much do we fear, now that the secret is out, that the above two wretches will have many imitators in their career of guilt, notwithstanding the example which is about to be made of one of them. We fear this the more, because the facility and secrecy with which murder may be committed in pretended lodging-houses, upon vagrant strangers and prostitutes, whose disappearance would occasion no remark, cannot escape the notice of those who are deeply engaged in the practice of crime. These are painful, but necessary considerations, which we cannot refrain from urging, and which we trust, will be pressed upon the attention of the Legislature. We cannot conclude without noticing the absurdity which has been committed, by some provincial journalists, in upbraiding the population of this city with crimes committed within its purlieus, by four vagabonds, who are not natives of it. Equal to this absurdity, would be the injustice of stigmatizing, on account of these crimes, the whole people of Ireland. God knows, that, in every nation, most foul and unnatural murders have been perpetrated : and while it is remembered that Burke and Hare and his wife are from Ireland, let it not be forgotten that M'Dougal (we blush to say it) is our own countrywoman, and that the witnesses Gray and his wife, through whose honesty and decision the hidden iniquities of the gang were first brought to light, happen to be Irish.*

When Burke was removed from the court-room to the lock-up-house, he was considerably agitated, and, throwing himself upon his knees, addressed a prayer to God, whom he had so grievously offended. During the rest of the day he was composed, and even spoke cheerfully to the policeman who had the charge of him. He expressed his

* This is a mistake : Gray states himself to be a native of Edinburgh, born in the Grassmarket ; his wife is also a native of Scotland.—*Vide* the account of both in this *Appendix*.

joy at the acquittal of M'Dougal, who is not his wife, but cohabited with him as such. He also said that the Irish woman was murdered, not by him, but by Hare, in the manner described in Hare's testimony; but admitted that, during the shocking operation, he held her hands. The policeman observed, that he wondered above all things how he could imbrue his hands in the blood of Daft Jamie—a being, by the bye, whose fate, from his inoffensive and amusing habits, has excited more commiseration than that of all the other butchered individuals. To the policeman's observation, he replied, that, as he hoped to meet with mercy at the Throne of Grace, his hand was not concerned in that murder. Hare and his wife, he said, were the sole perpetrators of it; but he allowed that he had decoyed Jamie to their house. He confessed *that he had participated in many more murders than those he had been indicted for;* and said, that after his mind was composed, he would make disclosures, which would implicate several others besides Hare and his wife, in the same crimes as those for which he was doomed to die. If, he said, he could make sure of the hanging of Hare, he himself would die happy. He was asked, how did he feel when pursuing his horrible avocation? He replied, that in his waking moments he had no feeling; but that when he slept he had frightful dreams, which previously he had been unaccustomed to. The fact is, that the wretch, when awake, by means of ardent spirits, steeped his senses in forgetfulness; and his excessive use of spirits accounts for his absolute penury at the time of his being apprehended. He expressed a wish that one of his counsel, whom he mentioned, would call upon him, that he might furnish him with notes of his life and adventures, as he was desirous to have his history published. At night he had short fits of sleep, during which he raved, but his expressions were inarticulate; and he grinded his teeth in the most fearful manner. Whenever he awoke, he was in a frantic state, but always recovered his composure; and in the course of the evening, he read two chapters of the bible. At two o'clock on Friday morning, he was removed in a coach to the Caltonhill jail, and put upon the gad. As before his trial Burke had intimated his intention to destroy himself, he has, since his conviction, been constantly watched by a person stationed within his cell.

The house occupied by Burke and M'Dougal was, since the trial, visited by shoals of people until Friday night, when the person in possession of the key, to escape the very unjust imputation which had been cast upon him by some, of his having made money by shewing the place, returned it to the landlord. The immediate access to it is appropriate—namely, through a dark passage, where the women stood while the murder of the Irish woman was being perpetrated. The dwelling is one small room, an oblong square, which presents the exact appearance it had when the culprits were apprehended. There is still the straw at the foot of the bed, in which the murdered woman was concealed. Altogether, it has an air of the most squalid poverty and want of arrangement. On the floor is a quantity of wretched old shoes, of all sizes, meant by Burke, perhaps, to indicate his being a cobbler; but they are so wretchedly worn, that we cannot suppose they were left with him to be mended, or that he designed to improve their appearance, for the purpose of selling them. We incline to think that they belonged to some of his victims. The dwelling is

most conveniently situate for the murderous trade he pursued,—there being many obscure approaches to it from different directions. Hare's dwelling, also, has attracted many visitors. Its appearance is equally deplorable with that of Burke. It is on the ground floor, consists of two apartments, and overlooks a gloomy close. Beside it is a sort of stable, used by Hare as a pig-stye, and secured with a large padlock. In this it is believed Hare and Burke committed many of their butcheries; and here, we are inclined to think, Daft Jamie encountered his fate. We cannot believe that, as Hare has stated, the poor idiot was put to death before mid-day in that monster's house; for, in that case, his cries, which are said to have been very loud, must have alarmed the people in the flats above. It is true, that the two assassins had been in the habit of getting up sham-fights in their houses, that the vicinage might be induced to take no notice of noises within them; but still the fearful yells and shouts of a stout young man, struggling for his life, at that time of the day, and in Hare's house, every part of which is seen into from the close, must have attracted the observation of neighbours.

We will notice the two murders charged in the indictment, but not entered upon by the Lord Advocate, as, we understand, they have been described by Hare. That villain, we may observe, always makes his associate the principal actor; but Burke's description totally differs from his; and, situate as Burke now is, entertaining not the most distant hope of mercy, we think that what he says is most entitled to credit. The first murder charged was that of Paterson, a girl possessed, it is said, of great personal charms, but of loose habits. She and a Janet Brown having been liberated about six o'clock on the morning of 9th April from the Canongate watch-house, in which they had been confined all night, were on their way to a public-house, when they met Burke, who, by promising them breakfast, and giving them two bottles of whisky, induced them to go with him to the house of his brother, Constantine, a scavenger in the Canongate. Burke and the woman M'Dougal got up a fight, pending which Hare, who had been sent for, made his appearance. The girl Brown, who rightly construed Hare's brutal countenance as a *caveat* against sitting in his company, took the alarm, and went away, leaving Paterson asleep in a bed. She returned in about twenty minutes, anxious for her companion, and was told she had left the house. In the afternoon she again inquired after Paterson, and received the same answer. During Brown's short absence in the morning, Burke had stifled the wretched girl; and between five and six o'clock in the afternoon, her body was in the dissecting-room, where £8 were paid for it.

As to the case of Daft Jamie—(be it remembered we still speak upon the foul authority of Hare)—it was still more atrocious. Doubtless, the assassins had long " marked him for their own." One morning in the beginning of October, he was met in the Grassmarket by Burke, who, learning from him that he was in search of his mother, to whom he was ardently attached, persuaded him, that he, Burke, knew where she was; and, by this pretence, decoyed him to Hare's house, where, after much resistance on his part, he was prevailed upon to swallow spirits to such a degree, that he sunk down upon the floor in a profound sleep. Burke was anxious to commence the work of

murder; but Hare observed that as yet he, Jamie, was too strong, and it would be better to delay it. Burke, in his impatience, after a short delay, threw himself upon Jamie, and proceeded to strangle him. The unhappy creature, roused to a sense of his danger, threw Burke away from him, and sprung to his feet. It is in moments like these that the instinctive movements of the idiot assimilate to the actions of the rational man. Jamie, who fought like a hero, would actually have subdued Burke, but that Hare, whose assistance was loudly demanded by his associate, tripped up Jamie's heels, and, as he fell, Burke again threw himself upon him. While Hare was dragging Jamie along the floor, Burke being still above him, Jamie contrived to bite the monster of an *incubus* who oppressed him, in such a way as to occasion a cancer,* which, it is thought, without the hangman's aid, would soon precipitate him into eternity. This circumstance goes far to support the often-alleged fact that the *saliva* of an enraged man, absorbed into the system of another, has a poisonous effect analogous to that of hydrophobia produced by the bite of a rabid dog; and so convinced are some of the African tribes of the truth of the fact, that when any of them engages in a conflict with another, with the intention of using his teeth, he previously throws himself into a violent rage. However, poor Jamie was eventually overcome before mid-day; and a student, who had seen him two days previously in good health, saw him stretched out at length on the dissecting-table.

It is impossible to calculate to what extent these villians have carried their murderous practices. Our conviction is—and we know that our estimate falls much short of the generally adopted one—they must, in certain seasons, have murdered at least two individuals in the course of each week; to do which, they had sufficient opportunities. Their habits of life, sordid as their dwellings are, imply as much. We mentioned, at the first *blush* of this horrible business, that a washerwoman, in the Grassmarket or West Port (we forget which), and the girl Paterson, had disappeared under very suspicious circumstances. That Paterson was sacrificed to the avidity of Burke and Hare is beyond all doubt; and that the washerwoman met the same fate, we have the strongest reason to believe. We have as little reason to doubt the following imputed murders, from a circumstance which will appear in the sequel:—About a fortnight previous to the apprehension of the murderers, an Irish beggarwoman, with her idiot son, who had reached puberty, arrived at the house of Burke, when the mother was suffocated by him on the straw at the foot of the bed, and her body put into brine in a herring-barrel; while Hare killed the lad by breaking his spine when across his knees, and threw him into the barrel above his mother. Burke's conscience, seared as it is, has been more agonized by his recollection of the death of this boy, than of that of any other atrocity in which he participated. Since his sentence, Burke has confessed that he shared in the murder, in Hare's house, of a young married female of the name of Jane M'Dougal, a niece of the proper husband of the woman M'Dougal.

* This is incorrect: Burke had been for many years complaining of a schirrous testicle, which would ultimately have caused his death. He received no injury on this occasion.

Her sister, who is in the greatest distress, has been inquiring at the wretch M'Dougal regarding her fate; but the only intelligence she could extract from her is, that she was murdered by Burke.

M'Dougal was liberated on Friday night, having been detained in the Lock-up-house solely for her personal protection; and immediately returned to occupy her old den, the scene of so many murders. On Saturday evening, however, she incautiously ventured out to a shop in the neighbourhood for whisky. The liquor was refused her; but she was observed by some boys, who called out that it was M'Dougal, and a mob almost immediately assembled. The police appeared on the first alarm, and taking her in charge proceeded to convey her to the watch-house in Wester Portsburgh; but such was the fury and exasperation of the mob, determined, apparently, to tear the wretch to pieces if they got hold of her, that the policemen were compelled to use their batons without mercy, in order to cover her retreat to the watch-house, which they reached with the greatest difficulty. Arrived there, the mob increasing every moment in numbers and fury, they endeavoured to afford the unhappy creature protection; but the windows being smashed in, and a disposition manifested by the multitude to storm the watch-house, the people within, were as a dernier resort, obliged to dress her in men's clothes and put her out by a back window. When this was effected, the fact that she had left the office was announced to the mob, who having missed their intended prey, soon after dispersed.

In the course of Sunday the 28th December, great crowds of well-dressed people resorted to the West Port to visit the scenes of the late murders; but so far as we have been able to learn, no disturbance of any kind took place. The only object on which popular fury could vent itself, had, by the exertions of the police escaped: and the only feeling that predominated, was one of curiosity mixed with horror.

On Tuesday (December 30th) M'Dougal, who is still lurking about town, applied at the jail to have an interview with Burke, but was refused. Her attachment to him, perhaps from congeniality of disposition, is undoubtedly strong. Burke, since he went to jail, has been remarkably composed and devout. He has observed that he is by no means a bigot in religion; that besides Popish churches, he had, when a soldier, attended Presbyterian, Episcopalian, and Methodist ones, with the peculiar tenets of all which he appears to be perfectly conversant. He says that he has received instruction from good men of every faith; and that "real repentance and a strong belief" are sufficient to ensure salvation. The other day, the Rev. Mr. Marshall of the Tolbooth church, and the Rev. Mr. Stuart, Catholic priest, called at the jail to see him; and, on being asked which he would wish to converse with, he replied that he would have both. Yesterday he received a visit from the Rev. Mr. Reid, Catholic priest. He persists in saying that Hare originally reduced him into the commission of murder.*

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* Taken from "The Edinburgh Weekly Chronicle" and the "Caledonian Mercury."

(From the " Edinburgh Weekly Chronicle.")

We are compelled to resume this awful subject, and request that our readers who have already " supped full of horrors " will bear with patience at least the facts we may yet have to state, and the remarks we shall offer.

The public feeling upon the subject has, ever since the trial terminated, daily increased in intensity; and the whole kingdom, from Cornwall to Caithness, rings with cries of indignation at the unparalleled foulness of the crimes which have been brought to light, the acquittal of the fiend M'Dougal, and the worse than brutal indifference of those persons to whom the murderers disposed of their merchandize. Indeed, it could never have been supposed that such things were to

> " ——— Overcome us like a summer's cloud,
> Without our special wonder."

Incredulity, at an early stage of the business, held the public indignation in check; but the worst that was feared has been fully realized; the most sceptical are now fully convinced, while reflection discovers, in the crimes committed, features too shocking and hideous ever to have been imagined. Reflection, then, which, in the general case, has a pacifying influence, in this serves to fan the flame of public resentment, which will never be quenched but in the blood of more than one of the assassins, or of their accomplices. To prove the growth of this most righteous feeling, we may mention the fact of the houses of Burke and Hare (the former of which has been re-opened) being *now* far more numerously resorted to by persons of all classes, than they were immediately after the termination of the trial.

There have been some very painful suspicions of late that the investigation of those murders is not to be farther prosecuted; and from the circumstance of M'Dougal, and Constantine Burke and his wife, having left this city for the West Country on Wednesday morning last, we are inclined to believe that such at one time was the Lord Advocate's determination. We happen to know that a certain public functionary (not the Lord Advocate, whose zeal in forwarding the late trial is beyond all praise), remarked the other day that *they* were perfectly sick of the business, and were resolved to stir no farther in it, lest it should bring shame upon the city! So this worthy personage opposes his delicate feelings to the canon of the Almighty, which says, " Whoso sheddeth man's blood, by man shall his blood be shed;" and from a respect to the reputation of this city, would extend impunity to the cold-blooded murderers of its inhabitants!!! If this gentleman's sensibility is such as to dispose him to throw a shield over crimes of the deepest die, all we shall say is, that he is totally unfit for his situation. If, by limiting the infliction of punishment to one of the murderers, others shall be encouraged to repeat crimes of the same kind, then according to the views entertained by this gentleman, still greater disgrace will attach to the city; and then, according to his precious logic, so much greater will be the propriety of taking no notice of them. In the present excited state of the public mind, no Lord Advocate will dare to say, " Thus far—(to the death of Burke)—shall the tide of public vengeance flow, and no

farther." The present Lord Advocate has too much good feeling—a too high regard for the public opinion—to admit of our supposing that he has come to any such determination. We would be the last to propose that his Lordship should violate any engagement, tacit or express, he may have entered into with Hare and his wife. If such an engagement has been entered into, it may possibly include, which we would deeply lament, a remission to them of all the murders they have been engaged in. But surely, now that the evidence as to those transactions has been augmented by the acquittal of M'Dougal, there can be little difficulty in discharging the bolts of justice at the heads of other offenders. On the occasion of the trial, had the Lord Advocate been resolved to adopt no ulterior proceedings, he certainly would have adduced his evidence with regard to the whole three charges, in order to satisfy the public that the guilt of all the persons implicated had been sifted to the bran by the Crown Officers; and, particularly, he would have examined Dr. Knox, were it only to " sear his eye-balls," with the sight of a multitude of his fellow-citizens listening with horror and indignation to the details of his testimony.

It is satisfactory to reflect, however, that our law has wisely restricted the Lord Advocate's prerogative, so that, even were he disposed, he cannot screen a murderer from justice, if the deceased's relations incline to prosecute him. The law says that murder shall not go unavenged, if either the public, represented by the Lord Advocate, or those who have been deprived by it of a near relative, insist for punishment. Will not then the friends of some of the butchered individuals, whose blood calls to Heaven for retribution, be roused to prosecute the butchers? No one can doubt that money would be liberally provided by the inhabitants to defray all expenses. A public meeting should be held upon this very subject.

With regard to Dr. Knox, too much delicacy and reserve have been maintained by a part of the press. When the atrocities in question first transpired, it was stated that Knox conducted himself with the utmost civility towards the police-officers who went to his house in search of the body, when the fact is, he swore at them from his window, and threatened to blow their brains out; and it was only upon their proceeding to force the door of his lecture-room, that it was opened by one of the keepers. Farther, a number of citizens have been called " fellows" by the press, because, acting upon a virtuous feeling, they ventured, illegally we grant, to indulge it, by breaking the windows of that man by whose myrmidons the temple of human life had been so often broken into and despoiled. Great pains, too, have been taken to persuade the public that the doctor was imposed upon by Burke and Hare with regard to the mode in which they acquired their *subjects;* but mark how a few queries will put down that supposition!

Were not bodies—one of them of a girl, with her hair *en papillote*—both warm and souple, repeatedly received into his lecture-room?

Did not Burke and Hare exclusively deal with Dr. Knox; and must not all their *subjects* have exhibited nearly the same symptoms—which symptoms, in the case of the woman Docherty, at once satisfied other medical men that she had been violently bereaved of life? And why did not the constant recurrence of these symptoms, as well as the symptoms themselves, rouse Dr. Knox's suspicions?

Has not the Doctor acknowledged that he has repeatedly bought bodies which had never been interred, alleging (and we believe partly with truth) that they had been disposed of by relations? And did not his doing so encourage among the lower orders, a most barbarous, unnatural, and demoralizing practice?

There are certain atrocious particulars connected with the murder of the woman Docherty, which are very susceptible of proof. A person in Dr. Knox's employment actually offered her for sale to a respectable gentleman of the profession before she was despatched; he saw her in Burke's house immediately after the spark of life had been extinguished; and he then again offered her for £15 to the same gentleman, who indignantly ordered him out of his house.

If neither Dr. Knox nor his man can be considered as any way accessary to any of the murders (and we hope it may be so), there cannot be the least doubt that both may be indicted for the misdemeanour of purchasing bodies under the circumstances we have described; by which process the public may be relieved of those terrors which their presence in this city so naturally inspires. While the question as to the policy of winking at occasional exhumations remains unsettled, we have no desire to have the law strictly enforced against those who purchase subjects which have been come at in the ordinary manner; but all the circumstances of this case are fraught with a peculiar criminality, which requires most exemplary punishment. We trust that, in such a case, we shall not see falsified the proud adage of our law, that the life of the poor man is as precious in its sight as that of the wealthiest; or verified Lear's bitter observation, that

> "———— Plate sin with gold,
> And the strong lance of justice hurtless breaks:
> Arm it in rags, a pigmy's straw doth pierce it."

It was not so, in 1814, when Dr. Patison of Glasgow—a person fully as eminent in his way as Dr. Knox, was arraigned at the bar of the High Court of Justiciary, along with a lecturer on surgery, and two medical students, for having disinterred a human body. *Has the spirit or the practice of the law changed since that period.* What distinction can be made between the case in which Dr. Patison was involved (innocently we are bound to believe) and the present one of Dr. Knox, which is not stupendously and infinitely to the disadvantage of the latter? *The greatest curse that can befal a country is the administrators of its law showing that law to be capricious in its practice.*

We have heard most unmeasured praises bestowed upon the learned gentlemen who defended Burke and M'Dougal, because they rendered their services *gratuitously*.* We cannot, admitting the *postulatum,* concur in those praises. Had the highly talented counsel supposed the murderers to be innocent, they might very safely have left them to the proverbial caution and lenity of a Scottish jury.†

* We have it from undoubted authority, that the services of the counsel were gratuitous. The Dean of Faculty was induced to undertake the defence of Burke, solely at the solicitation of the junior counsel, who waited on him in a body for that purpose.

† Two of the jury, we learn, on the Trial of Burke and M'Dougal, were for acquitting Burke; and it was only by a sort of compromise that a unanimous verdict was returned against that person!

If they supposed them guilty, why expend their talents in trying to rescue them from their merited fate? We believe better of these gentlemen than to suppose that they rendered their services *gratuitously*. Had they been *fee'd*—(and our impression, which may be wrong, is that they were so, but by whom we cannot say)—the only observation we could have made is, that they acted in a *business-like* manner. Of all humbugs, professional humbug is the most dangerous, because it is the most imposing.

(From the " Caledonian Mercury.")

Every hour some fresh tale of horror reaches us. Since our last we have been told of many things—(aye, and told, too, by anatomists)—calculated to freeze the very blood in our veins. Murder upon system —murder almost by wholesale—has been carried on in this city for the last year and a half; and not only has it been systematically committed, to an extent which it is appalling to contemplate, but it has been perpetrated upon the most refined principles of anatomical science, and with a knowledge of the functions and organs of life, which few ordinary medical practitioners possess, and which must have emanated from some higher source, yet unsuspected or unknown. In fact, this is the most fearful, as it is the most melancholy and deplorable attribute of the crime; and it is one circumstance among many which calls loudly, and trumpet-tongued, for further investigation. The horrid circumstances which have been stated to us in regard to victims, the disappearance and murder of whom have not yet been brought to the knowledge of the public, we, *for the present*, refrain from mentioning, in the hope that the Lord Advocate will redeem the solemn pledge which he gave to the Court and the country in the course of the late trial; but matters have now come to such a pass, and a system of such infernal iniquity has been revealed to us, by those whose dearest interests are concerned in having the truth, the whole truth, and nothing but the truth, unravelled, that, unless some steps are speedily taken to bring to justice *all* those who have been concerned in it, we shall feel ourselves called upon to throw aside every feeling and every wish to spare by which we are now restrained, and to disclose facts which we have reason to believe are already known to the legal authorities, but which, openly proclaimed to the world, they can no longer hesitate or refuse to investigate. It won't do to affect a contempt for statements contained in the newspapers, or to tell men whose professional character and reputation are at stake—" We do not even deign to laugh at them." There is nothing particularly calculated to move the laughter of any one, however largely he may share in the *præfervidum ingenium Scotorum*, in the recital of multiplied atrocities, such as never before disgraced the annals of any civilized country; nor is it long since a statement in a newspaper—in our own—relative to the circumstances in which the body of the infant stolen from the Pleasance was found, led to an investigation which, we understand, is still in progress, and which may ultimately bring about the discovery of the murderer. The sacrifice of Burke alone will not appease the present righteous cry for vengeance against a horde of systematic and scientific murderers; nor will the public tolerate an

attempt to "smother" an inquiry, because it might eventually implicate persons of a different description. *Fiat justitia ruat cœlum.* The community can have no interest so strong as they have in the equal and uncompromising execution of the laws; and they can suffer no injury so great as that which must be inflicted upon them by attempting to arrest the course of justice, where crimes have been committed which strike at the very roots of society, and are calculated to unloose the bonds by which it is knit together.

"We have heard, with unspeakable surprise," says an able writer in the *New Scots Magazine*, "that these judicial investigations are to proceed no further, and that the miserable wretch Burke is to be the only victim that is to be yielded up to public justice. We cannot believe this rumour; for assuredly the public mind cannot be quieted by such an imperfect inquiry as this trial has afforded. THE LORD ADVOCATE PLEDGED HIMSELF TO PROBE THESE ASSASSINATIONS TO THE BOTTOM—*and to pursue those measures which are necessary to tranquillize the public agitation*—a feeling which we are sure at this moment pervades every family, and every mind in this city—and wherever the tragical tidings have been heard. To stop short now, will just be to leave in every breast that undefined and gloomy apprehension which haunts the imagination, and oppresses it more heavily than a full knowledge of the real extent of such evils in society; and we have such confidence in the sound discretion of the Lord Advocate, that we cannot imagine he will leave the nest of monsters, who have taken up their abode and practised the trade of murder among us, unkennelled, and without bringing every individual implicated to a public trial, and disclosing to the community the dangers they have to guard themselves against from such a system of terror, and such a horde of miscreants. We have only one *practical* remark to make, and it is, that the higher authorities should pay some attention to our police establishment, and prompt them to a vigilant discharge of their duty. It does not appear that the officers of police had the slightest intelligence of any one of the murders which are now known to have been committed; and but for the information given by the man Gray, whose wife discovered the murder of Campbell, the whole mystery of iniquity might have still remained in full operation. *The police had no merit whatever in this affair; and indeed its officers act upon a principle which actually affords facilities for the repetition of similar crimes.* They have instructions not to interfere in such scenes as preceded, or rather formed a prelude to the murder of Campbell, and will not commit the perpetrator of an outrage tending to murder, unless they either see it, or some informant commits an offender to custody. There could not be a better illustration of the utter absurdity of this regulation, than the facts which have come out on this trial. If Alston, who heard the broil in Burke's house, when the murder was committed, could have found a policeman in Portsburgh, and if they had entered the house at the moment that cries of murder issued from it, the perpetration of it would either have been prevented, or the whole gang of murderers would have been apprehended in the fact. Unless, therefore, a different principle is acted upon, the police is useless, and worse than useless; and, however meritorious it may be in detecting petty larcenies, it is utterly inefficient for the protection of life in this city."

In every one of these observations we entirely concur. More effectual protection to life is indispensably necessary; but the first and most important step towards affording it is to bring to justice all those who have been trading in murder. And to show the indispensable necessity for this, we beg our readers to attend to the *mode* in which it was proved at Burke's trial that the late murders had been committed. To render our statement intelligible, however, it will be necessary to give some preliminary explanations.

At every inspiration, the ribs of the chest or thorax are dilated by muscular action to an extent of about one-fifth larger than immediately after expiration, and, in cases of a full or strong inspiration, to nearly one-third. A partial vacuum is thus produced, and the atmospheric air rushes in by the trachea to fill the cavity in the diaphragm, the recipient of the air inspired, and to oxygenate the blood. In murder upon scientific principles, therefore, the first point is to compress the ribs of the thorax, so as to prevent this dilatation; and if the compression be powerful, it will of itself be sufficient to destroy life in a few minutes, without the application of pressure to the throat at all, and without leaving on the body any external marks of violence. Even a full grown bull might be destroyed in this way in a very short space of time; for independently of the necessity of respiration to the support of life, the blood, for want of oxygen, instantly becomes poisoned, and this of itself would occasion immediate death. If, however, to this compression of the ribs of the chest be added what Dr. Christison called "throttling," or the simultaneous application of pressure to the trachea, nay, if the head were even thrown back so as to strain the windpipe out of its natural position, without any application to the throat at all, the consequence of the use of both means would be the immediate extinction of life. But mere "throttling," without compression of the chest, though it might produce death if carried the length of literal strangulation, would always leave external marks of violence, and might, as in the case of Daft Jamie, lead to a struggle perilous to the assassins themselves; while the combination of both—of the compression of the chest and of the trachea—is equally easy and effectual, and is, moreover, the only mode in which the assassin could accomplish his deadly purpose without leaving traces of his murderous work on the body of his victim.

We pray our readers to compare this description with the mode in which Burke is proved by the evidence on his trial to have proceeded in the murder of Margery Campbell or Docherty. He threw himself upon her body, with his knees upon her chest, to compress the respiratory organs, in the manner above mentioned; and at the same instant he grappled her by the throat: he prevented by his weight the expansion of the ribs, and at the same moment he stopped the canal which communicates with the external air, thus ensuring the almost immediate and easy extinction of his victim. The choking sounds that were heard must have been occasioned by the sudden pressure upon the chest of the unfortunate woman when Burke threw his weight upon her, expelling violently the air contained in the lungs; for after that she could have uttered no sound, and must have died in the gripe of the assassin in the course of two or three minutes. And, in farther illustration of the efficacy of this scientific mode of perpe-

trating murder, we may allude to what is stated and believed to have taken place in the case of Daft Jamie. From his impatience and impetuosity, the assassin missed his intended aim of planting his knees on the breast of the poor victim, and only grappled him by the throat. The consequence was, that the muscles of the chest being unencumbered, and the rest of the body free, the poor creature was able to exert his whole strength—and a desperate, a mortal struggle ensued, in the course of which several severe external wounds were inflicted on him. But had the assassin been as deliberate as in the case of the woman Docherty, the result would have been the same.*

Now, we ask, WHO taught Burke, a common Irish labourer of the very lowest class, to commit murder after a fashion, the science displayed in which is a subject of wonder and dismay to many of the most skilful anatomists in this city, with three of whom we have conversed in regard to it, and found them overwhelmed with horror and amazement? *Who*, we say, taught Burke?—for that he was *tutored* as to the mode of committing the crime, no human being can entertain a shadow of doubt. We will answer the question: IT WAS HARE! But the same question again returns, *who* taught Hare, a person of the very same country and class with Burke? This is a point to be resolved by the Public Prosecutor alone; and we adjure him by the regard he is known to bear to the law, by the solemn pledge which he gave at the late trial in the face of the Court and the country, and by the sacred interests of eternal justice, to lose not a moment in taking steps to have it resolved. With unspeakable astonishment we have learned that Hare is only detained in jail for his own personal protection until after New-Year's-Day. But we cannot permit ourselves to give credit to this statement, notwithstanding we have heard it from quarters where accurate information in regard to such matters is usually obtained. We would fain think it impossible. This subtle fiend was Burke's master in the art of murder, and he has been longer engaged in the trade than his apt scholar, who is now delivered over to justice. We know, too, and are ready to state, where and to whom he offered murdered bodies for sale, recklessly admitting that they had been "popped," or in other words murdered by him and his associates. Daft Jamie was murdered in his house, and in that assassination he was a principal, not an accessary. But it may be said there is no proof. We utterly ridicule this idea. We know there *is* proof, and the mode in which it may be obtained has been pointed out to one of the honourable and learned counsel for the Crown. Two individuals have been named, whose apprehension would lead to the unravelling of the whole of this great mystery of iniquity; from them every information may be obtained necessary to insure the conviction of this monster.

We have heard it alleged that the officers of the Crown became alarmed at the gigantic system of crime which, in the course of their

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* That such traces and marks were left on the body of Jamie is sufficiently proved by the fact, that his body was kept four or five days in spirits before it was laid on the dissecting table. The effect of immersion in spirits, we need scarcely say, is to remove the lividity consequent on external bruises or contusions, to corrugate the skin, and to give it all one uniform colour.

inquiries, began to unfold itself; and that not knowing whither it might lead, or whom it might ultimately implicate, and from a regard to the credit and honour of the country, they have been induced to stop short with the conviction they have already obtained, and to " smother" all further investigation. This, however, is mere stuff. As to the consequences said to be dreaded from pursuing the inquiries which had been opened up, we are sure that we speak the public sentiment when we say, justice ought to be done at whatever cost; and with respect to the honour of the country, we cannot conceive a mode in which it will be more effectually læsed than by interposing to quash a matter of such terrific magnitude as this, and to leave suspicion to fancy horrors still more appalling than even the dreadful reality.

A contemporary of Monday, speaking of Burke and his associates, says, " This gang of murderers found it neccesary *at times to deceive the anatomists* into a belief that the subjects sold had come from a distance." *No such* DECEPTION *was ever practised!* We have conversed on the subject with three of the most distinguished *anatomists* of Edinburgh, who most solemnly assure us that no such *deception* was ever attempted upon them; and that it could not by possibility have been " practised," because they would have infallibly detected, and as certainly refused every such subject. Moreover, they state that it is impossible to obtain before interment bodies which have died a natural death; at least, that in the course of fifteen years' experience, they have only known two instances in which such bodies were procured. The strongest feelings of human nature, they say, are opposed to it; and even if this were not the case, there are extrinsic difficulties (we need not specify them, as they must be easily divined by all who know any thing of the modes in which the schools of anatomy are *regularly* and *legitimately* supplied) which render it quite impracticable. The inference from this is obvious. Uninterred bodies offered for sale would, from experience of the insuperable difficulty of obtaining them, have roused their suspicion, and prevented the possibility of their being deceived in the manner stated by our contemporary. In illustration of this, we may add that the body of the unfortunate woman Campbell or Docherty, was offered for sale to a most respectable teacher of anatomy in this city, at or near one o'clock in the morning of the 1st November (she had been murdered, as our readers will remember, betwixt eleven and twelve o'clock on the night of the 31st October), that was in less than an hour and a half after she had been murdered; and *fifteen guineas* were demanded for the body; but our friend, after putting a few questions to the fellows who waited upon him, peremptorily and sternly refused to purchase it at any price, or to have any thing whatever to do with it. One of the fellows who waited upon him on this occasion, was a conspicuous witness at the late trial, and stated, upon oath, that all he learned from Burke when he called at the house of the latter about midnight was, that Burke " had something *there* (pointing to the bed) for the doctor, which would be ready in the morning." To the gentleman in question, however, an hour or thereby after the murder was committed, he stated that the body he wished to dispose of was the body of a woman; and that he had " *a desperate gang* " in his pay, through whom he could procure as many subjects as he wished for.

DAVID PATERSON.

(From the "Caledonian Mercury.")

We have received the following communication from Mr. David Paterson, the person who gave evidence at the late trial, and whose name has since been so frequently before the public in connexion with the late horrid transactions. As he insists upon it, we have no objection to give it a place here:

"Sir—I have now long borne with great patience the many false and cruel accusations alleged against me in all the papers, relative to the horrid transactions of Burke and his associates,—I being held forth to the public as one of the most odious characters in existence. I can assure you, Sir, that I have been shamefully wronged; for in all the late allegations against me, I have only kept silence by advice of Dr. Knox, as he was, according to promise, to espouse my cause, and clear my innocence; but which I now find he has most cruelly failed to perform. And I now most solemnly protest, and can prove, that throughout all the services rendered by me to Dr. Knox, I acted entirely under his own guidance and direction.

"I therefore beg thus to address you, as your paper seems to have been the leading one in this affair.

"It has also been most grossly and erroneously reported that I had absconded, and been dismissed from Dr. Knox's service,—all of which I can prove to be false.

"My home is well known to the public authorities: I therefore request, nay, even solicit them (if for one moment they conceive me in any way guilty in this late transaction), to bring me to a public trial, and adduce any evidence they think proper, and either let me be found guilty, or have the benefit of an honourable acquittal.

"This I again earnestly beg to be inserted, being the declaration of an innocent man; and if I am found guilty, let me be punished as the crime deserves, and as innocent, let this suffice to silence the accusations alleged against me, and free me from the public odium which the same has given birth to.—Your immediate notice to this will very much oblige your very humble and obedient servant,

"David Paterson.

"*Portsburgh*, 15*th January* 1829."

Now, we have a word or two to say to Mr. David Paterson. And, first of all, we beg to ask him, whether it be true or the reverse, that about one o'clock on the morning of the 1st of November last, he, in conjunction with an individual whom he well knows, offered the body *of a woman* for sale to a highly respectable lecturer on anatomy? Secondly, whether or not he asked *fifteen pounds* for the subject, stating at the same time that Dr. Knox would give only *twelve?* Thirdly, whether he did not say that he wished to have no further dealings with the Doctor, because he had handed over *them* (Paterson and his associate) to his assistants? And, lastly, whether the body so offered was or was not the body of *the woman Docherty?* We request Mr. Paterson to speak to these points, and to afford the public the expla-

nations which, for many reasons, are indispensably necessary. Next, as to our correspondent's dismissal from Dr. Knox's service, we unquestionably stated that fact, upon authority which we conceived unexceptionable; and we afterwards heard it confirmed from Dr. Knox's own lips. We know, in short, that Mr. David Paterson was dismissed from Dr. Knox's service; and if he has the least anxiety about the matter, we can have no objections to tell him the reason. As to Mr. Paterson's supposed absconding, no such statement was ever made in this paper, and he ought therefore to contradict it, if he feels inclined to do so, through the medium of the journal which first gave it publicity.

The second communication of David Paterson it was our original intention *not* to publish, chiefly because it contained no satisfactory answers to the queries we had put to the ostensible writer, and also from motives of delicacy to a respectable individual not at all implicated in the discussions which have lately agitated the public mind. But after what has appeared in the columns of a contemporary of Saturday, as well as the wanton misrepresentations to which our withholding this document has, we understand, given rise, in quarters where we should least of all have expected any misconstruction of our motives, we can no longer hesitate in giving it a place in our columns. Its publication or non-publication was to us individually a matter of no moment whatever; but it may *now* be of importance as affording a standard by which to test the consistency or inconsistency of the writer, and to ascertain what measure of credit is due to the statements which he has caused to be put forth in regard to matters of the deepest interest to the public at large. The following is the communication addressed to ourselves, which we shall place in juxtaposition with that which appeared in the *Courant* of Saturday last.

" To the Editor of the " Caledonian Mercury."

" Sir—After the publication of my letter to you in this day's paper, I observe you have inserted the following queries:—First, whether it be true or the reverse, that about one o'clock of the morning of the 1st November last, I, in conjunction with another individual whom I well knew, offered the body of a woman for sale, to a highly respectable lecturer on anatomy? My answer is simply, No. Secondly, whether or not I asked fifteen pounds for the subject, stating at the same time, that Dr. Knox would give only twelve?—Answer, No. Thirdly, whether I did not say, that I wished to have no farther dealings with the Doctor, because he had handed us over to his (the Dr.'s) assistants? My answer is, No. And lastly, Whether the body so offered, was or was not the body of the woman Docherty? To this I answer, that having no body to offer, the transaction could not take place. But for your and the public satisfaction, I will give what information there is in my possession respecting the queries; to the first I answer, That a friend of the lecturer alluded to called upon me three weeks before the time you have stated, and inquired at me if I knew where the individuals lived that were in the habit of supplying Dr. Knox; but as I did not know, he received no information. At the same time I was aware of the animosity that existed

between the two lecturers, and it was then my opinion that the friend was more on the quiz than in reality; but he still holding forth that it would greatly oblige the lecturer, I said, that the next time I saw the resurrectionists, I would mention it to them, providing Dr. Knox was supplied. The sum offered was about fifteen pounds. To the second query I explain, that the individual who gave the information must not have been aware that I was a servant of Dr. Knox's, and I never made use of the words that Dr. K. would give no more than twelve pounds. I had nothing to do with the purchasing or selling of subjects. To the third query I can give no explanation, not knowing its precise meaning; I can only add, that Dr. Knox was my master, and the assistants had none, nor ever assumed any control over me. To the last query, I again repeat, that having no subject in my possession, I could not make the offer. But about the time alluded to, I did ask the lecturer in question whether he was still inclined to give his friend the large sum formerly offered. He answered in the affirmative, and added, that his rooms would be open all night, to receive any thing his friend (not me) would send. If it is supposed that I was to furnish him with a subject, and that subject the woman Docherty, why should I have desired Burke to go to Dr. Knox's instead of the other lecture-room?

"The statement you give of my dismissal from Dr. Knox, said to have been from his own mouth, stamps ———————. Let him put his hand upon his breast, and deny, if he can, that he has not repeatedly solicited me to return to his service; in corroboration of which, I beg to annex his letter to me of Sunday 11th January.

"'DAVID—From your not having come after that I have *thrice* sent for you, I fear that you feel satisfied in your own mind, of not having been faithful at all times to my interests.

"'Still such is my good feeling towards you, that I wish to do every thing in my power to prevent your taking wrong steps—the public clamour is of course much against you, but *all such matters as these subside in a short period*,* provided the individuals themselves do not adopt false steps.

"'I think it would be prudent for you to come and see me this evening at nine—for you can have *no ground* for *believing*, since I have never said so, that *I am not concerned in your behalf, and ready to use my utmost exertions for you.* No *prejudice* shall ever be allowed to enter *my mind* against you, unless your own conduct give rise to it.

"'R. KNOX.'

"It is my wish to give the public every information that lies in my power, which will shortly be done by another individual who is more capable than I am; even the secrets yet unknown to the public will be revealed. Your indulging me with the insertion of the above will greatly oblige, your very obedient servant,

"DAVID PATERSON."

Portsburgh, January 17, 1829.

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* It is hoped the Doctor is wrong here: *such matters* cannot *subside* till such time as he *clears himself* to the public satisfaction.

The following is *another* version of the same story, differing, as the reader will perceive, in some most material particulars, from that with which we had been favoured. We have not time at present to point out the discrepancies, which indeed must be apparent to every one who reads both communications; but it is important to observe that Paterson (or the person who writes the letter to which his name is affixed) cautiously avoids giving a *direct* answer to our query, as to whether the body he offered for sale on the morning of the 1st of November last, was the corpse of the woman Campbell or Docherty, and attempts to escape from it by means of an inference as to the probability of his acting in a particular way under the circumstances. Now, this is not a question of probability but of *fact;* and we again ask him, *whose* was the corpse he confessedly offered for sale an hour or an hour and a half *after* Burke had, according to his own evidence in the witness-box, told him that he had " something for the Doctor, which would be ready in the morning?"

" The Caledonian Mercury of the 17th inst. after inserting my letter, has proposed a few queries, which the editor said he would be glad to have answered. To satisfy that gentleman, I answered his queries the same evening, accompanied with a letter I received from Dr. Knox, dated Sunday, 11th January. But it would appear other matter of the greatest importance has prevented him from giving to the public answers to those queries, and in this case the public may think that I decline answering them. But so far from this being the case, I court inquiry, sensible that the more minutely this affair is examined, the more will it appear that I have been made the scape-goat for a personage in higher life. I also observed in your esteemed paper of the 22d, extracts from a pamphlet in the shape of a letter to the Lord Advocate, with a remark, that that part of the story respecting the offering of a body to another lecturer, has been entirely overlooked in the pamphlet. Allow me here to state, that so much of the pamphlet as relates to me, is perfectly correct; and I am willing to substantiate it upon oath, supported by other proofs. The remarks were made by another individual, who, I have every reason to believe, is in possession of information of greater importance than what has yet transpired. But to the point. I will now give you what I trust the public will consider a *satisfactory* explanation of the transaction alluded to in your paper of the 22d, which will at the same time answer the queries in the Caledonian Mercury of the 17th. About three weeks before the murder of Docherty, a Mr. —— called upon me, who was very intimate (or appeared to be so) with Dr. ——. During the conversation, in a walk along the Bridges, the topic turned upon the scarcity of subjects amongst the lecturers. I was asked how Dr. —— was supplied; and after informing him to the best of my knowledge, he Mr. ——, said that he understood that Dr. —— could not get one, and that he had offered him fifteen pounds if he could get one for him. My answer was, that I thought there was nothing more easy, as there were plenty of resurrection men came about Dr. ——'s rooms, who might procure one for him. He then requested me to accompany him to Dr. ——'s house, and he would ascertain if Dr. —— had got one. I did so. Dr. —— and Mr. —— talked for some time upon various matters, when the discourse turned upon the matter in ques-

tion. I heard Dr. —— offer £15 for a subject, as he was in great strait. *I took no part in the conversation, nor made any remark;* but after we had left Dr. ——, Mr. —— strongly urged me to allow a subject to go to Dr. ——'s, rooms, when any would arrive, without the knowledge of Dr. ——, for which no doubt *I was to receive a remuneration for my trouble.* Dr. —— about that time had fifteen subjects, and I did resolve to allow one to Dr. —— at the first opportunity. Shortly after this time, Burke and Hare brought a subject, but not having an opportunity of speaking to them that night, resolved to do so when I next saw them, or any *other* of the resurrectionists. A few days after a notorious resurrectionist called at the rooms, and informed me that he was going to the country upon business, and inquired if the Dr. was in want of goods. I replied that possibly he might, but that I wanted one for a friend, and would pay him when he returned. The bargain was struck, and he received earnest and a trunk, saying he had two customers before me, and it might be eight or ten days before he could supply me, as the grounds were strictly watched. This passed over, and on Friday evening, the 31st October, a person brought a letter addressed to Mr. ——, Surgeons' Square. This turned out to be from Andrew (or Merry Andrew, as he was styled.) The following is a literal copy :—

" '*Oct.* 29.

" 'Doctor am in the east, and has ben doin little busnis, am short of siller send out abot aught and twenty shilins way the carer the thing will bee in abot 4 on Saturday mornin its a shusa, hae the plase open. " 'AND. M———s.'

" Just after I received this letter, I went with Mr. —— to spend the evening, and returned home about twelve o'clock. I found Burke knocking at the door of my lodgings;—what then transpired is fully stated in the pamphlet. After my return from Burke's, which was only a few minutes past twelve o'clock, *I went to bed:* the letter had escaped my memory. I slept none: the suspicions I had entertained of Burke and Hare, and the determination I had come to *to examine the body of the subject they were to send*, and a retrospective view of their late conduct, passed before me. The letter now came into my mind; it was between *three and four o'clock:* I went to Dr.——; did say I expected a subject from his friend: *did not say what place.* The Doctor desired it to be sent to his lecture-rooms, as his assistants were or would be in waiting. He did not refuse it, as has been alleged. The Doctor did not receive it, however, as Mr. Andrew M——s thought proper to address it to another quarter—a very common trick with him, especially if he received part in advance. Now, if, as it has been stated, the woman Docherty was the individual I offered Dr. ——, *why should I urge Burke, as he himself confesses, to take it to Dr. ——, if I wished it to have gone to another quarter? How easy could I have done it.* I did not even say to Dr. —— that I had one, therefore could not offer one; but did say that one was expected, for the truth of which I appeal to that gentleman. Various recent circumstances made me very suspicious of the manner Burke obtained his subjects, and I again avow it, that at all hazards I was determined to examine the body of the first subject

they brought, and satisfy myself upon that point. *I confess that the circumstance of the subject coming from the east at the nick of time Docherty was murdered* LOOKS RATHER SUSPICIOUS. But when I inform you that I have seen three subjects at the same time of day sent to the lecture-room from different quarters, your suspicions will cease. I have another witness to prove the truth of my allegations, which, taken with the confession of Burke, and the evidence of Hare, will be sufficient to satisfy any unbiassed mind *that Docherty could not be the subject intended for Dr.* ——.

"With regard to the paragraph in the Caledonian Mercury, stating that they had heard from Dr. Knox's own mouth that he had turned me out of his service, I answer, that Dr. Knox has since sent for me, and expressed the most friendly intentions towards me, which I can prove by a letter received from him. This document I am ready to shew, which will speak for itself. But this is not all. The public shall be made acquainted with facts they little expected to hear. I understand that —— has traced out other individuals that have been murdered, their names, descriptions, and designations, the times and places where they were committed; and from an examination I underwent before him, it is but too true that I can vouch for the identity of such persons after they were dead. I understand he is in possession of the names and descriptions of two of Burke's accomplices, and all the information in my power shall be at his service.

(Signed) "DAVID PATERSON.

"*Portsburgh, 23d January* 1829."

[The following, which is the joint statement of Dr. Knox's principal assistants, in reference to the situation actually held by David Paterson in the Doctor's service, as well as his late proceedings, has been handed to us for publication, and, in justice to these young gentlemen, we think it right to give it a place in our columns.]

"It is amazing with what effrontery this person has contrived to push himself into the notice of the public under the feigned character of '*Keeper of the Museum belonging to Dr. Knox*,'* '*Assistant to Dr. Knox*,' *&c. &c.* The facts stand thus:—David Paterson was never in his life entrusted with the keys of the museum, and had nothing at all to do with it; the keys being kept by Dr. Knox, and the management entrusted to a gentleman who has a salary of £195 a-year. David Paterson was nothing more than *a menial servant, hired by the week at 7s., and dismissable at pleasure;* his duties being those generally and in other lecture-rooms performed by scavengers or porters—such as keeping the door, cleaning and sweeping out the rooms, putting on and mending the fires, scrubbing the tables, and carrying away and burying the offals of the dissecting-rooms; washing and cleaning subjects preparatory to their being brought into the class-room; attending on the students, and doing little jobs for them —such as cleaning and scraping bones, getting their dissecting clothes washed, which was done by his mother and sister; he had likewise to

* Paterson was cited *as such* in the list of witnesses, and gave his *evidence* accordingly.

go messages, and be *ready at all times to receive packages,* and go for them.

"With regard to his connexion with Burke and Hare, he was so far associated with them, that he was on the eve of entering into an agreement with one of these miscreants to accompany him to Ireland. that they might (as he said) procure a greater supply of subjects and at a less price, the people being poorer there.

"This is the person who presumes to address the Lord Advocate of Scotland!* This is the person who says he had nothing to do with subjects or the dissecting-room! This is the person who pretends to have had no connexion with Burke and Hare, although he was going to enter into an agreement with one of them, and become his partner, and intended, nay, actually tried, to make a profit on the subjects procured from them, by bargaining with another lecturer for a higher price than his master was willing to give (thus committing a shameful breach of trust.) This is the person who says he suspected Burke and Hare, and determined to watch them! And this is the person who said that the body of the woman Docherty presented marks of violence; yet this was the same body, to sell which he was in treaty with a lecturer for £15, saying his master would not give more than £12."

CONFESSIONS OF BURKE.

(From the "Edinburgh Advertiser.")

The Lord Advocate having considered it proper that the public should be put in possession of these confessions, they were accordingly transmitted by the sheriff, along with the following letter, to the Lord Provost:—

Sheriff's Office, Edinburgh, Feb. 5, 1829.

My Lord Provost—As it is now fully understood that all proceedings of a criminal nature against William Hare have terminated, it has appeared to the Lord Advocate that the community have a right to expect a disclosure of the contents of the confessions made by William Burke after his conviction. I have, therefore, been directed to place those confessions in your Lordship's hands with the view to their being given to the public, at such a time, and in such a manner, as you may deem most advisable.

Your Lordship is already aware that the first of these confessions was taken by the sheriff-substitute, on the 3d of January last, in consequence of Burke having intimated a wish to that effect. The second was taken on the 22d of the same month, a few days before Burke's execution; and in order to give it every degree of authenticity, Mr. Reid, a Roman Catholic priest, who had been in regular attendance on Burke, was requested to be present.

It may be satisfactory to your Lordship to know, that in the infor-

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* A Letter by "The Echo of Surgeons' Square," and attributed to Paterson, was addressed to the Lord Advocate, "disclosing the accomplices, secrets, and other facts relative to the late murders," &c.

mation which Hare gave to the sheriff on the 1st December last (while he imputed to Burke the active part in those deeds which the latter now assigns to Hare), Hare disclosed nearly the same crimes in point of number, of time, and of the description of persons murdered, which Burke has thus confessed ; and in the few particulars in which they differed, no collateral evidence could be obtained calculated to show which of them was in the right.

Your Lordship will not be displeased to learn, that after a very full and anxious inquiry, now only about to be concluded, no circumstances have transpired, calculated to show that any other persons have lent themselves to such practices in this city, or its vicinity; and that there is no reason to believe that any other crimes have been committed by Burke and Hare, excepting those contained in the frightful catalogue to which they have confessed.

In concluding, I need hardly suggest to your Lordship the propriety of not making those confessions public until such time as you are assured that Hare has been actually liberated from jail.—I have the honour to be, my Lord, your Lordship's most obedient humble servant, AD. DUFF.

The Right Hon. the Lord Provost, &c. &c.

CONFESSIONS OF BURKE IN THE JAIL.

Present—Mr. George Tait, Sheriff-substitute; Mr. Archibald Scott, Procurator-fiscal; Mr. Richard J. Moxey, Assistant Sheriff-clerk.

Edinburgh, 3d January 1829.

Compeared William Burke, at present under sentence of death in the jail of Edinburgh, states that he never saw Hare till the Hallow-fair before last (November 1827), when he and Helen M'Dougal met Hare's wife, with whom he was previously acquainted, on the street: they had a dram, and he mentioned he had an intention to go to the west country to endeavour to get employment as a cobbler; but Hare's wife suggested that they had a small room in their house which might suit him and M'Dougal, and that he might follow his trade of a cobbler in Edinburgh; and he went to Hare's house, and continued to live there, and got employment as a cobbler.

An old pensioner, named Donald, lived in the house about Christmas 1827; he was in bad health, and died a short time before his quarter's pension was due: that he owed Hare £4; and a day or two after the pensioner's death, Hare proposed that his body should be sold to the doctors, and that the declarant should get a share of the price. Declarant said it would be impossible to do it, because the man would be coming in with the coffin immediately; but after the body was put into the coffin, and the lid was nailed down, Hare started the lid with a chisel, and he and declarant took out the corpse and concealed it in the bed, and put tanner's bark from behind the house into the coffin, and covered it with a sheet, and nailed down the lid of the coffin, and the coffin was then carried away for interment. That Hare did not appear to have been concerned in any thing of the kind before, and seemed to be at a loss how to get the body disposed of; and he and Hare went in the evening to the yard of the College, and saw a person like a student there, and the de-

clarant asked him if there were any of Dr. Monro's men about, because he did not know there was any other way of disposing of a dead body—nor did Hare. The young man asked what they wanted with Dr. Monro, and the declarant told him that he had a subject to dispose of, and the young man referred him to Dr. Knox, No. 10, Surgeon Square ; and they went there, and saw young gentlemen, whom he now knows to be Jones, Miller, and Ferguson, and told them that they had a subject to dispose of, but *they did not ask how they had obtained it ;* and they told the declarant and Hare to come back when it was dark, and that they themselves would find a porter to carry it. Declarant and Hare went home and put the body into a sack, and carried it to Surgeon Square, and not knowing how to dispose of it, laid it down at the door of the cellar, and went up to the room, where the three young men saw them, and told them to bring up the body to the room, which they did ; and they took the body out of the sack, and laid it on the dissecting-table: That *the shirt was on the body, but the young men asked no questions as to that ;* and the declarant and Hare, at their desire, took off the shirt, and got £7 : 10s. *Dr. Knox came* in after the shirt was taken off, *and looked at the body,* and proposed they should get £7 : 10s., and authorized Jones to settle with them ; and *he asked no questions as to how the body had been obtained.* Hare got £4 : 5s. and the declarant got £3 : 5s. Jones, &c. said that *they would be glad to see them again when they had any other body to dispose of.*

Early last spring, 1828, a woman from Gilmerton came to Hare's house as a nightly lodger,—Hare keeping seven beds for lodgers: That she was a stranger, and she and Hare became merry, and drank together ; and next morning she was very ill in consequence of what she had got, and she sent for more drink, and she and Hare drank together, and she became very sick and vomited ; and at that time she had not risen from bed, and Hare then said that they would try and smother her in order to dispose of her body to the doctors :* That she was lying on her back in the bed, and quite insensible from drink, and Hare clapped his hand on her mouth and nose, and the declarant laid himself across her body, in order to prevent her making any disturbance—and she never stirred ; and they took her out of bed and undressed her, and put her into a chest ; and they mentioned to Dr. Knox's young men that they had another subject, and Mr. Miller *sent a porter to meet them* in the evening at the back of the Castle ; and declarant and Hare carried the chest till they met the porter, and they accompanied the porter with the chest to Dr. Knox's class-room, and Dr. Knox came in when they were there : the body was cold and stiff. *Dr. Knox approved of its being so fresh, but did not ask any questions.*

The next was a man named Joseph,† a miller, who had been lying

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* When the reader notices what is printed above in *italics*, he will see that the *facility* with which Burke and Hare got a *purchaser* for the *body* of Donald, and the *desire* to " see them again when they had *any other body to dispose of*," must have been great *inducements* to such miscreants to *commence* their career of *murder*.

† Hare gave the same account as Burke of the number, and the same description of the victims ; but they differ in the order of time in which the murders

badly in the house: That he got some drink from declarant and Hare, but was not tipsy: he was very ill, lying in bed, and could not speak sometimes, and there was a report on that account that there was fever in the house, which made Hare and his wife uneasy in case it should keep away lodgers, and they (declarant and Hare) agreed that they should suffocate him for the same purpose; and the declarant got a small pillow and laid it across Joseph's mouth, and Hare lay across the body to keep down the arms and legs; and *he was disposed of in the same manner, to the same persons,* and the body was carried by the porter who carried the last body.

In May 1828, as he thinks, an old woman came to the house as a lodger, and she was the worse of drink, and she got more drink of her own accord, and she became very drunk, and declarant suffocated her; and Hare was not in the house at the time; and *she was disposed of in the same manner.*

Soon afterwards an Englishman lodged there for some nights, and was ill of the jaundice: that he was in bed very unwell, and Hare and declarant got above him and held him down, and by holding his mouth suffocated him, and *disposed of him in the same manner.*

Shortly afterwards an old woman named Haldane, (but he knows nothing farther of her) lodged in the house, and she had got some drink at the time, and got more to intoxicate her, and he and Hare suffocated her, and *disposed of her in the same manner.*

Soon afterwards a cinder woman came to the house as a lodger, as he believes, and she got drink from Hare and the declarant, and became tipsy, and she was half asleep, and he and Hare suffocated her, and *disposed of her in the same manner.*

About Midsummer 1828, a woman, with her son or grandson, about twelve years of age, and who seemed to be weak in his mind, came to the house as lodgers; the woman got a dram, and when in bed asleep, he and Hare suffocated her: and the boy was sitting at the fire in the kitchen, and he and Hare took hold of him, and carried him into the room, and suffocated him. THEY WERE PUT INTO A HERRING BARREL THE SAME NIGHT, AND CARRIED TO DR. KNOX'S ROOMS.

That, soon afterwards, the declarant brought a woman to the house as a lodger; and after some days she got drunk, and *was disposed of in the same manner:* That declarant and Hare generally tried if lodgers would drink, and if they would drink, they were disposed of in that manner.

The declarant then went for a few days to the house of Helen M'Dougal's father, and when he returned, he learned from Hare that *he had disposed of a woman* in the declarant's absence, *in the same*

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were committed. He stated, with great probability, that the body of Joseph the miller was the second sold (that of the old pensioner being the first), and of course he was the first man murdered. Burke, with less likelihood, asserts, as above, that the first murder was that of the female lodger. We are apt to think Hare was right; for there was an additional motive to reconcile them to the deed in the miller's case,—the fear that the apprehensions entertained through the fever would discredit the house, and the consideration that there was, as they might think, less crime in killing a man who was to die at any rate. It is not odd that Burke, acted upon, as he seems always to have been, by ardent spirits, and involved in a constant succession of murder, should have misdated the two actions.

manner, in his own house; but the declarant does not know the woman's name, or any farther particulars of the case, or whether any other person was present or knew of it.

That about this time he went to live in Broggan's house, and a woman, named Margaret Haldane, daughter of the woman Haldane before mentioned, and whose sister is married to Clark, a tinsmith in the High Street, came into the house, but the declarant does not remember for what purpose; and she got drink, and *was disposed of in the same manner:* That Hare was not present, and neither Broggan nor his son knew the least thing about that or any other case of the same kind.

That in April 1828, he fell in with the girl Paterson and her companion in Constantine Burke's house, and they had breakfast together, and he sent for Hare, and he and Hare disposed of her in the same manner; and Mr. Ferguson and a tall lad, who seemed to have known the woman by sight, asked where they had got the body; and the declarant said he had purchased it from an old woman at the back of the Canongate. *The body was disposed of five or six hours after the girl was killed*, and *it was cold, but not very stiff*, but he does not recollect of any remarks being made about the body being warm.

One day in September or October 1828, a washer-woman had been washing in the house for some time, and he and Hare suffocated her, and *disposed of her in the same manner.*

Soon afterwards, a woman named M'Dougal, who was a distant relation of Helen M'Dougal's first husband,* came to Broggan's house to see M'Dougal; and after she had been coming and going to the house for a few days, she got drunk, and was served in the same way by the declarant and Hare.

That "Daft Jamie" was then disposed of in the manner mentioned in the indictment, except that Hare was concerned in it. That Hare was lying alongside of Jamie in the bed, and Hare suddenly turned on him, and put his hand on his mouth and nose; and Jamie, who had got drink, but was not drunk, made a terrible resistance, and he and Hare fell from the bed together, Hare still keeping hold of Jamie's mouth and nose; and as they lay on the floor together, declarant lay across Jamie, to prevent him from resisting, and they held him in that state till he was dead, and he was disposed of in the same manner: and Hare took a brass snuff-box and a spoon from Jamie's pocket, and kept the box to himself, and never gave it to the declarant —but he gave him the spoon.

And the last was the old woman Docherty, for whose murder he has been convicted. That she was not put to death in the manner deponed to by Hare on the trial. That during the scuffle between him and Hare, in the course of which he was nearly strangled by Hare, Docherty had crept among the straw, and after the scuffle was over, they had some drink, and after that they both went forward to where the woman was lying sleeping, and Hare went forward first, and seized her by the mouth and nose, as on former occasions; and

* It is certain that Helen *M'Dougal* (or rather *Dougal*, for that is her *proper* name), never was *married*: she absconded from home with a married man of the name of M'Dougal, long before she knew Burke, and had two children by him: he is the father of Gray's wife.

at the same time the declarant lay across her, and she had no opportunity of making any noise; and before she was dead, one or other of them, he does not recollect which, took hold of her by the throat. That while he and Hare were struggling, which was a real scuffle, M'Dougal opened the door of the apartment, and went into the inner passage and knocked at the door, and called out police and murder, but soon came back; and at the same time Hare's wife called out never to mind, because the declarant and Hare would not hurt one another. That whenever he and Hare rose and went towards the straw where Docherty was lying, M'Dougal and Hare's wife, who, he thinks, were lying in bed at the time, or, perhaps, were at the fire, immediately rose and left the house, but did not make any noise, so far as he heard, and he was surprised at their going out at that time, because he did not see how they could have any suspicion of what they (the declarant and Hare) intended doing. That he cannot say whether he and Hare would have killed Docherty or not, if the women had remained, because they were so determined to kill the woman, the drink being in their head;—and *he has no knowledge or suspicion of Docherty's body having been offered to any person besides Dr. Knox;* and he does not suspect that Paterson would offer the body to any other person than Dr. Knox.

Declares, That suffocation was not suggested to them by any person as a mode of killing, but occurred to Hare on the first occasion before mentioned, and was continued afterwards because it was effectual, and showed no marks; and when they lay across the body at the same time, that was not suggested to them by any person, for they never spoke to any person on such a subject; and it was not done for the purpose of preventing the person from breathing, but was only done for the purpose of keeping down the person's arms and thighs, to prevent the person struggling.

Declares, That with the exception of the body of Docherty, they never took the person by the throat, and they never leapt upon them; and declares that there were no marks of violence on any of the subjects, and they were sufficiently cold to prevent any suspicion on the part of the Doctors; and, *at all events, they might be cold and stiff enough before the box was opened up,* and he and Hare always told some story of their having purchased the subjects from some relation or other person who had the means of disposing of them, about different parts of the town, and the statements which they made were such as to prevent the Doctors having any suspicions; and NO SUSPICIONS WERE EXPRESSED BY DR. KNOX OR ANY OF HIS ASSISTANTS, AND NO QUESTIONS ASKED TENDING TO SHOW THAT THEY HAD SUSPICION.

Declares, That Helen M'Dougal and Hare's wife were no way concerned in any of the murders, and neither of them knew of any thing of the kind being intended, even in the case of Docherty; and although these two women may latterly have had some suspicion in their own minds that the declarant and Hare were concerned in lifting dead bodies, he does not think they could have any suspicion that he and Hare were concerned in committing murders.

Declares, *That none of the subjects which they had procured, as before mentioned, were offered to any other person than Dr. Knox's assistants,* and he and Hare had very little communication with Dr.

Knox himself; and declares, that he has not the smallest suspicion of any other person in this, or in any other country, except Hare and himself, being concerned in killing persons and offering their bodies for dissection; and he never knew or heard of such a thing having been done before.

WM. BURKE.
G. TAIT.

Present, Mr. Geo. Tait, Sheriff-Substitute; Mr. Archibald Scott, Procurator-Fiscal; Mr. Richard J. Moxey, Assistant-Sheriff-Clerk; the Rev. William Reid, Roman Catholic Priest.

Edinburgh 22d January 1829.

Compeared William Burke, at present under sentence of death in the gaol of Edinburgh, and his declaration, of date the 3d current, being read over to him, he adheres thereto. Declares further, that he does not know the names and descriptions of any of the persons who were destroyed except as mentioned in his former declaration. Declares, that he never was concerned in any other act of the same kind, nor made any attempt or preparation to commit such, and all reports of a contrary tendency, some of which he has heard, are groundless. And he does not know of Hare being concerned in any such, except as mentioned in his former declaration; and he does not know of any persons being murdered for the purpose of dissection by any other persons than himself and Hare, and if any persons have disappeared any where in Scotland, England, or Ireland, he knows nothing whatever about it, and never heard of such a thing till he was apprehended. Declares, that he never had any instruments in his house except a common table knife, or a knife used by him in his trade as a shoemaker, or a small pocket knife, and he never used any of those instruments, or attempted to do so, on any of the persons who were destroyed. Declares, that neither he nor Hare, so far as he knows, ever were concerned in supplying any subjects for dissection except those before mentioned; and, in particular, never did so by raising dead bodies from the grave. Declares, that they never allowed Dr. Knox, or any of his assistants, to know exactly where their houses were, but Paterson, Dr. Knox's porter or door-keeper, knew. And this he declares to be truth.*

WM. BURKE.
G. TAIT.

CONFESSIONS OF BURKE,

AS AUTHENTICATED BY HIS OWN SIGNATURE.

(From the "Edinburgh Evening Courant.")

The following is the document which we have had for some time in our possession. The words printed in Italics were added by himself (Burke) in the MS.

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* At the time Burke was under examination by the Sheriff, he (Burke) remarked to a gentleman who happened to see him, "that the murders never

Abigail Simpson was murdered on the 12th February 1828, on the forenoon of the day. She resided in Gilmerton, near Edinburgh; has a daughter living there. She used to sell salt and camstone. She was decoyed in by Hare and his wife on the afternoon of the 11th February, and he gave her some whisky to drink. She had one shilling and sixpence, and a can of kitchen-fee. Hare's wife gave her one shilling and sixpence for it; she drank it all with them. She then said she had a daughter. Hare said he was a single man, and would marry her, and get all the money amongst them. They then proposed to her to stay all night, which she did, as she was so drunk she could not go home; and in the morning was vomiting. They then gave her some porter and whisky, and made her so drunk that she fell asleep on the bed. Hare then laid hold of her mouth and nose, and prevented her from breathing. Burke held her hands and feet till she was dead. She made very little resistance, and when it was convenient they carried her to Dr. Knox's dissecting-rooms in Surgeon Square, and got ten pounds for her. She had on a drab mantle, a white-grounded cotton shawl and small blue spots on it. Hare took all her clothes and went out with them; said he was going to put them into the canal. She said she was a pensioner of Sir John Hay's. (Perhaps this should be Sir John Hope.)

The next was an Englishman, a native of Cheshire, and a lodger of Hare's. They murdered him in the same manner as the other. He *was* ill with *the* jaundice at the same time. He was very tall; had black hair, brown whiskers, mixed with grey hairs. He used to sell spunks in Edinburgh; was about forty years of age. Did not know his name. *Sold to Dr. Knox for £10.*

The next was an old woman who lodged with Hare for one night, but does not know her name. She was murdered in the same manner as above. *Sold to Dr. Knox for £10.* The old woman was decoyed into the house by Mrs. Hare in the forenoon from the street when Hare was working at the boats at the canal. She gave her whisky, and put her to bed three times. At last she was so drunk that she fell asleep; and when Hare came home to his dinner, he put part of the bed-tick on her mouth and nose, and when he came home at night she was dead. Burke at this time was mending shoes; and Hare and Burke took the clothes off her, and put her body into a tea-box. Took her to Knox's that night.

The next was Mary Paterson, who was murdered in Burke's brother's house in the Canongate, in the month of April last, by Burke and Hare, in the forenoon. She was put into a tea-box, and carried to Dr. Knox's dissecting-rooms in the afternoon of the same day; and got £8 for her body. SHE HAD TWOPENCE HALFPENNY, WHICH SHE HELD FAST IN HER HAND. Declares that the girl Paterson was only four hours dead till she was in Knox's dissecting-rooms; but she was not dissected at that time, for she was three months in whisky before she was dissected. SHE WAS WARM WHEN BURKE CUT THE HAIR OFF

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would have been discovered, had Gray not found the body of Dôcherty among the straw." The public satisfaction in the integrity of Gray has been manifested by a subscription in his favour, (which, however, has amounted to very little), and by his admission into the Police Establishment of Edinburgh, in which he has already given earnest of becoming an active and intrepid officer.

HER HEAD; and Knox brought a Mr. ——, a painter, to look at her, she was so handsome a figure, and well shaped in body and limbs. One of the students said she was like a girl he had seen in the Canongate as one pea is like to another. They desired Burke to cut off her hair; ONE OF THE STUDENTS GAVE A PAIR OF SCISSORS FOR THAT PURPOSE.*

In June last, an old woman and a dumb boy, her grandson, from Glasgow, came to Hare's, and were both murdered at the *dead* hour of night, when the woman was in bed. Burke and Hare murdered her the same way as they did the others. They took off the bed-clothes and tick, stripped off her clothes, and laid her on the bottom of the bed, and then put on the bed-tick, and bed-clothes on the top of her; and they then came and took *the boy* in their arms and carried him ben to the room, and murdered him in the same manner, and *laid* him alongside of his grandmother. They lay for the space of an hour; they then put them into a herring barrel. The barrel was perfectly dry; there was no brine in it. They carried them to the stable till next day; they put the barrel into Hare's cart, and Hare's horse was yoked in it; but the horse would not drag the cart one foot past the Meal-market; and they got a porter with a hurley, and put the barrel on it. Hare and the porter went to Surgeon Square with it. Burke went before them, as he was afraid something would happen, as the horse would not draw them. When they came to Dr. Knox's dissecting rooms, Burke carried the barrel in his arms. The students and them had hard work to get them out, being so stiff and cold. They received £16 for them both. Hare was taken in by the horse he bought that refused drawing the corpse to Surgeon Square, and they shot it in the tan-yard. He had two large holes in his shoulder stuffed with cotton, and covered over with a piece of another horse's skin to prevent them being discovered.

Joseph, the miller by trade, and a lodger of Hare's. He had once been possessed of a good deal of money. He was connected by marriage with some of the Carron Company. Burke and Hare murdered him by pressing a pillow on his mouth and nose till he was dead. He was then carried to Dr. Knox's in Surgeon Square. They got £10 for him.

Burke and Helen M'Dougal were on a visit seeing their friends near Falkirk. This was at the time a procession was made round a stone in that neighbourhood; thinks it was the anniversary of the battle of Bannockburn. When he was away, Hare fell in with a woman drunk in the street at the West Port. He took her into his house and murdered her himself, and sold her to Dr. Knox's assistants for £8. When Burke went away he knew Hare was in want of money; his things were all in pawn; but when he came back, found him have plenty of money. Burke asked him if he had been doing any business, he said he had been doing nothing. Burke did not believe him, and went to Dr. Knox, who told him that Hare had brought a subject. Hare then confessed what he had done.

A cinder-gatherer; *Burke* thinks her name was Effy. She was in the habit of selling small pieces of leather to him, *(as he was a*

* What do *Dr. Knox* and his *principal assistants* say to this statement?

cobbler), she gathered about the coach-works. He took her into Hare's stable, and gave her whisky to drink till she was drunk; she then lay down among some straw and fell asleep. They then laid a cloth over her. Burke and Hare murdered her as they *did the* others. She was then carried to Dr. Knox's, Surgeon Square, and sold for £10.

Andrew Williamson, a policeman, and his neighbour, were dragging a drunk woman to the West Port watch-house. They found her sitting on a stair. Burke said, "Let the woman go to her lodgings." They said they did not know where she lodged. Burke then said he would take her to lodgings. They then gave her to his charge. He then took her to Hare's house. Burke and Hare murdered her that night the same way as they did the others. They carried her to Dr. Knox's in Surgeon Square, and got £10.

Burke being asked, did the policemen know him when they gave him this drunk woman into his charge? He said he had a good character with the police; or if they had known that there were four murderers living in one house they would have visited them oftener.

James Wilson, commonly *called* Daft Jamie. Hare's *wife* brought him in from the street into her house. Burke was at the time getting a dram in Rymer's shop. He saw her take Jamie off the street, bare-headed and bare-footed. After she got him into her house, and left him with Hare, she came to Rymer's shop for a pennyworth of butter, and Burke was standing at the counter. She asked him for a dram; and in drinking it she stamped him on the foot. He knew immediately what she wanted him for, and he then went after her.* When in the house, she said, you have come too late, for the drink is all done; and Jamie had the cup in his hand. He had never seen him before to his knowledge. They then proposed to send for another half mutchkin, which they did, and urged him to drink; she took a little with them. They then invited him ben to the little room, and advised him to sit down upon the bed. Hare's wife then went out, and locked the outer door, and put the key below the door. There were none in the room but themselves three. Jamie sat down upon the bed. He then lay down upon the bed, and Hare lay down at his back, his head raised up and resting upon his left hand. Burke was standing at the foreside of the bed. When they had lain there for some time, Hare threw his body on the top of Jamie, pressed his hand on his mouth, and held his nose with his other. Hare and him fell off the bed and struggled. Burke then held his hands and feet. They never quitted their gripe till he was dead. He never got up nor cried any. When he was dead, Hare felt his pockets, and took out a brass snuff-box and a copper snuff-spoon. He gave the spoon to Burke, and kept the box to himself. Sometime after, he said he threw the box away in the tan-yard; and the brass-box that was libelled against Burke in the Sheriff's-office was Burke's own box. It was after breakfast Jamie was enticed in, and he was murdered by twelve o'clock in the day. BURKE DECLARES, THAT MRS. HARE

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* This statement is *decisive* as respects the *criminality* of the *female fiend* Hare's wife.

LED POOR JAMIE IN AS A DUMB LAMB TO THE SLAUGHTER, AND AS A SHEEP TO THE SHEARERS; and he was always very anxious making inquiries for his mother, and was told she would be there immediately. He does not think he drank above one glass of whisky all the time. He was then put into a chest that Hare kept clothes in; and they carried him to Dr. Knox's, in Surgeon Square, that afternoon, and got £10 for him. Burke gave Daft Jamie's clothes to his brother's children; they were almost naked; and when he untied the bundle they were like to quarrel about them. The clothes of the other murdered persons were generally destroyed, to prevent detection.

Ann M'Dougal, a cousin of Helen M'Dougal's former husband. She was a young woman, and married, and had come on a visit to see them. Hare and Burke gave her whisky till she was drunk, and when in bed and asleep, Burke told Hare that he would have most to do to her, as she being a distant friend, he did not like to begin first on her. Hare murdered her by stopping her breath, and Burke assisted him the same way as the others. ONE OF DR. KNOX'S ASSISTANTS, *Paterson*, GAVE THEM A FINE TRUNK TO PUT HER INTO. It was in the afternoon when she was done. It was in John Broggan's house; and when Broggan came home from his work he saw the trunk, and made inquiries about it, as he knew they had no trunks there. Burke then gave him two or three drams, as there was always plenty of whisky going at these times, to make him quiet. Hare and Burke then gave him £1 : 10s. each, as he was back in his rent, for to pay it, and he left Edinburgh a few days after. They then carried her to Surgeon Square as soon as Broggan went out of the house, and got £10 for her. Hare was cautioner for Broggan's rent, being £3, and Hare and Burke gave him that sum. Broggan went off in a few days, and the rent is not paid yet. They gave him the money that he might not come against them for the murder of Ann M'Dougal, that he saw in the trunk, that was murdered in his house. Hare thought that the rent would fall upon him, and if he could get Burke to pay the half of it, it would be so much the better; and proposed this to Burke, and he agreed to it, as they were glad to get him out of the way. Broggan's wife is a cousin of Burke's. They thought he went to Glasgow, but are not sure.

Mrs. Haldane, a stout old woman, who had a daughter transported last summer from the Calton jail for fourteen years, and has another daughter married to ——, in the High Street. She was a lodger of Hare's. She went into Hare's stable; the door was left open, and she being drunk, and falling asleep among some straw, Hare and Burke murdered her the same way as they did the others, and kept the body all night in the stable, and took her to Dr. Knox's next day. She had but one tooth in her mouth, and that was a very large one in front.

A young woman, a daughter of Mrs. Haldane, of the name of Peggy Haldane, was drunk, and sleeping in Broggan's house, was murdered by Burke himself, in the forenoon. Hare had no hand in it. She was taken to Dr. Knox's in the afternoon in a tea-box, and £8 got for her. She was so drunk at the time that he thinks she was not sensible of her death, as she made no resistance whatever. She and her mother were both lodgers of Hare's, and they were both of

idle habits, and much given to drinking. This was the only murder that Burke committed by himself, but what Hare was connected with. She was laid with her face downwards, and he pressed her down, and she was soon suffocated.

There was a Mrs. Hostler washing in John Broggan's, and she came back next day to finish up the clothes, and when done, Hare and Burke gave her some whisky to drink, which made her drunk. This was in the day time. She then went to bed. Mrs. Broggan was out at the time. Hare and Burke murdered her the same way they did the others, and put her in a box, and set her in the coalhouse in the passage, and carried her off to Dr. Knox's in the afternoon of the same day, and got £8 for her. Broggan's wife was out of the house at the time the murder was committed. Mrs. Hostler had ninepence halfpenny in her hand, which they could scarcely get out of it after she was dead, so firmly was it grasped.

The woman Campbell or Docherty was murdered on the 31st October last, and she was the last one. Burke declares that Hare perjured himself on his trial, when giving his evidence against him, as the woman Campbell or Docherty lay down among some straw at the bedside, and Hare laid hold of her mouth and nose, and pressed her throat, and Burke assisted him in it, till she was dead. Hare was not sitting on a chair at the time, as he said in the Court. There were seven shillings in the woman's pocket, which were divided between Hare and Burke.

That was the whole of them—sixteen in whole: nine were murdered in Hare's house, and four in John Broggan's; two in Hare's stable, and one in Burke's brother's house in the Canongate. Burke declares that five of them were murdered in Hare's room that has the iron bolt in the inside of it. Burke did not know the days nor the months the different murders were committed, nor all their names. They were generally in a state of intoxication at those times, and paid little attention to them; but they were all from 12th February till 1st November 1828; but he thinks Dr. Knox will know by the dates of paying him the money for them. He never was concerned with any other person but Hare in those matters, and was never a resurrection-man, and never dealt in dead bodies but what he murdered. HE WAS URGED BY HARE'S WIFE TO MURDER HELEN M'DOUGAL, the woman he lived with. The plan was, that he was to go to the country for a few weeks, and then write to Hare that she had died and was buried, and he was to tell this to deceive the neighbours; but he would not agree to it. THE REASON WAS, THEY COULD NOT TRUST TO HER, AS SHE WAS A SCOTCH WOMAN. Helen M'Dougal and Hare's wife were not present when those murders were committed: they might have a suspicion of what was doing, but did not see them done. Hare was always the most anxious about them, and could sleep well at night after committing a murder; but Burke repented often of the crime, and could not sleep without a bottle of whisky by his bedside, and a twopenny candle to burn all night beside him; when he awoke he would take a draught of the bottle—sometimes half a bottle at a draught—and that would make him sleep. They had a great many pointed out for murder, but were disappointed of them by some means or other; they were always in a drunken state when they committed those murders, and when

they got the money for them while it lasted. When done, they would pawn their clothes, and would take them out as soon as they got a subject. When they first began this murdering system, they always took them to Knox's after dark; but being so successful, they went in the day-time, and grew more bold. When they carried the girl Paterson to Knox's, there were a great many boys in the High School Yards, who followed Burke and the man that carried her, crying, "They are carrying a corpse;" but they got her safe delivered. They often said to one another that no person could find them out, no one being present at the murders but themselves two; and that they might be as well hanged for a sheep as a lamb. They made it their business to look out for persons to decoy into their houses to murder them. Burke declares, when they kept the mouth and nose shut a very few minutes, they could make no resistance, but would convulse and make a rumbling noise in their bellies for some time; after they ceased crying and making resistance, they left them to die of themselves: but their bodies would often move afterwards, and for some time they would have long breathings before life went away. Burke declares that it was God's providence that put a stop to their murdering career, or he does not know how far they might have gone with it, ' even to attack people on the streets, as THEY WERE SO SUCCESSFUL, AND ALWAYS MET WITH A READY MARKET: THAT WHEN THEY DELIVERED A BODY THEY WERE ALWAYS TOLD TO GET MORE.* Hare was always with him when he went with a subject, and also when he got the money. Burke declares, that Hare and him had a plan made up, that Burke and a man were to go to Glasgow or Ireland, and try the same there, and to forward them to Hare, and he was to give them to Dr. Knox. Hare's wife always got £1 of Burke's share, for the use of the house, of all that were murdered in their house; for if the price received was £10, Hare got £6, and Burke got only £4; but BURKE DID NOT GIVE HER THE £1 FOR DAFT JAMIE, FOR WHICH HARE'S WIFE WOULD NOT SPEAK TO HIM FOR THREE WEEKS. They could get nothing done during the harvest time, and also after harvest, as Hare's house was so full of lodgers. In Hare's house were eight beds for lodgers; they paid 3d. each; and two, and sometimes three, slept in a bed; and during harvest they gave up their own bed when throng. Burke declares they went under the name of resurrection men in the West Port, where they lived, but not murderers. When they wanted money, they would say they would go and look for a shot; that was the name they gave them when they wanted to murder any person. They entered into a contract with Dr. Knox and his assistants that they were to get £10 in winter, and £8 in summer for as many subjects as they could bring to them.

Old Donald, a pensioner, who lodged in Hare's house, and died of a dropsy, was the first subject they sold. After he was put into the coffin and the lid put on, Hare unscrewed the nails and Burke lifted the body out. Hare filled the coffin with bark from the tan-yard, and put a sheet over the bark, and it was buried in the West Church Yard. The coffin was furnished by the parish. Hare and Burke

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* "They were always told to get more;" alas! it is now too apparent what effect these words carried in the minds of Burke and Hare.

took him to the College first; they saw a man there, and asked for Dr. Monro, or any of his men; the man asked what they wanted, or had they a subject; they said they had. He then ordered them to call at 10, Dr. Knox's, in Surgeon Square, and he would take it from them, which they did. They got £7 : 10s. for him. That was the only subject they sold that they did not murder; and getting that high price made them try the murdering for subjects.

Burke is thirty-six years of age, was born in the parish of Orrey, county Tyrone; served seven years in the army, most of that time as an officer's servant in the Donegal militia; he was married at Ballinha, in the county of Mayo, when in the army, but left his wife and two children in Ireland. She would not come to Scotland with him. He has often wrote to her, but got no answer; he came to Scotland to work at the Union Canal, and wrought there while it lasted; he resided for about two years in Peebles, and worked as a labourer. He wrought as weaver for eighteen months, and as a baker for five months; he learned to mend shoes, as a cobbler, with a man he lodged with in Leith; and he has lived with Helen M'Dougal about ten years, until he and she were confined in the Calton Jail, on the charge of murdering the woman of the name of Docherty or Campbell, and both were tried before the High Court of Justiciary in December last. Helen M'Dougal's charge was found not proven, and Burke found guilty, and sentenced to suffer death on the 28th January.

Declares, that Hare's servant girl could give information respecting the murders done in Hare's house, if she likes. She came to him at Whitsunday last, went to harvest, and returned back to him when the harvest was over. She remained until he was confined along with his wife in the Calton Jail. She then sold twenty-one of his swine for £3, and absconded. She was gathering potatoes in a field that day Daft Jamie was murdered; she saw his clothes in the house when she came home at night. Her name is Elizabeth M'Guier or Mair.* Their wives saw that people came into their houses at night, and went to bed as lodgers, but did not see them in the morning, nor did they make any inquiries after them. They certainly knew what became of them, although Burke and Hare pretended to the contrary. Hare's wife often helped Burke and Hare to pack the murdered bodies into the boxes. HELEN M'DOUGAL NEVER DID, NOR SAW THEM DONE; BURKE NEVER DURST LET HER KNOW; he used to smuggle and drink, and get better victuals unknown to her; he told her he bought dead bodies, and sold them to doctors, and that was the way they got the name of resurrection-men.

" Burk deaclars that docter Knox never incoureged him, nither taught or incoregd him to murder any person, nether any of his asistents, that worthy gentleman Mr. Fergeson was the only man that ever mentioned any thing about the bodies. He inquired where we got that yong woman Paterson.

(Sined) " *WILLIAM BURK, prisoner.**"

Condemned Cell, January 21, 1819.

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* She is a native of Ireland, as we are well informed.

* While Burke was in the Lock-up-house, the evening before his execution, he signed a paper, in which he says, " The document, or narrative, which I signed

EXECUTION OF BURKE.

Shortly after mid-day of Tuesday the 27th January, preparations commenced at the place of execution. Strong poles were fixed in the street, to support the chain by which the crowd was kept at due distance, and on this occasion the space enclosed was considerably larger than usual. By half-past ten o'clock at night, the frame of the gibbet was brought to the spot; and, as the night was very wet, there was no time lost by the workmen, and by 12 o'clock, the whole preparations in this department were completed. So exceedingly anxious were all ranks, that in utter disregard of the "pelting of the pitiless storm," the operatives were constantly surrounded by a great assemblage. When their labours were finished, *the crowd evinced their abhorrence of the monster Burke, and all concerned in the West Port murders, by three tremendous cheers.*

About four o'clock on Tuesday morning, he was taken in a coach from the jail on the Calton Hill to the Lock-up, a prison immediately adjacent to the place of execution.

At a very early hour on Wednesday morning, although the rain fell in torrents, the people began to assemble; and by eight o'clock, one of the densest crowds had collected ever witnessed on the streets of Edinburgh—certainly there were not fewer than from 20,000 to 25,000 spectators. Every window and house-top from which a glimpse of the criminal could be obtained was occupied. For some days previous, great interest had been used to obtain windows commanding a full view of the scaffold,—the cost varying according to the local position, from five to twenty shillings. Crowds of people continued to arrive, not only from all parts of the city, but from all the neighbouring towns. The scene at this time was deeply impressive. No person could without emotion survey such a vast assemblage, so closely wedged together, gazing on the fatal apparatus, and waiting in anxious and solemn silence the arrival of the worst of murderers.

Burke slept soundly a great part of Tuesday night, and when he awoke, expressed some anxiety to have his irons struck off, which was done about half-past five o'clock. When holding up his leg, and when the fetters fell off, he said, "So may all my earthly chains fall!" At a previous part of the morning, he held up his hand, and with much apparent earnestness, said, "Oh that the hour was come which shall separate me from this world!" About half-past six o'clock, the two Catholic clergymen (the Rev. Messrs. Reid and Stewart) entered the Lock-up-House, and the former immediately waited upon the criminal in his cell. At seven o'clock, he walked into the keeper's room, with a firm step, followed by Mr. Reid, and took his seat in an arm-chair

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for ——— Ewart, was correct, so far as I had time to examine it; but it was given under the express stipulation that it should not be published for three months after my decease. I authorize ——— ——— to insist upon the delivery of the paper above alluded to from the *Courant* office, or any other person in whose possession it may be; and, at same time, I desire Bailie Small to be present when the papers are demanded and got up, and that they may be taken to the Sheriff's Office, and compared with my declaration made before the sheriff, which is the only full statement that can be relied on."—And this is witnessed by Bailie Small, Mr. Porteous, and Mr. James Burn.

by the side of the fire. It was remarked, however, that twice or thrice he sighed heavily. At this time two of the magistrates were present, and were shortly after joined by the Rev. Messrs. Marshall and Porteous. The criminal and his spiritual assistants of the Catholic persuasion had, in the meantime, commenced their devotions, Burke apparently taking a fervent interest in these solemn preparations for his end. In the course of the religious exercise, the priest endeavoured to comfort his mind, and exhorted him to " confide in the mercy of God." This expression appeared to touch some peculiar chord of sympathy in the prisoner's breast, and drew from him a deep sigh, which seemed to bespeak some sudden and indescribable, though momentary, distraction of mind. In retiring to another apartment, he was accidentally met by the executioner, who stopt him rather unceremoniously, upon which he said, " I am not just ready for you yet." He was, however, followed by Williams, and returned shortly afterwards with his arms pinioned, but without any change in his demeanour. While the executioner was discharging this part of his duty, Burke made no remark, except to tell him that his handkerchief was tied behind. He was then offered a glass of wine, which he accepted, and drank " Farewell to all my *friends !*" and then entered into conversation for a few minutes with Mr. Marshall and Mr. Porteous. The magistrates, Bailies Crichton and Small, now appeared in their robes, with their rods of office, and the criminal took the opportunity, before he went forth to meet his doom, of expressing his gratitude to the magistrates, particularly to Bailie Small, for the kindness he had experienced from him, as well as from all the public authorities. He also made similar acknowledgments to Mr. Rose, the governor, Mr. Fisher, the deputy, and Mr. and Mrs. Christie, who have the charge of the Lock-up-house.

At eight o'clock, the procession left the Lock-up-house, and Burke walked to the scaffold with a firm step, but leaning on the arm of Mr. Reid. As soon as the officers by whom the culprit was preceded made their appearance at the head of Libberton's Wynd, *one loud and simultaneous shout was given by the crowd.* When he mounted the stair, it was with a step as if he were anxious to bring the tragedy to a conclusion; and having heard the shouts of the multitude, his presence of mind seemed to be disturbed a good deal, and he appeared to require more support than when he was walking from the Lock-up-house. When he was fairly upon the scaffold, loud and universal shouts and yells of *execration* burst from the spectators, and he cast a look of fierce and even desperate defiance at the multitude. He knelt immediately, and was engaged for a few minutes in his devotions, assisted by one of the Catholic priests. Mr. Marshall concluded the religious exercises by a short prayer. At the time when the culprit was observed to kneel, which he did with his back to the crowd, the shouts were repeated, with cries, to the persons on the scaffold, of " Stand out of the way !" " Turn him round !" &c. Signals were made to the crowd by the magistrates to intimate that Burke was engaged in his devotions; but these were totally disregarded, and the clamours continued. Besides the cries above noticed, shouts were heard of " Hare ! Hare ! bring out Hare !" " HANG KNOX !" " He's a *noxious* morsel !" When Burke rose from his knees, he lifted a

silk handkerchief upon which he had knelt, and put it with much care into his pocket; he then gave one single glance up to the gallows.

At ten minutes past eight, Burke took his place on the drop. While the executioner was adjusting the rope, one of the priests said to him, "Now say your creed; and when you come to the words 'Lord Jesus Christ,' give the signal, and die with his blessed name in your mouth." During all this time shouts were heard of, "Burke him!" "Give him no rope!" "Do the same for Hare!" "Weigh them together!" "*Wash blood from the land!*" &c. When the executioner was about to unloose his handkerchief, in order to adjust the rope, Burke said to him, "The knot's behind;" which were the only words he uttered on the scaffold. Precisely at a quarter past eight, Burke gave the signal, and amidst the most tremendous shouts, died almost without a struggle.

On the body being cut down, about five minutes before nine o'clock, another shout was sent forth by the multitude. There was evidently a great desire to get hold of the dead body, and the people were only restrained by the numerous body of police, aided by the strong barriers. A scramble took place among the assistants under the scaffold for portions of the rope, and knives and scissors were actively at work. Even a handful of shavings from the coffin was pocketed as a relic. Not the slightest accident of any kind occurred.

The body of Burke was removed, during the night, to Dr. Monro's class-room, and on Thursday it was in part dissected. The brain was the portion of the subject which was lectured upon; it was described as unusually soft; but peculiar softness is by no means uncommon in criminals who suffer the last punishment of the law. The anxiety to see the body was very great. A prodigious crowd collected at an early hour in the forenoon, and besieged the class-room door, eager to gain admission. The regular students were provided with tickets. It was with great difficulty, however, that these could be made available, even with the assistance of the police. Those having been accommodated who were entitled to admission, others were then admitted till the room was filled. The lecture began at one o'clock, and is usually over by two, but from the nature of the subject it was necessarily protracted, and did not terminate till after three. About half-past two o'clock, however, a body of young men, consisting chiefly of students, assembling in the area, and becoming clamorous for admission, which of course was quite impracticable, it was found necessary to send for a body of police to preserve order. But this proceeding had quite an opposite effect from that intended. Indignant at the opposition they met with, conceiving themselves to have a preferable title to admission, and exasperated at the display of force, the young men made several attempts, in which they had nearly succeeded, to overpower the police, and broke a good deal of glass in the windows on either side of the entrance to the anatomical theatre. The police were in fact compelled to use their batons; and several hard blows were exchanged on both sides. The Lord Provost was present for some time, but was gla.. to retire with whole bones, amidst the senseless hootings of the obstreperous youths, who lavished opprobrious epithets on the magistrates, particu-

cularly on Bailie Small, the College Bailie. This disturbance lasted from half-past two till nearly four o'clock, when an end was at once put to it by the good sense of professor Christison, who announced to the young men that he had arranged for their admission in parties of about fifty at a time, giving his own personal guarantee for their good conduct. This was received with loud cheers, and immediately the riotous disposition they had previously manifested, disappeared. Several of the more violent of the youths were taken into custody by the police, but were liberated on their parole by the magistrates. Several of the policemen, we regret to learn, were severely hurt, as also were some of the students. On Friday, an order was given to admit the public generally to view the body of Burke, and of course many thousands availed themselves of the opportunity thus afforded them. Indeed, so long as daylight lasted, a stream of persons continued to flow through the College Square, who, as they arrived, were admitted by one stair to the anatomical theatre, passed the table on which lay the body of the murderer, and made their exit by another stair. By these means no inconvenience was felt, except what was occasioned by the impatience of the crowd to get forward to the theatre. As if to preserve a uniformity in the disgusting details connected with this monster, it remains to be recorded that seven females pressed in among the rest of the crowd to view the corpse. They were roughly handled, and had their clothes torn by the male spectators.

PHRENOLOGICAL DEVELOPMENT OF BURKE.

MEASUREMENT.

	Inches.
Circumference of the head - -	22.1
From the occipital spine to lower Individuality -	7.7
From the ear to lower Individuality -	5.
From ditto to the centre of Philoprogenitiveness -	4.8
From ditto to Firmness - -	5.4
From ditto to Benevolence - -	5.7
From ditto to Veneration - -	5.5
From ditto to Conscientiousness - -	5.
From Destructiveness to Destructiveness -	6.125
From Cautiousness to Cautiousness - -	5.3
From Ideality to Ideality - -	4.6
From Acquisitiveness to Acquisitiveness -	5.8
From Secretiveness to Secretiveness - -	5.7
From Combativeness to Combativeness - -	5.5

DEVELOPMENT.

Amativeness, very large. Philoprogenitiveness, full. Concentrativeness, deficient. Adhesiveness, full, Combativeness, large. Destructiveness, very large. Constructiveness, moderate. Acquisitiveness, large. Secretiveness, large. Self-esteem, rather large. Love of Approbation, rather large. Cautiousness, rather large. Benevolence, large. Veneration, large. Hope, small. Ideality, small. Conscientiousness, rather large Firmness, large. Individuality, upper, moderate. Do. lower, full. Form, full. Size, do. Weight, do.

Colour, do. Locality, do. Order, do. Time, deficient. Number, full. Tune, moderate. Language, full. Comparison, full. Causality, rather large. Wit, deficient. Imitation, full.

The above report, it may be necessary to observe, was taken a few hours after the execution. In consequence of the body having been thrown on its back, the integuments, not only at the back of the head and neck, but at the posterior lateral parts of the head, were at the time extremely congested; for in all cases of death by hanging, the blood remaining uncoagulated, invariably gravitates to those parts which are in the most depending position. Hence, there was a distension in this case over many of the most important organs which gave, for example, *Amativeness, Combativeness, Destructiveness, &c.* an appearance of size which never existed during life, and, on the other hand, made many of the moral and intellectual organs seem in contrast relatively less than they would otherwise have appeared. In this state, a cast of the head was taken by Mr. Joseph; but although for phrenological purposes it may do very well, yet no measurement, either from the head itself in that condition, or a cast taken from it, can afford us any fair criterion of the development of the brain itself. We know that this objection applies to the busts of all the murderers which adorn the chief pillars of the phrenological system; and in no case is it more obvious than in the present.

Our able professor, Dr. Monro, gave a demonstration of the brain to a crowded audience on Thursday morning; and we have, from the best authority, been given to understand, it presented nothing unusual in its appearance. We have heard it asserted that the lateral lobes were enormously developed, but having made inquiry on this subject, we do not find they were more developed than is usual. As no measurement of the brain itself was taken, all reports on this subject must be unsatisfactory; nor could the evidence of any eye-witness in such a matter prove sufficient to be admitted as proof either in favour of or against phrenology.

The question which naturally arises is, whether the above developments correspond with the character of Burke? It is not our intention to enter into any controversy on this subject; yet we cannot help remarking, that it may be interpreted, like all developments of a similar kind, either favourably or unfavourably for phrenology, as the ingenuity or prejudices of any individual may influence him. We have the moral organs more developed certainly than they ought to have been; but to this it is replied, that Burke, under the benign influence of these better faculties, lived upwards of thirty years, without committing any of those tremendous atrocities which have so paralyzed the public mind. He is neither so deficient in benevolence nor conscientiousness as he ought to have been, phrenologically speaking, and these organs, which modified and gave respectability to his character for as many as thirty years, all of a sudden cease to exercise any influence, and acquisitiveness and destructiveness, arising like two arch fiends on both sides, leave the state of inactivity in which they had reposed for so long a period, and gain a most unaccountable control over the physical powers under which they had for so many years succumbed. But, is the size of the organ of destructiveness in Burke

larger than it is found in the generality of heads ?—and are his organs of benevolence and conscientiousness less developed than usual ?

ANOTHER ACCOUNT.

Phrenology is the only science of mind which contains elements and principles capable of accounting for such a character as that before us; and it does so in a striking manner. We have seen a measurement and development of the head of Burke, taken by an experienced phrenologist from the living head ; also a very accurate cast of the head with the hair shaven, taken by Mr. Joseph after the execution ; and we have conversed with a medical gentleman who saw the brain dissected. The head was rather above than below the middle size. The middle lobe of the brain, in which are situate the organs of destructiveness, secretiveness, and acquisitiveness, was very large ; at destructiveness, in particular, the skull presented a distinct swell, and the bone was remarkably thin.* The cerebellum, or organ of amativeness, was large ; and Burke stated that, in some respects, his ruin was to be attributed to the abuses of this propensity, because it had led him into habits which terminated in his greatest crimes. The organs of self-esteem and firmness were also largely developed. It is mentioned in all the phrenological works, that self-esteem and acquisitiveness are the grand elements of selfishness. The anterior lobe, or that in which the intellect is placed, although small in proportion to the middle lobe, was still fairly developed, especially in the lower region, which is connected with the perceptive faculties. In accordance with this fact, Burke displayed acuteness and readiness of understanding. He could read and write with facility, and his conversation was pertinent and ready. The upper part of the forehead, connected with the reflecting organs, was deficient. The organ of ideality, which gives refinement and elevation, was exceedingly small ; that of wonder, which prompts to admiration, is also deficient ; and the organ of wit is small.

Here we find the organs, which, when abused, lead to selfishness, cruelty, cunning, and determination, all large ; but we have still to account for the faculties which enabled him to act a better part in early life. Accordingly, combativeness is considerably inferior to destructiveness in size, and cautiousness is large. These, acting in combination with great firmness and secretiveness, would give him command of temper ; and accordingly, it is mentioned that he was by no means of a quarrelsome disposition ; but when once roused into a passion, he became altogether ungovernable—deaf to reason, and utterly reckless, he raged like a fury, and to tame him was no easy task ; that is to say, when his large destructiveness was excited to such an extent that it broke through the restraints of his other faculties, his passion was elevated into perfect madness. Farther, looking at the coronal surface of the brain—the seat of the moral sentiments—we find it narrow in the anterior portion, but tolerably well elevated ; that is to say, the organ of benevolence, although not at all equal in size to the organs

* This, as our readers will perceive, is the report which is contradicted, on the highest authority, in the preceding account. The thinness of the bone alluded to, we are also informed, was not peculiar to the skull of Burke, for it is found in that part to be attenuated in almost every skull.

of the animal propensities before mentioned, is fairly developed. Veneration and hope are also full; while conscientiousness is, in phrenological language, "rather full," or, in common speech, not remarkably deficient. Love of approbation also is full. In these faculties we find the elements of the morality which he manifested in the early part of his life; and also an explanation of the fact, remarked by all who saw him, that he possessed a mildness of aspect, and suavity of manner, which seemed in inexplicable contradiction with his cold-blooded ferocity. If there had been no kindness at all in Burke's nature, this expression would have been an effect without a cause.

The organ of Imitation is well developed; and it is mentioned in the phrenological works, that Secretiveness (which in him is likewise large), in combination with Imitation, produces the power of *acting*, or simulation. It is curious to observe, that Burke possessed this talent to a considerable extent. He stated, that he was fond of the theatre, and occasionally represented again the acting which he had seen. *He* also, and not Hare, was the *decoyer*, who, by pretended kindness, fawning, and flattery, or by *acting* the *semblance* of a friend, inveigled the victims into the den. This quality enabled him also to *act a part* in his interviews with the various individuals who visited him in jail. He showed considerable tact in adapting himself to the person who addressed him; and from the same cause it was sometimes difficult to discover when he was serious and when only feigning. His great Self-Esteem, Firmness, Cautiousness, and Secretiveness, produced that self-command, and unshaken composure, which never forsook him during his trial and execution.

One of the most striking tests of the degree in which the moral sentiments are possessed by a criminal, is the impression which his crimes make upon his own conscience when the deeds have been committed. In John Bellingham, who murdered Mr Perceval, the organ of Destructiveness is very large, while that of Benevolence is exceedingly deficient; and Bellingham could never be brought to perceive the cruelty and atrocity of the murder. Burke, in whom Benevolence is better developed, stated, that "for a long time after he had murdered his first victim, he found it utterly impossible to banish for a single hour the recollection of the fatal struggle—the screams of distress and despair—the agonizing groans—and all the realities of the dreadful deed. At night, the bloody tragedy, accompanied by frightful visions of supernatural beings, tormented him in his dreams. For a long time he shuddered at the thought of being alone in the dark, and during the night he kept a light constantly burning by his bedside." Even to the last, he could not entirely overcome the repugnance of his moral nature to murder, but mentioned that he found it necessary to deaden his sensibilities with whisky, leaving only so great a glimmering of sense as to be conscious of what he was doing. He positively asserted, that he could not have committed murder when perfectly sober.

Burke was considerably muscular, and in the cast with the hair shaven, taken after death, the measurement of destructiveness is two-eighths of an inch larger than the measurement taken during life, which must be abated in the estimate of the organ.

PHRENOLOGICAL DEVELOPMENT OF HARE.

We are happy to have it in our power to give, in addition to the above, the following report of the measurement of the atrocious Hare. It was taken the night before his acquittal from prison, and its accuracy may be confidently relied on.

MEASUREMENT.	Inches.
From the occipital Spine to lower Individuality	7.17-20ths.
From the Ear to lower Individuality -	4.8
From ditto to the occipital Spine -	4.3
From ditto to Philoprogenitiveness -	5.
From ditto to Firmness - -	5.7
From ditto to Benevolence -	5.4
From ditto to Causality - -	5.
From ditto to Comparison - -	5.4
Destructiveness to Destructiveness -	5.19-20ths.
Secretiveness to Secretiveness -	5.8
Acquisitiveness to Acquisitiveness -	5.11-20ths.
Combativeness to Combativeness -	5.7
Ear to Conscientiousness - -	4.5
Ideality to Ideality - -	5.4

DEVELOPMENT.

The organ of destructiveness is large in Hare, but certainly rather *below* than *above* the average size. The organ of acquisitiveness is also large, but its true development cannot be ascertained in consequence of the size of the temporal muscle, under which it lies. Secretiveness is large. Benevolence is well developed, in proportion to the size and figure of the head. Conscientiousness is full. Cautiousness is large. Combativeness is large. Ideality is very large. Causality is large. Wit is full.

The phrenologists and antiphrenologists draw very different deductions from the development of both of these murderers.

The antiphrenologists argue that destructiveness in Burke being rather below than above the average size, and benevolence decidedly large,—his character is at variance with these indications. The phrenologists reply, that destructiveness is certainly large, and as to his benevolence, he was until within the last few years really a benevolent man.

The antiphrenologists aver that Hare's destructiveness is not so large as they would *a priori* have anticipated, and his intellectual organs, causality, wit, and ideality, are so well developed as to be totally at variance with his acknowledged character. The phrenologists reply, that the coronal surface of the head is low and flat, and the anterior lobes of the brain very small; to which it is again rejoined, that this flat shape of head is very common, and it is impossible to ascertain by external inspection what is the proportional development of the cerebral lobes.

The antiphrenologists state that the organ of benevolence is in Hare well developed, which the phrenologists deny, referring to its distance from the ear, which is not so great in this instance as in Burke; to

which is retorted, that the head is broader, and it makes up in expansion what it wants in length.

The caution and secretiveness of both are large, to which the antiphrenologist replies, that these faculties did not predominate so much as is commonly believed in either of their characters.

Such are many of the arguments that have come within our own hearing, and we leave our readers to draw their own conclusions.

Mr. Combe's report will appear, we presume, in the Phrenological Journal, and the professed antiphrenologists of this city have not yet given theirs to the public.

HARE IN DUMFRIES!

(Abridged from the "Dumfries Courier.")

At a little past eight on Thursday night, Hare was released from the Calton-hill Jail, and after being muffled in an old camlet cloak, was conveyed by the head turnkey to Newington, where the two waited till the mail came up. He got safely seated on the top of the mail, and the tall man who came to see him off, exclaimed, when the guard said "all's right," "Good bye, Mr. Black, and I wish you well home!" At Noblehouse, when the inside passengers alighted and went into the Inn, Hare followed their example. At first, however, he sat down near the door, behind backs, with his hat on, and his cloak closely muffled about him. But this *backwardness* was ascribed to his modesty, and one of the passengers, by way of encouraging him, asked if he was not perishing with cold. Hare replied in the affirmative, and then moving forward, took of his hat, and commenced toasting his paws at the fire—a piece of indiscretion that can only be accounted for by his imbecility of character. And little indeed was the wretch aware that Mr. Sandford, advocate, one of the counsel employed against him in the prosecution at the instance of Daft Jamie's relations, was then standing almost at his elbow. When the guard blew his horn, the associate of Burke managed to be first at the coach-door, and as there happened to be one vacant seat, was allowed to go inside. But Mr. S., on coming forward, immediately discovered what had taken place, and though something was said about the coldness of the night, determinedly exclaimed, "Take that fellow out." Again, therefore, he was transferred to the top, and then Mr. S., to explain perhaps his seeming harshness, revealed to his fellow-travellers a secret which we devoutly wish he had kept. When the coach arrived in Dumfries, the news flew like wild-fire in every direction. We have already spoken of the crowd that had assembled shortly after eight o'clock, and by ten it had become perfectly overwhelming. The numbers of the people are estimated at 8000. It was known that Hare was bound to Portpatrick; and in the interim of more than four hours, that elapses between the arrival of the Edinburgh, and departure of the Galloway or Portpatrick mail, hundreds, if not thousands, were admitted to see him. It was deemed impossible to drive the mail along the High Street, when the time for her departure arrived, if Hare were either out or inside, with safety to any person connected with it. When it became generally known that Hare had not proceeded by the mail, group

after group continued to visit the monster's den. By these successive visitors, he was forced to sit or stand in all positions; and cool, and insensate, and apathetic as he seems, he was occasionally almost frightened out of his wits. Abuse of every kind was plentifully heaped on him. On one occasion he was menaced by a mere boy, while others urged him on and took his part, and at this time he became so much irritated, that he told them "to come on and give him fair play." A second time, when pressed beyond what he could bear, he took up his bundle and walked to the door, determined, as he said, to let the mob "tak' their will o' him." In this effort he was checked by a medical man.

During the whole forenoon, Mr. Fraser, the landlord, was apprehensive for the safety of his premises, and naturally anxious to eject the culprit who had rendered them so obnoxious. In fact, the whole town was so completely convulsed, that it was impossible to tell what would happen next; and in these circumstances, and after due deliberation on the part of our magistrates, who had a very onerous duty to perform, an expedient was hit on, and successfully executed, though the chances seemed ten to one against it.—Betwixt two and three o'clock, a chaise and pair were brought to the door of the King's Arms Inn, a trunk buckled on, and a great fuss made; and while these means were employed as a decoy duck, another chaise was got ready almost at the bottom of the back entry, and completely excluded from the view of the mob, if we except a posse of idle boys. The next step was to direct Hare to clamber or rather jump out of the window of his prison, and crouch like a cat along the wall facing to the stables, so as to escape observation. This part of his task was well executed; and the moment he got to the bottom and jumped into the chaise, the doors were closed, and the postilion drove off. The mob had become suspicious that a manœuvre of some kind was in the act of being executed, and hurried off in pursuit. At every little interval the chaise-driver was intercepted and threatened; and though Hare endeavoured to keep up the near pannel, and also cowered down to be out of harm's way, three stones were thrown at, and entered the chaise. The jailor had previously received his clew, and though a strong chain was placed behind the door, an opening was left to admit the fugitive; and into this gulf he leapt, hop-step-and-jump—a thousand times more happy to get into prison than the majority of criminals are to get out of it! His escape enraged the mob greatly, and the scene of action must now be shifted from the King's Arms Inn to the neighbourhood of the jail. As their numbers increased, they laid regular siege to this place of safety, preventing all ingress or egress, excepting at considerable personal risk. From four to eight o'clock, nothing but clamour and rioting were heard; and at nightfall they smashed and extinguished the nearest gas lamps, for reasons that may be easily enough conceived. Though the militia staff and police exerted themselves to the utmost, their numbers were inadequate to preserve proper order; and it was not till near eight o'clock, when a hundred special constables were sworn in, and appeared armed with batons on the spot, that the peace of the town was re-assured. Previous to this, nearly the whole front windows of the Court-house were smashed, as well as a few in an adjoining building. In spite of the noise occasioned

by the uproar and ceaseless hum of human voices, Hare was in bed and sound asleep. At one o'clock on Saturday morning the mob had dispersed, and Hare was roused, and ordered to prepare for his immediate departure. While putting on his clothes he trembled violently, and enquired eagerly for his cloak and bundle. But as these articles were not at hand, he was told that he must just go without them, and thank his stars into the bargain that he had a prospect of escaping with whole bones. As the whole population of Galloway were in arms, and as the mail had been surrounded and searched on Friday at Crocketford toll-bar, and probably at every other stage betwixt Dumfries and Portpatrick, he was recommended to take a different route, and being fairly put on the Annan road, he was left to his own reflections and resources. At three o'clock he was seen by a boy passing Dodbeck, and must have been beyond the Border by break of day, though a report was circulated on Saturday and Sunday, that he had been discovered at Annan, and stoned to death. But this mistake was corrected yesterday (Monday) by the driver of the mail, who reported that he saw him at a quarter past five on Saturday evening, sitting beside two stone-breakers on the public road, within half a mile of Carlisle. As the coach passed he held down his head, but the driver recognised him notwithstanding, as well as a gentleman who was on the top of the mail.—Since writing the above, we have learnt that Hare was seen on Sunday morning last, about two miles beyond Carlisle. He seemed to be moving onwards, trusting to circumstances, and without any fixed purpose, if we except the wretched one of prolonging, as long as possible, his miserable life.

(From the "Glasgow Chronicle" of Tuesday.)

The celebrated Mrs. Hare was this afternoon rescued from the hands of an infuriated populace by the Calton Police, and for protection is confined in one of the cells. She had left Edinburgh jail a fortnight ago, with her infant child, and has since been wandering the country incog. She states, that she has lodged in this neighbourhood four nights, with her infant and "her bit duds," without those with whom she lodged knowing who she was, and she was in hopes of quitting this vicinity without detection. For this purpose, she remained in her lodgings all day, but occasionally, early in the morning or at twilight, she ventured the length of the Broomielaw, in hopes of finding a vessel ready to sail to Ireland; but she has hitherto been disappointed. She went out this morning on the same object, and when returning, a woman, who she says was drunk, recognised her in Clyde Street, and repeatedly shouted, "Hare's wife; Burke her!" and threw a large stone at her. A crowd soon gathered, who heaped every indignity upon her; and with her infant child, she was pursued into Calton, where she was experiencing very rough treatment, when she was rescued by the police. She occasionally burst into tears while deploring her unhappy situation, which she ascribed to Hare's utter profligacy, and said all she wished was to get across the channel, and end her days in some remote spot in her own country, in retirement and penitence. The authorities, before releasing her, will probably make arrangements for procuring her a passage to Ireland. An immense

crowd surrounded the Calton Police Office this afternoon, in expectation of seeing the unhappy woman depart.

(From the " Edinburgh Evening Courant " of Saturday, Feb. 14.*)*

Hare's wife was sent down from Glasgow to Greenock, for the purpose of taking passage to Derry in the steam-boat for that port, which is at no great distance from her native place. In consequence, however, of the want of a bundle of clothes, which she could not get away with her, from being intercepted by the crowd, she was detained till Thursday, 12th February, about two o'clock, when she sailed in the Fingal for Belfast. While in Greenock, the police took her under their guardianship, and it was to but a few that she was known to have been in town till after her departure.

Popular Tumult—On Thursday, a number of people who had assembled about the Calton, were observed to come up Leith Street and pass along both the Bridges, southward, bearing an effigy of a certain Doctor, who has been rendered very obnoxious to the public by recent events. The figure was pretty well decked out in a suit of good clothes, and the face and head bore a tolerable resemblance to the person intended to be represented. On the back was a label bearing the words " Knox, the associate of the infamous Hare." In passing along the South Bridge a policeman, a resolute fellow, attempted singly to stem the torrent and pull the figure from those carrying it, but failed, receiving some severe blows for his boldness. The crowd, which increased rapidly, proceeded onward to Newington, where the figure was suspended by the neck from a tree, fire being also put to it, but which soon went out. The figure was then torn to pieces amidst the loud huzzas of thousands. Up to this period no actual violence had been committed, but the appearance of the crowd was very threatening, the whole flower-plot and railing in front of the Doctor's house being literally packed with people, who were shouting in a wrathful manner—blending the names of the West Port murderers with that of the medical gentleman so often alluded to, as connected with these horrid transactions. Captain Stewart, the Superintendent of the Police, and a superior officer of another department of the establishment, having out-run the main body of watchmen, and having got admission to the house from the rear, made a determined charge from the front door upon the crowd, who instantly retreated to the road and commenced throwing stones, whereby Mr. Stewart and the other gentleman were considerably injured; but no farther rioting then took place, and no property was destroyed beyond a pane or two of glass broken. This mob, which may be said to have consisted principally of boys and young lads, among whom eight or ten bakers seemed the most active, quietly dispersed, but re-assembled in different parts of the city. A crowd, mostly boys, assembled in Prince's Street, and, armed with sticks, paraded the High Street, but did no mischief, having encountered a body of the police at the Tron Church, by whom they were dispersed. Another mob collected in the West Port, came down the Grassmarket and Cowgate, and went up the Horse Wynd, breaking a number of panes of glass in the windows on the west and

south sides of the College. A third crowd had collected about the Cowgate, where several of the most active were apprehended. But, notwithstanding all the efforts of the police, the mob again attacked the house of Dr. Knox about seven o'clock, when a great number of windows were broken, both in his house and those adjoining. An attempt was also made on Surgeon Square, but a party of police, under the direction of Mr. Kerr, completely repelled the attack. Upon the whole, the police never appeared more vigilant or more successful in preserving the peace. They apprehended about twenty of the most active, who are to be brought before the sitting magistrate to-day.

From the "Edinburgh Weekly Chronicle."

Since the grand spectacle of the execution of Dr. Knox in effigy was exhibited, about twenty-three of those concerned in it have been fined in sums of from 5s. to 40s. We understand that all these have been defrayed out of a stock purse previously collected. Some of the rioters had large quantities of gunpowder upon them. Another *auto da fe* is meditated; on which occasion, the cavalcade will move in the direction of Portobello, where, it is supposed, the Doctor burrows at night. As we said before, *the present agitation of public feeling will never subside until the city be relieved of this man's presence, or until his innocence be manifested.* IN JUSTICE TO HIMSELF, IF HE IS INNOCENT—IN JUSTICE TO THE PUBLIC, IF HE IS GUILTY,—HE OUGHT TO BE PUT UPON HIS TRIAL. The police have a duty to perform, and it gives us pleasure to learn that they discharge it with promptitude; but the feelings of nature, when outraged as they have been in an immeasurable degree, will soar superior to all technicalities. It scarcely ever was known that a populace ventured upon acts of wild and irregular justice, when there was not extreme official apathy.

From the "Edinburgh Evening Courant" of Sat. 14th Feb. 1829.

HARE.—We understand that an investigation is now going on in this city, relative to a murder committed some time since in Shields, in a manner, it is supposed, similar to the West Port murders; and the object of the inquiry is said to be to ascertain whether Hare or Burke were in Edinburgh at the time the crime was committed. A story has been in circulation, but which we have not been able to trace to an authentic source, that Hare had been apprehended in Newcastle on the above charge. It is possible he may have reached Newcastle and been taken into custody; but from his being in the vicinity of Carlisle so late as Tuesday last, it is probable the report is without foundation.

The Edinburgh Murders.—Some of our contemporaries affect to be shocked at the shouts of disgust and horror against the miscreant *Burke* which broke from the excited populace of Edinburgh while witnessing the legal retribution for his crimes. We are more shocked at that sickly and sickening pretence to fine feeling by these newspapers. *The exclamations of the Scotch were ebullitions of virtuous*

and honest resentment against the perpetrator of cruelties unheard-of: we honour them for it; they proved themselves to be unsophisticated men.—*Times.*

The extraordinary sensation created by *Burke's* atrocities caused a display of feeling on the part of the populace while the last dreadful ceremonies were in progress, similar to that witnessed in England when the wretched Jonathan Wild, and when the cruel Brownriggs suffered at Tyburn. In that awful hour, when the sword of justice is about to descend on the devoted sinner, it were to be wished that no clamorous shouts of abhorrence, or of sympathy, should interrupt the parting prayer which would fit the crime-stained spirit for its passage; but certainly, if any excuse can be offered for exulting over the dying agonies of a victim, it is furnished by the extraordinary guilt of the sufferer in the present case.—*Sunday Times.*

JAMES GRAY'S ACCOUNT OF HIMSELF.

"I was born on the 1st day of January 1783, in the Grassmarket of Edinburgh,—leaving me exactly forty-six years of age last New Year's Day. My father kept a public-house, the same now possessed by Mr. Porteous, victual-dealer; and at present there are now residing in Edinburgh several very respectable people who were intimately acquainted with him.

"My brother, who had served his time with Messrs. William and Peter Cunningham, jewellers, having completed his apprenticeship, set up in company with a Mr. Sinclair on the North Bridge. To this brother I was sent to learn his trade. In the course of a short time my brother told my mother that if he had set up in some other town, he could have done much better, as his acquaintance were the means of often drawing him from his work, and signified his intention of removing to Glasgow, which was immediately complied with, and whither I went with him. However, before leaving Edinburgh, he had contracted an intimacy with a Miss Scrymgeour, which was kept up by letter for, I think, half a year, when he set out for Edinburgh on purpose to get married, leaving me in charge of the shop. We had at that time one journeyman: and the very day appointed to celebrate the nuptials, he was dressed in a winding-sheet. I was at this time but young, and quite unable to manage a shop. My father in a short time arrived in Glasgow, and brought me and every thing belonging to the shop to Edinburgh; after which time I was sent to a Mr. Mackenzie, a jeweller, to learn the trade. He was bereaved of reason in a short time, and the shop shut. I then enlisted in the Elgin Fencibles: in the course of two years joined the 72d regiment, when I went abroad; and for the course of seventeen years it was unknown to my parents where I was. My other brother, however, had, at the expiration of that time, found me out, and wrote to me, informing me of the death of my parents. On the 14th day of October, arrived in Edinburgh from Aberdeen. I saw Burke for the first time in my life on the 24th October—parted with him on the High Street. I

again saw him in his own house on Sunday the 26th, at which time I was invited to remain at his house. Mrs. Burke went in company with my wife to Henry M'Donald's, our former lodgings, and paid ninepence, which we were at that time due for lodging, and removed our small effects to Burke's house. Nothing transpired above common until Friday, when Burke brought in an old woman: my wife was at the time making some porridge for breakfast: he said, Give this woman her breakfast; but she said she could take none before twelve o'clock, she being a *Catholic,* and the day being Friday. In the course of conversation, Burke said he had discovered the old woman was a relation of his mother's. I was present all the time; but as the conversation was sometimes in Irish, I could not join in it excepting when they spoke English."

(As the remainder of this account already appears in the evidence given on the trial, it is not necessary to quote farther.)

(Signed) " JAMES GRAY."

Notes taken during a Conversation with James Gray.

Helen Dougal *(Burke's Paramour),* not M'Dougal, was born at Middistone *(near Falkirk).* Gray's wife's name is Ann M'Dougal, and she was born at the same place.

Burke was very kind in treating Gray and his wife, which Gray imputed to his wife being a town's-woman of Burke's wife, and Helen Dougal having had two children by Gray's wife's father; but has now every reason to think that Burke had an intention of making Gray and his wife victims also.

Almost every day, not less then ten or twelve bottles of liquor were brought into Burke's house, and when he was treating Gray with drink, Burke never used the common dram glass, but generally used a strong ale glass, the contents of which he swallowed as with avidity, and not content with what was brought into the house, he frequently went into Rymer's shop to drink.

Burke never took Gray to M'Kenzie's but twice: the first time Gray's wife and Helen Dougal were there, when they had half a mutchkin of whisky. The second time only Gray, his wife, and Burke, were present: this was on the Saturday about two o'clock, when the dead body was in the house, when Burke, instead of taking the spirits, took a glass of *vinegar,* which Gray had never seen him do before.

Burke seemed to be always flush of money, which Gray at first considered he might have made by his occupation in mending and selling old shoes, &c.; but he never saw him do any thing in this way that could furnish him so plentifully: during the five days Gray remained in his house, he only mended one pair of shoes.

Never saw any strange man at Burke's during this time, except Hare; but Mrs. Gray says she has seen Mr. Paterson's sister calling.

When Gray and his wife discovered the dead body, Mrs. Lawrie's servant girl, with a child in her arms, was just going out of Burke's house, and they did not think it proper to give any alarm by calling her back.

On discovering the body, Gray went immediately to Mackenzie's, and requested him to keep a few articles for him till the evening. Burke had also let him know that he could not sleep there that night, but for what purpose he does not know, except that it might be for the purpose of removing the body.

Went back to Burke's; found Dougal and his wife; came out of the house, Dougal following Gray; met in the street Hare and his wife; and the latter asked what was the matter—why they were making such a noise in the street? and asked Gray to go to Mr. Spalding's and take a dram, and settle the matter. While there, it came out from Mrs. Hare, that Burke's wife had told her that they had discovered the dead body. Hare did not go into this house.

Went from this house and carried away his child's clothes from Hare's, and on leaving them at his present lodgings, he went immediately to the police, and gave information.

About a fortnight after Burke was committed, Hare's servant girl came to Gray, and said that in consequence of her having been in Hare's employ, she was afraid she would not get into any service, and requested him to write to the sheriff in her favour, which he did, but without effect. She said to Gray that she could tell a great many things if she liked, but only mentioned one instance, and that was of an old woman (Grannie, she called her, if he remembers right,) being carried by Hare from his kitchen into the cellar, while in a state of intoxication, but she never knew what became of her afterwards. She did not mention at what time this took place. The servant's name is Betty Main. She was in the witness-room during the trial, but was not called on.

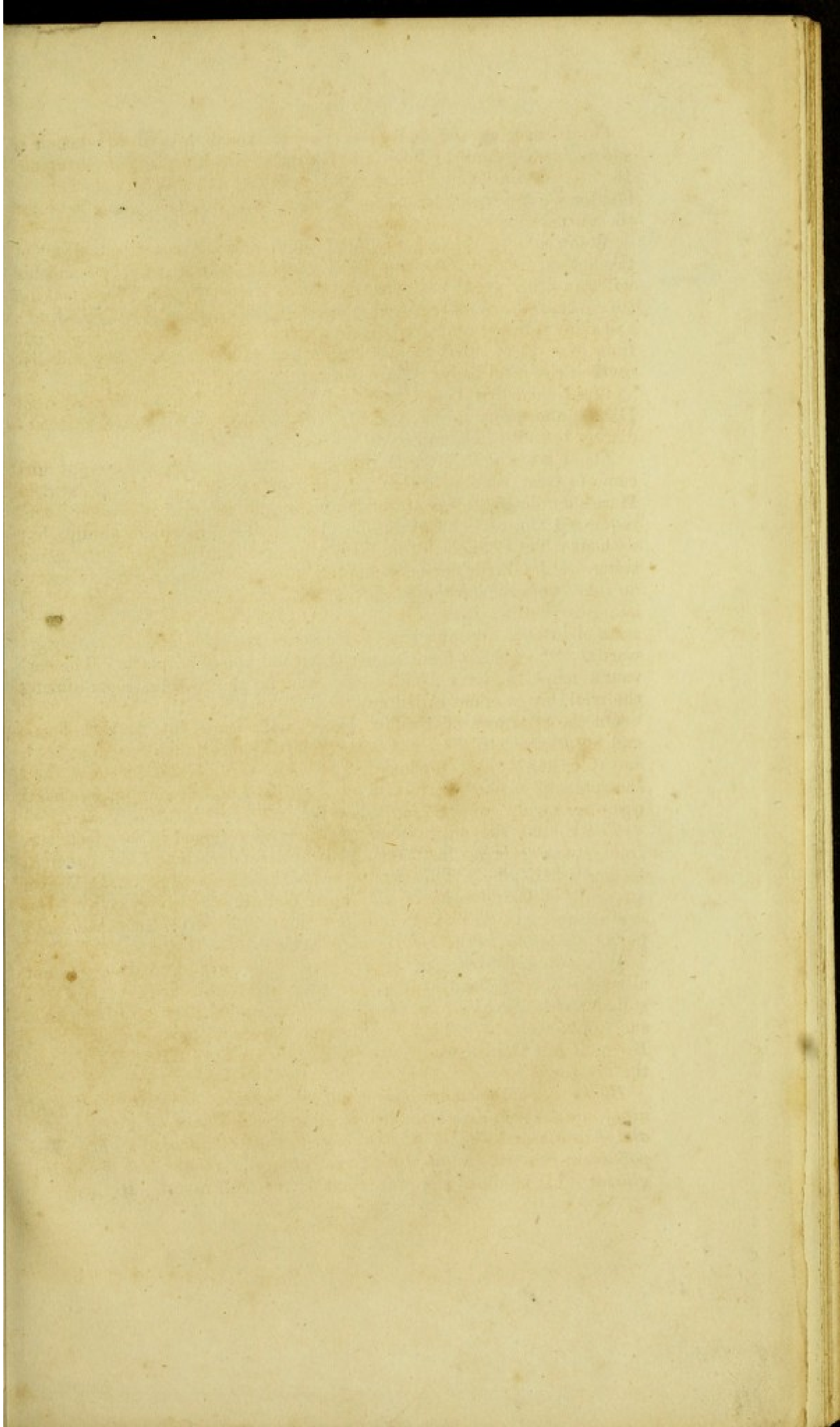
On the afternoon of Friday, Hare's wife came into Burke's house and found the old woman Docherty sitting on the chair intoxicated, and gave her a glass of whisky, at two or three different times, and she refusing to take it, she poured it into her mouth and put her hand upon her mouth, to force her to swallow it.

The wound the old woman (Docherty) received in her foot was from striking it against Mrs. Conway's fender, when she came in to light her pipe. This wound was the cause of Mrs. Conway's swearing to the identity of the dead body in the police-office; she said if such a wound was found (describing the part), then she could positively swear to the body being Docherty's.

What excited Mrs. Gray's suspicions was Burke and Dougal's not allowing her to clean the house. Mrs. G. then thought they had stolen goods concealed among the straw; and she said to Gray that she would see to it. This put them on the search for the body, when Broggan and Dougal went out. 'Now,' says Mrs. Gray, 'I will see the mystery.'

Burke generally came home about ten, eleven, or twelve o'clock at night, and always accompanied by a policeman from off the station; and had also a bottle of whisky to treat him with every night. The policeman generally stopped a few minutes, and always took one or two glasses. (It is hoped the proper authorities will investigate this.)

FINIS.



Manner of swearing Irish Roman Cath[illegible]
Witness (Hare) - 88 -

What part of injuries produced during life & after death 12[illegible]

Trial began on Wed. 24. Dec. at 10.15 A.M. & las[ted]
all day & night. Jury returned verdict on 25 Dec. a[t]
9.20 A.M. - 194 - D.F. Moncrieff rose to speak [at]
3.15 A.M. - 150 - Trial lasted about 24 hours 19[illegible]

Cockburn's remarks on the value of [illegible]
L.J.C. in reply 187 -

Cockburn's remarks on value of testimony [illegible]
Socii 180 - D. [illegible] 167 - L.J.C.'s remarks [in]
reply in his charge 187 - Ld. Adv. on same subject [illegible]

Accession to crime - Cockburn 180 - L.J.C. 190.

Law as to Locus Criminis 19 - 47

Law @ Public & Private Prosecution 40 - 87 - Ld. A[dv.]
be compelled to [illegible] to concur [illegible]

Assythment 65 - 76 - 100 - private prosr. 91.

Eulogy on Ld. Hailes 81.

Diffce in form between Indictment & Criminal Letters 89 -

Lord Justice Clk. originally substitute of Public Prosecutor 88. 91. bu[t]
Originally Ct. of Justiciary both prosecutor & Judge like a Presbytery 9[illegible]

Indemnity of Soc. Crim. does not depend on his explanation [illegible]
to witness in witness-box 4 111.

Trial of Dr. Gleghorn for Murder 134 -

urke - defence - fumigation of room with whisky.

His concealments, evasions & contradictions explained away by the illicit traffic in corpses which he pursued.

His bringing a surgeon to the house to see the body immediately after alleged murder when body must still have been warm, is inconsistent with his having murdered woman 163.

Persons while intoxicated may be suffocated by falling into uneasy positions - 157 - cf. Christison's evid. & Black's.

His bringing persons into house to breakfast & leaving them there alone while body lying there inconsistent with murder 163.

Socii criminis unworthy of credit 167. Yet even on prosecution's own showing their evidence is indispensable to proof of crime 178.

Dougal. Defce.

Probably wife of Burke by habit & rep. having cohabited with him 10 yrs. Natural she shd. wish to screen him of guilt. Accounts for her offering to bribe witnesses into silence.

Knowledge of intended crime & concealment of committed crime not legally accession to crime 180 - but cf. L. J. C. 190 -

Socii criminis not credible witnesses - reasons 180 -