

Walter Scott

**Trial of Duncan Terig,
alias Clerk, and Alexander
Bane Macdonald**



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Walter Scott
Trial of Duncan Terig, alias Clerk, and
Alexander Bane Macdonald / for the
Murder of Arthur Davis, Sergeant in
General Guise's / Regiment of Foot

TO THE

RIGHT HONOURABLE

SIR SAMUEL SHEPHERD,

THIS CURIOUS TRACT,

RESPECTING PERHAPS THE ONLY SUBJECT OF LEGAL

ENQUIRY

WHICH HAS ESCAPED BEING INVESTIGATED BY HIS SKILL,

AND ILLUSTRATED BY HIS GENIUS,

IS RESPECTFULLY INSCRIBED,

BY HIS AFFECTIONATE FRIEND, AND MUCH

OBLIGED HUMBLE SERVANT,

WALTER SCOTT

15th Feb., 1831

INTRODUCTION

Although the giving information concerning the unfair manner in which they were dismissed from life, is popularly alleged to have been a frequent reason why departed spirits revisit the nether world, it is yet only in a play of the witty comedian, Foote, that the reader will find their appearance become the subject of formal and very ingenious pleadings. In his farce called the Orators, the celebrated Cocklane Ghost is indicted by the name of Fanny the Phantom, for that, contrary to the King's peace, it did annoy, assault, and terrify divers persons residing in Cocklane and elsewhere, in the county of Middlesex. The senior counsel objects to his client pleading to the indictment, unless she is tried by her equals in rank, and therefore he moves the indictment be quashed, unless a jury of ghosts be first had and obtained. To this it is replied, that although Fanny the Phantom had originally a right to a jury of ghosts, yet in taking upon her to knock, to flutter, and to scratch, she did, by condescending to operations proper to humanity, waive her privileges as a ghost, and must consent to be tried in the ordinary manner. It occurs to the Justice who tries the case, that there will be difficulty in impanelling a jury of ghosts, and he doubts how twelve spirits who have no body at all, can be said to take a corporal oath, as required by law, unless, indeed, as in the case of the Peerage, the prisoner may be tried upon her honour. At length the counsel for the prosecution furnishes the list of ghosts for the selection of the jury, being the most celebrated apparitions of modern times, namely, Sir George Villiers, the evil genius of Brutus, the Ghost of Banquo, and the phantom of Mrs Veal. The counsel for the prosecution objects to a woman, and the court dissolves, under the facetious order, that if the Phantom should plead pregnancy, Mrs Veal will be admitted upon the jury of matrons.

This admirable foolery is carried by the English Aristophanes nearly as far as it will go; yet it is very contrary to the belief of those, who conceive that injured spirits are often the means of procuring redress for wrongs committed upon their mortal frames, to find how seldom in any country an allusion hath been made to such evidence in a court of justice, although, according to their belief, such instances must have frequently occurred. One or two cases of such apparition-evidence our researches have detected.

It is a popular story, that an evidence for the Crown began to tell the substance of an alleged conversation with the ghost of a murdered man, in which he laid his death to the accused person at the bar. "Stop," said the judge, with becoming gravity, "this will not do; the evidence of the ghost is excellent, none can speak with a clearer cause of knowledge to any thing which befell him during life. But he must be sworn in usual form. Call the ghost in open court, and if he appears, the jury and I will give all weight to his evidence; but in case he does not come forward, he cannot be heard, as now proposed, through the medium of a third party." It will readily be conceived that the ghost failed to appear, and the accusation was dismissed.

In the French *Causes Célèbres et Intéressantes*, is one entitled, *Le Spectre, ou l'Illusion Réprouvée*, reported by Guyot de Pittaval [vol. xii. edition La Haye, 1749], in which a countryman prosecutes a tradesman named Auguier for about twenty thousand francs, said to have been lent to the tradesman. It was pretended, that the loan was to account of the proceeds of a treasure which Mirabel, the peasant, had discovered by means of a ghost or spirit, and had transferred to the said Auguier, that he might convert it into cash for him. The case had some resemblance to that of Fanny the Phantom. The defendant urged the impossibility of the original discovery of the treasure by the spirit to the prosecutor; but the defence was repelled by the influence of the principal judge, and on a charge so ridiculous, Auguier narrowly escaped the torture. At length, though with hesitation, the prosecutor was nonsuited, upon the ground, that if his own story was true, the treasure, by the ancient laws of France, belonged to the Crown. So that the ghost-seer, though he had nearly occasioned the defendant to be put to the question, profited in the end nothing by his motion.

This is something like a decision of the great Frederick of Prussia. One of his soldiers, a Catholic, pretended peculiar sanctity, and an especial devotion to a particular image of the Virgin Mary, which, richly decorated with ornaments by the zeal of her worshippers, was placed in a chapel in one of the churches of the city where her votary was quartered. The soldier acquired such familiarity with the object of his devotion, and was so much confided in by the priests, that he watched for and found an opportunity of possessing himself of a valuable diamond necklace belonging to the Madonna. Although the defendant was taken in the manner, he had the impudence, knowing the case was to be heard by the King, to say that the Madonna herself had voluntarily presented him with her necklace, observing that, as her good and faithful votary, he had better apply it to his necessities, than that it should remain useless in her custody.

The King, happy of the opportunity of tormenting the priests, demanded of them, whether there was a possibility that the soldier's defence might be true. Their faith obliged them to grant that the story was possible, while they exhausted themselves on the improbabilities which attended it. "Nevertheless," said the King, "since it is possible, we must, in absence of proof, receive it as true, in the first instance. All I can do to check an imprudent generosity of the saints in future, is to publish an edict, or public order, that all soldiers in my service, who shall accept any gift from the Virgin, or any saint whatever, shall, *eo ipso*, incur the penalty of death."

Amongst English trials, there is only mention of a ghost in a very incidental manner, in that of John Cole, fourth year of William and Mary, State Trials, vol. xii. The case is a species of supplement to that of the well-known trial of Henry Harrison, which precedes it in the same collection, of which the following is the summary.

A respectable doctor of medicine, Clenche, had the misfortune to offend a haughty, violent, and imperious woman of indifferent character, named Vanwinckle, to whom he had lent money, and who he wished to repay it. A hackney-coach, with two men in it, took up the physician by night, as they pretended, to carry him to visit a patient. But on the road they strangled him with a handkerchief, having a coal, or some such hard substance, placed against their victim's windpipe, and escaped from the coach. One Henry Harrison, a man of loose life, connected with this Mrs Vanwinckle, the borrower of the money, was tried, convicted, and executed, on pretty clear evidence, yet he died denying the crime charged. The case being of a shocking nature, of course interested the feelings of the common people, and another person was accused as an accessory, the principal evidence against whom was founded on this story.

A woman, called Millward, pretended that she had seen the ghost of her deceased husband, who told her that one John Cole had assisted him, the ghost, in the murder of Dr Clenche. Cole was brought to trial accordingly; but the charge was totally despised, both by judge and jury, and produced no effect whatever in obtaining conviction.

Such being the general case with respect to apparitions, really alluded to or quoted in formal evidence in courts of justice, an evidence of that kind gravely given and received in the High Court of Justiciary in Scotland, has some title to be considered as a curiosity.

The Editor's connexion with it is of an old standing, since, shortly after he was called to the bar in 1792, it was pointed out to him by Robert M'Intosh, Esq., one of the counsel in the case, then and long after remarkable for the interest which he took, and the management which he possessed, in the prolix and complicated affairs of the York Building Company.

The cause of the trial, bloody and sad enough in its own nature, was one of the acts of violence which were the natural consequences of the Civil War in 1745.

It was about three years after the battle of Culloden that this poor man, Sergeant Davis, was quartered, with a small military party, in an uncommonly wild part of the Highlands, near the country of the Farquharsons, as it is called, and adjacent to that which is now the property of the Earl of Fife. A more waste tract of mountain and bog, rocks and ravines, extending from Dubrach to Glenshee, without habitations of any kind until you reach Glenclunie, is scarce to be met with in

Scotland. A more fit locality, therefore, for a deed of murder, could hardly be pointed out, nor one which could tend more to agitate superstitious feelings. The hill of Christie, on which the murder was actually committed, is a local name, which is probably known in the country, though the Editor has been unable to discover it more specially, but it certainly forms part of the ridge to which the general description applies. Davis was attached to the country where he had his residence, by the great plenty of sport which it afforded, and, when dispatched upon duty across these mountains, he usually went at some distance from his men, and followed his game without regarding the hints thrown out about danger from the country people. To this he was exposed, not only from his being intrusted with the odious office of depriving the people of their arms and national dress, but still more from his usually carrying about with him a stock of money and valuables, considerable for the time and period, and enough of itself to be a temptation to his murder.

On the 28th day of September, the Sergeant set forth, along with a party, which was to communicate with a separate party of English soldiers at Glenshee; but when Davis's men came to the place of rendezvous, their commander was not with them, and the privates could only say that they had heard the report of his gun after he had parted from them on his solitary sport. In short, Sergeant Arthur Davis was seen no more in this life, and his remains were long sought for in vain. At length a native of the country, named M'Pherson, made it known to more than one person that the spirit of the unfortunate huntsman had appeared to him, and told him he had been murdered by two Highlanders, natives of the country, named Duncan Terig alias Clerk, and Alexander Bane Macdonald. Proofs accumulated, and a person was even found to bear witness, that lying in concealment upon the hill of Christie, the spot where poor Davis was killed, he and another man, now dead, saw the crime committed with their own eyes. A girl whom Clerk afterwards married, was, nearly at the same time, seen in possession of two valuable rings which the Sergeant used to have about his person. Lastly, the counsel and agent of the prisoners were convinced of their guilt. Yet, notwithstanding all these suspicious circumstances, the panels were ultimately acquitted by the jury.

This was chiefly owing to the ridicule thrown upon the story by the incident of the ghost, which was enhanced seemingly, if not in reality, by the ghost-seer stating the spirit to have spoken as good Gaelic as he had ever heard in Lochaber. – "Pretty well," answered Mr M'Intosh, "for the ghost of an English sergeant!" This was indeed no sound jest, for there was nothing more ridiculous, in a ghost speaking a language which he did not understand when in the body, than there was in his appearing at all. But still the counsel had a right to seize upon whatever could benefit his clients, and there is no doubt that this observation rendered the evidence of the spectre yet more ridiculous. In short, it is probable that the ghost of Sergeant Davis, had he actually been to devise how to prevent these two men from being executed for his own murder, could hardly have contrived a better mode than by the apparition in the manner which was sworn to.

The most rational supposition seems to be, that the crime had come to M'Pherson, the ghost-seer's knowledge, by ordinary means, of which there is some evidence, but desiring to have a reason for communicating it, which could not be objected to by the people of the country, he had invented this machinery of the ghost, whose commands, according to Highland belief, were not to be disobeyed. If such were his motives, his legend, though it seemed to set his own tongue at liberty upon the subject, yet it impressed on his evidence the fate of Cassandra's prophecies, that, however true, it should not have the fortune to be believed.

Abbotsford, 18th March, 1830.

**TRIAL OF DUNCAN TERIG ALIAS CLERK, AND FOR
THE MURDER OF ARTHUR DAVIES, SERJEANT IN
JUNE,
A.D. MDCC.LIV**

TRIAL

OF

DUNCAN TERIG ALIAS CLERK,

AND ALEXANDER BAIN MACDONALD

CURIA JUSTICIARIA S. D. N. Regis tenta in Nova Sessionis Domo Burgi de Edinburgh, Decimo die Mensis Junij 1754, per honorabiles viros Carolum Areskine de Alva, Justiciarij Clericum, Magistros Alexandrum Fraser de Strichen, Patricium Grant de Elchies, et Hugonem Dalrymple de Drummorie, et Dominum Jacobum Ferguson de Killkerran, Commissionarios Justiciarij dicti S. D. N. Regis.

Curia legitime affirmata,

Intran

Duncan Terig*alias*Clerk, and Alexander Bain Macdonald, both now prisoners in the Tolbooth of Edinburgh, Pannels,

Indicted and accused at the instance of William Grant of Prestongrange, Esq., His Majesties Advocate, for His Majesties interest, for the crime of murder committed by them in manner at length mentioned in the indictment raised against them thereanent, which indictment maketh mention, That whereas, by the laws of God, and of this and all other well governed realms, Murder or Homicide is a most atrocious crime, and severely punishable, especially committed with an intent to rob the person murdered, and that by persons of bad fame and character, who are habite and repute thieves, yet true it is, and of verity, that they, and each of them, or one or other of them, are guilty, actors, or art and part, of the foresaid crime, aggravated as aforesaid, in so far as the deceast Arthur Davies, serjeant in the regiment of foot commanded by General Guise, being in the year one thousand seven hundred and forty-nine, quartered or lodged alongst with a party of men or soldiers belonging to the said regiment in Dubrach, or Glendee, in Braemar, in the parish of – and sheriffdom of Aberdeen, he, the said Arthur Davies, did, upon the twenty-eighth day September, one thousand seven hundred and forty-nine, or upon one or other of the days of that month, or of

the month of August immediately preceding, or October immediately following, go from thence to a hill in Braemar, commonly called Christie, at the head of Glencponie, in the parish of – and sheriffdom aforesaid. As also that same day, both of them, the said Duncan Terig alias Clerk, and Alexander Bain Macdonald, went from the house of John Grant, in Altalaat, armed with guns and muskets, pretending when they went from thence that they were going to shoot or hunt deer upon the said hill, to which place both of them having accordingly gone, and there meeting with the said Arthur Davies, each, or one or other of them, did, on the said twenty-eighth of September, 1749, or upon one or other of the days of that month, or of the months aforesaid, cruelly and barbarously fire a loaded gun or guns at him, which were in their hands, whereby he was mortally wounded, and of which wounds he died on the said hill, immediately or soon thereafter, where his dead body remained concealed for sometime, and was afterwards found, together with a hat, having a silver button on it, with the letters A. R. D. marked on it. Likeas, soon after the said Arthur Davies was murdered, each of the said two panels, being persons of bad fame and character, and who were habite and repute thieves, were, by the general voice of the country, reputed to have perpetrated the said murder, and to have robbed and taken from him a silver watch, two gold rings and a purse of gold, which it was known or believed in the country he generally wore or carried about him, which said opinion or belief of the neighbourhood, that both of them had been guilty of the said murder and robbery, has been since that time rendered the more credible, particularly with respect to him, the said Duncan Clerk, in so far as, although he was not possesst of any visible funds or effects which could enable him to stock a farm before the period of the said murder, yet soon thereafter he took and obtained a lease from Lord Bracco, of a farm called the Craggan, for which he was bound to pay thirty pounds Scots of yearly rent; as also thereafter he obtained a lease of the farm of Gleney, from – Farquharson of Inverey, for which at present he was bound to pay a yearly rent, or tack duty, of one hundred and five merks Scots, as appears from the judicial declaration of him, the said Duncan Clerk, to be hereafter more particularly taken notice of; and both of the said panels having been apprehended in the year one thousand seven hundred and fifty-three, for being guilty of the foresaid murder, and upon the twenty-third day of January last, one thousand seven hundred and fifty-four years, brought into the presence of the Right Honourable Alexander Fraser of Strichen and Hugh Dalrymple of Drummory, two of the Lords Commissioners of Justiciary each of them gave different and contradictory accounts of themselves, in so far as the said Duncan Clerk did then acknowledge, in presence of the said Judges, that he was on the hill of Gleneye, alongst with the said Alexander Bain Macdonald, both armed as above set forth, on the day the said Arthur Davies was amissing; that the said Alexander Macdonald fired a shot at some deer, but that about ten o'clock the said Duncan Clerk parted with him on the hill, and came back to his father's house, to which likewise the said Alexander Macdonald came the same evening, where he lodged or stayed all night; as also a paper containing a list of debts, beginning with the words, "I, Duncan Clerk, in Gleneye, was put in Perth Jail," and ending, "Angus Macdonald, 12 sh.," now marked on the back with the name and surname of the said Lord Drummory, being exhibited to him the said Duncan Clerk, he acknowledged the same to be his handwriting, and that it contains a list of debts due to him when he was imprisoned, as is at more length to be seen in his said confession or declaration, signed by him and the said Lord Drummory. Likeas he the said Alexander Bain Macdonald did, upon the twenty-third day of January last, one thousand seven hundred and fifty-four years, in presence of the said Judges, acknowledge and declare, that one year, while he was Lord Bracco's forrester, he went with the said Duncan Clerk to the Hill of Gleneye, to search for deer, where he fired at them, but that about nine or ten o'clock in the forenoon, Duncan Clerk went home to his father's house, and thereafter the said Alexander Macdonald returned to his own house in Allanquoich, where he staid all that night, not seeing the said Duncan Clerk more that day, as is at more length to be seen in his said confession or declaration, signed by the said Lord Drummory, he having declared he could not write; both which confessions or declarations, with the list of debts

above specified, said to be due to him, the said Duncan Clerk, as also, the hat mentioned to be found in summer one thousand seven hundred and fifty in the hill of Gleneye, are all now lodged in the hands of the Clerk to the Court of Justiciary, before which they are to be tried, that they may see the same: At least time and place aforesaid, the said Arthur Davies was murdered or bereaved of his life, and they, and each of them, or one or other of them, are guilty, actor or art and part of the said murder, aggravated as above set furth; all which, or part thereof, being found proven by the verdict of an Assize, before the Lords Justice General, Justice Clerk, and Commissioners of Justiciary, he, the said Duncan Terig alias Clerk, and Alexander Bain Macdonald, ought to be punished with the pains of law, to the terror of others to commit the like in time coming.

(Signed)	Alex. Home, A.D.
Pursuers.	Procurators in defence.
William Grant, of	Mr Alexander Lockhart,
Prestongrange. Esq.,	Mr Robert M'Intosh,
His Majesties Advocate.	Advocates.
Mr Patrick HALDANE, and	
Mr Alexander Home,	
both His Majesties Solicitors.	
Mr Robert Dundas,	
Advocate.	

The Libel being openly read in Court, and the panels interrogate thereupon, they both denied the same, and referred their defences to their Lawiers.

Lockhart, &c., for the panel, denying the libel, or any guilt or accession of the panels to the murder charged, pled that the panels were persons of good fame and reputation, and that as no cause of malice in them against Serjeant Davies was alleged, so the circumstances founded on in the indictment, though they were true, were not in any sort sufficient to infer a proof of the panels' guilt. And further, the panels would be able to prove a true and warrantable cause for going to the hill libelled on in arms, and that they went openly and avowedly; and that in the circumstances they were in, it was impossible they could have any wicked design against, or expect to have an opportunity of executing such a design against Serjeant Davies: That they were not so much as suspected of murdering him at the time of his being amissing, or for several months thereafter, when many different accounts were given, and suspicions raised and entertained concerning that matter. They also objected and alleged for the panels, that as murder was the only crime charged against them in this indictment, no vague or general allegation of robbery, or other crime or accusation against their characters, could be allowed to go to the knowledge of an assize, though they were noways apprehensive of the consequences of it, other than from the false and malicious reports, raised and propagated against them, since their commitment for the foresaid crime; and the panels had great reason to complain of the undue delays in bringing them to trial for this offence: In so far as, after they were committed for the same in September last, and had taken out letters of intimation,

and upon expiry of the days, had also obtained letters of liberation, they were again committed upon a new warrant for alleged theft, upon which new commitment they raised new letters of intimation, and when the sixty days were just expiring, they were served with an indictment for the theft, which was fixed to within a few days of the expiry of the forty days allowed by law, and then allowed to drop; and after all, there was again a new warrant of commitment obtained against them for wearing the Highland dress; and last of all they were served with this indictment; all which steps plainly show the oppression they have met with, which the panels do by no means lay to the charge of the prosecutor, but are willing to allow the same to be owing to the malicious information of some private informer, which they hope to be able to make appear if they were allowed an exculpatory proof, and that very undue means had been used both before and since the citation of the witnesses to influence them to give evidence against the panels in this matter; and the panels, amongst many other things for their exculpation, would be able to prove, that after they returned from the hill upon the day upon which the Serjeant is said to have been murdered, he, the Serjeant, was seen with his party in that hill. So that it is impossible the panels could be the perpetrators of the murder.

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