

The 'legal' in socio-legal history: *Woods and Pirie v. Cumming Gordon*

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Abstract

This article explores the Scottish defamation case *Woods and Pirie v. Cumming Gordon* (1810–1812) in order to demonstrate the value of legal readings across the broadest spectrum of socio-legal history. While the case has attracted attention from social historians, particularly historians of sexuality, it was shrouded in secrecy and thus did not contribute to the development of legal doctrine. Nonetheless, careful attention to the specifically legal nature of the archive and proceedings deepens our understanding of them and their social implications. *Woods and Pirie* concerned an allegation of lesbianism made by a half-Indian, half-Scottish schoolgirl against her teachers. Its extensive records offer particularly rich material relating to gender, sexuality, race, nationality, and empire, the significance and limitations of which are only fully grasped if it is analysed with an understanding of its legal context. Ultimately, such engagements also expand our knowledge of the law's operation.

1 | INTRODUCTION

Court cases are often as important to social history as to legal studies and legal history. Indeed, those cases that do not set a legal precedent but that do illuminate key social questions may seem

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to belong primarily to social historians.¹ This article argues that social history and legal history are neither mutually exclusive nor in competition, but rather that there is particular value in fully socio-legal approaches. A legal reading is crucial in order to fully understand a case's social significance, just as the social histories behind statutes and case law have much to offer the legal historian. While the latter point is well appreciated by contemporary legal historians,² this article demonstrates how close legal readings can make distinctive contributions to primarily social histories.

The lines between legal and social history are increasingly blurred,³ particularly by the greater focus of legal historians on the wider social contexts of the law.⁴ There is arguably less movement in the other direction, with fewer social historians eager to pay detailed attention to the legal minutiae of their primary sources, while an apparent lack of wider legal significance means that they are, understandably, little considered by legal historians.⁵ This article argues that further blurring of these boundaries is crucial, and in particular that legal sources that have hitherto been primarily the preserve of social historians would benefit from close legal readings too. In other words, legal historians who have already broadened their methodologies might constructively further extend the terrain upon which they apply them. The value that can be added is demonstrated through an examination of the proceedings in the case of *Woods and Pirie v. Cumming Gordon*, exploring how a legal approach can enrich and expand existing social history-based analyses.

From November 1810 to February 1812, this civil defamation action was before the Court of Session in Edinburgh. It was heard behind closed doors, under conditions intended to maintain secrecy about the subject matter of the proceedings – namely, lesbianism. That central issue was closely intermingled with questions of race, nationality, imperialism, gender, and class. There was some gossip and speculation among Edinburgh society at the time, but that was nothing to the academic and popular interest that the case papers have excited in the last 90 years. They run to many hundreds of pages and include depositions (written records of witness testimony), diagrams, detailed legal arguments, interlocutors (interim decisions of the Court), and judgments.⁶ They are a rich source of detailed information on the social history of early nineteenth-century Edinburgh and empire; their topics range from domestic life and household arrangements to girls' education,

¹ I use the term 'social history' broadly here to include, for example, histories of gender and sexuality, empire, and class. This follows the Social History Society's working definition of social historians as having 'an interest in social and cultural history': Social History Society, 'About' *Social History Society*, at <<https://socialhistory.org.uk/about/>>.

² As Kunal M. Parker writes of the United States context, it 'has been thoroughly normalised': K. M. Parker, 'Law "in" and "as" History: The Common Law in the American Policy, 1790–1900' (2011) 1 *UC Irvine Law Rev.* 587, at 593.

³ See for example the overview in C. L. Fisk and R. W. Gordon, 'Foreword: "Law as ...": Theory and Method in Legal History' (2011) 1 *UC Irvine Law Rev.* 519.

⁴ A good example of such blurring of disciplinary lines is E. Rackley and R. Auchmuty (eds), *Women's Legal Landmarks: Celebrating the History of Women and Law in the UK and Ireland* (2018). This collection brings together legal academics, historians, and practitioners, and analyses the legal significance, wider context, and consequences of each landmark.

⁵ Detailed exploration of this generalization and its exceptions are outside the scope of this article. For a recent example of the continuing focus upon topics of overtly legal interest, see M. D. Dubber and C. Tomlins (eds), *Oxford Handbook of Legal History* (2018). It does have a chapter on social history that focuses upon finding law in social spaces – a different kind of extension of legal history's social reach: L. F. Edwards, 'Law as Social History' in Dubber and Tomlins (eds), id., p. 118.

⁶ Definitions of Scots terms are drawn from W. Grant and D. Murison (eds), *Scottish National Dictionary* (1931–1976) in *Dictionaries of the Scots Language*, eds V. Skretkovicz and S. Rennie (2001–2004), at <<https://dsl.ac.uk/our-publications/scottish-national-dictionary/>>, which has extensive legal coverage, and W. Bell, *A Dictionary and Digest of the Law of Scotland* (1838).

servant–employer relationships, British beliefs about life in Indian zenanas (women’s quarters of wealthy households), concepts of lesbianism, female reputation, and networks of patronage. They are also careful records of a prolonged legal process that encompassed issues including case management, the admissibility of evidence and the burden of proof, legal fact finding, and defences to defamation. The two types of material may seem distinct when listed in this way, but in fact the legal and the social were intertwined through the case; attention to both aspects and the relationships between them therefore yields valuable results.

Interest in the case was revived in the 1930s after Scottish lawyer and true-crime writer William Roughead bought a set of case papers that had previously belonged to the pursuers’ (claimants’ or plaintiffs’) lawyer John Clerk and used them to re-tell the story.⁷ His account of the ‘great Drumsheugh case’ in *Bad Companions*, published in 1930,⁸ inspired Lillian Hellman to write the play *The Children’s Hour* four years later;⁹ in 1961, it became a film.¹⁰ Childhood memories of acting in the play drove pioneering lesbian historian Lilian Faderman to research the case. Her discussion within *Surpassing the Love of Men* was perhaps the earliest academic treatment of it,¹¹ and followed publication of a facsimile edition of the case papers in 1975.¹² A few years later, Faderman also devoted a popular history book, *Scotch Verdict*, to the case.¹³ It focused heavily upon the question of whether the two women had in fact engaged in sexual activity, but also emphasized the silencing of the existence of sex between women, exploring the judges’ denial of the possibility of female sexual gratification without a penis (or penis substitute) being involved.¹⁴

Jack Halberstam highlighted that in Faderman’s retelling, the half-Indian, half-Scottish witness Jane Cumming was ‘repeatedly Orientalized and depicted as suspiciously sexually knowledgeable’.¹⁵ Halberstam’s own attention to the intersections of race, colonialism, and gender is typical of the recent academic literature. Lisa L. Moore discussed the case in the context of ‘romantic friendship’, a category of intimate but non-sexual relations between privileged women that, she persuasively argued, reinforced colonial hierarchies of feminine virtue.¹⁶ Mikko Tuhkanen suggested that the trial anticipated late-nineteenth-century eugenicist and sexological discourses by linking the categories of ‘racial difference’ and ‘sexual perversity’.¹⁷ For Geraldine Friedman, the case offered ‘an exceptional opportunity to explore not only women’s same-sex sexuality, but also the ways in which it intersects with issues of race, class and the constitution of the British nation

⁷ L. W. Blake, ‘Roughead, William (1870–1952)’ in *Oxford Dictionary of National Biography*, ed. L. Goldman (2004), at <<https://doi.org/10.1093/ref:odnb/49504>>.

⁸ W. Roughead, *Bad Companions: Studies of Famous Criminals* (1930).

⁹ L. Hellman, *The Children’s Hour* (1934).

¹⁰ W. Wyler (dir.), *The Children’s Hour* (1961).

¹¹ L. Faderman, *Surpassing the Love of Men: Romantic Friendship and Love between Women from the Renaissance to the Present* (1981).

¹² *Miss Marianne Woods and Miss Jane Pirie against Dame Helen Cumming Gordon* (1975). All subsequent references to case documents are found in this book.

¹³ L. Faderman, *Scotch Verdict: Miss Pirie and Miss Woods v Dame Cumming Gordon* (1983).

¹⁴ This was an important refinement of the argument in Faderman, op. cit., n. 11, pp. 148–149, that the judges did not believe that the women could be ‘sexual creatures’ at all.

¹⁵ J. Halberstam, *Female Masculinity* (1998) 63.

¹⁶ L. L. Moore, *Dangerous Intimacies: Toward a Sapphic History of the British Novel* (1997) 78–83.

¹⁷ M. Tuhkanen, ‘Breeding (and) Reading Lesbian Knowledge, Eugenic Discipline, and *The Children’s Hour*’ (2002) 48 *Modern Fiction Studies* 1001.

within the frame of colonial geopolitics’;¹⁸ crucially, she insisted that attention must also be paid to ‘the Scottish context in which *Woods and Pirie* was heard’.¹⁹ Chris Roulston aimed to build upon post-colonial readings of the case by considering its cultural afterlife.²⁰ Interest in the imperial and racialized elements of the case was also to the fore in Frances Singh’s biography of Jane Cumming, which sought to take a psychological approach to its subject’s life.²¹ While that book devoted several chapters to the court case, its interest was primarily in Cumming’s subjective experiences rather than the legal process itself.

With such significant issues to consider, these accounts understandably tended to treat the legal aspects as almost incidental to a primarily ideological battle. Thus, though Roulston identified the case as ‘a trial as much about textuality as sexuality’ and paid some attention to the legal context, she quickly moved to other dimensions.²² Moore similarly focused upon the case’s challenge to ‘a whole system of interpreting women’s “ordinary” acts and desires’.²³ In fact, the judges also engaged in varied forms of specifically legal activity and analysis. After outlining the case facts and litigation process, this article explores how a legal reading illuminates our understanding of those events. It focuses upon four examples where such legal readings add specific value. First, the witness evidence available to the court, and thus the materials available to historians today, depended upon the rules of evidence; the judges’ application of those rules determined who was allowed a voice in court and what they were allowed to say. Second, key remarks of one of the judges, Lord Meadowbank, take on greater significance when they are understood as being a specific kind of legal utterance: an assertion of judicial knowledge. Third, the article identifies the importance of competing legal formulations of the defence; central to the *ratio decidendi* of the ultimate decisions, these also allowed some judges to avoid deciding whether sexual activity could or did take place. Finally, the article highlights the detailed fact finding that nonetheless underpinned most judgments. It concludes that the proceedings and their outcomes were shaped by intricate interactions between legal reasoning and wider ideological concerns. The legal system itself (including its courts, laws, rules, and procedures) was therefore not a passive instrument for ideological manipulation but played a central role in producing particular ideologically informed results.

2 | *WOODS AND PIRIE V. CUMMING GORDON*

The events that led to the court case began in 1809, when close friends Marianne Woods and Jane Pirie established a small boarding establishment for young ladies. After years of taking classes to develop their own accomplishments, saving money, and, perhaps most importantly, establishing impeccable reputations for both teaching practice and moral conduct, they had taken premises in Drumsheugh. Today it is firmly within the city of Edinburgh, but it was then a relatively rural area a little to the west of the New Town.

¹⁸ G. Friedman, ‘School for Scandal: Sexuality, Race, and National Vice and Virtue in Miss Marianne Woods and Miss Jane Pirie against Lady Helen Cumming Gordon’ (2005) 27 *Nineteenth-Century Contexts* 53, at 64.

¹⁹ *Id.*, p. 54.

²⁰ C. Roulston, ‘“A Thing Perhaps Impossible”: The 1811 Woods/Pirie Trial and Its Legacies’ in *Developments in the Histories of Sexualities: In Search of the Normal, 1600–1800*, ed. C. Mounsey (2013) 122.

²¹ F. Singh, *Scandal and Survival in Nineteenth-Century Scotland: The Life of Jane Cumming* (2020).

²² Roulston, *op. cit.*, n. 20, p. 124.

²³ Moore, *op. cit.*, n. 16, p. 80.

The venture did not begin particularly well. Pirie had to serve out her notice as a governess, and tensions built between the two women as, in her absence, Woods and her aunt were taken to be the proprietors. When Pirie became able to devote herself fully to the school, it still had only two pupils. Even so, Pirie was initially reluctant to accept Jane Cumming into the establishment, but Cumming's grandmother Dame Helen Cumming Gordon persuaded the schoolmistresses that her patronage would outweigh any disadvantages to taking an illegitimate, half-Indian pupil. Cumming Gordon kept her word; by November 1810, there were over a dozen girls at the school, including several more of her granddaughters as well as the daughters of friends. The venture was thus apparently thriving when, with no warning, all of the pupils were suddenly withdrawn from the school, forcing it to close within a few days.²⁴ The schoolteachers traced the source of the disaster to Cumming Gordon but could not discover the nature of the charge against them beyond that it concerned 'some very improper or criminal conduct, which rendered them unfit to be trusted with the education of young ladies'.²⁵ They resorted to bringing defamation proceedings against her in the Court of Session, Scotland's highest civil court.²⁶ Only when the defence condescendence (statement of the particulars of the defence) was served did they discover that they were accused of having had a sexual relationship.²⁷ In the proceedings that followed, the chief evidence against them came from Cumming and her fellow pupil Janet Munro. The school's servant Charlotte Whiffin had been expected to be a key witness but her oral evidence departed wholly from her earlier accounts; she denied seeing improper conduct between her mistresses or having conversations about such behaviour with the pupils.²⁸

The pursuers lost their case by the narrowest of margins – four judges to three – only to win by the same margin on review in 1812.²⁹ Cumming Gordon then appealed to the House of Lords and, nearly a decade after the case began, the appeal was finally refused and the parties agreed the damages to be paid.³⁰ In the course of those long proceedings, the courts had explored and expounded upon matters including gender, sexuality, race, class, nation, and empire. However, the lawyers and judges did not lose sight of the case as a legal process; that fact shaped the evidence heard by the court, the forms in which it was heard, the arguments founded upon it, and the ways in which it was treated and interpreted. This is not to suggest that the legal aspects of the case are somehow separate or superior to the social history that it contains, but rather to argue that the two are inseparable and best understood when interpreted accordingly.

²⁴ The pursuers' account of their background and the school's history is set out in 'Answers for Miss Marianne Woods and Miss Jane Pirie, to the Condescendence for Lady Cumming Gordon', March 1811, pp. 22–32.

²⁵ 'State of the Process', 14 June 1811, p. 2. For an overview of defamation law in Scotland, see J. Blackie, 'Defamation' in *A History of Private Law in Scotland*, eds K. Reid and R. Zimmermann (2000) 633–707.

²⁶ The Commissary Court of Edinburgh, ecclesiastical and primarily a venue for family law matters, also had jurisdiction to hear defamation cases (reviewable in the Court of Session). Given the sensitivity and complexity of this case, it is unsurprising that the Court of Session was the pursuers' preferred venue. In any event, it had assumed jurisdiction for defamation cases that caused the victim economic business losses since the beginning of the eighteenth century: Blackie, *id.*, pp. 640, 652–653.

²⁷ 'State of the Process', *op. cit.*, n. 25, pp. 4–7.

²⁸ 'Petition of Lady Cumming Gordon of Altyre against Interlocutor Sustaining Objection to a Witness' (hereafter 'Petition of Lady Cumming Gordon'), 30 May 1811, pp. 2–3. A petition was an application to the court.

²⁹ The court reviewed a decision when one of the parties appealed; parties could apply for review of Court of Session judgments within 21 days: Bell, *op. cit.*, n. 6, p. 268.

³⁰ This outcome was established by Singh, *op. cit.*, n. 21.

3 | WITNESS EVIDENCE

The case papers include lengthy depositions that record the evidence of key witnesses, offering a rare opportunity to hear from a range of women in their own voices. However, in order to understand and contextualize these, it is necessary to be aware of the legal constraints upon the evidence heard in court. First, though the depositions record the words spoken by witnesses, these were not unforced accounts of the events. Instead, they had been guided by the questions of the lawyers and judges, themselves governed by the rules of evidence as well as the specific legal issues raised by the parties. The witnesses' answers were given in unfamiliar and daunting surroundings before a number of unknown men, by women whose own reputation was often on trial, and who were often speaking of things that they would not usually mention in public. Those considerations, some of them specific to this trial, are combined with more general limitations to such accounts. As Lawrence Stone has pointed out in the context of English matrimonial proceedings, 'the story of what really happened has to be pieced together from two semi-fictitious constructs created by the prosecution and the defence, each buttressed by the often coached, and occasionally false, sworn evidence by their respective posses of witnesses'.³¹ Thus the information should be treated as potentially suspect and by no means unequivocally true or complete. Nonetheless, since the very fact of what the parties chose to put forward is so revealing, there is a great deal to be learned from this material even where its veracity is unclear or contested.

There was also a constraint upon whose voices were recorded. Legal rules dictated which potential witnesses were legally competent to give evidence in court. The parties themselves were not, as their obvious close interest in the case was deemed to make them too partial for their evidence to carry weight. Thus, the court did not hear directly from Woods, Pirie, or Cumming Gordon. Instead, their stories were mediated by their lawyers into pleadings that reworded, edited, elaborated, or redacted them; they are rendered in the third person, with no sense of the individual voices of the women. One might contrast the relatively dispassionate tone of the pursuers' 'Answers' to the defender's (defendant's) condescendence ('still in absolute ignorance of what it was that was charged against them, and knowing only by the dark hints which their friends were able to collect that it was an imputation of the last atrocity')³² with the more fervid tone of Pirie's letter to the defender's daughter Mary Cumming quoted within it ('If ever you expect mercy from the God of mercy, tell what your niece has said to injure two innocent persons, who have laboured for nearly twelve months to improve her in every religious and moral virtue, and who are thus cruelly repaid by her').³³ Indeed, it is only in letters produced to the court that anything of the women's voices is heard directly; however, letters themselves were, of course, written for another purpose, edited by the sender, kept or disposed of according to the recipient's wishes, and selectively chosen for use in the legal proceedings.

The accounts of other potential witnesses who were not allowed to testify are more thoroughly absent from the record, though the legal arguments as to their admissibility do preserve some of the testimony that they were expected to give. (The evidence that they would actually have given might, of course, have been very different.) The principle that those with a close connection to or interest in the case were not admissible as witnesses extended to the parties' close family

³¹ L. Stone, *Uncertain Unions: Marriage in England 1660–1753* (1992) 5.

³² 'State of the Process', op. cit., n. 25, p. 33. Answers were a pleading responding to a condescendence.

³³ *Id.*, p. 33.

members.³⁴ This rule meant that Cumming Gordon's granddaughter Margaret Dunbar, also a pupil at the school, could not give evidence.³⁵

Nonetheless, another granddaughter, Jane Cumming, was not only admitted but became the key witness in the case. She was permitted to do so when, after legal argument, the judges concluded that as an *illegitimate* granddaughter her evidence could be received *cum nota* ('with a certain degree of suspicion of [the witness's] credibility').³⁶ That decision confirms the significance of legitimacy as a matter of formal legal status. It also reveals how the courts interpreted its significance to familial relationships; Cumming was legally constructed as potentially less partisan than Dunbar because she was less fully of the family. In reality, as Lord Meadowbank would later acknowledge, her illegitimacy made her more dependent upon Cumming Gordon's patronage and thus less reliable.³⁷ That is a useful reminder that legal doctrine and its underlying social assumptions were rooted in norms and ideologies; they were not accurate reflections of the complicated realities of familial life. Indeed, the courts themselves recognized this, adding layers of complexity to apparently straightforward rules in order to limit their divergence from those realities³⁸ – as well as to protect their own interests and those of parties, such as Cumming Gordon, from their own class and social milieu.

Cumming's status as a witness, then, made explicit the ambiguous and somewhat precarious status that she occupied socially and in the minds of the judges: both part and not part of the Cumming Gordon family, through a relationship of blood but not law. In Roulston's terms, she had a hybrid status, both in society and in the courtroom. Her presence as a witness was also, as alluded to by one of the judges, Lord Woodhouselee, a consequence of the silences around women's sexuality.³⁹ Had Cumming Gordon or her relatives been willing to disclose the nature of the accusation to the pursuers, Woods and Pirie would have known Cumming to be the source and could have made her a defender alongside her grandmother. She could then not have been called as a witness, and without her evidence it is unlikely that the pursuers would have lost at first instance or that the proceedings would have been so prolonged.

Other laws of evidence also operated to restrict witness testimony. The facsimile edition of the case papers begins, non-chronologically, with an interlocutory petition against such a decision.⁴⁰ The servant Whiffin had unexpectedly failed to confirm the evidence of Cumming and Munro. The defender therefore sought to call Margaret Little, another servant to whom Whiffin had apparently told the original version of her story. Little's evidence was ruled inadmissible hearsay; the defender countered that it was not to be used as proof of the truth of Whiffin's statement to her, but for some other purpose (a distinction familiar to today's lawyers).⁴¹ Specifically, it would show that a conversation that Whiffin denied had in fact taken place, and thus impeach her credibility by showing that she was not reliable. As Little was a party to the conversation, she would be

³⁴ See the summary in Bell, *op. cit.*, n. 6, p. 843.

³⁵ This decision followed extensive legal argument, discussed below. See also 'Answers for Miss Marianne Woods and Miss Jane Pirie to the Petition of Lady Cumming Gordon' (hereafter 'Answers to the Petition'), 10 June 1811.

³⁶ Bell, *op. cit.*, n. 6, p. 372. See also 'Answers to the Petition', *id.*, pp. 2–3.

³⁷ 'Speeches of the Judges', p. 1.

³⁸ See for example *penuria testium*, discussed below.

³⁹ '[S]he ought to have stood as a defender, and not as a witness': 'Speeches of the Judges', *op. cit.*, n. 37, p. 77.

⁴⁰ 'Petition of Lady Cumming Gordon', *op. cit.*, n. 28.

⁴¹ For an overview of hearsay law at this period, see Bell, *op. cit.*, n. 6, pp. 462–463.

speaking from her own direct knowledge of its subject matter.⁴² There was a further barrier to admissibility: having called Whiffin as a witness, the defender was not allowed to seek to discredit her general character. Defence counsel argued that they were not, but were rather seeking to show which of their several contradictory witnesses should be believed. Somewhat boldly, they made an appeal to ‘the law of England, where the doctrine of evidence has been more matured than in this country’.⁴³ The petition to admit Little’s evidence was refused.

The petition also sought review of the decision not to allow evidence from Dunbar, the defender’s legitimate granddaughter. It asserted that the interpretation of the law on the competence of witnesses had been too strict, and that this was in any event within the exception of *penuria testium* (scarcity of witnesses to ‘criminal and clandestine acts’ within a household),⁴⁴ and thus her evidence should have been admitted even if *cum nota*.⁴⁵ The judges requested further argument from the pursuers on these points. The pursuers responded with a 15-page document⁴⁶ arguing that the allegation did not fall into that category,⁴⁷ and that the defender herself had relied upon the distinction between ‘natural’ and legitimate grandchildren when arguing for Cumming’s evidence to be admitted. Detailed consideration of the case law in relation to family members as witnesses followed.⁴⁸ The court concluded that the legal issue was the publication of the defamatory statement, which did not fall within the exception for acts within the family or household.⁴⁹ That this issue was taken so seriously by all concerned is a strong reminder of the significance of legal procedure and the rules of evidence. The judges saw themselves as primarily judicial actors, constrained by and obedient to a judicial framework that set out not only the law but also the way in which it should be applied.

4 | JUDICIAL KNOWLEDGE OR NOTICE

The case had first come before Lord Meadowbank sitting as Lord Ordinary (a single judge) in the Outer House of the Court of Session (which dealt with less complex cases as well as the early stages of more complex ones). Since this case required oral evidence to be heard, his role was to prepare it for presentation to a panel of judges (including himself) in the Inner House. His report to the Inner House was sympathetic to the pursuers and attributed the allegations against them to a ‘malign domestic’, Whiffin. By the time that the Inner House gave judgment, the pursuers had developed the argument that Cumming was the true source of the allegation. Thus, there was a shift from

⁴² ‘Petition of Lady Cumming Gordon’, op. cit., n. 28, pp. 3–4.

⁴³ *Id.*, p. 6.

⁴⁴ See J. D. Stair and G. Brodie, *Institutions of the Law of Scotland: Deduced from Its Originals, and Collated with the Civil and Feudal Laws, and with the Customs of Neighbouring Nations* (1826, 4th edn) 767–769.

⁴⁵ ‘Petition of Lady Cumming Gordon’, op. cit., n. 28, pp. 8–14.

⁴⁶ ‘Answers to the Petition’, op. cit., n. 35.

⁴⁷ Specifically, they argued that it was not *in re domestica* (a domestic affair) – an interesting troubling of the public/private divide in relation to female spaces: *id.*, p. 11.

⁴⁸ *Thomson v. Stevenson* [1666] in W. M. Morison, *Decisions of the Court of Session* (1811) (hereafter ‘Mor’) 12601; *Brown v. Town of Kirkcudbright* [1679] Mor 16679; *Stirling v. Hamilton* [1704] Mor 372; *Barber v. Stewart* [1732] Mor 16742; *Cameron v. Malcolm* [1756] Mor 12680; *Boyd v. Gibb* [1770] Mor 16770; *Dalziel v. Richmond* [1790] Hailes 1090; *Bell v. King* [1797] Mor 16786.

⁴⁹ ‘State of the Process’, op. cit., n. 25, p. 99.

displacing the knowledge or possibility of lesbianism onto the lower classes, to displacing it onto foreign women too in an 'imbrication of racial difference and sexual perversity'.⁵⁰

However, that shift created a dilemma for Lord Meadowbank and the other judges. Cumming might be half Indian but she was also half Scottish and the acknowledged granddaughter of the upper-class defender. Lord Meadowbank resolved that dilemma by a further displacement of the forbidden knowledge onto Cumming's ayah, a woman who was Indian, Hindu, and, as a nanny, a member of the servant class. This was a clever solution; it not only maintained the innocence of 'respectable' women by associating inappropriate knowledge of deviant sexuality with those who were not British or higher class, but it did so without locating it directly in the person of Cumming. India, rather than Indianness, became the guilty party.

This sleight of hand was achieved through a particular legal manoeuvre: a finding that certain facts were a 'matter of notoriety'. To quote Lord Meadowbank:

I hold myself entitled to assume it as an historical fact, and matter of notoriety, that the language of Hindoo female domestics, turns chiefly on the commerce of the sexes: That the instructions of nurses to their female-infants, relate to the same subject, and are calculated to excite anticipations of its nature, even before the instincts which relate to it, have begun to exist: That the seclusion of women in the Zenanas of the more wealthy, gives birth to contrivances to supply the absence or neglect of males, and gives occasion for this purpose to a commerce with China, to an extent that is surprising; and, in fine, that it is impossible to sojourn in Indostan, without learning, by the age of eight or nine years, somewhat relative to venereal intercourse by observation, as well as instruction.⁵¹

These 'notorious' facts were enough to explain Cumming's extraordinary knowledge and locate its source conveniently distant in culture and geography from her Scottish boarding school.

Lord Meadowbank's precise wording here is important. By 'holding' this as a 'matter of notoriety', he was explicitly not simply asserting an opinion. As Viscount Stair's *Institutions* had defined it, '[p]robation by notoriety of the verity of fact is when the judge of proper knowledge knows, that the point to be proved is commonly known or acknowledged to be true'.⁵² This is a form of judicial knowledge or, in English terminology also sometimes also found in the Scottish courts, judicial notice. Its legal significance is that a matter of judicial knowledge is one so well known and accepted that no evidence need be called to prove it.⁵³ (For example, the English courts had taken judicial notice a few years earlier of the fact that a full-term pregnancy lasts longer than two weeks.)⁵⁴ Indeed, once the habits of Hindu female domestics were held to fall within judicial knowledge, 'no evidence in rebuttal could be led'.⁵⁵

⁵⁰ Halberstam, *op. cit.*, n. 15, p. 63.

⁵¹ 'Speeches of the Judges', *op. cit.*, n. 37, p. 16.

⁵² Stair and Brodie, *op. cit.*, n. 44, p. 776.

⁵³ As the *Encyclopaedia of the Laws of Scotland* summarizes, facts within judicial knowledge included 'those general rules governing the operation of natural events and human affairs, with knowledge of which the Court is seised without special evidence, ... by reason ... that such facts are constantly accepted as true in the daily practice of the Court': J. Walker, 'Evidence' in *Encyclopaedia of the Laws of Scotland*, eds J. L. Wark et al. (1926–1941) 412.

⁵⁴ *R v. Luffe* (1807) 8 East 193.

⁵⁵ I. D. McPhail, *Scottish Criminal Evidence: Practice and Procedure* (2012) para. 2.26.

Yet at the same time, a fact only needs to be identified as notorious in this way when it *is* in issue in the case. Most notorious facts are taken for granted by all concerned; there is no need to spell out that they are within judicial knowledge. Even more than that, Lord Meadowbank's insistence that the sexual conversation of Hindu servants is notorious beyond the need for proof, combined with the extraneous but superficially objective details about 'commerce with China', hint at an insecurity about whether, were evidence to be called, it might contradict his assertion. In those circumstances, the claim of judicial knowledge is revealed as a pre-emptive move that forecloses any possibility of contradiction and thus implicitly and paradoxically recognizes that contradiction might in fact be possible; indeed, there was every likelihood of it had the matter been raised in evidence.

Social history illuminates both why Lord Meadowbank's confidence was more fragile than it first appeared and why he nonetheless drew upon those tropes at that time. Colonial rule in India was moving between 'rule in an Indian idiom and rule in a British idiom', where 'nabobs' immersed in Indian governance structures, culture, and relationships gave way to 'sahibs' who prided themselves on their superiority to, and remoteness from, Indian life.⁵⁶ That shift marked a change in British self-perception too, apparent in Scots defamation law; milder insults such as 'rascal' became actionable, 'which was not formerly the case',⁵⁷ because 'the increase in civilisation in the present age' had brought 'progress of manners'.⁵⁸ Yet 'progress' also brought new anxieties. With Scots over-represented in Britain's Indian endeavours, there was a sense of 'Scottish identity being threatened from two sides, by Indianization and Anglicization'.⁵⁹ The latter made Court of Session reform a sensitive issue; the 1707 Act of Union had protected Scots law, so reforming the court on a more anglicized model was debated as a matter of national feeling and identity as much as a pragmatic response to an overburdened court.⁶⁰

Given the new importance of contrasting Indian and British standards of 'civilization', the assumption of Indian immorality was becoming prevalent at this period.⁶¹ Nonetheless, it was not as straightforward as Lord Meadowbank suggested, particularly in relation to zenanas, which were closed to all men outside the family. In other words, they were designed to ensure the modesty of the women who dwelt within them and were effectively inaccessible to white men. However, the British orientalist imagination filled that gap in knowledge with speculations that reveal more about the colonizers than the realities of Indian women's sexuality. Indeed, the zenana was a favourite focus of orientalist fantasies, simultaneously constructed as a site of fervid, lascivious, and erotic imaginings *and* of another but opposite kind of excess: a place of absolute modesty and seclusion.⁶² Those tensions are captured in contemporary accounts, such as Jemima Kindersley's 1777 description of the zenana's inhabitants as 'never seen but by one man' yet

⁵⁶ Friedman, op. cit., n. 18, p. 59.

⁵⁷ *Christian v. Lord Kennedy* (1818) 1 Murr 419, cited in Blackie, op. cit., n. 25, p. 687.

⁵⁸ *Marshall v. Renwick* (1835) 13 S 1127, cited in id., p. 687.

⁵⁹ Friedman, op. cit., n. 18, p. 69.

⁶⁰ Id., pp. 67–68.

⁶¹ In 1817, James Mill drew on numerous European reports to attack Hindus' low moral character: J. Mill, *History of British India* (1817) 321–331.

⁶² For example, a popular trope was that Indian women would literally prefer to die than consult a male doctor. It would later be mobilized by social reformer Pandita Ramabai Sarasvati to justify her desire to practice medicine; her hopes were dashed by impediments placed on women in England, rather than India: SOAS Library, 'Women's History Month 2020: Pandita Ramabai Sarasvati' *SOAS Library Blog*, 23 March 2020, at <<https://blogs.soas.ac.uk/archives/2020/03/23/womens-history-month-2020-pandita-ramabai-sarasvati/>>.

excessively sensual ('there is often a wantonness in the rolling of their eyes').⁶³ They are entwined with the tensions between Lord Meadowbank's apparent confidence in the truth of what he claimed and the insecurities that led him to foreclose any possibility of alternative narratives.

It was not only imperialism that informed Lord Meadowbank's approach here. Inevitably, the colonial and racial ideologies underpinning that approach were entangled with those of gender and class. Like the Scottish woman whom he originally identified as the source of contagion, the ayah was a servant. Her racial otherness was compounded by her – imagined – unwomanly lack of modesty; it was both proof of her foreignness and low class status, and explained by it. That was a particularly potent point at this moment in imperial history, when the justification for empire was increasingly its supposed moralizing influence, and in particular the claimed need to save colonized women from the immorality of their own cultures. Lord Meadowbank's formal legal claim to unassailable knowledge about the intimate domestic lives of women whom he had never met in a country that he had never visited was not only a *reflection* of the imperial context in which he worked but also a *contribution* to it. Its central trope was one with wider purchase; a few years after his assertion of judicial knowledge, Mary Martha Sherwood's *The Ayah and the Lady* included a scene where the lady, returning early from dinner, found the ayah 'dancing and singing ... bad songs, such as bad women sing' with other female servants while her five-year-old daughter sat with them.⁶⁴

Lord Meadowbank's discourse upon 'Hindoo female domestics' as imparting sexual knowledge to their charges from an early age was designed to spare Cumming herself from suspicion of precocious or perverted sexuality. She knew about these things because she was exposed to them in early life, but she had since 'escaped from the tuition of Hindoo domestics' to have every hope of becoming a proper Scottish lady.⁶⁵ In other words, she was positioned as potentially European and higher class, having been effectively rescued from the corruption of the lower classes of the East. It is a culturally ignorant view, and a racist one, but that racism was not aimed directly at Cumming herself. Indeed, the supposed risks to white British children were a theme found in writing on the Anglo-Indian experience. A handbook for parents of 1810 stated that children who remained in India, even if only to the age of four, 'under the care of ayahs, become crafty, proud and unmannerly ... [A]yahs will initiate their young charges in many practices and especially in language, such as must require infinite assiduity to subdue.'⁶⁶

Lord Meadowbank had decided that this was a matter of notoriety in response to submissions for the pursuers; the differences between their 'notorious facts' and his are revealing. They argued for two such facts. One was that 'the manners of the lower natives of India are of the most licentious nature', a point taken up by Lord Meadowbank, though he diverged from them in attributing this primarily to ayahs and domestic spaces (particularly zenanas, which had not been a feature of Cumming's early life) rather than 'schools of every sort'. That shift implicitly exculpated the pursuers' own school as well as those of India. The other 'well known fact' alleged by the pursuers was that 'the natives of those climates come much earlier to maturity than people in colder latitudes' and 'have ideas quite unknown to the natives of this country at the same age.

⁶³ Cited in N. Bhattacharya, 'Behind the Veil: The Many Masks of Subaltern Sexuality' (1996) 19 *Women's Studies International Forum* 277, at 286–287.

⁶⁴ Cited in *id.*, p. 284.

⁶⁵ 'Speeches of the Judges', *op. cit.*, n. 37, p. 16.

⁶⁶ T. Williamson, *The East India Vade-Mecum*, Vol. 1 (1810) 341, cited in V. Brendon, *Children of the Raj* (2005) 34.

The tendencies of nature alone instruct them.⁶⁷ Had he adopted this point, Lord Meadowbank would have established Cumming as both fundamentally Indian despite her Scottish schooling and family, and irredeemably corrupt in her own person. Instead, while allowing that Cumming had an ‘eastern imagination and education’,⁶⁸ he did not refer to her Indian parentage. On the contrary, he attributed her accusations and those of Munro to resentment at the punishments that they had received.⁶⁹ He portrayed Munro, as well as Cumming, in unflattering terms:

Whatever [Munro] observes, acquires in her eyes an extraordinary character, and what she fancies herself, she conceives is seen, and thought by her companions; and she is blind as a mole, to whatever was adverse to the hypothesis suggested to her.⁷⁰

In other words, Cumming’s Indian origins did become central to the case, and the judges did not resist this, but they were responding to the arguments put before them. That is not to say that none of the judges would have chosen to raise the issue in any event; however, to identify that the initial impetus came from the evidence presented to them is to subtly alter the picture. While there was plenty to discuss when the issue was made explicit, the initial analysis of the case by Lord Meadowbank did not depend upon this. Instead, he focused upon the school’s servant and presumed class corruption.⁷¹ Had the pursuers followed his lead in their subsequent presentation of the case, different analyses might have emerged, with the issue of class more obviously at their forefront. Even when Lord Meadowbank raised the issue of India, his critique was shot through with class-based assumptions. The sharing of forbidden sexual knowledge was not distributed evenly through society but came from lower-class servants or the zenanas of wealthy aristocrats. The respectable middle classes and gentry in Scotland, and implicitly their Indian counterparts, were corruptible because of their innocence; they were not corrupters.

Lord Meadowbank was known for his liberalism, and his views were not necessarily representative of his fellows. (Lord Woodhouselee, for example, attributed Cumming’s ‘impure ideas’ not only to her Indian education but also ‘partly perhaps ... that precocity of temperament which she owed to an Indian constitution.’)⁷² However, his approach is again a reminder of the need to avoid oversimplified analyses of the racism directed at dual-heritage children of British fathers. Roulston articulates some of the complexity of the judges’ responses: ‘[Cumming’s] paternity, although illegitimate, gives her access to the Scottish aristocracy, so that it is less her absolute otherness than her hybrid status that produces discomfort.’⁷³ When Friedman suggests that ‘Jane Cumming is the one “oriental” in the case’,⁷⁴ her attention to Cumming’s race has obscured the role of class; while

⁶⁷ ‘Additional Petition of Miss Mary-Ann Woods and Miss Jane Pirie’ (hereafter ‘Additional Petition’), 10 October 1811, pp. 49–50.

⁶⁸ ‘Speeches of the Judges’, op. cit., n. 37, p. 20.

⁶⁹ Id., p. 19.

⁷⁰ Id., p. 17.

⁷¹ This was a common concern. The hugely influential anti-masturbation tract *Onania; or, the Heinous Sin of Self-Pollution* (1723) included a teenager introduced to the vice by her family’s maidservant, and Mary Wollstonecraft warned against contact between domestics and pupils in *Thoughts on the Education of Daughters* (1995 [1787]) 118–123. The pursuers’ own school rules forbade pupils from talking with servants.

⁷² ‘Speeches of the Judges’, op. cit., n. 37, p. 73.

⁷³ Roulston, op. cit., n. 20, p. 127.

⁷⁴ Friedman, op. cit., n. 18, p. 58.

not *physically* present, the Indian ayah was repeatedly invoked in the courtroom as a source of contamination.⁷⁵

These complexities and nuances, sometimes explicit but more often implicit, have to be drawn out and contextualized from other sources precisely because Lord Meadowbank used the legal device of judicial knowledge to silence alternative accounts. The fact that he did use such legal tools to achieve quite subtle and specific ends is also a rebuttal of any claim that he simply expressed the attitudes of his time; he was not a passive conduit for the racism of the period but engaged in the conscious production of specific forms of othering. He was therefore doing something more complicated and important than non-legal readings of this key passage have suggested. For Halberstam, Lord Meadowbank simply ‘comments’,⁷⁶ while, to Friedman, his ‘observations’ served as ‘an alternative explanation’ to that of the pursuers’ lawyers.⁷⁷ In fact, he was executing a specific legal manoeuvre that allowed a complex brew of race, nationality, class, and gender to be given legal force without evidential support. The ambiguities, the exoticization, and the extraordinary, complex, and contradictory knowledge claims of the patriarchal and imperial projects are only fully captured, then, through appreciation of this potent combination of the legal significance of Lord Meadowbank’s statement with its social and cultural context.

5 | THE NATURE OF THE DEFENCE

The judges did not find their task straightforward. On the contrary, the court was almost evenly divided (four to three) in both hearings, but reached opposite results. At least some of those who found in favour of the defender were nonetheless far from convinced of the women’s guilt. Lord Newton explained:

If the pursuers were tried for this crime, I might probably, if called upon, to decide as a juryman, return a verdict of Not proven; but, in the present shape of the question, I think enough has been established to justify Lady Cumming Gordon for every thing she has done.⁷⁸

What was the ‘shape of the question’? Defamation occurred where a defamatory statement (one ‘injurious to the good name and reputation of an individual’)⁷⁹ was made maliciously (with intention to injure the other person).⁸⁰ There was no disputing that Cumming Gordon had intentionally made communications disastrously detrimental to the pursuers’ reputations and livelihood. The legal question at the heart of the proceedings was therefore whether she had a defence of justification based upon the truth of the allegations and her good faith. Both points raised legal questions. On the issue of good faith, was it enough that the allegations were grounded in good motives when they had followed wholly inadequate enquiries? As for what amounted to truth, the allegations

⁷⁵ Despite frequent mention, she remains nameless; Singh identified the ayah who travelled with Cumming from India as Coongee, but this was probably not the same woman: F. Singh, ‘Digging for Jane and Finding Yorrick’ (2011) 33 *Nineteenth-Century Contexts* 60.

⁷⁶ Halberstam, *op. cit.*, n. 15, p. 64.

⁷⁷ Friedman, *op. cit.*, n. 18, p. 61.

⁷⁸ ‘Notes of the Speeches’, p. 16.

⁷⁹ Bell, *op. cit.*, n. 6, p. 272.

⁸⁰ Blackie, *op. cit.*, n. 25, pp. 662–665.

had taken several forms: the vague assertion of ‘very serious reasons’ made in Cumming Gordon’s original communications to her connections, the more detailed account that she gave when pressed, and the full version of events set out in her defence. The issue of whether truth could be a defence to defamation, and if so in what circumstances, was controversial at this period but it was allowed in this case.⁸¹ The question that divided the judges, and that was crucial to their ultimate decisions, was which version Cumming Gordon was required to prove in her defence.

The defender seems at the last to have backed away from the assertion that the allegations were wholly true. Cumming Gordon’s counsel argued that it was not necessary for her to show that the pursuers had engaged in specific sexual acts, but simply that she had acted in good faith following some fault on their part: ‘[I]f there was proof of *any* indecency or *any* impropriety, it was enough to justify the defender.’⁸² The pursuers characterized this argument as ‘most anxiously laboured by her counsel, to depreciate the extent and atrocity of the defamation, and to represent it as no more than a reasonable dissatisfaction with the management of the school.’⁸³ For those judges who accepted the defence argument, the facts in issue were focused upon the good faith of the defender. If she had genuinely believed in the existence of immoral conduct and acted out of concern for the pupils rather than malice towards the schoolmistresses, then she would not be guilty. The allegations against Woods and Pirie did not need to be substantially correct. Other judges, however, insisted that it was for the defender to prove the more elaborate version of events put forward on her behalf in court.

In other words, the very substance of the case is not quite what most non-legal readings have assumed. Tuhkanen, Friedman, and Roulston framed the ‘hard decision’⁸⁴ faced by the judges as being which of the parties’ accounts was actually true: ‘that a schoolgirl had imagined her teachers acting together in such a way ... or that the teachers themselves had not only imagined but carried out such acts’.⁸⁵ Halberstam similarly suggested that the case ‘seem[ed] to turn on disagreements about what two women can actually do sexually together’.⁸⁶ However, the question was more nuanced than that. On the defender’s legal framing of the issue, the pursuers’ claim would fail if Cumming Gordon’s actions had been justified by *anything* improper about the women’s conduct; no conclusion about the possibility of lesbianism need be reached. For those who accepted the pursuers’ legal argument that the specific sexual allegations must be established, a failure to prove the highly specific facts of this case would suffice without the need to decide about the possibility of lesbianism more broadly. Most judges, regardless of which party they favoured, were not certain that those particular women (British, white, Christian, middle-class, apparently respectable schoolmistresses) had committed those particular acts (tribadism (frottage) and digital penetration, including of the anus) in those particular circumstances (with pupils sleeping nearby or even sharing the bed).⁸⁷

The decision was narrowly in the defender’s favour, with four of the seven judges finding that she had established her defence. The pursuers’ application for a review of that decision was based

⁸¹ *Id.*, pp. 667–670. See also Bell, *op. cit.*, n. 6, p. 272. There was a broad consensus that truth could be relevant where, for example, the accusation was of a crime or where there was no malevolent intent: see *Hamilton v. Rutherford* [1771] Hailes 439. This case would seem to fall within the (admittedly contested) exceptions.

⁸² ‘Additional Petition’, *op. cit.*, n. 67, p. 17.

⁸³ *Id.*, p. 18.

⁸⁴ Tuhkanen, *op. cit.*, n. 17, p. 1004.

⁸⁵ Moore, *op. cit.*, n. 16, p. 81.

⁸⁶ Halberstam, *op. cit.*, n. 15, p. 64.

⁸⁷ See for example the detailed factual analysis on these points in ‘Lord Ordinary’s Note’, 30 January 1811, pp. 8–17.

upon the same legal issue (and not, as Friedman suggested, the narrowness of the majority),⁸⁸ arguing that good faith alone should not be a defence and that the court would only be justified in finding for the defender if convinced of the truth of her claim that Woods and Pirie ‘came to one another’s beds, *in the pursuit of the gratification of unnatural lust*’ as she had originally offered to prove.⁸⁹ Their petition succeeded, again by a majority of one, and the defender was found liable in damages and expenses, though her subsequent appeal to the House of Lords meant that the pursuers would have to wait eight years to receive any money.

6 | DETAILED FACT FINDING

The judges had not found that lesbianism was impossible – far from it, despite the pursuers’ claim that it was ‘a crime so horrible and infamous, that the criminal records of the whole world are in vain searched for any example of it’.⁹⁰ Some judgments evaded the question altogether by accepting the defender’s argument that any cause for dissatisfaction would suffice. Those who held that the specific accusation of sexual activity must be proved engaged in a process that combined social, moral, and ideological concerns with factual analysis in order to reach their own conclusions. The nature and significance of the reasoning that they deployed is therefore best understood through an analysis that takes account of the dynamic relationships between ideology and law in this case, paying attention to both – that is, a fully socio-legal analysis.

The two elements were intertwined throughout the judgments. Indeed, at the very outset of the case, Lord Meadowbank had urged the parties, and particularly the defender’s lawyers, ‘to consider deliberately what they had heard, to inquire further if they thought fit, and to mature their views as to the conduct of a cause so new and so important’.⁹¹ In other words, they were exhorted both to seek further evidence and to consider the wider consequences of using that evidence in court (and, by implication, to quietly settle the case). This was a recognition that the public nature of a court hearing posed particular dangers. Lesbianism was characterized as something to be kept carefully from the knowledge of middle- and upper-class women – a result typically achieved by imposing silence upon the subject. Lord Meadowbank did his best to ensure that the silence was not broken by ordering that the hearings should take place behind closed doors and that elaborate measures should be taken to keep the papers from wider circulation. Since such secrecy could be only imperfectly maintained as the proceedings continued and gossip circulated, the judges made a concerted effort to associate the possibility of lesbianism, both physically and in terms of knowledge, with women of other races and classes. As Roulston suggested, ‘Jane’s hybrid instability [made] her a stable referent of otherness and impurity, enabling Scottish femininity to remain pure’.⁹² It was not Scottish femininity in general, though, but that of respectable, higher-class females; Friedman identified that the case operated ‘on the ideological level ... by associating deviant and excessive forms of desire with certain gendered sexualities, national origins, races and classes’.⁹³

⁸⁸ Friedman, *op. cit.*, n. 18, p. 55.

⁸⁹ ‘Additional Petition’, *op. cit.*, n. 67, p. 24, emphasis in original.

⁹⁰ ‘Answers to the Petition’, *op. cit.*, n. 35, p. 2.

⁹¹ ‘State of the Process’, *op. cit.*, n. 25, p. 9.

⁹² Roulston, *op. cit.*, n. 20, p. 128.

⁹³ Friedman, *op. cit.*, n. 18, p. 54.

The judges did not conceal their concerns about the possibility of lesbianism, nor that those concerns were for women within their milieu. In his judgment, Lord Meadowbank had spelled out that ‘the virtues, the comforts, and the freedom of domestic intercourse, mainly depend on the purity of female manners, and that, again, on their habits of intercourse remaining as they have hitherto been, – free from suspicion’.⁹⁴ Lord Hope similarly recognized that the comfort of men such as himself depended upon believing that their wives and daughters were innocent of lesbian desire: ‘I would rather believe Miss Cumming, and almost Lady Cumming herself perjured, than I would believe the statement about *the wrong place* to be true, especially with regard to women of good character.’⁹⁵ The term ‘good character’ was doing a great deal of work here in defining which women fell within the charmed circle of innocence. Cumming Gordon, despite her status, was at this moment barely within it thanks to the forbidden knowledge revealed by her accusations and her case. Her granddaughter’s precarious class, nationality, ethnicity, and place in the family had already situated the young woman in a liminal position, and her public display of sexual awareness was enough to push her outside. This expulsion was the price of keeping those within free from suspicion. The judges were well aware that more was at stake in this case than the question of damages.

Nonetheless, the specific facts did matter, particularly to those judges who held that the defender needed to prove her detailed allegations. While the judicial findings were shaped by multiple contemporary discourses, they were also underpinned by a sometimes painstaking attention to fact finding. Lord Meadowbank led the way in such analysis, which was set out in his initial report to the Inner House as well as his later judgment. Once the proceedings went before a full court, the original events came under intense judicial scrutiny, supported by classical and contemporary ‘authorities’. Witnesses’ accounts were assessed not only on the perceived factual consistency of their stories, measured against assumptions about female sexuality, but on the credit (reputation or credibility) of the witnesses themselves. This credit was intimately connected to nationality, race, and class as well as to a wider narrative in which the British gentlewoman was placed in clear contrast to women in the rest of the world. Thus, the process of finding facts involved forensic analysis of inconsistencies and points of agreement in competing accounts, but the judges were also forced to measure these ‘novel’ accusations against their own worldview and make explicit the process of reconciling the two. These different processes were not necessarily seen as discrete and at least some of the judges clearly took pride in careful attention to legal and factual detail.

The academic literature has focused upon the ideological process of marshalling the evidence to support pre-determined positions. In consequence, both the nature of the fact-finding process and the extent of differences between the judges have been flattened. Roulston argued that their task ‘was to rule on the truth or falsehood of the accusation of deviant female sexuality while simultaneously confirming that its non-representation within the law was the logical reflection of its non-existence’.⁹⁶ Moore similarly emphasized how the case’s ‘challenge to cultural assumptions about sexless female friendship posed an interpretive problem for the judges’.⁹⁷ While there is truth to these claims, their foregrounding of the ideological role of the courts oversimplifies the legal issues and obscures the careful legal and factual analysis that actually occurred. The

⁹⁴ ‘Speeches of the Judges’, op. cit., n. 37, p. 2.

⁹⁵ Id., p. 57, emphasis in original. The statement, allegedly made during the pursuers’ sexual relations, implied digital penetration of the anus.

⁹⁶ Roulston, op. cit., n. 20, p. 124.

⁹⁷ Moore, op. cit., n. 16, p. 80.

judges' conclusions on the possibility of sex between women were somewhat more complex and varied than such critiques might suggest. Friedman came closer in recognizing 'a pattern of selective suppression and acknowledgement [of same-sex sexuality], which is organized by the sharply dichotomous views of romantic friendship put forward by the opposing parties'.⁹⁸ However, she again described a largely ideological battle.

The judges did not view themselves as engaged in a *purely* ideological exercise. Most of them took the legal process seriously.⁹⁹ As Lord Craigie expressed it,

This is a most painful discussion; and I have endeavoured to relieve myself from the feelings it is apt to excite, by confining my attention as much as possible to the questions of law and of evidence that are involved in it.¹⁰⁰

Exploration and analysis of the legal reasoning thus sheds more light upon the ideological manoeuvres that the judges nonetheless carried out. A few examples indicate the often meticulous efforts to establish a factual basis for findings. Consideration of these conscious performances of the judicial role illuminates the mechanisms through which underpinning ideologies were explicitly and implicitly, consciously and unconsciously, perpetuated.

As well as hearing extensive testimony and reading various documents relating to the case, the judges made a visit to the former boarding school on 14 March 1811. They carefully examined and described the premises, particularly in relation to the allegation that Whiffin had observed her employers acting improperly on the drawing-room couch when she looked through the keyhole. The judges established that there was no keyhole in one door, while that in the other was obscured, and they paid attention to the placement of the couch and marks showing that it had not been recently moved. Plans were drawn of the whole house, and the arrangements of beds noted.¹⁰¹ Subsequently, witness evidence and legal arguments were heard on a further 12 days, followed by additional petitions, witness depositions, answers, admissions, and submissions of authorities before judgment was given for the defender.

In his first judgment, Lord Meadowbank introduced his own careful analysis of the facts with a warning to his fellow judges of the need for such an objective, cool-headed approach:

Where the facts alleged are of so extraordinary a character, that the evidence of them comes to be addressed, rather to the imagination than to actual observation, a species of intoxication is apt to appear among all concerned . . . It operates, in short, upon the moral feelings, as the imputation of witchcraft did upon the religious ones of our ancestors: The charge was the evidence of its own truth; and all the nonsense, and the extravagance, and the palpable falsehood, with which it was often accompanied, escaped the observation of the intelligent and religious, but enthusiastic minds, of the prosecutors and judges.¹⁰²

⁹⁸ Friedman, *op. cit.*, n. 18, p. 56.

⁹⁹ Lord Polkmet was an exception. His full judgment was: 'My Lord, I have formed an opinion in this cause, and I am now ready to deliver it. My opinion is, to sustain the defences.' 'Notes of the Speeches', p. 16.

¹⁰⁰ 'Speeches of the Judges', *op. cit.*, n. 37, p. 87.

¹⁰¹ 'State of the Process', *op. cit.*, n. 25, pp. 157–161.

¹⁰² 'Speeches of the Judges', *op. cit.*, n. 37, pp. 2–3.

Both his judgment and his initial report on the case included detailed analysis of the factual plausibility of the allegations, including that some incidents apparently observed by witnesses would have occurred in darkness;¹⁰³ that the teachers had chosen to share beds with their pupils, when they might have shared a bed with each other; and that on the defence version of events, the schoolteachers were aware that they had been detected but went on to

sleep together for criminal gratification in a sort of public room, where Miss Cumming continues to be placed in a situation competent to observe them, as well as the other boarders sleeping there, of whom those that were elder had all been apprised of their enormities by the maid, and thus rendered spies on their conduct.¹⁰⁴

Thus, while various assumptions about class, race, and female sexuality were factored into Lord Meadowbank's decision, it also rested upon an apparently sound factual basis.

Lord Meadowbank's apparent dismissal of the possibility of sex between women as 'equally imaginary with witchcraft, sorcery, or carnal copulation with the devil' was in fact much more limited. He was rejecting it specifically 'when imputed to women of the ordinary conformation of this country, for the purpose of the habitual gratification of the venereal appetite, by means of copulating with each other'.¹⁰⁵ That is, the rejection was specific in terms of physiology ('conformation'), nationality ('this country'), purpose ('habitual gratification'), and means ('copulating'). It was also rooted in the witness evidence, supported by authorities from ancient Greek and Latin literature, which on his analysis excluded vaginal penetration. He also excluded tribadism on the basis that 'venereal orgasm could not possibly follow from the mere surface action of the parts moving in imitation of a man and woman in copulation', while the facts excluded the use of 'tools resembling the male instrument of generation' or fingers.¹⁰⁶

Might the women be able to penetrate each other with their clitorises? Again, Lord Meadowbank considered a combination of ancient, legal, and religious sources and the facts of the case in order to dismiss such an act as one that, 'in the general case, it is impossible in this country to commit'.¹⁰⁷ For Friedman, his discussion was an 'overinvestment in gratuitous detail' that 'far exceeds the requirements of any legal argument': 'he takes great pains to make fine distinctions between such venereal crimes as tribadism and the use of tools, providing into the bargain the classical Latin and Greek names of the former'.¹⁰⁸ Yet such detailed examination of authorities (put forward by the defender) and drawing of distinctions between them is precisely what legal method entails. Faced with a novel question, he considered a range of persuasive authorities and applied them to the competing factual scenarios presented in court, just as his professional training required.

The evaluation of facts was, however, being undertaken in a specific place and time. Again, the processes can best be understood by bringing together social and legal history. For example, Lord Meadowbank's invocation of enlarged clitorises reflected specific understandings of sexual difference at this historical moment. The eighteenth century had seen significant changes as an older,

¹⁰³ 'State of the Process', *op. cit.*, n. 25, p. 11.

¹⁰⁴ *Id.*, p. 17.

¹⁰⁵ *Id.*, p. 13.

¹⁰⁶ *Id.*, p. 14.

¹⁰⁷ *Id.*, pp. 13–14.

¹⁰⁸ Friedman, *op. cit.*, n. 18, p. 65.

'one-sex' model was being replaced in professional circles by a 'two-sex' model. The older model had posited that men and women shared one fundamental physiological structure, differing only in its arrangement.¹⁰⁹ Greater 'vital heat' made humans superior to other animals, and men superior to women, and it was this heat that caused men's genitals to be placed externally. Women had the same genitalia but, being inferior in heat (and thus further from perfection), kept theirs internally. The model was therefore based upon hierarchy rather than fundamental physiological difference; the clitoris was the analogue of the penis and 'a healthy mark of female lustfulness'.¹¹⁰ Nonetheless, it was an inferior analogue since women were lesser beings who craved the 'dry heat of male semen' that they lacked and were thus sexually insatiable, 'open', 'passive recipients of men's power'.¹¹¹

Scientific advances and the rise of liberalism focused attention upon the individual and, in so doing, needed fixed categories with which to justify inequalities.¹¹² One such category was sex, with difference established through a two-sex model. The clitoris became 'problematic'; its 'capacity ... for homo- and autoeroticism was increasingly perceived as a threat to the social order'.¹¹³ Consequently, a new feminine ideal of the passionless woman emerged.¹¹⁴ However, such shifts happen slowly, particularly at the cultural level, and elements of both models are visible in *Woods and Pirie*.¹¹⁵ Lord Meadowbank's analysis drew upon a range of older authorities, as well as the facts alleged, in order to conclude that the allegations were impossible since penetration, and thus orgasm, was only feasible on the facts if both pursuers were 'endowed with an extraordinary confirmation' since, he pointed out, 'they are represented as alternately ... performing the function of the *male*'.¹¹⁶ Such a 'crime' was 'impossible in this country to commit' since 'the crista or clitoris ... in this country is not more considerable than the nipple of the breast'. His suggestion that women in other countries did have enlarged clitorises was part of an eighteenth-century discourse, according to which, as Susan Lanser argued, 'old paradigms attributing female homosexuality to a "hermaphroditic" clitoral hypertrophy began to be ... displaced onto Asian and African women'.¹¹⁷

The attention to the clitoris was itself a relic of eighteenth-century understandings of female sexuality. Nineteenth-century discussions increasingly constructed women's difference as involving a lack of independent sexual desire, rendering the clitoris irrelevant. Virtue became analogous with female sexual purity.¹¹⁸ That view also coloured the judges' deliberations – and with so many

¹⁰⁹ T. Hitchcock, *English Sexualities, 1700–1800* (1997) 42; S. M. Connell, 'Aristotle and Galen on Sex Difference and Reproduction: A New Approach to an Ancient Rivalry' (2000) 31 *Studies in the History and Philosophy of Science* 405; J. E. Salisbury, 'Gendered Sexuality' in *Handbook of Medieval Sexuality*, eds V. L. Bullough and J. A. Brundage (1996) 81.

¹¹⁰ O. Moscucci, 'Clitoridectomy, Circumcision, and the Politics of Sexual Pleasure in Mid-Victorian Britain' in *Sexualities in Victorian Britain*, eds A. H. Miller and J. E. Adams (1996) 60, at 69.

¹¹¹ Salisbury, op. cit., n. 109, p. 85. See also Hitchcock, op. cit., n. 109, p. 44.

¹¹² T. Laqueur, *Making Sex: Body and Gender from the Greeks to Freud* (1990).

¹¹³ Moscucci, op. cit., n. 110, p. 69.

¹¹⁴ S. O'Driscoll, 'A Crisis of Femininity: Re-Making Gender in Popular Discourse' in *Lesbian Dames*, eds J. C. Beynon and C. Gonda (2010) 45.

¹¹⁵ K. Harvey, 'The Substance of Sexual Difference: Change and Persistence in Representations of the Body in Eighteenth-Century England' (2002) 14 *Gender & History* 202.

¹¹⁶ 'State of the Process', op. cit., n. 25, p. 14, emphasis in original.

¹¹⁷ S. S. Lanser, 'Befriending the Body: Female Intimacies as Class Acts' (1999) 32 *Eighteenth-Century Studies* 179, at 186.

¹¹⁸ Friedman, op. cit., n. 18, p. 53.

competing, sometimes conflicting attitudes towards female sexuality at this particular period, it is unsurprising that the judges both differed in their opinions and seemed to be struggling for understanding at various points.

Facts were evaluated not only in light of scientific and medical theories but also according to specific philosophies. When Lord Meadowbank stated that he had heard no legal or theological authorities ‘that went to shake what he conceived was founded in common sense and reason’,¹¹⁹ his reference to ‘common sense’ was not simply an appeal to unexamined norms. Rather, common sense philosophy, grounded in moral and metaphysical philosophy, was central to eighteenth- and nineteenth-century university education and legal thinking in Scotland.¹²⁰ As expounded by Thomas Reid, it held – in contrast to the scepticism of Hume or Descartes – that ‘those things do really exist which we distinctly perceive by our senses, and are what we perceive them to be’.¹²¹ That offered an epistemological basis for tenets including that humans had an innate moral sense, and that they universally believed common sense principles, the denial of which – since they had ‘the consent of ages and nations’ – was absurd.¹²² Only in ‘matters beyond the reach of common understanding’ did expert authority outweigh lay opinion.¹²³ Thus, Lord Meadowbank was drawing upon key tenets of contemporary Scottish philosophy when he dismissed literary allusions in favour of shared understandings of women’s sexuality. His was not an unthinking dismissal but rather one rooted in the leading philosophies of the day.

The decisions, then, were not guided only by cultural assumptions around race, class, and gender, even though such assumptions permeated them; their appeals to ‘common sense’ invoked the evidence of the senses as much as wider norms. The judges did not assume the impossibility of lesbianism, though their biases and interests circumscribed their understandings of its possibility. Careful consideration of the ways in which at least some of these men approached their decision making shows that assumptions about gender, race, and class were deployed to interpret and fill gaps in the evidence, rather than to replace it. The extent of serious attention given to fact finding by judges such as Lord Meadowbank, as well as the role of the parties in raising and setting the terms of these issues, is significant in understanding how such an unusual and complex case was approached by the judiciary.

Attention to the legal process also challenges assumptions that such constructions were purely a top-down imposition from the court rather than at least a partial reflection of the agency of the parties, and the pursuers in particular. The evidence and judgments were shaped in large part by the arguments put forward by counsel for the pursuers and the defender, as well as the evidence that they chose to call in support. While the judges could (and did) exclude evidence, the parties were responsible for bringing it before the courts. Their pleadings and submissions determined the legal as well as the factual issues that the judges considered. These points can be lost in analyses of the case that give priority to the prejudices and assumptions of the judges at the expense of their forensic approaches. Reinstating them offers a more nuanced understanding of what the courts

¹¹⁹ ‘Lord Ordinary’s Note’, op. cit., n. 87, pp. 13–14.

¹²⁰ C. Kennedy, ‘“Ungovernable Feelings and Passions”: Common Sense Philosophy and Mental State Defences in Nineteenth Century Scotland’ (2016) 20 *Edinburgh Law Rev* 285, at 286–287. Kennedy identifies its influence upon Lord Hope, a judge in this case.

¹²¹ T. Reid, *Essays on the Intellectual Powers of Man*, eds D. Brookes and K. Haakonssen (2002 [1785]) 476.

¹²² R. Nichols and G. Yaffe, ‘Thomas Reid’ in *The Stanford Encyclopedia of Philosophy* (2014), at <<https://plato.stanford.edu/archives/win2016/entries/reid/>>. See also id., p. 464.

¹²³ Reid, op. cit., n. 121, p. 522. See also Kennedy, op. cit., n. 120, p. 303.

believed themselves to be doing – and, with it, greater insight into both the specificity and the changing constructions of the judiciary, the British in India, female agency, race, and class.

7 | CONCLUSION

Woods and Pirie v. Cumming Gordon is a rich source of information about the usually unrecorded intimate lives of Scottish women at the start of the nineteenth century. It is also an extraordinary record of attitudes about female sexuality and its intersections with race, nationality, empire, and class. Explored purely in those terms, the case is of enormous value, as the scholarly and popular literatures attest. However, understood simultaneously as a legal text, it has even more to offer.

There was no clear separation of the social and the legal within the proceedings themselves. At the outset, Lord Meadowbank explicitly (albeit unsuccessfully) urged defence counsel to consider both the social and the legal risks of contesting the case. That theme of the extra-legal consequences (for the individual witnesses, their wider circles, and British society) pervaded later rulings, and was particularly clearly articulated in Lord Meadowbank's judgments. In other words, the nature of the case as both legal *and* social process was recognized contemporaneously by those involved; it offers a particularly overt invitation to careful socio-legal analysis.

This article has given just a few examples of the potential significance of taking seriously the 'legal' of socio-legal history, even when that history is of more social than legal historical significance. Indeed, through addressing the legal nature of such history, there is every likelihood of learning more about the law, too. Legal rules shaped the evidence available in ways that themselves have much to tell us about the law, the society within which that law operated, and the connections between the two. The use of judicial knowledge, for example, was, in the wider scheme of the case, a small point, but a revealing one. Careful legal reading also has some blunter insights to offer – notably, that this case was not, as is sometimes presumed, about whether sex between women was possible; the judges all accepted that it was. Rather, it was first about whether Cumming Gordon's defence required her to prove the truth of the specific allegations of particular sexual misconduct, or whether establishing some broader kind of impropriety would suffice. Depending upon the answer to that question – and the judges did not agree – a second question was whether these specific women had a sexual relationship. The answer to that depended upon detailed factual evidence as well as assumptions about such sexual activity being the preserve of the lower classes and foreigners. The evidence that the judges used to establish their various answers also has much to reveal about the ways in which imperialism, race, and class worked together with legal practices, as the example of Lord Meadowbank taking judicial notice demonstrates.

If we treat this case as a piece of legal history *alone*, it is of limited interest. It did not establish lasting precedents, and the secrecy with which it was treated ensured that it had no enduring impact on the courts. Conversely, if we only look at it as social history, we miss many of the nuances and learn less than we might from it. *Woods and Pirie v. Cumming Gordon*, then, is not only fascinating in itself but also a good illustration of the value that a socio-legal reading of historical cases can bring. In other words, legal historians' contributions could and should extend beyond areas of overtly legal significance. Legal history has increasingly widened its view beyond parliament and the courtroom to consider the law's relationship with wider society. Social history, similarly, gains much if it looks at the legal specificities of statute, case law, and procedure. *Woods and Pirie* offers a compelling example of just how much value such developments can bring.

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