

**Chapter Two: The Violent North? Sexual Violence, 1660-1960.**

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**Introduction**

This chapter analyses the nature and incidence of sexual violence in Scotland between 1660 and 1960. In comparison with the other chapters of this volume, the multifarious complexities of the offences concerned and associated categorisation issues rendered the content of this chapter particularly challenging. For instance, indictments for rape, and especially for sodomy and bestiality were often reported to the Scottish courts in summary form due to the perceived need to shield the public from the abhorrent details, so it is incredibly difficult for the scholar to make determinations about these offences.<sup>1</sup> Should bestiality be considered a violent offence when it is committed against an animal rather than a person? How can we determine whether an act of sodomy was consensual or not, or indeed violent or otherwise, when both individuals were indicted for the offence, the details of what transpired are largely obscured, and the line between perpetrator and victim is wholly blurred? How can we accurately determine what is meant when offences are defined by the court as an instance of 'sexual assault' or 'indecent assault' when the details of instances of sexual violence have been substantially censored, and how can we know whether such categorisations were applied consistently across the Scottish judiciary over time?

The research conducted for this chapter raised a significant number of questions which cannot be answered in a broad study such as this and which will necessitate a more

focussed and significant analysis by the author in a subsequent research project. For the purposes of this chapter then, although a range of so-called 'sex crimes' will be referred to in the content which follows, the piece will largely concentrate on the crimes of rape and attempted rape. As the various case studies at the end of the chapter clearly show, rape in itself was one of the most persistent but also one of the most nuanced and complex crimes of violence brought before the Scottish courts. However, the details of these offences were *less* obscured by court officials when compared to other crimes of a sexual nature and this enables scholars to track instances of this kind of offence and reactions to its perpetration more easily over time in order to assess its contribution to notions of Scotland as an inherently violent nation.

## **Sexual Violence and the Law**

### *(a) Bestiality and Sodomy*

Although, and as has already been articulated above, it is often difficult for the scholar to come to understand the specific details associated with the 'crimes' of bestiality and sodomy, until the modern era at least, these offences were nevertheless regarded with horror and loathing by the Scottish authorities.<sup>2</sup> In Scots Law, bestiality and sodomy were deemed to be capital offences, despite the fact that this ruling was not based on any statutory provision. This makes these offences highly unusual in a Scottish context and the northern approach towards these offences is also somewhat incompatible with that of England where statutes passed against 'buggery' in 1533 and 1548 established a clear prosecutory pathway for these types of offences. As Peter Maxwell-Stuart has explained, the law north of the Tweed appears to have made illicit carnal intercourse a capital crime on the basis of chapter eighteen of Leviticus<sup>3</sup>, where it is written:

'You shall not lie with a male as with a woman; it is an abomination. And you shall not lie with any beast and defile yourself with it, neither shall any woman give herself to a beast to lie with it: it is perversion...If a man lies with a male as with a woman, both of them have committed an abomination; they shall be put to death, their blood is upon them...If a man lies with a beast, he shall be put to death; and you shall kill the beast...If a woman approaches any beast and lies with it, you shall kill the woman and the beast; they shall be put to death, their blood is upon them.'<sup>4</sup>

In other words, bestiality and sodomy were considered more *sinful* than criminal and furthermore, they were regarded as sins that were both against God *and* against nature.<sup>5</sup> This probably goes a long way to explain why so many of these cases were brought to the courts' attention by the Church authorities in Scotland, rather than by sheriff officers or other judicial officials. In addition and perhaps more interestingly, as there was no statute upon which to base these offences, the judges in proven cases of sodomy or bestiality were permitted, or at least they permitted themselves, to mete out explicitly *exemplary* sentences of capital punishment to those convicted of these crimes. As we saw in chapter one, sodomy and bestiality felons in Scotland after 1600 could be strangled, burnt at the stake or more commonly drowned prior to being hung on a gibbet by the common hangman, as according to Baron David Hume, the offender's '...very presence is a pollution to the society of his fellow creatures.'<sup>6</sup>

In addition to the staunch legal provision of sorts that existed in the pre-modern for bestiality and sodomy, we can see from the gravity of the language used in indictments and in the courtroom itself that these offences were taken very seriously by the judicial authorities and by the public more generally. In the early modern period, Scottish trial advocates used phrases like '...these shameful and unnatural lusts', '...a maist

detestable, odious and abominable crime', '...a vile and filthy crime' and '...a fearful and unnatural act of evil' in their opening arguments. In witness testimonies too, although the mechanics of the actual act of sodomy or bestiality were often shrouded in vague and complicated language such as 'unnatural connection', 'sowing the dirty seed', 'carnal capture' and 'obscene assembly', by and large, the language used evidently illustrates that these offences were regarded as sinful and aberrant in nature. As we saw in the previous chapter, such commentary and language indicate efforts at labelling this kind of behaviour as aberrant, in order to re-emphasise the conventionally 'civilised' state of Scottish society. Although attitudes to consensual acts of sodomy have slowly changed over the course of the twentieth century, culminating in the legalisation of homosexuality in Scotland in 1980<sup>7</sup>, bestiality cases brought before Scottish courts since the more modern era still seem to adopt this historic rhetoric of bewilderment, censorship and condemnation. However, neither bestiality nor sodomy has received any scholarly attention in the post-1750 Scottish context as yet and what is provided in this chapter serves merely as a clarion call for further research in these areas.<sup>8</sup>

#### *(b) Incest and Child Sexual Abuse*

I have chosen to separate out forms of child abuse from rape and sexual assault in this chapter, as in my view, these offences were treated very differently by the Scottish courts when compared to instances when the victim was considered to have reached maturity, although a separate legal provision was not clarified until 2009.<sup>9</sup> Although as we will see in the section below, a charge of rape or sexual assault could be applied to episodes of sexual violence involving pre-pubescent Scottish victims, arguably such

indictments were dealt with in a swifter and more routine fashion by the Scottish courts for three reasons.

First, this was because less emphasis was placed on the interrogation of victims in cases of child sexual abuse. Second, the courts went to great lengths to censor the material contained in these court cases and as a result trials were often heard summarily and behind closed doors. And thirdly, owing to the uniformly condemnatory attitude of judicial officials and the populace at large towards individuals suspected of child sexual abuse, convictions were clearly craved from the prosecutions that did come before the court. However, as the standards of proof required for conviction in instances of serious sexual offences were complicated by various contextual elements and evidentiary problems that were specific to cases involving young victims, prosecutions were commonly laid for *lesser* offences – such as attempted ravishment, indecent assault or even lewd behaviour – in order to secure a guilty verdict and punishment.<sup>10</sup> Consequently, the evidence required was less onerous for all concerned and hearings were more concise and successful as a result.

One type of sexual offence, which often involved children, which was considered heinous and which was punishable by death in pre-modern Scotland on the basis of it being ‘...a very gross and shameful immorality’, was incest.<sup>11</sup> We have already encountered a case study involving this offence (amongst others) in the previous chapter, and it was evident how the Scottish authorities regarded relations deemed to be ‘...violations of the duty of a decent and well-disposed citizen.’<sup>12</sup> Defined by Baron Hume as ‘...carnal knowledge between persons who are of near kin’<sup>13</sup>, the advocate went to some lengths to try to determine which kinds of relationships would qualify as

incestuous and which would not. In the end, he seemed to include the entirety of the family circle (including relations by marriage rather than just by blood) and so incest in Scots Law at least, seems to have a particularly wide catchment.<sup>14</sup>

The exemplary punishments that came to be associated with this particular offence once again stemmed from incest being regarded as more *sinful* than criminal.<sup>15</sup> As was the case with bestiality and sodomy, chapters eighteen and twenty of Leviticus once again seems to have provided direction to the Scottish legal context on how to approach and regard this type of felonious activity.<sup>16</sup> In addition, and according to Baron Hume, indictments for incestuous connections can only be laid if the parties involved knew they were related to one another and continue to have relations with one another in that knowledge.<sup>17</sup> He also acknowledged, that unless the accused confessed to their 'crimes', as occurred in our case study from chapter two, incest was a very difficult offence to prove beyond reasonable doubt, as corroborating evidence was typically lacking and this was especially problematic in instances where one of the participants was a minor.<sup>18</sup>

Similar problems of proof were evident in relation to other forms of child sexual abuse brought before the Scottish courts between 1660 and 1960.<sup>19</sup> Although the Scottish authorities and the Scottish populace were united in their distaste and outright abhorrence of this type of offending, cases of this type were problematic to prosecute nonetheless, particularly if the charge was more serious in nature. For instance, sometimes the victim was simply too young and too innocent to understand or describe what had happened to them in sufficient depth, or with sufficient confidence. Sometimes they were incapable of offering a verbal or written declaration detailing the

events because of the trauma and/or injury they had endured, or owing to the terror they felt at having to relive their experiences at a young age in the public sphere of the courtroom.

Sometimes child victims were scarcely supported by their immediate family and their testimony was doubted by those nearest and dearest to them, especially when alleged assailants were friends or family members who could produce convincing explanations for what had transpired. Sometimes medical testimony and forensic evidence was inadequate or inaccurate and unable to substantiate claims of abuse, particularly in the era before the use of this kind of professional evidence became a matter of routine. Consequently, and as is evident from the Edward Hand case study from 1822 analysed below, it was common for Scottish individuals to be indicted for less serious sex crimes against children, which were easier to prove.

Tragically too, and as we have only recently come to recognise in the contemporary world, some child victims simply remained wholly silent about their abuse as they had normalised their experiences over time and their suffering went unnoticed. Although, the majority of sexual assault prosecutions in pre-modern Europe related to instances of child abuse rather than adult rape, the numbers were still remarkably low and the statistics unlikely to reflect anything like real levels of offending.<sup>20</sup> As many scholars have convincingly argued, unreported cases of child abuse (and incest) must have made (and continue to make) a significant impact upon the 'dark figure' of unknown sexual offences perpetrated in Scotland and beyond.<sup>21</sup> When this suggestion is set alongside the persistent prosecutorial problems referred to above, and the historic lack of convictions for sexual offences against children explored in the section on trends in

offending below, it would seem that our approach towards child sexual abuse in Scotland and indeed elsewhere, has remained archaic and wholly unsatisfactory for too long.<sup>22</sup>

### *(c) Rape*

Throughout history, rape has always been considered a very serious offence by the Scottish judiciary. Formerly, for instance, it was one of the Four Pleas of the Crown alongside murder, robbery and wilful fire-raising where the monarch held exclusive jurisdictional rights to try defendants accused of these offences.<sup>23</sup> As Baron David Hume has explained, the ‘filthy crime’ of rape (as he terms it) is held to be a grave offence in Scots Law as it is:

‘...one of the most grievous injuries than an individual can sustain being a robbery of that wherein a woman’s honour, her place in society, and her estimation in her own eyes depend, and being also, in the perpetuation of it, necessarily accompanied with great alarm and terror, and with actual violence to the person.’<sup>24</sup>

Although Hume’s description is gendered and excludes the possibility of male victims of this offence<sup>25</sup>, it does at least capture some of the nuances of experience related to rape. Moreover, and unlike his exceedingly limited discussion of the legal context for sodomy and bestiality, Hume does provide a detailed definition of rape and explains the conditions necessary for such a charge to apply to an individual (or individuals) accused of this offence.

According to Hume, in Scots Law rape is defined as ‘...the unlawful carnal knowledge of the woman’s person, forcibly, and against her will.’<sup>26</sup> Proof of the use of force against



the victim's will (her non-consent) as well as evidence of an unstinting resistance to the assault were thus both necessary for a conviction to be achieved in these cases, unless the victim was a minor and therefore likely to be physically incapable of resisting.<sup>27</sup> More specifically, and although the abduction of the victim was not required for a rape charge to result (as it was in Roman Law) '...there must be carnal knowledge of the woman's person, by penetration of her privy parts, or entry of her body.'<sup>28</sup> Hume points out however, that no emission was necessary for a rape charge to be laid, that it was not necessary for disclosure of the assault to be immediate, nor was there an issue regarding the age of the victim either, as in Scots Law, it made no difference to the charge whether the victim concerned had reached puberty or not.<sup>29</sup> Thus, the problems which beset English courts when dealing with child rape in relation to confusion over the relevance of the age of consent did not occur north of the Tweed.<sup>30</sup>

From the research conducted for this project, and as is evident from the case studies below, some aspects of Hume's commentaries were accurate and valid in relation to prosecutions for rape and others were not. Emission, for instance, was not a focus for court proceedings in pre-modern Scotland as Hume points out. However, as we can see from the 1948 case study below, the increased use of forensic and medical evidence in sexual assault cases, meant that proof of emission did grow in importance over time. Hume was also accurate in saying that child victims were largely treated the same as adult victims, although as testimony always had to be corroborated in the Scottish courtroom, rape cases were notoriously difficult to prove. For instance, and as the case studies in this chapter illustrate once again, proving *both* the use of force and non-consent in these situations was extremely difficult as it was highly unusual for a third party to witness what had transpired.<sup>31</sup> Indeed, this fact may go some way to

explain why Hume's dismissal of the importance of the quick disclosure of sexual assault is one aspect of his commentary that is not supported by evidence from indictments for this kind of offence. Arguably, the evident difficulties with proving these cases necessitated other tangential aspects of the alleged events – such as whether disclosure had been prompt – to take on more significance than might otherwise have been the case.<sup>32</sup>

In addition to these prosecutorial parameters for rape indictments, Hume was also at pains to point out that both the motive for rape and the moral character of the victim were wholly irrelevant to the proving of a given case.<sup>33</sup> As he explained:

'As the crime of rape is independent of the age of the female, so it is also independent of her situation, be she maid, wife or widow, and even of her character and way of life, though it were that of a strumpet...For the person of this woman, as much as that of any other of the King's subjects is under the safeguard of the law...in fixing the character of any crime, and deciding whether it has been committed, the constant course is to attend to the act itself, and never to the person, to consider the immediate and fundamental thing that has been done – the violation of order, peace, or security – and to pay no regard to the merits of the sufferer, nor attempt to trace the precise degree of evil which follows it in the particular case.'<sup>34</sup>

Once again, there are accuracies and inaccuracies about Hume's commentary here. For instance, the determination of motive on the part of the alleged protagonist did not seem to play an important part in rape trials in Scotland between 1660 and 1960. On this matter, the evidence concurs with Hume. In relation to his suggestion that the character of the victim should have no bearing on the case, however, Hume's comments seems somewhat naïve and erroneous. As *all* of the case studies below

show and as various scholars have clearly demonstrated in relation to a variety of different judicial contexts, one of the central and persistent strategies of defence teams in rape cases has been to manipulate the past sexual history, background, opinion, character and even the dress-sense or style of alleged rape victims in order to discredit them in the eyes of jurors.<sup>35</sup> Arguably, the interrogation of the victim in this fashion has happened more explicitly in rape prosecutions than for trials relating to any other type of offence, violent or otherwise. Defence lawyers garner any 'ammunition' they can to undermine the victim's testimony in order to call into question the degree of resistance offered to an assailant and to add uncertainty to considerations regarding whether sex had been consensual or otherwise. Indeed, the scale and extent of how rape victims were treated in the courtroom, particularly within our period of study 1660-1960, has led some to acknowledge that such practices rendered them feeling victimised a further time.<sup>36</sup> Certainly, these experiences must explain why, as we will see in the next section of this chapter, so many rape victims in Scotland and elsewhere throughout history have been reluctant to report the crimes committed against them and to accuse their attackers.<sup>37</sup>

In the final sections of his commentary on the legal context of rape, Baron Hume noted that in Scotland if the violation of a person was attempted but penetration was not accomplished, an individual could still be indicted, but for 'assault with intent to ravish'.<sup>38</sup> He also made it plain that 'The punishment of rape is death, by immemorial custom.'<sup>39</sup> This sentence was the case until 1841 when the Substitution of Punishments of Death Act abolished capital punishment for this offence.<sup>40</sup> He further notes that in Scots Law, a husband cannot rape his wife, as technically upon marriage she becomes his property. However, as with other individuals who assist in the

perpetration of rape, a husband can be charged art and part.<sup>41</sup> Surprisingly, the exemption for marital rape was not abolished until as late as 1989 in Scotland and 1992 elsewhere in the United Kingdom.<sup>42</sup> Finally, Hume emphasises the importance of the victim's testimony in rape prosecutions (or their declaration if under age) and its centrality to achieving a successful conviction. In order to avoid false accusations made against innocent individuals '...the credit to be given to her testimony must depend on the probity of her story (all circumstances considered) and the concurrent evidence which supports it.'<sup>43</sup> This final point is an important one as it relates to a pre-modern preoccupation and a prolonged 'moral panic' which associated rape prosecutions with attempts at blackmailing wealthy individuals.<sup>44</sup>

### **Trends in Sexual Violence and its Punishment:**

As the number of indictments for bestiality and sodomy were insubstantial over the 1660-1960 period and tended to be assimilated into the judicial statistics of relatively minor so-called 'unnatural offences' including exposing the person and other 'lewd and libidinous practices', a chronological incidence analysis of these offences was not possible.

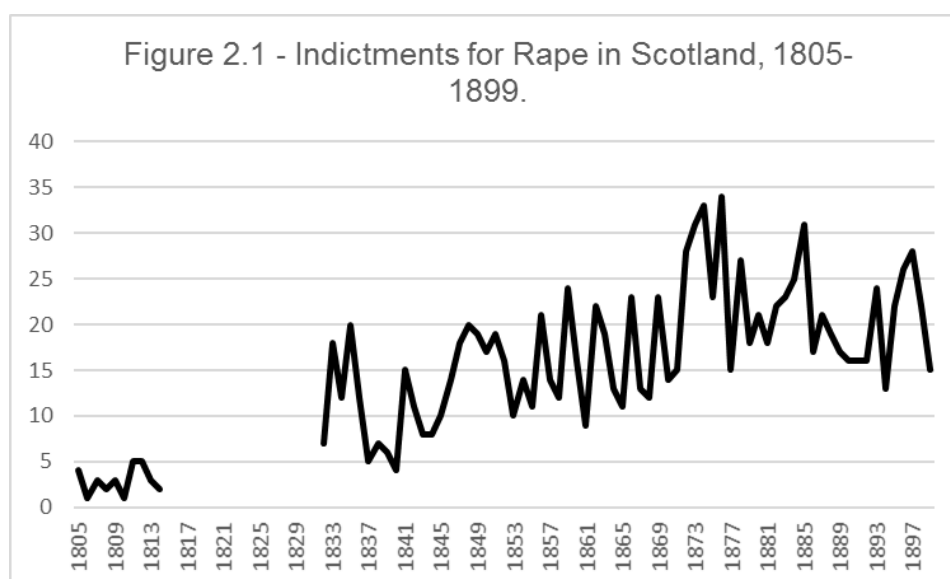


Figure 2.2 - Indictments for Rape in Scotland, 1900-1960.



Figure 2.3 - Indictments and Convictions for Rape in Scotland, 1805-1899.

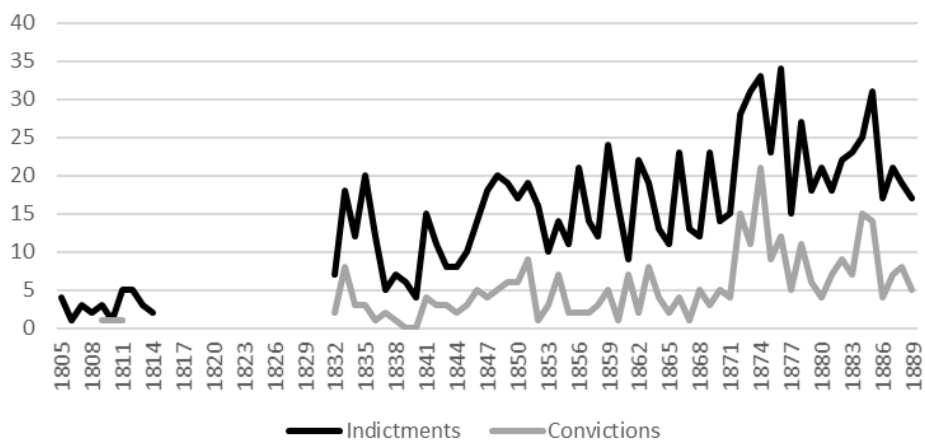


Figure 2.4 - Indictments and Convictions for Rape in Scotland, 1900-1960.

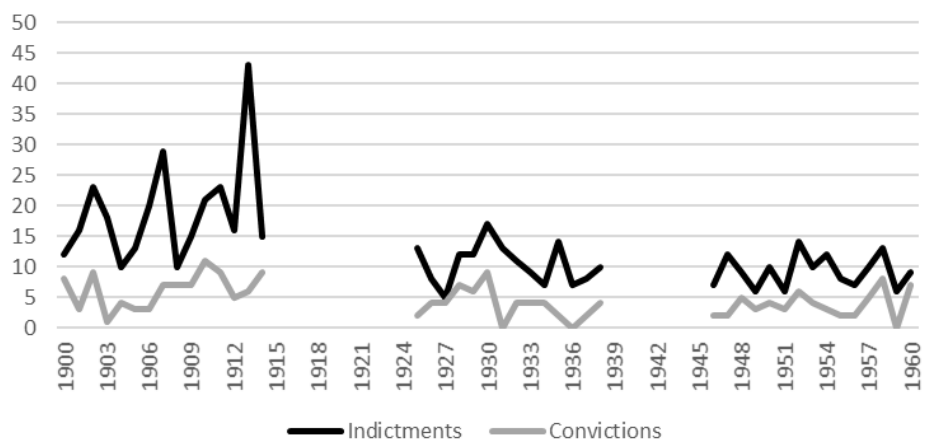


Figure 2.5 - Indictments for Attempted Rape in Scotland, 1830-1899.

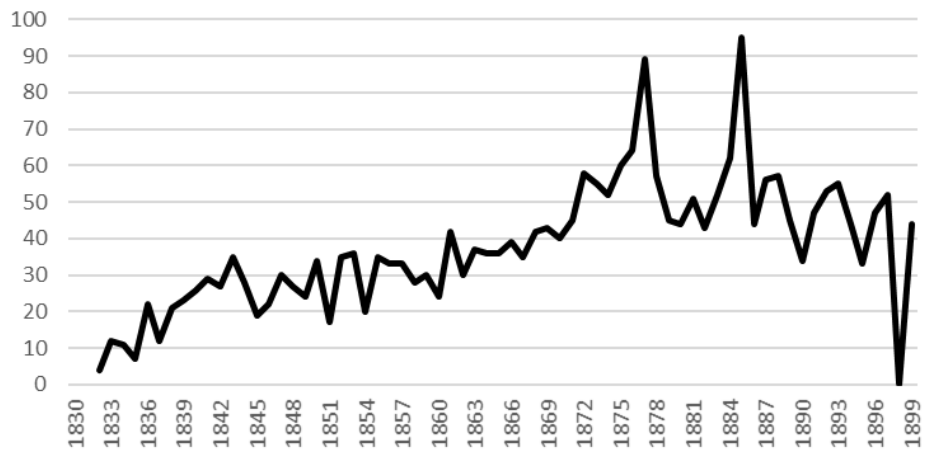
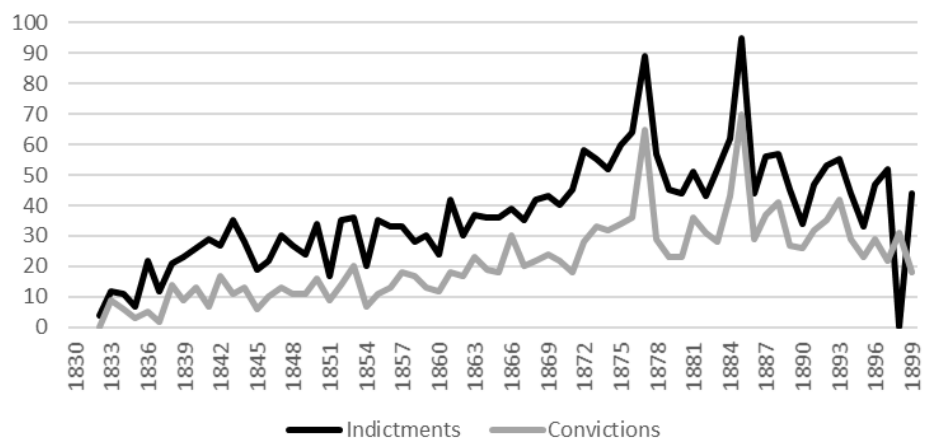
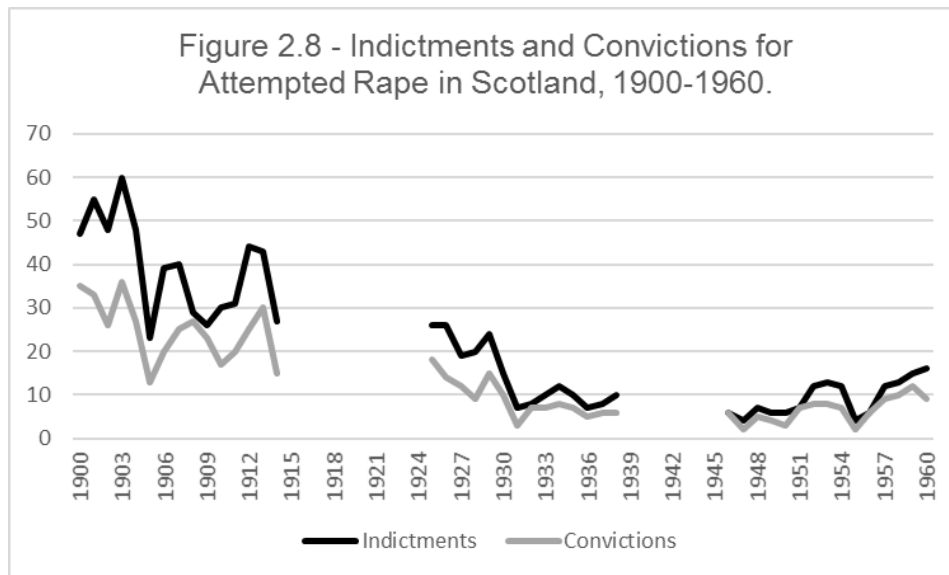


Figure 2.6 - Indictments for Attempted Rape in Scotland, 1900-1960.



Figure 2.7 - Indictments and Convictions for Attempted Rape in Scotland, 1830-1899.





Figures 2.1 and 2.2 above show trends in indictments for rape in Scotland between 1805 and 1960. Although the data for the nineteenth century shows an encouraging upward rate of indictments for this offence, this trend is not continued into the twentieth century. Moreover, and as Figures 2.3 and 2.4 clearly illustrate, the conviction rate in Scottish rape trials was woeful, especially in the more modern era, when at times there is an evident inverse relationship between indictments and convictions (see between 1912 and 1915 and again between 1935 and 1938). Clearly, successful rape prosecutions were hard to achieve and knowledge of this must have impacted upon the readiness of victims to report assaults to the authorities over time. The full force of the law was only very rarely used upon individuals convicted of rape in the Scottish context between 1805 and 1960 and instead, sentences of transportation, or penal servitude of typically 5-7 years in duration, were more commonly deployed.

The trends in incidence for attempted rape in Scotland between 1805-1899 and 1900-1960, shown in Figures 2.5 and 2.6 above are not too dissimilar from that of rape proper, although the numbers of actual indictments are higher as attempted rape was deemed easier to prosecute than its more serious counterpart. Perhaps for this reason,

the relationship between indictments and convictions is closer for attempted rape as shown in Figures 2.7 and 2.8. However, once again, we see a significant downward trend in both indictments and convictions from the mid-1920s onwards, probably due to the under-reporting of the offence coupled with a reluctance to prosecute unless unequivocal evidence was available, which as we know was not common to episodes of sexual assault. Punishments for Scottish individuals convicted of attempted rape between 1805 and 1960 were relatively insignificant in nature, with fines and short stays of imprisonment being typical. Moreover the lenient outcome of these cases may well have further contributed to the evident under-reporting and unwillingness to prosecute.

### **Offenders, Victims, Methods and Motive:**

Until very recently, crimes involving sexual violence were considered explicitly gendered. Normally offenders have been male and victims female.<sup>45</sup> We have already seen in this chapter how, in the pre-modern period at least, many of the victims in prosecuted cases tended to be children. However, the significant number of unreported sex crimes during this era and in the more modern period, makes it difficult for scholars to accurately establish a typical offender or a typical victim profile in relation to this type of offending. Certainly, the majority of reported cases brought before the Scottish courts between 1660 and 1960 related to lone assailants, although on occasion, and as is exemplified by the Glasgow Green case study below from 1948, gangs of sex attackers were not unheard of and likely became more common in the post-1970s period when we came to realise the existence of sex trafficking industries and child abuse 'rings' where multiple offenders used new technologies to further despicable criminal exploits.



Victims of sexual violence had many barriers to overcome if they were to see their assailants prosecuted and convicted. First, they had to disclose what had happened to them. Second, they had to be believed, so they had to have appropriate and persuasive evidence to substantiate their claims. Third, they had to have the courage to face their attacker and to relive their experiences in court. And fourth, they had to ensure that they revealed the details of their experiences to maximise the credibility of their testimony and to limit any criticism regarding their behaviour. Thus victims had to describe what had occurred without sounding particularly experienced in sexual matters, as this would potentially jeopardise portrayals of their 'innocent' character.<sup>46</sup> The fact that so many of the victims of sexual violence were assaulted by someone from their immediate family, or someone well known to them, also undoubtedly made their task harder and more traumatic. Typically in these cases, the outcome often came down to the jury favouring one person's word against another, even in the face of overwhelming forensic, medical or circumstantial evidence as can be seen in both of the case studies from 1822 below.<sup>47</sup>

Evidence of premeditation in these cases was rare within our period of study as more often than not, sex crimes committed by lone assailants were opportunistic in nature rather than planned. Weapons were often employed in order to threaten victims or to get them to comply with their protagonist's wishes, but were rarely used.<sup>48</sup> This is not to suggest that sexual assaults were non-violent however. Brute force was regularly involved in the instances of rape, sexual assault and non-consensual sodomy (male rape) brought before the Scottish courts between 1660 and 1960. Victims were often bruised and bloodied after the fact, either from the aggressive sex act itself or from

being battered and abused before or afterwards.<sup>49</sup> In addition, many victims suffered intense emotional and mental trauma which persisted long after the attack had ceased. It is arguably only in the more modern period that we have better come to realise the full extent of the psychological impact that sexual offences have upon victims both young and old.

As with so many violent crimes against the person, the motives in sexual assaults are difficult to discern and typically vary from one offence and offender to another. We have already seen in this chapter that establishing motive in these offences was far less important to the court authorities than establishing proof that an assault had occurred, that resistance had been offered and that the event was non-consensual. Nevertheless, some analysis has been conducted into the rationale behind these kinds of crimes and certainly, the conventional view that sexual offences were caused by uncontrollable or unnatural lusts is now regarded as a significant oversimplification and inaccurate. As court cases of non-consensual sodomy are so difficult to distinguish from consensual ones across our period, and indeed as we have seen prosecutions are so few, it is impossible to work out how many of these episodes were not offences at all, but were instances of normal homosexual relationships and encounters and therefore the motives involved were sexual or joyful rather than deviant or criminal. In instances of bestiality, several motives can be discerned from the evidence at hand and particularly from the confessions that some offenders gave before the courtroom. Some individuals said they had sex with animals because of a lack of opportunity for sex with females in the area where they lived. Some had done so to avoid getting their usual sexual partners pregnant. Some confessed to experimentation and an imitation of animals in the field. Some had engaged in

bestiality in a deliberate manner within the confines of a perceived 'relationship' of sorts.<sup>50</sup>

In instances of the sexual assault or abuse of children one common motive that can be discerned from the evidence is that a significant number of attacks in the pre-modern period were caused by the myth that having sex with a virgin cured adult men of venereal disease. This apologue and associated practice was certainly perpetuated in Scotland well into the twentieth century as scholarship has shown, and it was probably one of the key reasons why more of these cases came to light in comparison with adult sexual assaults where victims often chose to remain silent about their experiences. As we can see from the Edward Hand case study from 1822 below, mothers occasionally discovered the under-clothes of their children to be soiled with discharges associated with sexually transmitted diseases and promptly took their suspicions over the cause to the authorities.<sup>51</sup>

Aside from this despicable practice, the other motives for the sexual assault and abuse of children were seemingly not substantially different from that involving adult victims. Although drink was often present in these abusive situations, it was not regarded by the courts as either an explanation or a mitigation.<sup>52</sup> Some individuals had been romantically rebuffed by their victims and had latterly took out their frustrations over their failed courtship on their erstwhile partners.<sup>53</sup> Power, control, the need to assert or reassert authority, the enjoyment of gratuitous violence and mental health problems have also been suggested by scholars to explain the motives behind the perpetration of sexual violence and the reasons why men have dominated the perpetration of this type of offending over time and across all cultures. However it is evident that in the

Scottish context at least, insanity verdicts or declarations were exceedingly rare in trials for sexual violence.<sup>54</sup>

### **Case Studies and Attitudes to Sexual Violence:**

#### *a) John and James Sword (Eighteenth Century)*

An interesting case was brought before the West Circuit Court in Glasgow on the 25<sup>th</sup> of May 1769. Two merchants from the city, John and James Sword were charged with raping (or 'ravishing') a woman called Janet Orr who was married to a local bookseller named John Brown. The very first thing that the men's defence team did was to make a statement to the court which said that:

...the Crime of Rape is of very difficult investigation, it requires the utmost degree of Attention, not only to the Import of the Evidence, but to the Credibility of the Witnesses who emitt it.<sup>55</sup>

The lawyers then went on to claim that rather than this indictment be one against the defendants for sexual assault, it should have been an indictment against the alleged victim and her husband for extortion. This may go some way to explain why, when the victim came to testify in court, she seemed to be more preoccupied with defending her right to bring a prosecution in the first place, rather than presenting the details of the assault that had been seemingly perpetrated against her.

Eventually, nonetheless, the court heard that Janet Orr and her husband John Brown had been walking back to Glasgow from Paisley on the 9<sup>th</sup> of July 1768 when they were joined by the two defendants (both of whom she described as 'being in Liquor') and a third man called James Boyd, who had originally been part of the indictment but

had been subsequently admonished in order to give evidence at the trial.<sup>56</sup> The victim alleged that John Sword laid hold of her by the arm and insisted that she walk with him separately. Janet's husband was displeased by this suggestion and explained that the couple were married, but John Sword was undeterred and said '...she is not your wife she is some Whore whom you have pick't up upon the Road.' After parting company for some short time, the defendants caught up with the couple once more, and again John Sword grabbed Janet by the arm and said rather crudely he would '...have the Girl...and that a standing prick and a Sallow Cunt were good for such a cold night as this.' He then proceeded to thrust his hand inside her petticoats and with the help of James Sword, the co-accused, they pulled her into a field whilst James Boyd restrained her husband from coming to her rescue.<sup>57</sup>

The men threw her down to the ground upon her back and whilst holding her down with force they took it in turns to have 'carnal knowledge' of her body. Janet Orr claimed that although she fainted during the course of the attack, she managed to recover her senses enough to observe the assault upon her and indeed, she was able to recollect it in fairly vivid detail. The victim was very clear that she had endeavoured to resist her attackers, that she cried out 'Murder!' and for her husband to come to her aid several times but he did not. Some fifteen minutes after the alleged incident had occurred, Janet Orr's husband John Brown returned to the scene, bringing several men with him to help escort his wife to a nearby house. However, a scuffle broke out between the parties concerned and John Brown proceeded to hit one of the accused with a stone hammer, whereupon the three men set upon him and beat him quite badly whereby he sustained a head injury. Eventually the fighting died down and the individuals went their separate ways.<sup>58</sup>

There were several issues that came to light during the trial proceedings which served, rightly or wrongly, to cast serious doubt on both the prosecution's case and the validity of Janet Orr's testimony. In the first instance, and in the aftermath of the alleged attack against her, the victim recalled that she was '...weeping but unable to speak' at that time, so she did not immediately inform her husband (or anyone else) of the violence she had been subjected to. Instead, she went to the authorities to complain about the beating *her husband* had received by the assailants. The defence lawyers thought that Janet Orr's initial non-disclosure was rather odd, given the fervency of her subsequent accusations, so they pushed her to explain her silence on the supposed rape. Janet Orr explained that as her husband was already suspicious of her infidelity and had threatened her that '...if ever she had dealings with any other Man he would Stick her through the Body', she had 'concealed' the details of the assault upon her from her husband for some thirty-six hours after it had occurred. Moreover, she testified that even when she had admitted to her husband that two men had thrown her to the ground, she had wholly and repeatedly denied that she had been in any way ravished. Similarly, she admitted that when she was rescued, her husband inquired whether the alleged assailants '...had got her wronged' and she had replied '...that she thanked God they had not.' Then, when asked the same question by a female witness who lived in the house she was taken to after the skirmish, she acknowledged that she had replied '...they had done her no wrong and had only tussled about her knees.'<sup>59</sup>

The second factor which served to undermine Janet Orr's testimony and the strength of the prosecution's case was the provision of defence testimony from men like Thomas King and Robert Tannahill which portrayed her as a woman of historically

loose morals. Indeed, various witnesses separately testified to her being ‘...habite and repute to be free of her person with men’, that they never saw her refuse the advances of men, that she was often drunk or very merry through drink and that ‘...men handled her very freely, putting their hands up her coatts and that she did not pretend to make any resistance.’<sup>60</sup>

The third and perhaps most significant problem with the testimony provided by Janet Orr and indeed the prosecution’s case as a whole, was that the individuals she had initially named as her assailants were not the two men who were now being prosecuted for her rape. Originally, Janet Orr had named James Boyd and a man called John Haldon as her abusers. However, the court heard that after a visit from James Boyd’s wife a few days after she had made her initial accusation, Janet Orr switched her story to implicate James and John Sword instead. Further inconsistencies, which served to undermine the prosecution case, continued to emerge when it was John Brown’s turn to testify. Although at first glance, he appeared to entirely corroborate his wife’s story in terms of the precise and intimate details of the assault perpetrated upon her, and in his description of her bruises and ripped clothing in the wake of the attack, his testimony was in fact exceedingly problematic as his wife had already testified that he was unaware of what had actually transpired as he had been absent at the time of the alleged assault.<sup>61</sup>

Then came the evidence of James Boyd. His testimony implied that the events that transpired had all been an elaborate and well-planned ruse by Janet Orr and her husband to extort money from innocent men. He told the court that Janet Orr behaved very strangely when the three men met her and her husband on the road from Paisley.

He recalled that whilst she stopped to rest at the side of the road, her husband continued on walking to the tollbar. Then, whilst chatting with James Boyd and the two accused, Janet Orr suddenly loudly cried out 'Murder!' for no reason. At no point, he argued, did anyone lay a hand on the victim nor impose any violence or force upon her of any kind. Yet, when her husband returned along with individuals he had roused in the town, he started to attack the group with a stone hammer and engaged in a random and unprovoked fist fight with them.<sup>62</sup> David Cross and James Osburn who both came to help escort Janet Orr to a house of safety in the wake of the alleged assault further testified that they '...observed no Marks of Violence about her' and '...observed nothing wrong about her Cloaths, but that she was as genteel as ever she was.' Their evidence was entirely contrary to that given by John Brown, the victim's husband.<sup>63</sup>

Finally, came the damning testimony of Isobell McIntyre (the woman who tended to Janet Orr in the safe house after the alleged affray), James George a tobacconist in Glasgow and Robert Auchincloss a cooper in the same city. Isobell McIntyre told the court that in the wake of the alleged incident, Janet Orr had asked her to broker payment to the value of five pounds sterling from John Sword with his wife acting as intermediary. As part of this deal, John Brown had said that he would absent himself from court as a witness, but that he would require one hundred pounds sterling to cover the fine he would incur, in addition to the five pounds currently being offered. John Sword's wife then offered ten pounds sterling to the couple, but negotiations broke down after this when she refused to increase her offer further and instead craved that the trial commence.<sup>64</sup>



Attempts at brokering a settlement did not end there however. The court then heard from James George that he had been asked by John Brown to broker a deal between John Sword, James Sword and James Boyd where John Brown would offer to absent himself from court as a witness. More specifically, James George was told that if he could persuade the three men to pay John Brown forty pounds sterling a piece, then ‘...he would make them as free as he was.’ Ultimately, however, it was the testimony of Robert Auchincloss that was crucial in determining the outcome of this case. He testified that in discussions he had with John Brown, Brown admitted to wanting money from the accused men to recompense him for the assault *against him* and for the loss of business accrued as he had taken time off work to recover from his injuries. Brown also said that he believed James Boyd when he had told him that ‘...no attempt had been made upon his wife’ and claimed instead that ‘...his wife behooved to be a base Jade.’<sup>65</sup>

Whilst the testimony of these three individuals did little to categorically prove or disprove the allegation that a rape or ravishment had occurred, it did a lot to undermine the testimony of Janet Orr, who had previously categorically stated before the court that ‘...there never was any offers made to her or to her husband so far as she knows of money or any other Consideration to persuade them to compromise this prosecution.’<sup>66</sup> It also cast doubt on the character and motivation of her husband John Brown as it now seemed that the charge of extortion implied by the defence lawyers at the start of the trial had more weight to it than may have been first thought. This was especially so, if we consider that every attempt to achieve some sort of financial settlement had been initiated and instigated by either Janet Orr or her husband and not by the accused men John and James Sword. Perhaps unsurprisingly then, the jury

unanimously found the two accused not guilty of the crime charged against them. They were exonerated and set at liberty.<sup>67</sup>

This case is interesting for many reasons, not least because even though a conclusion is reached in relation to the prosecution, there remains no certainty over what did or did not happen to Janet Orr on the 9<sup>th</sup> of July 1768. Was she indeed raped, but her assailants escaped justice due the naïve and arguably ill-judged attempts of her and her husband to either attain some compensation through an out-of-court settlement or to avoid the ignominy of a court case played out in public? Or was this an instance of the kind of bare-faced blackmail and extortion efforts that authorities believed to widely exist in relation to sexual violence during the eighteenth and nineteenth centuries?

Clearly, it is impossible to come to a firm conclusion, but the testimony of so many separate and independent witnesses would seem to support the suggestion that Janet Orr and John Brown were confidence tricksters of sorts whose actions evidently lent weight to the general and prevailing assumption that victims of rape and sexual assault typically fabricated accusations against other individuals either for their own benefit, or on account of their own fantasist tendencies. We have also seen here, as elsewhere in this chapter, that defence lawyers did their best to undermine the character and credibility of victims in these cases. Indeed, this was done with more rigour and with greater frequency in relation to prosecutions for sexual violence than in any other type of criminal trial. Indeed, and as was evident in this case, the defence team's strategy could on occasion invert the roles of victim and alleged perpetrator in the courtroom. This not only had a devastating impact on 'real' victims of sexual violence, but it also dissuaded other victims from coming forward to prosecute their assailants. Thus it can

be argued, as indeed this chapter has done, that rape has probably made the most significant contribution to the so-called 'dark figure' of unknown or unrecorded crime throughout history. This makes it exceedingly difficult for us to determine the extent to which crimes of this nature contributed to the prevailing assumption regarding the violent character of the Scottish nation and its people.

*b) Edward Hand and James Burtney (Nineteenth Century)*

In 1822, in closed sessions of the Justiciary court, two men were separately indicted for acts of sexual violence against a minor in the western lowlands of Scotland and their cases reflect the historic nature of the complications and difficulties associated with prosecuting child sexual abuse. More than this too, when compared with one another, both prosecutions reflect the centrality of the initial charge laid in prosecutions for sexual violence in terms of the proof required and the punishment resulting upon conviction. It also highlights the challenges brought about by the testimony of victims who were not considered to be 'of age'.

Edward Hand (a thirty-four-year-old glass blower from Renfrewshire) was indicted at the West Circuit Court in Glasgow on the 17<sup>th</sup> of September 1822.<sup>68</sup> Married with one child, he was accused of 'attempting to ravish' twelve-year-old Mary Ann Smart, the young daughter of his employer, on the 20<sup>th</sup> of July 1822 within her own house at Finnieston, Renfrewshire.<sup>69</sup> It was alleged in the indictment that Edward Hand had laid hold of Mary Ann Smart, threw her down on the bed and attempted to have '...carnal knowledge of her person forcibly and against her will.'<sup>70</sup>

Interestingly, the court heard from the victim herself and her account of events was clearly crucial in determining both the nature of the charge levied against Edward Hand and indeed the outcome of the prosecution. Mary Ann explained that Hand had come to her father's house whilst her parents were absent. She recalled that he had been drinking but was not insensible from it. Hand gave Mary Ann's four-year-old sister a half-penny and sent her off to buy sweets and then asked Mary Ann to go and cut him some parsley. She duly did this and was going to go and fetch a tub for him to take it away in, when he called to her and gave her some money: a silver sixpence. When she asked Hand what the money was for, he told her it was a present for herself and that she should keep it, so she thanked him and put the money in her pocket. Mary Ann's testimony explained that at this moment, Hand

'...caught hold of her by her two sides and threw her down upon her own bed and turned up her petticoats and got upon the top of her, and opened his breeches. That she cried out for help, but nobody came, and Hand laughed at her and said "Hold your bother you old slut." That her person was fully exposed and so was Hand's. That Hand was upon her top for about five minutes and he would not let her up though she repeatedly asked him but always told her to hold her bother...'<sup>71</sup>

Mary Ann told the court that she was very much frightened and '...did not know what Hand was doing but she did not think that he got into her body.' She testified that '...although he tried all he could to have connection with her, he did not hurt her much...nor was she sensible of anything being left on her person.' Edward Hand charged her not to tell her mother and father what had transpired. Mary Ann did what Edward Hand asked, but seemingly this was less on account of her fear of him and more on account of her fear of what her mother, in particular, would say or do. As Mary

Ann explained in court ‘...she was afraid her mother would thrash her’ if she recounted what had happened. Despite Mary Ann claiming that Edward Hand had not injured her in any way, she did testify that in the aftermath of the assault, she ‘...felt sore’. When questioned by the prosecution lawyer with regard to where that pain had emanated from, she explained that about three days after Hand’s assault upon her, she ‘...felt a pain in her belly...’ but once again, she maintained her silence on its cause.<sup>72</sup>

The circumstances of what had happened to Mary Ann were eventually revealed when some time afterwards her mother (Elizabeth Savage) was about to do the washing and noticed ‘...an unusual stain’ on her daughter’s shift. When she asked Mary Ann about the cause of the mark, her daughter simply said that ‘...something had been coming from her that she did not understand.’ Elizabeth Savage was not satisfied that this reply was any sort of explanation and pushed Mary Ann to explain what had happened and eventually, she made her daughter ‘...tell all’ in relation to the abuse she had suffered. In her opinion, due to the naivety and innocence of her daughter, it was impossible to tell what had exactly transpired from the details she recounted. Mary Ann admitted to her mother that since she had been assaulted she had felt unwell and so her mother took her to see a doctor.<sup>73</sup>

Dr Alexander Gibson observed Mary Ann Smart on the 2<sup>nd</sup> of August 1822, nearly two full weeks after the alleged incident had occurred. From his examination of Mary Ann, the doctor was able to ascertain that she had become infected with a sexually transmitted disease as ‘...she had a discharge of purulent matter from the vagina.’ He also noted however that ‘...there were no symptoms of violence having been done to the parts and the inflammation of the parts was very slight.’ He added that in his view

‘...from the age of the patient and the size of her person it was physically impossible she could have complete carnal connection with a man.’ Latterly, the doctor inspected Edward Hand and found him to be suffering from a receding case of gonorrhoea. Doctor Gibson concluded that ‘...he had little doubt that the disease affecting Mary Ann Smart had been communicated by Edward Hand.’<sup>74</sup>

The accused pled not guilty to the charges against him. He told the court that although he remembered going to visit the house of Benjamin Smart and his wife Elizabeth Savage, he had no recollection of what transpired when he was there as he was slightly the worse for drink. Despite his protestations, the jury convicted him nonetheless. There were three elements to his punishment which, when combined, made for a pretty severe penalty for what was prosecuted as an ‘attempted’ rape case. First, Hand was imprisoned in the Tolbooth of Glasgow for eight days. After this, he was ordered to be whipped through the streets of Glasgow by the hands of the common hangman. Finally, he was sentenced to be transported for life from Scotland and if he ever returned to his native land, it was ordained that he would ‘suffer death’.<sup>75</sup>

Contemporary newspaper accounts focussed on the public flogging inflicted on Hand in particular. They reported that ‘Although the day was very wet, an immense crowd attended; and all the windows of the shops in the streets through which the cavalcade passed were shut up.’ Hand received eighty lashes in total and afterwards ‘...his back was much lacerated and bleeding profusely.’ Press coverage was also at pains to point out that the specific crime for which Hand was convicted had ‘...become very frequent in this country...bringing to light a depravity of morals, and an indulgence of passions of such a black and brutal nature, that we thought existed not in any class of the

community.’<sup>76</sup> Once again, and as with the preceding two chapters, we see the influence that a particular case could have on general perceptions regarding the nature and incidence of Scottish criminality.

Evidence that this commentary was perhaps not mere hyperbole on the part of the press came when another well-publicised prosecution for child sexual assault was brought within a few months of the Edward Hand case. On the 18<sup>th</sup> of November 1822, James Burtney was indicted at the High Court of Justiciary in Edinburgh charged with ‘...the rape of child under the age of puberty.’ Burtney was also accused of the sexual assault and *attempted* rape of the victim in the same indictment.<sup>77</sup> Dual-charge indictments of this sort were quite a common ploy by the Scottish courts at this time and reflected the difficulties inherent in securing convictions for this kind of offence. Prosecution lawyers had to be perspicacious and lay as many charges as possible if they were to achieve any measure of success.

James Burtney was said to have assaulted eight-year-old Janet Anderson at Prestwick on the 14<sup>th</sup> of September 1821. The court heard that:

‘...having forcibly seized hold of her, and having thrown her down on the ground, you did then and there, wickedly and feloniously ravish her, and had carnal knowledge of her person, forcibly and against her will, notwithstanding every resistance in her power...’<sup>78</sup>

The details of this case and how the assault came to be discovered were articulated to the assize when the judge permitted testimony from the young victim about the events that had occurred, despite protracted protestations from the defendant’s legal team. They tried to claim, for instance, that Janet Anderson was ‘...originally of weak intellect’

and that since the time of the alleged assault she had entered ‘...a state of total derangement of mind, and is, even now, weak in her mind, and subject to fits of nervousness and partial incapacity of understanding.’<sup>79</sup> However, the judge in the case rejected their claims, and allowed the victim’s testimony to be heard via a declaration she had previously given to court authorities. This enabled her to avoid the trauma of a court appearance where she would have had to face her would-be attacker once more. The only meaningful effect of the defence team’s legal wrangling in this instance then, was to emphasise the grave impact that the assault had clearly had upon the unfortunate and innocent victim.

Piecing together evidence from both the victim and from other witnesses testifying for the prosecution in this case, it is evident that James Burtney and the family of the victim were neighbours who shared access to a plot of land where they had planted potatoes. Janet Anderson and her older brother Thomas had gone to the potato field on the morning of the alleged assault to dig up some produce. They met James Burtney there and after they had assisted him in digging up some of his potatoes, they bagged up their vegetables and started off for home together. Some way along the journey, James Burtney sat down for a rest. He encouraged Thomas to go on his way and said that he would bring Janet with him once he got his breath back.<sup>80</sup>

Burtney returned to the homestead around fifteen minutes after Thomas Anderson. At roughly the same time, Janet Anderson entered her house and her mother (Agnes Shields) immediately ‘challenged’ her after noticing that the back of Janet’s clothes seemed wet. When Janet’s mother investigated her daughter’s garments more closely, ‘...she saw a good deal of blood on the backside of her petticoats’ and assumed that



Janet must have got herself torn when walking through the bushes or clambering over a dyke. However, Agnes realised that all was not well with her daughter who appeared somewhat traumatised and out-of-sorts. After pressing Janet to explain what had transpired, she simply explained that James Burtney ‘...had hurt her.’ Agnes lifted her daughter’s petticoats to discover ‘...that her private parts were bleeding and [there was] a good deal of blood on her thighs.’<sup>81</sup> Janet explained to her mother, more specifically, that Burtney had:

‘...gripped her when she was following her brother and had carried her in to the side of a dyke and laid her down and took up her petticoats and shift and took down his breeches and got on the top of her and had bruised her with his knee and his kneeve [fist] and hurt all her belly... That he had put two large potatoes in her mouth and after she got the potatoes out he put in his hand and prevented her crying and lay upon her sometime and during all the time she was much affrightened and felt great pain from the place where she makes her water and she felt him pressing something into that place.’<sup>82</sup>

After hearing what had transpired, Agnes Shields instantly went out to challenge James Burtney over what he had done to her daughter. Burtney denied having done anything to Janet saying that she was already in that state before they had left the potato field and he promptly walked off. Agnes returned to nurse her daughter who collapsed in a faint. She gently washed Janet’s legs and private parts with warm water and milk but noticed that she was still bleeding profusely. After the attack Janet Anderson was confined to bed and according to her mother at least, ‘...she was feverish and in a state of stupor and complains much of pains in her loins and belly.’<sup>83</sup> Agnes Shields then called for some medical assistance. Doctor William Whiteside examined Janet Anderson in the immediate aftermath of the assault against her and

found her to be 'much bruised and wounded' in her private parts as '...the hymen was swollen, ruptured and inflamed and lacerated wounds of about half an inch in length appeared at the lower and back parts of the vagina.' He noted that he found the girl in '...a state of nervous excitement and irritability' and that she had been suffering from related 'convulsions' brought about by the trauma of her experience. He also testified that upon the arrest of James Burtney, he went to examine the defendant and found him to be wearing a shirt which had splatters of blood at its 'front tail' and the said shirt was collected as evidence for the prosecution.<sup>84</sup>

James Burtney offered no evidence in defence. The assize enclosed and after '...only a few minutes' they unanimously found the defendant guilty of rape. In delivering sentence, the judge addressed the prisoner saying:

'In this case a rape had been committed under the most atrocious circumstances and of the most abominable nature – one more abhorrent to human nature had never, he believed, been before a Court of Justice. He cautioned the prisoner against entertaining any idle hopes of any mitigation of punishment, as there was no circumstances in his case that court warrant such an idea.'<sup>85</sup>

He then ordered that Burtney be taken back to the Tolbooth of Edinburgh and imprisoned there for seven days before being transported on to the Tolbooth of Ayr. He was to remain a prisoner there for three weeks before being executed on a gibbet.<sup>86</sup> There was to be no reprieve for him and unlike in the Edward Hand case, the evidence presented in court was conclusive and damning.

It would seem from the testimony heard in the Edward Hand case that something more than *attempted* ravishment had taken place between him and his victim. Her fairly detailed description of the assault itself, the pain she felt afterwards and the incontrovertible evidence of her contracting a sexually transmitted disease all pointed to *actual* rape, rather than anything less than this. However, the testimony presented in court also revealed why an indictment for rape in this instance would have been difficult to prove. It was evident, for instance, that few of the witnesses in this case believed that it was even possible for a girl of such tender years to be abused in a physical sense by a male adult. Then, of course, we heard from the victim herself who seemed convinced that penetration had not occurred despite clear circumstantial evidence to the contrary. Crucial too, was the fact that the victim did not reveal the circumstances of the crime committed against her immediately. Rather, it was nearly a fortnight later that disclosure was given. As we have seen elsewhere in this chapter, revelations of sexual violence had to occur promptly as otherwise the veracity of victims and their claims was likely to be challenged.

In the case against James Burtney on the other hand, the evidence presented to court was more immediate, precise and corroborated meaning conviction was effectively the only possible likely outcome against the accused. Perhaps this was particularly inevitable given contemporary concerns that this type of crime had become rife and that the verdict and sentence given to other individuals tried earlier in 1822 (such as Edward Hand) was now held to be insufficient to curb the slide of the nation into further depravity. The concerns voiced by the press in relation to the Hand case were indeed echoed once more in relation to the trial of James Burtney. However, this time, it was a local sheriff officer who voiced his fear about the state of criminality in early

nineteenth century Scotland, rather than a journalist. Upon the arrest of Burtney, Ayshire Sheriff William Eaton argued:

'This is a most cruel and aggravated case, and one that is turning too common in this country and therefore I would suggest that the culprit be tried and meet with that punishment which the enormity of the crime deserves.'<sup>87</sup>

Further evidence of a clear determination to bring James Burtney to justice amongst both the authorities and the Scottish populace more broadly comes in the precognition material relating to his trial. Papers recount the extensive man-hunt launched against Burtney after his altercation with Agnes Shields, the mother of his young victim. After a reward of five guineas was posted for his apprehension for instance, it was recounted that '...the muirs [moors] were covered with people in quest of him.'<sup>88</sup> Moreover, and according to Sheriff Eaton, who saw Burtney being apprehended 'If I had not been present...I really believe the inhabitants would have murdered him.'<sup>89</sup> Although it was clearly evident that both of these assaults were brutal and horrific experiences for the young girls concerned and that there was a formidable strength of feeling against individuals suspected of such heinous offences, the outcome of trials such as these was generally difficult to predict. They were often determined by a myriad of factors which were only indirectly or tangentially related to the sexual offence alleged. Once again we can see that the weight given to the multifarious *contextual* elements related to instances of sexual assault made the content, tone and reaction to these prosecutions very different to judicial trials relating to other types of interpersonal violence in the pre-modern era.

*c) The Glasgow Green Gang Rapes of the 1940s (Twentieth Century)*

One of the first crimes to grip public attention in Scotland in the aftermath of the Second World War was the infamous 'Glasgow Green Case'. As it involved a gang of protagonists and multiple victims, it was a highly complicated legal affair with various indictments laid and different individuals on trial at different times but for the same suite of violent sexual offences. This case study investigation concentrates on the last and arguably most significant of the indictments related to this case which was brought before the High Court in Glasgow on the 14<sup>th</sup> of February 1948 and was laid against John McKenzie McPike (17), John Anderson (20), Hugh Dearie Docherty (20) and John Docherty Calikes (19).<sup>90</sup> Each man was accused of rape and assault. By this point, two other individuals had already been convicted in this case: James Bell Martin (then prisoner in the Criminal Lunatic Department of Perth Prison) and Alexander Bannan (then prisoner in Barlinnie Prison).<sup>91</sup>

The court heard that on the 1<sup>st</sup> of August 1947, a couple (who we will refer to as Female A and Male A) were sitting on Glasgow Green near the King's Bridge. While they were chatting, two individuals came up to them wanting a cigarette and they asked Male A what gang he belonged to. Male A replied that he didn't belong to any gang as he had just been demobbed out of the army. The individuals initially went away but returned a short time later with two other men, just as the couple were leaving to go home. They shouted after Male A and asked to speak to him once more. Whilst Male A went to speak to the men, one of the four came towards Female A and as she explained in court:

'...he tried to kiss me, and I objected. He had hold of my arm and I objected. I was frightened when I saw him at first. Then there was another

man came over and I started to cry and he asked me what I was crying for, and I just told him that I wanted to go home. A chap then came over and took a razor out of his pocket and he put it back again. They pulled me over to the embankment. The chap who had the razor knocked me down on the embankment. I tried to struggle but it was no use. I was screaming and two of the chaps caught me by the throat. The chap that knocked me down the embankment took off my underwear. I was struggling. One of the fellows started interfering with me. He got on top of me. There were two chaps holding me down.’<sup>92</sup>

Female A then described to the court how this process was then repeated again and again by all of the men present at the scene, excepting her helpless boyfriend. When asked by the prosecution how many men in all abused her, the victim answered: ‘Eight’.<sup>93</sup> Medical evidence provided in court by W.D. Richardson (Acting Casualty Surgeon, Glasgow Royal Infirmary), J.A. Imrie (Lecturer in Forensic Medicine at the University of Glasgow) and John Glaister (Professor of Medical Jurisprudence at the University of Glasgow) revealed the presence of some bruising on the legs of Female A and her ‘private parts’ showed signs of swelling, tenderness, tearing and bleeding ‘...consistent with recent defloration and forced penetration.’ No other marks of violence were found on the victim’s body but trace evidence of blood and semen were found on her under-slip and it was noted that the victim was ‘...somewhat agitated and shaky’.<sup>94</sup>

At this point in the proceedings the victim was asked some pretty testing, inappropriate and arguably irrelevant questions. Crucially, however, these were not posed by lawyers acting to defend the accused, but instead, the questions came from the legal team acting on behalf of the victims in this case. They asked:

‘Were you wearing knickers at the time?’  
‘Did you allow them to do this?’  
‘Was anything done to frighten you?’  
‘Did you see any weapons?’  
‘What did you think was taking place?’  
‘Did you stop struggling or did you go on struggling all this time?’  
‘Did you yield yourself willingly to any of these men?’  
‘Did you consent to what they did?’<sup>95</sup>

Managing to keep her composure, Female A emphasised that although she became exhausted during the course of the attack against her, she continued to struggle throughout her ordeal and at no point did she consent to what was done to her. In court, the victim managed to positively identify Hugh Dearie Docherty as one of the rapists and it was noted that she had picked out formerly indicted Alexander Bannan in an earlier identification parade too.<sup>96</sup> Male A identified both Hugh Dearie Docherty and John McKenzie McPike as two of the assailants and in his testimony, he also explained his frustration and shame at not being better able to defend his girlfriend but after being threatened with a revolver, a bayonet, a bread-knife and a razor, he had been rendered powerless.<sup>97</sup> For their part, the counsel for the defence, tried to make Female A contradict her testimony by using the fact that she had been attacked by eight different men to confuse her identification of Docherty and her recounting of events. They claimed that Female A had misunderstood Docherty’s actions: he was actually trying to defend her and persuade the other men present to leave her alone. Female A refuted such arguments and steadfastly stuck to her testimony, emphasising once again the persistent nature of the struggle she offered her assailants and her absolute noncompliance with what had transpired.<sup>98</sup>

Another couple (who we will refer to as Female B and Male B) testified to having suffered a similar fate at the hands of the Glasgow Green rapists in the exact same location and on the very same day as the assault previously described. Indeed, Female B actually testified to having witnessed the assault conducted on Female A and corroborated her story entirely.<sup>99</sup> In an attempt to divert an attack upon them, Female B and Male B pretended to be married, thinking that this would put off their assailants. It did not. Female B's testimony of the assault carried out upon her was very similar to that of Female A although arguably, Female B's experience was even more horrendous as she testified that in addition to being raped and terrorised, she had been viciously punched and kicked by her attackers throughout her ordeal. One of the group had also plainly threatened her saying: 'If you squeal I will stick a razor in you.'<sup>100</sup> Female B was able to positively identify both McPike and Docherty in court as two of the individuals who had attacked her.<sup>101</sup>

Male B similarly seemed to have suffered a worse fate than Male A during the second attack as he claimed to have been repeatedly punched about the head and body and assaulted with a bayonet. The three men called to provide professional medical evidence in this case substantiated Male B's claims, testifying to the presence of long incised wounds on the victim's head which had effectively scalped him in two places. In their opinion the wounds '...were consistent with injury due to a sharp instrument such as a bayonet.'<sup>102</sup> The medical evidence presented in court in relation to Female B's injuries seems to have been wholly inconclusive and aside from some abrasions noted on the victim's knees and trace evidence of semen on her clothing, little evidence was offered by the three medical professionals to support her claims of rape, indecent assault or aggravated assault.<sup>103</sup>



Despite Male B corroborating his girlfriend's story and his identification in court of McPike, John Anderson and John Docherty Calikes as assailants in this case, his testimony was undermined somewhat by the defence counsel who were able to show that in the immediate aftermath of the alleged assault, Male B had picked out a completely innocent individual as one of the attackers in an identification parade. Male B thus came to be portrayed as an unreliable and confused witness.<sup>104</sup> The defence team then set about trying to dismantle the testimony of Female B by meticulously cross-examining her about the statements she had made in court. When this strategy failed to have the desired effect, the defence lawyers then asked Female B to provide the court with the details of her sexual history. Female B explained that she had lost her virginity at the age of fifteen. Despite this being a clear attempt to suggest that the victim was sexually promiscuous and had likely consented to the sexual activity described, it was evident from a close reading of Female B's testimony at this juncture of the proceedings that her loss of virginity at a fairly young age, was on account of sexual abuse that had been conducted against her will.<sup>105</sup>

The defence counsel proceeded with no exculpatory evidence for John McKenzie McPike, John Anderson or John Docherty Calikes. A few character witnesses were submitted in defence of Hugh Dearie Docherty but their testimonies were somewhat superficial and lacked detail and after the judge summed up the 'ghastly' and 'disgusting' details of the case, the verdict was deliberated on by the assize. Unanimously, the jury found John McKenzie McPike and Hugh Dearie Docherty guilty of one charge of rape and indecent assault and guilty of two further charges of aggravated assault. They found John Anderson guilty of two charges of indecent

assault and two charges of aggravated assault and they also found John Docherty Calikes guilty of one charge of indecent assault and one charge of aggravated assault.<sup>106</sup>

In the wake of the jury's decision, the court then sentenced the convicts with Docherty receiving fifteen years penal servitude, McPike twelve years penal servitude, Anderson five years penal servitude and Calikes three years penal servitude.<sup>107</sup> The contemporary press thought that the punishment inflicted on the four young men convicted in this case was 'heavy', despite the 'reign of terror' the gang inflicted over Glasgow's courting couples.<sup>108</sup> Perhaps in the wake of such commentary and immediately after their trial had concluded, McPike and Docherty launched appeals against both their convictions and the sentences received which they too argued were excessive. Anderson and Calikes (both of whom had no known previous convictions) also launched appeals at this time, but against their convictions alone.<sup>109</sup> All four men argued that the verdicts against them had been 'unreasonable' and not supported by the evidence presented in court. They argued that 'insufficient evidence of their direct involvement in the crimes charged' had been provided in the trial proceedings, that the judge had misdirected the jury and that their case was thus 'a miscarriage of justice'.<sup>110</sup>

Anderson and Calikes were successful with their appeals and their convictions and relative sentences were subsequently quashed. McPike and Docherty's appeals on the other hand were unsuccessful and the verdict and sentence against both young men stood.<sup>111</sup> This decision sparked repeated appeals for the early release of both John McKenzie McPike and Hugh Dearie Docherty which originated from various quarters of Scottish society and which persisted over the duration of their respective

confinements.<sup>112</sup> Clemency was craved on the grounds of their youth, their belief that the jury had been prejudiced by newspaper publicity at the time of the offences, their good behaviour whilst incarcerated and on account of the fact that they had received harsher sentences than most reprieved murderers of the same era.<sup>113</sup> However, ‘...the dastardly and appalling nature of the crimes for which they were convicted’ negated any pleas in mitigation and they both served the entirety of their sentences ‘...to act as a strong deterrent to similar criminals of an abhorrent character.’<sup>114</sup>

The gang rapes committed on Glasgow Green in the late 1940s and the trial proceedings which eventually emanated from them, contained certain key aspects which appear to have been common amongst indictments for sexual violence in modern Scotland and indeed earlier in the history of the prosecution of this type of criminality. Although it was evident that such offences were roundly condemned by the general populace and were taken extremely seriously by the Scottish authorities as was evident from the sentencing in this case study, it is also plain that trials for rape and violent sexual assault unequivocally added further trauma to the experiences of the victims in these cases. First, and as happened to Females A and B in this case study, a victim had to undergo a humiliating, often painful, degrading and harrowing medical examination where they were digitally penetrated by medical professionals trying to ascertain whether sexual activity had occurred and whether penetration had required force. Their trauma did not end there, however. Indeed it has become clear from the findings of this chapter and from other scholarship that historically, the victims of sexual offences have been wholly disadvantaged in comparison to the victims of other types of crimes, violent or otherwise. Not only did victims have to report sex crimes committed against them immediately despite the shock, terror, injury and

potential shame they felt, they also had to prove in court that they had resisted their attacker at every stage of the crime committed against them and they had to demonstrate that they had clearly and repeatedly articulated their non-consent to sexual activity. The onus was on the victim to provide this evidence and often corroboration was impossible as sexual offences were rarely witnessed and medical testimony was regularly imprecise or inaccurate. Accused individuals on the other hand were not expected to prove that they had consent or that force was unnecessary in the events that had transpired.

The whole emphasis of court trials where sexual violence was alleged was to undermine the victim's evidence and to test their resolve. To do this, lawyers from both the prosecution and the defence routinely went to great lengths to question and re-question the victim and their version of events. Then, as we saw in the case study, the sexual history and moral character of victims became exposed to public scrutiny and past behaviours were debated at length to determine their impact upon the causality of events. Yet typically, the moral fibre of the accused was not dismantled in sexual violence prosecutions to anything like the same extent and indeed, if we compare these kinds of cases to other forms of criminality, there were few instances where the victim of an offence appeared to be more on trial than his or her alleged assailant. As academic and campaigner for women's rights Sue Lees has pointed out, if a female victim reports a burglary at her house, she is automatically assumed to be telling the truth and her credibility and integrity are not questioned. This does not occur when a woman reports that she has been raped or sexually assaulted.<sup>115</sup>

When we take the experiences together, it is evident why incidents of sexual violence are so under-reported even in the present day, as well as why convictions in these cases remain a rarity, rather than the norm. Although improvements to the victim experience have definitely been made as we have seen, there are still undoubted problems with prosecutions for sexual violence in present-day Scotland where archaic practices and demeaning attitudes still persist. What is also unequivocal, is that those victims who have managed to come forward to disclose their traumatic experiences of sexual violence over the centuries should be considered brave and heroic for doing so. Clearly, they were, and indeed still are deserving of our empathy, our attention and our appropriate conduct.

### **Conclusion – The Violent North?**

Sexual violence is a very difficult subject to study with any definitive precision due to under-reporting, the routine censorship of trial details and an ongoing uncertainty regarding the best course of action in dealing with crimes of this nature. It is also a relatively diverse category of 'crime' potentially involving consensual and non-consensual acts of a sexual nature, given former attitudes to homosexuality. Prosecutions for bestiality and sodomy were relatively rare (unless witnessed first-hand) over the 1660-1960 period, although the punishments for these offences upon conviction were serious and exemplary. The same could not be said of indictments for rape and attempted rape. Although these offences were more commonly brought before the Scottish courts between 1805 and 1960, they were rarely proven and when convictions did result, culprits were given remedial sentences of little consequence. For rape and attempted rape, the staunch set of legal provisions available were evidently more ineffective in practice and this likely contributed to the under-reporting

of sexual violence and an unwillingness to try crimes of this nature when the odds were so heavily and routinely stacked in favour of the defence rather than the prosecution.

As several of the case studies in this chapter illustrate, rape (or sexual assault) was a considerably violent and invasive crime, typically perpetrated by men against women or children, and in many instances, the victim and the assailant were related or at least known to one another. Motives for this type of criminality were hard to glean or indeed to fathom, especially in relation to episodes involving child victims, but a desire to dominate and appropriate control in sexual matters seems to have been one explanation commonly offered by assailants in the more modern era at least. The historic and ongoing uncertainty regarding the true nature and incidence of sexual violence in Scotland between 1660 and 1960 means that it is impossible to assess the contribution that crimes of this nature made to perceptions of the violent character of the Scottish nation. However, in this chapter, as earlier in this volume, there is some evidence to suggest that specific well-publicised cases had a significant part to play in the persistent notion that Scotland had an entrenched and inherent crime problem that it could not resolve.

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<sup>1</sup> For further discussion of the difficulties associated with researching these crimes see for instance R. Trumbach (1989) 'Sodomitical Assaults, Gender Role, and Sexual Development in Eighteenth-Century London' in K. Gerard and G. Hekma (eds) *The Pursuit of Sodomy: Male Homosexuality in Renaissance and Enlightenment Europe* (New York and London: Harrington Park Press), pp. 407-429 at p. 420; A.N. Gilbert (1978) 'Sodomy and the Law in Eighteenth- and Early Nineteenth-Century Britain', *Societas – A Review of Social History*, VIII, 3, pp. 225-241 at pp. 226-227 and H.

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Cocks (2003) *Nameless Offences: Homosexual Desire in the Nineteenth Century* (London: I.B. Taurus), p. 17, p. 20, p. 25 and p. 28.

<sup>2</sup> See B.P. Levack (2010) 'The Prosecution of Sexual Crimes in Early Eighteenth-Century Scotland', *The Scottish Historical Review*, LXXXIX, 228, pp. 172-193 at p. 177.

<sup>3</sup> P.G. Maxwell-Stuart (2002) "'Wild, Filthie, Execrabil, Detestabil, and Unnatural Sin": Bestiality in Early Modern Scotland' in T. Betteridge (ed.) *Sodomy in Early Modern Europe* (Manchester: Manchester University Press), pp. 82-93 at p. 83.

<sup>4</sup> (1952) *The Holy Bible – The Old Testament: Revised Standard Version* (New York and Glasgow: Collins), Leviticus chapter eighteen, verses 22-23 and chapter twenty, verses 13, 15 and 16.

<sup>5</sup> For further discussion of this notion of bestiality and sodomy as sinful rather than criminal see K. Crawford (2007) *European Sexualities, 1400-1800* (Cambridge: Cambridge University Press), p. 156; C. Bingham (1971) 'Seventeenth-Century Attitudes Towards Deviant Sex', *The Journal of Interdisciplinary History*, 1, 3, pp. 447-468 at p. 447; E. Fudge (2000) 'Monstrous Acts: Bestiality in Early Modern England', *History Today*, 50, 8, pp. 20-25 at p. 21; J. Liliequist (1992 edition) 'Peasants against Nature: Crossing the Boundaries between Man and Animal in Seventeenth- and Eighteenth-Century Sweden' in J.C. Fout (ed.) *Forbidden History: The States, Society and the Regulation of Sexuality in Modern Europe* (Chicago and London: University of Chicago Press), pp. 57-87 at p. 57; C.A. Conley (1991) *The Unwritten Law: Criminal Justice in Victorian Kent* (New York and Oxford: Oxford University Press), p. 187 and J. Grosclaude (2014) 'From Bugger to Homosexual: The English Sodomite as Criminally Deviant', *Revue Française de Civilisation Britannique*, 19, 1, pp. 33-48 at pp. 35-38.

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<sup>6</sup> For further discussion see Baron D. Hume (1797) *Commentaries on the Laws of Scotland Respecting the Description and Punishment of Crimes – Volume II* (Edinburgh: Bell and Bradfute), pp. 335-336. For examples of exemplary punishments given in other jurisdictions outside of Scotland for these types of offences see J. Peakman (2004) *Lascivious Bodies: A Sexual History of the Eighteenth Century* (London: Atlantic Books), chapter five and pp. 256-259.

<sup>7</sup> The Criminal Justice [Scotland] Act (1980) decriminalised homosexual acts between men over the age of twenty-one and in private. The age of consent was then reduced to 18 in 1994 and then again to 16 in 2001. See R. Davidson and G. Davis (2014 edition) *The Sexual State: Sexuality and Scottish Governance, 1950-1980* (Edinburgh: Edinburgh University Press), chapters three and four; Grosclaude (2014) 'From Bugger', p. 46 and [www.stonewallscotland.org.uk](http://www.stonewallscotland.org.uk).

<sup>8</sup> The exception to this is in relation to sodomy at least is Jeffrey Meek's magisterial work on the post-war period which contains a chapter on the subject see J. Meek (2015) *Queer Voices in Post-War Scotland: Male Homosexuality, Religion and Society* (Basingstoke: Palgrave Macmillan), chapter two.

<sup>9</sup> See the Sexual Offences [Scotland] Act (2009). For further discussion see C.H.W. Gane, C.N. Stoddart and J. Chalmers (2009 edition) *A Casebook on Scottish Criminal Law* (Edinburgh: W. Green), chapter nine.

<sup>10</sup> For evidence of this approach elsewhere in the pre-modern period see J.R. Ruff (2001) *Violence in Early Modern Europe* (Cambridge: Cambridge University Press), p. 145 and L. Jackson (2000) *Child Abuse in Victorian England* (London: Routledge), pp. 22-23.

<sup>11</sup> Hume (1797) *Commentaries – Volume II*, p. 299.

<sup>12</sup> *Ibid*, p. 288.



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<sup>13</sup> *Ibid.*

<sup>14</sup> *Ibid.*, pp. 292-298.

<sup>15</sup> See *ibid.*, p. 298.

<sup>16</sup> (1952) *The Holy Bible*, Leviticus chapter eighteen, verses 6-18 and chapter twenty, verses 11-14, 17 and 19-21.

<sup>17</sup> Hume (1797) *Commentaries – Volume II*, p. 301.

<sup>18</sup> *Ibid.* For further discussion on the development of the law of incest in a Scottish context albeit later than the scope of this present volume see W. Leeming (1996) 'New Taboo? Some Observations on the Late Arrival of Changes to the Law of Incest in Scotland', *Journal of the Sociology of Law*, 24, pp. 313-336.

<sup>19</sup> For further discussion of the difficulties associated with evidence relating to alleged child abuse cases across history and within different jurisdictions see E. Snell (2012) 'Trials in Print: Narratives of Rape Trials in the Proceedings of the Old Bailey' in D. Lemmings (ed.) *Crime, Courtrooms and the Public Sphere in Britain, 1700-1850* (Farnham: Ashgate), pp. 23-41 at p. 34; J. Gammon (1995) "'A Denial of Innocence": Female Juvenile Victims of Rape and the English Legal System in the Eighteenth Century', in A. Fletcher and S. Hussey (eds) *Childhood in Question: Children, Parents and the State* (Manchester: Manchester University Press), pp. 74-95 at p. 86; C. Emsley (2005 edition) *Crime and Society in England, 1750-1900* (Harlow: Longman), p. 28; L.A. Jackson (1999) 'The Child's Word in Court: Cases of Sexual Abuse in London 1870-1914' in M. Arnot and C. Usborne (eds) *Gender and Crime in Modern Europe* (London: UCL Press), pp. 222-237; Jackson (2000) *Child Abuse*, p. 71 and p. 80; C. Smart (2000) 'Reconsidering the Recent History of Child Sexual Abuse, 1910-1960', *Journal of Social Politics*, 29, 1, pp. 55-71 at pp. 63-66 and K. Stevenson (2016) 'Offences Against Children: Incest and Child Sexual Abuse' in D.S. Nash and A-M.

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Kilday (eds) *Murder and Mayhem: Crime in Twentieth Century Britain* (Basingstoke: Palgrave), pp. xx-xx at pp. 5-6 and p. 11 (on draft).

<sup>20</sup> For further discussion of the significant numbers of child victims in prosecutions for sexual assault in Britain through history see G. Walker (2013) 'Everyman or Monster? The Rapist in Early Modern England, c.1600-1750', *History Workshop Journal*, 76, pp. 5-31 at p. 18; J. Gammon (2013) 'Researching Sexual Violence, 1660-1800: A Critical Analysis' and K. Barclay (2013) 'From Rape to Marriage: Questions of Consent in Eighteenth-Century Britain' both in A. Greenfield (ed.) *Interpreting Sexual Violence, 1660-1800* (London: Pickering and Chatto), pp. 13-22 at p. 20 and pp. 35-44 at p. 42 respectively; L. Jackson (1999) 'Family, Community and the Regulation of Child Sexual Abuse: London, 1870-1914' in A. Fletcher and S. Hussey (eds) *Childhood in Question: Children, Parents and the State* (Manchester: Manchester University Press), pp. 133-151 at p. 135 and Jackson (2000) *Child Abuse*, p. 18 and p. 20.

<sup>21</sup> For evidence of the likely contribution of child abuse to the so-called 'dark figure' of unreported sexual violence see M. Ingram (2001) 'Child Sexual Abuse in Early Modern England' in M.J. Braddick and J. Walter (eds) *Negotiating Power in Early Modern Society* (Cambridge: Cambridge University Press), pp. 63-84 at p. 64 especially; A.S. Wohl (1978) 'Sex and the Single Room: Incest Among the Victorian Working Classes' in A.S. Wohl (ed.) *The Victorian Family: Structure and Stresses* (London: Croom Helm), pp. 197-216 at p. 200; Jackson (1999) 'Family, Community', p. 135 and Jackson (2000) *Child Abuse*, p. 25 and p. 46.

<sup>22</sup> For further evidence of a lack of convictions relating to trials for child sexual abuse across time and in relation to different jurisdictions see J. Hurl-Eamon (2005) *Gender and Petty Violence in London, 1680-1720* (Columbus, OH: Ohio State University

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Press), p. 39; Ingram (2001) 'Child Sexual Abuse', p. 65 and Stevenson (2016) 'Offences Against Children', pp. 9-10 (draft).

<sup>23</sup> Levack (2010) 'The Prosecution of Sexual Crimes', p. 179.

<sup>24</sup> Hume (1797) *Commentaries – Volume II*, p. 1.

<sup>25</sup> Within our period of study male rape not recognised officially as a crime by the Scottish law courts. Indeed, this did not change fully until the Sexual Offences [Scotland] Act of 2009. As there were no prosecutions for this offence between 1660 and 1960, male rape cannot be included in this work, but for scholarship on this topic in the modern English context see R.J. McMullen (1990) *Male Rape: Breaking the Silence on the Last Taboo* (London: GMP Publishers); G.C. Merely and M.B. King (2000 edition) *Male Victims of Sexual Assault* (Oxford: Oxford University Press) and S. Lees (1997) *Ruling Passions: Sexual Violence, Reputation and the Law* (Buckingham: Open University), chapter five.

<sup>26</sup> Hume (1797) *Commentaries – Volume II*, p. 2.

<sup>27</sup> *Ibid*, p. 9. For evidence of the need to prove resistance and use of force in other judicial contexts and across time see Crawford (2007) *European Sexualities*, p. 154; G. Walker (2013) 'Rape, Acquittal and Culpability in Popular Crime Reports in England, c. 1670-c.1750', *Past and Present*, 220, pp. 115-142 at p. 135; K. Stevenson (2010) "'Most Intimate Violations': Contextualising the Crime of Rape' in A-M. Kilday and D.S. Nash (eds) *Histories of Crime: Britain 1600-2000* (Basingstoke: Palgrave Macmillan), pp. 80-99 at p. 84 and S. Lees (1997 edition) *Carnal Knowledge: Rape on Trial* (London: Penguin), p. 112.

<sup>28</sup> Hume (1797) *Commentaries – Volume II*, p. 2.

<sup>29</sup> *Ibid*, pp. 2-3 and p. 14. Evidence that emission was considered an important proof in England from the early modern period until 1828 can be seen in Walker (2013)

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'Rape', p. 129 and in M.R. Block (2013) "'For the Repressing of the Most Wicked and Felonious Rapes and Ravishments of Women": Rape Law in England, 1660-1800' in A. Greenfield (ed.) *Interpreting Sexual Violence, 1660-1800* (London: Pickering and Chatto), pp. 23-33 at p. 32.

<sup>30</sup> For further discussion see Walker (2013) 'Rape', p. 128; L. Jackson (2000) *Child Abuse*, p. 13 and S. D'Cruze (1998) *Crimes of Outrage: Sex, Violence and Victorian Working Women* (London: UCL Press), p. 168.

<sup>31</sup> For more on the difficulties with successfully prosecuting individuals for rape due to the standards of proof required throughout history see Levack (2010) 'The Prosecution of Sexual Crimes', p. 179; Walker (2013) 'Rape', p. 125 and p. 128; J. Kelly (1995) "A Most inhuman and Barbarous Piece of Villainy": An Exploration of the Crime of Rape in Eighteenth-Century Ireland', *Eighteenth-Century Ireland*, 10, pp. 78-107 at p. 83; C.A. Conley (1986) 'Rape and Justice in Victorian England', *Victorian Studies*, 29, 4, pp. 519-536 at p. 520; J. Bourke (2013 edition) *Rape: A History from 1860 to the Present* (London: Virago Press), p. 23; Stevenson (2010) "'Most Intimate Violations'", p. 80 and Lees (1997 edition) *Carnal Knowledge*, p. xiii and p. xvi.

<sup>32</sup> There is some evidence that prosecutions for sexual violence held before the Scottish ecclesiastical courts *did* require immediate disclosure in the seventeenth and eighteenth centuries – see R. Mitchison and L. Leneman (1989) *Sexuality and Social Control: Scotland 1660-1780* (Oxford: Basil Blackwell), p. 194.

<sup>33</sup> Hume (1797) *Commentaries – Volume II*, p. 9.

<sup>34</sup> *Ibid*, pp. 7-9.

<sup>35</sup> See for instance S. D'Cruze (1993) 'Approaching the History of Rape and Sexual Violence: Notes Towards Research', *Women's History Review*, 1, 3, pp. 377-397 at p. 389; Walker (2013) 'Rape', p. 140; Conley (1986) 'Rape', pp. 530-532; Lees (1997)

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*Ruling Passions*, p. 66, p. 81 and p. 88 and Lees (1997 edition) *Carnal Knowledge*, pp. 129-158.

<sup>36</sup> See for example Hurl-Eamon (2005) *Gender and Petty Violence*, p. 37; A. Clark (1987) *Women's Silence: Men's Violence – Sexual Assault in England 1770-1845* (London and New York: Pandora), p. 50; Bourke (2013 edition) *Rape*, p. 5; D'Cruze (1998) *Crimes of Outrage*, pp. 160-161 and Lees (1997) *Ruling Passions*, p. 54.

<sup>37</sup> See for instance M. Chaytor (1995) 'Husband(ry): Narratives of Rape in the Seventeenth Century', *Gender and History*, 7, 3, pp. 378-407 at p. 378; G. Walker (1998) 'Rereading Rape and Sexual Violence in Early Modern England', *Gender and History*, 10, 1, pp. 1-25 at p. 1; Bourke (2013 edition) *Rape*, p. 16 and p. 394; D'Cruze (1998) *Crimes of Outrage*, p. 2 and pp. 19-20 and Lees (1997 edition) *Carnal Knowledge*, p. 24.

<sup>38</sup> Hume (1797) *Commentaries – Volume II*, p. 15.

<sup>39</sup> *Ibid*, p. 10.

<sup>40</sup> 4 and 5 Vict c. 56 (1841).

<sup>41</sup> Hume (1797) *Commentaries – Volume II*, p. 10.

<sup>42</sup> For further discussion of marital rape see Bourke (2013 edition) *Rape*, p. 327 and especially Lees (1997) *Ruling Passions*, chapter six.

<sup>43</sup> Hume (1797) *Commentaries – Volume II*, p. 15.

<sup>44</sup> For further discussion see A.E. Simpson (1986) 'The "Blackmail Myth" and the Prosecution of Rape and its Attempt in Eighteenth Century London: The Creation of a Legal Tradition', *The Journal of Criminal Law and Criminology*, 77, 1, pp. 101-150; L. Edelstein (1998) 'An Accusation Easily to be Made? Rape and Malicious Prosecution in Eighteenth-Century England', *The American Journal of Legal History*, 42, 4, pp. 351-390 and Bourke (2013 edition) *Rape*, pp. 28-41.

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<sup>45</sup> For further discussion of the historic gendered nature of sexual violence see H.V. McLachlan and J.K. Swales (1994) 'Sexual Bias and the Law: The Case of Pre-Industrial Scotland', *International Journal of Sociology and Social Policy*, 14, 9, pp. 20-43 at p. 40; Hurl-Eamon (2005) *Gender and Petty Violence*, p. 32; Emsley (2005 edition) *Crime and Society*, p. 107; Jackson (2000) *Child Abuse*, p. 108; Conley (1986) 'Rape', p. 532; Clark (1987) *Women's Silence*, p. 1 and Stevenson (2016) 'Offences Against Children', p.11 (draft).

<sup>46</sup> For further discussion of the need to give evidence of sexual violence in a certain way in court see Gammon (1995) "A Denial", p. 75; Hurl-Eamon (2005) *Gender and Petty Violence*, pp. 33-4; K. Stevenson (2000) "Ingenuities of the Female Mind": Legal and Public Perceptions of Sexual Violence in Victorian England, 1850-1890' and J. Jones (2000) "She Resisted With All Her Might": Sexual Violence against Women in Late Nineteenth Century Manchester and the Local Press' both found in S. D'Cruze (ed.) *Everyday Violence in Britain, 1850-1950: Gender and Class* (London: Pearson), pp. 89-103 at p. 93 and pp. 104-118 at p. 108, p. 113 and p. 116 respectively.

<sup>47</sup> For further evidence that reported instances of sexual violence were typically committed by individuals known to their victims see Ingram (2001) 'Child Sexual Abuse', pp. 74-76; Ruff (2001) *Violence*, p. 142; T. Dunning (2007) 'Narrow Nowhere Universes, Child Rape and Convict Transportation in Scotland and Van Diemen's Land, 1839-1853', *Scottish Historical Review*, 86, 1, pp. 113-125 at p. 117; Jackson (2000) *Child Abuse*, p. 31 and Lees (1997) *Ruling Passions*, p. 61.

<sup>48</sup> For further evidence of threats used in relation to instances of sexual violence see Ingram (2001) 'Child Sexual Abuse', p. 71.

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<sup>49</sup> For further evidence of the physical violence often involved in sex crimes see Ingram (2001) 'Child Sexual Abuse', p. 70; Conley (1986) 'Rape', p. 525 and Clark (1987) *Women's Silence*, p. 39.

<sup>50</sup> For further discussion of the confessed testimony of Scottish individuals indicted for this offences see A-M. Kilday (2007) 'A Strange Kind of Loving? Bestiality in Early Modern Scotland' paper given to the European Social Science History Conference (Dublin). For similar material from other jurisdictions in the pre-modern period see Liliequist (1992 edition) 'Peasants', pp. 76-77 and G. Parker (1986) 'Is a Duck an Animal? An Exploration of Bestiality as a Crime', *Criminal Justice History – An International Annual*, VII, pp. 95-109 at pp. 104-105.

<sup>51</sup> See for instance A. Gollapudi (2013) 'The Disordered Fundament: Sexual Violence on Boys and Sodomy Trial Narratives in the Old Bailey Proceedings' in A. Greenfield (ed.) *Interpreting Sexual Violence, 1660-1800* (London: Pickering and Chatto), pp. 45-56 at p. 45 and p. 49; Ingram (2001) 'Child Sexual Abuse', p. 70; Gammon (1995) "A Denial", pp. 78-9; Dunning (2007) 'Narrow Nowhere Universes', p. 120 and p. 123; Jackson (1999) 'Family, Community', pp. 136-7; Jackson (2000) *Child Abuse*, p. 33; Smart (2000) 'Reconsidering', pp. 59-60 and especially R. Davidson (2000) *Dangerous Liaisons: A Social History of Venereal Disease in Twentieth Century Scotland* (Amsterdam: Rodopi), pp. 86-7 and pp. 170-171 and R. Davidson (2001) "This Pernicious Delusion": Law, Medicine, and Child Sexual Abuse in Early-Twentieth-Century Scotland', *Journal of the History of Sexuality*, 10, 1, pp. 62-77.

<sup>52</sup> See for instance the case study of Edward Hand from 1822 in this chapter as well as J. Mills (2009) 'Rape in Early Eighteenth-Century London: A Perversion "So Very Perplex'd"' in J. Peakman (ed.) *Sexual Perversions, 1670-1890* (Basingstoke:

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Palgrave Macmillan), pp. 140-166 at p. 158 and Dunning (2007) 'Narrow Nowhere Universes', p. 123.

<sup>53</sup> For further discussion see for instance D'Cruze (1998) *Crimes of Outrage*, p. 134.

<sup>54</sup> For further discussion of the motives behind rape and other forms of sexual violence see Simpson (1986) 'The "Blackmail Myth"', p. 107; Jackson (1999) 'Family, Community', p. 147; Jackson (2000) *Child Abuse*, p. 117; Clark (1987) *Women's Silence*, p. 6 and Lees (1997) *Ruling Passions*, p. 53.

<sup>55</sup> National Records of Scotland (NRS), Justiciary Court, West Circuit Minute Books, JC13/16.

<sup>56</sup> *Ibid.*

<sup>57</sup> *Ibid.*

<sup>58</sup> *Ibid.*

<sup>59</sup> *Ibid.*

<sup>60</sup> *Ibid.*

<sup>61</sup> *Ibid.*

<sup>62</sup> NRS, Justiciary Court, Process Papers, JC26/189.

<sup>63</sup> NRS, Justiciary Court, West Circuit Minute Books, JC13/16.

<sup>64</sup> *Ibid.*

<sup>65</sup> *Ibid.*

<sup>66</sup> *Ibid.*

<sup>67</sup> NRS, Justiciary Court, Process Papers, JC26/189.

<sup>68</sup> NRS, Justiciary Court, West Circuit Minute Books, JC13/53.

<sup>69</sup> NRS, Justiciary Court, Precognition Papers, AD14/22/149.

<sup>70</sup> *Ibid.*

<sup>71</sup> *Ibid.*



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<sup>72</sup> *Ibid.*

<sup>73</sup> *Ibid.*

<sup>74</sup> *Ibid.*

<sup>75</sup> NRS, Justiciary Court, West Circuit Minute Books, JC13/53. For a contemporary newspaper account of this case see National Library of Scotland (NLS) (1822), *Trials and Sentences of All the Different Prisoners who have Stood their Trials at the Circuit Court of Justiciary, which Opened at Glasgow on Monday the 16<sup>th</sup> of September 1822* (Glasgow: John Muir), Special Collections (SpC), L.C. Fol. 73 (038).

<sup>76</sup> See NLS (1822) *An Account of the Public Flogging of Edward Hand through the Streets of Glasgow, on Wednesday the 25<sup>th</sup> of September 1822, for Committing a Violent Assault on the Person of a Young Girl under 12 Years of Age at Greenock* (Glasgow: John Muir), SpC, L.C. Fol. 73 (039).

<sup>77</sup> NRS, Justiciary Court, High Court of Justiciary, Minute Books, JC4/13.

<sup>78</sup> *Ibid.*

<sup>79</sup> *Ibid.* The case was originally held at the West Circuit of the Justiciary Court in Ayr but due to the legal debate over the permissibility of the victim's testimony, the prosecution was deferred twice before being transferred to the High Court in Edinburgh – see *The Scots Magazine*, XI, June-December 1822, p. 621.

<sup>80</sup> NRS Justiciary Court, Precognition Papers, AD14/22/227.

<sup>81</sup> *Ibid.* My addition in parenthesis.

<sup>82</sup> *Ibid.* My addition I parenthesis: I am grateful to Mr Daniel Vicars for advising me with regard to the definition of 'kneeve'.

<sup>83</sup> *Ibid.*

<sup>84</sup> *Ibid.*

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<sup>85</sup> For the judge's summation see NLS (1822) *Trial and Sentence Of James Burtney before the High Court of Justiciary at Edinburgh, on Monday the 18<sup>th</sup> Nov. 1822 for Violating the Person of a Girl under Nine Years of Age at Prestwick, near Ayr* (Glasgow: John Muir), SpC, L.C. Fol. 73 (041).

<sup>86</sup> NRS, High Court of Justiciary, Minute Books, JC4/13.

<sup>87</sup> NRS, Justiciary Court, Process Papers, JC26/1822/180.

<sup>88</sup> NRS, Justiciary Court, Precognition Papers, AD14/22/227.

<sup>89</sup> NRS, Justiciary Court, Process Papers, JC26/1822/180. The contemporary press also praised the activity displayed by the public and the authorities in the apprehension of the culprit see NLS, (1822) *Trial and Sentence Of James Burtney*.

<sup>90</sup> See *The Glasgow Herald*, 27<sup>th</sup> February 1948 and NRS, Justiciary Court, Books of Adjournal, JC13/145 and JC15/59. I am very grateful to the Lord Advocate for granting me access to the papers in this case and for our lengthy discussions regarding the legal complexities associated with this trial. It should be noted that as the names of the accused are a matter of public record, they have been included in this work. The names of the victims on the other hand have been anonymised due to the sensitive nature of the material and in order to protect their identity.

<sup>91</sup> NRS, Justiciary Court, Appeal Process Papers, JC34/2/240.

<sup>92</sup> NRS, Justiciary Court, Process Papers, JC26/1948/34.

<sup>93</sup> *Ibid.*

<sup>94</sup> NRS, Justiciary Court, Appeal Process Papers, JC34/2/240.

<sup>95</sup> NRS, Justiciary Court, Process Papers, JC26/1948/34.

<sup>96</sup> *Ibid.*

<sup>97</sup> NRS, Justiciary Court, Appeal Process Papers, JC34/2/240.

<sup>98</sup> NRS, Justiciary Court, Process Papers, JC26/1948/34.

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<sup>99</sup> *Ibid.*

<sup>100</sup> *Ibid.*

<sup>101</sup> *Ibid.*

<sup>102</sup> NRS, Justiciary Court, Appeal Process Papers, JC34/2/240.

<sup>103</sup> *Ibid.*

<sup>104</sup> NRS, Justiciary Court, Process Papers, JC26/1948/34.

<sup>105</sup> *Ibid.*

<sup>106</sup> NRS, Justiciary Court, Books of Adjournal, JC13/145 and JC15/59 and *The Glasgow Herald*, 27<sup>th</sup> May 1948.

<sup>107</sup> NRS, Justiciary Court, Books of Adjournal, JC13/145 and JC15/59. It is worth noting the court's recommendation that John McKenzie McPike (who had been indicted for theft when he was just nine-years-old on the 14<sup>th</sup> of November 1940 but had been admonished from the charge) serve his sentence in a borstal due to his so-called 'criminal tendencies' – see NRS, Justiciary Court, Appeal Process Papers, JC34/2/240.

<sup>108</sup> For commentary on this case which not only reflects the divergent views of public opinion as well as the global reach of this case see for instance *The Times*, 27<sup>th</sup> February 1948, Issue 51006 and *The Mirror* (Perth, Western Australia), 13<sup>th</sup> March 1948.

<sup>109</sup> *Ibid* and NRS, Justiciary Court, Appeal Process Papers, JC34/2/240.

<sup>110</sup> NRS, Justiciary Court, Process Papers, JC26/1948/34.

<sup>111</sup> See *The Glasgow Herald*, 28<sup>th</sup> May 1948.

<sup>112</sup> See for instance NRS, Justiciary Court, Criminal Case File, HH16/269/2.

<sup>113</sup> For further detail on these attempts see for instance the material on Hugh Dearie Docherty available at NRS, Justiciary Court, Criminal Case File, HH16/269/1.

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<sup>114</sup> *Ibid.*

<sup>115</sup> Lees (1997 edition) *Carnal Knowledge*, p. 116.