"WELL COMING STRAIGHT TO BUSINESS, IMMEDIATE MARRIAGE IS ABSOLUTELY IMPOSSIBLE": SEDUCTION CHRISTIAN-STYLE IN THE EASTERN CAPE, C.1930"

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Dramatis Personae

- Native Administration Act (38 of 1927)
- Case 12/1933, Kabane versus Bokwe, Native Commissioner's Court, Victoria East
- Case 12/1933, Native Appeal Court, Kingwilliamstown, Bokwe versus Kabane
- Dorothy (Dor, Damisa) Kabane: plaintiff, spinster, teacher at Lovedale primary, daughter of a Wesleyan minister
- Selbourne (Bon, Bonny) Tandabantu Bokwe: Defendant, Agricultural Demonstrator, Ntselamanzi Gardens, Alice, son of John Knox Bokwe
- Love and not-so-loving letters A-L between Dorothy Kabane and Selbourne Bokwe (the evidence)
- Christianity
- Xhosa customary law
- Civil law: seduction and breach of promise
- sundry white male lawyers and officials, brought up in the Eastern Cape and used to these cases, or appearing for either the plaintiff or defendant in cases of this sort

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In September 1933 R.D.H. Barry, Judge President of the Cape and Orange Free State Native Appeal Court (NAC), denied Selbourne Bokwe's appeal for a reversal of the decision in a case in which he had been the defendant, first brought before the Native Commissioner's Court (NCC), Victoria East, in May of that year.[1] Barry, in his judgement, upheld the decision of Assistant Commissioner Nel to award Miss Kabane, Bokwe's former lover, £55 in damages - £5 for Bokwe's breach of promise and £50 for the damages as a result of a pregnancy that had occurred during their relationship.

The reason I begin here is that the end of this case is much easier to determine than the start. While the case itself appears to be a relatively discrete event (though discrete is probably not the best word under the circumstances), in actuality it brings together a number of different processes. Does its beginning point lie in the early nineteenth century, when Christian missionaries first began spreading the gospel amongst the amaXhosa? Christian belief and identity were part of Dorothy Kabane's lodestar in guiding her behaviour throughout the case. Or perhaps its origins lie in the way in which Xhosa converts acquired literacy and began to put it to their own uses – including prominent figures such as John Knox Bokwe, father of Selbourne. This literacy was to encompass the writing of letters, including the love letters which were a key ingredient in the Kabane case. A more accurate date for the start of this case might also be 1927, when the South African government passed the Native (or Black)

[1] Cape Archives Depot, 1/ALC 2/1/2/1, Records of the Native Commissioner's Court, Alice, Case 12/1933 (which includes the full record of both the original case and the appeal).

Administration Act, which affected – amongst other matters – the status of Black South Africans under the law, including the decision of their civil matters according to 'the choice of law rule'. This process itself has an interesting and awkward history, drawing on nearly a century's colonial rule in Xhosaland and a more contracted period, though none the less important, of colonial rule in Natal.

All of these are true for this case, but these beginnings ignore the personal dimensions of the case. For Dorothy Kabane, the unfortunate events of 1932 were probably traceable to the 7 March 1932, when she apparently had penetrative sex with Selbourne Bokwe for the first time. Or perhaps her case began when she received a letter from Selbourne in November of that year, a quote from which heads up this paper. For Selbourne, the origins of the case lie in his delight at finding what he thought was a modern soul-mate, prepared to engage in a sexual relationship with no strings attached. What is clear, though, is that for both of them, the start of the court case marked the end of a relationship which symbolised the disjunctures that existed between young Africans' aspirations around romantic love and the cold, hard fact of identities and relationships laid down in a community which had only partially moved away from more pre-colonial ideas about women's fertility and women's worth in marriage. In this paper, I shall try to engage with the different valences.

The Law, the Courts and the Case

The 1927 Black Administration Act marked a watershed in the administration of African inter-personal relationships, to a degree achieved by few other piece of segregationist legislation. Amongst its different effects, one of its most far-reaching lay in the legal standing it gave to the relationships of power that had characterised black South African society. What had previously been a tendency towards patriarchy became the sine qua non of African customary law. Older male power over women and younger men, as well as the distribution of power amongst women in polygamous marriages was given legal status and administrative backing.[2] This held for even more modern and bourgeois family relationships.

Martin Chanock, in what is one of the best discussions of the creation of South African customary law, ascribes the Act's rationale to white fear around black urbanisation, and the effects of migrant labour.[3] Part of this fear was the result of, and found expression through, discourses around the breakdown of the family, the impacts of detribalisation and the rampant immorality associated with black female urban migration. As a number of scholars have noted, fears about the growing independence of black women were features of both black traditional and white institutional discourse of the period.[4]

The Act achieved its goals by relegating black women to permanent legal minority, making them the wards of either their fathers, male guardians or husbands in civil matters like marriages, divorce, child custody, inheritance etc.[5] Indirectly it also had an impact on younger men, especially in their relationships with women, because no marriage or divorce could be entered into without involving some

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[2] Thomas V. McClendon, *Genders and Generations Apart: Labor Tenants and Customary Law in Segregation-Era South Africa 1920s-1940s*, ed. Alan Isaacman and Jean Allman, *Social History of Africa* (Portsmouth, NH and Oxford: Heinemann and James Currey, 2002).

[3] Martin Chanock, *The Making of South African Legal Culture 1902-1936: Fear, Favour and Prejudice* (Cambridge: Cambridge University Press, 2001). I am indebted to Chanock in much of my understanding of the legal framework in this chapter.

[4] Alan R. Booth, "'European Courts Protect Women and Witches': Colonial Law Courts as Redistributors of Power in Swaziland 1920-1950," *Journal of Southern African Studies* 18, no. 2 (1992), D. Jeater, *Marriage, Perversion and Power: The Construction of Moral Discourse in Southern Rhodesia 1894-1930* (Oxford: Oxford University Press, 1993), T.V. McClendon, "Tradition and Domestic Struggle in the Courtroom: Customary Law and the Control of Women in Segregation-Era Natal," *International Journal of African Historical Studies* 28, no. 3 (1995), Cherryl Walker, "Gender and the Development of a Migrant Labour System," in *Women and Gender in Southern Africa to 1945*, ed. Cherryl Walker (Cape Town: David Philip, 1990).

[5] It also regulated their economic relationships with white South Africans, but that is not a subject for this paper.

older man, either the woman's guardian or a headman or chief who had status as an recognised expert on customary law.

This move reversed some of the legal protection which especially Christian women and younger men had had recourse to after the Act of Union in 1910. For instance, prior to 1927 women married according to Christian rites or civil law had their marriages governed according to the colonial civil law, and their matrimonial property might be governed by community of property rules. Black women in the Cape could also attain legal majority at age 21, which gave them capacity to enter into legal contracts and matters on their own behalf. The potential independence which this gave black women, something which a generation of white officials horrified at black female oppression had worked towards, was negated by the Act.[6]

However, what the Act also did, in response to certain tensions in its construction, was to leave it to the discretion of South African law courts (most often the lowest, which were the 'native' law courts) whether a case required the application of customary or civil law. Magistrates could, if a case warranted it, chose to apply the rules of civil law if the application of customary law appeared unfair. I am aware that the legal discourse around this provision displays admirable clarity as far as the repugnancy clause could be applied. The situation on the ground, though, was much more fluid.

It is entirely possible – as many legal scholars have done – to spend too much time considering the impact of the law, without considering whether it actually changed matters for black South Africans and without considering the impact of individual magistrates. According to Chanock, the regulation of African marriages by civil law (for those who elected to follow this route) prior to 1927 probably made little difference to the form of African marriages, where lobola was still more common than not, and succession still occurred according to custom.[7] The real source of change lay in the impact of industrialisation and migrant labour – matters which customary law had never considered.[8] Likewise, the choice of law rule meant that some Africans could have their affairs governed by civil law after 1927 – as long as one of the parties to a dispute could convince a magistrate that civil law was the more proper route.[9] However, all of this argument supposes a role for the native law courts, when in reality most interpersonal disputes relating to marriage did not even reach the courts. The workings of the Black Administration Act occurred most often in a subterranean manner, through limiting choice for black men and women at the inception of relationships, rather than in their dissolution.

In order to consider the role of the Black Administration Act in the Kabane case, it is necessary to step back a moment from the law as a regime to the work of the native law courts. This also requires consideration of the nature of court cases as sources. Across Southern Africa, the gradual penetration of European colonialism and colonial rule brought black Africans increasingly under the sway of the colonial law courts. Here I am thinking particularly of the period spanning the early- to mid-twentieth century.

Colonial law courts obviously considered the cases of both Africans found guilty of criminal behaviour (in South Africa's case they were subject to Roman-Dutch criminal law), or Africans involved in civil legal matters. Some of the work on Africans who engaged with the colonial state in this way can be

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[6] See McClendon and also Booth, "'European Courts Protect Women and Witches': Colonial Law Courts as Redistributors of Power in Swaziland 1920-1950.", Tapiwa B. Zimudzi, "African Women, Violent Crime and the Criminal Law in Colonial Zimbabwe, 1900-1952," *Journal of Southern African Studies* 30, no. 3 (2004).

[7] Chanock, *The Making of South African Legal Culture 1902-1936: Fear, Favour and Prejudice*.

[8] Ibid.

[9] And in fact if an African woman could convince her partner of the need for an ante-nuptial contract, she could inherit according to its provisions – but not land held under customary tenure.

seen in work already mentioned, as well as Martin Chanock's work on women and the law in Northern Rhodesia; the chapters in Kristin Mann and Richard Robert's book, *Law in Colonial Africa*, Elizabeth Schmidt's work on Southern Rhodesia, Marc Epprech'ts work on homosexuality in Southern Rhodesia, and more recently a series of papers in a special edition of the *Journal of Southern African Studies.*[10]

In differing ways, and often drawing on or against Chanock's pioneering work in this field, these papers have attempted to engage with and to consider the implications of the appearance of Africans before the colonial law courts.[11] Chanock's original work set in motion a debate around the degree to which colonial customary law was, or was not an entirely colonial creation, which also required a consideration of the degree to which, for civil cases, Africans were prepared to engage with unfamiliar legal systems in search of justice, itself a contested concept in this scholarship. What I want to engage with, though, is the understanding, common in much work on African use of colonial law courts (customary or otherwise) that civil cases which reached the colonial courts were exceptional. This statement conflates two issues: the nature of the case being taken to court (i.e. how representative a court case is of non-court issues) and whether the action of taking the case to court represents the exceptionality of the instance. So far, my impression is somewhat different, based on a comprehensive survey of the court records for two Ciskei districts, Kingwilliamstown and Alice, as well as a brief look at some other magisterial districts. My findings (which are likely skewed by the type of district in which the cases were heard) suggest that, in the period under review, and across three magisterial districts, Africans of a particular type routinely went to the European law courts when not satisfied with more local justice.

This finding is based on an assessment of the court records themselves – not their detailed content, but rather their fact. It is impossible to know how many customary cases were resolved before they reached either the magistrate's court before 1929 or the native commissioner's court after 1929. However, the number of civil cases between Africans which did reach the law courts was at least consistent both between years and in terms of the types of cases which reached the courts. Fortunately for the Cape, some conclusions about the culling of files can be made, based on a comparison of the Civil Judgement Books with the extant records of particular cases.[12] The situation as regards the culling of case files is dire: in 1920, where 46 cases involving Africans were awarded, only one file has been preserved.[13] The following year, only two files remain, out of a total of 151 judgements awarded.[14]

But this tells us about record preservation rather than African court habits. In fact, following the Civil Judgement Book, every year roughly 2-3 of the types of cases in which I am interested (damages for

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[10] in *Law in Colonial Africa*, ed. K. Mann and R. Roberts, *Social History of Africa* (Portsmouth, New Haven and London: Heinemann and James Curry, 1991), Martin Chanock, "Making Customary Law: Men, Women, and Courts in Colonial Northern Rhodesia," in *African Women & the Law: Historical Perspectives*, ed. M. J. Hay and J. Wright (Boston: Boston University, 1982), Marc Epprecht, ""Good God Almighty, What's This?" Homosexual "Crime" in Early Colonial Zimbabwe," in *Boy-Wives and Female Husbands*, ed. Stephen O. Murray and Roscoe Will (New York: St. Martin's Press, 1998), Michael R. Mahoney and Julie Parle, "An Ambiguous Sexual Revolution? Sexual Change and Intra-Generational Conflict in Colonial Natal," *South African Historical Journal*, no. 50 (May2004), Jeremy Martens, "Polygamy, Sexual Danger, and the Creation of Vagrancy Legislation in Colonial Natal," *Journal of Imperial & Commonwealth History* 31, no. 3-27 (2003), Sean Redding, "Deaths in the Family: Domestic Violence, Witchcraft Accusations and Political Militancy in Transkei, South Africa 1904-1965," *Journal of Southern African Studies* 30, no. 3 (2004), E. Schmidt, "Negotiated Spaces and Contested Terrain: Men, Women, and the Law in Colonial Zimbabwe, 1890-1939," *Journal of Southern African Studies* 16 (1990), Zimudzi, "African Women, Violent Crime and the Criminal Law in Colonial Zimbabwe, 1900-1952."

[11] McClendon, *Genders and Generations Apart: Labor Tenants and Customary Law in Segregation-Era South Africa 1920s-1940s*. pp.8-10

[12] (which record all civil judgements for a particular year, but not judgements involving Africans after 1929) See McClendon for a discussion of the impacts and extent of archival clearances.

[13] Some of these were for bad debt judgements between white retailers and black customers.

[14] Compare CAD 1/ALC 2/4/1 Civil Judgement Book with 1/ALC 2/1/1/35 Civil Proceedings, 1916-1928.

seduction and infringement of lobola) appeared before the magistrate's court. The majority of cases involving Africans centre on debt – to merchants and fairly often, ironically, to lawyers who had represented them in previous cases. What is interesting is that the preserved records incline towards two case types: the seduction/ lobola cases or land disputes. While this may say more about archival staff's perception of the significance of land and gender than any contemporary significance they may have, the regular presence of these cases in the Civil Judgement Book is indicative of their contemporaneous significance. Moreover, the types of judgements recorded in the judgement book bear out the judgements in the cases with records, so that it is possible to suggest that the lost cases would have been similar in nature and discussion to the extant cases.

Again, though, this doesn't really establish anything other than the fact that probably 2-3 cases involving seduction and lobola came before the courts every year. However, based on the fact that, in the extant cases, the majority of this type of case involved a first appearance before a traditional court, I want to suggest that what kept people from the magistrate's court was a combination of factors. In the first place, a perception of justice done in the customary judgements led cases to resolution before a possibility of coming to a colonial court. In the second place, where customary judgements were perceived to be unfair – and this was why people went to the colonial courts – money was the deciding factor. Court appearances, even if they did not involve lawyers, were costly and time consuming. However, for those with some disposable income (there is a class component to the cases) a case in the colonial law court was often seen as necessary to the dispensation of justice, although a type of justice often reckoned in pecuniary terms.

While this may seem to back up the idea that African cases which made it to the courts were exceptional, exceptionality seems to be dictated by cost rather than a desire to see justice done. I would suggest that in the Eastern Cape the colonised population was aware of the benefits (and disadvantages) of colonial justice, but that issues around affordability constrained people from using it. This is not an argument about lack of awareness of the law and rights under the law, which characterises contemporary discourse around rural South African women for instance. Both the nature of the colonial law courts, which were open to the public, and the high degree of colonial penetration and patronage of African life in certain centres meant that knowledge about the use of magistrates – who after all were also often the native commissioners after 1929 – was fairly widespread. What would be interesting to attempt to uncover – which is something I have not seen done in any serious historical fashion – is the impact of civil and colonial justice on the administration of so-called organic customary law, but this is a subject for another paper.

However, this is not getting us any closer to the drama at the centre of this paper. For the Kabane case, the truly exceptional fact was not that it went to court, but that it appears to have gone straight to the native commissioner's court, bypassing the chiefly rulings which accompanied traditional dispensations of justice. Its exceptionality, therefore, lies in its instance rather than its lack.

So far, I have considered the fact of court cases, rather than their reliability as sources. Much of the work on the use of colonial law courts has also considered the use of court cases as sources. Thomas McClendon has a very useful summary of the problems encountered in using them. "[L]itigants sometimes lie, rules of evidence often exclude, and translation and transcribers may trammel the truth."[15] Researchers, including among them McClendon himself, have overcome these difficulties in different ways, most of which emphasise the need to read records across and according to both their contexts and the context of their production.[16]

[15] McClendon, *Genders and Generations Apart: Labor Tenants and Customary Law in Segregation-Era South Africa 1920s-1940s*. p.26.

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All of these caveats needed to be born in mind when I began working on the court case which forms the centre piece of this paper. The record I am using consists of the original record from Miss Kabane's case against Selbourne Bokwe, as well as the record of his appeal in the Native Appeals Courts, both in 1933. In fact, there is a third record of the case, in the record of decisions in black appeal cases, 'Selected Decisions of the Native Appeal Court, Cape and OFS'. This, like its companion volumes for different years and different parts of the country, was used by attorneys and native commissioners, following the Roman-Dutch tradition of precedent, to help reach decisions in cases involving customary law.[17] All three levels focus on different aspects and different pieces of evidence, so that the 5 NAC (this is lawyerly speak) write-up does not entirely correspond to the first prescriptive event. What the implications of this shift are, is a subject for further research.[18]

The case, like similar ones in the records is well-detailed and contains testimony from both defendant and plaintiff, as well as their witnesses. However, what makes this case somewhat different from some of the cases to which other scholars in this paper have referred, is the extent of personal material contained in the file as well as the social status of the litigants. The case record contains 15 lengthy letters written between Selbourne and Dorothy, dating from the start of their sexual relationship until a letter Selbourne wrote, with potential legal proceedings in mind.[19] These letters were rendered by both sides as evidence for statements made about the nature of their relationship, and entered into the court record. This is where the court case begins to become unlike some of the other cases I looked at.

In May 1933, roughly a month after her child was born, Dorothy Kabane and her lawyer, Edward Burl, appeared before the native commissioner's court seeking a judgement which would award her £100 in compensation for breach of promise, and a second £100 in damages for seduction and pregnancy. While both civil and customary law recognised such cases, Miss Kabane's claim was to have the case tried under civil law because she and Bokwe had "adopted the European standard of living".[20] Dorothy's claim was based on the lifestyles her and Selbourne's family had adopted. It should be noted that a claim for damages under customary law carried a penalty of £15, the equivalent then of three head of cattle. Dorothy's claim rested on the fact that she had become pregnant and delivered a child as a result of a sexual relationship with Selbourne, a relationship she entered into because she believed that she and Selbourne were to marry. She and her family had incurred both financial and emotional damages as a result of her giving birth, damages compounded by his refusal to marry her.

Selbourne's plea, prepared together with his attorney, Mr Welsh, attempted to answer Dorothy's charges in two ways. In the first place he attempted to have the case tried under customary law, because (according to his plea) "although both parties to this action are Christians and educated natives, nevertheless both parties adhere to their native law and customs". Anticipating the failure of this gambit, his next defence rested on the fact that, although he had promised to marry Dorothy, he had not seduced her and was not responsible for her pregnancy. As a result, according to him, this cancelled his promise to marry.

When the case actually came to court (the initial proceedings took place just before Dorothy's child was born), Dorothy was the first to give evidence. In a manner which correlates with other similar cases, she first gave evidence in respect of her claim to be tried according to civil law. Both she, her brother

[17] 5 NAC Cape and OFS, 1933, 18.
[18] I am grateful to Rob Turrell's paper on Mietjie Bontnaal for pointing out the lack of continuity between different states of a case. Rob Turrell, "The 'Singular Case' of Mietje Bontnaal, the Bushmanland Murderess*," *Journal of Southern African Studies* 29, no. 1 (2003).
[19] It's possible there were other letters, but these were not surrendered as evidence.
[20] All references to the case are from CAD 1/ALC 2/1/2/1 Case 12/1933.

and her uncle, who were also witnesses, laid stress upon their status as Christians and the fact that they did not pay dowry (the transcriber's word) in the traditional manner. Dorothy's next testimony concerned how she met and became involved with Selbourne, and how her persuaded her to have 'intercourse' with him. On cross-examination by Selbourne's lawyer, she told the court how her engagement with Selbourne had been secret, even to her parents, as well as how she had twice been engaged before meeting him.

This, though was not to be the usual sort of seduction case. After establishing the initial detail, Dorothy's tale became more bizarre as she recounted, under examination, her sexual experiences with Selbourne. According to the rather stiff court transcription, in March 1932 "Defdt. [had] put his private parts into mine then for the first time. Since then deft had frequent intercourse with me. Deft had proper intercourse with me. I felt something being ejected into me". However, after she was reminded of comments she had made when she first consulted a doctor to confirm her pregnancy, "I told him deft. did not fully put his private parts into mine". Her final testimony concerned the length of her pregnancy, which, according to the witness for the defence, fell within the normal gestation period.

Following Dorothy's testimony, her brother and uncle were called upon the recount the details of a meeting they had had with Selbourne's representatives in January 1933. According to Milner and Michael, a meeting had been held at Selbourne's house. Selbourne waited outside during most of the meeting, but when called in to answer some questions he did not use the opportunity to deny his responsibility. Rather, his male relatives asked for more time to consider the matter. After some time had elapsed the Bokwes, according to the Kabane men, announced their belief in Selbourne's innocence and their refusal to pay damages.

These three comprised the witnesses for Dorothy's case. The first defence witness was the doctor, Malcolm MacVicar, whom Dorothy had seen when she first suspected she was pregnant. MacVicar's testimony was used by the defence, together with doubt cast on Dorothy's having a normal length gestation, to show that Dorothy had been a virgin when she first consulted him. As I have already mentioned, though, the assistant native commissioner, Mr Nel, used Dr MacVicar to confirm the normality of Dorothy's pregnancy. However, MacVicar's really interesting testimony came with his description of Dorothy's first visit. "I tried to examine her internally. I could only get one finger into her vagina as the vagina was still intact. Carnal connection (a favourite transcriber's phrase in similar cases) cold not have been complete, penetration could not have taken place. She admitted that penetration had not actually taken place."

Selbourne's own testimony confirmed the doctor's rather strange tale. He also laid stress on the fact that his lack of a denial of responsibility in the January meeting was not a confirmation of responsibility.

The magistrate did not have much trouble reaching a decision, prompted no doubt by a wish not to see a young woman financially as well as socially- compromised. Notwithstanding the confusion that characterised Dorothy's understanding of her own virginity, he based his findings on Selbourne's failure to deny his responsibility when confronted at the January meeting.

Selbourne was fairly quick in a rebuttal, because by September that year the case was on appeal.[21] Barry, as we already know, upheld the native commissioner's decision.

This, fairly dry account of the case disguises, however, some of the currents at work within it. The different stages of the case, once it came to court, were characterised by different processes going on

[21] 5 NAC Cape and OFS, 1933, 18.

in the minds of those involved. With such a rich case, and what appears to be such a fair judgement, it is easy to lose sight of the nature of power at work in the case. Colonial law courts, after all, are about European colonialists trained to maintain the colonial status quo dispensing justice on behalf of the those whom they ruled. There are, therefore, a number of paradoxes at work within the functioning of these courts, which were – after all – only outposts of colonial governmentality.

How did white lawyers, who took clients where they could and specialised neither in defence nor prosecution, who were brought up in many cases by Xhosa nannies, whose families were tied into the mechanisms of colonial extraction (Dorothy's lawyer had labour agents in his family) and profit-creation, absent themselves from a patronising familiarity with their clients, both as individuals but also as representatives of a colonised population? What about the native commissioners and appeal court judges, some of whom were that type of colonial official remembered in second, third and fourth generation naming practices amongst their subjects – and who did in fact have a pretty good idea of what was going on? How did they reconcile protecting women's rights with the need to dispense patriarchal customary law? In short, what kind of colonial subjects were the NC Courts attempting to create? My comments here are partial, preliminary and relate to one aspect of colonised status only.

The statements and questions made by and to Dorothy are instructive in this case. At one level, the case can be read as rewarding Dorothy for her moral character, potential loss of virginity notwithstanding. While part of Selbourne's defence rested on trying to prove that Dorothy was of loose moral character, a defence appearing frequently in cases of this sort and material which the NC Courts routinely considered, Mr Nel was at pains to emphasise her respectability. "The plaintiff appears to me to be a very respectable native girl. She gave her evidence in a very straightforward manner … nor … has evidence of any description been led to show her to be of a shady character."

Was Mr Nel in court the day Dorothy gave testimony? If the court transcript is accurate, Dorothy's testimony was full of inconsistencies – something which my rendition of her twelve pages of testimony probably disguises. She declared that full penetration had taken place, then said that it hadn't, and she lied about when she had first visited Dr MacVicar. Elsewhere in his judgement, Nel referred to the way in which the defence pointed out the inconsistencies in her testimony, but these did not seem to bother him. In fact, Dorothy Kabane's own evidence appears to have been of little importance to the case, since all important details about her condition were supplied by Malcolm MacVicar who, as defence witness ended up supplying the case's expert medical testimony. MacVicar told the court that a) it was possible to be pregnant and to continue to menstruate and b) it was possible to fall pregnant without rupturing the hymen. The evidence which swung the case in her favour was that supplied by her and Selbourne's letters, which were used as proof of a 'hectic' relationship (the NAC description), and that supplied by Selbourne's failure to declare his lack of responsibility, proved through the male witnesses to the January meeting.

Sean Redding and Tapiwa Zimudzi's articles in *JSAS* have both emphasised the need to move beyond seeing African women as victims, although in these instances they were working on women appearing before criminal courts.[22] From a somewhat different direction, Stephen Robertson's work on statutory rape in New York in the early twentieth century has shown that the construction of women as passive/ victims before the court was not just an attempt to rewrite and constrain their sexual agency but an effort to provide women protection which otherwise courts would be unwilling to accord.[23] These

[22] Redding, "Deaths in the Family: Domestic Violence, Witchcraft Accusations and Political Militancy in Transkei, South Africa 1904-1965.", Zimudzi, "African Women, Violent Crime and the Criminal Law in Colonial Zimbabwe, 1900-1952."
[23] Stephen Robertson, "Age of Consent Law and the Making of Modern Childhood in New York City, 1886-1921," *Journal of Social History* 35, no. 4 (2002).

articles point to the need to consider the issue of women's status before law courts, their agency, and representations of this agency.

So what did the court's lack of attention to Dorothy Kabane's evidence, weighed up against its support for her, mean? Here, I think, is where considerations of female agency fall victim to colonial constructions of African womanhood. In its disregard for her testimony, despite an interest in her story, the court considered Dorothy more as a prop than a participant. Also, evidence of a fairly ardent love affair notwithstanding, both courts decided to confirm her respectability. At some level, therefore, the court officials do not appear to have viewed Dorothy as responsible for her own actions – indeed, Selbourne was held responsible for them. The courts' view upheld a very conventional sexual division of power. While its individual judgement cast the mantle of its might over Dorothy, its deliberations more generally confirmed ideas about social status and the division of power between men and women.[24]

At the same time though, the court also reconfirmed Dorothy's status as a black woman. Although all versions of the case accepted it be tried according to European civil law, Dorothy was still only a 'native girl' for whom damages could be awarded on the European scale, but definitely not at the top of it.[25] Selbourne, too, seems to have suffered at the hands of the court. The court was not, I would suggest, resolved in its mind as to what kind of colonial subjects Dorothy and Selbourne represented. They were neither 'natives', since they conducted themselves in fact "according to European standards of living", but nor were they the same as Europeans. Their public and visible links with Christianity made their case complex to administer in ways which did not trouble cases involving non-Christians (complexities around how to hear cases rather than around how to reach judgements). For this reasons, native commissioners and magistrates were continually on the look out for Christian status or Christian marriages in cases such as these, a practice which helped to create a colonial understanding that distinctions existed between Christians and non-Christian subjects.

The Letters

What makes the Kabane case, so interesting though, is the juxtaposition of this first discussion of the legal case with what can be gleaned from the largely-ignored body of evidence which accompanied it. Here I want to discuss the letters which passed between Selbourne and Dorothy as well as what they reveal.

At about the time I began writing about this case, I had just read Isabel Hofmeyr's *The Portable Bunyan*, in which Hofmeyr discusses the peculiar materiality of documents.[26] Pieces of paper, either as personal or official documentation, signified a range of understandings, practices and relationships, and the trails left by absent and present pieces of paper can be seen as both reflecting and constituting people's sense of themselves in the world. Hofmeyr, discussing the polyvalent meaning of paper for Africans, wrote the following: "Pieces of paper can prove troublesome. They change shape and form; they disappear and reappear. They demand different types of attention, behaviour and deportment. At times they must be contemplated as objects. At times they must be carefully carried. Documents, in other words, are dangerous and unpredictable. But, they are also priceless and precious…".[27]

What is so interesting, in my case, is that it concerns pieces of paper within pieces of paper. The majority of paper in this case consists of the court record itself – the typescript summons and its

[24] I have yet to check the currents at work in the same court in white cases involving seduction.

[25] I still need to compare this record with similar ones involving white litigants in the Eastern Cape courts.

[26] Isabel Hofmeyr, *The Portable Bunyan: A Transnational History of the Pilgrim's Progress*, ed. Emily Apter, *Translation, Transnation* (Princeton, New Jersey: Princeton University Press, 2004).

[27] Isabel Hofmeyr, "Dreams, Documents and 'Fetishes': African Christian Interpretations of *the Pilgrim's Progress*," *Journal of Religion in Africa* 32, no. 2 (2002). p.448. This article appears as chapter 6 in Hofmeyr's book.

response , the assistant native commissioner's judgement, the judgement of the NAC, as well the clerk of the court's hand-written record of proceedings. When I began reading the Kabane case in the archive on a blustery summer's day (in Cape Town it is always windy in February, in case I may be accused of misremembering), I also found, contained within the contents of the pale brown case file, a collection of letters between the two protagonists, though not assembled in the order in which they were written. On differently-coloured note paper, some blue, some buff, and envelope-less, were a collection of letters between Dorothy and Selbourne.

Table 1

Letter	Date	Day	SB	DK	Place	Event Recorded as Per Court Record
A	07-Mar-32	Monday	X		Ntsela	DK says night after first sexual encounter
B1	09-Mar-32	Wednesday	X		Ntsela	
B4	10-Mar-32	Thursday	X		Ntsela	
B2	25-Mar-32	Friday	X		Ntsela	
	08-Jul-32					DK says last period
	12-Jul-32					DK says they had sex
D	27-Jul-32			X	Lovedale	
B5	01-Aug-32		X		Ntsela	
	09-Aug-32					Dr MacVicar says DK visited him for the first time
E	12-Oct-32			X	Lovedale	
F	19-Oct-32			X	Lovedale	
G	06-Nov-32			X	Umtata	
H	15-Nov-32			X	Umtata	
J	18-Nov-32			X	Umtata	
C	03-Dec-32		X		Ntsela	
K	03-Jan-33			X	Grey Hospital, KWT	
	04-Jan-33					families meet
L	09-Feb-33		X		Ntsela	letter written after relatives meet
B3	08-Mar-33	Tues	X		Ntsela	
	04-Apr-33					child born
	07-Sep-33					SB's appeal dismissed
B	17 March 1933?	Thurs	X		Ntsela	

While these were not the first love letters I had come across in the civil case records, they are perhaps the most distinctive, both for their number, the fact that they were written without the aid of letter writers, and the language of their writing (English interspersed with isiXhosa). At first I was struck by the poignancy of Dorothy rendering up the sacred evidence of their love affair for a dry court record – the pieces of paper which were once both priceless and precious - where evidence of their affair would be permanently shifted to the indifferent hands of the colonial state. After reading the letters, though, I soon realised, that the collection in the court record is only a subset of their correspondence. While this raises all sorts of questions about Dorothy and Selbourne's preservation of their correspondence, the speculation that answering these entails is beyond the kind of speculation in which historians ordinarily engage.

Love letters have not themselves received that much attention in South African history. Between the 1930s, when Isaac Schapera used letters between migrant workers and their wives to reconstruct their married life, and more recent work including that of Keith Breckenridge and Vukile Khumalo, few researchers have considered love letters beyond their content and individual correspondences, though this situation is beginning to change.[28]

The letters which stand as physical props for the love affair between Dorothy and Selbourne, however, bear little resemblance to the kinds of letters which Breckenridge has discussed, although there are similarities in the ambiguous location of these declarations of affection and love. In his work, Breckenridge has examined the multiply-authored nature of working-class private lives – where letter writing represented a collective effort on the part of scribes, lovers and their compound comrades.[29] He was concerned to account for the rise of a private sphere "simultaneously personal and collaborative" amongst working class Africans.[30] As Breckenridge discusses, this occurred in a manner which ran contrary to western expectations around the consequences of letter writing and the elevation of individual subjectivity as a mode of self-perception. What interests me in his work is the notion of a private sphere which situates the private firmly within the borderlands and practices of the public.

More similarities, though, to the Kabane case, are present in a soon-to-be published paper by Lynn Thomas on schoolgirl pregnancies and love letters in late-colonial East Africa.[31] While three decades separate Dorothy's pregnancy from some of those mentioned in Thomas's work, there are marked convergences between the contexts surrounding both our cases.

As Thomas has shown, letter-writing between young people was at the nexus of a set of practices around self-creation, self-promotion and defence of reputation. While Thomas writes of this as evidence of a hybrid and school-learning-centred modernity, some of this behaviour is distinctly post-modern. School-educated young women, in search of suitable husbands, would write letters which both displayed their learning and also represented them as modern in the eyes of their potential suitors.

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[28] Keith Breckenridge, "Love Letters and Amanuenses: Beginning the Cultural History of the Working Class Private Sphere in Southern Africa 1900-1933," *Journal of Southern African Studies* 26, no. 2 (2000)., and Khumalo citations in Breckenridge. To an extent, Kenda Mutongi's work on the advice column in Drum addresses issues of intimacy through letters, but letters to an advice columnist. K. Mutongi, "'Dear Dolly's' Advice: Representations of Youth, Courtship, and Sexualities in Africa, 1960-1980," *International Journal of African Historical Studies* 33, no. 1 (2000). It is always a precarious exercise for a historian (me) to make a comment like this. There is nothing more geared to raise the – justified – hackles of fellow researchers through this kind of practice, which is a real Foucauldian venture into cataloguing and the exercise of power – and which can inadvertently ignore very valuable work.

[29] Breckenridge, "Love Letters and Amanuenses: Beginning the Cultural History of the Working Class Private Sphere in Southern Africa 1900-1933." pp.338, 346.

[30] Ibid.

[31] Hofmeyr, *The Portable Bunyan: A Transnational History of the Pilgrim's Progress*, Lynn M. Thomas, "Schoolgirl Pregnancies, Letter-Writing, and 'Modern' Persons in Late Colonial East Africa," in *Africa's Hidden Histories: Person, Text and the Colonial State*, ed. Karin Barber (Bloomington: Indiana University Press, In press).

Letters were a way to advertise their writer's up-to-dateness, together with the way in which the letters and relationships were linked into other forms of popular culture like detective novels. At the same time, the letters produced by a relationship could serve to confirm the nature of that relationship. In pregnancy compensation cases, letters were often submitted as evidence to prove (according to what was written in them) dates of conception or sexual encounters.[32] Much of this is evident in the Kabane/Bokwe correspondence, although in this instance both parties submitted letters in evidence.

The letters can be grouped into three categories. The first category, letters A and B1-5, were written by Selbourne in the period immediately following the start of their sexual relationship. These were submitted by Dorothy as evidence of the relationship. They reflect on Selbourne's state of mind and his perception of how lovers ought to behave to one another. The second batch of letters, D, E, F, G, H, J, and K, were written by Dorothy to Selbourne after the pregnancy was confirmed, as she was preparing to leave Lovedale, during a visit to her sister in Lovedale and a few months before the child was born. Most of these letters were written in a state of considerable emotional and physical distress, the former occasioned by Dorothy's consideration of the consequences of a premarital pregnancy (which resulted in extreme anxiety and insomnia) and the latter by much morning sickness. In several of these letters Dorothy, in her attempts to get Selbourne to commit to marriage, makes vague allusions to herself being to blame. These were used by Selbourne as evidence of her having slept with someone else and become pregnant with this unnamed man's child. The final two letters, C and L, were written by Selbourne and include his first definite postponement of marriage (see paper title) and then his refusal to marry Dorothy. It is clear that Selbourne's last letter, perhaps even his last two letters, were written with a defence in mind, although it was Dorothy who used his last letter as proof of his breach of promise.

Letter A was, according to Dorothy, written by Selbourne on the March Monday after they had first made love. These early letters have much to say about Selbourne's understanding of love. In fact, while the letters show Selbourne to have been consistently manipulative in his quest to have Dorothy declare herself for him mind, body and soul, they are also a rather fair statement of his perception of the meaning of modern love. While he doesn't use the word 'modern', it is clear from what he describes as well as how he behaves throughout the case, that he is not writing of more traditional understandings of intimacy. In this letter, as in the next few, Selbourne taxed Dorothy with the strength of her feeling for him, alternating between love as emotion and love as sexual passion.

> So far as I am concerned I am quite sure my love for you is not a mere passing passion as you put it last night. … In the past I have loved you well enough as I did last night, only there was a great deal of doubt as to whether my love for you was of any value to you & whether you cared at all to be loved by me. Only last night did you give me the impression that after all my love could mean something to you… Why darling to you wish to control your love? Why Dor won't you let your love have its own way where it could if its not in the wrong place?[33]

This was a regular refrain in his first few letters. According to Selbourne, Dorothy's passion and love could never quite match up to his. There are none of Dorothy's letters from this period, so it is unclear how she replied.

A second theme in Selbourne's letters is misunderstanding. "You misinterpret me in all ways. That is, you misinterpreted my love in every way that because you do not understand I love you…".[34] Misinterpretation was a word he used fairly often – that he spoke at a different register than Dorothy,

[32] This is but a partial discussion of Thomas's findings.
[33] Letter A
[34] Letter B1

who did not understand the meaning of his words. While the letters were clearly an attempt to clear up these misunderstandings, Selbourne's somewhat coy allusions lead me to suspect that Dorothy probably understood him fairly well. Dorothy, by her admission furnished in Selbourne's letters, was less trusting and much more reticent. There are interesting points to be made here about how Selbourne (and ultimately both of them) felt that pieces of paper could fix meaning.

More ardent love and misinterpretation is closely associated with a third theme, which emphasises freedom.

> I say I do not know how I stand in your love, because whenever I try to be free in talk & in some other ways you are offended. I have to guard myself in every little act of love I do. Whilst I expect to be at ease whenever I am with you in any way. I had no idea I could have limits in talks, joke & questioning with you. So you have refused me that freedom which means my own happiness.[35]

Freedom, for Selbourne appears to mean the end of any boundary between himself and his lover, a giving up of individual privacy as a token of mutual love. At the same time, though, he viewed his individual happiness as being linked to a state of freedom, a very clear statement of his understanding of selfhood and what having a self meant.

Selbourne's invocation of freedom is also interesting, if read against contemporary shifts in the meaning of love for men. While some of the work mentioned in this paper goes as far as to consider the existence of love and intimacy in relationships, it does not necessarily start to consider understandings of the meaning of love. This is a field that has had much more attention outside South Africa, than within. There is a rich history on the changing meaning of love in the western world, some of which looks at what happened to Victorian standards of romantic love in the twentieth century.[36] In the US, as Peter Stearns and Mark Knapp have written, a 'new love' had taken over from the transcendental nature of Victorian love by the 1920s.[37] Male emotional culture had moved towards stressing compatibility in interests and sexual proclivity, while ironically reflecting a misogynistic bent located in male fears of growing female independence.

While a few letters are not sufficient from which to chart the same development in Christian circles in South Africa (Stearns and Knapp were writing about more secular middle-class understandings of love), it seems as if Selbourne was operating according to an understanding of love as something that could be decoupled from marriage while still leading to increased coupling. There is almost a sense of euphoria in his earlier letters, derived I suspect from delight at finding what he thought was a modern play-mate as much as from his expressions of love. Ultimately, Dorothy proved not to be that girl, and Selbourne found himself less supportive of the idea of female freedom in love, especially if it impacted on his future prospects. At this point, he found himself forced to use more-traditional understandings of relationships gone wrong in order to extricate himself from their relationship – although breaking the news to Dorothy's family (when she would not) via having his brother, Barbour, send them a telegram was hardly traditional.

Dorothy's first letter, written in late July, contains the following:

> Your yesterdays/Mondays letter crowned by your person gave me the impression of what is in your mind. If there was anything the matter with me – I wouldn't have hesitated to tell you straightaway. Last night you came up with the idea there was, &

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[35] Letter B4.

[36] For a discussion of this literature, see Peter N. Stearns and Mark Knapp, "Men and Romantic Love: Pinpointing a 20th-Century Change," *Journal of Social History* 26, no. 4 (1993).

[37] Ibid.

> you were irresponsible (sic), somebody else being responsible – Needless to say how I felt & took it. Well fortunately enough for me – as far as I know the idea is false.[38]

Dorothy's statement in this letter was used by Selbourne to show that he was not responsible for a pregnancy, and he attempted in court to show that she must have got pregnant after this date.

However, the issue is not as clear as Dorothy's statement might seem. Dorothy's letters are hesitant about the issue of love mostly as obligation, rather than love as sexual passion. In response to Selbourne's suspicions about her carrying on with other men – jealousy lay behind many of his comments about complete freedom with one another – Dorothy's replies consisted of apologies for giving him such an idea. Her apologies relate to matters of emotion, rather than matters of the body, although her later letters are filled with the corporeal as she struggled through a difficult and anxiety-laden pregnancy. She was continually fearful, both of Selbourne leaving her and of how she and her behaviour would appear to others. In November, she wrote to Selbourne, "Darling I am blue", though at the time she still hoped for marriage.[39] Three days later, she laid out carefully the reasons for their getting married. "As Wesleyan minister [she means her father] if I go home in this state … Mama can be disqualified or brought forward in the Manyano for hiding her daughter … The proper thing to do now is to quietly get married".[40]

What is much more apparent in Dorothy's letters is a concern for the community in which she was located, as the comment about her mother reveals. Selbourne seldom thought beyond his needs while Dorothy's letters were all about her needs in relation to the needs of her family. Overall, Dorothy's letters convey an understanding of love very different to that conveyed by Selbourne's. Her fearfulness at what other people would say contrasts sharply with Selbourne's stated disregard for them. She saw herself much more as needing to be anchored in a community. This was a different sense of selfhood to Selbourne's, which it is possible to ascribe to the nature of her character, but it may also say more about the ability of African women particularly to take up modern notions of selfhood. This is something I need to examine further. Ironically, of course, in the end her going to court was an action which challenged prevailing social norms much more than Selbourne's use of his family and traditional forms of seduction resolution to tie up the matter.

Conclusion

This is a truncated discussion of the contents of Selbourne and Dorothy's letters, but I plan to extend my analysis later.[41] Much more could be said about the letters, and what they reveal of the nature of people's understanding of intimacy and privacy in the context of modern love and traditional requirements around respect for kin and proper marriages. More could also be written about the role of Christianity and literacy in their relationship – I have glossed over the way in which letters formed the medium for a relationship parallel to Selbourne and Dorothy's physical one. My thinking in relation to the letters is to begin a conversation, begun already in the work of Thomas and Breckenridge, around the nature of 'modern' understandings of subjectivity and their limits, in the context of societies which have only partially moved away from more traditionally-defined understandings of social relationships.

The letters, however, are still part of a court case and the court case has a very different effect on Selbourne and Dorothy to that provided by the letters. The court record and its confinement of Selbourne and Dorothy to a brown envelope in the Cape Archive Depot deprived them of the selfhood they had attempted to construct through their letters. At the level of the case Selbourne and Dorothy

[38] Letter D.
[39] Letter H.
[40] Letter J.
[41] Including a consideration of their bi-lanuaged nature.

become emblematic of sets of colonial relationships centred on the negotiation of methods of local rule, and patriarchal power relations.

I would not, however, like to leave the case or the letters there. I have, though, one final thought, which should be read against some of my earlier comments about the nature of colonial court findings in favour of women. As Isabel Hofmeyr notes, pieces of paper can much more ephemeral than they seem, but the oral testimony in this case should be treated likewise. I haven't yet attempted to explain the discontinuities between the letters and the official record of events. Did or did not Dorothy and Selbourne have penetrative sex? If they did not, as Dr MacVicar's testimony would suggest, why did Dorothy think they had, or lie about what they had done? These seem to be the questions which spring most to mind in considering the case. The order of the evidence given, the nature of the ruling, - these would all seem to suggest that the problem in the case probably lies with Dorothy. The only reason I can make statements about Dorothy's confused testimony is because of Dr MacVicar's testimony. His is the record of her first visit to him having taken place on the 9 August 1932, whereas at one point in the transcript Dorothy says the visit took place at the end of August. The disparities in the tale – including the fact that Dorothy and Selbourne had never had penetrative sex – can be resolved if Dr MacVicar is seen to be the source of misdirection instead of Dorothy. If Dr MacVicar lied about the date of Dorothy's first visit and the state of her hymen, the conflicting testimony is resolved. Even at a distance of nearly 100 years, assumptions about male voices and their integrity still intervene in our consideration of the record. What Thomas McClendon forgot to say is that we still read court records through our current prejudices – mine included – and this, as much as the fact that some witnesses must be lying, helps to determine how we use them.