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XHOSA LAW OF PERSONS.

J. van Tromp

[1941]

Thesis approved for the Degree of Doctor of  
Laws in the University of Stellenbosch.



Promotor: Professor Dr. F.J. Schoeman.

I humbly dedicate this work to my parents  
and sister Mimie for what they did for me.



"It is impossible I think to govern people satisfactorily without knowing their customs and modes of thought; magistrates who do not possess or soon acquire a knowledge of these, are dangerous persons to be entrusted with the charge of native populations. If you do decide to touch the evil at all, it must be touched judiciously and with a firm hand."

Sir Theophilus Shepstone, K.C.M.G.

Reply to Question 593:

Report of Commission on Native Laws and Customs, 1883.

## INTRODUCTION.

"I can't imagine a greater difficulty than a man appointed to a magistracy in the Transkei would find himself in, having to administer laws which he knows little or nothing about, and regarding which he has no special means at hand of acquiring information." <sup>1</sup>.

This work is based on verified information gathered from among the amaXhosa both in the Transkeian and Ciskeian Territories, and cognate tribes. For more than eighteen months the writer lived in close contact with the amaXhosa, endeavouring to see and understand their laws, modes of life and social institutions as these are seen and understood by the amaXhosa themselves.

The method followed was to go to the villages of each district and to stay there for some weeks at a time. During this period an endeavour was made to make contact with reliable informants who are well versed in the laws and social institutions of the amaXhosa. When interviewing informants, mostly old and experienced men but also old women, I listened, observed and questioned them in their own language after they had had an opportunity of telling me everything they could think of and knew about a custom. This method proved to be the best to obtain reliable evidence without forcing one's own ideas about a subject on the informants.

The author was also fortunate in having been able to attend many ceremonies like the circumcision, the intonjane (initiation of girls), weddings, sacrificing to the ancestral spirits, also to sit and listen to and help to decide and settle disputes in the Chiefs' Courts.

In the study of Native Law, the major difficulty which confronts the student is the lack of a suitable and scientific handbook .....

<sup>1</sup>. Words of Sir Theophilus Shepstone, K.C.M.G.:  
Reply to Question 863: Report of Commission on Native  
Laws and Customs, 1883.

handbook on the Nguni. The only works on Native Law are Whitfield's: South African Native Law, and Schapera's: Tswana Laws and Customs, which is a praiseworthy work; but no recognised work on Xhosa Law has as yet been written.

Whitfield's book (of which I made much use), though an invaluable book of reference for the practitioner, is nevertheless unsuited to the student. For, a student of Native Law does not require a book of judicial decisions, many decided on ill-understood legal principles, other decisions again based on rules and principles of Roman Dutch Law, while other decisions again are so conflicting that it makes his study too complicated a burden rather than an interesting scientific study.

Simplicity of well-defined legal principles is the main feature of Xhosa Law. Being an unwritten code, every member, especially the males, of the tribe is from an early age coached in the understanding, appreciation and application of these principles which bind together both families and tribe, and which preserve peace and harmony among the members of the tribe. The smooth running of the tribal machinery was and still is, dependant upon the observance of these legal principles.

This work is intended to be a re-statement of law and not a Codification of Xhosa legal principles. It is endeavoured to shew that Xhosa Law is a system of living and well demarcated principles.

A main characteristic of Law is its elasticity. Now it is clear that codification brings about rigidity in a legal system and kills its elasticity. A re-statement like this, on the other hand, of the legal principles, secures and preserves that elasticity.

Native Law, because of its "primitive" character and the uncertainty among Europeans with regard to its legal principles together with the fact that these legal principles are very often ill-understood, is unfit for codification.

A re-statement, to my mind, on the other hand, brings about greater certainty and provides opportunity for correction and ....

and adjustment. Such a system acts as a guide to those who are entrusted with the administration of Native Law without laying down hard and fast rules which are dangerous to a system of "primitive" law.

This work is also an endeavour to reproduce Xhosa legal principles as understood by the amaXhosa, untainted by ideas and conceptions peculiar to Roman Dutch Law or English Law. As a product of the amaXhosa it is here reproduced, re-stated, for the benefit of the amaXhosa in particular, and for the sake of justice and a better understanding in general. For, justice can and should be obtained wherever possible, by the application of Xhosa legal principles without taking refuge to Roman Dutch Law legal principles. The latter are not only foreign to the amaXhosa but are also in many instances unfit to be applied in Xhosa cases and in fact inflict a hardship on them.

By applying their own legal principles the amaXhosa will show a renewed interest in and respect for their Laws and Customs and feel more satisfied with the administration of justice. This will bring about a better spirit of co-operation between the administrator and the administrated.



ACKNOWLEDGMENT.

It is impossible to mention all those to whom I am indebted, but I wish to acknowledge the advice afforded me by Professor Dr. W.M.R. Malherbe, Dean of the Faculty of Law at the University of Stellenbosch. Having heard that I come from the Transkeian Territories and could speak Xhosa, he strongly advised me to study Bantu Languages in conjunction with my Law studies.

Through his far-sightedness and initiative my Alma Mater through my Promoter, Professor P.J. Schoeman, in 1937 took the lead and started a two-year course in Bantu Law.

Again my Promoter and Professor Malherbe encouraged me to study Bantu Law which I did for two years. This was the impetus to this work.

I would thank my Promoter, Professor Schoeman for guidance in my research work. Being himself a keen student of African studies, and one who knows the Bantu, he was able to render me much assistance and was a source of inspiration.

Much gratitude is owed to Professor P.D. Holloman for his useful and greatly appreciated guidance and criticism.

I am also indebted to the Secretary for Native Affairs, Dr. H. van Warmelo; Government Ethnologist for useful advice, the Chief Magistrate (Mr. R. Fyfe King) of the United Transkeian Territories, and his Native Commissioners; and the Chief Native Commissioner (Mr. C.L. Barnett) of the Ciskeian Territories with his Native Commissioners for facilitating my work among the Bantu people.

I also wish to thank all these Chiefs, headmen, councillors and old men (amaxhegu) who in a spirit of trust so willingly entrusted their legal principles to me, and enabled me to complete this work. It is hoped that they and their people will benefit as a result hereof.

Lastly, I would thank the Inter-University Committee for financial support.

BELLVILLE,  
CAPE PROVINCE,  
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*J. van Tonge B.A. LL.B.*

## CHAPTER 1.

### A. GENERAL REMARKS:-

A human being in Xhosa Law is termed umntu. This term carries no juridical significance and is applied in a special sense to any human being surviving its birth.

If still-born or deceased before its umbilical cord (imfane) has been cut off, a child is not considered to have an umntu (see Chapter V. General).

An umntu is sometimes referred to as an inja, a dog, to show the relationship of legal dependency existing between father and child, or between Chief and subject. The word inja is used to denote both the responsibility of the father for the torts or misdemeanours of his child, and the lack of capacity of the child to acquire and maintain rights for itself. (Inja yakho, i bambela wena (inja i bambela umniniwe): the dog catches for its master). When used of the relations between chief and subject, it denotes the power of the Chief over his subject.

The term umntu is not the same as the term person in Roman Dutch Law. A similar term conveying the significance of a human being possessed of legal rights, does not exist in Xhosa Law, no more than the conception, familiar to Roman Dutch Law, that the status of a legal person attaches to a human being at, and even before birth. According to Xhosa legal conceptions a surviving child is only potentially a bearer of rights and obligations.

A human being, umntu, only gradually acquires the status of a person according to his development in life.

According to Xhosa Law there are two stages or circumstances in the life of a person which mark off his legal status.

These stages are :

- (1) When he has reached the age of puberty, and undergoes the initiation ceremony (ukwaluka kwa makwenkwe);
- (11) Marriage.

These two stages <sup>Cover</sup> represent three periods: from birth to initiation; .....

initiation; from initiation to marriage; from marriage onwards, as will be described below.

#### B. DIFFERENTIATION OF LEGAL STATUS ACCORDING TO AGE:

Before we describe how the legal status of a human being increases according to his development, it is necessary to note that under Proclamation 112 of 1879, Section 39, "All persons, male or female, when they shall attain, or who have attained, the full age of twenty-one years, shall be deemed to have attained the legal age of majority." This is not so in Xhosa Law. The idea of majority and minority as being dependant on the attainment of a certain number of years is foreign to the Xhosa mind. Where I nevertheless use the terms minority and majority, I do so in the sense in which the ideas are understood in Xhosa Law and not in Roman Dutch Law.

1. The first period is from birth to initiation and may be divided into two stages :

- (a) from birth to the time when he is capable of herding the cattle, and
- (b) from the cattle herding stage to initiation.

(a) A boy is granted more freedom than a girl and is allowed to go out into the veld and play about with other boys of more or less his own age.

From birth to about six or seven years, that is when he begins to herd, a boy is not considered to have "eyes to see", that is, to do anything wrong: "A yi ka tungululi"<sup>1)</sup>, he has not had his eyes opened. He cannot distinguish between <sup>right</sup> good and <sup>wrong</sup> evil nor can he see his danger. If he should commit a wrong e.g. allowing cattle to stray into the lands, or burning the veld, he is punished by the injured party or his parents and the matter is <sup>to settle</sup> over. Where the mischief results in damage, the father or lawful guardian ....

Note 1) "Ukutungulula" is a word indicating a pup when it begins to open its eyes.



guardian of the child is not responsible: "A yi ka tungululi." But, the father or lawful guardian may, in order to preserve friendship and good relations, help to restore what has been damaged by his inja, child. If a man passing by sees boys doing mischief, he is at liberty to administer corporal punishment and he himself (the man) incurs no liability for administering the punishment to the child of another man.

- (b) The boy has an enhanced social status from the cattle-herding stage to initiation. He is now considered to have more experience and better judgment, and is allowed to herd cattle and milk the cows. He has to do light jobs at the kraal (umzi), and help with the cultivation of the lands. His legal status, however, has not increased. From birth to the cattle-herding stage, and from this stage to initiation, the boy remains an inkwenkwe, a boy, and is in no way responsible for his actions though he may be punished by anyone who finds him committing a wrong. He has no hearing in any court; he cannot enter into a contract/and has no legal capacity/. If he receives anything, by labour or otherwise, it falls to the household property of the hut, indlu (house) of which he is an inmate/and is controlled by his father./ He cannot be betrothed or married for as a rule only persons who have undergone the initiation ceremony are considered ripe for marriage. The initiation is the ritual transition from boyhood (ubukwenkwe) to manhood (ubuḁoda). During the seclusion period the initiates, abakhwetha, are treated like iinyamezane, wild animals. They are not considered to be abantu, human beings, with a status or a say. Corporal punishment is common but they have no redress. They are as yet not responsible for their actions and are guarded by one or more inkankatha, (a kind of male nurse), representing the fathers of the initiates. The fathers and not the inkankatha accept responsibility for

the .....



the actions of the initiates. The amankankatha nurse the wounds of the boys.

2. On initiation the boy acquires the status of a <sup>MAN</sup> person. His eyes are opened and now that he has undergone the initiation ceremony he is accepted as an indoda, a man. He now has a legal capacity. / He can accept presents which belong to him though these may be controlled by his father. He is ripe for marriage, can be betrothed and can enter into a <sup>valid</sup> binding marriage contract.

On the day he comes out of the isutu (itonto, ipempe) or seclusion hut, while at the umzi of the umnin' umzi (owner of the seclusion hut), the act or ceremony of ukosoka (presenting gifts), also takes place. This is a ceremony in which his father, family and friends give him presents indicating his status, for these now become his own. Participation in the final ceremony is an essential for attaining the status of an indoda. For only then will he be an indoda in the true sense of the word. This became clear to me in a case where an umkhwetha was charged with theft. He was imprisoned <sup>2)</sup> and felt very much distressed and concerned about the matter, because he would not be able to attend the ceremonies on the final day, and this would, I was emphatically assured, affect his status. He could not rightly be considered an indoda although he had undergone all the previous ceremonies in connection with the initiation ceremony.

At the ukusoka ceremony, everyone who wishes to give him a present gets up, congratulates him on becoming an indoda and then presents him with a beast, a pig, a fowl, a blanket or the like.

The short period from the time the abakhwetha leave the isutu to the time they enter marriage, is an important one. They are called amarwala; sometimes abafana, meaning adolescents or young men. They can mix freely with the opposite sex, have sexual intercourse with amadikazi, loose women; and in fact, in this irwala-period plans for a marriage are being started. Marriage,

however, .....

Note 2) European Criminal Law is applicable to all persons in the Union, also to the Bantu.

however, is mainly a family affair and though the adolescent is allowed freedom in his choice, his father has a great say, especially with regard to the first wife he marries (vide Chapter 11). Though he has the status of a man he is still under the control of his father as long as he is considered an inmate of his father's umzi (see Chapter 11).

Through initiation he attains greater rights and privileges. He takes part in his family court or inkundla <sup>3)</sup> where he can, discreetly, question the parties. When needful he may act for his father. He can now be selected by the Chief for work, perhaps as an umsengi, one who milks and provides milk for the calabashes of the Chief. He may go to the Great Place (Komkulu) and attend the Chief's Court.

In social life he has a higher status. He can attend beer-drinks and feasts with other young men of more or less his own age. He will not be pushed aside at these feasts and be branded as a "kwedini" or child. To show the far reaching effect of initiation on the status of a male, the following example may be given:

I met a middle-aged native undergoing this rite. He was married and had children. (It is ~~however~~, not common for an uncircumcised man to marry and such males are not welcome sons-in-law. It is considered a disgrace). The reason why he underwent the ceremony, he told me, was because he was treated like a kwedini, child, by other amadoda, men. At beerdrinks or feasts he was pushed aside and told to go and enjoy himself with the amakwedini, boys.

Not only men look down upon an uninitiated male and treat him with contempt, but also women. And, for all this treatment, treatment amounting to insult, Xhosa Law affords no remedy.

Once he is circumcised and has undergone the initiation ceremony, he can also sacrifice to the ancestral spirits, isinyanya. For, only men, amadoda, can sacrifice and speak to the .....

Note <sup>3)</sup> This word implies both the courtyard and the court itself.

the ancestral spirits. He is now a potential kraalhead and may one day sacrifice for his children.

The amaXhosa even hold that an uncircumcised male - being a kwedini - cannot inherit. He must be treated as a minor. He cannot therefore succeed to the status and legal capacity of his father. The Courts probably would not uphold this view for they accept all persons of 21 years or more as majors, and will allow an uninitiated son to succeed his father, if he has reached the age of 21 years, or even before.

3. Marriage gives an initiated male the full status of membership of his umzi and tribe. He has a say in the family court as well as in the Chief's court. His word now carries more weight. His first wife having been sanctioned and lobolaed by his father, he may hereafter marry freely as many wives as he can afford to lobola. With the consent of his father he can build his own separate umzi, and thus become a kraalhead, umnin' umzi. The father is then no longer legally responsible, according to Xhosa Law, for the deeds of his son, but public opinion urges him to help his son in case of difficulty, and because he is his son's father, he sometimes pays the fine for his son. While the son remained in the umzi of his father, the latter was responsible. Now that the son has his own umzi he has full legal capacity and can acquire anything, and what he acquires he acquires for his umzi. He can enter into any contractual obligation and is responsible for his own acts and for those of his wife and children. For the legal relation between father and son, see Chapter V.

Age also influences the legal status of females though not to the extent that it does the status of men. Initiation brings about a change in the female's social status but not in her legal status. Marriage however, influences both her social and her legal status.

From birth to marriage a female has no legal status whatsoever; she is under the guardianship of her father or his lawful

heir .....



heir and successor. Because she is a minor and a female, she cannot inherit. No female can in Xhosa Law become heir (indlamafa) or succeed her father or husband, ~~the~~ in his estate.

Puberty, marked off by the intonjane ceremony, brings a change in the female's social status. After the age of puberty the girl is taken more notice of, has a higher social status, can do more work, can take part in feasts where women are concerned and can now be betrothed and married.

The intonjane ceremony is a kind of initiation similar in object to that of males. It is customary for girls to undergo this ceremony before marriage but a female may marry even if she has not undergone it and no stigma will cling to her or to any of her children, for neglecting it. [When she reaches puberty she enters the domain of womanhood (ubufazi) and is now marriageable and ready to bear children.]

Xhosa Law sanctions the intonjane ceremony and in certain cases insists that it shall be performed, for it is believed that upon its proper performance will depend successful maternity and the health of the children. Should the girl not have undergone this ceremony before marriage and certain mishaps e.g. miscarriage (ukuphuma kwesisu), or the ill-health of the woman be ascribed to its non-performance, the father or lawful guardian of the woman is forced to take her back and put her through this ceremony at his own expense. In these circumstances the husband may also send his wife back to her people to put her through the ceremony and they may not refuse. Her family must support and maintain her and her baby, should she have one, while she is with them.

I attended an intonjane ceremony of two married women. One had had two miscarriages and the other was continuously ailing. On the evidence of the igqira, doctor, the court of the women's family decided that these women should come back to undergo the ceremony. The one had a baby whom she took with her to her people's umzi where it was also cared for.

It is well to note here that under Act No. 16 of 1891, Intonnjane Dances are prohibited. The screening of the girl (woman).....

(woman) however, is not mentioned in this act and it may be taken that the legislature intended to abolish the accompanying dances only. To abolish the intonjane ceremony itself would be bad policy and in direct conflict with Xhosa Law.

Marriage changes the status of a woman, both socially and legally. She is now more respected and has <sup>more</sup> greater authority and say among women in the affairs of the family. She has certain definite domestic rights and privileges. She is given and holds a piece of land to cultivate and to produce crops for her indlu. Until marriage she has <sup>proprietorship</sup> no legal capacity and <sup>can</sup> could not acquire anything for herself. After marriage, though she is under the guardianship of her husband, she has a <sup>proprietary</sup> legal capacity which, though limited, makes it possible for her, inter alia, to <sup>own</sup> possess the ubulunga beast (inkomo yobulunga) and those cattle given to her by her family at the time of her marriage (see Chapter IV. C. 1(1) and (11)), though she must consult her husband if she wishes to alienate them. She can also acquire household property (see Chapter IV.C. I).

When a woman has reached the menopause, she is considered in many respects like a man, indoda. This change affects mainly her social status (and not her legal status.) She can now sit in the inkundla of her husband. (This she could previously not have done). She may freely speak to older men; she has a say in the affairs of the umzi and her word is taken into consideration. She may now also go into and sweep that side of the indlu which is reserved for men, amadoda. Because of all this a woman at this age is sometimes referred to as an indoda.

Widows (on the other hand) seem to enjoy <sup>an even</sup> greater freedom. A widow has more say in the affairs of the umzi than she had during the <sup>life of her husband</sup> (time when she was married.) The older she is, the greater her say. She may express her opinion, which is sometimes sought by the new umnin' umzi who has succeeded her deceased husband, but her word cannot override his. Should a widow wish to return to her .....

her own people, she is at liberty to do so, but for dissolution of the marriage part of the lobola cattle must be returned to the deceased husband's umzi (see Chapter VI). When this is done she is free and again reverts to the guardianship of her father or his lawful heir and successor. She then is an inkagana ya se khaya apha, a woman of her father's umzi. If she remains at the umzi of her deceased husband, the new umnin' umzi must care for her and maintain her. She then falls under his guardianship. It is sometimes rightly asserted that a widow has great say in the affairs of the umzi.

### C. DIFFERENTIATION OF THE LEGAL STATUS ACCORDING TO SEX.

The disabilities of women on account of their sex will be treated in this sub-section. In no sense are men and women of the same status in Xhosa Law. As has been said above, a male becomes a major but a female remains a minor and remains under perpetual guardianship. Because she is a female she cannot inherit or become heir or successor to her father, husband or any other male. Females in general take no part in the political or administrative life of the tribe. They cannot become councillors or have a seat in any court. But Sarili, Paramount Chief of the amaXhosa, created a precedent <sup>to his contrary</sup> between 1858 and 1865, by appointing his hunch-backed daughter Nggqoloza chieftainness and ruler over a portion of the tribe. He furnished her with councillors (amaphakathi) and said she should be looked upon as an indoda. The tribe accepted Sarili's ruling.

Though they do not have the same status and cannot be placed on a par with men, females are not treated as chattles. They are protected and girls are occasionally examined to see whether they are still intact.

Because of her sex the female has to observe certain rules and restrictions. She may not go into the ubuhlanti, cattle kraal, of her husband. While an umtshakazi, newly married wife, she must not walk through the inkundla but must keep close to the

izindlu .....



izindlu (huts). If she commits a breach of this custom she will be termed a bad woman and the public will turn against her. She must hlonipha, pay reverence to, her father-in-law and all male members related to her husband in the patrilineal line (see Chapter IV. B (1)(c)). If she disobeys this rule she may be sent home and the marriage may be dissolved. It is true, the husband also hloniphaes his mother-in-law but the rule in his case is not so strictly observed (see Chapter IV. B(1)(c)).

<sup>Some</sup> Certain work is done by women only; other work, again, is reserved for men. The division between the work of men and of women is a social affair and has no legal sanction. The female members of the umzi must gather the firewood; they must draw water and prepare the food for the men and the children. They must see that the huts are kept in order. Cutting grass for thatching and thatching itself, are the work of the female sex. But at present men may be seen helping the women thatch. Women have to cultivate the lands, but this too is now largely done by men, except the hoeing (ukuhlagula). Beer is made by the woman.

Men on the other hand are the warriors and hunters. They herd the cattle and milk the cows for no woman is allowed to do this. If women work with the cows they believe that some evil will befall them. Men slaughter the animals and also sacrifice to the izinyanya or ancestral spirits, though women may take part in the feasts - when not menstruating or pregnant.

On account of her sex a Xhosa female cannot sue or be sued unassisted. But the Native Appeal Court has decided otherwise. They have accepted the view that because an unmarried girl has no right of action under Native Law, she has an action under Common Law. The Courts have gone so far as to allow a woman an action for the restoration of a temporary ubulunga beast (see Chapter III and Chapter IV. C 1(1)); and it has furthermore been decided that the father of the woman has no right to sue in his own name for this temporary ubulunga beast if it has been wrongfully taken possession ....

possession of <sup>1</sup> (in spite of the fact that this temporary ubulunga beast is the property of the woman's own father, according to Xhosa Law; the woman only has possession).

Now the view held by the Native Appeal Court is contrary to Xhosa Law for a woman cannot sue or be sued without the aid of her father, husband or lawful guardian (see Chapter IV).

In the Xhosa Law a Widow, if she remains at the umzi of her deceased husband, [as was said above,] is under the guardianship of the lawful heir and successor of the deceased husband. [Being a female she also cannot freely sue or be sued unassisted.] But here too our Courts have created a peculiar position. The Court has decided that every widow has a right <sup>to sue</sup> of action against <sup>in order to</sup> the guardian of her deceased husband's estate to protect herself and the rights of her children <sup>2</sup>. The principle expressed here that a widow has a right of redress in her own name against the guardian as above, is not contrary to Xhosa Law; for she may complain to the members of the deceased husband's family, or even to the headman. But, she can not <sup>have to</sup> (in court) sue the guardian unassisted; she is a female, and a male, either one of the deceased husband's relatives or the headman will appear on her behalf.

A widow may, according to the Native Appeal Court, sue the heir of her deceased husband for maintenance and support in cases where he neglects his duty. In *Nosentyi vs. Makonza* (1900) N. A.C. 37, it was said that every widow has a right <sup>to sue</sup> of action unassisted against the guardian of her late husband's estate to protect herself and her children from improper administration by the heir <sup>3</sup>. But even in this case a woman would be protected in Xhosa Law; though here too, the principle as laid down in this case is not altogether contrary to the spirit of Xhosa Law, which allows the woman to complain directly to the guardian, or to her husband's .....

1. *M. Dyanti vs. P. Diniso* (1921) N.A.C. 365.

2. *Heveliti vs. Ntwayi* (1911) N.A.C. 170.

3. See also: *Noseyi vs. S. Gobozena* (Henkel) 124, where it is said that a widow has the right to maintain the interests of her children in the property of her late husband and she is therefore entitled to be heard.



husband's brothers who will take up the case, and finally the headman or the Chief who will see that justice prevails. To say therefore that a woman has no remedy against the guardian if she is not afforded an action unassisted, does not hold good in Xhosa Law.

The Courts have gone further and have given the female sex the same status and rights under certain conditions as an indoda, man. The Court has for instance accepted and established the right of a woman to sue for the return of her husband's property which has been spoliated, and also to interplead for her husband's property attached under a writ when the husband is absent "and the wife has been left in charge of the kraal ...."4.

This is contrary to Xhosa Law according to which a woman can never be in the position of an umnin'umzi, not even temporarily. A woman cannot sue for any property belonging, to her husband, because, being a female, she cannot be "curator bonis" of her husband's property or his estate, nor of the property of her child. The husband always makes provision in case he goes away. If he <sup>not</sup> has/done so then his nearest male relative or the headman is the person who will conduct the case.

The passage quoted from the above case goes on: "..... but the right of a woman to sue for the property belonging to her husband and which has never been in his possession has never been recognised by this Court". This case seems to be <sup>self -</sup>contradictory (in itself.) Surely this is the property of the husband, and if so, why in the light of what has been said in this case, may the woman not sue?

#### D. DIFFERENTIATION OF THE LEGAL STATUS ACCORDING TO RANK.

Rank is <sup>acquired</sup> achieved by birth (and also by) appointment or wealth. and affects the social status of a Xhosa, but it is only the rank by birth or appointment that plays an important part in the legal life .....

4. Gxwalintloko Mpahlwa vs. Nolam Mowaba (1919) N.A.C. 302.

life of the amaXhosa.

There are roughly three ranks distinguishable among the amaXhosa: They are formed by the Paramount Chief and his family; the minor (petty) chiefs, and lastly the common people (abantu abamnyama). The Paramount Chief, and the minor chiefs to a lesser degree, have certain rights and privileges which commoners do not possess.

It may be stated that slaves and other aboriginal inhabitants or subjected tribes generally, no longer form a separate <sup>class</sup> rank among the amaXhosa.

The Paramount Chief represents the whole tribe. "All blood belongs to the Chief"; and because of this he receives the izizi or blood money: a fine payable by a person who has physically injured or killed another. The injured party, or his family in the case of manslaughter, has no claim to compensation but the Chief (Kumkani, inkosi enkulu), may, and usually does, give the injured party or his family a portion of the fine.

This view was expressed and accepted by the Native Appeal Courts: "Now according to Native Custom the person of each individual was the property of the Chief and any injury to the person or character of such individual was an offence against the Chief, punishable, as a crime, by fine. The Chief might as an act of grace, award a portion of the fine to the injured person, who however, had no right of action for damages 5".

Now the word or term "property" used by the Court in this <sup>case</sup> / is incorrect for it is not applicable to human beings in Xhosa Law. A human being can never be a piece of property.

So also is the term "character" wrongly inserted in "... any injury to the person or character or such individual....." A person, if he is the umnin' umzi, or if he is the guardian of a female, can always institute an action when his own character or reputation, or the character or reputation of his daughter  
or .....

or wife has been injured. The fine goes to him and not to the Chief. The Chief has no legal right to such a fine. But if the case is heard by the Chief's Court the injured party will always give the Chief a beast or two out of the fine he has received. It is only in cases of physical injury, or manslaughter, where blood has been spilt, that the Chief has a claim.

(a) Is the Chief above Law and Order?

The Chief in spite of his status, does not possess arbitrary power of life and death over his subjects | or their possessions. | He cannot order the death of a person unless that person has been tried, or he has consulted his councillors (amaphakathi) and given them some proof of the person's dangerous character. The Chief will then insist that he would be acting in the interests of the tribe to have this person removed. The Chief respects the person and property of his subjects. He is bound by Xhosa customary law, and in maintaining this, he follows the advice of his councillors, and he is checked by his councillors and public opinion.

The fear that he may lose some of his followers has a great effect on the actions of a Chief. If he should commit a crime or a breach resented by his people, his punishment may be tribal disintegration. His dissatisfied subjects may leave him and join the ranks of another Chief. This actually is what happened to a portion of Ngqika's tribe when Ngqika took Tutula, the wife of his uncle Ndlambe, as his wife. For, being the wife of his uncle, she was considered to be his "mother", because an uncle is considered also to be a "father". The subjects of a Chief may even resort to civil war (see Chapter III. C. I(a)).

If the sons of the Chief commit a crime, they will be rebuked by the Chief and the older Councillors. The sons may be found guilty but the imposing of punishment in their case is difficult. Should they not be rehabilitated, the



people would refuse, when time came, to acknowledge them as Chiefs and rulers.

(b) Offences against the Chief:-

Because of his rank an offence against the Chief is relatively greater and more serious than a similar offence against a commoner, umntu umnyama. If the Chief or one of his family is assaulted or insulted the guilty party is liable to have his property confiscated or he may even be killed.

(c) Marriage of the Chief :-

The Chief may marry any woman, and as many as he can afford to lobola (concubines who are not lobolaled, excepted), but the Great Wife must be of royal blood (u ne gazi) and sanctioned by the people (see Chapter IV. A 3(b)). Because of his rank, his people will contribute towards the ikhazi to lobola the Great Wife. He marries her in his capacity as representative of the tribe. She is the umfazi wesizwe, the woman of the land; sometimes she is called "the mother of the tribe". The Chief gives more lobola for a woman than a commoner does.

A commoner may marry a girl of royal blood but has to give a greater ikhazi. It sometimes happens that a Chief sends one of his daughters by a minor wife to be married to a rich commoner who may not refuse and thereby slight the Chief, for he may take revenge and eat-up the rich commoner.

E. TERMINATION OF A PERSON'S LEGAL STATUS.

The existence of a human being as a person is terminated in Xhosa Law:

- (I) by death, and
  - (II) by excommunication; but not by
  - (III) long absence.
- (I) Death terminates the existence of a person (in law.) He may be considered to continue to exist for religious purposes if he was the head of a family, because he will then be an inyanya, spirit, that forms a link between the living and the Great Power and other izinyanya, but this does not interest us at present. The question whether a deceased man is considered to exist ...

exist for certain matrimonial customs like ukungena <sup>6)</sup>, does not arise, here, for this is not a Xhosa custom and is not practised by the amaXhosa, who consider it to be incest, umbulo, therefore a disgrace and punishable by fine.

{ When a person dies, especially in the case of a male, it must be reported by his family to the nearest isibonda (headman) or inkosi (petty or minor chief) who in turn will report the matter to the Chief at the Great Place. The Chief must know when he loses a member of his tribe. There is as yet no registration of deaths among the amaXhosa.

(II) A person ceases to exist for his own family and tribe when he is excommunicated, ukucithwa, by his father or his lawful guardian. If a son, after repeated warnings and chastisement from his father or lawful guardian, insists upon committing torts, misbehaving himself, disobeying the authority of his father or lawful guardian, publicly degrading his family after repeated remonstrations, and becoming a public danger, causing heavy loss to his family as a whole and to his father in particular, he may be excommunicated by adopting the proper and recognised procedure and thus be placed in the same position as if he were dead or had never existed at all.

It is also asserted that if a son goes away, never works for his parents, neglects them and refuses to come back, his father may also "wash off" (ukuhlamba) his son.

The procedure for the father or lawful guardian to adopt is to discuss the whole question with his own family and in the family court. If the family court decides that the son has had opportunity enough to reform and that he is <sup>evidently</sup> certainly becoming too heavy a burden and a dangerous subject, the father will report the decision to the Chief who has the final say. Should the Chief.....

Note 6) This custom is practised by the amaZulu, amaMponda and cognate tribes, and means "to go in unto". Should a man die his widow will be ngenaed (gone in unto) by the eldest living brother, and the children born will be the children of the deceased husband of the widow. This custom is anathema to the amaXhosa.

Chief think the son unworthy of any further care and protection and confirm the decision of the family court, the son is told to leave the tribal boundaries, or, if he refuses, he is driven away by force over the boundaries of the tribe: He is considered non-existent for his family and tribe, and forfeits everything he may have possessed.

It sometimes happens that an excommunicated son comes back and begs for pardon from his father or lawful guardian. If he is sincere and truly wishes to reform, he is again taken into the family circle by the consent of his father and the Chief. If he was the eldest son and general heir and successor to his father before he was excommunicated, he will, now that he has come back and been accepted, still be the heir and successor to his father. Should he come back only after the death of his father, he will, some say, succeed his deceased father in spite of the fact that he was excommunicated. This hardly seems possible. The usual procedure for him is to apply to the Chief and to his father during the lifetime of the latter to rescind the order of excommunication. Whether he will, after the death of his father, be again taken into the family circle and become successor to his father, will depend upon circumstances and upon the decision of the Chief's Court.

(III) The fact that a person has disappeared and is not heard of for a long period, is not considered to terminate the existence of that person and to induce his family or the Chief to act as if the man were dead. If he is unmarried there is little to worry about. If on the other hand he is married and has a family, whether he lives within the precincts of his father's umzi or has established an umzi for himself with the consent of his father, and he disappears for a long period, his rights and obligations are temporarily transferred according to Xhosa Law to his lawful heir and successor until such time as he comes back or his family hears of his death and has proof thereof.

Should the man who has disappeared have no heir or next of

kin .....



kin in the male line, the Chief will appoint a fit and proper person to act in the absence of the person who has so disappeared. Unless the man is proved to be dead his property may not be disposed of except in the case of necessity, as, for example, to maintain and support his family.

But such cases are very uncommon among the amaXhosa because if a person disappears his whereabouts are very soon found out.

<sup>It</sup> <sup>but</sup> Nor is it unusual for a man to go away for many years in order to work, leaving everything and everyone behind, and then unexpectedly to return after the lapse of many years. As soon as he returns he automatically takes charge of his property and effects and should there be a dispute, the Chief decides.

## CHAPTER II.

### RELATIONS BETWEEN MARRIAGEABLE YOUNG PEOPLE.

#### I. GENERAL:

Marriageable youths are males who have undergone the initiation ceremony and females who have undergone the intonjane ceremony. But it happens that males who have not undergone the initiation ceremony do marry. Neither is it essential that females should have undergone the intonjane ceremony before they marry. (see Chapter I(b)).

The stage of life after initiation, that is the ikrwala stage, is actually the period for courting. This is especially so in the case of young men. Often premarital relations between young men and girls end in marriages. The young man if he likes a particular girl, may, indirectly, bring this to the notice of his father. Should his father approve of the girl, preparatory dealings between the two families follow, and if the family of the girl is willing, she will marry the man she has had as a lover. The amaXhosa are well aware that love matches are the most desirable of marriages.

If the girl does not like the young man who pays her attentions, she can refuse to accompany him to feasts or dances, or to allow him to make love to her.

Relations between young people start even before they have undergone the initiation ceremonies. It is common for females to have lovers before they have undergone the intonjane ceremony. But it is very rare for a girl to have a lover before she has reached the age of puberty and has started to menstruate. After the age of puberty she is considered to be marriageable and can therefore have a lover. Her relations with young men are then also more open and she mixes more freely with the opposite sex. A girl may, however, allow only young men not related to her, to make love to her.

#### II. OPPORTUNITIES FOR RELATIONS BETWEEN MARRIAGEABLE YOUTH:

Marriageable young men and girls mix freely at certain feasts and ceremonies. It is at such places that they really

meet .....



meet and come to know one another.

At the intonjane feast and dance young men and girls from other kraals, imizi, gather at the umzi, of the intonjane and here they indulge in love-making. The same thing happens when there is a marriage, umtshato, or dances which are frequently held for young people at different imizi.

But, not only at dances, ceremonies and feasts do the marriageable young people meet and metsha, make love. If a young man meets a girl he knows, in the veld or along the road, they may make love if she is willing. This they will do in some secluded spot.

In rare cases a young man may visit the umzi of a young girl he has met, and when he has the opportunity he may make love to her. A beer drink at this umzi will afford him the necessary opportunity.

### III. CODE OF BEHAVIOUR OF MARRIAGEABLE YOUTH:

All marriageable youth must observe a certain code of behaviour, and if they should commit a breach of this code, it brings them into conflict with society. Therefore they must guard their speech in the presence of the opposite sex; vulgar expressions in company, especially when females are present, and free talk about sex and sexual matters are not tolerated. Not only in speech but also in conduct they are required to adhere to a certain code of behaviour.

Although it is not publicly advocated, adolescent young men are free to have external sexual intercourse (metsha) with the opposite sex. While he is in the isutu (seclusion hut) the adolescent is taught practically everything and anything in connection with sex. He is usually urged to have intercourse with loose women, amadikazi, and also with prostitutes, amahulokazi, so as to "wash off" the ifutha or white clay, and therefore the signs of boyhood. That is why during the ikrwala period (the period after initiation and before marriage a young man tries his best to have intercourse with such loose women ....

women.

During this period he also makes love to girls, intombi, but he is in no way bound to make love to one girl only, or to have only one lover. Even if he has a lover he may have relations with other girls or women and his lover usually makes no objection.

But a young man may not have full sexual intercourse <sup>7)</sup> with a virgin (intombi). It is prohibited on pain of a fine, being considered as a serious misdeed. He may however, metsha with the intombi. (see Ukumetsha, V. below.)

A marriageable young girl may have a lover; she usually has only one. Usually she accompanies her sweetheart to the feasts, dances and ceremonies where they also make love. She may allow him to make love to her whenever they meet. But it will be in a secluded spot so that no one knows or sees.

It is however, not expected of the girl to allow full sexual intercourse. She must remain a virgin while at her father's umzi until such time as she marries. / She must remain intact. / If a man deflowers or makes her pregnant her family will have a case against the man, for, apart from the insult suffered by her father and family, her marriageable value is thereby depreciated and her chances of marriage have become less.

#### IV. SUPERVISION OF PARENTS IN CONNECTION WITH RELATIONS BETWEEN MARRIAGEABLE YOUNG PEOPLE:

Parental supervision in the case of boys is generally limited to an occasional warning by a father to his son to be careful; and should they not like the girls with whom their sons mix they will tell them not to be too intimate with such girls lest they should later want to marry them. But on the whole the family of the boys impose no restrictions on their relations .....

7) Usually - though erroneously - this is termed "seduction". Where I use the words: seduce, seduction, seducer, I use them not in the same sense as I would in writing Roman Dutch Law. I use these words to convey ideas peculiar to Nkomo Law. "Seducer", in Nkomo Law means that man who has misled an unmarried female (virgin).

relations with girls provided they are not relatives.

The supervision of girls is more strict and their family will warn them against young men that are not fancied by the family. After every feast, dance or ceremony, or otherwise at regular intervals if there are no such ceremonies, the girls of the umzi are examined by old and experienced women, to see whether they are still <sup>virgins</sup> intact, and if not, then to locate the "seducer". The girls are taken to a secluded spot near the umzi, made to lie on their backs and are then examined by the experienced women of the umzi. They are examined after every feast because it is generally known that the girls make love at feasts, dances and other ceremonies, and there may be a likelihood that they have been deflowered. For, if a girl is found to have been deflowered, the man with whom she metshaed will be held responsible unless he be able to prove his innocence. The word of the girl (see below) is taken to be the truth until the young man satisfactorily rebuts it.

In former times - but now no longer - when a girl was misled (seduced), the women of her umzi, usually those of the same age group, went, sometimes naked, to the umzi of the <sup>guilty</sup> man who had misled her, broke open the ubuhlanti (cattle kraal), and drove away cattle as compensation for the "seduction". This was because "seduction" was looked upon as a great stain on the women, more so on the class of unmarried women of the umzi; it was an unpardonable offence.

The chastity of the bride - in this restricted sense - is one of the major concerns of a marriage. The extent of the ikhazi <sup>8)</sup>, depends also upon whether the girl is still a virgin or not. If she is deflowered fewer lobola cattle will be given .....

Note 8). "Ikhazi" is the compensation, the number of cattle, while "ukulobola" means the handing over of the cattle the ikhazi and indicates the custom. See: Soga: The amaXhosa: Life and Customs, p. 277.

I prefer to use the Xhosa word "ikhazi" instead of dowry, bride price or bride wealth. These last three terms are equally bad and inappropriate and do not convey the true meaning of the term. We use "lobola" so why not "ikhazi".



given for her; and this means that her father and family suffer not only the insult (see III above), but they suffer also a material loss. But the status of the girl will also suffer; because the larger the ikhazi the better for the social status of the girl. To <sup>discourage</sup> prevent premarital intercourse between marriageable young people, Xhosa Law imposes a fine which varies according to whether the deflowered girl is a commoner or of royal blood (see VII below).

#### V. UKUMETSHA:

The most common and usual form of premarital intercourse between marriageable young people is "ukumetsha", which ~~actually~~ means to make love. (It is) an external sexual play between the thighs of the girl who is not supposed to lie on her back but on her side while the young man has his penis between her thighs. Full sexual intercourse does not take place but semen is emitted between the thighs of the girl by the man. Even this restricted form of intercourse however, sometimes causes a girl to become pregnant. 6.

This custom is indulged in at feasts and other ceremonies or parties. Sometimes when a man meets a girl alone he may also metsha. It is customary for two lovers to metsha but not only lovers metsha. A betrothed girl is expected to metsha only with her betrothed young man and not with others.

Ukumetsha, more often than not, takes place at night at some secluded spot where the feast or dance is in progress.

This custom has been practised from time immemorial and Xhosa Law makes no provision forbidding it. If he does not like the young man who pays his daughter attentions, a father may prohibit his daughter to accompany that young man to any feast, dance or ceremony. He may also prohibit his daughter to metsha under any circumstances whatsoever, not because

ukumetsha .....

6. J. Jarman vs. M. Blakfesi and B. Ncamile (1938) N.A.C. 94.

ukumetsha is not a recognised custom, but because he does not wish the man to marry his daughter and in order to prevent the possibility of his daughter's being deflowered by the man. The law of the amaXhosa however, affords the father of the girl no remedy whatsoever for ukumetsha with his daughter. Should he catch them in the act he may give the young man a thrashing but the courts will not entertain an action for "damages" for ukumetsha 7.

Soga: The amaXhosa: Life and Customs, on p. 131, inter alia, says about ukumetsha: "It is not, according to the Xosa idea, a custom, but isono (a sin), isigelo (a customary habit)."

Whitfield: South African Native Law, p. 405, condemns without reason, except from a European moral point of view, this custom and says: "This custom which is universally practised, is subverting the Natives both physically and morally." He goes on to say that this custom may be "further described as a form of fornication without sexual intercourse."

Soga, as well as some modern amaXhosa who condemn this custom, view it from the christian point of view and measure it according to European standards. They do this and find this custom to be immoral.

The same is true of Whitfield, who makes the groundless statement that ukumetsha is "subverting the Natives both physically and morally". (It hardly seems necessary to say that <sup>m</sup>medical opinion does not support Whitfield, as is revealed by Soga on p. 134, where he quotes from a letter by a well-known medical man who states that "no injury seems to result to health, as these people are, in the raw state, strong and vigorous and also prolific after marriage".

I have asked many amaXhosa people whether they hold the same view of Soga and Whitfield, and all of them disagreed with these

two .....

7. Qabazayo vs. Noose (2, N.A.C.) 7, expresses Xhosa Law.

two gentlemen. It is not an "isono" or "isigelo" but a well recognised custom which is not detrimental to them, either physically or morally.

#### VI. THE UPHUNDLO CUSTOM:

This custom was akin to ukumetsha but differs from ukumetsha in this respect that it was restricted to Chiefs and their followers when they attended a feast or ceremony like the intonjane. The marriageable girls attending the feast, no matter from what clan, or whether they were betrothed or not, were assembled by the order of the Chief, and distributed by him among his followers, he taking anyone he wished. The Chief and his followers then metshad with these girls and usually slept with them for the night. If a man deflowered a virgin or made her pregnant, he was fined, the fine going to her people. Very often the guilty man married the girl.

The custom of ukuphundla was widely practised towards the end of the eighteenth and at the beginning of the nineteenth century. It disappeared among the amaRharhabe during the reign of Ngqika (who died in about 1829), but was revived during the reign of Sandile in about 1840. How long it was practised or when it died out among the other amaXhosa tribes is not known. To-day this practice has fallen into disuse.

This custom was also practised at the Great Place when intimate friends of the Chief visited the Great Place. The amaphakathi when at the Great Place often indulged in this practice for they did not bring their wives with them. Very often these girls if deflowered were kept at the Great Place as concubines of the Chief who handed to their respective parents certain cattle, not as lobola, but as a sort of compensation; these cattle were not known as ikhazi but as "ikebe" which means a compensation given for the temporary use of a woman or concubine. Any children these women gave birth to were considered to be the children of the Chief. But, not being the wives of the Chief (his abafazi), they could leave whenever they so wished (vide Chapter VIII).

#### VII. ....



# VII. (PROCEDURE AND LEGAL CONSEQUENCES OF DEFLORATION:

If upon examination the girl is found to have been deflowered, her father is informed, and she is forced to <sup>name</sup> mention the man responsible. Should the girl be reluctant to do so, her relatives sometimes force her by inflicting corporal punishment, and she will ultimately give in. Her people do, moreover, know the young man with whom she goes to feasts, dances and ceremonies. It is however, unusual for an unmarried girl to conceal the name of the man who has deflowered her or who has made her pregnant, for such an act is considered disgraceful not only to herself but also to her offspring.

As a matter of evidence the word of the girl weighs heavily among the amaXhosa. 8. She is thoroughly cross-examined in the court and her evidence is taken as the truth unless the young man can produce evidence exculpating himself. If the father or other male relative can produce a blanket or some property of the young man previously taken when he found them in the act of ukumetsha, he can now use that as intlonze (proof) of the "seduction".

The father of the girl, once the latter has mentioned the man (or the man is known), sends two men to the father of the young man to tell him that his son has deflowered the girl. It is customary for the father of the girl not to go himself but to send two men who may afterwards be witnesses in the case.

If the young man admits to his own father that he has "seduced" the girl, the father pays the fine. 9. In former times - but no longer now - the penalty for defloration without pregnancy .....

8. But see: E. Makuto vs. J. Pihla (1936) N.A.C. where the opposite, but according to Xhosa Law, the wrong view was expressed.

9. But see: Section 38 of Proclamation 110 of 1879; and also Daniso vs. Makinana (1, N.A.C.) 86.

pregnancy was only one head of cattle, called inkomo yokhona, a beast for deflowering the girl 9). (Vide Chapter V.)

The people of the girl tell the umnin' ikhaya (the head of the kraal) of the young man that they will accept the fine but will watch and see if anything develops, meaning if the girl should become pregnant and give birth to a child.

Though the father or lawful guardian of the "seduced" girl has a claim against the "seducer" he can not in Xhosa Law demand or force the "seducer" to marry his daughter. No court would assist the father; nor would the Chief force the marriage. It was however, not unusual for the father to send his deflowered daughter, to a middle-aged married man as wife. This man then handed over to her family a small number of cattle as ikhasi.

If the people of the intombi (girl) after some months see that their daughter is pregnant, they again take up the case. Two men, perhaps the original two, will again be sent to the young man's kraal, and according to the statement made on the previous occasion, now exact a further fine in the form of at least one beast called inkomo wesisu, or beast of the belly; hence a child born in such circumstances is sometimes also called umntana wesisu, a child of the belly. (see Chapter V.)

Should the young man of his own free will, and perhaps on the exhortations of his father or lawful guardian, now decide to marry the girl he has "seduced", marriage does not immediately follow, but preparations are first made for the marriage which usually takes place before birth of the child. (See Chapter V.)

When the father of the intombi sues the young man for the defloration and pregnancy of the girl and the latter admits guilt, he very often expresses the wish to marry the girl and says: ndi nyuka nengalo. This means that whereas the father of  
the .....

Note 9). The inkomo yokhona is sometimes known also under the following names: inkomo yomda, or inkomo yomgela, both meaning a beast for "scratching", breaking, the girl.



the girl now "beats" (firms) him, he grasps the arm of the father and wishes to be drawn nearer to the father and daughter so that he may <sup>create</sup> make family ties by marrying the daughter. If the father of the intombi consents, the ikhazi is discussed and other arrangements for the marriage made.

If the people of the young man now refuse to pay for the pregnancy, the father of the young man is sued and the case is taken to the Great Place (Kosakhulu), for the young man is considered to be the cause of the pregnancy because he used to metsha with the girl, he has admitted that he deflowered her, and he has already paid the inkomo yokhona for the defloration. <sup>should</sup>

It is the father or lawful guardian of the girl who takes the case to the Great Place, and the father or lawful guardian of the young man defends the action. The deflowered young girl and accused young man act as witnesses for their respective fathers or lawful guardians.

The following quotation holds good also for Xhosa Law: "If intercourse is proved, the woman's statement, as to the paternity, is usually believed, although more than one man may have visited (metshaed) her; but there are cases where, if it is shown that all these men visited her about the time <sup>of</sup> conception (took place,) the case goes against the man to whom it (i.e. the child) bears resemblance." 10.

The fine, however, does not merge into the ikhazi.<sup>11.</sup> The fine paid for "seduction" and pregnancy, is separate from the number of cattle given as lobola for the girl. In my research I found the amaXhosa most emphatic that this was the case. For it would be easy for a man to deflower or make pregnant a girl and then <sup>escape</sup> jeopardise the law imposing a fine for his act by marrying ....

10. J. Sontundu vs. S. Damane and J. Damane (3, N.A.C.) 261.

11. See Whitfield: South African Native Law, at pp. 85 - 86.

marrying the girl. Moreover, the fine and the ikhazi are two such distinct matters that it is impossible to say that the two merge, or that the fine is obliterated by the handing over of the ikhazi on the marriage of the girl to her "seducer". For, until the girl is handed over to the young man at his umzi, he has no right or claim to have intercourse with the girl.

However, not only the father or lawful guardian of the girl may institute an action for damages as a result of the "seduction" of the girl :

- (a) If a father has allotted one of his daughters to one of his sons, and that daughter lives in the umzi of that son (if he has been allowed to build his own umzi), the latter has a right of action for damages if his sister so allotted is "seduced". 12.
  - (b) When a girl has been lobolaed and his bride, already handed over to the family of the young man, is found to be pregnant, her husband (now) has a right to institute a claim for damages against the "seducer", for it is she that now suffers the insult and loss. But if he married the girl well knowing that she was "seduced" or pregnant, he has no claim.<sup>13</sup> If she is "seduced" by a man other than the one to whom she is to be married (i.e. during the period of betrothal) and the father of the girl institutes an action for the "seduction" of his daughter, he must pass on the fine to the prospective husband who has already handed over lobola cattle, or he must reduce the number of lobola cattle asked as ikhazi for his daughter.
- If a girl is "seduced" but she dies before it is found out or before she has pointed out or named her "seducer", the father or lawful guardian has no right of action.

But ....

12. Nondlwana vs. S. Lubaxa (3. N.A.C.) 253.

13. Tshetsha vs. Mavolintiya (1. N.A.C.) III; also: J. Sibabala vs. T. Temba and Another (N.A.C.) 1928, quoted by Whitfield: South African Native Law, p. 410.

But where the girl dies after she has named or pointed out the man that "seduced" her, her father or lawful guardian may bring an action for damages and the case will be decided upon the evidence before the Court. 14.

As has already been stated (vide p. 5 above), the amaXhosa from time immemorial have looked upon the "seduction" as an unpardonable offence against the family head and the whole umzi. (At first) "seduction" caused the women and family to take the law into their own hands and strip the young man's kraal of practically all the cattle they could manage to drive away with them. However, in the course of time Xhosa Law made definite provision for the payment of the fixed minimum of cattle for the defloration and the pregnancy which has been mentioned above, viz. the inkomo yomda and the inkomo yesisau, respectively. This is presumably a later development in a more stable and united society where the law lays down a definite number that must be paid; anyway, it is a minimum number of cattle and the inkundla may award more.

The Native Appeal Court has, on the evidence of Native Assessors, <sup>and down</sup> accepted the rule that the fine payable for "seduction" and pregnancy is five head of cattle. This view is being accepted, though slowly, by the amaXhosa. "Among the Gcaleka, Gaika and Fingo tribes a fine of three head of cattle is exacted for a seduction followed by the girl's pregnancy." 15.

<sup>rule</sup> This view of the Native Appeal Court now applies to all Bantu Tribes of the Southern Nguni. But, this is not the fine imposed by Xhosa Law. Xhosa Law knew the minimum fine as stated above, though a larger fine could be imposed, as was the case where a Chief's daughter had been "seduced". The fine for the defloration of a Chief's daughter is heavy, and it may happen  
happen ....

14. Ndupana vs. Mxaxeni (1911) N.A.C. 178. This is a principle well recognised in Xhosa Law.

15. Whitfield: South African Native Law: p. 415. The N.A. Court seems to have established the fine of five head of cattle for all tribes.



happen that the umsi of the guilty person may be deprived of every beast as punishment for such defloration.

VIII. PARENTAL AND FAMILY CONTROL:

The parental and family control over marriageable youth, and the relations between parents and children will be treated of under Chapter V.

CHAPTER III.A. GENERAL:

Marriage and the formation of a family unit is the essence of Xhosa social life; it is the basis of the social structure of the amaXhosa. Every marriageable man and woman is expected to marry and to procreate. It is considered to be a disgrace not to be married; unmarried people are laughed at and looked upon with disapproval.

Marriage brings about a change in the status of males; through marriage they acquire full citizenship. Women attain the highest status through matrimony which enhances their social and legal position. They acquire a greater personality (see Chapters I and II and B(v) below).

POLYGAMY:

The main characteristic of Xhosa marriage law is that it not only acknowledges polygamy but approves of it and encourages it.<sup>16</sup> A man may have as many wives as he can afford to lobola. It is a fact that a man of means and of status has more than one wife; the number of wives a man has adds to his status. It gives him a large family, a greater following, a certainty that his name will not die out, and also makes of him a greater character socially.

Polygamy is deep-rooted and firmly established in the Xhosa Law of marriage and permeates not only Xhosa social life, but all the underlying principles of Xhosa Family Law and the law of Inheritance are based upon and are the inevitable consequence of this system. The whole umzi system is based on the system of polygamous marriages: one man with more than one wife (see Chapter IV). This system has worked well in Xhosa tribal and social life in general, and domestic life in particular has not suffered as a result of polygamy.

It .....

16. This is recognised by Proclamation No. 142 of 1910 for the Transkeian Territories and also Act 38 of 1927 seems implicitly to recognise polygamy among natives for the whole Union, See Section 35.

It is true, however, that polygamous marriages encourage family and tribal differentiation which, under abnormal circumstances, may lead to family and tribal disintegration. But originally only differentiation was aimed at, and not disintegration. Such differentiation is especially marked among Chiefs. The Great Son of every indlu, more especially of the indlu ya se kunene (right hand house) is a potential Chief of a part of the tribe. The great sons may break away and form a sub-tribe. Originally these sub-tribes, though semi-independent, remained organic parts of the large tribe, but as a result of abnormal circumstances, for instance tribal quarrels, or wars, this differentiation often developed into tribal disintegration.

Churches of the Christian faith have discouraged polygamous marriages among the Bantu people. Those of most denominations demand monogamous marriages for their members and require a man already married to more than one wife, to marry according to Christian rites one of his many wives if he wishes to become a christian member of such church. The husband may make provision for his other wives and send them home to their own people, or they may remain at his umzi. In either case the marriage is considered not to exist any longer. According to Xhosa Law, however, a marriage can only be dissolved by the return of at least part of the ikhazi (see Chapter VI).

The legislature and administration also influence polygamous marriages. For instance, marriages according to Xhosa Law (Native marriages in general) are legally termed "customary unions" whereas marriages of a Xhosa man and woman according to Christian or civil rites are spoken of as "marriages".

"Customary union" means an association of a man and a woman in a conjugal relationship according to Native Law and custom, where neither the man nor the woman is party to a subsisting marriage; 'marriage' means the union of one man with one woman in accordance with any law for the time being in force in .....



in any Province governing marriages." 17.

The general impression of this unnecessary and offensive distinction between a marriage contracted according to Xhosa Law and a marriage contracted according to Christian or civil rites, is that to be married according to the latter form, seems more dignified and more civilized in the eyes of certain classes of Bantu; by the European greater weight is attached to a marriage contracted according to Christian or civil rites. This acts as an impediment to polygamous marriages especially with regard to those Bantu people who come into contact with western civilization.

The reason for such a distinction by the legislature is obscure. Surely a union contracted according to Bantu Law is a marriage. Such "union" has, according to Xhosa Law, all the consequences of a so-called "civil" or "Christian" marriage. The children of such a "union" are legitimate and the marriage legally binding. It would be far better and more compatible with public policy and natural justice to speak of a "Bantu marriage" and not of a "customary union". It is, in fact, a marriage, whether we approve of it or not.

Another impediment is that the administration requires every native male to pay hut (indlu or house) tax for each wife. (See Section 19 of Act 41 of 1925.

Perhaps the greatest contributory factor towards monogamous marriages today, is the general economic condition existing among the amaXhosa and Bantu people in general. There can be no Xhosa marriage according to Xhosa Law without cattle or other live stock or the equivalent of cattle in the form of money.

Because they are so poor, the men cannot afford to lobola, and moreover, to support many wives and they therefore marry only one; for this reason monogamous marriages nowadays predominate, yet, for the very same reason extra-conjugal relations  
between ....

17. See: Section 35 of Act 38 of 1927.

between a married man and other females are on the increase  
(See Chapter VIII).

B. INFLUENCES AFFECTING THE CHOICE OF PARTNERS:

- (i) Personal qualities (health, beauty, temper, industry).
- (ii) Economic conditions.
- (iii) Social conditions.
- (iv) Parental and family influence.
- (v) Age.

(1) PERSONAL QUALITIES:

It is the ideal of every young man to marry a healthy, usually a well setup girl; and every family expects to get a daughter-in-law who will not need the igqira (doctor) and thereby cause unnecessary expenses on account of illnesses. She must also be pretty so that other men will admire her stature and features and pass favourable remarks with regard to the possibilities of her bearing children. A girl with a vile temper is not welcome in the family circle of the young man for she may say or do things which may cause trouble in the unzi or in the outside world. A young man and his family will therefore pay special attention to the temper of the girl. She is also closely watched to see whether she is an industrious woman.

The personal qualities of the young man are also taken into account by the girl's family. They do not wish to have a son-in-law who possesses a violent temper and who may ill-treat their daughter. There is sure to be an objection if he is lazy and a drunkard or an immoral person.

(ii) ECONOMIC CONDITIONS:

The wealth of a man adds to his status and influence, and therefore to his ability to marry. A poor man can not have many wives and as a rule marries among the less wealthy. The daughter of a Chief, a Chief's councillor, or a man of great influence and authority, will marry a man of rank or wealth. This is so especially because a Chief sends his daughter to be married ....

married to a person of his choice. And he always decides on a man that is also rich.

There seems to be a general rule that a woman should marry a man of her own status or one of higher status; but a man may, without shame to himself or his family, marry a woman of lower status than himself. Thus also a man who, among other qualities (see (iii) below) is also rich, may marry either a daughter of rich parents or a daughter of poor parents.

(iii) SOCIAL CONDITIONS:

Here we have: the social character and the status of the parties.

One of the major factors in the eligibility of a young man or a girl as son-in-law or daughter-in-law, is: the character of the family, the whole umzi in general, and the character of the young man and girl in particular. There will be a definite objection if the man or girl is of bad repute even though their respective families may have an excellent reputation (see (iv) below for illustrations). Every man and his family want a girl of good character, or upon her behaviour depends the reputation of an umzi, to a very great extent. No family wants to be burdened with the responsibility of a bad character; this may degrade the umzi and incur liabilities which her husband and his family will have to meet. The wife must, moreover, be an example to the children of the umzi.

The same holds good for the young man and that is why abahloleli, those who go and spy for the family, are sent to see the general state of affairs at the kraal of the young man. The respective families also find out from neighbours and other people all they can with regard to the character of the young man and girl respectively.

The status of the family in the tribe to which they belong, and of the indlu to which the girl (young man) belongs in her (his) umzi, is also taken into consideration. The question whether the girl (young man) is from the Great Wife or from a wife of minor status plays a rôle in the decision of a family

with ....



with regard to marriage. The principle that a girl should not marry a man of lower status, but that the status of the girl the son marries is of less importance (see (ii) above) also applies here.

The daughter of a commoner would rather be married to a man of royal blood than to another commoner, even though the commoner offered a larger ikhazi.

Very often the Chief marries his daughters from minor houses to his amaphakathi, not because the amaphakathi give greater makhazi, but on account of their status.

(iv) PARENTAL AND FAMILY INFLUENCE VERSUS OWN CHOICE:

A Xhosa marriage contract is in the first instance a concern of the two partners involved, binding them in marriage. But the partners not being socially independent individuals, but more or less dependent members of their respective families, the marriage contract is also a family concern. The father has greater authority though the son usually approaches his mother first who will directly or indirectly bring the matter to the notice of her husband. Not only the father but also his brothers may influence a marriage. The question of marriage is discussed in the family courts (izinkundla) of the young man and of the girl respectively. For it is an agreement the consequences of which will affect the whole umzi and its inmates, and not only the father's interests.

Anyone who has a ground for objection either against the young man or his family on the one hand, or against the girl and her family on the other hand, is at liberty freely to discuss the question in the family court. This will influence the respective fathers. The father of either the girl or the young man will never go against the wishes of their family court.

The young man, should he have decided to marry a certain woman who is not of bad repute, will have his way, though his father may have tried to persuade him. If his family see that the son is reluctant to give way and there is socially nothing

against ...

against the girl, they will concede to the son's wishes.

It is different with respect to the girl. She is expected to submit; her consent is tacitly assumed. Should she object they may give her a thrashing, perhaps a severe one. She is however, not without any remedy if she is persistent.

In the case of a daughter it is to a great extent her parents (family) that are responsible for her marriage to a man. She is as a rule not consulted, sometimes hardly knows anything about the marriage, but is expected to submit, which she as a good and obedient girl generally does; she is considered tacitly to consent to the marriage with a man of her parents' choice. Should she however violently dislike the proposed husband she may make an appeal to her paternal uncles who may or may not thereupon influence her father to cancel the marriage negotiations.

It happens that when a girl violently dislikes the proposed husband and his family she does go to the umzi of the young man to be married there, but then rubs her own excreta on to her face; or she calls out the name of the father of her intended husband, saying that she does not want to be the wife of this man, the son of so-and-so, thereby deliberately violating the hlonipha rule due to her father-in-law. All this is clear and sufficient proof of her unwillingness and she is let free to return to her people who will then restore the ikhazi. However, for the simple reason that she is expected to obey the wishes of her family she will as a rule tacitly consent and marry the man though she does not love him.

Because the girl's people are aware that a love-match is happier and more stable than one where the girl was forced into marriage, they will not, unless for good reason, disregard a possible marriage with a man she is in love with and force her to marry the man of their choice. If any considerable family interest is at stake, however, the will of the family prevails and she is considered to have no say in the matter.

This position, however, has been affected by Section 29

of .....

of Proclamation 140 of 1895, and subsequently by decisions of the Native Appeal Court, viz. that there can be no valid and binding marriage where there has been no consent on the part of the girl: "Admitting that under old Native Custom the consents of the bride and bridegroom were assumed in all cases and overridden especially in the case of a dissenting bride, our Courts cannot and will not for one moment disregard the absence of consent on the part of an unwilling bride." 18.

Assuming that a forced marriage is contrary to the principles of natural justice, support for this view is also contained in the proviso of Section 11(1) of Act 38 of 1927, which leaves it to the discretion of the N.A.C. to administer native law: "provided that such native law shall not be opposed to the principles of public policy or natural justice."

A young man is also influenced by his father and family with regard to his marriage, though he as a rule marries the girl he loves. Formerly if a young man was reluctant to marry, his father would lobola a wife for his son, who was obliged to take the woman thus lobolaed. If he wanted another girl as a wife he might marry her also after he had married the one lobolaed by his father. This state of affairs does not readily occur nowadays, and it is now accepted that the consent of the young man also is essential to a valid marriage. He may fancy a girl, but should she be of bad repute his father will exhort him not to marry her. For his father legally must assist his son to lobola his first wife. If it be his first wife, his Great Wife, therefore, his father may even refuse to give him the ikhazi to lobola this woman. It therefore seems that the consent of the father is also necessary if he has to assist his son with the ikhazi, but after the first wife the consent of the man marrying is essential.

I .....

18. Medleni vs. Pezani (4, N.A.C.) 212.



I know of an instance near Willowvale district, where a son wanted to marry a certain girl. He went to the mines, saved money and sent this home for his father to buy cattle to make up the ikhazi. His father found proof that this girl that his son wanted to marry was of bad repute. On his return his father tried to persuade the son not to marry this girl. After much argument and many exhortations he succeeded and undertook: to send his son back to the mines; to find a girl fit for his son; to give the whole ikhazi for this woman he would find; to hand over to his son all the cattle he had bought with the money his son had sent him from the mines.

(v) AGE:

In Xhosa Law there is no stated age at which betrothal or marriage should or should not take place, provided the parties have reached the age of puberty. When the breasts <sup>10)</sup> of a girl develop, her family may make plans for her betrothal and her marriage. She need not at this or any other stage have undergone the intonjane.

Betrothal or marriage of children under this age is not tolerated by the amaXhosa and does not occur. Old spinsters, however, are not an asset or credit to a family and a girl is really looked down upon if she grows old without having been married. Because of this the father very often sends his ageing daughter to an old man to be married to the latter. In cases like these the ikhazi may be, and usually is, small.

In the case of a man it is generally accepted that he may only marry when he has reached the age of puberty and has undergone the initiation rite, for only then is he a man, indoda, and fit for marriage. A man, on the other hand, is not readily considered to be too old to marry (See Chapter II).

## C. IMPEDIMENTS AND PREFERENTIAL MARRIAGES.

### I. IMPEDIMENTS.

#### (a) CONSANGUINITY OR BLOOD-RELATIONSHIP:

People with the same isiduko or patrilineal clan name

(sometimes ....

Note 10). Ukuyela kwamabele = the appearing of the breasts  
See: Soga: The amaXhosa: Life and Customs. p. 228.

(sometimes also called the isibiso), are not allowed to marry because they are blood-relatives descended from a common ancestor. It is said that people of the same isiduko may not even metsha.

But it has happened that people who originally had the same isiduko have intermarried. Because people of the same isiduko do not always remain together, the clans become subdivided; some of these subdivisions even adopt different isiduko, and the blood-relationship is forgotten.

Should the existing consanguinity however, be discovered, the proposed marriage will not be concluded. If previous investigation has not revealed blood-relationship and the marriage has been concluded in good faith, it stands and is not considered to be null and void. Hence it seems that the fact that people belong to the same isiduko is a more serious impediment to marriage than the underlying principle of blood-relationship.

As an issue of blood-relationship, however, a marriage is also prohibited between ascendants and descendants ad infinitum, both patrilineal and matrilineal.<sup>19</sup>

All these marriages are considered incestuous (umbulo). Incestuous marriages deliberately concluded are null and void and the guilty parties heavily punished; in some instances the culprits are branded as sorcerers and are driven away; formerly the men were killed.

So strong is the general abhorrence of incestuous intercourse that people are prohibited even to metsha with each other if they can trace relationship back to a common ancestor. Children born of such incestuous intercourse are called abantwana bombulo, incestuous children. A father may reject and cast out, uku m citha, his son should he commit incest. His daughter would be in no better position.

The ....

19. See also: Whitfield: South African Native Law, 133.

The idea of consanguinity, and consequently of sexual intercourse amounting to incest, is not limited to patrilineal or matrilineal ascendants and descendants; it is also extended to classificatory relations. Thus according to Xhosa Law a man may not marry two sisters, the first one being alive while he marries the second. The second sister is considered to be his own "sister". But it is not prohibited for a man to marry a wife's sister after the death of the wife, though this is rare.

According to Thembu Law (Ntlangweni vs. Mkwabane (4, N.A.G.) 381, and also Pondo Law (P. Yoywana vs. T. Yoywana s, N.A.G. 301, a man may marry a "seed-bearer" (better called a womb) from the same family as his wife for whom he marries this womb. This is not the case in Xhosa Law. A man may in Xhosa Law under no circumstances marry a second sister (or girl from the same family) while the first one is still living. In Xhosa Law a stranger is married as a womb.

The following illustration gives another instance and at the same time an indication of how serious the amaXhosa consider incest: Ngqika managed secretly to take Tutula, the wife of his uncle Ndlambe, as wife for himself. All the amaXhosa considered this as incest (webulo). For, Ndlambe being the uncle of Ngqika, was considered to be also a "father" according to the amaXhosa rules of relationship. It follows therefore that the wife of Ndlambe would be considered as a "mother" to Ngqika. Thus Ngqika could not marry or cohabit with Tutula, who was considered to be one of his "mothers". This act of Ngqika's was the direct cause of the War of Amalinda (indabi la malinda).

Again, a brother may not marry or cohabit with his brother's widow.<sup>11)</sup> This custom of ukungena, though allowed by .....

Note 11). This, however, according to the amaXfengu, is allowed among them.



by the amaZulu, is not practised among the amaXhosa; intercourse or marriage of this kind being considered incestuous.

Also "cousins" (usually called aba sa), may not marry; both paternal and maternal cousins are deemed to be related by blood. It is rightly said that no marriage is allowed with a blood relative less than at least four generations removed, be it on father's or on mother's side.<sup>20</sup> In this respect no distinction is made between "parallel" and "cross cousins". All sexual intercourse between cousins is invariably considered as incest.

(b) IMPOTENT PERSONS:

Persons suffering from a permanent incurable incapacity to procreate children are, according to our Native Appeal Court, deemed to be incompetent to marry.<sup>21</sup>

(c) EXISTING MARRIAGE:

In Xhosa Law a woman may not contract a second marriage nor her family contract one for her while the previous marriage subsists. A marriage is considered to subsist while the lobola cattle handed to her family by her husband, or part thereof, have not been returned to mark the dissolution of the marriage. Should another man marry her before dissolution, such a marriage cannot be countenanced by Xhosa Law, and the man is treated as an adulterer.<sup>22</sup> Moreover, as a result of this, a father can never according to Xhosa Law, hold two amakhosi at the same time for the same woman (see Chapter VI).

Before the passing of the Union Act No. 38 of 1927, in the Transkeian Territories by Section 3 of Proclamation No.

142 .....

<sup>20</sup> See: Mrs. Hornle in: The Bantu-speaking Tribes of South Africa: Edited by I. Schapera, p. 73.

<sup>21</sup> Whitfield: South African Native Law, p. 127; and: Yapi vs. Ngayi (1, N.A.C.) 61.

<sup>22</sup> Feliti vs. Mkhumbeni (2, N.A.C.) 11. This is good Xhosa Law.

142 of 1910, a male Native could not validly contract a marriage according to Xhosa Law (Native Law) while his marriage by Christian or civil rites still subsisted. "If a Native is married by Christian rites, the law can acknowledge no rights to another woman based upon the payment of dowry, seeing that the taking of this other woman and the payment of dowry for her, are a clear breach of the solemn contract already entered into".<sup>23</sup> And also, "The plaintiff having married under Colonial Law, cannot contract any other marriage during its subsistence. The arrangement he entered into is an immoral contract. The woman is not his wife, nor can he recover the cattle (lobola) paid." <sup>24</sup>.

The second marriage may be an immoral contract from the point of view of Colonial Law; but according to Xhosa Law it is not, and why the man, in the last case quoted above, cannot claim back "the cattle paid", is not quite clear. He does not get the woman, there is no marriage and he should therefore get back his cattle. Now the ruling of the Court allows the father of the woman to be enriched at the expense of the other man, which from the point of view, both of Colonial and Xhosa Law, is an injustice. In Xhosa Law, if there is no marriage, the person who handed over the ikhazi has a claim to get it back.

Under the Act 38 of 1927, which is applicable to all Bantu people in the Union, "polygamous relationships are recognised under the Native Administration Act only in so far as they are contracted by persons neither of whom is a party to a marriage according to civil or Christian rites. A native may contract a marriage during the subsistence of a customary .....

<sup>23</sup>. *Mnduze vs. Mlilimbi* (1, N.A.C.) 27.

<sup>24</sup>. *Matsee vs. Njongwana* (1, N.A.C.) 272.

customary union between himself and another woman but may not contract a customary union during the subsistence of his marriage." 25.

## II. PREFERENTIAL MARRIAGES:

Preferential marriages are found only among Chiefs. It was customary formerly (though the custom is no longer strictly adhered to) for the Paramount Chief of the amaXhosa, that is the Gcaleka Chief, to marry a Thembu princess as his Great Wife (unfazi omkhulu). But, formerly and now, the Chiefs of the amaXhosa also married princesses from the amaPhondo and the amaMpondomise. In cases of dispute about the status of wives, the Thembukazi had preference provided other essentials were present.

Chiefs also must marry women of royal blood from other tribes as their Great Wives. If they do not do this, their amaphakathi who are the representatives of the tribe will take the Chiefs to task and will themselves select suitable wives for their Chiefs.

There are no preferential marriages among the amaXhosa commoners, abantu abamnyama. In this respect the amaXhosa are different to the abeSutu and other more northern tribes who often prefer cross-cousin marriages. These kinds of preferential marriages are condemned by the amaXhosa as incestuous. (see C.I above).

## D. PREPARATORY DEALINGS, GIFTS, LOBOLA, CONSUMMATION OF MARRIAGE.

The initial step in a Xhosa marriage may be taken either by the parents of the girl who will look for a husband for their .....

25. H. Rogers: Native Administration in the Union of South Africa (1933), p. 238.



their daughter, or by the parents of the young man or the young man himself who will look for a wife. <sup>26.</sup> The latter is the more usual.

It is customary for the parents of the girl to look for a husband for their daughter when they see that she is growing old and as yet no marriage proposal has been received. She will then usually be sent to an old man who dare not refuse, unless the girl is of very bad repute. The ikhazi in this case is less than that usually given for young iintombi (girls) of commoners. In the case of a Chief's daughters the ikhazi also is less than that usually given for princesses but higher than the ikhazi for commoners.

This method of matching is also practised among Chiefs with the object of creating a bond of friendship and alliance between the two tribes. Rharhabe, the Xhosa Chief, for instance, married his daughter Yess to a Thembu Chief. Many other Chiefs have sent their daughters to the amaXhosa Chiefs, so as to create an alliance with one or more of the amaXhosa Chiefs. A further notable example was the case of Palo, Chief of the amaXhosa to whom two girls (from different tribes), the mothers of Gcaleka and Rharhabe respectively, were sent by their respective parents (see Chapter IV).

The initial step here is to send along two men (sometimes only one) called abahloleli (those who go to spy for another), with an assegai to the umzi of the young man. In negotiations between Chiefs these abahloleli will go to the isi gaba <sup>12)</sup> where they leave the assegai; sometimes under a mat. It may also happen that the assegai is stuck into the ground in the inkundla. Once this act has been accomplished the abahloleli take to their heels and return home.

For ....

26. See also: Soga: The amaXhosa: Life and Customs, p.227.

Note <sup>12)</sup> This is the hut where the amaphakathi assemble to discuss matters, maybe a case before judgment.

For the accomplishment of their errand they are entitled to a beast from the father of the girl.

The young man's people know what the assegai means and have to decide whether they wish to open marriage discussions or reject the proposal, which is effected by sending back the assegai. In the case of a Chief, the assegai is hardly ever sent back, for it is degrading to the Chief and a grave insult to get back the assegai he sent, and it may even be a cause of war.

If the Chief has sent the assegai to a rich commoner, who refuses and returns the assegai, the Chief will "eat" up the commoner, that is confiscate all his cattle.

The same procedure is followed by abantu abomnyama (commoners) though if the assegai is sent back, the father of the girl has no remedy in spite of the fact that it is an insult.

Sometimes the uduli (bridal party) is got ready and no sooner has the abahleleli returned than the bridal party sets out to the umsi where the assegai has been left. This is to prevent the other party from changing its mind. For, once the uduli has made its appearance, it is taken for granted that the people of the young man will not turn down the offer and the parties will proceed with the marriage negotiations.

It happened that a Xhosa Chief in the Ciskei once sent a girl of his family to a rich commoner in the district of Kingwilliamstown without giving the man a timely warning. Only a few hours before the arrival of the uduli did the man know what was happening. The marriage went through.

Unless a princess of royal blood whom they agree to, is sent to a Chief, his amaphakathi will usually look round for a woman suitable for the Chief to marry as his Great Wife who will then become the "woman of the land" (see Chap. IV).

Marriage negotiations are however, usually opened by the family of the young man. The method of sending an umhleleli with an assegai is also adopted when the preliminaries are opened by the young man and his people. When

marriage negotiations are to be carried on the matter is discussed in the open family court. It is not only the ikhazi, as was said above, that is the deciding factor in opening marriage negotiations. All the points discussed above (sub B) are matters that are gone into.

As soon as the assegai is retained, indicating that the other party is willing to open negotiations, the first preliminaries are over and one or more, but usually two *conozakuzaku* (sing. *unozakusaku*), "masters of ceremonies", are appointed by the family of the young man to proceed further with the negotiations. The *conozakuzaku* are at the head of all the ceremonies and act for the parents and the young man. They will go to the family of the girl and discuss with them the prospects of the marriage and the ikhazi.

#### GIFTS:

The discussions are lengthy and take place more than once or twice, and the family of the girl will ask the *conozakuzaku* to show that they are sincere and in earnest in negotiating for the marriage of the daughter of this *umzi*. Hereupon the family of the young man will produce proof of their sincerity by handing over to the girl's family, the isinyaniso or earnest-beast, either an ox or a cow. This in fact is a pledge, and it indicates that the parties are now at one, and that the negotiations have resulted in an engagement or betrothal (see sub E, below).

Under certain conditions, e.g. great droughts, cattle sickness or something like the cattle-killing delusion of 1856, when cattle are very scarce, something like an assegai may be given as an *isinyaniso*. An instance like this occurred among the royal family during the time of Sarili, just after the delusion of 1856.

From now on certain other gifts also pass between the two families. During the period of betrothal the young girl will buy beads and make necklaces and other decorations for ....



for the young man. The young man, on the other hand often, may be as a result of the ukumetsha, gives to his betrothed some gift called unanyobo which really is a gift for the enjoyment of some privilege. This gift-custom should not be confused with the ukunyoba custom which is found among the amaXhosa in the case of adultery and which bears a different character.

Meanwhile the passing of the ikhazi is also fully discussed, for without lobola there can be no binding marriage in Xhosa Law.<sup>27</sup> There is a transference of lobola cattle already during the period of betrothal.

#### LOBOLA:

Where, during betrothal lobola cattle have passed from the young man's family to the girl's, and any of these cattle die before the marriage is completed, it is incumbent upon the family of the girl to report the deaths to the young man's family and also to exhibit the skins of the dead animals as proof. For the loss in such a case is the loss of the person who hands over the ikhazi. Should the family of the girl however not do this, they must bear the loss.<sup>28</sup>

The ikhazi as a rule consists of, and is always spoken of in terms of cattle (iinkomo); but it must be well understood that according to the amaXhosa there is no limit to the number of cattle given as ikhazi, and it is usual for the family of the woman to demand a beast after the birth of every child. They may however, incite the woman to return home, and exact more lobola cattle from her husband under the ukuteleko custom (see below).

There ....

<sup>27</sup> Mpakanyiswa vs. Ntshangase (1897) N.A.C. 17;  
Lise vs. Bushula Makalima (1911) N.A.C. 180;  
Sipoxo and Delayi vs. Kwexwana (1919) N.A.C. 205.

<sup>28</sup> Radoyi vs. Ncetoze (1911) N.A.C. 174. This gives the true position in Xhosa Law.

There was a general minimum number of cattle in the ikhazi among the abantu abasanyama, for instance eight to ten head for the intombi of a commoner. There was no such minimum among Chiefs, in whose case the number of lobola cattle might vary from about twenty to over one hundred. The amaXhosa have expressed this view over and over to me, viz. that the ikhazi cannot be a definitely fixed number of cattle.

The two families agree only in the first place on the "possible" number of cattle to be handed over, and in the second place on the number of cattle to be handed over before the marriage can be celebrated.

The number of cattle given as ikhazi may be influenced by certain conditions such as devastating droughts and sickness of cattle: or, by circumstances like the Xongxause-episode (cattle killing delusion) of 1856-7. Under such circumstances the ikhazi may not only be fixed at a smaller number of cattle but other things like assegais, sheep, horses, bees, and even mealies and money may be substituted for cattle; but such articles will always be called inkomo, cattle.

The cattle forming the ikhazi come from the father of the young man in the first instance; he is legally compelled to help his son to lobola his first wife. Should he not have sufficient cattle, his brothers will help him; and they will have a claim to the ikhazi of one of the daughters born of the wife they thus help to lobola. The family of the son's father can be compelled by the Chief to help him (the father) to lobola a wife for the son. But after the father and his family have assisted the son to get his first wife, they are no longer responsible for helping him to lobola any more wives.

It sometimes happens that the father allocates his eldest daughter to his eldest son who will then get the lobola cattle given for this daughter; both children usually belong to the same indlu or wife. But a father may also allocate a daughter of one indlu to a son of another indlu if there are no girls

by ....

by the latter. The following supports this view: "The case having been submitted to the Native Assessors, on the question of Native Custom, Lindinxiwa and Mabla (Gcalekas) say that the transfer of a daughter from the Great House to the Right Hand House is in accordance with Native Custom, and instance cases in Hintza's and Kreli's families in which this was done."<sup>29</sup>.

Until the marriage is consummated, however, the cattle handed over to the father of the girl or her family, as the ikhazi or part thereof, still belong to the intended husband's family. Therefore, until the bride has been handed over to the young man and his family, her father and family cannot acquire "ownership" of the cattle. At the moment when the girl is handed over her father and family become owners of the lobola cattle in their possession.<sup>30</sup> If the cattle are handed over to the uduli, and this is usual, the uduli accepts the cattle as representatives of the father of the girl for whom these cattle were given.

The ikhazi handed over by the young man and his family to the family of the girl belongs in the first instance to the father of the girl. But if his brothers have contributed towards the wedding outfit of the girl, they obtain a right to claim part of the ikhazi received for the girl. This claim is instituted under the ukufakwa custom, which custom has been fully described as follows: "Ukufakwa applies where contributions are made in connection with the ceremonials connected with the puberty or marriage or other circumstances of a woman in which the contributor is fakwaed or put into the dowry of the woman..... the contributor expects to receive some return for .....

29. Mtshotshisa vs. Mtshotshisa (1, N.A.C.) 100.

30. Lucani vs. Mbuzweni (1910) N.A.C. 27.



for the contribution made by him; in the case of ukufakwa, from the dowry of the woman in respect of whom he has been 'put in'.<sup>31</sup>

Again, "Ukufakwa is a common form of contract among Natives and is well known and recognised by the Courts of the Transkeian Territories, and, in case of dispute, requires to be proved in the same manner as any other kind of contract.... it is not contrary to the custom for a contributor to receive more than one beast from the girl's lobola if his contributions exceed the value of one beast."<sup>32</sup>

Also, "where a man has a claim on the lobola of a certain girl under the ukufakwa custom and she dies before he marries her, he is entitled to enforce such claim against the lobola of the next sister and so on to the last daughter."<sup>33</sup>

Should the people of the young man assist him with the lobola cattle, the custom of Ukwenzelele comes into operation.

This custom was well explained in the case of Nobumba vs. Mfecane, quoted above: "Ukwenzelele, applies to the affairs of men, and is the contribution of one man to another, usually a relation, who is about to take to himself a wife, and requires cattle with which to pay dowry..... the contributor expects to receive some return for the contribution made by him; .... in the case of Ukwenzelele, from the dowry of the first girl to be born of the marriage in respect of which the contribution has been made ..... under the custom of Ukwenzelele the contributor expects a return, and may recover it by action at law.. there ....

<sup>31</sup>. Nobumba vs. Mfecane (2, N.A.C.) 104.

<sup>32</sup>. Whitfield: South African Native Law, p. 388. This is the true position in Xhosa Law.  
And see: M. Nkethleni vs. B. Mlanjeni (4, N.A.C.) 368.

<sup>33</sup>. Whitfield: *ibid.* p. 388, and: N. Titi vs. M. Titi (4, N.A.C.) 369.

there is peculiarity in connection with the custom of Ukwenzelele, that when contributions under it are made to the dowry to be paid by a chief for his Great Wife, no return is expected, as the Chief is marrying the mother of the tribe."

With regard to the ikhazi given for a widow, see Chapter VII.

In a Xhosa marriage therefore, there is a transference, a handing over of a girl by her father (family) to the young man and his family, and at the same time a handing over of ikhazi or a part thereof at some future date, by the young man and his family to the father and family of the girl.

Though a binding promise is sufficient, it is nevertheless usual that at least part of the ikhazi, no matter how few cattle, should pass between the two families before or at the time of marriage. If not, then a very short time after the marriage a portion of the ikhazi will be handed over to prevent the people of the girl from exacting it under the ukuteleko custom. This custom is legally resorted to by the girl's family when they wish to exact more cattle from the husband. The cattle then handed over form part of the ikhazi, and if the husband does not hand over the beast asked under the Ukuteleke custom, he cannot sue the woman's father for the return of his wife. In this connection see: *N. Solani vs. N. Manxiwa* (4, N.A.C.) 342, and *Adonis vs. Zazini* (1, N.A.C.) 46, which expresses the general rule in Xhosa Law.

See further Chapter VI.A, and: *Kenzile vs. Rato* (1, N.A.C.) 223, where this custom is resorted to in case of dissolution of marriage.

This binding promise which like all transactions is discussed and agreed upon by the two families in the combined inkundla at the umzi of the girl's people, may also take the form of an agreement whereby the bridegroom "pledges his eldest daughter as a kind of security for the ikhazi of her mother." This in reality means that the future ikhazi of the daughter is the security. The pledged daughter either

remains ....

remains at the *umzi* of her own father as usual, until such time as she marries, whereupon her *ikhazi* will go to her mother's father or his family; or, the father of the daughter may hand her over to the pledgee; this, however, the amaXhosa say is not readily done. Such an agreement is something not unusual among the amaXhosa and it must not be regarded as an immoral contract, for the father of the woman acquires no rights in the daughter of the pledgor (his son-in-law), but only acquires rights in the *ikhazi* of this daughter. This practice has also been accepted by the Native Appeal Courts and holds good for Xhosa Law.<sup>34.</sup>

It is usually in the case of very poor people that the *ikhazi* is not immediately handed over in full, and then they make use of the expression: Ndi boleke, lend her to me.<sup>35.</sup> This does not mean that there is no marriage or that the bride is only lent to the young man. It only means that the *ikhazi* will be handed over as soon as possible, in the near future.

The question as to what lobola actually is, has often been discussed and different explanations have been attached to it. I wish here to limit myself to a few remarks only on the most important theories in so far as they imply legal consequences, but to leave other aspects of the problem to ethnologists.

It is contended<sup>36.</sup> that lobola is a kind of ante-nuptial contract by which the bridegroom (or his family) gives a number of cattle for the woman and her children to her family for her subsistence and that of her children in case she should ....

<sup>34.</sup> M. Vatsa vs. M. Mienaduna (1936) N.A.C. 41. Cape and O.F.S.

<sup>35.</sup> See also: Soga: The amaXhosa: Life and Customs, p. 266.

<sup>36.</sup> See: Report and Proceedings of the Government Commission on Native Laws and Customs of 1883, at p. 30 et seq. And the Evidence of Rev. W. Beste at p. 147.



should become a widow, or when she is in need.

This contention cannot be correct, for the cattle pass on to the family of the woman and she has no claim whatsoever in Xhosa Law to any of the cattle given as ikhazi.<sup>37</sup> Furthermore should the marriage be dissolved as a result of the behaviour of the woman, at least part of the ikhazi (the original cattle where possible) must be returned to the husband of such woman.

<sup>NOTE: 36</sup>  
See above.

Another contention is that the lobola cattle are given to the family of the girl for subsistence in case she should become a widow; but this also cannot be correct, for as a widow she has the undisputed right to remain, and if she is a mother of children she is expected to remain, at the umzi of her late husband. The heir of the deceased husband must support and care for her and her children; and whenever she returns to her own people she will be received as a daughter of the umzi and be treated as such.

Neither is the ikhazi handed over to the family of the girl as a guarantee of good treatment by her husband and his family during his lifetime. For, if she is ill-treated, Xhosa Law provides a specific remedy: she may take advantage of the first opportunity she gets and return to her own people, and the ukuteleka (noun: uteleko) custom<sup>38</sup> immediately comes into operation. This is a custom under which the family of the woman is allowed to teleka or hold her back until such time as her husband shall have paid at least one beast as a fine for ill-treating the woman. See Chapter VI.

Perhaps the most common theory is the one of purchase and sale. This theory was rightly discarded as early as the nineteenth ....

37. But see: Soga: The amaXhosa: Life and Customs, p. 277 where the contrary view is expressed. This view however, is also incorrect.

38. Adonis vs. Zamini (1901) N.A.C. 46.

nineteenth century, inter alia by Shepstone in 1832; <sup>39.</sup> and moreover by all ethnologists who had studied the subject.

The substance of a contract of purchase and sale in Xhosa Law is totally different from that of lobola, though in appearance they may resemble each other. With the amaXhosa there is no thought of, and no association with, a contract of purchase and sale when the contract of lobola is discussed.

The legal consequences also are totally different; Purchase and sale gives the new owner the right of "ownership" and the right of disposition or alienation; the rights of the former owner in the subject matter cease. Through the medium of lobola, however, a relationship of mutual affinity between two people and their families, is created. And, just as one cannot - in primitive law - in connection with the composition or atonement money for a deceased person, speak of a purchase price for the deceased or the sale of his person or body (corpse), so one cannot in connection with the lobola speak of a purchase price for the woman and the sale of her person or body.

"No person among the amaXhosa is of a fixed value by which she may be sold, because the amaXhosa have never known that a person possessed of a soul could be sold." 13).

The importance of this purchase and sale theory from a judicial point of view has ceased since the legislature has in section 11 of Act 38 of 1927, recognised the custom and has provided "that it shall not be lawful for any court to declare that the custom of lobola ..... is repugnant to (the principles of public policy or natural justice)."

The .....

39. See also: Report: Native Affairs Commission, 1883, Answer to Question 492.

Note 13).

12/ Something to the effect of the above quotation was expressed by someone but the origin of this quotation is at present unknown to me. This quotation is so striking that it would be a pity not to make use of it, which I do with due apology; I cannot find the author in my notes Vide: Proceedings of Native Affairs Commission of 1883 at p. 210 par. 6.

The late Dr. A. Kropff, a missionary at Stutterheim in the Ciskeian Territories, in his Kafir-English Dictionary, gives the following about lobola: "The idea lying at the root of this custom is that the father suffers loss by the marriage of a daughter. He is deprived of her assistance, and has a just claim for compensation."<sup>40</sup>.

To a certain extent this compensation-theory of Kropff seems correct, but his explanation does not cover the whole question or substance of lobola.

Lobola - in my opinion - may to a large degree be looked upon as a kind of compensation; but the term compensation should not, as by Kropff, be viewed only in an economic or commercial light, for it also has a religious, magic, a social and a legal aspect.

With regard to the legal aspect of this compensation, it suffices here to say that there can be no valid and binding marriage according to Xhosa Law if the passing of the bride to the family of the bridegroom has not been counterbalanced or compensated for by the passing of lobola cattle (or an agreement to this effect) in the reverse direction. (See E below).

#### OTHER GIFTS.

Where a girl of royal blood marries, it is customary for her father to send also imigqungu, girl servants, with her to serve his daughter. These servants usually accompany the uduli or bridal party, and remain at the umzi of the girl's husband, from where they usually get married. The imigqungu are the daughters of amaphakathi. If they marry while serving the woman whom they have accompanied, the amakhazi will go<sup>to</sup> the house of this woman whom the imigqungu serve, and will be inherited by the Great Son of this indlu. But this indlu is in return responsible for the maintenance, support and .....

<sup>40</sup>. See also: Soga: the amaXosa: Life and Customs p. 264.



and welfare of the imigqungu serving it as if they were in fact the daughters of this house. The wedding outfit for the imigqungu is also supplied by this house. It is said that some of the imigqungu sent by Bhabhe with his daughter Yese actually got married at the uszi of Yese's husband while the uduli was still there awaiting the final settlements in connection with the ikhazi for Yese.

One of these girls will be an impelesi, or a kind of nurse. She is always sent where a daughter of royal blood marries and it is her duty to look after and care for the woman and her future child. The son of the impelesi of Nondwe, the wife of Sarili, is still living.

The war between Gangelizwe, the abathembu Chief, and Sarili, the Paramount Chief of the amaXhosa, was started on account of an impelesi. Sarili married his daughter Nomkafulo to Gangelizwe and also sent Hongxokozelo as impelesi. Gangelizwe liked the impelesi, paid her attentions, slept with her, and aroused the jealousy of his wife Nomkafulo. A quarrel started which resulted in Gangelizwe beating his wife. Sarili resented this act of Gangelizwe's and waged war on him.

Not only girls but also men servants are often sent with a girl of royal blood to serve her house. These men, unmarried, are taken as being the children of the indlu of the girl they accompany (though they cannot become heirs) and the husband of this girl is responsible for them and bound to assist them to lobola their first wives. These men are commonly called izicaka, servants.

Before the uduli leaves, the bride's wedding outfit is prepared. It is usual for her paternal uncles to contribute towards this outfit, for which contribution they have a claim to a part of the ikhazi of this girl, under the ukufakwa custom as set out above. The wedding outfit (izinto zo ku tshata) consists of new blankets, mats to sleep on (ukhukho)

and ....

and to eat on (izithebe), a pot, a bucket, and some other household necessities.

#### GIFTS IN CATTLE.

Apart from the household necessities the bride is also accompanied by usually three head of cattle, viz. impotulo, inqakwe, and ubulunga. Because these cattle are of great importance in Xhosa Family Law, it is proper to give a more detailed description of each:

(1) IMPOTULO, usually an ox, though it may be a cow, is an animal given to the bridal party by the father of the bride. It is taken from the cattle of the house of which the bride is an inmate when the uduli proceeds to the umzi of the young man. If it is taken from another house it must be replaced and usually is replaced from the lobela cattle received for this daughter.

The impotulo beast is given to nombisa, decorate, the bride and to provide for the uduli when they arrive at the bridegroom's umzi. Some of this animal's meat is also given to the people of the young man's umzi. By giving this beast to his daughter, the father indicates that she is a girl of status and not one that phuma enxweni, one that comes from "the gutter". The animal was formerly given to daughters of royal blood only; but the abantu abamnyama also adopted this custom, which today is deeply-rooted in Xhosa social life.

It must be well understood that no legal but only a moral obligation rests on the father to give this beast to his daughter; it shows good manners and makes his daughter more welcome and acceptable to the in-laws who will get a portion of this beast when it is slaughtered. It is further proof to them that the man of their umzi is marrying a girl of status and of good repute. It also acts as a kind of compensation to the hosts for the meat they will miss on account of the cattle they have to give as ikhasi to the

family ....

family of the girl. This beast moreover, serves as a contribution from the family of the bride towards the marriage feast.

It seems as if the name "impotulo" dates back to the time of Sarili, the Paramount Chief of the amaXhosa. On a certain day he decided to take possession of an umzi which belonged to one of his subjects called Tyabinkobe. Because of this act Sarili received the nickname (isigqulo), of Tyabinkobe.

The beast that was sent with the uduli was formerly called "inkobe", hard-cooked mealies, to indicate that the uduli had food, mealies, to eat while at the umzi of the bridegroom and before the consummation of the marriage. When Sarili got the nickname of Tyabinkobe (cooked mealies), his daughters-in-law, oomolokazana, and other women could, for reasons of hlonipha, no longer call this beast "inkobe". But also male relatives of Sarili avoided the word "inkobe". On account of the hlonipha rule the beast became known as "impotulo". Older men among the commoners, however, still sometimes use the word "inkobe", but the word "impotulo" has come to stay.

(11) INQAKWE:

This beast is sometimes called ileqe or inkomo yeselwa, a beast of the calabash. It is either a cow or a heifer due to calve soon and is a gift from the father, u ya m hombisa, decorating the bride. It is her own personal "property" and is there to supply the woman and her future child with milk; for this reason it is sometimes also called inkomo yesondlo, a maintenance beast. The husband has no claim to this animal nor to its progeny, though his consent is wanted should the woman wish to alienate this beast, but as a rule it is inalienable even by the wife herself. Where the husband with the woman's consent disposes of this beast he must, if he alienates it, replace it by giving another beast to the house of the woman, which beast

is ...



is then considered to be her inqakwe.

(111) UBULUNGA:

"Inkomo yobulunga", the beast that makes well, is a sacred animal to the amaXhosa. It is the absolute "property" of the wife and the husband has no claim whatsoever to it. This beast is inalienable as a rule even by the wife herself, and it or its progeny can only be alienated should the woman give her consent, which is the exception rather than the rule. The Chief himself will respect this possession of the woman and avoid confiscating it. It is the only animal that stands in close relation to the health and good fortune of the woman and is sometimes said to be the umpefumlo or breath (life) of the woman. It is her best iyesa or medicine when she is ill: from its tail hairs are plucked and a necklace, intambo, made (ukucwitha intambo). This is worn around the neck and acts as a charm warding off all evils from the woman.

The woman has a right to demand an inkomo yobulunga from her father or his heir and successor, when she marries (or is re-married), or when the ubulunga beast dies and she is left without one, and it cannot be refused her. It is always a cow or a heifer, an inkomo yesibunu, and must be a beast from the father's own umzi, and one of the cattle of his own kraal.

The father may give a temporary ukulunga beast <sup>41</sup>. inkomo yesibambiso (a temporary beast), in case he finds it impossible on account of circumstances, to give her a permanent one, and this one may be either a cow, a heifer or an ox. If it be a cow or a heifer and it has progeny, the father will fetch these cattle and leave a permanent ubulunga beast, inkomo yomisele (a permanent beast), for his daughter.

Should ....

<sup>41</sup>. Jakavula vs. Melane (2, N.A.C.) 89. In this case it was also stated that the first heifer calf must be allocated as the final ubulunga beast.

Should the temporary beast be an ox, he must later replace it with an inkomo yesibunu, a cow or a heifer.

The ubulunga beast, the temporary or the permanent one, need not necessarily be given to the bride on the day she sets out for the young man's umzi; it may be given after she has been married for some years. A certain woman in Willowvale district, for instance, received her ubulunga beast when her eldest son was about five years of age.

A temporary ubulunga beast does not belong to the husband nor does it become permanent on his death, therefore it cannot be claimed by his heir and successor as was rightly contended by the Native Appeal Court. <sup>42</sup>.

If the widow returns to the umzi of her father she may take the ubulunga beast and its progeny, and these she may use for the support and maintenance of herself and her children if it be a permanent beast, or if it be not a permanent ubulunga beast, her father may retake possession of these cattle and hand over one or more to her. These then become her absolute property. <sup>43</sup>. (See Chapter IV, C).

#### COMPLETION OF MARRIAGE:

The marriage described below is an umdudo ozelevo (umtshato, or full dress marriage ceremony). When all arrangements have been made, the wedding outfit and other gifts to the bride are complete and the people of the young man are ready, the time arrives for the bride to go to the umzi of the young man's family to be married there. For this purpose her own family will select men and women to form the uduli or bridal party, who must accompany her and  
who .....

<sup>42</sup> M. Dyanti vs. P. Diniso (1921) N.A.C. 365.

<sup>43</sup> Nombuyana vs. Ntuntu and Mtyibili (4, N.A.C.) 365.

who have formally to hand her over. The parents of the bride never go with the uduli.

The uduli consists of men, elderly women, and girls of more or less the same age as the bride; all usually relatives on the father's side. They accompany the bride and carry through the marriage transactions at the umzi of the young man as the representatives of the family of the girl, whose parents do not attend the marriage ceremony.

The uduli are accompanied by the impotulo, the inqakwe and perhaps the ubulunga beast, and carry the wedding outfit as was said above. If they arrive at the umzi of the young man without the impotulo, the young people of this umzi will not let it pass unnoticed. During the night they will secretly place wet cow dung in front of the indlu which has been set aside for the bride and her associates. On seeing the cow dung in front of their indlu the next morning, the uduli know what it means: the people of the umzi expect an impotulo beast! And, to prevent any ill-feeling, they will immediately send back home to see whether an impotulo beast cannot be obtained.

I know of an instance where a sub-headman was chosen by his family to accompany the uduli of his eldest brother's daughter. They did not take an impotulo beast with them. On the morning after their arrival at the umzi of the young man's people, they saw the token of disapproval in front of their indlu. The sub-headman and uncle of the bride was sent home to try and raise an impotulo beast. The marriage ceremony was deferred until he returned. After much trouble a beast was bought and he returned with it; it was the impotulo and everyone was satisfied.

When the bridal party, arriving at the umzi of the young man late in the afternoon, occupy the hut (indlu yo duli), as a mark of friendship and hospitality, they are given a goat called umthul' entabeni, taken down from the mountain, to slaughter .....



slaughter. This animal is brought and held in front of the door of the indlu occupied by the uduli, and so symbolises the welcoming of the bride to her new home.

The impotulo beast is slaughtered on the day following the arrival of the uduli. It is slaughtered in the ubuhlanti (permission, having been asked to use the ubuhlanti) early in the morning by the uduli, with perhaps the assistance of some amakwenkwe of the young man's umzi, and the carcass is cut up into different portions. 44.

The day after the impotulo beast has been slaughtered, towards the evening, the uduli is notified by the people of the young man that the bride who has so far not shown herself, should come out the next morning to be examined: intombi mayi bonwe ngomso: let us see the bride to-morrow.

As soon as the bride and her female companions are ready the following morning, they leave the indlu yoduli and proceed veiled and slowly towards the ubuhlanti or cattle kraal. The bride carries an assegai (umkhonto) which she sticks into the ground in the entrance of the kraal or sometimes places under the mat they will kneel on. The bride and the girls then go and kneel on a mat in the centre of the ubuhlanti and slowly unveil themselves and completely uncover themselves from their head down to their hips. This is the unveiling ceremony. After the young man and his associates who have been sitting in the ubuhlanti, have seen this and offered their criticisms, the uduli returns to the indlu yoduli. The family of the young man usually now slaughter a beast or some stock as meat for those present.

As they prepare to leave the ubuhlanti, the bride secretly hides some gift, nowadays money (formerly an assegai would have been enough) as a reward, under the mat on which they have knelt ....

44. See: Soga: The amaXosa: Life and Customs, p. 231, for the cutting up and division of this animal.

kneelt . This gift is considered to be an offering to the izinyanya, ancestral spirits, and to belong to the umnin' umzi (kraalhead) who acts as mediator between the people of the umzi and the izinyanya. It is an offering lest the izinyanya be offended by the fact that a female belonging to another umzi has entered the ubuhlanti of this umzi.

After this ceremony further discussions with regard to the ikhazi may take place, while the feasting and dancing goes on.

The last step for the family of the young man is to slaughter a goat for the bride, roast a piece of meat and make her eat of it; at the same time she is given some milk, usually sour milk (amasi) taken from the calabash, to drink, one or two sips being enough.

This act is called ukutyis' amasi (to make her drink milk) and is done in the presence of at least one of her male relatives who acts as a witness, and her husband. The girl is thereby introduced into the family circle as the wife of the bridegroom. Now the marriage ceremony is complete and the marriage has been performed, and the bride is a member of her husband's family. Cohabitation takes place afterwards and does not form part of the essential requirements of a legal marriage. The uduli may after ukutyis' amasi safely leave on their return journey with the lobola cattle.

The uduli may occasionally remain at the umzi of the bridegroom for weeks or months on end awaiting the handing over of lobola cattle to their satisfaction; but this does not occur very often. When Yese, the daughter of Rharhabe married a Thembu Chief, the uduli of Yese, composed of more than ten men and ten women, remained in Thembuland for four years while the abaThembu slowly added to the number of lobola cattle until the uduli were satisfied.

The foregoing description is of an ordinary regular and full ceremonial marriage, nowadays called an umtshato. It is a set of proceedings that is observed especially in the case of rich people and people of status. In case of Chiefs, the

Great ....

Great Wife will always be married according to this ceremony, even in case she is thwalaed or carried away (see F below), for then she will afterwards be sent home and return with an uduli to undergo the further process described above

The poorer classes do not indulge in these grand proceedings, but limit themselves to the shorter ceremonies which reach their climax in the ukutyis' amasi. Though the shorter ceremony culminates in the ukutyis' amasi, I wish to draw attention to the fact (it is treated of fully under G1, below) that the other essential requirements of a legally binding marriage are also present, viz: handing over of the bride; consent of the young man and his family on the one hand, and the consent of the father and the implicit consent of the girl on the other hand; agreement as to the handing over, or the actual handing over, of the ikhazi, and the ukutyis' amasi ceremony.

(1) UKUTYIS' AMASI:

It is contracted at the umzi of the bridegroom's father where no other ceremony takes place but the slaughtering of a goat and giving the bride a piece of its meat roasted and a few sips of amasi (sour milk) in the presence of one male relative of her family and her husband. This ceremony is combination with other essential requirements already complied with, is sufficient to create a legal and binding marriage and to make the bride the umfazi of the man. There are no other ceremonies, nor are any other ceremonies needed.

It may be that the young man is too poor to hand over the ikhazi immediately but wishes to marry the girl. Thereupon the family of the young man will discuss the question with the family of the girl and if the girl's family agree, and a general agreement on the ikhazi has been reached, the girl will as soon as possible be sent to be married to the young man, not with an uduli as in the case of an umdudo oseleyo (umtshato) but accompanied perhaps by only one male relative to attend  
the ....



the ukutyis' amasi ceremony. This form of marriage is resorted to in order to cut down all expenses and to hasten the marriage. (Some call it an "emergency marriage").

There are cases in which people are satisfied, for the time being, with this poor-class type of marriage ceremony, the ukutyis' amasi; but later they decide to give a better status to the marriage by making use of the umguqo ceremony (kneeling of the bride), in the same way as, for example, Chiefs do when they have made use of the ukutyis' amasi ceremony in cases of Ukuthwala, and thereafter give the marriage a better status by making the bride go through the additional ceremonials of an umtshato. For, the umguqo is not an essential for a legal marriage, but of secondary importance, in order to make the marriage more grand and of a higher status.

#### (11) UMGUQO:

This means to make the bride kneel and unveil herself in the ubuhlanti so that she may be looked at by the young man and his companions. It is really an extension of the marriage ceremony by ukutyis' amasi, but the marriage thus concluded is considered to be of a higher grade.

A woman who has already undergone the ukutyis' amasi marriage ceremony and who therefore is the umfazi of a man, may be sent home, after a period of months or years have elapsed, by her husband and his family, and told to come a second time as if she had never been married before, in order that she may undergo the umguqo or kneeling ceremony. No other ceremonies will take place, expenses are limited, but the husband of the woman will after the kneeling and unveiling in the ubuhlanti, slaughter a beast or one or two goats or sheep.

#### E. BETROTHAL:

Because the period of betrothal is distinguished as a separate and important stage in the proceedings towards marriage, it should be treated of as a separate subject, in spite of the close connection with the ensuing marriage.

As has already been stated, Xhosa Law knows no stated age at which the betrothal should or should not take place except that it takes place at about the age of puberty when the breasts of the girl are swelling (ukUvela kwa mabele). She need not have undergone the intonjane ceremony before betrothal or marriage (See Chapter I). The young man on the other hand is expected to have undergone the initiation ceremony before betrothal (See Chapters I and II).

During the period of betrothal the young couple metsha with each other <sup>45</sup>. and the girl is expected to metsha now only with the young man and not with other men. If she does metsha with other men it may cause the young man legitimately to break off the engagement, or he may complain to her people.

A betrothal does not necessarily result in a marriage; for another young man may come along and be preferred by the parents of the girl,<sup>46</sup> or the engagement may be broken off on either side for some other cause. If this is the case only the pledge is at stake and it will depend on circumstances whether the isinyaniso beast (the pledge), with increase, given by the young man will be retained by the girl's family as a penalty, or be returned to the young man's family.

An engagement according to Xhosa Law, therefore, is a verbal agreement to negotiate for marriage, between the young man and his family on the one side, and the family of the girl (and the girl to a lesser extent) on the other side, reinforced

or ....

45. Qabazayo vs. Ncoco (2, N.A.C.) 7.

46. See also: Soga: The amaXosa: Life and Customs, p.228.

or supported by the handing over of the isinyaniso 14). or pledge beast, by the young man to the family of the girl.

Although the betrothal is a preliminary to a subsequent marriage, the engagement is a contract and the betrothal is a legal position, by itself, and it never makes it compulsory that marriage should take place.

Where the engagement is broken off by the young man or his family without good and sufficient cause, the pledge beast together with its increase is lost as a penalty.<sup>47</sup>

It must however, be understood that the pledge - or earnest- beast has no connection whatsoever with the ikhazi already tendered, and that the fate of the former in no way influences the fate of the latter.

In the case of *Nojiwa vs. Vuba* (1, N.A.C. 57, it was decided that where the young man, without good and sufficient cause broke off the engagement, the father of the girl was allowed to retain the whole ikhazi already handed over by the father of the bridegroom. 48. And in *Mills vs. Bidli* (1905) *Buch. A.C.* 244, it was stated inter alia: "If there is a failure to complete the marriage due to the fault of the intended husband he loses his property, and the father is not compellable to restore the dowry paid."

This is a mistaken view as far as Xhosa Law (Native Law in general) is concerned, for only the isinyaniso or pledge beast with increase, if any, may thus be retained. This beast is kept back, not so much as "damages", for in Xhosa Law ....

Note 14). Some other object, e.g. an assegai, may also be given as pledge. This is done only in circumstances where there are no cattle, eg. on account of cattle sickness, etc.

47. *Lucani vs. Mbuzweni* (1910) N.A.C. 27.

48. See also: *S. Ranayo vs. X. Namba* (4, N.A.C.) 114.



Law there is no action for "damages" for breach of promise to marry, but as a result of breaking the serious contract reinforced by the pledge, which pledge was expressly given to serve this purpose. Moreover, the father loses in fact nothing, he still retains his daughter and can still marry her to another man.

The object of the isinyaniso beast is totally different from that of the ikhazi. The ikhazi provided to the bride's family for a very different object viz. to compensate for the expected transfer of the bride, will, because no transfer of the bride will take place, certainly have to be returned to the young man; together with its increase, for the amaXhosa hold that the increase before marriage form part of the ikhazi. 49.

To repeat: provided the marriage negotiations are broken off by the young man without good and sufficient cause, the only cattle that may be retained by the family of the girl are the isinyaniso beast and its increase.

Where the girl or her family unlawfully break off the engagement, the young man will take back not only his isinyaniso beast plus the increase, should there be any, but also, though for a different reason, the ikhazi already provided, with their increase.

If the engagement is terminated by the consent of both parties, the isinyaniso beast must be returned and also the increase thereof to the young man and his family.<sup>50</sup> Also the ikhazi is then restored in full.

Fornication on the part of the young man is not regarded as a legitimate reason for the girl's family's breaking off the .....

49. See also: Whitfield: South African Native Law p. 96.

50. Kolman vs. Utlaka (1906) Seymour, p. 18 expresses also Xhosa Law.

the engagement or postponing the marriage and then also retaining the isinyaniso beast with its increase, or for retaining the ikhazi already handed over by the young man to the people of the girl.<sup>51.</sup> If they, however, do, the young man is entitled to get back his pledge beast plus increase, and also the ikhazi already handed over.

Until completion of the marriage, the ikhazi handed over to the people of the girl, including the increase, belongs to the young man or to his family. Should the negotiations be broken off by the people of the girl, without sufficient reason, the young man or his family are entitled to recover all the cattle handed over to the people of the girl together with their increase, as is stated above.

In the case of *Dyomfana vs. Klassie* (2, N.A.C.) 95, it was stated inter alia: "If the marriage negotiations are broken off by default of the father or his daughter without just and sufficient cause, the suitor is entitled to recover the cattle paid by him, together with the increase". This is proper Xhosa Law, but the case goes on: "If the marriage is celebrated, the increase becomes the property of the father, but does not count in the dowry." Now this is not Xhosa Law and I venture to say that it is not Native Law in general; in spite of the statement by Chief Dalindyebo in *Mdini Matyesini vs. Ntampu Dulo* (3, N.A.C.) 102: "These cattle are returnable, but not with increase, only the original number should be returned, as these were dowry cattle."

These cases should not be applied to Xhosa Law, for they have been I submit, wrongly decided. The increase count as part of the ikhazi. If the increase do not "count in the dowry" they should also not be restored when the engagement ....

<sup>51.</sup> *Petana vs. Sinukela* (1897) N.A.C. 22; and, *Pontshwa vs. Msi* (2, N.A.C.) 147.

engagement is broken off by the father of the girl without good and sufficient cause, for here too the increase did not form part of the original cattle handed over as ikhazi. The father of the girl has no legitimate claim to the increase under any circumstances. The increase cannot also - as might be contended be looked upon as a compensation for looking after and herding the cattle, for this would mean the introduction into the case of a consideration attached to a contract of a very different kind, viz. the contract of herding another person's cattle. The cattle handed over as lobola, these very beasts and their increase, remain one inseparable whole and if the ikhazi is returned, this means the whole of the ikhazi plus the increase. Moreover, for his care, the father of the girl is given the right to use the cattle so handed over to him, to cultivate his lands, and he may also use the milk.

The legal position of the ikhazi before marriage is that the cattle continue to belong to the bridegroom's family who provided them, until marriage is completed. And the increase may be counted as forming part of the ikhazi.<sup>52</sup> The father of the girl has only an interest in these cattle, but they belong to the bridegroom and his family.

In the case of *Peacocke vs. B. Rango* (19, S.C.) 323, quoted with approval by Kotze J.P. in *M. Bidli vs. Mills* (19, E.D.C.) 93, it was stated that: "....the ownership in the dowry cattle did not pass until the marriage had taken place." What is meant here is that until completion, the lobola cattle that have passed to the family of the girl, continue to belong to the young man and his family; and this is the view expressed also by Xhosa Law.

On the same principle as set out above, the young man and his family are entitled to the return of all his lobola cattle plus increase (and also of the isinyaniso and its increase)

handed .....

52. See also: Whitfield: South African Native Law, p. 96.



handed over to the family of the girl, if the girl dies before marriage as a result of illness and if the young man is not to blame. If they wish, as they usually do, they may leave one or more cattle behind, but there is no obligation to do so.

Fornication on the part of the girl is not allowed and this entitles the young man to break off the engagement and get back his isinyaniso beast.

Should a girl, during her period of betrothal be made pregnant by a man other than the one to whom she is engaged, her own father or guardian can demand the fine, and if the young man to whom she is betrothed does not wish to break off the engagement (which he may lawfully do), he (the father) may pass the fine on to the future husband of the girl, or he may keep the fine, which will then be discounted on the ikhazi, for a smaller ikhazi will now be given as the pregnancy of the girl has the natural effect of decreasing the number of lobola cattle. The future husband, however, cannot of his own right claim the fine for pregnancy before his marriage to the girl. He may however, as was said above, break off the engagement and demand the return of the isinyaniso beast plus increase, and also of the lobola cattle that may already have passed to the family of the girl, plus the increase.

#### P. OTHER FORMS OF CONTRACTING MARRIAGE:

The forms of contracting marriages as described above are regular forms of marriages with a greater or smaller amount of ceremonies. Now other but irregular forms of contracting a legally binding marriage with hardly any ceremonial, will be described. These may be grouped under the category of Ukuthwala, but fitting in with Xhosa conceptions, three distinct forms will be distinguished.

For the moment we note only the essential features of these three forms of Ukuthwala. They are:

- (1) Ukuthwala oku nge na mvumelano, also known as Ukugcagca, elopement. There is no consent on the part of the parents

before ....

before the ukuthwala. Both families; or only the girl's family are ignorant of what is happening. By pre-arrangement between the young man and the girl, the latter is carried off to the umzi of the former's father. Her resistance is sham. Mutual consent of families and agreement as to lobola are achieved. Ukutyis' amasi should precede sexual intercourse.

(ii) Ukuthwala Kobulawu:

Mutually pre-arranged plan between families. The girl is uninformed and is carried to the umzi of the young man's father, either forcibly or consenting. The girl consenting, ukutyis' amasi as a rule precedes sexual intercourse. The girl resisting, no marriage can ensue. Generally lobola is already agreed upon.

(iii) This last form of Ukuthwala has no specific Xhosa term. There is no consent of either family, or, only the young man's family is informed. The girl resists and is forcibly carried to the umzi of the young man's father. Marriage can ensue only if the girl and her family consent. Lobola in principle is accepted. Sexual intercourse follows on ukutyisa' amasi.

Before I pass on to a more detailed description of these different forms of ukuthwala marriage, a few remarks are appropriate:

The term ukuthwala, literally meaning "to carry away" has always been translated and taken to mean "abduction". This is a most unfortunate translation for, though it is literally correct, the English term "abduction" invariably implies the commission of a crime, which implication is not contained in the Xhosa term ukuthwala; while the Xhosa term implies a marriage by carrying the girl away, which implication is again lacking in the English term abduction. Ukuthwala therefore actually means marriage by carrying the girl away to the umzi of the young man.

Neither should ukuthwala, as frequently happens, be considered synonymous with ukugcagca, to elope, for the latter is only one of the three forms of ukuthwala that we dis-

tinguish. ....

tinguish.

I shall now discuss the three forms of ukuthwala that we distinguish, more fully:

(I) IKUTHWALA OKU NGE NA MVUMELANO (UKUGCAGCA):

This form of ukuthwala also constitutes a marriage in Xhosa Law. Under this form the consent of the intombi has been received, but not the consent of her family and parents. It is agreed upon by the young man and the girl that they will resort to this form of marriage and later obtain the consent of the girl's family. The girl's family will be faced with a fait accompli, and will have to decide whether they will give their consent.

The family of the young man are usually informed, for it is his father or lawful guardian who has to help him to lobola the girl, if she is his first wife.

This form of ukuthwala is actually ukugcagca or "sloperment", which to some degree defies the respect owed to the parents, but there is no trace of a crime being committed here; and it does not even run counter to Xhosa Law. It is another, though irregular, form of contracting a legally binding marriage. It is always a love match, and the young couple resort to it firstly because they love each other but are afraid that the family of the girl, or perhaps the family of the young man, may object. Or, it may be adopted in cases of need, for instance, when the man is as yet not in a position to give an ikhazi. His idea in thwalaing the girl is not to escape lobola, but rather to find a way to marry the girl he loves and then wait and arrange about the lobola cattle.

The girl agrees to meet the young man and his associates at a certain time, at a fixed spot, to enable him to thwala her. Usually she puts up a show of resistance so as not to be called an over-willing bride; but this is all sham. She and the young man have pre-arranged this procedure so that they may more easily marry and force the people of the girl to give their consent.

It ....



It is this form of marriage that is common among the people, and that usually results in court cases: "'ukuyitwala intombi means to carry off a girl secretly without her parents' consent or the consent of any other person having the lawful care and charge of her. It is immaterial whether she is taken with her own consent or at her own suggestion or against her own will or whether she is decoyed or enticed."

The above, quoted from a case in the Selected Decisions of the Native Appeal Court (Cape and O.F.S.) 1933, Vol. V, especially the last paragraph, does not distinguish the various forms of ukuthwala. Here all three forms are indiscriminately thrown together. If she is taken with or against her own consent but with the consent of her parents, then it is the second form of ukuthwala, viz. ukuthwala kobulawu; see below. If she is taken with her own consent and at her own suggestion but secretly without the knowledge or consent of her parents and family, it is this form of ukuthwala, viz. ukugcagca. Where she is taken against her own will and without the knowledge or consent of her family, it is the third form of ukuthwala treated of below.

Under this ukugcagca the girl is followed up as soon as possible by her family should the young man not immediately send word to her people; but the family of the young man usually communicate immediately with her father and formally ask for her in marriage. If she is followed up, discussions as to the ikhazi and marriage will immediately be proceeded with. Whether the parents of the girl agree to the marriage or not (and they will as a rule agree for the girl has already been thwalaed and they are as it were confronted with the scandal of the accomplished fact, their daughter herself also wanting to marry this young man), the young man will have to hand over to the family of the girl an inkomo yokuthwala, a beast for carrying off the girl without their consent, for this act is considered as an insult to the girl's parents.

According to the circumstances under which this form of a

Xhosa ....

Xhosa marriage takes place, there naturally is no question of the isinyaniso or pledge beast; and the compensation given by the young man does not become merged into the ikhazi. But the Native Appeal Court has held that the fine paid by the young man "becomes merged into the dowry and is recoverable on the dissolution of the marriage as dowry." 53.

The above view expressed by the Court is not Xhosa Law (or Native Law in general). In Xhosa Law a fine does not merge into the ikhazi. A fine is imposed for a criminal act, or some tort; the ikhazi on the other hand is that number of cattle handed over to the people of the girl as a consideration.

It is true that when a father gets ten head of cattle as ikhazi and one as fine under this form of ukuthwala (ukugcagea) he will, when asked how many cattle he has received as lobola, say eleven. But, he does not mean that the ikhazi consisted of eleven; he distinguishes between the ikhazi as such and the one beast handed to him as compensation for the insult for thwalaing of his daughter without his consent, and upon the dissolution of the marriage there will be no question as to the return of this beast or its progeny. Even if no marriage takes place under these conditions the young man will still have to pay this fine. It is usual that marriage negotiations are entertained by the family of the girl only after the insult or injury done to them has been "wiped out" by the payment of the fine.

The view that fines do not merge into the ikhazi has been rightly adopted by the Native Appeal Courts in some cases, immediately following the former, the decisions have been reversed.

In the case of *E. Totoyi vs. M. Sitebele* (4, N.A.C.) 66,  
it .....

53. *Pumlobo vs. Mbusi* (1908) N.A.C. 179.

it was stated in conformity with Xhosa Law, inter alia: "The Native Assessors to whom the question is submitted, state that the fine is not merged in the dowry. This agrees with the opinion of the Native Assessors in a similar case (Shidi Majeke vs. Ngwegqweni Nzuzana, (4, N.A.C.) 64)." The Court in these cases definitely laid down, and correctly too according to Xhosa Law (Native Law in general) that fines do not merge in the ikhazi.

Unfortunately these decisions were reversed. Thus in P. Meyi vs. T. Mgengwana (4, N.A.C.) 67, it was said inter alia: ".....the fines already paid become merged in the dowry." And, in another case it was said: "The generally accepted opinion, however, is that immediately the agreement as to marriage is concluded and something additional is paid as dowry the fines already paid become merged in dowry. There is no difference whether the fine is paid long before or just before marriage." 54. Further comment is unnecessary.

If the young man before ukutyis' amasi deflowers the girl and makes her pregnant, he will have to pay a beast for the defloration, inkomo yokhona, to the girl's father and also a beast for the pregnancy, inkomo yesisu (see Chapter V), a best of the belly, if the marriage negotiations are broken off. He has to pay these beasts, under these circumstances, in addition to the beast for the insult as is said above.

## (II) UKUTHWALA KOBULAWU:

This is the usual form of ukuthwala in which the young man and his parents on the one side, and the parents and family of the girl on the other side have agreed that the girl shall be thwalaed at about a certain time, at a certain spot ....

54. M. Mampondo vs. M. Manqunyana (4, N.A.C.) 7.



spot, and taken to the young man's unzi, either forcibly or consenting. She is, however, not informed beforehand of her future fate.

Let it be understood that in no form whatsoever does this constitute "abduction" in Xhosa Law (Native Law in general), and no criminal or civil action can result, because the parents have mutually agreed. This form of marriage was resorted to in former days and still occurs among the amaXhosa and other Bantu tribes, though to a lesser extent nowadays.

The girl is ignorant (or knows very little) of all the pre-arranged plans between the family of the young man and her own family. She is not consulted because she is said to have no say, a ka nazwi, and she has no hearing unassisted in the family court, inkundla ya manantsi.

This form of ukuthwala is a type of marriage suddenly decided upon and is also sometimes said to be an emergency marriage. It is done to save unnecessary expense in connection with the wedding outfit and other expenses at the young man's unzi. This is when the parties to the marriage are poor and the young man is unable to hand over all the lobola cattle immediately.

It is also resorted to as a form of marriage when the young man and the family of the girl are afraid or suspect that the girl may object to marrying this young man, and that she may, in her objection, be supported by her family. Or, it may be that the young man is afraid that another suitor may come along and get preference: therefore, to avoid this, he quickly agrees with her family to thwala the girl.

The method adopted to thwala the girl is the following: The bridegroom and his family have pre-arranged with the people of the girl about the thwalaing of the girl, and the manner of the operations. The girl is sent, accompanied by one or two other girls, at about the fixed time (it usually is in the afternoon) on the date fixed to a certain spot, usually a river, a trading store or some other wellknown place, not to make the girl suspicious, so that the young man and his..

his associates may be placed in a position to thwala her.

The ukuthwala is carried out by the bridegroom elect with the assistance of two or three of his male friends; but in all cases of ukuthwala the girl may be thwalaed by the friends of the young man alone on the express request of the bridegroom and his family. These friends then act as agents of the bridegroom and his family, and they are in no way committing a breach of law.

When the girl and her companions reach the appointed spot, the men who have been waiting for her lay hands on her and she is taken to the umzi of the young man's people. When she is thus thwalaed she offers resistance which usually is <sup>in</sup>earnest. If she hits, shouts and tries to get loose, she is sometimes overwhelmed by brute force.

Should she however know the young man and realize what it all means, and be willing to become his bride, she will still, to save her reputation, make a show of resistance though not so violent as if she has known nothing and refuses to become his bride.

Upon the arrival of the girl at the umzi of the young man, a male from here is sent as soon as possible to report to the family of the girl. The girl is meanwhile kept at the intended husband's umzi and is as a rule locked up in an indlu in spite of her resistance and unwillingness. Whenever she comes out, she is closely guarded.

It is however, customary for the girl's father to send a trustworthy man of his family to inform the girl that her father had consented to the thwala and she must not refuse the young man because he is of good character and is sure to make her life happy at his umzi.

Should the girl insist upon refusing to marry the young man, she has certain remedies. The most important and the one usually resorted to is that she shouts out that she refuses to be the wife of the intended husband, the son of so-and-so. This is enough to convince the people of the young man, and the girl is thereupon .

thereupon allowed to return to her own people and all negotiation are void from the beginning. Another method adopted by a girl under such circumstances is to rub her own excreta on to her face. In this way she will show the young man and his people her violent dislike of becoming the *umfazi* of this young man.

On the day following the girl's arrival at the man's *umzi*, the young man induces her to give way and to *metsha* with him. It is not unusual for him to have sexual intercourse, *udibane ngegazi*, because once he has succeeded in having connection the girl will no longer refuse him; and should she in spite of this, still refuse him, and return home, the young man cannot be charged with "abduction" or "rape" for the consent of the girl's father had been obtained to *thwala* her, and under this form of *ukuthwala* it is understood that the father of the girl tacitly consents to carnal connection between his daughter and the young man with the object of marriage, and of trying to induce the girl to submit. For by having sexual intercourse, the young man forms a bond, *intambo*, between himself and his bride.

But, as a rule before the young man has carnal intercourse with the girl, she is induced to undergo the *ukutyis' amasi* ceremony, where a goat is slaughtered and a piece of its roasted meat given her as well as a few sips of *amasi* (milk) from the milk-sack; thus introducing her into the family of the young man. She is now his *umfazi* or wife.

If marriage negotiations are broken off and the girl returns to her home, the young man will, under all circumstances, if he has deflowered the girl, have to pay to the girl's father one beast, *inkomo yokhona*, and if he has made the girl pregnant, another beast, *inkomo yesisu* (see Chapter V. E, for the position of a child born to an unmarried daughter).

In this *ukuthwala* the young man need not hand over to the father of the girl the *isinyaniso* or pledge beast. Neither is he liable to pay a beast as fine to the father of the girl for *thwalaing* her; for, the consent of the father is present and the father or his family suffer no insult.

Should ...



Should the girl submit, her family will send some men to carry further the negotiations with regard to the ikhazi; for, before the ukuthwala a binding promise to give lobola cattle has been made by the family of the young man to the family of the girl. Before the girl is thwalaed there is no time for lengthy discussions with regard to the ikhazi.

Sometimes it is asserted that it is not necessary that the girl who is thwalaed should have reached the age of puberty. It may safely be said however, that a girl under the age of puberty is not thwalaed for she is not yet considered to be marriageable. Only some seasons <sup>15)</sup>. after she has reached the age of puberty is she considered fit for marriage.

(III) In the last form of ukuthwala there is no previous consent of the girl or her family, but the family of the young man may be informed before the girl is actually thwalaed and brought to the umzi.

The young man and his companions who assist him to thwala the girl will await a suitable opportunity to thwala her and bring her to the umzi of his family. If he has not previously informed his family, he will do so immediately upon arrival at the umzi, for his father or lawful guardian will certainly have something to say under these circumstances.

The girl is then laid hands on by the young man and his associates and forcibly brought to his umzi. She will cry, shout and endeavour to free herself but is usually overpowered by male force. Once at the umzi of the young man, she is placed in an indlu and a male is immediately sent to her family to inform them that their daughter is safe and that the young man and his family desires to discuss marriage proposals with them.

It will be incumbent upon the young man to produce the inkomo yokuthwala as fine to the father of the girl for thwalaing the girl .....

Note 15). The amaXhosa do not count years, but go according to the number of seasons, e.g. how many times mealies have been sown since this or that occurred; or, they remember certain occurrences, e.g. The Nongquase episode; big droughts, e.g. Ilanga li ka Qilo; or cattle-sickness e.g. Imofu.

girl without his consent, and this beast does not merge into the ikhasi. Usually this beast is demanded before marriage negotiations are possible, for the insult done to the father of the girl would otherwise block the way to further discussions. Marriage can only ensue upon the consent of the father and on the girl's yielding. For, even if her father and family consent, she may, in spite of their exhortations, be persistent and refuse to marry the man (see (II) above), whereupon all negotiations are void.

The young man and his family will come to an agreement with the girl's family with regard to the question of lobola. As soon as this has been done and the consent of the girl received, which consent is usually tacitly expressed in her submission, the girl is put through the ukutyis' amasi ceremony and she is taken into the family of the young man as his wife. After this the young man may have sexual intercourse and not before.

Should the young man have intercourse before he has received the consent of her family, and they refuse, it is a serious offence and is sure to be heavily punished. This is ukudlwengula, rape, which is heavily fined especially when no marriage takes place. If the girl is willing to become the wife of the young man, it will encourage the parents to decide in the young man's favour.

This kind of ukuthwala is not uncommon among the amaXhosa, and it is of great importance to draw attention here to the peculiar feature of Xhosa legal conceptions that the element of brute force employed at the initial stage of the proceedings, does not forthwith determine and stigmatise the whole issue of these proceedings as a crime, as would be the case according to our own legal conceptions. In Xhosa Law a series of connected acts is viewed as a whole and is judged retrospectively from the viewpoint of the object sought and attained. Consequently a previous act in the sequence can be condoned and the whole issue be retrieved by a later act. So, in the matter under discussion the brute force employed against the girl can be condoned by her later consent and the violation of the bride's father's consent can be condoned by his final agreement to the marriage. Should

the .....

the final consent of the girl and her father not be attained, there can be no retrieval and the whole issue must be regarded as a crime.

If a marriage has been arrived at, there is therefore no longer any question of "abduction" and no criminal intent is any longer connected with this act.

Something like this third kind of ukuthwala sometimes occurred in the olden<sup>days</sup> when a Chief saw a pretty girl he fancied. He would tell his followers to thwala the girl and take her to the Great Place. When this had been accomplished the Chief would send to the family of the girl to inform them he had thwalaed their daughter. He would at the same time send some cattle as compensation for the insult and as ikhazi.

In all three forms therefore there must be present before the marriage is considered complete: the consent of the family of the young man and the young man; the consent of the girl and her family; the agreement as to the handing over of the ikhazi; and the transference or handing over of the bride which is here an accomplished fact, having been performed by the young man, and now made legal by the consent of the girl's father. After this the girl is put through the ukutyis' amasi ceremony, and she is then considered to be the umfazi, of the young man.

It may happen, however, that the girl's family will agree to her marriage with the young man who has thwalaed her, but will agree on condition that she be brought back to them so that they may send her with an uduli as in a normal regular marriage ceremony. This may be done either in (I) or (III) above.

In none of the three forms of ukuthwala can there be any question naturally of the inqakwe, impotulo or ubulunga beast at the time of the completion of the marriage; nor of the wedding outfit, though it may happen that the girl's family will send some household utensils to her.

Now that the three forms of ukuthwala have been described, it is necessary to review some denunciations of the custom of ukuthwala ....



ukuthwala by our Courts. Ukuthwala is sometimes referred to as a "forced marriage". From the European point of view this may be so; but this is not what the amaXhosa understand by the term ukuthwala, and that should be the leading principle for our Courts (see Sec. II(1) of Act 38 of 1927). It might be called a "forced marriage" because in some cases the express consent of the intombi is not acquired before she is thwalaed, and in other cases again the express consent of the parents of the intombi is not obtained before she is thwalaed.

In considering the question of "force" therefore, we must distinguish the rôle "force" plays in each of the three forms of ukuthwala with regard to the consent of the parents, and also with regard to the consent of the intombi, girl. Whether the consent of the young man's parents is present or not, it is of no vital importance for this discussion. Usually however, it is present in all three forms of ukuthwala.

The consent of the girl's parents is not present before the girl is thwalaed in forms (I) and (III) of ukuthwala. In both cases it is however, obtained after the girl is thwalaed.

It is true that there is some kind of compulsion on the family of the girl to give their consent. They are faced with the accomplished fact that the girl is thwalaed and at the umzi of the young man; the young man pays the inkomo yokuthwala besides being willing to come to terms with regard to the lobola cattle. They will accept the inkomo yokuthwala and if they also consent to the marriage, then, according to Xhosa Law, as has been stated above, the element of force has been condoned and is no longer existent if marriage ensues. Especially in the first form of ukuthwala, which is the result of love, the parents will accept the inkomo yokuthwala and will not be reluctant to give their consent, for they know that a love-match is the best and more stable than any other marriage. Should the consent of the girl's family however, not be achieved, especially under form (III), then the element of force remains unaffected and causes the ....

the whole adventure to be regarded as a crime; but as no marriage has been concluded, the term "forced marriage" is not appropriate to the case.

For the completion of the marriage, however, the consent of the bride also is essential, though this is generally achieved by way of her submission.

In case she submits and thereby tacitly acts out her consent, again the element of force is retrieved if marriage ensues. Should she persist in her refusal, no marriage can follow, and again there can be no question of a "forced marriage".

Ukuthwala has come to be looked upon as a crime and is treated as a crime and adjudicated upon by European Courts of Law according to the principles of Roman Dutch Law.<sup>55</sup> This is so because the Courts have indiscriminately and a priori taken for granted that the conception of ukuthwala is the same as that of "abduction". Now, it has been made clear that ukuthwala ending in marriage, in no way constitutes "abduction", which is a crime. The object of ukuthwala is lawful, although the means employed are irregular; it is directed towards the marriage of the girl with the young man who is responsible for thwalaing her, and in the majority of cases the object is reached and the means legitimised. And, as will be seen below (G.1) the essential requirements for a valid and binding marriage are all present in all cases of ukuthwala.

In some cases ukuthwala is spoken of as a "barbarous custom".<sup>56</sup> And, continued the learned judge in *Rex vs. Swartbooi*: "As I have pointed out on other occasions, this Court will not recognise the barbarous custom of thwalaing as a defence to a charge of assault which may be committed upon the girl whom it is desired to .....

55. See: Gardiner and Lanedown: South African Criminal Law, Volume II pp. 1060 - 1, Third Edition.

56. *Rex vs. Tembela*: Justice Cir. (1939) par. 93; *Rex vs. Zuma and Others*: Justice Cir. (1936) par. 704; *Rex vs. Swartbooi* (1906) B.D.C. 170; *Rex vs. Ncedani* (1908) B.D.C. 243.

to twala, or upon any of her friends and relations who wish to resist the efforts made by the bridegroom or any member of his party."

Again in *Rex vs. Njova* (1906) N.D.C. 71, Hopley J. ruled that the abduction by a native man of a native girl between the ages of 14 to 21 years for the purposes of marriage or carnal knowledge is <sup>a</sup>crime in the native territories and may be dealt with under Section 269 of Act 24 of 1886. Section 169 of the Code enacts that: "Whoever with intent to deprive any parent or guardian or other person having the lawful care or charge of any child under the age of 14, unlawfully leads or takes away or decoys or entices away or detains any such child, or receives or harbours any such child, knowing it to have been dealt with as aforesaid, shall be punished with imprisonment with or without hard labour, for a term which may extend to five years, or fine or both: Provided that nothing herein shall extend to any one who gets or takes possession of any child, claiming in good faith a right to the possession of the child."

In this section provision is made for the "abduction" of a child under 14 years; but as a rule a girl of over fourteen years is thwalaed. However, it is clear that this section is covered by Section 269 of the Act which makes the "abduction" of a child under 21 years, an offence under the common law.

That ukuthwala, when it ends in marriage may not according to Xhosa legal conceptions be regarded as a crime, has already been demonstrated above.

Our Native Appeal Courts are not clear with regard to the problem of ukuthwala. They admit that there is such a custom which is widely practised, but as far as is known and as is revealed in the decisions of the N.A. Courts, a specific form of Native Marriage has not yet been discerned and recognised in this custom by these Courts. In the case of *M. Joke and Another vs. N. Melane*, C.M. Cir. dated 9th April, 1924, No. 2, "it was held that it was not competent for a husband to institute an action for damages for the adultery of a woman who had been forced ...



forced to marry him, as no legal marriage subsisted between him and her." 57.

This is not true! Once the essential requirements are present, a legal and binding marriage exists and the husband can institute an action for damages. Vide discussion above.

The circumstance that our Courts have not discerned the true character of ukuthwala and indiscriminately treat every form of ukuthwala as a crime, is not only resented by the amaXhosa, but has been taken advantage of in this unfavourable sense that the bride's family frequently and successfully blackmail the young man's parents by threatening to institute criminal action against the young man and his associates, for the Courts wrongly support the girl's family's view. However, there can be no marriage unless the girl's father and his family also give their consent.

#### G. ESSENTIAL REQUIREMENTS FOR MARRIAGE:

It is necessary now to inquire as to what are the legal requirements of a Xhosa marriage.

If we compare the conclusion of marriage under European and under Xhosa Law, it is obvious that in the former circumstances the marriage is a juridical contract between the two parties involved, attested by a statutory authority. When all legal requirements have been complied with, it is an occurrence reduced to a legal abstraction; in Xhosa life and law this is not the case: a marriage is concluded by the performance of various acts and ceremonies, each of which has a particular signification and is regarded as embodying a part of the object in view, and all conjointly are considered to be the essential requirements for a legally binding marriage; hence in Xhosa law .....

57. Whitfield: South African Native Law. p. 416.

law the marriage and union of the parties concerned are virtually acted out in a concrete and perceptible manner.

Consequently it is not possible in Xhosa marriage ceremonies to point out one particular moment when, or one act by which particularly the marriage is constituted. The only thing we can say is that at the beginning of the performance marriage is not yet, and that at the close, marriage is duly contracted.

Now we can proceed to the question of which are the essential requirements for a legally binding marriage. If we keep in mind the proceedings in regular marriages with full or less ceremonial as well as those in irregular marriages with no ceremonial, then the following juristic acts and ceremonies are to be tested:

(1) The consent of the girl and her family on the one hand and the consent of the young man (and his family) on the other hand. The consent of the girl and her family is essential for a legally binding marriage. From beginning to end the consent of both parents and daughter is concretely acted out; it is not expressed in explicit words or legal maxims, but in acts and performance. The consent of both families is first acknowledged when they agree to the marriage proposals, by offering and accepting the assegai and allowing marriage negotiations to be opened and proceeded with. Their consent is further displayed by offering and accepting the iskhaniso or pledge beast, and then by the agreement as to the question of the ikhazi (see (11) below). The last stage in expressing their consent in a concrete manner, is that the family of the girl send her with the uduli to be handed over to the young man and his people, who accepts her. Furthermore, the representative of both families assist in the ukutyis amasi ceremony.

The consent of the girl is, as a rule taken for granted; she is assumed to consent tacitly when she submits in the same way as her refusal is very clearly acted out in the way she takes refuge to the remedies already mentioned in B(IV) and F(II), for then there will be no marriage. She expresses  
her ....

her dissent in concrete performances or acts, viz. refusing to hlonipha her father-in-law; by rubbing her own excreta on her face.

With regard to the consent of the young man and his family, they show their consent in that they help their son to open and carry to completion the marriage negotiations. They help him to provide the lobola cattle and assist him in the whole transaction which is thus composed of various acts.

Referring to the ukuthwala cases, we have seen that there also, the consent of the girl and her family is present, and without their respective consents there cannot be a legally binding marriage (see F(1), (11) and (111)).

(11) The transaction of lobola, conjointly with other essential requirements, is one of the chief factors in a legally binding marriage in Xhosa Law or Native Law in general. The legislature has under Section II(1) of Act 38 of 1927, granted formal recognition to the custom of lobola.

Though a binding promise by the young man and his family to hand over lobola cattle to the family of the girl at some future date, after the pledge beast, isinyaniso, or some other object as pledge has been handed over by the young man and his family to the family of the girl, should be regarded as sufficient, lobola cattle nevertheless as a rule do actually pass before or at the time of the conclusion of the marriage.

Lobola (see D, above) is an essential element in the whole of the essential requirements of a legally binding Xhosa marriage, whether regular or irregular, and is never absent. Without lobola cattle there can be no marriage; just as there is a transference, a handing over of the bride (see (111) below) so there is a formal handing over of the cattle and acceptance of these by the family of the girl.

(111) The handing over of the bride to the young man and his family is accompanied by ceremonial and is done by the uduli in a very perceptible way. She is taken to the umzi of the young



man by the uduli who act as representatives of her father and family, and here at the young man's umzi she is handed over. 58. This handing over is an essential in the whole marriage transaction. The parents of the bride do not accompany her, but they send the uduli to contract for them.

In the ukuthwala marriages of (1) and (111) there is no such formal and concrete handing over of the bride by her family to the young man and his family; but, the actual transference already accomplished more or less forcibly, is made legitimate. By giving their consent the parents of the bride make legal the transference of the bride, which transference has been irregularly and perhaps even unlawfully accomplished by the young man.

But the people of the bride may, and they sometimes when they agree to the marriage under ukuthwala (1) and (111) do ask that the girl be sent home so that she may be brought to the young man's umzi by an uduli and then formally, in a realistic transaction be handed over to him and his family.

(1V) The performance of the ukutyis' amasi ceremony, is the final stage in the whole of the essential requirements of a legally binding Xhosa marriage (see p. 67). The performance of this ceremony in a most perceptible manner finally introduces the bride into the family of the bridegroom and she is thereby taken in as a member of this umzi. Before this ceremony she is not yet called an umfazi. In all marriage ceremonies, either of regular marriages or irregular, this ceremony must be performed before the marriage is considered complete and binding. After this, full sexual intercourse, which is the privilege of married people only, is permitted.

(V) Some amaXhosa hold that the umdudo or dance, is essential to a valid and binding marriage in Xhosa Law. It is true that the .....

58. *Epakanyiswa vs. Ntshangase* (1897) N.A.C. 17; and *Lize vs. Makalima* (1911) N.A.C. 180, express the principle of Xhosa Law

the dance has become an inseparable part of the ordinary full ceremonial marriage, and in such circumstances it is observed by practically all amaXhosa; but, to repeat, it is practised only in an umtsha to or full ceremonial marriage. It is not as a rule, practised in other forms of marriage which are regular but have less ceremonial, or in marriages which are irregular and have little ceremonial. It is therefore not an essential to a valid and binding marriage. It is a usage (isiqelo), at most a custom, the non-observance of which does not affect the validity of the marriage.

The dance lends more colour to the wedding ceremony, makes it more conspicuous and fuller, and is as it were the finishing touch that makes an umtshato ceremony complete. A wife of will always have a dance at her wedding indicating her status, status, and it is usual and customary to perform the dancing part of the wedding when a man marries his Great Wife. It has evidential value for it will bring out her status and make known to the world that she is the Great Wife whose son will be general heir and successor of her husband. The omission of the umdudo, however, does not affect the validity of the marriage.

(VI). It is sometimes averred that the slaughtering of a beast, the impotulo or the beast (it may be smaller stock) by the bridegroom after the unguqo (unveiling ceremony), is essential for a valid marriage, and that it is actually the point at which the marriage is solemnised. There must be shedding of blood to complete the marriage tie, some say. But, sound reasoning and a thorough knowledge of Xhosa Law prove that no one act can be said to be the one which confirms a marriage. And the slaughtering of a beast is not an essential requirement for a legally binding marriage, for its omission will not affect the validity of the marriage, though it may affect the quality of the marriage.

The Native Appeal Courts seem to have accepted the following as essential requirements for a legally binding marriage in Native Law, and therefore Xhosa Law too: (1) Con-

sent ...

sent of the contracting parties; (11) "payment of dowry"; (111) "delivery of the bride". 59.

(1) It is true, the consent of the contracting parties is essential. But it is not clear whether the Court here means the consent of the bride and bridegroom alone, or the consent of these two people and also the consent of their respective families. For, the two families, including the bride and bridegroom, are really the two contracting parties. The consent of the bride and bridegroom, without the consent, especially of the family of the bride, is not sufficient, according to Xhosa Law, for a legally binding marriage. On the other hand, the consent only of her family, or the family of the young man, is also not sufficient; see B (1V) and G(1) above. It is to be noted however, that nowhere need the consent be expressed in words; it is deduced from the actions of each party.

(11) "The payment of dowry" 16). is an essential requirement. But, to put this better: the transference of the ikhazi, or part thereof, before or at the time of marriage, or a binding promise to transfer lobola cattle at some future date, by the young man and his family to the family of the bride, constitute an essential element in the whole of the essential requirements of a marriage. See G(11) above.

(111) "Delivery 16). of the bride"; to say "transference of the bride" either or not by the uduli as representatives of her family, to the young man and his family, would be better. See G(111) above.

These ....

59. See: Modikayi Mfawwe vs. D. Modikayi (1939) N.A.C. 16, (Cape and C.F.S.)

Note 16). The words "payment" and "delivery" should not be used; for these are terms used in a transaction of purchase and sale, and there is no such transaction here. Neither is the word "dowry" well chosen, as has already been stated. The best word to use is the Xhosa word ikhazi (or in another Bantu language a word of the same meaning).



These are the three essentials according to our Native Appeal Courts who do not state whether these essentials singularly or conjointly, acting in harmony as one complete whole, are essential requirements.

But these three essentials only, though conjointly, are not by themselves sufficient. The other essential that makes the whole transacting complete, is the performance of the ukutyis' amasi ceremony, introducing the bride as member of the bridegroom's family. See G(1V) above.

Only upon the completion of this ceremony is a marriage finally concluded in Xhosa Law. Nowhere is this ceremony described, and it is not even mentioned by the Native Appeal Courts.

CHAPTER IV.RELATIONS BETWEEN HUSBAND AND WIFE.GENERAL:

As has already been pointed out in Chapter I, a female, according to Xhosa Law, is always considered to be under the "guardianship" <sup>17)</sup> of a male. Upon her marriage a wife falls under the guardianship of her husband. The domicile of the husband is the domicile of the wife. <sup>60.</sup> Because she is under his guardianship, her husband fixes her place of residence, which in the indlu he builds for her. He usually builds this indlu when she has borne him children. It is customary for the newly married wife to sleep with her mother-in-law (unina zala) for the first few nights so that the unina zala may initiate her into the rights and duties connected with the umzi.

The relationship between husband and wife is of course sui generis, but to a degree resembles that which exists between a "major" and a "minor", between father and daughter. The wife has passed from the guardianship of her father to that of her husband.

But, let it not be supposed that the relationship between husband and wife is that which exists between an owner and his chattel as some people think. A wife can never be treated as a piece of property. She is not the property of her husband, he cannot sell or prostitute her. She cannot be punished without cause. Her husband cannot injure or kill her, for if he does he is liable to pay a fine to the Chief. <sup>18)</sup>

She ....

Note 17). This term is not a pure Xhosa legal term, but is used here to express the relationship spoken of.

60. T. Nodada vs. J. Nodada (4, N.A.C. 304, expresses also Xhosa Law.

Note 18). There is an old maxim: "induku a yi namzi" which means there can be no place on harmony where brute force (the stick) rules the home.

She must conduct herself like a good and respectable wife under the guardianship of her husband. She must fulfil her marital, domestic, and social duties in accordance with the control of her husband (see (b) below). In spite of all this, the wife is however, in no servile position. She is regarded as the mistress of the home. "Uazi u ngu mzi ngomfazi", which means that a home is such by virtue of the wife.<sup>61.</sup>

To a certain extent the influence and control of her own people are also felt, as is clearly seen under the ukuteleka custom. This means to hold back or to withhold the wife, and affords her people the remedy of exacting afine when the husband of the woman illtreats her (see Chapter III).

#### A. STATUS OF WIVES:

Where a man marries only one wife there is no difficulty with regard to her status (see Chapter I). But where a man marries more than one wife the status of these successive wives is different and must be fixed. The status of these wives is fixed according to the indlu, - that is hut or house - system.

In order to understand the indlu system and therefore the status of the different wives, a sketch and a description of a Xhosa umzi are essential.

#### 1. DESCRIPTION OF THE UMZI:

Coming out of the Great House (indlu enkulu or ibotwe), the Right Hand House (indlu ya se kunene) is on one's right hand.<sup>19).</sup> Each of these izindlu has one or more amaqadi or "rafters" attached to it. The amaqadi or supporting houses of each of these two principal houses are situated on the side of ....

61. See Soga: The AmaXosa: Life and Customs, p. 272.

Note 19).

This is therefore different from the Zulu umzi.



# UMZI WOM XHOSA.

(Xhosa Kraal)

Indlu ya se kunene.  
(Right Hand House)

Thotwa; indlu enkulu.  
(Great House)

Vimba  
(Store Hut)

Vimba  
(Store Hut)

Qadi le ndlu ya se kunene.  
(Support of the  
Right Hand House)

Qadi le ndlu enkulu.  
(Support of the  
Great House).

Isibaya.  
(Kraal  
of calves)

Isibaya.  
(Kraal  
of calves)

Xegokazi.  
(Hut of old Mother)  
(Girls Boys).

Vimba.

Vimba.

## I N K U N D L A .

Relatives.  
(Sons)

Ekunene.  
(Cattle Kraal  
of the Right  
Hand House)

Ndlu enkulu.  
(Cattle Kraal of  
the Great House).

Relatives.  
Umtshana.  
(Nephews) or  
Umtshana ka  
Mtshana.  
(Sons of nephews)

of the house which they support. It may happen, however, that the qadi is situated at a different spot, away from this umzi it supports. Each indlu has its own vimba or store hut. Sometimes each of the principal houses has its own ubuhlanti or cattl kraal and its own isibaya or kraal for the calves. But nowadays there is usually one ubuhlanti and one isibaya to the whole umzi.

There are separate huts for relatives and boys and for girls when they grow older; also a hut for the old mother (Kegokazi) of the umzin' umzi. The boys very often sleep here with the Kegokazi. This hut is situated on the side of the Great House (see sketch). The boys have their own hut when they grow older on the Right Hand side.

The open space between the ubuhlanti and the izindlu (huts) is called the inkundla, meaning both courtyard and court. It is here that the men gather on festival occasions; here laws and customs are discussed and cases decided; it is an open court of justice; here male strangers are attended to; a girl about to be married must kneel here in order to receive the blessings of her father and relatives; the bride must first walk through the inkundla; on the day the abakwetha are released from the isutu they have together in the inkundla to receive the devotions (iziyalo) and gifts from their fathers, relatives and friends (see Chapter I).

The right hand side as one enters an indlu is the side reserved for the husband, and the left hand side belongs to the wife. The usual place for the children is just ahead of the fire-place. If there are many children, the girls will sleep on the mother's side and the boys on the father's side. When the children grow older they have their own huts to sleep in (see sketch).

## 2. CHIEF'S UMZI:

The umzi of the Chief is built on the same principle as that of a commoner described above. The only difference of note .....

note is that an ixhiba house, is found only in a Chief's umzi; this is a house to look after the interests of the deceased father of this house (see below) and prevent them from dying out. The xhiba house, as will appear below, is however, not in the same umzi as the other houses but at a separate place.

### 3. GREAT WIFE:

#### (a) The Great Wife of a Commoner:

The first wife a commoner marries is his Great Wife or umfazi omkhulu, who exercises great influence in the umzi. She has a good deal of authority over the other women, especially over the amaqadi. She is as it were the mother of the umzi and the other wives do most of the work in the umzi under her direction. But the Great Wife cannot force the other women to work, e.g. to hoe the gardens for her.

"Sometimes, when the Great Wife is a harsh woman, and the minor wives do not care to submit to her, they appeal to the husband for protection, and in that way "rafters" are transferred from the Great Wife's section to that of the Right Hand Wife; more consequence would then be attached to the Right Hand section, but this practice is not usual." <sup>62</sup>.

The possibility exists for the commoner-husband, upon exceptionally good and sufficient cause, and for very strong reason, to change the order of the status of his wives. This is however very rare. He has to take the case before the family court, and the matter may even end before the Chief's Court.

Our Native Appeal Courts have decided that a commoner has no right to nominate the rank or status of his wives and that their rank and status follow the order of their priority of marriage. <sup>63</sup>. This view holds good for Pondo Law but it is doubtful .....

<sup>62</sup>. Report and Proceedings of the (Cape) Commission on Native Laws and Customs 1883, the Evidence of Toto C.S. Ques. 1958 p. 116.

<sup>63</sup>. Stena Ngcongolo vs. W. Ngcongolo (1930) N.A.C. 11. See also Whitfield p. 34.



doubtful whether it is in conformity with Xhosa Law. Xhosa Law acknowledges the limited right of a husband to nominate upon very strong reason and good and sufficient cause.

The umnin' umzi divides his time between the Great House and the other houses. If he falls ill he must be taken to the Great House, for he must die there. Should he suddenly die elsewhere, his body is taken there to be carried to the place of burial. This is to indicate, for the last time that this is the Great House and to prevent any argument or strife as to which is the Great House.

It is customary for the husband to discuss with his unfazi omkhulu any intended or successive marriage. For she must preserve peace and harmony in the umzi and the dignity of the umzi largely depends upon her (see (b) below). Being the Great Wife she usually insists upon the husband's marrying more wives, for this means an increase in her authority and it also enhances her status in the eyes of the outside world.

The Great Wife gives birth to the indlamafa, or the heir and successor of the umnin' umzi. Because the first son born to the Great Wife is the successor to his father's status and property, he not only has a claim to all the property of his father not distributed to the specific houses, but he has also a legal claim to the property of the qadi le udlu enkulu (the support, rafter, of the Great House) if the heir and successor to this house dies. After the death of the umnin' umzi the indlamafa also succeeds to the control over the whole umzi, in that he takes the place of the umnin' umzi.

If there be no heir at all to the Great Wife, the husband may marry a womb (isisu) for the Great Wife (see 7 below) or Amaqadi (rafters) to the Great Wife (see 6 below).

Should a man (usually in the case of Chiefs), having two or more wives, die while it is uncertain which wife was married first and therefore who is the rightful heir of the deceased, the brothers of the latter and/or his nearest and closest relatives

will ....

will bring the matter before the family court where the point at issue will be settled. If the court is divided and cannot decide the case is taken to the "supreme court", where the Chief and his amaphakathi finally decide. In the case of a Chief, the matter will be settled by the amaphakathi and minor chiefs.

(b) The Great Wife of the Chief:

Unless she is the only wife he marries, the first wife married by a Chief is not his umfazi omkhulu (Great Wife) as is the case with abantu abamnyama (commoners); this is so even if she is of royal blood. The first wife married by a Xhosa Chief is called the umsul'udaka, the wife that washes off the white clay (ifutha) of his initiation and as such cannot be the Great Wife. As the name indicates, this umsul' udaka wife the Xhosa Chief marries not long after he has come out of the seclusion hut. She is not necessarily a woman of adequate rank and status, or one of royal blood. There are cases known where the first wife has been a woman of loose character, but because she was the one who cleansed the Chief of his boyhood, it did not matter, for her son would not become the heir and successor. The first wife of a Chief however, is usually from amongst the daughters of his councillors or close friends.

According to Xhosa Law the Great Wife of a Chief may be married last but there is no specified time when such marriage should take place. For this reason it is not uncommon for a Chief to marry his Great Wife not many years before his death. The method was, especially in olden days, resorted to as a means of protection, to prevent the eldest son of the Great Wife from usurping the power of his father and pushing his father aside. This method also prevented disputes with regard to succession during the life of the Chief.

The Chief has a right to nominate the status of his wives. Here Xhosa Law differs from the law in force in Western Pondoland, where the first wife married by the Paramount Chief is the Great Wife. This has a historical origin but this rule differs also from ....

from the law in force in Eastern Pondoland where the custom of ukubeka, that is to nominate, like the amaXhosa Chiefs, prevails. This is usually done in collaboration with his amaphakathi or councillors, and a wife's status is sometimes proclaimed on the day the Chief marries her.

"In Gcalekaland it is held to be the custom that once a Chief's wife has had her precedence assigned to her she may not be deposed from it under any circumstances." 64. This view is not, however, correct, as will appear below.

Should the Chief during his lifetime not have nominated a Great Wife with the help of his sub-chiefs and councillors, and hence, after his death it be unknown who the Great Wife is and who has to succeed the deceased, it will be the duty of the sub-chiefs, headmen and other councillors to nominate the Great Wife whose son will then also be the successor. In such cases, rare though they are, the wife nominated will be one who is of highest rank, of royal blood and one who has borne a son.

The status and rank of the Great Wife of a Xhosa Chief are determined by various factors, which, if present, do away with any difficulty in respect of succession after the death of the Chief. These factors are: (1) The woman must be of royal blood from some other Bantu Tribe and not from among the amaXhosa tribes. Intimate research has revealed the fact that all Xhosa Chiefs took as Great Wives women from the Thembu Tribe and other not Xhosa tribes. Should there be a dispute as to the status of wives of a Chief a wife from the Thembu royal house is sure to have priority. The fact that she is thembukazi, is decisive, provided other factors are equal.

The only tribe in the Xhosa area whose Chiefs may marry a Great Wife from among the amaXhosa tribes, is the amaQunukwebe.

This .....

65. See Whitfield: South African Native Law, p. 34.



This fact however, and other facts and circumstances tend to prove that the amaGqunukwebe are not a true Xhosa tribe though they have accepted Xhosa culture in full and consider themselves, to be amaXhosa.

(ii) Furthermore, the Great Wife of a chief is not lobolaed by himself, though he may also contribute towards the ikhazi. It is the tribe that contributes the lobola cattle and actually lobolaes the wife for the Chief. This Great Wife of the Chief is taken and spoken of as the woman or mother of the whole land, the nation. She is the inkosikazi yesizwe. Some amaXhosa express it by saying that not the Chief but the tribe marries the Great Wife and the Chief is there only as representative of the tribe to cohabit with this woman and to produce a successor to reign over the tribe. That is why the wish of the Chief to marry his Great Wife is discussed by his councillors (amaphakathi) who are the appropriate representatives of the tribe and are also instrumental in seeing to it that the marriage is so concluded.

(iii) Another factor which determines the status of the Great Wife, is that she has to be accepted and formally declared such by the full court, ibandla, of the Chief. But this procedure is not strictly adhered to, for by contributing towards the ikhazi, the tribe and sub-chiefs have accepted this woman as the Great Wife of their Chief, and the nature of the marriage and the fact that she inhabits the ibotwe or indlu enkulu, are sufficient to convince anyone.

#### 4. THE RIGHT HAND WIFE:

The second-married wife of a commoner is the umfazi wa se kunene (Right Hand Wife). This is not so among the Chiefs as we have already seen.

The umfazi wa se kenene has a very important status. It is second only to that of the umfazi omkhulu (Great Wife) and she therefore exercises great authority in the umzi. She is not wholly subservient to the Great Wife; and has an independent status which is especially emphasised by the facts that (like the umfazi omkhulu to a certain degree): (i) she may have one or

more amaqadi married for her, and amaqadi are only married for women of status; (ii) a womb, isien (vulgo: "seed-bearer") may be married for her; (iii) in case the lawful heir and successor is still a minor, her first son will function and act for him and in the case of a royal family he will act as regent for an heir and successor who is still a minor. A striking example is Ndlambe, the right-hand brother of Mlawu, the sons of Rharhabe. After his brother's death Ndlambe acted as regent for Ngqika, the lawful heir and successor of Mlawu. (iv) In case of both abantu abannyawa (commoners) and abantu negazi (Chiefs, royalty), the heir and successor of the husband does not become heir of the property of the indlu ya se kunene; the property of this house belongs to the eldest son born to this house. (v) In the case of Chiefs, as a result of his mother's status he will be given a chieftainship over a portion of his father's tribe. An example of a very early date, as far back as one can trace it among the amaXhosa, is that of Gcaleka and Rharhabe, the sons of Chief Nko by his Great Wife and his Right Hand Wife respectively. Gcaleka, as a result of his mother's status became Paramount Chief of all the amaXhosa tribes; Rharhabe became Paramount Chief of all the tribes descendant from the Right Hand House of Nko. That is why today the amaNgqika are superior in status to the amaNdlambe, but the amaGcaleka are superior to all other amaXhosa tribes. This position is known and acknowledged up to the present day among the amaXhosa.

##### 5. THE ORIGIN OF THE INDLU ENKULU AND THE INDLU YA SE KUNENE:

In the case of commoners it seems natural that the first wife a man marries should be his umfazi omkhulu (Great Wife); and the second one his umfazi wa se kunene (Right Hand Wife). But why is this not the case among the Chiefs? To this the amaXhosa give an explanation which, though it may seem feasible, cannot historically be correct, for the same principle is found among other and older Bantu tribes independent of the amaXhosa.

The ....

The amaXhosa say that the indlu enkulu and the indlu ya se kunene had their origin some time in the eighteenth century, during the time of Palo, a younger/<sup>son</sup> of Chief Tshiwo. Here according to them also lies the origin of the right of the Chief to nominate his wives.

It was usual for a Chief to send one of his daughters as wife to a Chief of another tribe (see Chapter (III)). The Chief did this (a) to make an alliance with the other tribe; (b) to enhance his status; (c) to increase his own exchequer; (d) to prevent his daughter from becoming an old spinster, which was considered a disgrace; (e) because it was a great honour for a tribe if their princess was married to a prince, more especially if he was the future King.

During the reign of Palo two chiefs of other tribes each sent their daughters to be married to the young Chief. These daughters with their respective ooduli (bridal parties) arrived at the same time at the Great Place. Palo did not know what to do. He could not send the princesses back, for it meant insulting the other Chiefs and it might mean war.

Now there was a great adviser (iciko) or expert (ichule) on all matters of law and custom (some say this man was Majeke, the son of Kulile), and Palo sent for this adviser. Meanwhile the two princesses with their ooduli were staying at kraals near the Great Place.

On his arrival this expert was given all the details and shown the girls. He was to decide what each of these princesses would be called after they had undergone the umdulo ozeleyo or full-dress wedding ceremony which is concluded by the umdulo. The people were assembled in the inkundla. The expert requested King Palo to stand up, and he asked the King: "Yi nto <sup>nina</sup> le i phakathi kweengalo zenkosi", what is this between the arms of the Chief? Palo said it was his head (intloko). Thereupon the expert took Palo's right arm and asked Palo what this was. Palo said: "ingalo yokunene", the right arm. The expert then

said ....



said: "let it be so with these two women when you marry them; let one be the 'head' and the other the 'right hand' ". This was to show, he said, that both women were of high status (nesibalo), for the "head" was the thing with "inqondo", brain, and the "right hand" was the thing with strength. The "head" came first and is greater; the "right hand" is strong and can help the "head".

On the wedding day they therefore "dalwaed" (created) these two women as the umfazi omkhulu (Great Wife) and the umfazi wa se kunene (Right Hand Wife). It was also then decided that each of these women should have power and authority, and the eldest son of the umfazi wa se kunene should also be a "kumkani" or king; but the son of the umfazi omkhulu should be the greatest kumkani.

In the same year these two women each gave birth to a son. These sons are sometimes, incorrectly, said to have been twins. What the amaXhosa actually mean is that they were born in the same year by two women married at about the same time, each wife having a high status independently of the other.

In this way the umfazi wa se kunene (Right Hand Wife) became a woman of great status, clothed with authority and not totally subservient to the umfazi omkhulu (Great Wife). Because of her status her son also became a Chief with his own followers as distinct from the Great Wife's son.

## 6. AMAQADI:

The amaqadi are women married and attached to the two principal houses; they give status to these principal houses and support the latter, hence they are often called "supporting houses" or "rafters". Should there be no male issue in the house to which a qadi is attached, the eldest son of the senior qadi will become the lawful heir and successor of the house without male issue (see below).

There is no limit in Xhosa Law to the number of wives a man may ....

may marry. In the case of a Chief, he nominates his wives; but in the case of a commoner, after the *umfazi omkhulu* and the *umfazi wa se khunene* comes the third wife a man marries. This third wife is, except in very extraordinary cases, according to the Native Appeal Courts (see below) the *qadi le ndlu enkulu* (the *qadi* of the Great House). She therefore supports the Great House.

It is sometimes asserted, though very rarely, that the third wife married by a Xhosa man is his "left hand wife" (*umfazi wa se khohlo*) and her *indlu* or establishment is then spoken of as the *indlu ya se khohlo* (the left hand house). This is confusing the Xhosa with the Zulu family system. Xhosa Family Law knows no left hand wife; the third wife, of a commoner, is the *qadi* wife of the *indlu enkulu*.

If therefore, a man marries more than two wives, these subsequent wives will be attached to one or another of the two principal houses (see sketch), but each of these *amaqadi* or minor wives will have her own separate hut and establishment and cattle allocated to that establishment. It is here that a *qadi* and an *isicwaba* or womb (see 7 below) differ. The *qadi* is usually married after the first two wives and she has a separate *indlu* and also a *vimba* (store hut) of her own. She is not absorbed by the principal house. The children of the *qadi* belong to her own establishment and not the *indlu* to which she is a *qadi*. Because of her status the children of a *qadi*, if boys, may in future be able to establish separate and independent establishments, as for example when they marry.

The rank and status of the *amaqadi* are inferior to those of the two principal houses, but they follow the rank and status of the principal house to which they are attached though they are subordinate. In the case of Chiefs, however, the *amaqadi* are accorded their rank and status by the Chief in collaboration with his family and *amaphakathi* (councillors). Among commoners, the third wife is the *qadi le ndlu enkulu*; the fourth wife is

the ....

the qadi le ndlu ya se kunene; the fifth wife again is the qadi le ndlu enkulu. As a rule the indlu enkulu has more amaqadi than the indlu ya se kunene, for, being the Great House, it is of higher status. Some say that the indlu ya se kunene can only have one qadi.

This is not according to Xhosa Law, and it has been correctly stated that "the sixth is the qadi wife of the Right Hand House, and so on."<sup>65</sup>.

There can, however, never be a qadi to another qadi. Only the two principal wives have amaqadi. Nor is an isisu or woma married to a qadi.

The general principle is that the indlu enkulu will have a qadi before the indlu ya se kunene. But the Native Appeal Courts have accepted the statement and principle that a man may marry a qadi to the Right hand House before marrying a qadi to the Great Wife when there is no stock in the latter house.<sup>66</sup>

This view clashes with the following case quoted by Whitfield, South African Native Law, p. 35, which holds good for Xhosa Law: "that the wives of a commoner must take precedence in accordance with the custom applicable to common people (The custom, viz. that the Great House gets a qadi before the Right Hand House), and that where any variation of the custom is alleged, overwhelming proof of such variation must be adduced."<sup>67</sup>

The principle accepted by our Native Appeal Courts that a man may under certain circumstances marry a qadi to the Right Hand House before marrying one to the Great Wife (umfazi omkhulu) clashes with the correct ruling in the case of Peko

versus ....

<sup>65</sup>. Whitfield: South African Native Law, p. 34.

<sup>66</sup>. Mgudlwa vs. Paliso (4, N.A.C.) 378.

<sup>67</sup>. N. Tshemese vs. N. Tshemese and Another (4, N.A.C.) 143.



versus Matanzima (1, N.A.C.) 60, "that a qadi wife could not be married in support of the Right Hand House before such a wife had been provided in connection with the Great House." 68.

The general principle is that the house which needs a qadi is expected to furnish lobola cattle for the ikhazi of such qadi wife. For, every indlu or house has to produce the ikhazi for its own qadi. But this does not necessarily mean that the third wife, for instance, must be the qadi to the Right Hand House if the latter house paid the ikhazi, as it is stated in the case referred to above in connection with the question of stock in one of the houses (Mgudlwa vs. Paliso, above). If the ikhazi for the third wife comes from the indlu ya se kunene that does not in itself mean that this third wife is the qadi to the indlu ya se kunene. For, the ikhazi of the wife is the qadi to the indlu ya se kunene came from the indlu enkulu. Because of this the indlu ya se kunene is indebted to the indlu enkulu for the number of lobola cattle which lobolaed the wife of the indlu ya se kunene. Hence under normal conditions the indlu enkulu has a claim to the ikhazi of the eldest daughter of the indlu ya se kunene. Now, should the husband lobola a third wife with cattle from the indlu ya se kunene, he may take these cattle for the third wife and set them off against the debt owed by the indlu ya se kunene to the indlu enkulu for the ikhazi given to lobola the wife of the indlu ya se kunene. If he does this (he will as a rule publicly make this known to his family court) then the indlu enkulu has no further claim to the ikhazi of the eldest daughter of the indlu ya se kunene.

It is, moreover, the custom that a wife of superior status should have an iqadi before a wife of inferior status.

Even if the Great House has taken the ikhazi given for  
the ...

68. Quoted by Whitfield: South African Native Law p. 35.

the eldest daughter of the indlu ya se kunene, it seems as if the latter house has no claim to the third wife's being the qadi le ndlu ya se kunene.

Should the husband, in order to lobola a third wife, take cattle from both the indlu enkulu and the indlu ya se kunene, the position is clear: This wife will be the qadi le ndlu enkulu. This is the case even if the indlu ya se kunene has contributed the greater number of lobola cattle.

Xhosa Law recognises no qadi wife to support another qadi wife; for, this custom is practised only in connection with the indlu enkulu and the indlu ya se kunene. And, as has already been said, neither can an isisu (womb) be married for a qadi; it would be as if a qadi were married for another qadi. If a qadi bears no children, it does not matter, and does not warrant the husband to marry another qadi for this childless qadi. If he wants an heir in case of total failure of male issue he will marry another qadi (or an isisu) to one of the principal houses.

Should there be no male issue in the indlu ya se kunene, the eldest son of the qadi le ndlu ya se kunene will, because of his mother's status, be heir to the indlu ya se kunene.

But, where the husband decides to marry an isisu (womb) to the indlu enkulu and one to the indlu ya sekunene, the sons of these wombs will succeed to the respective houses with the exclusion of the eldest sons of the amaqadi (see 7 below).

#### 7. ISISU, WOMB (VULGO: SEED-BEARER):<sup>20</sup>).

Should either the umfazi omkhulu or the umfazi wa se kunene, not give birth to any children and be proved to be  
barren .....

Note 20). I prefer to use the word "isisu", "womb" for according to the amaXhosa this woman is considered actually to be the womb of the childless wife; she is the woman who brings life into the womb. "Seed-bearer" is not well chosen.

barren, or should either die without male issue, her husband may marry an isisu or womb to that house. Wombs are not married to any but the two principal houses. The womb thus married will then give birth to and raise seed for the wife for whom she is married and as it were sit in the doorstep of the house: ukuhlala emnyango. Hence a husband cannot rightly marry a womb for a wife who has a son, and any additional woman married for this wife would rank as a qadi; he may marry this woman while the wife is living if she be past the child-bearing stage and has borne no male issue.

A husband might prefer to marry a womb rather than a qadi to a house where there is no male issue, because he need not give the womb a separate establishment, and she has no status in the umsi (see below).

It is customary for the husband not to marry a womb to the indlu enkulu before he has married the umfazi wa se kunene, unless the umfazi omkhulu is dead and has no male issue.

If the wife for whom a womb is married has only daughters, and cannot any longer give birth to children, the sons and daughters of the womb will be looked upon as the younger brothers and sisters of the daughters of the wife to whom their mother was married as a womb.<sup>69</sup>

The womb that is married is not given the rank or status of the wife to whom she is married. Nor is she given the status of a qadi. The womb virtually loses her personality and becomes absorbed by the house to which she is married as a womb. She has no status "but becomes the 'body' of the woman for whom she has to raise up seed, and the children borne by her are regarded as being those of the woman to whom she is seed-bearer" .....

69. Nbangwa vs. Simungumungwana (3, N.A.C.) 271. This is a case from Qumbu, the centre of the amaMpondomise tribe, but it expresses the same principle as that found in Xhosa Law.



seed-bearer." 70. This is true also for Xhosa Law, except that the amaXhosa do not view this woman as a "seed-bearer" or the "body" of the wife to whom she is married, they take this woman to be the womb, the isisu, of that woman who cannot give birth to an heir. For, they believe that something is wrong with the latter's womb, since she cannot give birth to an heir. And, because she is the womb of another wife and has to yusa, to awake, (raise up) that house and thereby prevent it from dying out, the womb has no separate establishment.

### B. XHIBA HOUSE:

This <sup>is</sup> house found among chiefs only and not among abantu abamnyama (commoners); and the establishment of the xhiba wife is not in the same umzi or kraal as the establishment of other women may be. The status of this wife differs from that of any other house of the husband. It is not under the control of either the indlu enkulu or the indlu ya se kunene.

The xhiba house is sometimes spoken of as the indlu ye ndlu enkulu, meaning it is the House of the Great House, thereby indicating that it is the house of the Chief's father. It must perform certain sacrificial ceremonies for the spirits of the fore-fathers who have occupied it.

"A Xhiba wife may be married at any time after the marriage of the Great Wife." 71. This was not the practice among the amaXhosa. The xhiba wife is one married after the fourth wife, and usually is the fifth wife married by the Chief.

Though it is customary for the Chief to put a wife into this umzi of his father after the latter's death, this is not essential and a xhiba wife may be married and "put in" even during ....

70. Whitfield: South African Native Law p. 34.

71. Tshubuso vs. Nojaji (3, N.A.C.) 303, per Native Assessors, quoted by Whitfield: South African Native Law, p. 35.

during the life of the father of the Chief if the former is very old. Should the father still be Chief and wish it, he may take the fifth wife of his eldest son and heir, who is responsible for seeing that this house of his father's is kept alive, and place her in this umzi of his. She does not become the father's wife, but remains the fifth wife of his son.

If the Xhiba House is instituted during the life of the father, this wife must look after and care for the old people. She will then fall under the control of her father-in-law; her eldest son will succeed to the property which belongs to his grand-father and which has not yet been allocated to any of the other houses, and he will also become head of this umzi. In any case, adequate provision is made for him, for upon his shoulders rests the responsibility of keeping alive the umzi of his grandfather.

It is also customary for the husband who marries a woman who is to be the xhiba wife, to give to her house certain cattle these are inherited by the eldest son of the xhiba wife, for the xhiba house is not dependent upon any other house of the husband's.

When the son of the xhiba wife marries, the ikhazi for his wife is provided from the stock of his grandfather.<sup>72</sup> This is natural, for he becomes the virtual heir and successor to all the property left at the umzi by his grandfather after the usual allocations to the different houses have been settled.

## B. THE RIGHTS AND DUTIES OF HUSBAND AND WIFE.

### (I) Duties of Wife:

The duties of the wife or wives of a man may be classed as:

- (a) marital;                      (b) domestic, and                      (c) social duties.

Should a wife seriously neglect any of the above groups  
of ....

<sup>72</sup>. Jonginamba vs. M. Jonginamba (1, N.A.C.) 104.

of duties, which will be enlarged on below, it may be a cause for the husband to repudiate her, and this may result in the dissolution of the marriage ties.

For the relations between parents and children, see Chapter V.

(a) The primary marital duty of a wife towards her husband is to be faithful to him and to cohabit and have carnal intercourse with him only. Should she commit adultery it will as a rule not lead to dissolution of the marriage (see chapter VI), though she may be beaten, but the adulterer (umrexesi) will be fined. She will have public opinion against her and will be called an irexezikazi, or an adulterous wife.

Though the wife is expected to be faithful to her husband, she is not always so. For, when the husband goes away, e.g. to work on the mines, his wife who remains behind soon finds a lover. There are instances where the husband's mother has selected from among friends a lover for her daughter-in-law. He netshaes with the woman and more often than not has sexual intercourse with her. This is contrary to the Xhosa Law of Marriage. If the husband should come back and find his wife committing adultery or pregnant, there would be no excuse.

The husband has an exclusive right to her body. She must be prepared to allow him the necessary conjugal rights. If she refuses these to her husband without valid reason, it may lead the husband to repudiate her which may lead to a dissolution of the marriage.

There are, however, instances where a woman may refuse her husband these conjugal rights:

- (1) When she is suckling a child: It is an old Xhosa custom that no man shall force a woman to cohabit and have carnal connection with him while her breasts contain milk and she is suckling a child. 73.

It ....

73. B. Mlungwana vs. B. Tonyela (1914) N.A.C. 16.



It is also said that a man may not force his wife to cohabit with him when her child has just been weaned and is ill. But when the child is grown-up and is ill, it does not afford her an excuse to refuse carnal connection with her husband.

(ii) If the woman is ill: The husband will naturally not enjoy his marital rights when his wife is indisposed, and the law affords him no remedy under such conditions if she refuses him. When she menstruates she does not cohabit with her husband and is not expected to allow him even to try to cohabit with her.

(iii) During pregnancy: It is customary for a woman occasionally to refuse intercourse with her husband when she is pregnant. This refusal however, is something personal and a local custom, and does not depend upon strict principles of law. But if the wife under such conditions refuses her husband he has no remedy. If the pregnant woman continues to cohabit with her husband he is expected to treat her with great consideration. Should he not, she may refuse him.

The next important marital duty of the wife is to care for her husband. He as her husband has primary right to her care, and her duty is in this respect first to her husband to the exclusion of all other people.

She must prepare the food for her husband and serve him. If he is thirsty there must be water for him to drink. When it is cold she must make a fire so that he may warm himself. If a feast is to be held she must prepare the beer for her husband and his friends. If he is ill it is her duty to look after him. She must mend his clothes and keep them in respectable order. Should he be in need of a sleeping mat she must see that he gets one. It is her duty to sweep his hut, smear it with cow-dung and keep it generally clean and in order.

Gross neglect of this duty may cause her husband to repudiate her, and it may ultimately lead to the dissolution of the marriage (see Chapter VI).

(b) The domestic duties of the wife embrace primarily the care of the children: She must see that they get food to eat, doctor them

when....

when they are ill, clothe them and see to their welfare in general. It is customary for her for a few months after its birth to carry the child on her back during the day and sleep with it at night so that it will be in constant close proximity to her body and so be prevented from dying of exposure.

As their mother, she must teach them, especially the girls, how to do the various domestic duties and how to behave. When they grow older she is responsible for their general education in the work of a woman; she prepares them for the day when they marry.

But, not only must she look after and care for her husband and children. Her domestic duties also extend to her parents-in-law. She must cook and draw water for them; she must make the fire and clean the huts. It is her duty to do this until a younger brother of her husband marries, when the latter's wife will take over this duty. It is generally accepted that her parents-in-law have a right to the services of their daughter-in-law.

A wife has to do her domestic work and also perform certain duties in the field. 21). She must keep her house clean and make it acceptable and as attractive as possible to her husband and his family. She must smear the huts, also that of her parents-in-law, but not the side allocated to men. If she refuses to perform these household duties the husband may repudiate his wife.

When a new indlu (hut, house) is built the wives must cut the grass to thatch it and also do the thatching. But nowadays, though the cutting of grass for the thatching is done exclusively by the women, the thatching itself has largely passed on to the shoulders of the men of the umzi. But, in the case of the isutu or seclusion hut of the abakhwetha, the thatching is still done  
by ....

Note 21). This is so even in the case of a pregnant woman, who does not abstain from carrying out her daily duties. But she is prohibited from carrying too heavy loads.

by the women only; and they must be married women. The women must make the long grass ropes used in thatching; and when the indly is finished, they must make the clay and plaster the inside and the outside of the indlu. Plastering, whenever needed, is the work of women.

When it is time for sowing they must help one another to cultivate the lands given to them by their husband. The introduction of the plough has transferred much of this work to the men, but it is not uncommon to see a woman driving the oxen, or leading them or even handling the plough. "When Gcaleka first saw a plough about 100 years ago, he was greatly impressed and said it was worth ten wives." 74.

Hoing is the work of women though occasionally a man may help his wives and children. When the reaping starts the wives have to see that the crops are reaped and brought to the umzi. They are usually assisted by the young men and boys of the umzi. Thrashing is done by the wives. But men nowadays also help with the thrashing in case of need. The wives must store away the mealies or take them out of the pit.

When some household utensil is needed and she has the consent of her husband, the wife must carry the mealies (she always does so on her head) to the trader where they are exchanged for the necessary tea, coffee, tobacco or piece of cloth or even medicine, or other household utensil.

Gross neglect of these duties may also cause repudiation of the wife, and the marriage ties may be dissolved (see Chapter VI).

(c) The Social Duty of the wife is to conduct herself with the utmost dignity. She must be an example to the children and take care that her deeds do not tend to cause trouble. She must preserve peace and harmony in the umzi and be friendly to the other amizi. A quarrelsome wife and one who disturbs the peaceful relations, ....

74. "A Transkei Enquiry" by: Howard Pim.



relations, not only between the different houses of the umzi, but between the umzi and the outside world, may be repudiated.

It is her duty to uphold the status of the umzi, to keep to the hlonipha rules, and keep peace between the children.

An umtshakazi or newly married wife, dare not approach the huts of the umzi where she is now living, from the inkundla. She must first go to the back of the hut and from there make her way into the indlu. She continues to observe this custom until she has one or more children. Should she be childless she still observes this custom but watches to see when women who were married at more or less the same time as she but who have borne children, no longer observe this restriction.

A wife is not supposed to walk through the inkundla, especially when she is an umtshakazi. The following example may be related: While sitting in the inkundla at an umzi, I saw the wife of one of the inmates come in from the fields; she wore a necklace of herbs around her neck. This interested me. I asked her to come to me but she refused. I was then told that it was contrary to custom, and indeed looked upon as an offence for a woman to walk about in the inkundla or to go into the ubuhlanti. It is the duty of the wife to avoid the inkundla and ubuhlanti of her husband's people. 22).

In case the wife does not carry out these restrictions of magic o religious importance she will soon be termed a bad and disobedient wife. The whole village will look down upon her. Her husband may punish her or even repudiate her.

There rests a solemn duty upon a wife to hlonipha or pay reverence to her husband's father and all his male relatives. She may not mention their names or any word that has the same root as the names of her father-in-law and his male progenitors.

This .....

Note 22). Only women born at the umzi, that is, daughters of this umzi, may walk and sit in the inkundla and enter the ubuhlanti, though not when they menstruate.

This duty is stringently enforced upon the wives of a husband. The neglect of this duty, wilful or otherwise, is punishable. A wife who does not strictly adhere to this rule is very often not only beaten, but immediately driven home to her people, and in many cases she will be fetched back only many years later, or not at all. She is a dangerous wife, may even be called an igqwirakazi or witch, and may cause damage to the umzi.

When I spoke to the old qadi le ndlu enkulu of a late Paramount Chief of the amaXhosa (she is a very old woman) she refused to mention the names of her father-in-law or any of his male progenitors. She told me it was strictly forbidden.

A wife who has committed a breach of the hlonipha custom will, even before her husband takes matters into hand, if she realizes the offence, go to her own people, tell them what has happened and ask them for a goat, sheep or something to take back to her umzi to clear her of the guilt and prevent an evil from coming over the umzi. The gift is taken to her husband and she thereby "washes off" the whole thing. If she does not do it her husband will send her to fetch something to settle the matter.

"Arising out of the hlonipha custom there is a peculiar custom observed. It is a prohibition placed upon the woman of a kraal by the pater familias against their use of some articles such as an axe or pipe or other object, into which he states has entered the spirit of an ancestor, or which may represent his father who may still be living." 75.

No woman is allowed to consume milk in any form during the period of menstruation and while she is pregnant. If she does she is punished and perhaps driven away as a dangerous woman. ....

75. Soga: The amaXhosa: Life and Customs, p. 212.

woman. A wife must avoid taking milk during these periods lest her deed have an ill effect on the cattle of the umzi and cause grave damage.

A pregnant woman must observe certain further restrictions the breach of which will turn public opinion against her in the first place, and if she insists in spite of warnings from the people of the umzi, may lead to the breaking-up of the marriage ties. For, if she insists upon doing the "evil" thing and miscarriage results, she will be accused of witchcraft and sent home to her own people. This is tantamount to a repudiation and may result in the dissolution of the marriage (see Chapter V).

Her movements are restricted in that she must not go to her own people when in an advanced state of pregnancy unless there is perfect agreement between the two families. The pregnant woman may only go to her own people if she has the consent of the umnin' ikhaya (umzi) or kraalhead. She first approaches her husband who in turn consults his father or the head of the kraal. This is the customary procedure and is especially rigidly observed in the case of a woman's first-born child. If the woman does not obey this rule it is believed that this will affect the child, because on her marriage day she was taken into the ubuhlanti (cattle kraal), which is a most sacred place and the "home" of the izinyanya or ancestral spirits, and from that time all the children born of her while she was the wife of this man, should be guarded by the izinyanya of the umzi of her husband. Should she therefore go to another umzi without consultation and consent, she is slighting the izinyanya, who are bound to take revenge and cause ill-fortune to befall the child.

Under normal conditions a pregnant woman is not allowed to give birth at her own family's umzi or at the umzi of any stranger, but only at that of her husband. If it happens that she is at her own people's umzi and her labour begins there,

word ....



word is quickly sent to her husband's umzi to ask that she may be allowed to give birth at his umzi. After birth she will return home with the child and anything to be done to the child will be carried out at the umzi of her husband.

(II) Rights of Wife:

Here the rights in general of a wife will be dealt with; the rights or interests a wife has in the property or effects of the umzi, of her husband will be treated of under Section C of this chapter.

The general idea that a Xhosa wife has no rights or rights so insignificant that they are not worth mentioning, that she herself is the property of her husband and is treated as a chattel by him, is incorrect (see "General" above).

She has the right to come to him when her person or rights are assaulted and demand protection from him. He represents his wife in all actions and assists her in her rights against others. Should she have to institute an action against her husband, she will complain to his brothers, or to the sub-chief who will take the matter in hand.

If her husband assaults or injures her, she has the right to go home to her own people when she has an opportunity and they will then resort to the ukuteleka custom. This is a right universally exercised by amaXhosa parents, in the first place to protect their married daughter against injury or cruel treatment by the husband, and it has the effect of a penalty to punish the husband for his deed. It is also resorted to in case her family wish to exact more lobola cattle (see Chap.III).

When a wife feels unreasonably wronged by her husband she takes advantage of the first opportunity to go home to her family. Xhosa Law provides her with this right to return to her family so that her family may "hold her back" and prevent her from returning to her husband, who is punished in that he has to pay a fine in order to get back his wife. Though the wife has no right to claim the fine or any portion of it from

her ....

her husband or her people, who receive it, the uteleko safeguards her against illtreatment by her husband.

It is the wife who takes the initial step, and whether this custom is resorted to or not, depends upon the wish of the wife to exercise the right she possesses.

The woman is kept at the umzi of her people until such time as the husband has paid the penalty for his acts. Her people keep her as a kind of pledge until her husband shall have handed over the fine. Usually one beast is imposed as fine and if he does not pay this fine his wife will remain at the umzi of her people.

She has the right to remain here for life if her husband refuses to redeem her, and conducts herself in this manner in order to place her family in a position to exercise the powers further afforded them under this custom.

The marriage ties are not broken, nor can the husband repudiate her for this conduct. This act of the woman in no way constitutes desertion, nor do the acts of her parents under such conditions afford her husband the right to repudiate her or lay an action against them. The husband and his family have no claim under such circumstances for the return of any part of the ikhazi.

When a woman is telekaed, her husband usually goes to her people and discusses the situation with them. If he is willing and offers the fine imposed upon him, the wife's people have no right to refuse to give her up. They must deliver the wife to her husband upon the tendering of the fine by him. Should she refuse to go back to him, they will not have a right to keep the fine, and the dissolution of the marriage may result (see Chapter VI).

Where a husband exceeds his power of chastisement by severely harming or inflicting some permanent injury on his wife, and drawing excessive blood, the case will go to the Great Place, and at the same time her people will (or may) hold her under the uteleko custom. Such acts, without exception,

will ....

will be punished by the Chief, the penalty being in the form of izizi or blood money. In former times, if a wife in such a case, was the daughter of a Chief, it might lead to war between the two tribes. A good example of this is the war between the amaXhosa and abaThembu during the reign of Sarili in 1873 when his daughter Nongxokezelo was ill-treated by the Thembu Chief.

After marriage a wife has the right to a doctor when she is ill and her husband pays. He calls an igqira or doctor, and has to pay the doctor's fees. But should her illness be ascribed to the fact that she did not undergo the intonjane ceremony before her marriage, she has the right to go back to her own people to be put through the ceremony, but she then has no right against her husband. Should her people refuse, she has the right, through her husband, to go to the Chief who will force her people to put her through the intonjane ceremony (see Chapter I).

Though her husband has the exclusive right to his wife's body, she has no such right against him. Even where the husband has more than one wife, his wives have no exclusive right to his body. It is their right that he should cohabit with them, but Xhosa Law does not demand conjugal fidelity from the husband; he may have intercourse with other women and no wife of his can demand reparation from the other woman for adultery, nor can she institute an action for "divorce" under such circumstances. A man may and does therefore have extra-marital relations with other women, and his wife has to be satisfied. Of course, public opinion will turn against him if he commits adultery too often.

His wives have a right to demand that he should cohabit with them and not neglect them; he usually lives with one for a while and then proceeds to the next. The time he spends with each depends upon himself, as long as she does not seriously neglect any one of them, for neglect may mean a gross insult and cause the woman to return to her own people, to whom the husband will then be answerable.

Once .....



Once his wife has grandchildren she has the right to inform her husband that she now wishes to go and live with her eldest son. She exercises this right and her husband does not prevent her for it is considered improper for a woman with grandchildren to be still cohabiting with her husband and bearing children. This act of the wife is not desertion and she undergoes no change of status or rank, though her husband may marry another woman.

A wife has the right to lead a normal social life; she may entertain her friends, and with the permission of her husband make beer and hold beer-drinks. She may also attend beer-drinks and other social gatherings and feasts, but must not neglect her household duties.

### (III) Duties of Husband:

Being the head of a family, the husband must conduct himself with manly dignity. The future and welfare of his umzi depends largely upon the way he conducts himself and the affairs of his umzi.

Only the duties of the husband with regard to his household, and not his social duties, will be discussed here. To a certain extent the duties of a husband are the rights of his wife, as already described in sub (II) above. Apart from his great duty, amaXhosa say it is the husband's primary duty, to "go in unto" his wife and procreate children (see Sub (II) above). The duties of a husband may be divided into:

- (a) his duty towards his wife;
- (b) his duty towards his children;
- (c) his duty (i) in providing household necessities and  
(ii) the preservation of law and order in his umzi.

#### (a) Husband's duty towards his Wife:

"A Native husband is obliged under Native Law to maintain his wife in a manner commensurate with her rank and position provided she agrees to reside at his kraal, or at any other where he decides to place her." 76.

76. It .....  
Ngcijana vs. Gwasa; Seymour's Native Law and Custom, p. 166  
quoted by Thibault, South African Native Law, p. 194: 166  
this is true for those Law also.

It is his duty to see that each of his wives obtains a plot of land which she may cultivate, but there is no obligation on him to cultivate it for her.

It has however, become customary nowadays for the husband to do the ploughing and sowing. The wife and other females then do the hoeing and reaping. The husband must also provide his wife with the necessary seed to sow.

A wife must be provided with an indlu by her husband. He must build it and put the wooden structure on. After this it is the duty of the women to complete it. A man usually builds a house for his wife as soon as she has borne him one or more children.

Should the wife be in need of clothes her husband must provide her with these or give her permission to exchange mealies, kafir-corn or the like for clothes. The husband usually tacitly consents to the latter. If he likes his wife and if she is a good wife he may slaughter a beast and take the skin and prepare it as a dress (isikaka) for his wife. This dress is worn especially at feasts and other ceremonies of note.

If the husband shamefully neglects these duties, it may be a cause for the woman to go to her own people, who may hold her under the uteleko custom.

It is sometimes contended that the husband must provide his wife with an isikaka or skin-dress. However, it may safely be said that no enforceable obligation rests on the husband to do this. If he does, it is a voluntary, at most a dutiful act; if he does not, his wife cannot force him to do so.

Some people also contend that in Xhosa Law a husband has the right to call upon the father of the woman to take her to a doctor, igqira, and to pay the doctor when the woman falls ill within a year after marriage. This is not so; it may be that they are confusing general illness, where the igqira doctors the girl, with an illness which the igqira says can only be cured if the woman undergoes the intonjane ceremony because she has not undergone it before her marriage; in the latter case her father must

bear the expense. The father of the woman may take her to a doctor when she is ill if he wishes to, and to prevent people from saying that he has married his daughter to a man while she is ill or that he has a sickly daughter. To repeat: it is the duty of the husband to take his wife to an igqira when she is ill, no matter how soon or how long after marriage she falls ill. And, it is he who must pay the usual beast for the doctoring of his wife. Nowadays the equivalent is paid in money.

This is the case also when the woman gives birth to a child. He must provide the midwives (abafukamisi) and also the expert (ingcibi) if one is needed, and he must pay the costs.

Because he has become the husband of the daughter of another umzi, the hlonipha-rules also automatically apply to him, and he must pay reverence to his mother-in-law (unkwekazi) and her female progenitors by refraining from the use of their names or the roots of words containing the same syllable as their names in their presence or even before his wife.

The husband, however, no longer adheres strictly to these rules, and he has only public opinion against him if he neglects this "duty". His wife or her family have no action against him if he does not observe the hlonipha custom.

#### (b) Husband's duty towards his Children:

As their father he is an <sup>general</sup> ~~h/rule~~ responsible for their upkeep, protection and welfare. He is responsible for their education, especially that of the boys. He must see that they are well behaved and obedient. If they are ill he must get a doctor for them.

It is his duty to put his sons through the initiation ceremony and thereafter to give them advice where necessary. He must put his daughters through the intonjane ceremony and can be forced to do this, and he must bear all the costs. (see (III)(a) above and Chapter I).

When his daughter marries he must provide her with certain household necessities and cattle (see Chapter III). When his



son married, he must help him to lobola a wife. He is compelled to do this in the case of his son's first wife (see Chapter III).

(c)(i) On the day of her marriage his wife is usually provided with certain household necessities by her family (see Chapter III Gifts). But after marriage she looks to her husband to supply her with these things if she is unable to replace them herself. It is his duty to see that his wife is provided with the minimum of household necessities; he does this by allowing her to buy the necessary utensils.

(ii) As head of the family he must see that law and order are preserved in his unzi. It is his duty to settle all family disputes which need not come before the family court. He must warn his wives and children in case they commit misdeeds. The duty of chastisement rests upon him, though he must not exceed the limits of reasonable punishment.

#### (IV) Rights of Husband:

(a) The husband has the exclusive right to enjoy all marital privileges with his wife without undue interference and to the exclusion of all other men. He has a right to the services of his wife and expects that she should be obedient and care for him (see: "Duties of Wife" above).

He has the right to choose the residence of his wife and can make her reside there provided it does not adversely affect her and he makes the necessary provision for her welfare and maintenance.<sup>77</sup> Though his wives cultivate the lands, sow and reap the crops and do the thrashing, he as head of the family can "utilise for the benefit of his whole estate proceeds of the produce of the various houses as he thinks best, provided the wife and family concerned are not impoverished."<sup>78</sup>

(b) He ....

<sup>77</sup>. N. Kopman vs. Nohakisa (3, N.A.C.) 228, explains also the position in Ntosa Law.

<sup>78</sup>. N. and N. Tshobo vs. S. Tshobo (4, N.A.C.) 142.

(b) He has a right to the services of his children and to their obedience. Their names, especially in the case of boys, are given by the husband. It is a right jealously watched over by the father.

C. RELATIONS BETWEEN HUSBAND AND WIFE WITH REGARD TO MATRIMONIAL EFFECTS, DEBTS, TORTS.

It is sometimes stated that a woman has the right to be consulted by her husband, and it is his duty to consult her when he has to decide upon certain matters, as for instance when he alienates the cattle of the indlu. "Although the kraalhead controls and administers the affairs and property of his various houses, Native Law requires that he shall in all things act in consultation with the wife of the house concerned and in a less degree in collaboration with her eldest son." 79.

This may be some other Native Law, but it is not Xhosa Law. There is no obligation enforceable at law upon the husband to discuss "all things" with his wife "of the house concerned". It is sufficient if he acts in consultation with the male members of his umzi.

I. PROPRIETARY CAPACITY OF WIFE (WIVES):

A wife can, according to Xhosa Law, possess certain property though her proprietary capacity is limited. The proprietary capacity of the wife is limited because she is under the guardianship of her husband, and he himself is subjected to the control of the family court. The husband has no absolute control over the property of the umzi; he is checked by the family court

In ordinary life no sharp line of demarcation is to be drawn between the things that belong to the husband and those that belong to the wife. This is so when there is peace and harmony in the umzi and between husband and wife, for then the husband and wife do not particularly stand on their rights. But as soon as trouble starts, the proprietary capacity of the

woman ....

79. Whitfield: South African Native Law, p. 195.

woman is clearly demarcated.

The clothes a woman possesses, no matter how, or when and where she obtained them, are her own property. This includes clothes bought or made by herself, or given to her by her husband or some other person before or during marriage. Upon the dissolution of the marriage she has the right to retain these clothes and she does.

Household utensils such as the mats she sleeps on and eats on, the baskets (ingobozi) she carries produce in, the pots she cooks food in and the buckets she draws water in, are all considered to be the property of the wife, whether she acquired these before or during the marriage. It is customary for the wife upon dissolution of the marriage to take with her as many of these articles she can carry. She also possesses everything which she brought with her when she got married to her husband, and which formed part of her wedding-outfit. For her cattle, see below. A wife cannot acquire and possess as her own property, any land. For all land is tribal property and is allocated to the individual inisi by the sub-chiefs as representatives of the Chief. Nor can a wife own in her own right the produce of such land given to her by her husband to cultivate. But some say that if she cultivates that strip of land on which the oxen turn, the produce of this piece of land belongs to her and she can do with it whatever she likes.

The earnings of a wife while the marriage subsists, whether she lives with her husband or not, do not belong to her but are considered to be the property of her husband; but our Native Appeal Courts have decided that though these earnings belong to her husband, he cannot divert such earnings from the indlu (house) to which she belongs, and she must be consulted.<sup>80.</sup> The true position in Xhosa Law is that: provided the husband causes no hardship to the indlu to which his wife belongs, he can divert, or ....

<sup>80.</sup> Sixakwe vs. Monjoli (1909) N.A.C. p. 11.



or alienate, her earnings and he need not consult her; if he does consult her, he does so on account of a moral and not a legal obligation. It is enough if he consults his family court. In the case of *Nomlata vs. Mbiti* (2, N.A.C.) 4, which expresses also Xhosa Law, it was correctly decided that "the earnings of the appellant's wife were his property, and could not be disposed of except by himself or with his approval."

Where a wife lives apart from her husband, the marriage still subsisting, it follows that whatever she may earn belongs to her husband. In the case of *Majomboyi and Another vs. Nobeqwa* (1910) N.A.C. 63, the Native Appeal Court decided that a woman who had been living apart from her husband for thirty years and who had acquired property, had acquired such property during her absence for her husband. This case expresses correctly also the principle of Xhosa Law.

"In Native Law, as it obtains among the Natives of the Transkeian Territories and Cape Province, donations inter vivos between husband and wife during the subsistence of a marriage according to customary forms are not prohibited. In the case of *Monawusi Mpafa vs. N. Sindiwe* (4, N.A.C.) 268, Mr. C.J. Warner, Pres. N.A.C. said inter alia: 'In Native Law a man may make a gift to his wife which then becomes her own property, and she may maintain a claim against the heir to her late husband's estate' ". 81.

This is not the view taken by Xhosa Law, for Xhosa Law does not know the so-called "donations inter vivos". As Mr. W. T. Welsh, Acting Pres. N.A.C. says: "While instances may be found of a Native making gifts to his wife, this Court is of opinion that it is so infrequent as to require the clearest proof." 82.

The husband does make certain allocations during his life to the different izindlu of his wives, but according to Xhosa Law  
these .....

81. Whitfield: South African Native Law pp. 197 - 198.

82. N. Mpafa vs. N. Sindiwe (4, N.A.C.) 38.

these allocations are not "donations inter vivos" to his wife, but the property of that indlu and will be inherited by the eldest son of that indlu after the death of his father.

The right a woman and her indlu (house) have to the cattle of that house, is sometimes spoken of as a "usufruct". Now it is clear that the amaXhosa, at any rate, do not know any such term. It rather seems that the woman and her house have a right to be supported by the husband, and this obligation he fulfils by allocating certain cattle to every house. The husband, however, retains control over these cattle thus allocated. Should he use any of them for the benefit of another house, the latter house will be indebted to the former by that number of cattle. Moreover if the husband should sell any of these cattle, the wife receives no compensation and has no remedy; except that she can claim support from him. Furthermore she is not required to sanction the sale of any cattle except the ubulunga and inqakwe beasts (see below).

A wife nevertheless has the capacity to possess certain cattle in her own name. These are the cattle she receives from her family the day she leaves their umzi to be married to a man from another umzi. <sup>23</sup>). These cattle are: (i) the ubulunga beast and (ii) inqakwe, sometimes called ilaqe, or inkomo yeselwa, the beast of the milk-sack. Very rarely this beast is also referred to as inkomo yesondlo, the beast of support and maintenance, meaning that it is there to support the wife after marriage, for it always is an inkomo yesibunu, a heifer or a cow.

(i) Ubulunga beast: See Chapter III. It is a beast given by the father to his daughter, at the time of her marriage or after, and bears a close relationship to the health and welfare of his daughter when she is married. It is a sacred animal, the umpefunlo .....

Note 23). The bridal party also go with the impotulo beast (see Chapter III) but this is not a beast given to the bride as her own property.

unpefunlo or breath (life) of the wife. She has an undisputed right to an ubulunga beast and can claim one from her father or his lawful heir and successor. If her father has no inkomo yesibunu, he may give her a temporary ubulunga beast,<sup>83</sup> inkomo yesibambiso, for he will never refuse such a beast "in the face of death", a ka na kutsho ekufeai. This temporary ubulunga beast is usually an ox or bull calf which will later be replaced by a permanent one in the form of a cow or a heifer.

The wife has the profit of the temporary ubulunga beast but this beast still belongs to her father.<sup>84</sup> Some contend that if this temporary ubulunga beast is a cow or a heifer, its first heifer calf will then be taken as the inkomo vomisela, the permanent ubulunga beast. It is customary to do this, but the father is not forced to do it, and he can give his daughter, or leave, any other heifer calf as the permanent ubulunga beast as soon as he takes away the temporary ubulunga beast, and its progeny if it was a heifer or a cow.

"The ubulunga beast must not originally have been acquired as lobola from the husband or his friends."<sup>85</sup> This is exactly how Xhosa Law views it. It must be a beast from the cattle of the father of the girl. Some amaXhosa once told me that it must come from the father of the woman no matter whether he originally bought the beast or got it as a present, provided it was in his ubuhlangi as his own beast; but it must not have been acquired as lobola cattle from the husband of the wife. The amaXhosa went further and stated that the father must give a second or even a third ubulunga beast if necessary, in case the former has died and the wife is left without one. A certain Xhosa headman in the Willowdale district had already given three ubulunga beasts to his ....

83. Jakavula vs. Melane (2, N.A.C.) 89.

84. M. Dyanti vs. F. Diniso (1921) N.A.C. 365, in which it was stated that a temporary ubulunga beast does not become permanent only because the husband dies.

85. Whitfield: South African Native Law, p. 200; and: Zondani vs. Nine (1, N.A.C.) 176.



his daughter, the first two having died without progeny.

Now this permanent ubulunga beast with its progeny remain the "personal" property of the wife and can never become the property of the husband. The husband has no right to dispose of this beast and dare not unless the wife gives her consent, and this she will do only under definite conditions: it must not be the original ubulunga beast; or, there must be one of the progeny left of the original beast for the wife in case of need.<sup>24)</sup>

On the other hand, should the wife want to dispose of the progeny of the ubulunga beast, she may do so, but she must be assisted by her husband for, inkomo yobulunga ye yomfazi; umfazi uantana wendoda: The ubulunga beast is the beast of the wife but the wife is the child (wife) of the husband. This does not, mean however, that her rights in the ubulunga beast are limited, only that her own right to dispose is limited.

This view is also clearly and correctly expressed by Headman Ngaba in the case of: *Jakavula vs. Melane* (2, N.A.C.) 83: "An ubulunga beast is a beast given to a wife by her father and it remains her property."<sup>25)</sup>

Not even the Chief of the tribe may confiscate this beast or deprive the woman of it. It is there to ensure the good health of the wife so that she may live and bear healthy sons to fill the ranks of the Chief's people.

Our Native Appeal Courts, however, do not seem to be clear with regard to the question of the ubulunga beast. The recent trend of the Courts seems to be towards the idea that the husband is the "owner" of the ubulunga beast; thereby they deny the woman any "ownership". It was decided for example, that "the ownership of ubulunga cattle vested in the husband of the wife to whom the original animal was given."<sup>86)</sup>

This .....

Note 24). Some amaXhosa once told me that the husband must also undertake to replace the ubulunga beast's progeny which he, with wife's consent, alienates. This seems a reasonable reason for the prohibition on husband's should for instance alienate these cattle for the advantage of another house.

25). This case is one from Elliotdale, Bomyanaland, which is not only adjacent to the amaXhosa territory but also inhabited by amaXhosa. It is these people who are usually related to the amaXhosa or their respective customs. The view expressed in this case is pure Xhosa Law.

86. See: *Homanti vs. Zanginsqi* (3, N.A.C.) 283; *E. Melinde vs. Lebinda* (4, N.A.C.) 252. Quoted by Whitfield: *South African Native Law*, p. 201.

This however, is not Xhosa Law and has never formed part of Xhosa Law. It is, moreover, in direct conflict with the correctly decided case quoted above: *Jakavula vs. Melane*, See 25).above.

Whitfield: South African Native Law, p. 201, says that these cases were apparently decided "on the authority of *Siwangubosa vs. Ngidana* (1, N.A.C.), and upon the Native custom 'that a woman is incompetent to own property', and it is submitted that this is not good Native Law."

The Native Appeal Courts have gone further and accepted the view that an ubulunga beast is attachable (*ukuthinjwa*) for the debts of the husband. <sup>87</sup>. This also, is absolutely contrary to Xhosa Law and the whole meaning and object of the ubulunga beast, as will appear still more clearly below. Xhosa Law does not know and has never recognised the rule that an ubulunga beast may be attachable for the debts of the husband.

Xhosa Law does not allow that even for the debts or torts of the wife an ubulunga beast may be attached; only where it has <sup>with</sup> progeny and/the consent of the woman may the husband use such progeny to pay the debt.

It is also submitted that where ubulunga cattle are attached the wife may, through her husband or lawful guardian, put in her claim for these cattle. "With regard to the ubulunga cattle, these belong to the woman, and she may put in her claim for them."<sup>88</sup> This view was supported also in another case where it was stated *inter alia* : "The Court holds that under all circumstances a married woman, whether continuing in bonds of matrimony or a widow, is entitled to possession of the ubulunga beast which is presented to her at the time of her marriage and is regarded as a sacred pledge or protection of her interests and that she is entitled to take it with her wherever she may elect to go."<sup>89</sup>

In ....

<sup>87</sup>. *N. Sigogo vs. N. Nogaya* (1936) N.A.C. 105.

<sup>88</sup>. *Tshaka vs. Buyesweni* (1, N.A.C.) 144. This is the Xhosa view point.

<sup>89</sup>. *Siduli vs. Nopoti* (1, N.A.C.) 20.

In other cases again, the Native Appeal Courts have tried to express the rights of the wife in her ubulunga animal as being an "interest": "The wife to whom an ubulunga beast is given has an interest in the animal and its progeny. She is entitled to the milk, and the husband could not divert them from her house to that of another wife without her consent, but such cattle are the property of the husband. In the present case, on the death of the Appellant's husband, the cattle by inheritance became the property of his heir, her son, the judgment debtor, and were attachable for his debts." 90.

In a recent case it was also argued that the ubulunga beast is the property of the husband and the woman has but an 'interest' in this beast. 91. It is hardly necessary to repeat that this view is totally incorrect as far as the amaXhosa (and other Bantu tribes where the institution of the ubulunga beast is found) are concerned.

It is not quite clear what this so-called 'interest' is that is often spoken of in connection with the rights of the wife in her ubulunga beast. It is true, a Xhosa wife has an interest in the permanent ubulunga beast, but it is an interest which accompanies the right a person has in something which belongs to him. The ubulunga beast belongs to the wife according to Xhosa Law. That this is so is further proved by the fact that in case of the dissolution of the marriage (by death or otherwise) the ubulunga beast follows the woman, and her husband must hand it over or replace it. 92.

In the very case of *Rarabe vs. Rarabe* above 91, it was *inter alia* stated: "In earlier times among the primitive Bantu, cattle were set apart by each family for the purpose of the observance ....

90. *Nomanti vs. Zangqingqi* (3, N.A.C.) 283.

91. *B. Rarabe vs. N. Rarabe* (1937) N.A.C. 229.

92. See: *Siwangobusa vs. Ngidana* (1, N.A.C.) 142 where it was stated that this beast was attachable for the debts of the husband.



observance of the 'isiko ubulunga' (the custom of ubulunga). These animals were regarded as sacred. They could neither be alienated nor could they be lent to anyone not related by blood to such family. The woman to whom an 'ubulunga' beast was given at the time or during the subsistence of her marriage or widowhood was entitled to its possession and could take it with her wherever she went. The animal and its progeny remained the property of her father's kraal and the husband did not acquire any ownership in them. Nowadays, owing to some extent to contact with European civilization, the custom has lost much of its meaning and sacredness, and the Courts, acting on the opinion of Native Chiefs and other authorities on Native Custom have decided quite definitely that although the wife to whom an ubulunga beast is given has an interest in it and its progeny and although the husband cannot divert them from her house to that of another wife without her consent, the dominium in them is vested in him and on his death they form part of his estate and become the property of his heir."

These decisions and statements of the Native Appeal Court lie open to some serious objections: Discussing the diverse legal relations of the wife, the husband, and the wife's father or kraal to the ubulunga beast, the N.A.C. speaking of "earlier times" and (obviously obsolete) primitive conceptions of Bantu law, ascribes to the wife the "possession" of the beast, saying that the "property" remained with the father (or his umsi), and the husband did not acquire an "ownership" in the beast.

Speaking of "nowadays", however, the Court, acting on the opinion of Native Chiefs and other authorities on Native Custom, has pronounced that the wife has an "interest" in the beast, which her husband cannot divert from her house without her consent, the "dominion" being vested in the husband.

Now, while professing to act on principles of Bantu (Xhosa) Law for both periods the Court for the earlier period, now obviously deemed obsolete, introduces and substitutes for Bantu legal conception the contradistinction of possession and

dominion ....

dominion (or ownership), a conception very peculiar to Roman Law and European Systems of law derived from this, while for the period of nowadays, "owing to some extent to contact with European civilization" the court no longer applies principles of Roman Law, but introduces and substitutes specifically British legal principles for Bantu legal conceptions.

It is hardly necessary to intimate that principles, both of Roman and of British Law, are absolutely alien to Bantu legal conceptions, and incomprehensible to Xhosa litigants, but it remains necessary to emphasize: (1) that the alien principles introduced and substituted do not correspond and moreover are inconsistent with rules of law governing the point to be adjudged, and (2) that with regard to either period the Court is bound by rule of law to administer Xhosa Law (Bantu Law) since it provides the due remedy and is not opposed to the principles either of public policy or natural justice, but it has failed to do so.

Thorough research and careful observation have revealed to me: that Xhosa Law in this matter has not changed at all and that the ubulunga beast still belongs to the wife, and not to her husband. It cannot be attached and her husband cannot alienate it, as has been stated above. At the dissolution of the marriage the woman can take the ubulunga beast with her if she returns to her own people, for it belongs to her and does not become the "property of the heir", for it does not form part of her husband's estate. For the alienation of the ubulunga beast, see p. 133 above.

Furthermore, in spite of the so-called "contract with European civilization" the bulk of the amaXhosa (and all those Bantu tribes where the custom regarding this beast is found) in their daily life still adhere to the significance of the ubulunga beast as much as they did in former times. It may be that for the urban, the more or less detribalized, and more educated Bantu the ubulunga beast has lost much of its meaning and sacredness, but for the masses in the rural areas, the centres of Bantu life and culture, the significance of the ubulunga beast still remains in spite of efforts to discounte-

tenance its existence.

It is not clear who the "Native Chiefs and other authorities" were who informed the Court, but in any case their opinion - as revealed in the decision - is incorrect. They do no longer possess a clear perspective of the whole question of the ubulunga beast.

That cattle are "set apart by each family for the purpose of the observance of the 'isike ubulunga'", is correct, but irrelevant in this connection. To explain: The head of the umzi sets aside a certain beast (one or more) as the ubulunga beast of his umzi, sometimes, though rarely, also called inkomo ya se khaya, a beast for the kraal, but this beast is not to be confused with the ubulunga beast of his wife. The husband therefore has an ubulunga beast of his own apart from the wife who has her ~~own~~.

The ubulunga beast of the husband is sometimes given to him by his father when he is allowed to leave the father's umzi and build his own umzi; and it is therefor his health and that of his children. Or, he may nyulwa, raise, or dalwa, create, an ubulunga beast for his family and himself from among his own cattle.

When his daughter marries the father will give her an ubulunga beast, preferably one from among his own ubulunga cattle; but he will never take a beast from the ubulunga cattle of his wife to supply his daughter.

While his children are at his umzi, they will get ubulunga necklaces (iintambo) from the father's ubulunga cattle and it is from the father's beast that necklaces are provided for the abakhwetha on the day of their initiation.

The meaning and sacredness of this ubulunga beast is not the same as that of the wife's. Unlike the wife's ubulunga beast this one of the husband's may be used by him for sacrificial purposes, for its his own and belongs to his umzi. That of the wife is not thus used, for it is her own and the izinyanya of this umzi want a beast that belongs to the umnin' umzi, the head of the kraal as a sacrifice and not a beast belonging to another person. The husband's ubulunga beast may also be attached for all debts;

should ....



should he be left without one, he can ask his father for one, or he can dalwa, create, one for his *umzi*.

On the death of the woman her ubulunga beast is inherited by her eldest son and not by the general heir and successor of her husband. The idea that on the death of the husband the ubulunga beast and its progeny become the property of his heir and successor, is entirely wrong and inconsistent with the principle and facts of Xhosa Law. <sup>93</sup>. This wrong idea is the natural and inevitable consequence of the wrong decisions of the Native Appeal Courts, viz. that the ubulunga beast is the "property" of the husband. See above.

(11) Ingakwe: (inkomo yeselwa ) See Chapter III.

This is a beast brought by the bride from the *umzi* of her people. It is always an inkomo yesibunu, a cow or a full-grown heifer. Its object is to provide the woman and her children with milk. For this reason it is sometimes also called inkomo yesondlo, a maintenance beast, or one for the support of the woman. It belongs to the wife who has prior right, as in the case of the ubulunga beast, to its milk, but the woman may give of its milk to another house. Unlike the ubulunga beast, no temporary ingakwe can be given; once a beast is given as ingakwe, it belongs to the wife and her father or family cannot get it back.

Her husband acquires no "ownership" in this animal as a result of the marriage; it can never become his "property" because it belongs to his wife, and he cannot off his own bat alienate this beast or divert it from the house of the woman to whom it belongs.

The progeny of this beast becomes the household property of the house of the woman, and as such the husband may use the progeny, provided the woman consents, for the benefit and welfare ....

<sup>93</sup>. See : E. Malinde vs. I. Mpinda (1918) N.A.C. 364.

fare of her own house. If he diverts the progeny for the benefit of another house, the latter must replace the cattle thus diverted.

Upon the dissolution of the marriage the inqakwe still belongs to the wife. Upon her death it is inherited by her second son;<sup>94</sup> the general heir and successor of the husband has no right to this animal.

## II. RELATION OF HUSBAND AND WIFE WITH REGARD TO TORTS:

A wife, like any other person, may commit a wrong for which fine or punishment may be exacted.

In all cases where liability for a fine occurs as a result of the wrongful act of the wife, she is accused and has to stand the hearing, though assisted by her husband, and she may be found guilty. Though she is found guilty, not she but her husband has to pay for the wrongful deed of his wife. She is an inmate of his umzi, and he as her husband, her guardian, and head of the umzi has to pay the fine.<sup>95</sup> "The legal guardian under whom a ward is living is liable irrespective of the degree of relationship subsisting between them." 96 and 26).

The .....

94. Mkwenkwana vs. Teyisi (1912) 35.

95. Ntonteni vs. N. Nkohl (1, N.A.C.) 172; Rubulana vs. Tungana (1, N.A.C.) 90; B. Fandesi vs. L. and M. Ntsizi (4, N.A.C.) 13.

96. Klaas vs. Mgweqwe (1, N.A.C.) 19. See also Note 26). below. Note 26).

His liability extends to all inmates and members, of his umzi. He is not liable for the torts of visitors. The Courts have held that when a tort has been committed by the inmate of an umzi the head of the kraal must be joined in the summons, and if the kraalhead has not thus been joined in an action for damages against the inmate, a separate action may not subsequently be brought against him. See: Sobekwa vs. Mntuyedwa (1911) N.A.C. 136.

The husband usually pays the fine with cattle taken from the house of the wife. If he does this he need not replace the cattle, with the exceptions mentioned under the headings of ubulunga and inqakwe cattle.

### III. RELATIONS OF HUSBAND AND WIFE WITH REGARD TO DEBTS:

All debts contracted by the wife in connection with household necessities and for the maintenance and upkeep of the husband and members of the umzi, must be paid by the husband, and if he dies without having paid these debts, payment will be demanded from the heir and successor of the husband, that is, usually the son from the Great House. In all cases of claims instituted against a wife her position is what has already been described in the previous paragraph.

Premarital debts of the wife, that is, debts contracted while she was still an inmate of her father's umzi, are not paid by her husband. The husband on the other hand, is responsible for debts contracted by himself during the marriage but not for debts contracted while he was still inmate of his father's umzi.

It is usual for a Xhosa wife to buy certain things for the house and herself with the money she earns, if her husband does not partake in such earnings.

As a general rule, there is no such thing as prescription in Xhosa Law. A debt, if admitted, never becomes prescribed. The Native Appeal Court has accepted the following ruling: "According to Native custom damages for seduction and pregnancy are demanded during minority of the child. If the child grows up before damages are claimed he or she becomes finally the property of his or her mother's family. No damages can be  
97.  
claimed after the child has grown up.

This .....



This is not altogether in accordance with Xhosa Law. No damages can be claimed except if the Plaintiff has without good reason neglected to institute his claim or if he has neglected to keep his claim "alive" for a reasonable number of years. Perhaps this is what the Court meant in the decision in the case quoted above. It should be noted, however, that this is not an application of prescription, but rather - if comparison be permitted - a kind of "Estoppel".

#### IV. PROPRIETARY RIGHTS OF HUSBAND:

As a rule the husband allocates certain cattle or stock to the different houses and sometimes ear-marks these, but he still has the control over these animals. By allocating these cattle to the different houses he enables the members of the respective houses to support themselves, and after his death the eldest son of each house will inherit the household property so allocated. All the property not otherwise allotted to the different houses belongs to the Great House, no matter where the husband lives.<sup>98</sup>

The husband generally uses the property of each house for the benefit of that house. It has become customary that if a husband lobolaes another wife with cattle from a certain house, he must replace the cattle thus taken. If, for instance, he lobolaes his Right Hand Wife with cattle from the Great House, he must replace the cattle from the Great House by cattle from the Right Hand House. This is usually done by taking the lobola cattle of the eldest daughter of the wife thus lobolaed. The rule is: the indlu (house) that supplies the ikhazi for another woman, will be re-imbursed with the ikhazi of the eldest daughter of such indlu (house).

It is also lawful for a husband to transfer a daughter from one house to another where there is no daughter. The lobola cattle .....

<sup>98</sup> Fanekiso vs. Sikade (S.M. Cir. dated 12/12/1925, No. 29), quoted by Whitfield: South African Native Law, p. 44.

cattle will then go <sup>to</sup> that house. 99.

This is done where there are no girls in a particular house, so as to help that house to acquire cattle, thereby assisting it to lobola wives for the sons in that house. It is not necessary that the daughter so "transferred" should actually go and live in that house to which she has been transferred. It is sufficient if the father makes a public statement to this effect in the family court. What is really meant is that the ikhazi received for this girl will go to that house; she will be considered as belonging to that house.

Generally therefore, we may say that all the effects of the umzi, (except the household utensils, the personal belongings of each wife, and the ubulunga and inqakwe cattle mentioned above), though allotted to various houses and destined to be the future property of the issue of that particular house, remains his property during the lifetime of the husband. He exercises the right of control and hence may alienate these effects with the approval of his family court, but not of his wife. But he should not alienate the effects of one house to the advantage of another and to its own detriment.

It is well to draw attention to sub-section (1) of Section 23 of Act 38 of 1927, where it is provided "that all movable property belonging to a native and allotted by him or accruing under Native Law and Custom to any woman with whom he lived in a customary union or to any house shall upon his death devolve and be administered under Native Law and Custom."<sup>100</sup>.

D. WIDOWS: (abahlolokazi):

In so far as the marriage is not dissolved upon the death of the husband, and the widow remains a member of her late husband ....

99. Mtshotshisa vs. Mtshotshisa (1, N.A.C.) 100.

100. Fanekiso vs. Sikade (5, N.A.C.) 178.

husband's umzi, her legal position is treated of in this chapter. Her legal position after dissolution of the marriage ties is described in Chapter VII.

The position of a widow after the death of her husband may best be treated under two heads: (a) Relations of widow with the heir and successor of her deceased husband, and (b) the position of the widow as to the effects of the umzi. Now (a) may again be divided into: (i) Rights of the widow and (ii) duties of the widow.

(a) Relations of Widow towards the Heir and Successor of her Deceased Husband:

(i) Rights of Widow:

The death of the husband does not automatically dissolve the marriage ties. The widow is still taken to be the umfazi, wife, of the deceased and is usually spoken of as the umfazi of this or that house. She retains the undisputed right to remain at the umzi of her deceased husband and may not be ejected.

While she remains at the umzi of her deceased husband she does not lose the rank and status she had during the life of her husband. In fact, she now has a greater say in the affairs connected with her own house, and if she is old, a greater say in the administration of the affairs of the umzi.

The widows of a deceased husband are not "inherited" by his relatives or any other male according to Xhosa Law. A widow owes no marital rights to any man, and she owes no duty to the new umnin' umzi to allow any male to have carnal intercourse with her. The custom of ukungena is not only not practised by the amaXhosa, but it is also considered as incest and hence strictly forbidden by Xhosa Law. Though a widow is not given the right to cohabit with other men, it happens that men secretly do have intercourse with her, and any children borne by her as a result of such intercourse belong to the umzi of her husband. See Chapters VI and VIII. The widows, as has been stated, remain at the umzi of their deceased husband, are still

considered ....



considered as his abafazi, wives, and if they return to their own people and the marriage is dissolved (see below and Chapter VI), they become daughters of their families' imisi.

The male who succeeds the deceased husband is also responsible for the maintenance and support of the widow.<sup>101</sup> It must be well understood that the widow cannot inherit and has no "usufruct" in the "estate" of her deceased husband, but only a right to be sufficiently well supported. If she is not thus supported, she has a remedy and the Chief will see that the heir and successor of her late husband supports her and her children.

It is sometimes contended that the widow must be consulted by the new umnin' umzi in matters relating to the umzi, as for instance when he wishes to alienate some property. It may safely be said, however, that this is only a moral obligation that rests upon the new umnin' umzi, and he usually does consult her, but if he does not, she has no remedy. This is clearly brought out by the fact that if he does consult the widow, his word overrides that of the widow in case of difference of opinion. The final decision in matters of the umzi rests with the new umnin' umzi. But if he abuses his position to the detriment of the widow, the family court, or the court of the isibonda, petty chief, or even the Chief's Court will take up her case, which she may either institute through her own son or some male relative of her husband, or even the petty chief.

But a widow has this right to support and maintenance only while she lives at the umzi of her deceased husband. She submits to the guardianship of the new umnin' umzi, and she cannot alienate or otherwise dispose of the property or stock belonging to the umzi or to her house in particular.<sup>102 and 27).</sup>

Should .....

101. Sekeleni vs. Sekeleni (21, S.C.) 116.

102. Baleni vs. Qosha (4, H.A.C.) 201.

Note 27).  
A widow is not a "maior" as some people, the Court included, erroneously try to make out (see sub (b) below.)

Should she leave the umzi of her late husband and return home, she loses this right of support and maintenance.

She can remain at the umzi of her late husband as long as she wants to, and the new umnin' umzi can under no circumstances force her to return to her own people. She has, however, the right to return to her own people if she so wishes and then dissolution of the marriage may follow (See Chapter VI). But children born to her while the marriage still subsisted may not be removed by her when she leaves. For, all children born while she was living at the umzi of her deceased husband are his children and belong to that umzi where they will be cared for.

The new umnin' umzi may upon reasonable and sufficient grounds build another indlu (house) for the widow and place her there. This act must not be prejudicial and detrimental to the benefit and welfare of the widow. However, where there is a clash of interests of the new umnin' umzi and the widow respectively, the interests of the new umnin' umzi have preference.

The widow too, has the right to ask the umnin' umzi to build another indlu for her if she can reasonably claim to need it on account, for instance of ill-health. Should the umnin' umzi unreasonably withhold the proper performance of this request, she may live somewhere else and the umnin' umzi must still maintain and support her. She does not lose her right of care and support, unless the marriage is dissolved.

Where the husband dies leaving the umhlolokazi in a state of poverty and need, she has the right to claim support and help from her father and his family and every individual who received part of the ikhazi given for her; she may enforce this right. If, on the other hand, she should be left destitute without any relatives or friends, she has the right to go to the Chief and claim maintenance, support and protection from him.

#### (11) Duties of Widow:

After the death of her husband a woman is considered to  
be .....

be unclean and must show hersorrow by remaining within the precincts of the umzi for at least some days. She must have her hair shorn off, and must abstain from attending feasts, beer-drinks and other social gatherings for some time. If she fails to observe these rules public opinion will be against her, it will affect not only her own character, but also the status of the whole umzi. It may even be a cause of trouble between her and the new umnin' umzi. In extreme cases she may be forced to leave the umzi.

Even after the death of her husband she may not commit a breach of the hlonipha custom. An interesting example in my experience was that a qadi wife of one of the late Paramount Chiefs of the amaXhosa, an old woman who did not dare to mention the name of her father-in-law and his male progenitors to me even at this late date.

As long as she remains at the umzi <sup>28)</sup> and under the guardianship of the new umnin' umzi, she is still considered to be the wife of the deceased, she undergoes no change of status or rank, and she therefore has the same duties as she has as an unfazi, wife, during the life of her husband (see B (1) above).

She has to cultivate the lands, carry on with the household duties, recognise the authority of the new umnin' umzi, and render him the same domestic services as she rendered her husband during his life. <sup>103.</sup> If she does not recognise the authority of the new umnin' umzi, the lawful heir and successor of her deceased husband, she has no claim for protection, maintenance and support.

(b) Position of Widow as to the Effects of the Umzi:

After her husband's death a widow is in more or less the same position with regard to the effects of the umzi as she was during ....

Note

28). Not necessarily at the same spot where she lived before her husband's death.

103. See: Sekeleni vs. Sekeleni (21, S.C.) 118.



during his lifetime. This is so, provided she lives with the heir and successor of the deceased (see (a)(i) and (ii) above). But the Native Appeal Court has in some cases given decisions which, as will be seen below, are contrary to Xhosa Law. In this connection see also Section 38 of Proclamation No. 140 of 1885, and Section 39 of Proclamation No. 110 of 1879 which fix the age of "majority" for both males and females at 21 years. This has perhaps influenced the Court to decide the cases accordingly, but these decisions are nevertheless contrary to Xhosa Law.

The widow, according to Xhosa Law, retains her right to her personal belongings including the ubulunga and ingakwe cattle, and household utensils of her house (see C I above). If she returns to her own people and the marriage is dissolved, she may take with her these cattle but she may not remove any other stock, for Xhosa Law does not recognise any rights of a widow to the effects of her deceased husband's estate. There is, moreover, no community of property in a marriage contracted according to Xhosa Law (see also Section 22(6) of Act 38 of 1927).

In the case of Nombuyana vs. Ntunta and Ntyibili (4, N.A.C.) 365, it is stated: "if a widow returns to her father with her ubulunga cattle and children, she may keep the cattle for the maintenance of herself and her children, or if the father takes possession of the cattle, he may allot one or more to her, and any cattle so allotted become the absolute property of the widow for the support of herself and her children." <sup>104</sup>. This case is in accordance with Xhosa Law, and it seems reasonable for her father to replace the ubulunga cattle, for she is, according to Xhosa Law, again a daughter of his umzi, and he is also responsible for her maintenance and support.

As a result of the decisions in Nolanti vs. Sintenteni (1, N.A.C.) 43, and Nbono vs. Manexoweni (6, N.D.C.) 62, a widow is entitled to hold as her own her earnings or all the property which she may have acquired after the death of her husband.

Thus ....

<sup>104</sup>. Quoted by Whitfield: South African Native Law, p. 202.

Thus in the case of Nosaiti vs. Xangati (1, N.A.C.) 50, it was stated inter alia: "By section 38 of Proclamation No. 140 of 1895 the age of legal majority for both males and females is fixed at 21 years; the Appellant being a widow, it therefore follows that after the death of her husband, being a major, she became free of all control and is entitled to claim in her own right all property she may have acquired since her husband's death. The Court is aware that this is in conflict with Native custom 29). but where Native custom is repugnant to justice and equity and to the provisions of the Proclamations for the government of the Native Territories, it must give way." 105.

It is submitted that the Courts have erred in the three cases cited above, and all cases decided on similar lines. The Courts forgot that a marriage is not dissolved by the death of the husband; the widow still remains his *umfazi*, and undergoes no change of rank or status.

What has been decided here is not Xhosa Law and the Court admits that it is contrary to "Native custom". While the widow remains at the *umzi* of her deceased husband she is under the guardianship of the person who succeeded her late husband; if she return to her own people she again falls under the guardianship of her father or his lawful heir and successor.

Xhosa Law knows no community of property, and the Courts have admitted that what a wife earns she earns for her house and it is controlled by her husband; the widow is in the same position. It therefore follows that what she earns should fall to her house and be controlled by the new *umnin' umzi*. If she cannot acquire property for herself, in "her personal right", during the subsistence of the marriage, she cannot after the death of her husband do so.

Moreover ....

Note 29). *Italics are mine.*

105.

See also: *Nobulawa vs. Joyi* (C.M. Cir. dated 22/12/1926, No. 38) quoted by Whitfield: *South African Native Law*, p. 199.

Moreover there is nothing whatsoever that is repugnant to justice and equity in these rules of Xhosa Law. The widow must in all cases be maintained and supported, whether she remains at the umzi of her deceased husband, or whether she returns to the umzi of her own people.

The person who has succeeded her deceased husband must not only maintain and support her, but he must also doctor her when she is ill. He usually spends more on her than she earns or is able to earn.

If the widow should acquire property and hold it in her "own personal right" according to this newly introduced principle, this seems to be unfair to the person who has succeeded her deceased husband and especially to the communally equipped umzi.

The position of the Xhosa widow is not analogous to that of the widow in western civilization where the cases cited above may perhaps be applied correctly. It is, in other words, forcing western ideas upon a very differently orientated society with an absolutely different social and legal structure. It means forcing ideas of full-fledged individualism upon a society whose principles are still very largely based upon a communal system.

This enforcement is not understood and, in my experience, is strongly resented by the amaXhosa. It is bound to inflict a hardship upon them, which in fact it does. It tends to weaken the family ties which they justly regard as essential to a healthy development of Xhosa civilization. The Court actually recognises the independent status of a female, something that was never and is even now not recognised by Xhosa Law, because it is against the whole spirit of Xhosa Family Law, and the only result is a keenly felt disregard of the legal principles of the Court, which they consider, often result in a miscarriage of justice.



CHAPTER V.CHILDREN.GENERAL:

The legal position and status of children in Xhosa Law, the parental and family control over children of marriageable age and various influences that affect their marriage, also parental have already been treated of in Chapters I, II and III. Though the unborn child is not yet considered an umntu (human being) with legal rights and duties, it nevertheless enjoys the protection of the law. It is protected in various ways. The pregnant woman has to observe certain restrictions for the benefit of the unborn child. See Chapter IV B(1).

A pregnant woman may not receive corporal punishment that may affect the yet unborn child. She should not be flogged though the husband may take a light switch (uwazi) and hit her lightly around the legs. If he exceeds this punishment and injures the woman he is liable to be fined.

If a woman commits abortion she is punished and also her husband or a doctor (igqira) if they have helped will go to the Chief's Court. The woman will be termed a witch (igqwirakazi), a dangerous person and will be sent home to her own people. It may mean dissolution of the marriage.

When abortion or miscarriage takes place after there was life in the womb, or if the child dies at birth or shortly after it is separated from the mother, the foetus or the child is buried as an umntu.

TWINS:

It is interesting to relate some particulars in connection with twins, for they play an important rôle in Xhosa social life.

Twins are not regarded as a misfortune or ill-omen among the amaXhosa. They are not killed but are loved and treated as all other children except that in their case particular customary rules obtain which bear more of a social than a legal character.

As soon as possible after the birth of the twins the father or his representative from his own family, goes and digs up two euphorbia trees (imihlontlo). These trees are planted alongside the hut in which the twins were born but the trees are different in order to show which of the twins is the elder; the right-hand one representing the first born and older twin is planted first, and then the left-hand one representing the younger twin.

This custom is strictly adhered to, for it also affects the growth and health of the children, for the trees are supposed to represent the lives of the twins. If one or both of these trees die, it means that the dead plant or plants reveal the future fate of the twin or twins they represent. These trees remain where they are planted and are never disturbed. No one of the family dare remove them or build or make a garden on that spot. Even strangers who come to live at the umzi will respect these euphorbia trees.

If the father neglects to plant these trees on the birth of twins to his wife, he will soon be reprimanded by his family and public opinion will resent his negligence.

Twins are considered to form a unity; something affecting one directly has a bearing upon the other. If both are boys they are not circumcised at the same time, but when one of them is being circumcised the other twin must be present. The ubulunga necklace that is to be placed around the neck of the boy who is undergoing the operation, is first placed round the neck of the other twin present, then taken off and placed around the neck of the one actually undergoing the rite of initiation. When it is time to go to the umzi of the owner of the seclusion hut (umnin' isutu) where all the initiates will meet before they are circumcised, both twins will proceed to the place, but the twin who is not to be circumcised will not participate in the ceremony any further.

However, when the other twin not undergoing the operation is a girl, she still has to take a further part in the initiation

ceremony after the initiates have assembled at the umzi of the umnin' isutu. The ubulunga necklace is also put around her neck. If she is the elder of the two, the necklace is put around her brother's neck, then taken off and put round her own neck. After a while it is again taken off and put round the boy's neck. Should her brother be the elder, the necklace is first put around her neck and then taken off and tied around his neck.

When the boys to be circumcised proceed to the seclusion hut, the twin girl accompanies them, for she has to undergo a sham or mock operation. She has to sit down like all the initiates, with the blanket drawn over her head. The "ingcibi" or operator will stand in front of her and making the movement with the assegai (irwana) pretend to circumcise her also.

After the operation the twin girl also proceeds to the seclusion hut, sits for a short while on the spot her brother will occupy during the seclusion period, and then leaves for the umzi. The twin girl's hair is also shaved off like her brother's.

The amakhosa still practise this custom strictly and I was told that if one of the twins was absent they would postpone the performance of this ceremony. If one of them falls ill, and the other one is away, he will be fetched no matter where he is.

If the first born sons of a wife are male twins, the twin who is born first will be the successor to his father; the younger twin is treated like any other younger brother.

#### A. RELATIONS BETWEEN PARENTS AND CHILDREN:

The father is the person who has most control and the greater say over the children, though it is sometimes asserted that the mother's voice carries great weight as far as the little children and daughters before they reach marriageable age, are concerned. The Xhosa family is on a patrilineal basis and a child is always spoken of as the child of its father. To show the relationship between father and child the amakhosa will



say, for instance: into ka bani, meaning the child of this or that man.

For the sake of convenience the relations between parents and children may be divided into: (i) relations between parents and daughter, and (ii) relations between parents and son.

(i) Relations between Parents and Daughter:

From the time of birth to the time of marriage a daughter is under the control and guardianship of her father or his lawful heir and successor. Because of this he has the right to demand obedience from his daughter.

The control of the father and family is especially noticeable in connection with the marriage of their daughter. It is customary for the daughter to abstain from any marriage not approved of by her father or his family; and her consent is tacitly assumed for the marriage he and his family arrange for her. Unless the father is influenced by the objections of his daughter and her paternal uncles, he may marry her to the man of his choice (see Chapter III). And, the father and family may conduct all arrangements without any direct reference to the feelings of their daughter.

These paternal uncles are usually called the "fathers" of the daughter of their brother, and they exercise a great control over her. She calls the paternal uncle older than her father bawo(kazi) mkhulu (great father) and the one younger than her father bawo 'ancinci (small father). / Should she object to a marriage she can call upon them to assist her. They may also help with her wedding outfit, and will receive part of her ikhazi under the ukufakwa custom (see Chapter III, Gifts). When she has to undergo the intonjane ceremony her paternal uncles will also help her father by contributing towards the costs for the proper performance of this ceremony if her father is in need. They will be re-imbursed under the uku-fakwa custom.

When the girl marries she leaves the family circle and enters the control of her husband and his family. The bonds  
with ...

with her own family are not severed however, and the latter continue to control her welfare by means of the uteleko custom (see Chapters III and IV).

As soon as she returns home after the dissolution of the marriage she immediately reverts to her former state and is again controlled by her father.

When she returns home after the death of her husband or when he drives her away (in either of which case the marriage still subsists), she is at the umzi of her father under his care and protection; but until dissolution of the marriage the control of the heir and successor of her deceased husband remains so strong that any children borne by her, belong to her deceased husband's umzi, and all the earnings she might have accumulated may be legally claimed by his heir.

The daughter has to work for her father and the family of her father's umzi. She may be ordered about by all her seniors in the umzi and has to serve them as best she can.

The earnings of the daughter belong to her father; he has a right to her services, and if he is deprived of these as the result of his daughter's marriage, he will be compensated by the handing over to him of the *thekhazi* by the young man and his family (see Chapter III(b)).

Because she is his daughter and under his control, her father has the right to chastise her. But he cannot illtreat, injure or kill her; for if he does this he will be fined by the Chief. His family also will condemn this treatment.

She must, on the other hand, be looked after and protected. For this reason she is constantly examined by one or two of the older women of the umzi to see whether she is still intact. Should she be deflowered, the matter will be reported to her father or lawful guardian who will take up the case (see Chapter II).

#### (ii) Relation between Parents and Son:

A son, as long as he lives in the umzi of his father, is

under ....

under the control and guardianship of his father, and he is to a lesser extent also influenced by the senior male member of his father's umzi. While still small the women of the umzi control and influence him.

This influence and control of the father however, is less marked in the case of a married son (see Chapter I). Some time after marriage the father usually gives his son the right to leave the umzi and build an umzi for himself. Even in this case the father still has an interest in his son, and all cases concerning family affairs in which his son is involved must be tried at the umzi of his father. Should the son wish to sacrifice he has to report the matter to his father for his father is the head of the family.<sup>30</sup> For, while his father lives he is nearer the isinyanya or ancestral spirits than his son and the son should not ignore his father. This interest, however, cannot be enforced by law; it is only a moral obligation which the son owes his father. If he ignores his father it may be discussed in the family court, the son may receive a scolding, but there are no further consequences and the son will not be punished. Public and family opinion will count against him and condemn his actions.

If this son wants to hold a feast or any other social gathering of note, he usually consults his father and invites him and his family to the feast.

The father and senior male members of the umzi have the right to chastise the son while he lives in his father's umzi. But a son is not as a rule beaten after he has undergone the rite of initiation. Those who inflict the punishment may not seriously injure, maim or kill him.

A son has to be protected and helped and maintained by his father. But he has to obey his father and serve him and the members ....

Note 30. It is sometimes said by the amaXhosa that after the death of the father the sons having their own imisi (kraals) must under such conditions report to the lawful heir and successor of the deceased father. This however is a moral obligation only and proves good manners.



members of his father's umzi. All the earnings of the son belong to his father. This principle, so typical and real in Xhosa Law, was well set out by the President of the Native Appeal Court: "A minor's <sup>31)</sup> earnings accrue to his father. What is bought therewith becomes the property of the father. The father may earmark stock for such minor. He retains dominium <sup>32)</sup> in such stock and the minor has no claim should the father subsequently dispose of the stock. That principle is basic in Native Law, especially so among the South Eastern Bantu. There is no proof on record that the practice is fast becoming obsolete, and which, carried to its legal conclusions leads to an absurdity. This Court fails to see any inequity in a system of law which entitles a kraalhead to the earnings of a minor who owes his very being to the care, protection, and nurture he has received at the hand of that kraalhead and its inmates during his tender years, plus a lobola <sup>33)</sup> exceeding the minor's possible contributions in the short period between attaining working age and his marriage. Native Law, however, goes deeper than this, regarding the family as a collective unit with joint responsibility and assets, so much so that the minor is entitled to a lobola from the kraal inmates in addition to other benefits received as a juvenile. To emancipate <sup>34)</sup> a minor would involve loss of that valuable asset in Native Law of Communal support, especially in the provision of a wife and in other directions which in their present stage of advancement as a mass would be detrimental." 106.

It .....

Note 31). The term "minor" is somewhat confusing. See explanation in previous chapters.

Note 32). This term is inapplicable to Xhosa Law (see previous chapters) Better: Bantu-ownership.

Note 33). For his first wife.

Note 34). "Emancipation", employing conceptions of Roman Law, is not the correct word to use in Xhosa Law. It expresses an idea foreign to the amaXhosa. It is true, the father gives his son leave to build a separate indlu, but it can hardly be called emancipation. It is best if such terms are avoided when one deals with Xhosa (Native) Law. See: Mqeko vs. Matikita (1, N.A.C.) 242.

106. Modikayi Mfawwe vs. Dlavedwa Modikayi (1939) N.A.C. 18.

It therefore follows, and correctly too, that the property of a child, not only of a so-called "minor", while he lives in his father's umzi, is execrable to meet a judgment obtained against his father.

The son should not resist or ignore the relationship and control that exist between him and his father. If he should dare to assault his father, ignore the remonstrations of his father or continue in the perpetration of wrongs, he may create a grave situation which will lead the father to hlamba, wash off, his son and publicly disinherit him (see Chapter I, e, 2).

The relation between father and son is clearly brought out when the son marries. In most Xhosa marriages a son will marry the girl who charms him and on whom he has set his mind. But he must get the consent of his father, who usually gives his consent, unless he is convinced that it will be an ill-advantageous match for his son on account of the girl's character or of the status of her umzi. The influence of the father on the marriage of his son is especially marked when it is the first wife his son marries; for the ikhazi for the first wife must be provided by the father, either entirely or at least partly. It is not unusual, though it may be rare nowadays, for the father to select the first wife of his son (see Chapter III).

As a result of the relationship that exists between a son and the brothers of his father (they are also called his "fathers" they help him, in case of need, to lobola a wife. If this is the case, they will be re-imbursed under the ukwenzelele custom (see Chapter III). The member who contributes under this custom has a claim enforceable at law, for re-imburement in the form of cattle against the husband of the wife so lobolaed. His claim is usually satisfied when the ikhazi for the eldest daughter of this marriage is received.<sup>107</sup> (see Chapter III).

When .....

<sup>107</sup>. Nobumba vs. Mfecane (2, N.A.C.) 194

When the Great Son of a Chief however, marries his Great Wife, the future queen, of the tribe, the contributions of his family and the tribe are not considered as an act under the ukwenzelele custom, and the family and tribe have no claim against their future king. They contribute these cattle because the Great Son of the Chief is marrying the umfazi wesizwe, the wife of the land (see Chapter III).

(iv) Liability of Father (lawful heir and successor) for Torts or misdeeds of Children:

This subject has already been treated of in Chapter I.

The position may be summed up: As a general rule a father is liable for the wrongs and misdeeds of his children while they remain with him in his umzi, unless the child's "eyes are not open yet". 108. Children of this age have no status whatever and their deeds do not incur any liability, not even to their father. But in case of damage done, the father will nevertheless do his best to restore it lest public opinion turn against him.

If the children are older and the father held responsible it is as though the wrong was committed by himself, and the amaXhosa say: inja yakho, i bambela wena, it is your dog, it catches for you (the dog catches for its master, whether good or bad). This situation lasts until the child leaves the umzi on marriage.

Where the son becomes uncontrollable however, and of very bad character, his father has the remedy of "washing off" his son provided he follows the proper procedure (see Chapter I, e, (ii) ). After this the father is no longer responsible for the deeds of his child who practically becomes an outlaw.

(v) Parental Control in the case of Illegitimate Children:

In case of an illegitimate child by an unmarried woman the parental control falls upon the shoulders of the father (or his lawful heir and successor) of the girl if the natural father does not get the child (see E, below).

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108. R. Skanjana and Another vs. Kambi Geca (C.M. Cir. Dated 12/2/29, No. 20), quoted by Whitfield: South African Law, p. 52, expresses the principle of Xhosa Law. Native



In the case of an illegitimate child by a married woman, it falls under the parental control of her husband if he does not repudiate the child (see C, below).

In both cases parental relations are the same as for legitimate children.

#### B. LEGITIMATE CHILDREN:

Children born during the subsistence of a valid and binding marriage are legitimate children to the husband and the wife to whom such children are born. A child born of such a marriage is called umntana wendlu, a child of the house.

Where pregnancy is caused by the future husband of a woman before their marriage, a child thus born is legitimate provided the husband has made reparation for the pregnancy and marriage ensues. It is a matter of indifference whether it is born before or in wedlock (see E(ii) below).

"Where a man and a woman have for many years lived together as man and wife and have had children, this Court will always lean to the view that there has been a marriage, and that the children are legitimate; and very strong proof will be required to the contrary." <sup>109</sup>. The idea expressed here by the Court is in accordance with Xhosa Law.

A peculiar condition arises as to the status of children born from a valid Bantu marriage, hence legitimate children, when their father, a partner in this "customary union" contracts a "marriage" according to Christian or civil rites. Although the material rights of wife and children of the "customary union" are safeguarded by Section 22(7) of Act 38 of 1927, the Bantu marriage itself is denounced by Section 35 s.v. "customary union." (see also Chapters VII and VIII).

#### C. ILLEGITIMATE ....

<sup>109</sup>. Quza vs. Masilana (3, N.A.O.) 196.

### C. ILLEGITIMATE CHILDREN BORN TO A MARRIED WOMAN:

A child born to a married woman but denounced by her husband and proved to be procreated by a man not her husband, is illegitimate and is called an um qakwe.

As a general rule an adulterine child does not belong to its natural father, no matter whether it was born at the umzi of its mother's husband or at another place, or whether the man who committed adultery with the wife of another paid for the adultery and pregnancy of the woman: He has no claim enforceable at law to take possession of the child. It belongs to the lawful husband of the woman.

At birth the husband of the woman will not utter words of satisfaction, calling the child his own, as is usually done when a child of which he is the father, is born. This declaration has evidential value.

By repudiating a child the husband implicitly denounces him as his heir. But he can tacitly accept the child as his own. In such a case there is no difference between him and the other legitimate children of the husband. This child will not be called an umqakwe, but will be accepted as the child of the lawful husband of the woman.

In the case of *N. Umgoka vs. M. Posiwe* (1930) N.A.O. 15, the Court held that an adulterine child of a married woman can never in any circumstances inherit the property of her husband. Even if the child has been brought up at the husband's kraal and the ikhazi for his wife had come from this umzi, he cannot become heir.

This is not Xhosa Law. Unless the husband publicly repudiates the child, it is recognised as his child, and he assumes it in fact. It is considered as his child so that if the child is not at his umzi he may fetch the child, or after his death his lawful heir and successor can go and fetch the child, whether a male or female.

If the child is a daughter and is married he can go and

claim ...

claim the ikhazi leaving some cattle as compensation for the care and maintenance of the girl.

Whitfield: South African Native Law, page 350 rightly supports the view that an adulterine son of a wife may succeed to his mother's husband's estate among "those tribes of the Cape Province that do not practise the ukungena custom."

Where a wife leaves her husband, returns to her own family and there gives birth to a child not belonging to her own lawful husband, that child does not belong to its natural father but to the lawful husband of its mother. This is so provided when there has been no return of lobola cattle to cancel the marriage bonds. For, if there has been no return of at least part of the ikhazi to the lawful husband of the woman, the marriage still subsists.

This is the case also where a wife returns to her own people, lives there for a time, and her people manage to "marry" her to another man who loboloes her. As a matter of fact this subsequent marriage is unlawful and it is usual under such conditions for the woman's family to tell the suitor that this is somebody's wife: Ngu mka mntu lo. The lawful husband of the woman has a claim to the child and also a claim against the adulterer for reparation. He gets no divorce as a result of the adultery, and he will never go to the Great Place (Kozkulu) to institute an action for divorce. On the contrary, marriage questions of this nature are family affairs and never leave the imizi of the families of the woman and the husband respectively. The lawful husband may go to the Great Place only perhaps if the adulterer refuses to compensate for his wrong. But he will not go there to get a divorce.

Should the child be reared, looked after and cared for, not at the umzi of the lawful husband of the woman, but for instance at the umzi of her own people, the lawful husband, in all such cases if he takes the child, must hand over to the people of his wife the isondlo, which is a compensation,

in ....



in the form of at least one beast, for the care and maintenance of such child. Such maintenance is payable whether the wife left her husband's umzi of her own accord or whether she was forced away by her husband, no matter whether the child was born at the umzi of her husband or at the umzi of her own people.<sup>110.</sup> He has to hand over the isondlo or maintenance irrespective of the sex of the child.<sup>111.</sup>

Some people contend that if the child is fetched when it is grown-up no claim for isondlo can be instituted, for, they say, the services of such a child compensate the people who cared for and maintained him. This however, is not Xhosa Law, the husband can only get the child upon the payment of isondlo, and before he pays at least one beast, he has no right to take the child unless the people of the woman agree. If the child grows older and works for the family of the woman, it does not debar them from claiming the isondlo if the wife's husband fetches the child. For they have to see to the health and general welfare of the child. His earnings or services may never be able to compensate them. A child is not fetched before it is weaned, but it is usual for the lawful husband of the woman to fetch boys while they are still small, sometimes at the age when they are able to herd the calves. With regard to girls it is different. It is not unusual for the lawful husband of the woman to leave a girl at the umzi of the woman's people until she marries; he will then go along and rightly claim the ikhazi. But he will then pay the isondlo as well as for the wedding outfit. What he always does is to leave some of the lobola cattle, perhaps half, as compensation.

Where the lawful husband of a woman repudiates a child born to his wife as a result of her adulterous intercourse with  
another ....

<sup>110.</sup> Mensiwa vs. Mbondi (2, N.A.C.) 149.

<sup>111.</sup> Boni vs. Njikilana (3, N.A.C.) 156.

another man (such repudiation is very rare), the natural father of such child has a right to claim it upon the ground that it is his blood: igazi lakhe.

It is said that should "the husband repudiate the adulterine child and send it to his wife's people, such child becomes the property of his wife's father."<sup>112</sup>. What is presumably meant here is that if the husband of the woman repudiates such a child under such circumstances it will be considered as an inmate of her father's umzi if it is not claimed by its natural father, who, when he claims the child from the people of the woman, will have to pay to them the isondlo for the child's maintenance and care, before he may get the child.

A repudiated child is as a rule only adopted by its natural father if the latter is a married man (see D below).

D. ILLEGITIMATE CHILD PROCREATED BY HUSBAND OUTSIDE MARRIAGE AND ASSUMED BY HIM:

It may happen that a married man may procreate a child by a married woman or by an intombi, girl. The first mentioned case is treated of also under C; that child is nevertheless an illegitimate child.

When it is made possible for him by the lawful husband of the woman or the people of the girl, to adopt his illegitimate child, the married man will consult his family court who will help the father to establish the status of such an assumed child.

A child procreated outside a marriage by the husband and assumed by him becomes his own child in every respect but it has an inferior status to the legitimate children of the husband procreated by him by his lawful wife or wives, and furthermore, such a child is unable to oust a legitimate son born in lawful wedlock from the inheritance of its father.

In ordinary life there is no distinction in status between the legitimate children and a child thus assumed. In the case  
of .....

<sup>112</sup>. See Whitfield: South African Native Law, p. 37; Tonono vs. Gobo (3, N.A.C.) 120.

of daughters no difference in status is noticeable. The great distinction in the case of boys arises with regard to the right of succession and inheritance. For as a general rule a child thus assumed by its natural father cannot succeed his father.

Whether the natural father will get his illegitimate child depends upon the lawful husband of the woman if it is a child he procured by a married woman (see C below) or upon the father (family) of the girl if she is unmarried. In the latter instance he will have to pay not only the damages for deflowering and pregnancy, but he will have to produce also the isondlo. The assertion that the natural father has a right under these circumstances to his illegitimate child and that the people of the girl must give up the child when claimed by its natural father is not Xhosa Law (and doubtful Native Law in general). Even should the natural father tender the isondlo, he has no legal right to force the people of the girl to hand over the child to him. Whether he gets that child or not will depend upon the father of the girl. If he refuses the natural father has no remedy.

The following instance among others may be mentioned: A girl was deflowered and made pregnant. Some time after birth of the child the natural father, who had made reparation but had not married the girl, wanted the child. He then tendered the isondlo and repeatedly asked that he be given the child, but every time the family of the girl refused. Xhosa Law granted him no remedy and the Chief's Court could do nothing. The child is still living with its mother and her family who to this day refuse to give up the child.

Even if the "seducer" marries the girl he is not without more entitled to the child if born before the marriage (see E, below).

Where the natural father gets his illegitimate child, procured by him outside marriage, either by an intombi or by a married woman, he may, if there is no male issue in one of

the ....



166.

the houses, place such a child in that house as heir to that house. When he does this he must publicly declare in his family court such child as heir to that house. 113.

Should there be no male issue at all in the umzi, the natural father may fetch his son procreated by him outside marriage and, after having publicly proclaimed him, institute him as lawful heir and successor. 114. Such a child will then after the death of his father not only become heir of his deceased father, but will also step into the status of his deceased father and be head of the family.

A good example of this is the following with regard to a son of a Chief of a Xhosa tribe: The father of this son was not married to the latter's mother who was the wife of an isibonda. The Chief committed adultery with this wife of the isibonda and this son was born. Being a Chief the adulterer managed to get the son thus born just before circumcision, circumcised him and made him his heir and successor, for he had no male issue by any of his wives. This son was "placed" in the house of the Great Wife of the Chief as her own son and lawful heir and successor to the Chief. This originally illegitimate child therefore was legitimated and became the heir to his natural father.

"According to our custom it is unknown that the illegitimate son of a married woman should be adopted by its natural father and instituted as heir," in the case of: M. Tokwe vs. N. Mkencele (3, N.A.C.) 118, is definitely not Xhosa Law. It does not matter whether the child is born by an unmarried or married woman. If the natural father succeeds in getting the child he may make the above declaration. 115.

E. ILLEGITIMATE....

113. Kaliwe vs. Dabula (4, N.A.C.) 148.

114. Collis vs. Matchawana (1, N.A.C.) 47.

115. See also: S. Mhantshana vs. D. Ngqingili (C.M. Cir. dated 31/12/1923, No. 27), which is based on an opinion and not on Xhosa Law or on Native Law in general.

# E. ILLEGITIMATE CHILDREN BORN TO UNMARRIED DAUGHTERS:

The case where an intombi is made pregnant by a married man has already been dealt with under D, above.

Xhosa Law distinguishes between two kinds of illegitimate children procreated by an unmarried woman, intombi.

(i) Umntana wesisu, a child of the belly, and (ii) isiza na nina, a child that came with its mother.

The illegitimate child born to an unmarried daughter belongs to the umzi of her father, is recognised as an inmate of that umzi and as a child, though of minor status of the house (indlu) to which the daughter who thus gave birth to this child, belongs. It is treated as any other inmate of the umzi though he is known to be illegitimate.

(i) Umntana wesisu:

This is the usual term for a child borne by a girl at her people's (father's) umzi, when the father of the child is not disclosed. Such a child will adopt the name or isiduko of the parents of its mother. If it should be a boy and remain at this umzi, other male issue failing, he may even be instituted as heir and successor to his grandfather.

He will receive his ikhazi from the indlu to which his mother belonged. If the child is a girl, she will be married from the umzi of her grandfather or his successor and her ikhazi will come to the indlu to which her mother belongs. To indicate that this child is considered as an inmate, as one of the family, of the umzi of the woman's parents, it is usually referred to as untakwethu, our child, or umta ka bawo, our father's child.

Should the natural father of this child arrive, be acknowledged and claim the child, he will not only have to pay for the pregnancy of the girl, but he will also have to pay isondlo before he will get the child. But it depends upon the father of the girl whether the natural father of the child will get the child (see D above). As has already been described in D above, by paying for the pregnancy of the girl the natural father does not yet in Xhosa Law acquire a right to obtain the child. It

depends ....

depends upon the father of the girl who has to agree to it that the natural father will get the child, and he does so by accepting the isondlo from the natural father of the child.

(11) Isiza nanina:

This is a term for a child procreated before marriage and born either before or after marriage. It is a child either born as a result of the *akumetsha* custom or more usually as a result of "seduction", but in either case it is procreated by the man who intends to marry its mother.

Where the child is born before marriage the intended husband of the girl, though he has no right to demand the child, (whether he had already handed over lobola cattle or not), will still have to make reparation; but it is usual that if he married the woman before the child is weaned, he will not pay the isondlo if the people of the girl allow him to get the child also. Where he takes the child, and marries its mother, it is his legitimate child by that wife.

If the child is born after the marriage of the girl, and it was known to the husband that she was pregnant it is regarded as the legitimate child of the husband, and nothing more is said.

Should the lawful husband find out after marriage that the girl he married is pregnant, and provided he can prove that another man is the guilty party he may institute a claim for reparation against the "seducer", or ask for a reduction in the number of lobola cattle. If he keeps the child it will be treated as was described under C above.

If he repudiates the child, and the child goes to the parents of its mother, it will be recognised as the child of that *umzi* if its natural father does not claim it (see C and D above).

It is, however, not unusual for such a child (if a son) when he reaches the age of marriage to go to his natural father with the consent of his mother's people, accept the latter's *isiduko* and marry from this *umzi* as a son of it, after he has been

publicly ....



publicly accepted by the family Court.

#### F. LEGITIMATION OF ILLEGITIMATE CHILDREN:

(i) The legitimation in general of illegitimate children has been treated of under B,C, D and E above, viz. an illegitimate child may be legitimised if it's natural father is allowed to take him and then publicly declare him to be his own child, or when the lawful husband of its mother accepts him as his own child.

When brought to the umzi of its natural father, or in the case of a married woman at the umzi of her lawful husband, the matter is discussed in the family court, and on a certain day the boy is publicly proclaimed in the family court as the legitimate son of its natural father or of the lawful husband of its mother.

(ii) Incestuous: A child born as a result of incestuous intercourse can never be legitimised (see Chapter III), though it may be tolerated. The child is in a pitiable position and a stigma clings to it for ever. It is believed that such a child may be the object of the vengeance of the izinyanya; he is open to all possible dangers. If he is left at the umzi of its mother's (or father's) family he has no right but lives on the generosity of the people.

Such cases are as a rule unknown among the amaXhosa on account of the prohibition against incestuous intercourse and thorough investigation as to relationship before the parties marry.

#### G. ADOPTION:

Adoption is the taking as one's own, the child of another.

The amaXhosa usually adopt only heirs when a man has no heir in general, or when there is no heir in one or other of his houses. A man may, however, also adopt a child to enlarge his own family.

As a rule children are adopted from among the family of the adopting father; but adoption of a stranger's child is not

excluded. The adoption of a child from among the family of the wife is unknown.

Where a man adopts a child, especially with regard to boys, certain lines of procedure must be followed: The parent who allows his son to be adopted by another man must publicly declare in his family court that this or that man is adopting this particular son. Hereafter he must notify the Chief of the intended adoption of the son by another man.

If the father whose son is thus to be adopted does not follow this procedure, such adopted son has the right to claim the inheritance of his father after the latter's death, if he is the eldest son. Or, if he is the eldest son of a particular indlu, he retains the rights and privileges of such a son.

The adopting father, on the other hand, must also make a declaration in his own family court to the effect that he adopts this particular son. The position and status of this adopted child is then fixed by the family court. Whether this adopted son will inherit or become general heir and successor of his adopted father, will depend upon his status fixed by the family court. After this the adopting father will notify the Chief and then everything will be in order. 116.

Adoption takes place after the child is weaned, when it is able to obey orders, and before it is to undergo the rite of circumcision. This is so especially where a son is adopted as heir; for, it is incumbent upon the adopting father that such son shall be circumcised from the former's umzi; this is to show that the son now is his own son.

If a man adopts a child he will put that child in one or other indlu, but such a child will not oust the son in that house. He will be treated as any other child of the umzi, with the same rights and obligations as other children, except that  
he .....

116. Zondani vs. Dayman (2, N.A.C.) 132. This holds good for Xhosa Law also.

he cannot inherit before other sons who are the legitimate children of the adopting father.

The adopting father or his lawful heir and successor will also have to care and maintain this child and, if a son, will have to help him to lobola a wife. "Where a man has adopted another, and has paid lobola on his behalf, he has a claim on the children of his adopted son, he having the right under Native Law to a portion of the lobola received for a girl born to the adopted son, or, if more than one daughter is born of the marriage, he might claim the eldest daughter." 117.

It is doubtful whether this is true Xhosa Law if it is applicable to cases among the amaXhosa, or whether it is true Native Law in general. For, a man who adopts a child takes that child as his own. The only possible basis for accepting the view expressed above is that this child is not the blood (igazi lakhe) of the adopting parent.

Where a man adopts a child as heir to one or other of his houses, that son will be recognised as the eldest son of that house and have all the rights and duties of a son of that house. But, if the wife of this house gives birth to a son, being the child of her lawful husband, such a son will oust the adopted son who will then be recognised as the minor brother of that son.

Another form of "adoption" found among the amaXhosa, especially in former times as a result of wars and famine, is in connection with the umcholwa, a picked-up child.

The man who finds such a child, umcholwa, will formally adopt the umcholwa and it will enjoy the same privileges as any other child of the umzi.

If she is a girl she will undergo the intonjane ceremony here  
and ....

117. Whitfield: South African Native Law, pp. 39 and 40. Also: Kokwe vs. Gubela (1, N.A.G.) 48; and, Lododana vs. Ntlanganiso (2, N.A.G.) 135.



and be married from this umzi, her adopting father or his lawful heir and successor receiving her ikhazi.

Should it be a boy, he will be circumcised at this umzi, as a son of the umzi, and he will be helped to lobola a wife. Where there is no heir in one or other of the houses, the adopting father may place this son so adopted in that heirless indlu as heir. In case of lack of all male issue, this adopted son has a right to heirship. If there are other legitimate sons, the adopted son will enjoy the same rights and privileges as the former, except that he cannot inherit.

#### H. GUARDIANSHIP: ORPHANS:

As a general rule all children are under the guardianship of their father or his lawful heir and successor (see also C, D and E above with regard to illegitimate children).

The children of an unmarried woman, unless the natural father manages to get them, are under the guardianship of the woman's guardian.

The illegitimate children of a married woman if not repudiated, are under the guardianship of her husband or his lawful heir and successor.

After the death of their parents the guardianship of orphans vests in general in the lawful heir and successor of the head of the family. And this is so whether they are absolutely orphans or whether only their father is dead.

In the case of half-orphans, where the mother is still alive, she has no right of guardianship, <sup>35)</sup> except that if she leaves her late husband's umzi, she will retain custody of the child if it is too young and tender to be kept at the deceased husband's kraal without the assistance and care of its mother. As soon as  
it .....

Note 35). If she is married according to "civil or Christian rites" she is the legal guardian of her minor children. See: M. Dlakiya vs. Z. Nyangiwe (4, N.A.C.) 173; and, M.A. Ntoyi vs. K. Ntoyi (4, N.A.C.) 172.

it is considered old enough to live without the care and assistance of its mother (usually after it is weaned) it is fetched by the guardian, that is the lawful heir and successor of its father.

If the lawful heir and successor of a husband is still a minor, the guardianship of the children will fall upon the shoulders of such a major who would have succeeded the deceased husband had he died without male issue. It is, under such cases, usually the oldest surviving brother of the deceased that becomes the guardian. If he had no brothers, then the eldest nearest male relative will become guardian.

The guardian must care for and maintain the children who in turn must render him services. He is in the position of the father and the relationship that exists is the same as that which exists between father and children (see A above).

CHAPTER VI.DISSOLUTION OF MARRIAGE: UKUCHITH' UMTSHATO.A. "DIVORCE" BY HUSBAND OR WIFE:

There are no specific or definite grounds for dissolution of marriage in Xhosa Law. Separation either or not followed by dissolution of the marriage ensues whenever cohabitation of husband and wife becomes unbearable on account of the conduct or behaviour of either.

This misconduct that leads to dissolution of marriage may be any gross violation of the duties which the spouses owe to each other. (See Chapter IV).

Our Common Law conception of "divorce", in the sense of a judicial decision dissolving the marriage on the application of one of the spouses, is equally unknown in Xhosa Law, for - as is more fully set forth below - a Xhosa marriage is not dissolved by any judicial decree, but by the return of at least a portion of the ikhazi after the woman has refused to return to her husband.

Thus, if the life at the umzi becomes unbearable as a result of the wife's misbehaviour (see Chapter IV), her husband can either send her home or force her to go to her people. He may leave her there as long as he wants to and may, if he wishes, fetch her back one day should she then wish to return. The more usual procedure for her husband under such circumstances is to leave her with her own people if her character is such that she would make life at the umzi unbearable. Under these circumstances the marriage is not dissolved and any children born to his wife are still considered as his. If the adulterer is known to the husband the latter may institute a claim against him, but there can be no dissolution of the marriage for that reason. The adulterer can lay no claim to such children resulting from his adulterous intercourse with an-

other .....



other man's wife. The lawful husband of the woman may come forward at any time and claim both his wife and the children borne by her.

If, however, the woman refuses to return to her former and lawful husband her father may on her account send back part of the ikhazi handed to him by the woman's lawful husband, thereby indicating that the woman does not wish to return to him, and the marriage is hereby dissolved.

I was told by many old amaXhosa that it was not unusual formerly for the woman herself to drive these cattle back to her lawful husband, thereby showing that the marriage was dissolved. When she did this she acted in silence and was almost naked. This indicated again in a most formal and perceptible manner her contemptuous repudiation of all marriage ties; the full implication of her behaviour was made sufficiently clear to her husband when he saw her driving these cattle into his abuhlanti. The matter was settled!

Once this is done the woman may again marry and the children will be those of her second husband. See Chapter VII.

If the husband of the woman, on the other hand, persists in ill-treating his wife <sup>36)</sup> and in making her life at the umzi strained and unbearable, she may take advantage of the first opportunity to return home to her own people.

Her husband can, after some time, either follow or pursue his wife or leave her at the umzi of her father. If he does not follow or pursue her he loses no interest in her and their position is the same as when the woman leaves her husband, as in the case already described.

When, however, the husband traces his wife under such circumstances, and he nearly always does if he is the cause  
of .....

Note. 36). This not only means physical ill-treatment, but also, for instance if he blames her for practising witchcraft.

of her "deserting" him, the ukuteleko custom is brought into operation. <sup>118.</sup> If the husband of the woman does not hand over the beast claimed under the ukuteleko custom he cannot sue the father of the woman for the return of his wife. <sup>119.</sup>

The parents of the woman may prevent her from returning to her husband until such time as he has fulfilled his obligation under this custom, and he has no remedy. He cannot "divorce" his wife, but has to hand over to her people the fine imposed upon him. Should the husband never comply with the requirements under this custom, the woman may never return to him and he will never get back his ikhazi or part thereof. But if the family of the woman is convinced, after the parties have had an opportunity of stating their side of the question in the family court, that a reprimand is sufficient to dispose of the case, they will reprimand the husband and send the woman back. Should the woman have left her husband without sufficient cause and sound reason she will receive a scolding and be sent back to him. Where she absolutely refuses to return to her lawful husband however, her father and family are obliged to return part of the ikhazi and thus to dissolve the marriage. <sup>120.</sup> For, according to Xhosa Law, the marriage can only be dissolved by the return of at least a portion of the ikhazi, according to the circumstances. "If a deserting wife refuses to return to her husband when ordered to do so by her guardian, he would have no option in the matter and would be obliged to restore to the .....

<sup>118.</sup> Zenzile vs. Roto (1, N.A.C.) 223.

<sup>119.</sup> M. Solani vs. N. Manxiwa (4, N.A.C.) 342, and Adonis vs. Zazini (1, N.A.C.) 46, which expresses the general rule in Xhosa Law.

<sup>120.</sup> Nonafu vs. Pike (1, N.A.C.) 120, expresses the Xhosa principle. See also: Nomatusi vs. Nompetu (3, N.A.C.) 165.

the husband such number of the lobola cattle to which, under Native Law, he would be entitled in the circumstances of the case." 121.

Should his daughter refuse to return to her husband, after exhortations from her family, it is usual for the father, before the matter ends in the Chief's Court, to return of his own accord a part of the ikhazi and thus formally to dissolve the marriage. If the woman refuses to render part of the ikhazi to her husband who does not follow his wife, she need not return to him but may remain at the umzi of her own people who must maintain and care for her while she must work for them in return. They may not drive her back to her husband if he does not care for her or if she is reluctant to return to him.

If the father or lawful guardian of the woman is reluctant or refuses to comply with the wish of the woman and to dissolve the marriage by the return of part of the ikhazi she will appeal to her paternal uncles. If, after the matter has been discussed in the family court and her father still refuses, the matter may finally be decided in the Chief's Court. Should the Chief be convinced of the wife's case he will order the father to return part of the ikhazi and thereby dissolve the marriage.

The father or lawful guardian of the woman will then obey the order of the Chief and restore part of the ikhazi to the husband of the woman. Whitfield: South African Native Law, p. 213, in quoting the case of Nonafu vs. Pike (1, N.A.C.) 120, urges: "Should the guardian of the wife continue recalcitrant and refuse or neglect to comply with the order of the Chief in regard to the restoration of the lobola cattle to the husband, the wife could then bring an action in .....

121. Whitfield: South African Native Law, p. 217.



in her own name in the Court of the Native Commissioner calling upon the husband and her guardian to show cause why her marriage should not be dissolved." This position is highly improbable, for in Xhosa Law the father or guardian of the woman will not disobey an order of the Chief, for fear of punishment. According to Xhosa Law, moreover, a woman cannot "in her own name bring an action to the inkundla. See Chapter IV.

When a portion of the ikhazi is restored to him, the husband has no other choice but to accept these cattle and to consider the marriage dissolved.<sup>122</sup> The husband may object to the number of cattle the father of the woman tenders, but he will not object to the dissolution of the marriage, for if he does, he has no remedy.

But the Native Appeal Court has gone further in the case of: Qeya vs. Latyabuka (4, N.A.C.) 203, in which Mr. W.T. Welsh, states inter alia: "The case now under consideration was not one for the return of the wife or dowry, but was an action by the woman, assisted by her father, for the cancellation of her marriage on the grounds of desertion. The order made by the magistrate granted the cancellation asked for, and there was no necessity for any cattle to pass as a mark of dissolution. It is quite competent for a Court to grant a woman a decree of dissolution of marriage for good cause without making an order for the return of dowry."

It is submitted that some of the views expressed in this case are in direct conflict with the well recognised principles of Xhosa Law still adhered to by the amaXhosa. Thus the fact that "it is quite competent for a Court to grant a decree of dissolution of marriage for good cause", is not in accordance with Xhosa Law. A court, not even the Chief's Court, can or  
does ....

<sup>122</sup>. Mendziwe vs. Lubalule (3, N.A.C.) 170. This case expresses the Xhosa legal principle well.

does dissolve a marriage, much less grant a "divorce". A marriage is dissolved by the wife assisted by her family, and a court may only point out the legal duties of the parties involved to attain this end; or a court may settle a dispute regarding this legal duty, e.g. the woman's father returns one head of cattle whereas the husband claims that three head shall be restored.

Furthermore, although the court cannot dissolve the marriage, yet for it to be dissolved Xhosa Law demands the refund of at least one head of cattle from the ikhazi, and an order to this effect can be issued by the Court, so that the expression "..... without making an order for the return of the dowry", it is submitted, is incorrect. To effect a dissolution of the marriage by the wife and her family, part of the ikhazi must be returned. This legal act marks-off the dissolution and thus prevents the original husband of the woman from claiming any children born to her in future, to exact a fine if his late wife cohabits with another man, and also further to enable the woman to re-marry, thereby entitling her father to exact ikhazi for her second marriage. In this connection I may point out that in a similar way as was described by the completion of the marriage, this contract is not dissolved in an abstract, but in a very concrete and perceptible manner by the performance of the acts essential to such rescission, viz. the actual return of the woman to her own people, and, in opposite direction, the return of a part of the ikhazi, (the part acting pro toto). Dissolution of marriage therefore is in substance always a bilateral transaction: from the side of the husband's family the wife returns home, and from the side of the wife's family at least a part of the ikhazi is returned; although ultimately the dissolution of the marriage depends upon the wish of the woman and her family. The husband can drive away his wife, cause her to leave him, but he cannot one-sidedly dissolve the marriage. Neither can the "desertion" of the wife alone, whether ....

whether as a result of ill-treatment by her husband or as a result of being forced by her husband to leave on account of her misbehaviour, cause the dissolution. The return of at least part of the ikhazi is in either case essential.

The Native Commissioner's Court and the Native Appeal Court, however, assumed the authority to dissolve marriages.

The amaXhosa state that normally there can be no second or subsequent marriage of a woman who was once married, meaning, that unless part of the ikhazi, according to the circumstances of the case, is returned and the existing marriage rescinded, there cannot be a second "marriage" for the former one still subsists. For the misrepresentation of the rule: "No two dowries for the same woman", see below, sub B(p. 183). This is the case also in connection with widows. See Chapter VII.

Whether a husband will demand the ikhazi or part thereof will depend upon whether he is a Chief or a commoner.

In the case of a commoner he will usually follow up and try to get back at least a part of the ikhazi. In the case of a Chief however, when a woman leaves her husband either as a result of her own misbehaviour or as a result of her husband's ill-treatment, he never repairs to her people to follow up his ikhazi or part thereof. It is an act that is left to the woman's people to perform. This is so even if the wife has not borne any children to her husband. There are remarkable examples of this on record among the amaXhosa, in the case of Chiefs as well as commoners. Thus we find Nohute, the Great Wife of Chief Mhalla Ndlambe, who left Mhalla and returned to Thembuland where she died; and the daughter of Ngubenchuka who was married to Ngqika, and who returned to her own people in Thembuland without giving birth to a child to Ngqika. In both these instances as in many others, the royal husbands never tried to get back their amakhazi or part thereof, the marriage subsisting until the woman or her family could bring or send back part of the ikhazi.

The same conditions prevailed with regard to the daughters of Chiefs who married outside the Xhosa ranks: Tase, the eldest daughter .....



daughter of Maqoma returned to her own people; also Mfutya the daughter of Mhalla and Emma the daughter of Sandile, and Kona the daughter of Maqoma. In all these cases the husbands of these women never tried to recover their amakhazi.

When a woman leaves her husband with the object of never returning she usually sees to it that she takes with her as much as possible of her personal effects and of the household utensils. If there is a dissolution of the marriage she has a right to recover her ubulunga beast which will then be administered by her father or his lawful heir and successor. Before the dissolution the ubulunga beast remains at her husband's umzi.

Regarding the number of cattle to be returned on dissolution of the marriage, according to Xhosa Law there are certain deductions when the ikhazi is returned to the husband by the people of the woman where she has left her husband and refuses to return.

As a general rule one beast is deducted for each child which a woman has borne to her husband.<sup>123</sup> Where, however, there are as many children, or more, than the number of cattle given by the husband as ikhazi to the people of the woman, at least one beast must be restored to the husband of the woman to mark the dissolution of the marriage. If the woman has not given birth to any children yet, most of the lobola cattle will be restored according to the circumstances of the case.

The question arises as to whether the father of the woman has a right to deduct one or more cattle for the services of the woman rendered to her husband during the subsistence of the marriage. According to Xhosa Law there is no deduction for the services of the woman for she was the man's lawful wife and as such she had to fulfil certain duties and work for her husband  
and .....

<sup>123</sup> Myaka vs. Xinti (4, N.A.C.) 196. This case is applicable to Xhosa Law.

and his umzi, while her position was counterbalanced by the rights and privileges she enjoyed. As his wife she was naturally expected to do all those duties compatible with her position in the umzi and if the marriage is dissolved her father cannot expect to receive anything for the services she rendered to her husband's umzi during the marriage. This has been recognised by the Native Appeal Court. 124.

The wedding outfit a father and his family give to his daughter is something voluntary and a gift as from her family to the woman. It has nothing to do with her husband or the lobola cattle handed over by the husband to the father of the woman. Xhosa Law therefore on dissolution of the marriage allows no deduction for the wedding outfit given to the girl by her family.

Whitfield: South African Native Law, on p. 237, says: "No deduction, however, is allowable for the wedding outfit in those magisterial districts comprising the old Chief Magistracy of the Transkei, viz. Idutywa, Willowvale, Butterworth, Kentani, Ngamakwe and Tsomo. Thus in the case of *Dilikane vs. Mazaleni* (2, N.A.C.) 103, Mr. W.T. Brownlee, Acting Pres. N.A.C. said: 'The appeal in this case is in the claim for return of wedding outfit. This Court is not aware of any case in which any deductions have been allowed in this Court in the Transkei for wedding outfit, and is of opinion that the decision of the Court below on this point should stand.'".

In this same line of thought there is also no deduction for the impotulo beast handed to the girl by her father when she left to be married to her husband. The impotulo (see Chapter III) is a voluntary gift which also bears no relation to the lobola cattle and there rests no responsibility upon the husband ever to refund it. He and his people were given

A .....

124. *Ntwanani vs. R. Tube* (3, N.A.C.) 65, which expresses Xhosa Law.

a portion of this animal's meat but they had no legal claim to it.

B. DISSOLUTION OF MARRIAGE UPON THE DEATH OF EITHER SPOUSE:-

Upon the death of the wife the marriage is dissolved. Should the wife have died shortly after marriage or before she had given birth to children, it was customary for her father to restore part of the ikhazi. This was under the Ukuketa custom which means that the father of the woman must give back certain of the lobola cattle. It was customary never to return the whole ikhazi but only more or less half; each case being decided upon its merits and according to the circumstances of the case.<sup>125.</sup>

This custom which is still in force though not widely practised in the Ciskeian Territories, has been abrogated, but, some profess, not totally abolished in the Transkeian Territories by Proclamation No. 189 of the 9th November 1922: "Whereas it appears to me that the Native Custom known as Ukuketa, whereby a husband is entitled to claim the refund of the whole or portion of the dowry paid by him on the death of his wife shortly after marriage, has largely fallen into disuse and disrepute; and whereas the said custom is opposed to the civilized sentiments of the majority of the Native people who desire its extinction; and whereas in the interests of progress it is expedient so far as possible to give effect to the desire, by withdrawing all legal recognition from the said custom in the courts of the Transkeian Territories; now, therefore, under and by virtue of the powers vested in me by law, I do hereby proclaim and make known that from and after the 1st day of January, 1923, no claim under the said custom of Ukuketa, save and except a claim then pending shall furnish a cause of action in any court in the Transkeian Territories; provided that this

Proclamation .....

125. See the following cases which reflect the position in Xhosa Law: Mgonongwana vs. Ndota (2, N.A.C.) 86; and, Kowe vs. Mbilini (1, N.A.C.) 41.



Proclamation shall not effect any right acquired or obligation incurred under any judgment or order of any court in respect of the said custom delivered or made before the said date."

In cases where the Husband dies the position is different and more difficult. As a general rule the marriage in Xhosa Law is not dissolved by the death of the husband. Exactly as long as the widow remains at the umzi of her late husband, she is considered by law to be the umfasi of her late husband and has the same status as before his death (see Chapter IV, D.). All the children she may give birth to <sup>belong to</sup> her deceased husband's umzi; they are his children and cannot be removed from his umzi. She may remain at the umzi of her late husband as long as she wants to and she has to conduct herself as his umfasi.

As a rule the widow will remain at the umzi of her late husband; she may however return to her people and if she so wishes dissolve the marriage. She can never be compelled to return to her late husband's umzi; but the fact that she has had children there is a factor that binds her to his home. A court can however never order her to return to her deceased husband's umzi.

She has a right to return to her own people and cannot be stopped by the lawful heir and successor of her late husband. The heir and successor can however, go along and fetch her, or the children, or both. He has a right to take the children, but she herself may refuse to come back; in such a case her family will hand back to the lawful heir and successor part of the ikhazi given for her and thereby dissolve the marriage. After this the widow may remarry (See Chapter VII).

Any children that might have been born before the dissolution are the children of the deceased husband in spite of the fact that they might have been begot and born at the umzi of the woman's family and not at the umzi of her deceased husband. After the marriage has been formally dissolved by the handing back of part of the ikhazi after the usual deductions have been made, her status and legal position are the same as those of the wife ....

wife treated of under A above.

The decision in the case of Nbone vs. Manoxoweni (6, E.D.C.) 62, an appeal from the Magistrate's Court ordering a widow to return from her father's umzi to that of her late husband, or in case she refuses, the return of the ikhazi or part thereof, correctly lays down the principle that a widow cannot be compelled to return to her deceased husband's umzi. But the decision goes further and introduces a new element into Xhosa Law, viz that there can be no return of the ikhazi or part thereof if the widow refuses to return to the umzi of her deceased husband. This innovation not only forecloses the only legal way of dissolving Xhosa marriage, but actually means that upon the death of the husband the marriage is, without more, dissolved.

In reversing the decision of the Lower Court, the Supreme Court based its argument mainly upon two factors: (a) the individual's freedom and the abolition of slavery; (b) the question of legal majority, under Proclamations No. 112 of 1879, section 39, and No. 140 of 1885, Section 38, which fix the age of legal majority for both males and females at 21 years.

"It was at one time the practice in the Court of these Territories to hold that under Native Law a woman's marriage is not cancelled by the death of her husband, and to give an order for return of the dowry paid for her, or a portion of it, should she abandon her husband's kraal after his death and refuse to return to it. 126.

In refuting the above principle, Mr. Brownlee in the same case continued: "The practice, however, ceased after the decision of the Eastern District Court in the case of Nbone vs. Manoxoweni (6, E.D.C.) 62, in which the principle was enunciated that not only is a marriage dissolved by the death of one of parties to it, but that a widow is no longer under the control of .....

126. Mr. W.T. Brownlee, Acting Pres. N.A.C. in: Mgqongo vs. L. Zilimbola (3, N.A.C.) 186.

of anyone and may go where she wishes, and the return of dowry may not be ordered if she refuse to return to the kraal of her late husband. A new element was thus introduced into cases of this nature, and this Court following upon the decision of the Eastern Districts Court has upon various occasions held that upon the death of a married man, the marriage is dissolved, and the widow is free to remarry; and it is only in cases where a widow has contracted a second marriage and a second dowry has been paid for her that this Court has held that the first dowry should be returned. This is done, however, not to mark the dissolution of the marriage, but on the principle that no man may hold more than one dowry in respect of one woman."

Thus as a result of an ill-considered application of western ideas and principles of Roman Dutch Law, and the submissive attitude of the inferior to the Superior Courts caused by the system of precedents, a new principle has been imposed upon Xhosa society to succeed the old and well-established, and by no means abandoned, legal principle which works very well and which tends to stabilize Xhosa family life.

The reason given by the Acting President for the return of the "first dowry" is not altogether correct. A man may not hold two "dowries" (amakhazi, is better) for the same woman, for while one or part thereof is not returned, the marriage is, according to Xhosa Law, still considered to subsist, and while this is the case, there can be no lawful and binding second marriage and henceforth no second "dowry".

That "a widow is no longer under the control of anyone and may go where she wishes" may be good Roman Dutch Law, or in accordance with governmental Proclamations, but is bad Xhosa Law, for any Xhosa widow who remains at the umzi of her deceased husband remains under the control and guardianship of the lawful successor to the deceased, for she is still regarded as the umfazi of the deceased.

That "she may go where she wishes" is true in so far that she may return to her own people and refuse to come back to ....



to her umzi of her deceased husband. Upon her refusal she may have the marriage dissolved by insisting that her parents give back a portion of the ikhazi. Unless this part of the ikhazi is returned, the marriage still subsists and the lawful heir and successor of the deceased has a legal right to come and fetch the widow and any children borne by her. (see above).

The view expressed, therefore, that "a marriage (is) dissolved by the death of one of the parties to it," is again good Roman Dutch Law but it is only half true for Xhosa Law.

As has already been intimated: There is no "divorce" and no list of specific "reasons" in Xhosa Law; all these are innovations of our Courts.

In the judicial practice of Xhosa Law (Native Law in general) "certain grounds" for "divorce" however, have developed under influence of western legal principles and have been accepted by our N.A. Courts, and for the sake of this practice most of these "grounds" will be treated of here. See also: Whitfiled: South African Native Law pp. 216 et seq.:

#### (1) Desertion:

This subject has been treated of at length above. The issue was that if a woman "deserts" her husband there can in Xhosa Law be no dissolution until such time as at least part of the ikhazi has been returned to mark such dissolution of marriage.

Nowadays the more sophisticated and detribalised amaXhosa accept "desertion" as a "ground" for "divorce", and either the woman or the husband can avail themselves of it. Here the pressure of Roman Dutch Law can clearly be discerned. See: Liwani vs. Batakati (5, N.A.C.) p. 57.

#### (2) Adultery:

Adultery is not a "ground" for "divorce" in Xhosa Law; but here again the more sophisticated and detribalised Native has come to accept it as such. In former times all the evidence in cases of adultery of the wife was used not in order to obtain a "divorce", but to assist the husband in exacting a com-

pensation .....

pensation for adultery.

If the husband commits adultery the wife cannot, according to Xhosa Law, "divorce" him. Should he persist she has no remedy except perhaps to slip away to her own people.

The Native Appeal Court has from an early date accepted that: "Ordinarily adultery on the part of a wife, married according to Native Custom is not sufficient cause for the husband to divorce his wife and recover the dowry, but there are exceptions to this rule. Where, after remonstrance the wife is guilty of repeated acts of adultery, or when a wife, who becomes pregnant by another man refuses to divulge his name or obstructs the husband in an action against the adulterer for damages." 127. Another so-called exception to the rule that adultery is no ground for "divorce", is incest, as was laid down in: Mangaliso vs. Fekada and Another, C.M. Cir. dated 26/12/1926, No. 36, and quoted by Whitfield, South African Native Law, p. 223.

Now this is not quite correct. Even in cases of repeated adultery and similar instances there lies no ground for "divorce". The husband may, if the marriage has become untenable at the umzi as a result of his wife's misconduct, force her to return to her own people, and exact a fine from the adulterer, but he cannot enforce a "divorce", this being a measure entirely dependent on the wife's family.

Again, "Adultery on the part of the wife is not sufficient cause for the dissolution of the marriage, but the husband may, if he wishes, repudiate his wife, but if he does so he is not entitled to the dowry paid by him." 128. Even if he repudiates his wife, there is no "divorce". See above.

The .....

127. Ngawana vs. Makuzeni (1, N.A.C.) 220.

128. Conana vs. Dungulu (1, N.A.C.) 136. This case holds good for Xhosa Law.

The usual fine for adultery unaccompanied by pregnancy was one beast, <sup>129.</sup> which fine always went to the injured, but has now been fixed at three head of cattle.<sup>130.</sup> This is not altogether correct; it seems that in ancient Xhosa Law there was no fixed number of cattle either for adultery alone or for adultery accompanied by pregnancy. In the following case the old Xhosa Law idea of an indefinite number of cattle payable, was adopted: "The circumstances having been placed before the Native Assessors they state that the measure of damages is in the discretion of the Court."<sup>131.</sup>

But in this very case the Court took into consideration certain extenuating circumstances and reduced the number of cattle payable as fine. It did this because the woman in the case was living a loose life.

Should there be aggravating circumstances the fine will be higher. Where a man for instance had infected the wife of another with syphilis, the Court awarded a higher fine.<sup>132.</sup> For each act of adultery a separate action for damages may be instituted. "The point, however, of the amount of damages to be allowed for successive acts of adultery has been decided in the case of Mondli vs. Buzza (1, N.A.C.) 160, and the custom as laid down by Native experts is this: Should a man make a catch .....

<sup>129.</sup> Mtsilana vs. M. Nopenya (3, N.A.C.) 13.

<sup>130.</sup> A. Matanda vs. A. Dingiwayo (C.M. Cir. dated 3rd May 1928, No. 3, quoted by Whitfield: South African Native Law, p. 421.

<sup>131.</sup> S. Tiwani vs. M. Gushani (4, N.A.C.) 14.

<sup>132.</sup> Magwaxaxa vs. Nganqane (1, N.A.C.) 273.



catch and institute proceedings, and then after such proceedings have been taken, again catch the adulterer with his wife, he may make separate claims. If, however, upon the occasion of the first catch he took no action and raised proceedings only after the subsequent catch, he is allowed to make only one claim." 133.

It must be stated here that, as a result of their rank and status, Chiefs are entitled to a greater fine in case of adultery with their wives. This is a serious offence and the offender will be fined according to the circumstances of the case and the discretion of the Chief. The fine, except in blood-cases (see Chapter I), goes to the injured party, in this case, to the Chief.

### (3) Impotency:

Impotency may, though not necessarily, be the cause of a woman returning to her own people, who will return theikhasi to the husband. That a marriage which cannot serve its primary purpose, the procreation of children, can be dissolved is, according to Xhosa Law, self-evident, and as a rule will be dissolved. That there is a legally binding marriage up to the moment of its dissolution is equally obvious, because the marriage was contracted and concluded in accordance with all requirements of Xhosa Law.

The question whether or not the whole ikhasi is to be returned, is answered in the affirmative by Xhosa Law. The girl is returned intact to her parents; no child has been borne by the woman; she can still be lobolased as an intombe; it is she who has returned to her people.

This view is supported by the Native Assessors in the case of D. Ncose vs. Ndandile (4, N.A.C.) 197, quoted by Whitfield: South African Native Law, p.128: "The Native Assessors to whom ....

133. Tsoanyane and Sikayi vs. Metsamai (3, N.A.C.) 25. This case holds good also for Xhosa Law.

whom the point was referred, state that, according to Native custom, as the girl was returned to her father intact, appellant is entitled to the return of all his dowry."

But in an earlier case the following contradictory principle was expressed: "An impotent person is not entitled to recover the whole of his dowry." <sup>134</sup>. This ruling was followed in the case of Dabi Smit vs. Galada Fuleni, not reported, but quoted by Whitfield (see above), p. 128.

"The impotency of a husband, in Native Law in the Cape Province, is a sufficient cause for the dissolution of a Native customary union at the instance of either the husband or wife." <sup>135</sup>.

The Native Appeal Court has gone further and in one of its latest cases <sup>136</sup>. established the principle to declare a marriage "null and void, ab initio". This whodcase and its decision were conducted on principles of Roman Dutch Law, and cases decided by the Superior Courts. Cases like the following are made use of here to decide on a simple principle in Native Law: B (otherwise S) vs. S (1916) C.P.D. p. 113; and the following quotation from the judge is with apparent satisfaction quoted: "By our Law (Voet 24: 2: 15) if no consummation of the marriage has taken place for three years after the marriage, the wife has been proved to be well formed and a virgin, a presumption of impotence through latent defect on the part of the husband will arise."

The case: H (otherwise C) vs. H (1906) 23, S.C. 609, was also quoted, and lastly, but not least, van Zyl's Judicial Practice,

<sup>134</sup>. Siyekile vs. Qiki (1, N.A.C.) 73.

<sup>135</sup>. Whitfield: South African Native Law, p. 225.

<sup>136</sup>. Jameson Bana vs. Evelyn Bana (1937) N.A.C. 186, Cape and C.P.S.

Practice, 3rd Edition, Volume II p. 696: "When the defect to procreate is not visible and is not otherwise known, or immediately ascertainable, or there is no immediate hope of success by means of medical or surgical treatment, then three years must intervene from the date of the marriage before such marriage can be set aside on the grounds of impotency." 137.

All this, but no reference to Xhosa (Native) legal principles! Why these Roman Dutch Law principles should be vainly displayed and applied when deciding on cases in Native Law, is not clear. Clear, however, is the renunciation of the leading principle of jurisdiction in Native Affairs proclaimed in Section 11 of the Native Administration Act of 1927. As I have stated above, there are well defined principles of Xhosa Law governing this case, that work with ease, are well understood by the Natives; principles which could and should be applied because they are in no way opposed to the principles of public policy or natural justice.

(4) Barrenness.

Barrenness never was a ground for dissolution of marriage in Xhosa Law, and it seems unlikely that it ever will be recognised as such by the people or by the Native Appeal Court. AmaXhosa whom I questioned on this subject told me that there was no dissolution of marriage on account of barrenness. They said a man could marry another wife to bear him children so there is no reason for "divorce". The husband, if his wife is childless, may marry a "womb" to that wife. (See Chapter IV, A, 7).

(5) Witchcraft:

Should a husband make his wife's life intolerable by blaming her for practising witchcraft, she may go back to her parents and if he follows her she will be kept under the

ukuteleko .....

137. See also: A. Mlete vs. A. Mlete (1940) N.A.C. Cape and O.P.S. Volume 12, Part III at p. 105.



ukuteleko custom, under which custom he will be forced to pay a beast called the ukuteleko beast. If he hands the beast to her people and apologises for his conduct, she usually returns.

The Courts seem to have accepted the view expressed by Whitfield: South African Native Law, p. 241: "In the Cape Province a Native customary union is dissolved where a Native husband accuses his wife of the practice of witchcraft and thus cause her to leave his kraal. By this act, he also forfeits his right to claim the restoration of the lobola cattle paid by him in respect of his wife." 138.

Whether the marriage will be dissolved will depend upon whether the wife absolutely refuses to return to her husband. And, if this be the case, at least part of the ikhazi, may be returned to effect the dissolution of the marriage.

(6) Gross ill-treatment:

This has never been recognised by the amaXhosa as being sufficient to cause a dissolution of marriage. The woman used to avail herself of the protection of the ukuteleko custom. The Native Appeal Court, however, has accepted the view that gross ill-treatment is a ground for the dissolution of a marriage, and also for the forfeiture of the lobola cattle. "When a husband, by ill-treatment drives away his wife for no reasonable cause, it is, under Native custom, a bar to the recovery of the dowry paid or a reasonable ground for a portion of it being withheld." 139. But in such a case the woman will go to her people and remain there. Should her husband follow her, he will have to face the consequences of the ukuteleko custom. If he does not, and her people do not return part of the ikhazi, there will be no dissolution of the marriage.

(7) "If .....

138. Whitfield: South African Native Law, p. 241, and Mafaka vs. Dyaluvana (1, N.A.C.) 65.

139. Rwanza vs. Nkankane (2, N.A.C.) 50.

(7) "If a Native husband in the Cape Province drives away his wife, to whom he is married according to Native customary forms, and thus repudiates her, he, by this act, not only dissolves the union but also forfeits his claim to the return of the relative lobola." 140. In Xhosa Law a husband cannot dissolve a marriage; it can only be dissolved by a woman with the aid of her people who will return at least some of the lobola cattle (See (5) Above).

(8) Our Native Appeal Court has held that "a marriage by Christian or civil rites dissolves a marriage by Native rites previously entered into by man or woman so contracting a Christian or civil marriage." 141. It is true, if a man marries one of his wives by Christian or civil rites, he will usually send his other women home after having complied with the provisions laid down in section 22 of Act 38 of 1927 as amended by Act 9 of 1929.

Here western ideas and principles have practically superseded Native legal principles and the whole position seems far from clear and satisfactory. For, according to Xhosa Law there is no dissolution of the marriage unless at least some of the lobola cattle are returned.

(9) Stuprum:

"A Native customary union may be dissolved at the instance of a husband in the Cape Province on the grounds of his ignorance of his wife's previous stuprum." 142. "In the opinion of this Court the Plaintiff is entitled to succeed in the action. He paid dowry as for a virgin, and married a woman ....

140. Whitfield: South African Native Law, p. 239, and cases quoted there.

141. Whitfield: South African Native Law, p. 135, and cases quoted on p. 138. See also: Section 35 of Act 38 of 1927 as amended by Act 9 of 1929.

142. Whitfield, *ibid.* p. 225, and cases quoted there.

woman whom he supposed to be a virgin, and had he discovered her condition prior to marriage he would have had good ground for refusing to marry her."<sup>143</sup>.

It is true, a man may refuse to marry the girl if he discovers "her condition prior to marriage", but should he marry the girl, he cannot afterwards repudiate her or dissolve the marriage, whether he knew of "her condition" or not. The usual procedure for the husband is to discuss the matter with the family of the woman; if he proves his case the father of the woman reduces the ikhazi and there is no further trouble.

<sup>143</sup>. Gweni vs. Mhlale and Manelo (3, N.A.C.) 179. This is not the principle in Xhosa Law.



## CHAPTER VII.

### REMARriage OF WOMEN.

#### A. AFTER DISSOLUTION OF MARRIAGE.

A woman living with her own people after the dissolution of the marriage, is termed an inkazana.

An inkazana is a woman, divorced, a widow, or one who has already borne a child without having been married, but who at the same time has not given herself over to prostitution or to leading a loose life. She is taken to be a daughter of the umzi, but is called an inkazana to distinguish her from an intombi, a virgin. The term unfazi is not applicable to her; she will not be spoken of disparagingly, but will be called inkazana la se khaya apha, a daughter of this umzi.

An inkazana, and in the present case a "divorced" woman, is again marriageable, if a man comes along he will be told that she is an inkazana and not an intombi. The ikhazi given for an inkazana will depend upon her age and the number of children she already has given birth to. It is nevertheless always less than the number of lobola cattle given for an intombi.

The marriage of an inkazana is not accompanied by any grand ceremony as in the case of the marriage of an intombi. The ukutyis' amasi ceremony is usually the only one. Because of this the people sometimes say that the inkazana did not marry properly, thereby meaning that her marriage was not accompanied by other ceremonies. We must, however, keep in mind that here too, besides the ukutyis' amasi, the three essentials are present, viz. lobola cattle, consent, and the handing over of the bride by her family to the young man and his family (see Chapter III).

There may be (but it usually is not the case, a betrothal but there is no pledge beast (isinyaniso) connected with the betrothal of an inkazana, and her father is only too glad if he can get rid of her for some lobola cattle, for if she does not marry, and more often than not amankazana do not marry, she is

apt to become an idikazi, a loose woman, or still worse, an ihenyukazi (ihulokazi), a prostitute.

Should an inkazana marry, she has a right to an ubulunga beast. If she had one given to her on occasion of her previous marriage, she can claim this when she now remarries for it still belongs to her. When she remarries without possessing one, whether she formerly had one or not, she can always ask her father and he will never refuse, for he can be forced to give her one.

The children born of this/inkazana after her marriage are legitimate and belong to her husband. Her position and rights and those of her children in this umzi in no way differ from the legal position of a lawful wife and legitimate children in other cases.

#### B. REMARRIAGE OF WIDOWS:

Formerly, because a widow, umhlolokazi, was expected to remain, as an umfazi, at the umzi of her deceased husband with the children and not to return to her own people, it was sometimes asserted that she could not remarry at all. This assertion should, however, be thus understood that only while a widow remains at the umzi of her deceased husband, she cannot remarry according to Xhosa Law. The custom of ukungena (Zulu, Mpondo) is not practised either. Any children she should give birth to while she remains at the umzi of her late husband are considered to be his children and no one else has a claim to these children.

The question of the remarriage of a widow only arises when she refuses to remain at the umzi of her deceased husband, refuses further to be called his umfazi, returns to her own people and induces her people to restore to her deceased husband's family at least a part of the/ikhazi after the usual deductions have been made (see Chapter VI). It is true, however, that her parents very often refuse to do this and that she is then induced to lead a loose life.

It ....

It was rightly said that "a widow is never given in marriage by the relations of her late husband, and this applies to all the tribes in the Territories. When a widow wishes to marry she invariably returns to her own people and is given by them to a second husband." 144. This is true for Xhosa Law too, for unless she returns and there is a dissolution of the marriage as stated above, she is still the umfazi of the deceased husband and cannot be married to another man.

The ikhazi given for a widow is small and the marriage is less ceremonial as that of a "divorced" woman described under A above. Children born to her after the marriage are the legitimate children of her husband and their rights and status will depend upon her position and rank in the umzi of her husband. In this case also she resembles a "divorced" woman.

It has already been described in detail (see Chapter VI) that as a result of the case of Nbono vs. Manoxoweni (6, E.D.C.) 62, decided by the Eastern Districts Supreme Court, our Native Appeal Courts have ceased to follow the rule of Xhosa Law that a widow can only remarry after her father or lawful guardian has restored to the family of her late husband at least part of the ikhazi - a view that is also supported by Whitfield: South African Native Law, at p. 140 (7) - but is contrary to Xhosa Law. There is no dissolution of marriage as a result of the death of the husband and dissolution only comes into operation after at least part of the ikhazi is restored to the lawful heir and successor of the deceased. Should this not be so, what then gives the heir of the deceased the right to fetch the children born to a widow who left her deceased husband's umzi, if part of the ikhazi given for her has not been returned? 145.

The .....

144. Dobeni vs. Baka (1, N.A.C.) 58.

145. See: Sega Simono vs. Ngxenga (3, N.A.C.) 125.



The Courts, it seems, base their decisions upon the provisions in Proclamation 140 of 1885 whereby a widow was freed from tutelage and was declared a major. This may be so, but it does in no way affect her marriage obligations, and these must be considered still to subsist.

## CHAPTER VIII.

### CONCUBINAGE AND OTHER EXTRA MARITAL RELATIONS OF MEN AND WOMEN: CONCUBINES AND PROSTITUTES.

#### I. Concubinage, Ubushweshwe:

In Dugmore's time the question of concubinage was well described to have been as follows: "Concubinage is also allowed, and amongst the Chiefs exists to a considerable extent. It is by no means uncommon for a chief to raise a favourite concubine to a more honourable rank after some years' cohabitation.

Among common people concubines consist of two classes:  
(1) the voluntary and  
(2) the bestowed. The former are those who have become such by personal consent, and arrangement with relatives in whose guardianship they are. The latter are such as Chiefs have authoritatively allotted to the young men of their retinue, who have acquired their special favour during their term of service at the 'Great Place'; and who have therefore obtained permission to select female companions from amongst their acquaintances without incurring the expense of the marriage dowry." 146

The position nowadays is not quite the same. One no longer, or very seldom, finds that a chief raises "a favourite concubine to a more honourable rank after some years' cohabitation."

"Voluntary concubines" are the most common, not only among the amaXhosa, but especially also among the amaMpondo. "Bestowed" concubines are no longer found among the amaXhosa.

Concubinage has (except among the amaMpondo) largely grown into disuse among the amaXhosa. A man nowadays sometimes keeps a "sweetheart" most commonly called an inkazana.

It is not a stain on the father or his family if a  
daughter.

daughter of his becomes a concubine. A concubine usually is a widow or a divorced woman and she rarely ever marries the man who cohabits with her.

The man who takes a woman as concubine hands to her family some fee or gift as compensation. This is called "ihogu" and is distinguishable from ikhazi in that it is not given for the woman, but merely as compensation for the use of the woman, and it is limited to one beast or its equivalent, or sometimes some other object may be given, e.g. mealies.

A concubine is not bound to live with the man who cohabits with her and she may at any time leave him. It is customary for the concubine however, to live with the man for some time. Should she do this, he has no remedy.

As a rule only men who have been married for some years indulge in concubinage, unmarried men not.

An ishwehwe (concubine) is described by the Rev. A. Kropf, D.D. as: "A concubine (one who lives with a man, enjoying all the privileges of a wife, but whose children are illegitimate)," <sup>147</sup>

Here we get:

- (1) illegitimate children of an ishwehwe who is an unmarried woman but not a widow, and
- (11) the children of an ishwehwe who is a widow.

There is no marriage, therefore the children are illegitimate except when born of a widow whose marriage ties are not dissolved; or of a woman who does not live with her husband, but whose husband accepts these children as his own. For the status of these children see: Chapter V, D and E; Chapter VI, B, and Chapter VII, B.

## II. Prostitutes:



## II. Prostitutes:

A prostitute is called ihenyukazi, or sometimes ihulokazi, the latter word probably derived from the Afrikaans word "hoer".

The amaXhosa say that in olden times a prostitute was something uncommon; nowadays however, there is an alarming increase in the number of prostitutes. AmaXhosa opinion is against prostitution, and a man will not marry a prostitute. Because the amaXhosa are against prostitution, prostitutes never solicit openly or in public.

A prostitute is paid, in money or in kind, by every man who makes use of her; because prostitution is looked upon as her profession. Children born to an ihenyukazi are illegitimate.

An ihenyukazi may be:

- (i) an unmarried woman,
- (ii) a widow, or
- (iii) a married woman,

though the latter is very rare.

For the status and legal position of her illegitimate children under:

- (1) see Chapter V, E; for the status and legal position of those under (ii), see Chapter VII, B; and in the case of (iii), see Chapter V, C.
-