CIV/T/55/81

IN THE HIGH COURT OF LESOTHO

In the matter of :

NTHABISENG MPHEULANE Plaintiff

v

LIMPHO LESOLI Defendant

J U D G M E N T

Delivered by the Hon. Chief Justice, Mr. Justice T.S. Cotran on the 24th day of November 1981

The plaintiff is Nthabiseng Mpheulane, now a young woman of eighteen. The defendant is Limpho Lesoli, a man in his early middle age, in good employment, and twice married.

The plaintiff's action in this Court has been commenced by the Legal Aid Department of the Ministry of Justice in early March 1981 after the Court appointed Mr. Attorney Kolisang as her curator-ad-litem. They claim on her behalf:

A. (1) M650 being wages from November 1979 to December 1980 at M50 per month,
(2) M50 one month holday pay,
(3) M50 in lieu of one months notice of termination of employment,
(4) interest thereon at 10%.

B. (1) M500 damages for assault,
(2) M5000 damages for seduction,
(3) interest on the above a tempore more at 10%,
(4) M73 medical expenses on her confinement at Morija hospital,
(5) Maintenance for the minor child at M30 per month from 1st February 1981.

C. (1) Taxed costs of CIV/APN/30/81 (this is the application for appointment of Mr.Kolisang as curator ad litem),
(2) Costs of the suit.

The affair that gave rise to these proceedings allegedly occurred between the defendant's two marriages, the first on the rocks but the second about to bloom, and started in

/November 1979.

November 1979.

The plaintiff (then aged about 16) and the defendant (then aged 45) first met at the "Egg Circle" bus stop in Maseru Town. She initiated the conversation by telling him that she was looking for a job as a domestic servant and had just arrived from Lifateng village in Mohale's Hoek to Maseru in search of work. She says her mother had died in 1973. She did not know her father. She was brought up by a grandfather who paid her school fees until he too died in 1979. She had no one left.

It is common cause that the defendant went away and told her to wait at the bus stop. He testifies that at the time one Elizabeth Maquetche, his cousin, was doing his housekeeping, and he wanted to consult her before employing the plaintiff. He adds that Elizabeth was in favour and in her presence he contracted to pay the plaintiff M20 monthly plus her board and lodging. There was no agreement about holidays or notice or school fees. He says he paid her until the date of the breach of their relationship which occurred sometime in December 1980. Elizabeth however did not give evidence as she was said to be in Swaziland. The plaintiff on the other hand says there was no agreement about monthly wages. He paid her no wages: the agreement was that she will do his domestic chores and look after his children in exchange of his paying her school fees as she wanted to continue with her studies. He gave her board and lodging, bought her coca-colas, a dress, a nightie a couple of panties but did not send her to school. She kept house for him and looked after his two children by his first wife from whom he was then estranged. His wife lived with the children at Roma but the defendant had access. They were then aged 8 and 5 and were normally brought to Maseru by the defendant for a weekend or during school holidays. His wife, or rather his former wife as I am writing this Judgment, also used to come to Maseru but only to collect the children after their visit: she never stayed overnight.

From November 1979 to January 1980 the plaintiff and defendant lived in house at Pheko's in Motimposo. The plaintiff says the woman she was introduced to was known to her by the name of Queenie and she left about a month after she started work. The defendant says he knows of no Queenie. This may be defendant's alleged cousin Elizabeth (counsel for plaintiff

informs me from the bar that in Lesotho Elizabeths and Victorias are often nicknamed Queenies) who went to Swaziland. The matter is of little importance. The defendant left Motimposo with the plaintiff in January 1980 and rented a room in another locality in Maseru from a landlady called Manthabiseng Pitso (PW2). The plaintiff says life went on as usual until some days before May 1980 when the defendant fondled her. After a day or two he invited her to have sex with him, saying she "had many pimples on her face". She testifies that she did have pimples on her face then but refused his suggestion. She had never been with a man before. She says he slapped her and sjamboked her with a small whip. She screamed (not for long) but finally submitted. He had intercourse with her several times during that one night but no intercourse ever took place thereafter.

The plaintiff says she and defendant shared one room and when the children were at home for weekends they slept there too. On the night of the incident the plaintiff says defendant asked her to take the children to sleep at Manthabiseng Pitso (PW2) the landlady from whom the room was rented.

The plaintiff had testified that she informed Manthabiseng Pitso that she was pregnant and that defendant was responsible for the pregnancy but my notes are not clear whether this occured after plaintiff herself realised she was pregnant or when Manthabiseng Pitso noticed her condition.

The plaintiff called Manthabiseng Pitso to testify. Mrs. Pitso denied that the plaintiff told her that the defendant was responsible for her pregnancy. Mrs. Pitso adds that the plaintiff did not complain to her of rape intercourse or assault. Mrs. Pitso's evidence, in brief, is this:

The defendant came with the plaintiff and rented a room in her establishment around January 1980. The defendant told her that the plaintiff was his "daughter". She found nothing strange in that assertion. Both slept in that room. She saw the plaintiff washing, sweeping the house, cooking, cleaning etc. Two other children of the defendant, younger than the plaintiff, often came on visits and stayed with them. The younger children sometimes spent the night at her place since some of her own children were about the same age and they played together. She noticed nothing strange in the relationship between plaintiff and defendant. The plaintiff seemed to

Manthabiseng Pitso to be a good girl and she had not seen her going around with boys in the area. The plaintiff did not complain to her about the defendant in May or at all. She noticed no bruises or swelling on her at all. Mrs. Pitso says she observed (that would be end November or early December) that the plaintiff was getting into a family way and told the defendant about it in confidence. He gave her some money (M1.20) to take the plaintiff to consult a doctor. She took the plaintiff to Queen Elizabeth II hospital and the doctor confirmed that she was 7 months advanced. She informed the defendant about this and she says he looked surprised.

The plaintiff's fate thereafter will now be briefly chronicled. The defendant (who was then courting another lady later - after his divorce went through to become his wife) sent her in December 1980 to his mother in Leribe. The defendant's mother expelled her. She stayed one night but returned to Maseru the following day and first phoned the defendant in his office. He told her to go to her people in Mohale's Hoek. He then saw her personally and asked why she had not gone. The plaintiff said she had no one in Mohale's Hoek. She went again to Manthabiseng Pitso for assistance. Manthabiseng took her to the defendant's sister a lady called Lineo. Lineo did not give evidence, but according to the plaintiff Lineo took her to the Maseru charge office. At the charge office the police told them that the matter did not justify the police in taking criminal action and referred them to the Police Community Relations Officer, who in turn referred them to the Legal Aid Department of the Ministry of Justice. The plaintiff was then taken over by Mrs. Naidoo the Chief Legal Aid officer. She apparently stayed at Mrs. Naidoo's house for a little while and then arrangements were made for her confinement at Scotts Mission hospital in Morija. There (in February 1981) she gave birth to a baby boy. The plaintiff says she did not want it and the child was taken away. Apparently adoptive parents were soon found. After her discharge she was sent to a girls boarding school near Roma. The plaintiff understands that a Mrs. Coaker is paying her fees though she had not personally met her benefactor.

The defendant went into the witness box and says the plaintiff's allegations of that one night in May 1980 are complete fabrications. He portrayed the plaingiff as a girl of loose character or potentially so. He says when he met her

at the bus stop she did tell him her mother was dead but added she was in Maseru because her father had expelled her from home in Mohale's Hoek. When he returned to collect the plaintiff from the bus stop he found her talking to a man who wanted to take her to Thibella. Since this area of Maseru is not known as a very reputable place the implication of the defendant's evidence is that apart from needing a housekeeper, his motive was to help save her from moral degredation rampant in that area. Although she lived in the room and kept house for him another man called Samuel Mohale often slept there as well, the implication being that Samuel Mohale himself could have been responsible for her pregnancy. The defendant says he had seen the plaintiff out with boys and had consistently warned her about the dangers. One particular boy was Tajana who worked as a panel beater in that quarter. The plaintiff also lied to him and he gave one instance when he saw her passing by the window of his office and asked her where she was going and she answered that she was on her way to Mrs. Manthabiseng Pitso's shop to help her pack up some toys, but when he later asked Mrs. Pitso if the plaintiff had actually been to help her, Mrs. Pitso said she (the plaintiff) had not. When Mrs. Pitso told him that the doctor confirmed the plaintiff was pregnant, he confronted her with this in Mrs. Pitso's presence, and she (the plaintiff) denied, and kept on denying, she was pregnant. He travelled extensively and when he had occasion to sleep in the room when the children were not there the plaintiff slept at Mrs. Pitso's. There was in any event a curtain separating his bed from hers. In December he was courting his fiance and the plaintiff said she would like to go back home to Mohale's Hoek to fetch her Standard VII certificate and to get a letter from her chief to obtain a passport. He never sent her to his mother at Leribe. The plaintiff was due for a holiday any way. It was not true that plaintiff had no one in the world, on the contrary he discovered she had a "sister" in Mohale's Hoek and indeed met her once to discuss the plaintiff's wages, and later wrote to her two letters but received no reply. He lost contact with the plaintiff after that until he received the summons. The persons who conspired and brainwashed the plaintiff to tell the world such an enormous lie were some of his colleagues at work who hated or envied him (one being Samuel Mohale above referred to), aided and abetted by his own sister Lineo, who too had a family grudge. Towards the end of his examination in chief (which took place more than a week after the plaintiff's evidence) he triumphantly brandished a letter and gave the Court the

/following story:

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One day, after having warned plaintiff against associating with boys, he came home and found the plaintiff trying to burn some letters. He rushed at her and was able to retrieve one but only with difficulty as it started to catch fire. The letter (Exhibit A) dated 30th August 1980, with what looks like a cigarette burn hole at the top, purports to be from a school boy Motsamai M, who gave his address as Maseru Day High School of P.O. Box 204 Maseru. There is no need to reproduce this letter in full, suffice it to say that the boy Motsamai purports to answer the plaintiff's own love letter and himself expresses his reciprocated love to her.

Now Mr. Molyneaux had cross examined the plaintiff vigorously and at some length. Apart from putting to her questions about the terms of her alleged contract with the defendant there were other questions on the main issue. She had never been with a man before and she did not go out with boys. She did not know a Samuel Mohale. Defendant did warn her about boys but that was after he had intercourse with her. No men visitors came to sleep in the room when defendant was away(as he was occasionally) but a lady visitor did come a few times to sleep, but when this happened she herself would go to sleep at Mrs. Pitso's. The defendant assaulted her twice, once just before she was forced to sexual intercourse in May, and on another occasion before she was taken to Queen Elizabeth II hospital after she told Manthabiseng Pitso that it was the defendant who had caused her pregnancy. She admitted she complained to no one (save Mrs. Pitso) as she had no one to turn to the defendant being her only provider. When she found herself pregnant she confided in Mrs. Pitso. She did not say to defendant that she wanted to go to Mohale's Hoek to fetch her Standard VII certificate and a letter from the chief. When defendant's mother expelled her from Leribe she came back to Maseru, phoned defendant, and later saw him, and he taxed her for not going back to Mohale's Hoek after having given her money to do so. She had no one in Mohale's Hoek and went again to Manthabiseng Pitso's house. The rest has already been told. Not one question was put in cross examination about a man offering her a more lucrative life at Thibella or about Tajana the panel beater, or the plaintiff's "sister" in Mohale's Hoek, or the plaintiff being a conspirator, nor was the love letter from Motsamai, much less the story that later emanated from the defendant with such gusto, surrounding his procuring possession of it.

/It was of

It was of course too early to make an assessment of the plaintiff's credibility when she left the box. The defendant's plea was a mere denial unadorned by details. Her evidence was, however, given in a matter-of-fact way, devoid of emotion, and rather impressive for an 18 years old, unless she was a very cunning woman, full of guile, or was the "gold digging" type, who had prima facie admirably succeeded in putting wool over the Judge's eyes. These latter possibilities were constantly in mind by reason of extreme caution acquired through the sum total of judicial and legal experience in claims of this nature. (See Julie Tayob v. Manuel Servio Ponte Penedo, CIV/T/76/75 dated 31st March 1976 - unreported).

The defendant during the course of the plaintiff's case was seated behind his attorney with arms oustretched and sporting a broad smile. In his case it was even more too early to form an opinion whether he was disgusted, if somewhat amused, at that most diabolical tale being unfolded against his person, or on the other hand it was the sly smile of not so innocent a man, supremely confident of his ability to destroy whatever evidence might emerge.

The Court asked Mr. Molyneaux why had he failed to cross examine the plaintiff when she was in the box about the letter from Motsamai a letter the authenticity of which could easily be checked by enquiries from the school authorities. Mr. Molyneaux replied that he did not do so because he himself knew nothing about it: the defendant gave him the letter and the information surrounding it on the same day he went into the box to testify. The Court glanced at the defendant who immediately interjected and contradicted his attorney saying he had in fact given it to him from the beginning. The Court was entitled of course to draw its own conclusions, nevertheless, in exercise of its discretion, the Court recalled the plaintiff from her boarding school to have another look at her and for Mr.Molyneaux to have another bite at the cherry. Her evidence was again straightforward. She was completely unshaken. Yes she knew Tajana the panel beater who lived or worked in the area but had no association with him and no correspondence. She did not know of a boy called Motsamai, had never corresponded with him, and never tried to burn this or any other letter. The handwriting is unknown to her, but it was not the defendant's handwriting.

This is a classic case of two mutually destructive

versions of events. Either the plaintiff is telling the truth or the defendant, and Mr. Molyneaux's thrust, in a nutshell, is this: the case involves a sexual matter where the making of false allegations can be and is a simple affair. We have only the oath of one fairly young woman against the oath of a mature man. No corroboration was forthcoming to tilt the balance of probability in the woman's favour. Mrs. Pitso did not support her and indeed defendant looked surprised when she confirmed the plaintiff's condition to him. She complained to no one about rape or assault, and the variation between her evidence in Court and the claim made on her behalf by her attorney from Legal Aid is so glaring that she ought not be held worthy of belief. He submits there are two possible courses or verdicts (if I may use the word) here; either that plaintiff's action be dismissed, or at best for her, the defendant should be absolved from the instance.

A famous American Judge, I think it was Oliver Wendell Holmes, (but I do not have sufficient material on jurisprudence in my library to quote his words or to vouch it was he) writing after his retirement says that in those cases where the only evidence before him was the oath of one person against the oath of another that he often decided the cases on a "hunch". In South Africa the law on the subject has been tackled by the late Mr. Justice F.P. Van Den Heever, in a little book entitled "Breach of Promise and Seduction" (Juta & Co. 1954). He did not go quite as far as the "hunch" theory but (at pages 51-63) he explodes the myth, whether acquired historically from old Roman-Dutch authorities and English Statutory enactments, or from some judicial pronouncements, that in seduction cases corroboration strictu sensu is a condition precedent for the foundation of liability against a defendant. At its highest, corroboration in this context was put by Stratford J in Mackay v. Ballot 1921 T.P.D. 430 at 432 as "some evidence..... in addition to the woman's which in some degree is consistent with her story and inconsistent with the innocence of the defendant", and by Kotze JP in De Klerk v. Drake 1920 C.P.D. 511 and 512, as evidence "of such nature as to satisfy a discreet and careful mind". De Waal JP in Van der Merwe v. Nel 1929 T.P.D. 551 for example founded his confidence in the plaintiff's story not by something "additional" but because he believed the defendant had told lies and Wessells & Curlewiss JJ in L. v. M. 1911 T.P.D. 946 (headnote) thought that the "way in which..... they (the

/parties)

parties) give their evidence" may provide a clue to the truth. Mr. Justice Van Den Heever, supra, at p. 55(last para) and p. 56 (top of page) writes thus:

> "If after both parties and their witnesses have been examined and cross-examined under oath a judge who is fully convinced of the truth of the plaintiff's allegation is so lacking in astuteness that in the whole complex of surrounding circumstances he cannot find and formulate a few considerations which are 'in some degree' consistent with the plaintiff's story and inconsistent with the innocence of the defendant, he would probably never have attained to the Bench. Moreover he would fail to do justice. If it is contended that the corroborating factors must be aliunde in the sense that they must be sought outside those which have a bearing merely upon the credibility of the parties, then the rule is arbitrary and based on no principle at all. Seduction is usually committed in private. Whether or not there are facts extraneous to the conduct of the parties which support the testimony of one would be a fortuitous circumstance. The alleged rule is so artificial and casuistical that it is no safeguard against chicanery".

The learned Justice commences (at p. 53) and concludes (at p. 59) his critique by suggesting that the alleged rule has no legal foundation, is wrong, and serves no useful purpose, that there is no law in force in South Africa which requires that the plaintiff in an action on seduction cannot succeed unless there is evidence aliunde corroborative of her evidence, and since the rule is legally and historically unsound it should be jettisoned.

It is within Mr. Justice Van Den Heever's exposition, which I respectfully subscribe to, that I propose to approach the evidence in this case.

Manthabiseng Pitso had been called on subpoena. She is a woman of many interests and my impression of her is that she was not prepared to become involved more than she had already been by the affairs between the plaintiff and the defendant. She found escapism even when under oath by committing herself to the cause of neither. Two examples will illustrate her nonchalance:

(1) the plaintiff had stated that she told Mrs. Pitso that the defendant had sexual intercourse with her and was the person who was responsible for her pregnancy. Mrs. Pitso denies that plaintiff told her so or that she named the defendant and goes further to explain that she did not even ask the plaintiff to name the person responsible for her condition. Well now really this is most improbable almost impossible of belief. Mrs. Pitso has herself two teenage daughters, a couple of years perhaps

younger than the plaintiff, and was the only woman the plaintiff resorted to after the defendant ordered her to go to Mohale's Hoek. Is it possible to accept that she was not inquisitive in these circumstances? If Mrs. Pitso was not told by plaintiff that it was the defendant who brought her pregnancy about, it seems beyond my comprehension why, when the chips were at last down, did Mrs. Pitso take the plaintiff to Lineo the defendant's sister and not someone else.

(2) The defendant says that when Mrs. Pitso came back from the doctor and confirmed his opinion that plaintiff was indeed pregnant he confronted the plaintiff with this fact but the plaintiff kept on denying that she was. The plaintiff was in her seventh month and must surely have shown. She had no reason to deny she was pregnant. The defendant swore to something that flies in the face of common sense. Mrs. Pitso, more conscious perhaps of common sense, says there was no such confrontation and no denials by the plaintiff of the fact of her condition.

I have earlier given my preliminary opinion about the plaintiff's story. At the end of the day I am completely convinced that what she told me about the defendant was substantially true. The defendant has struck me, at the end of the day, as a man without the slightest scruple: he invents a pimp at the bus stop to entice a village girl to Thibella, he invents a "sister" of the plaintiff living in Mohale's Hoek who does not respond to his letters, he invents what he perceives to be a trump card in the shape of a letter from Motsamai with a cigarette burn hole to make his story more plausible, and finally invents a conspiracy to frame him up hatched by the plaintiff, his sister Lineo, and Samuel Mohale a colleague in his office, all of which items he not only concealed from his own attorney, but which items he knows (except perhaps for the letter Exhibit A) are incapable of tangible refutation or proof. Mrs. Pitso's observation that the defendant looked "surprised" when she told him the doctor confirmed plaintiff's pregnancy has not impressed me as something in his favour. It could not have been genuine either because if, as he says, the plaintiff was having affairs with, amongst others, Samuel Mohale, Tajana the panel beater and Motsamai the student, then her pregnancy should not have caused <u>him</u> any surprise. I think that if he was surprised or so appeared to Mrs. Pitso he was more likely than not quickly reviewing in his mind the one night of lust or sexual aberration, which had a fifty fifty chance of becoming a thing of the past without anyone taking much notice considering

the plaintiff's predicament, turning out to be something a little more serious needing a different solution.

What damages to award this orphan, with no roots left in her rural society, living on charity in Maseru, has caused me not an inconsiderable amount of anxiety. I think the staff of Legal Aid have been rather too articulate and over zealous in their claims on the plaintiff's behalf. I believe the plaintiff when she says there was no agreement on wages or holiday pay or salary in lieu of notice. I believe her when she says that the defendant said he would pay her school fees in exchange for her labour but I have no idea what kind of school she had envisaged if she was working and looking, albeit spasmodically, after two children and I have no evidence of termly fees charged either in a day, an evening, or boarding school. I am satisfied he did not pay her M20 every month. Quite frankly I do not think, whatever arrangement there was, that the parties had intended to create or enter into legally binding relationship enforcible at law. She had no roof over her head, was happy to find one with her board and keep and few needs, and a hope that defendant would provide something for an education she was anxious to pursue, thats all.

I award nothing under claim A. If I am wrong, or if something could be awarded on either quantum meriut, or a legally enforcible contract to pay for school fees, I would assess this at M10 per month for 13 months, with 6% interest from the date of Judgment, bearing in mind that education in Government schools are free up to a certain age, that thereafter schools are subsidised, and that fees or other scholastic disbursements are generally low by any standard.

On claim B, the plaintiff is entitled to damages for assault. I do however accept her evidence that it consisted of slaps and the use of a small sjambok that only caused a bruise on her neck. The plaintiff did not for one moment attempt to exaggerate this injury and I think it was not a major assault. I would award her M100 under this head.

Damages for seduction is a more difficult matter. If she had a father, or a person who stands to her in loco parentis, in a rural or even an urban atmosphere or society, he would have been able to claim and succeed in getting from the guilty party 6 heads of cattle or the present equivalent of M200 per head

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making a total of M1200 (Laws of Lerotholi Part II s.6 and see Duncan Sotho Laws and Customs page 107). But from that source she has no one to claim and most probably her breach with custom is now complete or nearly so. Should this Court adopt this measure of damages? I think not:.

In Basotho society the parents do not, on their daughter's seduction, lose her or the wealth she might bring. She remains for all intents and purposes part and parcel of their household and if she gives birth to a child that child is theirs and bring it up accordingly. Her seduction is often converted into a fully fledged marriage. Were this not to happen true her marriage prospects are diminished, and it is even more true that if a suitor does in due course emerge, that he or his parents, would insist, or try to, on paying less 'bohali' than the normal one of 20 heads. Nevertheless the girl and her child (or children) are at least assured, for the duration of her parents life time perhaps beyond, of a great measure of sympathy and support. The plaintiff in the case before me has none of these advantages. I think I have to, in the assessment of damages for seduction, bear this in mind. It would be inequitable not to. Under this head I think I am justified in awarding her the full equivalent in money terms of what her parents, if she had any, would have benefited (that is 20 heads at M200) viz M4000.

The plaintiff has no idea who paid for her confinement expenses at Morija but acting, as I shall, on the general principle that a tortfeasor may not take advantage of the charity or benevolence of a third party, I hold the defendant to be liable to pay this amount. I would urge the curator ad litem (in liaison with the Master of the High Court) to exercise his discretion, as I think he can, to refund this amount to whoever paid it.

The baby boy is gone and no expenses for maintenance could be awarded under this head.

In the result I enter judgment for the plaintiff in the sum of M4173 with 6% interest from the date of the Judgment, and taxed costs on party and party scale, including the costs of CIV/APN/30/81, such costs to go into the revenue of the Chief Legal Aid Officer under the provisions of s.10(5) of the Legal Aid Act 1978 (Act No. 19 of 1978).

/In case

In case the defendant is thinking of disappearing after this Judgment to Bophuthatswana, Venda, Qwaqwa, Transkei, or other obscure place this Kingdom does not recognise, I order the Sheriff (in exercise of implied powers under Rule 6 of the Court of Appeal Rules 1972) to attach forthwith to the extent of the Judgment debt:

(a) half his salary or other emoluments due to him from his employers,

(b) his bank credits in any bank or other financial institution in Lesotho,

(c) his other movable property in Lesotho.

Service of a copy of this Judgment on the defendant's employers, banks, or other institution where he may keep an account, shall constitute sufficient authority for the aforesaid orders to withheld payment unless they hear from the Sheriff to the contrary.

This attachment will be lifted on payment of the Judgment debt into Court within 10 days, if necessary, by arrangement with his employers or bankers. If an appeal is noted within the time specified in the Rules of Court such sum will not be uplifted until the appeal is determined. If no appeal is lodged the Master of the High Court could uplift, or plaintiff's attorneys apply for execution, as the case may be, of the defendant's attached property. The Master will hold the amount paid in trust and apply both principal and interest for the plaintiff's maintenance, education and general welfare until she attains the age of 21. Any amount still outstanding to her credit should then be paid to her absolutely. The Master may confer with the Chief Legal Aid Officer, and may seek directions on notice of motion from this Court in its capacity as upper guardian of minors, in case of difficulties.

CHIEF JUSTICE
24th November, 1981

For Plaintiff : Adv. Moorosi
For Defendant : Mr. Molyneaux(Webber Newdigate & Co.)