Privy Council Appeal No. 69 *of* 1934

Charles William Gilbert - - - - - - *Appellant*

v.

Francis Henry Ching - - - - - - *Respondent*

FROM

THE ROYAL COURT OF THE ISLAND OF JERSEY (SUPERIOR NUMBER)

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 11TH NOVEMBER, 1935.

Present at the Hearing:
LORD ALNESS.
LORD MAUGHAM.
LORD ROCHE.
[*Delivered by* LORD MAUGHAM.]

The questions which arise for decision upon this appeal are, first, whether the Cour d'Héritage of the Royal Court of Jersey is competent, so far as regards jurisdiction, to deal with the matters involved in the action, and secondly, whether an objection to the jurisdiction of that Court could properly be taken in the circumstances by the respondent, the defendant in the proceedings. Other questions were discussed at the hearing, but, in the view their Lordships take, do not call for consideration or decision.

The circumstances under which the two questions arise are as follows. George Edward Ching, who has conveniently been described in the proceedings as the *de cujus*, died in Melbourne, in Australia, on the 8th August, 1907, possessed of certain immoveables in Jersey. By his will, made at Melbourne on the 19th June, 1888, he left all his real and personal estate, including his immoveables in Jersey, to one Elizabeth Hessey. It was alleged in certain proceedings in Jersey, to which reference will shortly be made, that the *de cujus* was a married man, and that he had lived in a state of concubinage with Elizabeth Hessey, who was not his wife, for many years prior to his death. According to the ancient Custom of Normandy, which, subject to subsequent legislation, prevails in the Island of Jersey, any legacy to a concubine was contrary to law, since by that law "*on ne peut léguer à une concubine*"; and indeed, according to the Custom, all gifts to a concubine were null. Until the year 1851 immoveables in Jersey could not be disposed of

by will, but by a Règlement or Ordinance passed in that year, the effect of which was considered by this Board in the case of *Nicolle* v. *Nicolle* [1922] 1 A.C. 284, limited powers of disposing of immoveables in Jersey by will were conferred on persons having the capacity of making wills of moveables who left neither children nor other descendants. It has not been asserted that the *de cujus* left any legitimate descendants, and accordingly he had a right, subject to certain formalities as to execution being complied with, to dispose of his immoveables in Jersey by will; and it is suggested by the respondent, but denied by the appellant, that, as the result of the Ordinance of 1851, the *de cujus* was empowered, notwithstanding the ancient law relating to gifts to concubines, to devise such lands to Elizabeth Hessey, even if she was at the date of the will a concubine of the *de cujus*.

The will of the *de cujus* was proved by the procureur of Elizabeth Hessey in Jersey on the 7th September, 1909, and registered pursuant to an Act of the Royal Court dated the 9th October, 1909, in the Public Registry of the Island on the 9th October, 1909. By Article 15 of the Ordinance of 1851 actions to annul wills of immoveables ought to be instituted within a year and a day of the Act of the Royal Court ordering the registration of the will. On the 24th September, 1910, i.e., within the year, the respondent, as procureur of John James Ching, instituted proceedings against the procureur of Elizabeth Hessey to have the will annulled on various grounds connected with its due execution, and also on the ground of the ancient law in reference to concubines. John James Ching under Jersey law was the principal *héritier à la succession collatérale* of the *de cujus*, and, if the will had been annulled, he would have been entitled, as one of the co-heirs in the succession to the immoveables of the *de cujus*, to a share in such immoveables in the Island. The proceedings were instituted in the Cour du Samedi by John James Ching in his capacity as principal héritier. The allegations as to the defects in the execution of the will appear to have failed, or to be likely to fail, and the question as to the alleged concubinage was not decided, for the proceedings were compromised, with the assent of the Court, upon terms set out in an order of the Inferior Number of the Royal Court dated the 16th November, 1912. In effect, John James Ching agreed to undertake all liability in respect of rents, mortgages, dues and dower charged on the property, and to pay £550 to Elizabeth Hessey; and she on her part agreed to convey, that is (to use the exact words) *céder et transporter à fin d'héritage audit principal héritier* all the rights of Elizabeth Hessey in the said immoveables, and to effect this by conveyances passed in open Court. The conveyance was in fact effected by a deed passed before the Bailiff of the Island on the 28th December, 1912. For reasons which will appear later, their Lordships do not think it necessary to comment upon the terms either of the order of the 16th November, 1912, or of the conveyance to John James

Ching. John James Ching paid the sum of £550 out of his own pocket and entered into possession of the property, and he is said to have discharged the charges which existed on it.

There were other collateral heirs of the *de cujus*, who, on the footing of an intestacy, would have been entitled to a *partage* or partition of the immoveables with John James Ching. The appellant, George James Gilbert, was one of these persons, and it is said that he remained ignorant of his alleged rights in the immoveables until about 1928; and, an amicable arrangement having failed, he instituted an action in the Cour d'Héritage on the 9th May, 1929, against John James Ching in which he claimed that the respondent ought

> "lui délivrer la juste part dudit Monsr. George James Gilbert de tous les héritages qui furent audit feu Monsr. George Edward Ching et pour cet effet voir appointer Arbitre pour partager lesdits héritages selon droit et usage."

This claim was on the footing of an intestacy. The title of the appellant as an heir was challenged, and certain genealogical enquiries took place before the Greffier, and on the 2nd July, 1931, the Inferior Number of the Cour d'Héritage decided that the appellant had established his heirship. Thereupon the respondent submitted by way of preliminary objections that he was not obliged to plead to the action on three grounds, viz.:

(1) that the appellant was wrong in commencing the action as principal héritier of his father Edward Gilbert;

(2) that the appellant was wrong in alleging that he represented his grandmother Elizabeth Ching; and

(3) that there never had been and was not at the time any *succession successorale à partager*.

On the 30th January, 1932, the Inferior Number of the Court decided in favour of the respondent on all three grounds. There was an appeal to the Superior Number of the Court, whereupon on the 19th May, 1932, the Court held that the defendant (the present respondent) was not bound to plead in the action "*dans sa forme actuelle et l'a renvoyé de l'action, chaque partie devant porter ses frais.*" In so deciding the Court stated that the Judges unanimously agreed with the decision of the Inferior Number on the first and second grounds, but by a majority disagreed with the Inferior Number on the third ground.

The appellant proceeded on 6th October, 1932, to take the steps in the Inferior Number of the Cour d'Héritage which have resulted in the present appeal. There is a controversy between the parties as to whether these steps were of the nature of a new action, or whether they are merely of the nature of fresh proceedings in the action commenced on the 9th May, 1929. It is therefore material to point out that in the proceedings initiated on the 6th October, 1932, the nature of which is stated in the order of

the 21st November, 1932, the claim of the appellant plaintiff is formulated as follows :—

"l'actionnant de lui délivrer la juste part dudit Monsr. George James Gilbert, ès qualités, de tous les héritages dont ledit feu Monsr. George Edward Ching est mort vêtu et saisi ou qui sont subséquemment rentrés entre les mains dudit Monsr. John James Ching en sa qualité de principal héritier dudit feu Monsr. George Edward Ching par quelque voie que ce soit ; et pour cet effet voir appointer Arbitre pour partager lesdits héritages selon droit et usage."

It will be noted that the claim is now enlarged to this extent, that the plaintiff is not merely claiming " a delivery of the just part of the heritage of which George Edward Ching died seised," but is claiming in the alternative the delivery of the just part of the heritage which subsequently came to the hands of John James Ching in his quality of principal heir of the *de cujus by whatever means.* The respondent thereupon raised the point that, having regard to the will of the *de cujus* which had been registered in the Public Registry of the Island, and to the lapse of time which greatly exceeded the time specified in Article 15 of the Ordinance of 1851, the will must be taken to have its full force and effect. The suggested consequence was that the terms of Article 28 of the Ordinance of 1851 applied, and therefore the action for partition of the immoveables of the succession ought to have been instituted in the Cour du Samedi, with the result that the Cour d'Héritage ought to decline jurisdiction. Article 28 of the Ordinance of 1851 is in the following terms :—

"Les actions touchant la validité des Testamens contenant des legs d'immeubles seront instituées à la Cour du Samedi, et aussi les actions en partage des immeubles d'une succession, lorsque ces immeubles auront été légués en tout ou en partie par Testament."

The Inferior Number on the 21st November, 1932, pronounced in favour of the defence. The judgment contains reasons in the form of a statement of the contentions of the defendant followed by the phrase :—

"La Cour, accueillant la prétention du défendeur, ès qualités, s'est déclarée incompétente dans l'espèce."

The contention of the defendant, to which the Court has thus in substance assented, is stated in the following terms :—

"Le defendeur, ès qualités, sous la réserve de toutes ses autres prétentions, tant préliminaires qu'au fond, a répondu que la prétention de l'acteur est absolument étrangère à la seule question maintenant devant la Cour, à savoir, celle de la compétence de la Cour d'Héritage dans la présente action. Que si la contention du défendeur à l'égard de la compétence de la Cour du Samedi dans l'espèce, est fondée en droit, il n'y a pas lieu de considérer la portée du jugement du Corps de la Cour dans la présente cause. Que c'est un principe de droit admis et reconnu que même le consentement des parties ne peut conférer une juridiction valable à un tribunal incompétent dans la matière. Qu'il est aussi de principe que le plaid d'incompétence du tribunal peut être soulevé en tout état de la cause, même en appel par devant la Cour d'Appel de dernière instance ; et si l'incompétence est établie, toute la procédure doit tomber. Qu'appliquant ces principes dans l'espèce la

prétention de l'Acteur ne contient que des arguments fallacieux et illusoires et ne tend qu'à s'écarter du vrai point en débat. Que d'ailleurs, cette prétention comprend des inexactitudes de fait et d'induction quant à la portée du Jugement du Corps de la Cour lequel même fut-il valide—n'aurait en aucune façon les conclusions tirées par l'Acteur, qui s'est trompé étrangement dans ses inférences, selon lui inéluctables mais qui réellement sont fausses. Qu'en examinant avec soin le jugement du Corps de Cour, il paraît clair que trois points préliminaires avaient été soulevés par le défendeur, que les deux premiers avaient été tranchés par le Nombre Supérieur en faveur du défendeur, mais que le troisième avait été tranché en faveur de l'Acteur—Or, ce troisième point concluait en termes exprès à ce que le défendeur (pour les raisons émises à l'appui de son troisième point) n'était pas tenu de plaider à l'action. Donc, si l'Acteur eût pu continuer son premier procès, le rejet par le Corps de la Cour du troisième point préliminaire du défendeur aurait eu pour effet de juger que le défendeur devait plaider à l'action c'est à dire sur le fond, ce qu'il n'a pas encore fait. Qu'il est donc erroné et faux de dire que ce jugement équivaudrait à un envoi devant le Greffier Arbitre si les deux premiers points préliminaires n'avaient été décidés en faveur du défendeur. Qu'au contraire, la position véritable est que la décision des deux premiers points préliminaires en faveur du défendeur, impliquait de toute nécessité un renvoi de l'action; et l'Acteur l'a interprété lui-même de cette façon, puisqu'il a institué une nouvelle action où l'Acteur assume une autre qualité que celle dont il était revêtu dans la première action, et où encore le fond de l'action est élargi et absolument reconstitué. Qu'il est évident que la Cour n'aurait pas pu envoyer les parties devant le Greffier sans permettre au défendeur de plaider sur le fond, ce qui eût été foncièrement illégal, et impliquerait une intention que la Cour dans sa justice, n'a jamais pu avoir. Partant, le défendeur a prétendu que la réponse de l'Acteur ne contient aucun argument valable qui pourrait licitement permettre à la Cour de mettre de côté les termes stricts et exprès de la Loi sur les testaments d'immeubles (1851) invoqués par le défendeur dans sa première prétention préliminaire, et il a demandé respectueusement que la Cour se prononce sur cette prétention."

There was an appeal to the Superior Number, and this Court by a majority, having regard to the circumstances and to article 28 of the Ordinance of 1851, which they said conferred on the Cour du Samedi "*seule competence dans les actions en partage des immeubles d'une succession lorsque ces immeubles auront été légués en tout ou en partie par testament,*" affirmed the judgment of the Inferior Number, and dismissed the appeal, and went on to declare that the procedure before the Cour d'Héritage from the interlocutory judgment of the 2nd July 1931 was null and void. It is from this judgment that the present appeal is brought.

The first question for consideration is as to the true construction of article 28 of the law of 1851. It will be observed that the article is to be found in an enactment which for the first time authorises, subject to conditions, the disposition of immoveables by will. The very ancient Court called the "Cour d'Héritage", which as their Lordships were informed, sits only twice a year, had no original jurisdiction to decide as to the validity of such a will, because prior to the Act of 1851 such wills were unknown. It was therefore necessary in the

Act to provide for proceedings relating to the validity of such testaments, and in the opinion of their Lordships, the jurisdiction created by article 28 was one conferred on the Court known as the Cour du Samedi (which sits weekly), to the exclusion of the jurisdiction of the Cour d'Héritage. There is no reason for thinking that any implied jurisdiction was conferred on the Cour d'Héritage. The original action instituted in the year 1910 being an action seeking to attack the validity of the will of the *de cujus*, was properly brought in the Cour du Samedi. It was strongly contended on behalf of the appellant that the existing proceedings are not of the nature of an action touching the validity of the will of the *de cujus*, nor is it an action *en partage des immeubles d'une succession* in a case where the immoveables have been devised in whole or in part by will. Their Lordships are unable to take this view. In the present proceedings, if they had been continued, it seems to them that it would have been essential to consider the effect, if any, of the will of the *de cujus*, followed as it was by the compromise entered into by the respondent. If the will was originally a valid one, either because it was impossible to establish that Elizabeth Hessey was the concubine of the *de cujus* or because of the suggested operation of the law of 1851, it is clear that the appellant could not succeed in his quality of a collateral heir claiming *ab intestato*, which was apparently the basis upon which the proceedings instituted in May, 1929, were founded. The validity of the will was by necessary inference challenged in those proceedings, and it remains one of the contentions in the present proceedings. If on the other hand the appellant was driven to contend that he based his claim upon the view that a compromise of a doubtful will entered into by the principal heir in the circumstances in question gave rise to a succession in which he is entitled to a share, it seems to their Lordships that the claim is within the latter part of article 28, since the claim must start by stating the will and must follow this by setting up the compromise of the principal heir's doubtful rights in such circumstances that he had acquired the immoveables in a fiduciary capacity. The claim would still be a claim to a share in the succession in a case in which they had been " légués . . . par testament." The compromise of course was followed by a conveyance; but the conveyance transferred a title to the immoveables only on the footing that Elizabeth Hessey had acquired them by the will of the *de cujus*. The claim on this footing must therefore necessarily begin with an assertion that the immoveables had been devised by the will. Their Lordships therefore agree with the judgment both of the Inferior Number and of the Superior Number in this respect.

The next question that arises is as to whether this point was open to the respondent, having regard to the circumstance that it does not seem to have been raised in the proceedings commenced on the 9th May, 1929. The

question being one of jurisdiction of the Court in regard to the subject matter of the proceedings, it would be clear, if English law was applicable, that the objection might be taken at any time, and even on an appeal, although it was not raised in the Court of first instance. Indeed it would appear to be *pars judicis* to take the objection, if it seemed to the Court to be well founded. It is in our jurisprudence well settled that parties cannot by agreement, delay, or otherwise confer jurisdiction upon a Court as regards subject matter or oust the jurisdiction of another Court (see *Mayor of Norwich* v. *Norwich Electric Tramways Co.* [1906] 2 K.B. 119). There were however pressed upon their Lordships a number of passages from the works of recognised writers of authority on the laws and usages of Jersey, and other writers on the Droit Normand—passages which seem to show that according to the law and practice of Jersey an objection to the jurisdiction of a Court must be taken at once and cannot be taken at a late stage in the proceedings (see the Code Le Geyt Livre 4, Titre 3; a report to the Privy Council dated A.D. 1789 by Hemery and Dumaresq; the Dictionnaire de Droit Normand Ed. 1780, volume 2, page 200; and some writings by Pothier, and other jurists on the more general law). Their Lordships accordingly hesitate to deal with this part of the case on what would be the English view as to an objection of the nature in question, although they observe that in the passage already set out from the judgment of the 21st November, 1932, it is contended that the plea of incompetence of the tribunal can be raised at any time, and it does not appear that the passages from the above mentioned writers, with which the Court was doubtless familiar, were regarded as an answer to this contention. Their Lordships however think it unnecessary to decide this point, as, in their opinion, the appeal fails on another ground. It seems to them that the present proceedings are of the nature of a new action. Not only are the grounds of the action different in the sense of being substantially wider than the single ground on which the proceedings of 1929 were based, but the plaintiff himself claims in a different quality to that in which he assumed to claim in the first proceedings. The contention that the present proceedings are new proceedings was very clearly raised before the Court, as appears from the latter part of the lengthy passage from the judgment of the 21st November, 1932, above set out, and, since the Court accepted this contention of the defendant, and was of course in a much better position than their Lordships to decide whether the action was in effect a new action or not, it seems to their Lordships impossible to come to a different conclusion from that of both Courts on this question. The passage referred to is to this effect:—

"The true position is that the decision of the two preliminary points in favour of the defendant made a renvoi of the action a matter of necessity and the plaintiff himself interpreted the matter

> in that way since he instituted the new action in which he assumed a different quality from that with which he was clothed in the first action and where the basis of the action is enlarged and absolutely reconstituted."

It may be observed that the appellant himself in his pleading in the present case seems to take the same view, since there is a recital that the plaintiff, having before the majority of the Court in the previous case succeeded upon the third point, "*il ne lui restait plus qu'à intenter une autre action où les omisions et fautes signalées par le Nombre Inférieur et confirmées par le Nombre Supérieur, seraient comblées et rectifées.*" In the result, therefore, their Lordships, agreeing with the Courts of the Island, consider that there were proceedings of a new character commenced by the appellant on the 6th October, 1932, in which it was open to the defendant to raise the point of jurisdiction founded upon article 28 of the Law of 1851, and, this objection being a good one, the appeal must be dismissed with costs. Their Lordships will humbly advise His Majesty accordingly.

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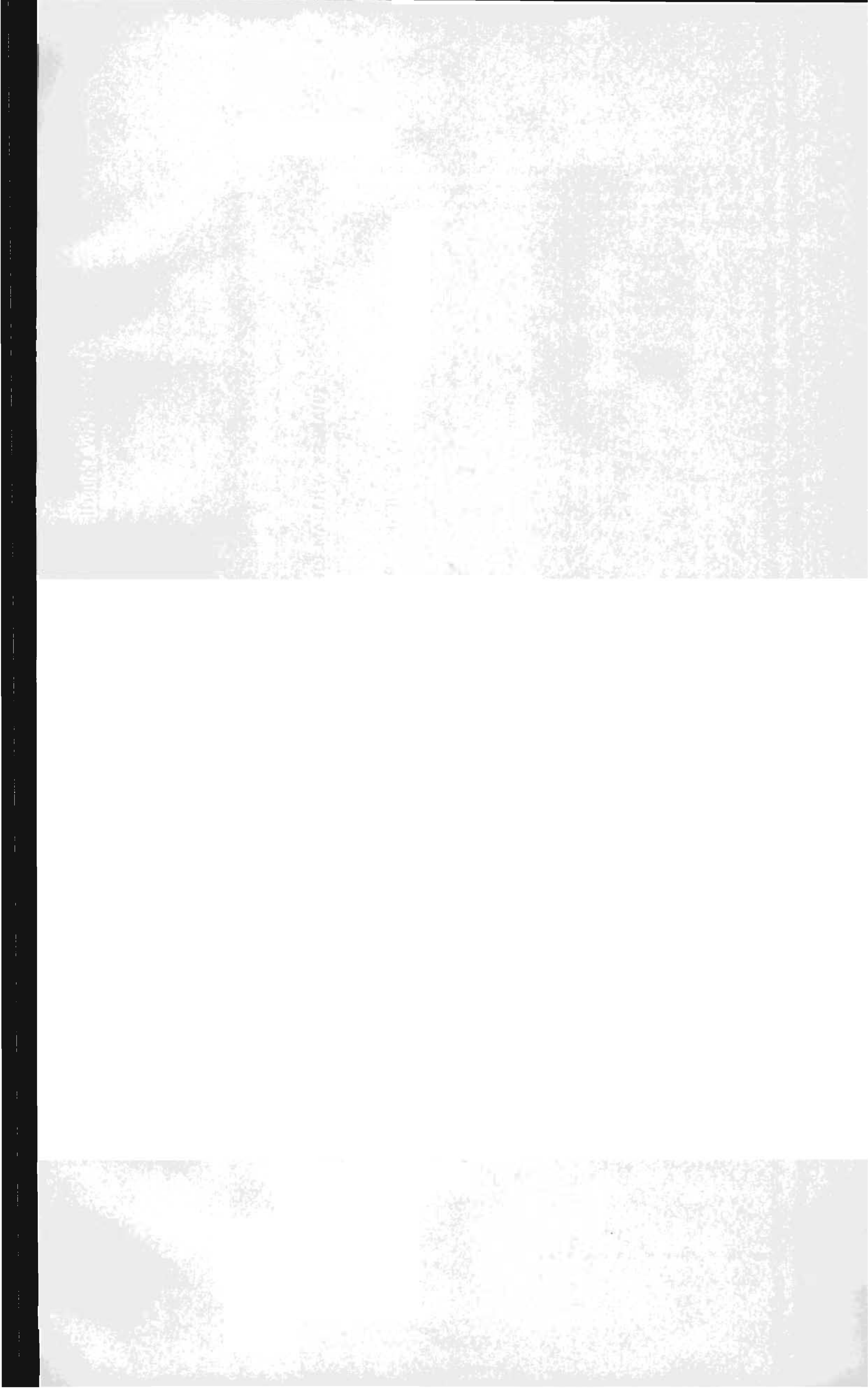

In the Privy Council.

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DELIVERED BY LORD MAUGHAM.

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