Privy Council Appeal No. 2 of 1947

M. G. Perera - - - - - - - - - *Appellant*

v.

Andrew Vincent Peiris and another - - - - *Respondents*

FROM

THE SUPREME COURT OF CEYLON

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 13TH OCTOBER, 1948

Present at the Hearing:

LORD UTHWATT
LORD MORTON OF HENRYTON
LORD MACDERMOTT
SIR JOHN BEAUMONT

[*Delivered by* LORD UTHWATT]

This is an appeal from the judgment of the Supreme Court of Ceylon affirming the dismissal by the District Court of Colombo of an action brought by the appellant Dr. M. G. Perera in which he claimed damages for defamatory libel from the respondents who are the printer and owners of a newspaper called The Ceylon Daily News. The libel complained of appeared in the issue of that paper of the 25th May, 1943, and consisted of an extract from the published report of a Commissioner who had been appointed under statutory powers to enquire into certain matters. The extract ran as follows:—

> "Dr. M. G. Perera who gave evidence was completely lacking in frankness and pretended that he knew very much less about the transaction than he actually did."

The respondents took all defences. They denied that the words were defamatory—a formal defence in the circumstances. The other defences were not formal. They pleaded justification in the sense that the statement was true and that its publication was for the public benefit. Fair comment was pleaded. Privilege was relied on upon two grounds, first, that the proceedings before the Commissioner were judicial proceedings and the extract was part of an accurate report of those proceedings, and second, that, apart from the supposed judicial nature of the proceedings, the circumstances were such that the publication in the newspaper of the Report was made on a privileged occasion. Neither the pleadings, the issues settled in the course of the proceedings, nor the conduct of the case at the trial, in any way limited the field of defence open to the respondents.

On the settlement of the issues in the action it was made clear that the appellant did not set up express malice with a view to destroying any qualified privilege that might exist.

The action arose in the following circumstances. It appears that in 1941 there were rumours in Ceylon that bribes had been offered to and accepted by members of the State Council. On the 13th August, 1941, the Governor, pursuant to a resolution passed by the State Council on the 15th May, 1941, set up a Commission of Inquiry under the Commissions of Inquiry Ordinance (No. 9 of 1872). Under the terms of the appoint-

ment Mr. de Silva, K.C., was appointed the Governor's Commissioner for the purpose of inquiring into and reporting upon the following questions:—

(*a*) whether gratifications by way of gift, loan, fee, reward, or otherwise, are or have been offered, promised, given or paid to members of the existing State Council, with the object or for the purpose of influencing their judgment or conduct in respect of any matter or transaction for which they, in their capacity as members of that Council or of any Executive or other Committee thereof, are, have been, may be, or may claim to be, concerned, whether as of right or otherwise: and

(*b*) whether such gratifications are or have been solicited, demanded, received or accepted by members of the existing State Council as a reward or recompense for any services rendered to any person or cause, or for any action taken for the advantage or disadvantage of any person or cause, or in consideration of any promise or agreement to render any such services or to take any such action, whether as of right or otherwise, in their capacity as members of that Council or of any Executive or other Committee thereof.

The instrument of appointment then contained the following direction by the Governor:—

" And I hereby authorise and empower you to hold all such inquiries and make all such investigations into the aforesaid matters as may appear to you to be necessary; and I do hereby require you to transmit to me a report thereon under your hand as early as possible."

To assist the Commissioner in this particular enquiry a further Ordinance (No. 25 of 1942) was passed which empowered the Commissioner to hear the evidence or any part of the evidence of any witness *in camera*. Sections 5, 6 (1) and (2) and 10 (*b*) of the Ordinance run thus:—

" 5. The Commissioner may, in his discretion, hear the evidence or any part of the evidence of any witness *in camera* and may, for such purpose, exclude the public and the press from the inquiry or any part thereof.

6.—(1) Where the evidence of any witness is heard *in camera*, the name and the evidence or any part of the evidence of that witness shall not be published by any person save with the authority of the Commissioner.

(2) A disclosure, made *bona fide* for the purposes of the inquiry, of the name or of the evidence or part of the evidence of any witness who gives evidence *in camera* shall not be deemed to constitute publication of such name or evidence within the meaning of sub-section (1).

10. Nothing in this Ordinance shall—

(*b*) prohibit or be deemed or construed to prohibit the publication or disclosure of the name or of the evidence or any part of the evidence of any witness who gives evidence at the inquiry, for the purpose of the prosecution of that witness for any offence under Chapter XI of the Penal Code."

The Commissioner duly held his enquiry, and on the 3rd April, 1943, the Commissioner made his report to the Governor. In light of the claim to privilege, the general nature of the Report and the circumstances in which it was produced are of importance. It appears from the Report that the Commissioner by public advertisement and otherwise made wide appeals to persons who were in possession of relevant information to place that information before him. Despite the immunity given to witnesses by the Ordinance, the public response was small and of the 124 witnesses examined only 12 were volunteers. All the evidence was taken *in camera*. There were made to the Commissioner allegations of gratification in respect of matters which came before open Council and in respect of matters which came before the Executive Committee. The chief items in

respect of which complaints were made were:—

(1) appointments to various offices;

(2) nominations to Municipal and Urban Councils and

(3) decisions on policy, the repercussions of which resulted in advantage or disadvantage to private parties.

The Commissioner states in his report (para. 16) that suggestions were made against 19 Councillors. In some cases he states, the allegations were made upon slender material. He found that eight members, whom he was able to identify, had received gratifications. Among that number were three European members who had taken gratifications openly. He also came to the conclusion that there were in all probability four other members whom he had not been able to identify who received gratifications. In other cases he found room for strong suspicion. He stated that there was a widespread belief that the number of Councillors who received gratifications was much greater than the number he had found so to do. On consideration of the evidence, the reading of debates in the Council and articles in the Press he had no doubt that this belief was honestly held, but he thought that popular belief was exaggerated.

The Commissioner in the main body of the Report dealt with the broad results of his enquiry, reserving details to appendices. In each appendix he states the witnesses examined on the particular subject matter, makes his comment, summarises the evidence and gives his finding.

Among the matters investigated by the Commissioner was an affair which he called the " Arrack contract gratification Incident ", and it is in connection with his treatment of this affair that the appellant appeared on the scene. The appellant, it should be stated, was, among other activities, engaged in distilling arrack. He complied with the Commissioner's request to attend, and his evidence was taken *in camera*. The arrack incident is dealt with by the Commissioner in para. 18 of his Report and in Appendix C.

Para. 18 and Appendix C were as follows: —

" 18. *Arrack Contract gratification incident.*—There was evidence before me that in 1939 contractors to the Government for the supply of arrack decided to pay to the same four members a sum of about Rs.2,000 for the purpose of having their contracts extended without competition from outside. There is evidence, which I believe, that money for this purpose was paid to one of the members, now dead, Mr. C. Batuwantudawe, but there is no evidence that it was paid by him to the others. I did not for this reason call upon the members now alive to answer the allegation as it cannot be held against them that, with regard to this particular incident, they actually received the money. This matter is more fully discussed and reasons for my view given in Appendix C."

" APPENDIX C.

ALLEGATION OF PAYMENT OF GRATIFICATIONS TO MESSRS. C. BATUWANTUDAWE, E. W. ABEYGUNASEKERA, E. R. TAMBIMUTTU, AND H. A. GUNASEKERA FOR THE PURPOSE OF SECURING THEIR SERVICES IN THE EXECUTIVE COMMITTEE OF HOME AFFAIRS IN THE MATTER OF THE EXTENSION OF A GOVERNMENT CONTRACT.

Witnesses examined.—Messrs. M. F. P. Gunaratne, D. E. Seneviratne, W. F. Wickremasinghe, M. G. Perera, C. M. Rodrigo, and A. J. Siebel.

Allegation.—These witnesses gave evidence with regard to the alleged payment of gratifications to four Councillors, Messrs. C. Batuwantudawe, E. W. Abeygunasekera, E. R. Tambimuttu, and H. A. Gunasekera, for the purpose of securing their services in the Executive Committee of Home Affairs. Certain contracts held by distillers for the supply of arrack to Government were due to expire on 30th April, 1939. The allegation was that money was paid to the Councillors mentioned in order to secure their support to a proposal that the contracts should be extended without calling for tenders.

The proposal itself was put forward by the Excise Commissioner for reasons which I need not go into. It was ultimately adopted by Government.

Finding.—My finding upon this matter is that without a doubt a sum of Rs.2,000 was paid by the distillers to Mr. Batuwantudawe. The distillers earmarked this sum for payment to members of the Executive Committee. They believed that portions of the sum would find their way to the other Councillors mentioned. One distiller at least thought that the money would be paid direct to them. Others received the impression that it would be paid through Mr. Batuwantudawe. Mr. Batuwantudawe is now dead and there is no evidence that he distributed money among the others. I do not think that any direct payments were made to them.

Comment.—In 1939 there were eight distilling plants in Ceylon, the proprietors of which were supplying arrack to Government. These suppliers consulted each other in matters of common interest and were loosely associated with each other as a body without a formal set of rules or any of the other formalities adopted by Associations proper. They regarded Mr. D. E. Seneviratne, proprietor of the Diyalagoda Distillery, as Treasurer, and Mr. W. F. Wickremasinghe, proprietor of the Anvil Distillery, as Secretary. They collected money from time to time as occasion required for meeting various expenses.

Mr. Gunaratne, the owner of Sirilanda Distillery, Kalutara, stated to me that either Mr. Wickremasinghe or Mr. Seneviratne or both came to see him and asked him for a contribution towards a fund from which the four Councillors mentioned were to be paid. Mr. Gunaratne says that Messrs. Wickremasinghe and Seneviratne (either or both) mentioned the names of the four Councillors and that he paid Rs.500. There is no doubt about this payment. The only question is what the conversation was. Messrs. Seneviratne and Wickremasinghe deny that they mentioned the four names in the explicit manner deposed to by Mr. Gunaratne. After carefully weighing up the evidence I feel that none of these witnesses is deliberately stating an untruth. Mr. Gunaratne says that he was told by Messrs. Wickremasinghe and Seneviratne that Mr. Batuwantudawe was the go-between between them and the other members. Mr. Seneviratne states that he paid Rs.2,000 to Mr. Batuwantudawe but that he paid no money to any of the other Councillors. It is common ground that there were informal conferences at which the distillers discussed various matters of importance to themselves. It appears that at these conferences the distillers sat in small groups for the purpose of informal discussion and that there was no meeting in the proper sense of that word. Mr. Seneviratne says that the names of the other Councillors were mentioned at these conferences as persons to whom Mr. Batuwantudawe would probably have to pay something. But he says that there was no definite arrangement with Mr. Batuwantudawe that they should be so paid. Mr. Wickremasinghe says that Mr. Seneviratne told him that Rs.2,000 was paid to Mr. Batuwantudawe and that Mr. Seneviratne undertook to obtain the votes of the four Councillors mentioned through Mr. Batuwantudawe. He also states that at the time it was common talk that these four members took bribes. The clear impression which I have formed is that as a result of the general talk that these four members took bribes their names were mentioned at conferences and discussions, that the manner of approach to them, if agreed upon at all, was not agreed upon with any degree of precision but that the distillers believed that the money would reach them. I believe that Mr. Seneviratne is speaking the truth when he says he paid Rs.2,000 to Mr. Batuwantudawe and that it is also true that neither he nor Mr. Wickremasinghe nor anyone else paid any money direct to the other Councillors.

Dr. M. G. Perera, who gave evidence, was completely lacking in frankness and pretended that he knew very much less about the transaction than he actually did.

Mr. C. M. Rodrigo, the other witness referred to above, was a clerk of Mr. Gunaratne and was able to speak only to the conferences and not to anything that took place at them.

Mr. Siebel was merely an officer of a bank producing certain cheques before me.

L. M. D. DE SILVA."

April 3, 1943.

The Governor having received the Report caused the Report to be printed as a Sessional Paper. The instructions given to the Government Printer were that it should not appear before the publication of a Government Gazette Extraordinary which was to contain a Bill to be introduced into the State Council connected with the Report. Those instructions were carried out, and simultaneously with the publication of the Report on the 19th May, 1943, there was published in the Gazette the text of a Bill enabling the State Council to expel any member on the ground of the acceptance of a pecuniary reward or other gratification in connection with the performance of his duties as a member.

Two hundred and twelve copies of the Report were published for circulation, 250 for sale to the public and 20 for the Commissioner. The 250 available to the public were quickly sold at the Public Record Office. Two hundred and twenty-five reprints were immediately asked for and they became available on the 24th May. They, too, it appears, were also quickly sold.

The practice in Ceylon is that Government Sessional Papers are issued free of charge to the Press. That practice was followed in the present case, and the Sessional Paper was sent to the Ceylon Daily News among other newspapers. In the office of The Ceylon Daily News the view was taken that the Report was a matter of public interest. Practically the whole of the Report was published. Only those portions were omitted which in the opinion of the Associate Editor were not of public interest or which had been sufficiently covered by other portions of the Report which were published. The Commissioner was quoted *verbatim*. Included in the matter published was the whole of para. 18 exactly as it appeared in the Report with an immaterial alteration in the heading, and the whole of Appendix C except the first and the last two paragraphs. Some immaterial cross headings were inserted and two sentences (neither affecting the appellant) were printed in bold type. The publication of the Report began on the 18th May, 1943, and ended on the 25th May, 1943, para. 18 appearing on the 20th May and Appendix C on the 25th May. The newspaper did not make any comments of its own.

The appellant forthwith instituted these proceedings.

At the trial there appears to have been some confusion on the issue of justification. Some observations by the appellant's Counsel as recorded in the Judge's notes rather support the view that he admitted the peccant statement to be true. No evidence was called directed to prove the truth of the statement. The District Judge, however, did not, in his judgment, rely on any admission of Counsel as to truth, and decided that, in the absence of evidence to the contrary, there was a presumption that the findings of the Commissioner were true and correct. He accordingly held that what the respondents published was true in substance and in fact, but he took the view that the publication by the respondents was not for the public benefit. In the Supreme Court, to which the appellant appealed, his Counsel did not query the finding of the District Judge that the words were true in substance and in fact and appears so far as the issue of justification is concerned to have dealt only with the question whether the publication was for the public benefit. The Supreme Court answered this question in the affirmative.

The Supreme Court were clearly entitled to determine the case on the footing as to the truth of the statement conceded by the appellant's Counsel at the hearing before them. But a determination of the matter at issue on the ground of justification is obviously not satisfactory, for the District Judge's reasons for arriving at a decision that truth was proved are plainly wrong, and the reasons for the concession made by the appellant's Counsel in the Supreme Court are not apparent. Their Lordships, having arrived at the conclusion that the respondents are entitled to succeed on other grounds, do not propose to deal further with the issue of justification. They will assume the statement as to the appellant's conduct as a witness not to accord with the fact. Fair comment does not therefore arise for consideration and the only question is whether the publication was made on a privileged occasion, the absence of express malice being conceded. On the question of privilege the District Judge took the view that any privilege which might attach to the publication of the Report in the newspaper did not extend to the matter published as regards the appellant, as it was foreign to the duty which the newspaper owed to the public. The Supreme Court held that this publication was privileged.

Their Lordships will now turn to consider whether this view is or is not correct.

In Roman Dutch Law *animus injuriandi* is an essential element in proceedings for defamation. Where the words used are defamatory of the complainant, the burden of negativing *animus injuriandi* rests upon the defendant. The course of development of Roman Dutch Law in Ceylon has, put broadly, been to recognise as defences those matters which under the inapt name of privilege and the apt name of fair comment have in the course of the history of the common law come to be recognised as affording defences to proceedings for defamation. But it must be emphasised that those defences or, more accurately, the principles which underlie them, find their technical setting in Roman Dutch Law as matters relevant to negativing *animus injuriandi*. In that setting they are perhaps capable of a wider scope than that accorded to them by the common law. Decisions under the common law are indeed of the greatest value in exemplifying the principles but do not necessarily mark out rules under the Roman Dutch Law. The " gladsome light of Roman jurisprudence " once shone on the common law: repayment to the successor of the Roman Law should not take the form of obscuring one of its leading principles.

Their Lordships' attention has not been drawn to any case under the Roman Dutch Law or the common law which exactly covers the point at issue. Both systems accord privilege to fair reports of judicial proceedings and of proceedings in the nature of judicial proceedings and to fair reports of parliamentary proceedings, and much time might be spent in an enquiry whether the proceedings before the Commissioner fell within one or other of these categories. Their Lordships do not propose to enter upon that enquiry. They prefer to relate their conclusions to the wide general principle which underlies the defence of privilege in all its aspects rather than to debate the question whether the case falls within some specific category.

The wide general principle was stated by their Lordships in *Macintosh* v. *Dun* [1908] A.C. 390, to be the " common convenience and welfare of society " or " the general interest of society " and other statements to much the same effect are to be found in *Stuart* v. *Bell* (1891) 2 Q.B. 341 and in earlier cases, most of which will be found collected in Mr. Spencer Bower's valuable work on Actionable Defamation. In the case of reports of judicial and parliamentary proceedings the basis of the privilege is not the circumstance that the proceedings reported are judicial or parliamentary —viewed as isolated facts—but that it is in the public interest that all such proceedings should be fairly reported. As regards reports of judicial proceedings reference may be made to *Rex* v. *Wright* 8 T.R. at p. 298 where the basis of the privilege is expressed to be " the general advantage to the country in having these proceedings made public ", and to *Davison* v. *Duncan* 7 E. & B. at p. 231 where the phrase used is " the balance of public

benefit from publicity "; while in *Wason* v. *Walter* L.R. 4 Q.B. 73 the privilege accorded to fair reports of parliamentary proceedings was put on the same basis as the privilege accorded to fair reports of judicial proceedings —the requirements of the public interest.

Reports of judicial and parliamentary proceedings and, it may be, of some bodies which are neither judicial nor parliamentary in character, stand in a class apart by reason that the nature of their activities is treated as conclusively establishing that the public interest is forwarded by publication of reports of their proceedings. As regards reports of proceedings of other bodies, the status of those bodies taken alone is not conclusive and it is necessary to consider the subject matter dealt with in the particular report with which the Court is concerned. If it appears that it is to the public interest that the particular report should be published privilege will attach. If malice in the publication is not present and the public interest is served by the publication, the publication of the report must be taken for the purposes of Roman Dutch Law as being in truth directed to serving that interest. *Animus injuriandi* is negatived.

On a review of the facts their Lordships are of opinion that the public interest of Ceylon demanded that the contents of the Report should be widely communicated to the public. The Report dealt with a grave matter affecting the public at large, viz., the integrity of members of the Executive Council of Ceylon, some of whom were found by the Commissioner improperly to have accepted gratifications. It contained the reasoned conclusions of a Commissioner who, acting under statutory authority, had held an enquiry and based his conclusions on evidence which he had searched for and sifted. It had, before publication in the newspaper, been presented to the Governor, printed as a sessional paper and made available to the public by the Governor contemporaneously with a Bill which was based on the Report and which was to be considered by the Executive Council. The due administration of the affairs of Ceylon required that this Report in light of its origin, contents and relevance to the conduct of the affairs of Ceylon and the course of legislation should receive the widest publicity.

As regards the newspaper the Report was sent to it by the authorities in the ordinary course. Nothing turns on any implied request to publish—that would in their Lordships' opinion be relevant only if malice were in issue. Their Lordships take the view that the respondents as respects publication stand in no better and no worse position than any other person or body in Ceylon. A newspaper as such has in the matter under consideration no special immunity. But it would be curious to hold that either the editor or the proprietor of the newspaper was disqualified by the nature of his activities from having the same interest in the public affairs of Ceylon as that proper to be possessed by the ordinary citizen. In their Lordships' view the proprietor and editor of the newspaper and the public had a common interest in the contents of the Report and in its wide dissemination. The subject matter created that common interest. To this it may, perhaps irrelevantly in law, be added that the ordinary member of the community of Ceylon would indeed conceive it to be part of the duty of a public newspaper in the circumstances to furnish at least a proper account of the substance of the Report.

Taking that view of the facts of the case, and applying the general principle their Lordships have stated, their Lordships are of the opinion that the immunity afforded by privilege attached to the publication by the respondents of this Report considered as a whole.

It remains to deal with two further matters. First, it was argued that assuming that the Report was published by the defendants on a privileged occasion the Report was divisible and that the statement relating to the appellant's conduct as a witness was not referable to any matter on which the privilege was founded. Malice, it will be recalled, was not alleged. Their Lordships cannot accept this contention. The main matter of public interest was the question of the extent to which members of the Executive Council had accepted bribes, and, linked up with that, the value which

might properly be attributed to the Report as one which covered the whole ground. No just estimation of the general position as to bribery or as to the value of the Report could be formed without knowledge of the grounds on which the Commissioner stated he had acted and of the difficulties which the Commissioner stated he had encountered in coming to a conclusion, or in failing to come, on particular topics, to a definite conclusion. Their Lordships have recited the facts which bear on the lines on which the Report was framed. It is in their Lordships' view clear that the statement as to the appellant was germane and appropriate to the occasion and does not fall to be distinguished in any degree from the other contents of the Report. Their Lordships would add that a view corresponding to that entertained by their Lordships here was expressed by Cockburn, C.J., in *Cox* v. *Feeney*, 4 F. and F. 13.

Second, it was argued that the publication of the matter complained of was illegal in that it constituted a breach of section 6 (1) of the Special Ordinance and that therefore a defence based on privilege must fail. In their Lordships' opinion the publication was not a breach of that section. On this point they agree with the view of the Supreme Court as expressed by the learned Chief Justice when he said:—

> "In my opinion publication is not prohibited of the name, but of 'the name and the evidence or any part of the evidence'. The name and the evidence or any part of the evidence has not been published."

It is true that section 6 (2) and section 10 (*b*) both say:—

> ". . . of the name *or* of the evidence . . .",

but this use of the disjunctive accords with the saving or qualifying nature of these provisions and in no way conflicts with the conjunctive form of the prohibition enacted by section 6 (1). Their Lordships can see nothing in the other terms of the Ordinance to justify any modification of the natural meaning of the words of that sub-section:—

> ". . . the name *and* the evidence or any part of the evidence . . ."

On the contrary it may well be said that the context points away from a disjunctive construction for section 6 (1) clearly relates only to evidence which is heard *in camera* and if, as section 5 contemplates, but part of a witness's evidence was so heard, that construction would have the strange effect of forbidding the disclosure of the witness's name while allowing publication of part of his testimony.

In the circumstances their Lordships will humbly advise His Majesty that the appeal be dismissed. The appellant will pay the costs of the appeal.

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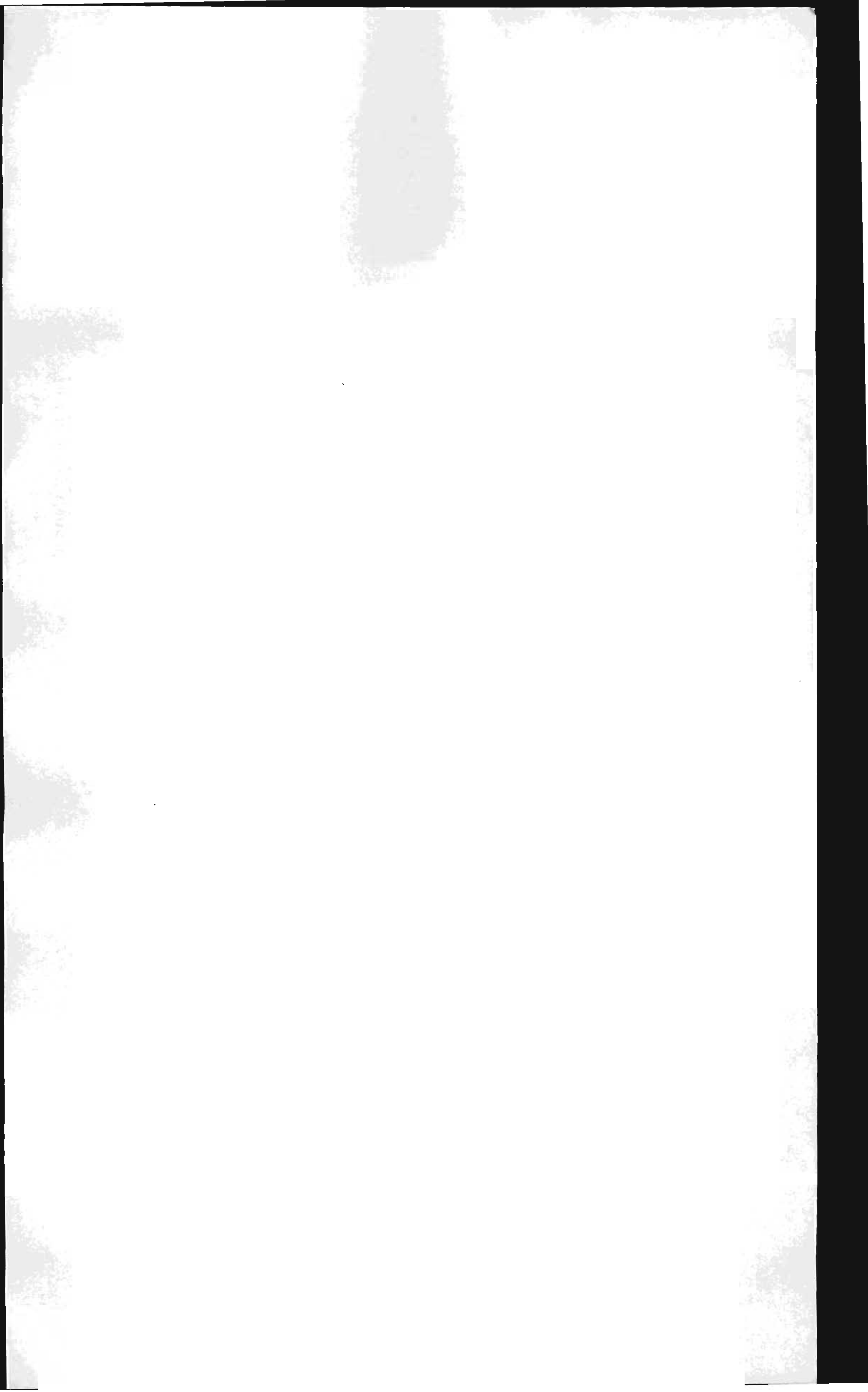

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DELIVERED BY LORD UTHWATT

Printed by HIS MAJESTY'S STATIONERY OFFICE PRESS,
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