Privy Council Appeal No. 54 *of* 1943

Allahabad Appeals Nos. 25, 28, 30 & 33 *of* 1939

Durga Prasad and another – – – – – – *Appellants*

v.

Ghanshiam Das and others – – – – – – *Respondents*

Tota Ram – – – – – – – – – *Appellant*

v.

Ghanshiam Das and others – – – – – – *Respondents*

Yad Ram – – – – – – – – – *Appellant*

v.

Ghanshiam Das and others – – – – – – *Respondents*

Basdeo Sahai, since deceased, and another – – – *Appellants*

v.

Durga Prasad and others – – – – – – *Respondents*

Consolidated Appeals from

THE SUPREME COURT OF JUDICATURE AT ALLAHABAD

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 6TH APRIL, 1948

Present at the Hearing:

LORD SIMONDS
LORD MORTON OF HENRYTON
SIR MADHAVAN NAIR

[*Delivered by* LORD SIMONDS]

These consolidated appeals from a judgment and decree of the High Court of Judicature at Allahabad, which varied a judgment and decree of the Subordinate Judge at Aligarh, have involved the close scrutiny of a large number of documents covering a long period of years. In this task their Lordships have been greatly assisted by the diligent researches of counsel for the appellants, but after a careful consideration of all the material before them they have come to the conclusion that no sufficient reason has been shown for displacing the judgment of the High Court.

The appeals raise the question in broadest outline whether there has been a separation of an undivided Hindu family of which the common ancestor was one Bhawani Das, who died very many years ago. The family and the parties to the suit out of which these appeals arise can be conveniently seen in the following pedigree:—

BHAWANI DAS.

- Girdhari Lal (died 1864).
  - Matru Mal (died 1918).
    - Yad Ram, Defendant No. 6, (adopted, 11.7.13).
    - Ghanshyam Das, Defendant No. 7, (born 1915).
- Kashi Ram (died 1885).
  - Behari Lal (died 1902).
    - Chet Ram (died before 1902. Musammat Rukmin widow, Defendant No. 4.
      - Chhote Lal (deceased). Musammat Gango widow, Defendant No. 5.
    - Basdeo Prasad or Sahai Defendant No. 1.
      - Ramesh Ch. minor, Defendant No. 2.
    - Bhimsen (died 1913).
      - Durga Prasad, Plaintiff No. 1 (born 1908).
      - Gaya Prasad, Plaintiff No. 2, minor.
      - Yad Ram, Defendant No. 6, adopted by Matru Mal.
    - Tota Ram, Defendant No. 3.
- Chain Sukh.
- Mohan Lal.
- Tika Ram.

Of the facts which are stated in the pedigree, their Lordships take particular note of the circumstance that the respondent Ghanshiam Das was not born until 1915 and that prior to his birth the appellant Yad Ram had been adopted by Matru Mal who was then without male issue. Yad Ram was the natural son of Bhimsen who was the son of Behari Lal who was the son of Kashi Ram, and thus belonged naturally to the other branch of the family from that of Ghanshiam Das who descended from Girdhari Lal.

In the year 1933 the present suit was commenced by the appellants Durga Prasad and Gaya Prasad and a third plaintiff who subsequently disappeared from the proceedings. Every member of the family was made a party to the suit and they were conveniently grouped into five sets of defendants (1) Basdeo Sahai and his son Ramesh Chander (defendants 1 and 2) (2) Tota Ram (defendant 3) (3) Musammat Rukman Kunwar and Musammat Gango (defendants 4 and 5) (4) Yad Ram and Ghanshiam Das (defendants 6 and 7) and (5) Sri Thakur Murli Manoharji Maharaj (defendant 8) whose rights are no longer in dispute.

By their plaint the plaintiffs pleaded inter alia that (*a*) during the time of Bhawani Das Girdhari Lal and his brothers there was no family property or fund and that Matru Mal, Kashi Ram and Bihari Lal acquired property and collected funds by their own efforts, (*b*) that Matru Mal adopted Yad Ram and executed a will on the 17th December, 1913, whereby he bequeathed his property in equal shares to Yad Ram and to his natural son, if any, born to his second wife, and that thereafter Ghanshiam Das was born so that he and Yad Ram became the owners of Matru Mal's property in equal shares, (*c*) that both Bihari Lal and Matru Mal carried on a separate money-lending business, the former under the style of Kashi Ram-Bihari Lal and the latter under the style of Girdhari Lal-Matru Lal and that in addition they carried on a joint business under the style of Kashi Ram-Matru Mal of which they were joint owners in equal shares, (*d*) that since the death of Matru Mal in 1918 all three concerns had been managed and supervised by Basdeo alone, (*e*) that the family of the plaintiffs and the defendants 1 to 5 had remained joint and defendant 1 (Basdeo) was the manager and supervisor thereof, (*f*) that by reason of the dishonest dealings of Basdeo and his failure to render accounts the plaintiffs did not wish to remain joint and claimed partition, (*g*) that defendants 4 and 5 were entitled only to maintenance but, as some of the Zamindari properties stood recorded in the Revenue Papers against their names "for their consolation", they too had been impleaded, (*h*) that defendants 6 and 7 (Ghanshiam Das and Yad Ram) were entitled to a moiety share in the joint property and the money dealings of Matru Mal and Bihari Lal, and (*i*) that in 1911 Matru Mal had constructed a temple and given some of the Zamindari property out of his half share in the Zamindari to defendant 8.

By their plaint the plaintiffs divided the property into three schedules—

(A) Property owned by the plaintiffs and defendants 1, 2 and 3 as descendants of Bihari Lal, of which the plaintiffs claimed one third,

(B) Property owned by Ghanshiam Das and Yad Ram as to one half and by the plaintiffs and defendants 1, 2 and 3 as to the other half, of which the plaintiffs claimed one sixth,

(C) Property of which Ghanshiam Das and Yad Ram and defendant 8 or defendant 8 alone was owner as to one half and the plaintiffs and defendants 1, 2 and 3 as to the other half of which the plaintiffs claimed one sixth.

It was urged upon their Lordships, and there is much upon the face of the plaint to support the contention, that at this stage of the proceedings the plaintiffs proceeded upon the assumption that at some time the two branches of the family deriving from Girdhari Lal and Kashi Ram respectively had divided and that the business latterly known as

Kashi Ram-Matru Mal was owned by the two branches in partnership in equal shares. It was perhaps for this reason that the plaintiffs did not think it necessary to plead with any particularity how or when the partition had taken place. They, it was said, regarded the dispute between themselves and Basdeo, another member of their own branch, as the only material issue and their joinder of Ghanshiam Das and Yad Ram was little more than formal. But, whether or not this assumption was made and whatever the justification for it, it could no longer be properly made after Ghanshiam Das had by his guardian put in his written statement and particularly his somewhat belated supplementary written statement of the 16th December, 1932, by which he pleaded " The entire business of the family of the plaintiffs, defendants 1st and 2nd parties and the contesting defendant has been carried on from this very ancestral fund and the entire property has been acquired from this very ancestral fund in different shapes. The business and money-lending, etc., no matter in whose name they are carried on and the property, no matter in whose name they have been purchased, all belong to the joint family, in which the contesting defendant owns a moiety share ". From this moment it was clearly incumbent on the plaintiffs to establish affirmatively a division between the two branches of the family and, as will be seen, they have failed in the opinion of the High Court to do so. The claim of Ghanshiam Das to own a " moiety share " in the joint property rested on his refusal to admit that Yad Ram had been validly adopted by Matru Mal. That is a matter no longer in dispute. But it has remained in dispute whether Yad Ram is entitled to one-half or one-quarter of the moiety belonging to Matru Mal's branch of the family. If the plaintiffs are right in their contention that at some date, which, however uncertain, must have been before Matru Mal's will, a division took place, then Matru Mal was competent to dispose of the property of which he purported to dispose, his will operated according to its tenor, and Yad Ram is entitled to one-half; if, on the other hand, there was not a division and Matru Mal was not competent to dispose of property which ex hypothesi was still joint, then Yad Ram was under Hindu law entitled to one-quarter only of the share, the other three-quarters being taken by Ghanshiam Das, the natural son of Matru Mal. It is for this reason, no doubt, that Yad Ram has throughout the proceedings, including these appeals, allied himself to the plaintiffs.

To the written statements of the other defendants it is unnecessary to refer in detail. It is sufficient to say that, while upon the issue whether there had been a division between the two branches of the family there was no general opposition to the plaintiffs, the sources of dispute between the members of the plaintiffs' branch of the family appear to have been numerous and complex. These matters are irrelevant to the present appeals. It may, however, be noted that specific reference was made to a partition of certain shops which took place in 1911 between Matru Mal on the one side and Basdeo, Bhimsen, and Tota Ram on the other side, a transaction which, whatever its true significance, appears to have led the learned Subordinate Judge to a conclusion which was not supported in the High Court or before their Lordships.

Upon the pleadings a number of issues were framed of which only three need be mentioned:—

> " 1. Are the plaintiffs and defendants 1st and 2nd parties (defendants 1 to 3) and defendant 7 not members of the joint Hindu family and did any partition take place between them, if so, when? Are the plaintiffs entitled to have any of the properties partitioned?
>
> 2. Is the firm Kashi Ram-Matru Mal a joint Hindu family firm or is it a mere partnership firm?
>
> 3. What are the respective shares of the parties in different properties in suit and how is the partition to be effected? "

It is, as their Lordships think, unfortunate that the issue of partition was not framed with greater precision, for this, if for no other, reason, that their Lordships have not the advantage of the views of the learned Subordinate Judge upon the contention which has been strenuously and

cogently argued before them that the partition took place at some date in or about the year 1885. Whether or not this contention was raised before the learned Judge, their Lordships are not in a position to say. There is at least no trace of it in his judgment. On the contrary, after a consideration of the oral evidence and the documents which were voluminous he held " that there was a partition between Matru Mal on the one hand and Bhimsen, Tota Ram and Basdeo Sahai on the other hand on the 2nd October, 1911 ". That there was such a partition of certain items of property on that date is beyond doubt. But the judgment of the learned judge and the decree that was based on it make it clear that he for some reason regarded the partition of all the family property as having taken place at that time.

From the judgment and decree of the learned judge several appeals were preferred to the High Court at Allahabad. The appeal with which their Lordships are at present concerned was that of Ghanshiam Das who claimed in the words of his first ground of objection that it was " amply proved from the evidence on the record that the family to which the parties belong is still joint and the finding of the Court below that a partition took place between Matru Mal on one side and Basdeo Sahai and others on 2nd October, 1911, is against the weight of evidence on the record and the plaintiffs have altogether failed to prove the same ".

Upon this question the High Court after penetrating and exhaustive examination of all the relevant facts and documents came to a clear conclusion. In the first place they rejected the finding of the learned Subordinate Judge that a partition of the family property took place on 2nd October, 1911, holding that this finding was not in accordance with the pleading of any party and that it was not supported by any evidence. They then proceeded to consider the case which, as they said, had been put before them on appeal by learned counsel for all parties except Ghanshiam, " namely that Matru Mal separated about 1885 ", and upon this the first conclusion to which they came is worth citing verbatim. " In spite of the suppression of many of the books of the family (for which the plaintiffs and Tota Ram blame Basdeo and for which Basdeo blames the plaintiffs and Tota Ram) there is abundant evidence to show that Kashi Ram-Matru Mal was merely the continuation of the ancestral business which was going on from 1832 under the name of Bhawani Das-Girdhari Lal and that it was not a new business begun by Kashi Ram and Matru Mal ". Next they considered the origin and status of the two so-called branch firms of Girdhari Lal-Matru Mal and Kashi Ram-Behari Lal and upon the evidence came to the conclusion of fact that each of these firms was started with joint family property, whence followed the conclusion of law that the property acquired by each of these firms was joint family property. From these conclusions which are supported by adequate evidence their Lordships see no reason for dissenting and they concur in the view which has been urged upon them by learned counsel for the respondent that a disclosure of all the books of family accounts might well have placed beyond doubt not only that the conclusions already stated were correct but also that no separation had taken place. It was contended on behalf of the appellant Yad Ram that he at least had not been implicated in any suppression of books, but his interest lay with those who were responsible for the suppression and he must suffer with them.

The facts being established that the old family firm was joint and that the branch firms, having been started with a nucleus of family property, were also joint, it was the task of the plaintiffs and their allies to prove a separation. No special stress need here be laid on the question of onus. As a determining factor of the whole case that question only arises if the Court finds the evidence so evenly balanced that it can come to no definite conclusion, see *Robins* v. *National Trust Co.*, 1927, A.C. 515 at 520. In the present case, though there are incidents and transactions which point more or less strongly to a separation having taken place at some time, it appears to their Lordships, as it did to the High Court, that they are susceptible of explanation and that the balance

of evidence leads to the opposite conclusion. It would be superfluous to rehearse the elaborate scrutiny to which every incident in the case has been subjected in the careful judgment of the High Court. In the present appeal, great stress was laid upon the acts of Matru Mal himself, the father of Ghanshiam Das, and particularly upon his endowment in 1911 of a temple in Purdilnagar and his adoption of Yad Ram in 1913 and upon the will that he made in the same year. It is not to be denied that these are factors from which, if they stood by themselves, an inference could be drawn that at some time a separation had taken place. But the appellants' case was that a separation had taken place as long ago as 1885 or thereabouts and, insufficient and imperfect as the family records are, they create a general impression which is not to be displaced by the conduct of Matru Mal nor by the fact, also relied on by the appellants, that the terms of his will were acted on by Basdeo and other members of that branch of the family. In this connection it is not to be forgotten that Matru Mal was Karta of the family and that, if he did not always act within the strict limit of his legal rights under Hindu law, acquiescence by the other members of the family would not be unusual.

One other category of documents may be mentioned. The appellants relied upon the fact that in certain Khewats, in which Matru Mal and Bihari Lal had been registered as sharers in equal shares, upon the death of Bihari Lal, his sons, Basdeo Sahai, Bhimsen and Tota Ram (and in some cases also the widows of a son and grandson) were registered as the transferees of his share " by right of inheritance ". It was rightly pointed out that such language is inappropriate to a transfer upon the death of a member of an undivided family. But their Lordships would repeat what was said in L.R. 47 I.A. 57 at pp. 69, 70, that a definition of shares in Khewats or other Revenue Papers can be regarded as only a very slight indication of title: it is not the function of the officer who compiles such papers to decide questions of title. In particular the nice distinctions which arise upon an issue whether or not there has been a separation are not for their determination. Thus, one by one, the documents on which the appellants rely can be examined and, though their cumulative weight may be considerable, there still remain the formidable facts, to which reference has already been made, and these are the more formidable because, through no fault of the respondents but by the deliberate act of one or more of the appellants, documents, which might have made the story clear, have been withheld. Nor can it be ignored that the appellants did not, as they should have done, at an early stage formulate exactly how and when the partition alleged by them took place, but left it to emerge from such oral evidence as might be given and such documents as they themselves thought fit to disclose.

On the whole, therefore, in this difficult and complex case, their Lordships concur in the judgment of the High Court. The appeals of (1) Durga Prasad and Gaya Prasad and (2) Lala Tota Ram (now represented by Musammat Har Piari) and (3) Lala Yad Ram fail and must be dismissed. A fourth consolidated appeal (No. 33 of 1939) was not proceeded with and must also be dismissed. Two other matters may properly be mentioned. The first relates to the maintenance now payable to Musammat Gango, the widow of Chhote Lal, a son of Chet Ram, who was a brother of Basdeo, Bhimsen and Tota Ram. This maintenance which had been fixed by the Subordinate Judge at Rs.51 per month was under his decree payable by the plaintiffs and by the defendants Basdeo and Tota Ram. This was clearly right. By the High Court the maintenance of Musammat Gango was increased to Rs.80 per month but the increase appears to have been directed to be paid by the appellants Durga Prasad and Gaya Prasad only. The reason for this apparent error is that they alone were made respondents to the appeal by Musammat Gango from the order of the Subordinate Judge, by which she asked (inter alia) that her maintenance might be increased. This appeal together

with all the other appeals was disposed of by the High Court in one judgment and it appears to have escaped the notice of the Court that the parties were defective. Upon the present appeal, however, the appellants Durga Prasad and Gaya Prasad have taken the point and have submitted that the appeal by Musammat Gango was incompetent in that it failed to implead the other parties who had to share in the order to pay maintenance and that the order of the High Court should in this respect be set aside. At the hearing of the appeal it was contended in the alternative that the burden of increased maintenance should be directed to be borne equally in the same way as the original maintenance, and it was urged that the order of the High Court should be varied accordingly. Their Lordships cannot entertain this latter alternative. There is no trace in the formal case of these appellants that they proposed to ask for any order against Basdeo and Tota Ram or their representatives and it would not be proper that any such order should be made. That leaves the question whether it was competent for the High Court to make an order for increased maintenance against the share of Durga Prasad and Gaya Prasad only. It does not appear that this matter was argued, or indeed that the point was ever taken, before the High Court, and for this reason, particularly having regard to the trifling nature of the sum involved, their Lordships do not think that the order of the High Court should in this respect be varied.

The second matter which must be mentioned is the apparent discrepancy between the judgment of the High Court and the formal Decree in appeal No. 246 of 1933. Their Lordships have expressed their approval of, and concurrence in, the conclusions of the judgment. But they find it difficult to reconcile it in all respects with the terms of the decree. Inasmuch, however, as there has been no cross appeal by Ghanshiam Das, who must be presumed to be content with the decree, their Lordships do not think it right to make further comment upon it or to advise that it should be varied so as to conform more nearly with the judgment.

For the reasons above appearing their Lordships will humbly advise His Majesty that these appeals should be dismissed. The appellants in each of the appeals other than the fourth appeal must pay one-third of the costs of the respondent Ghanshiam Das of the consolidated appeals.

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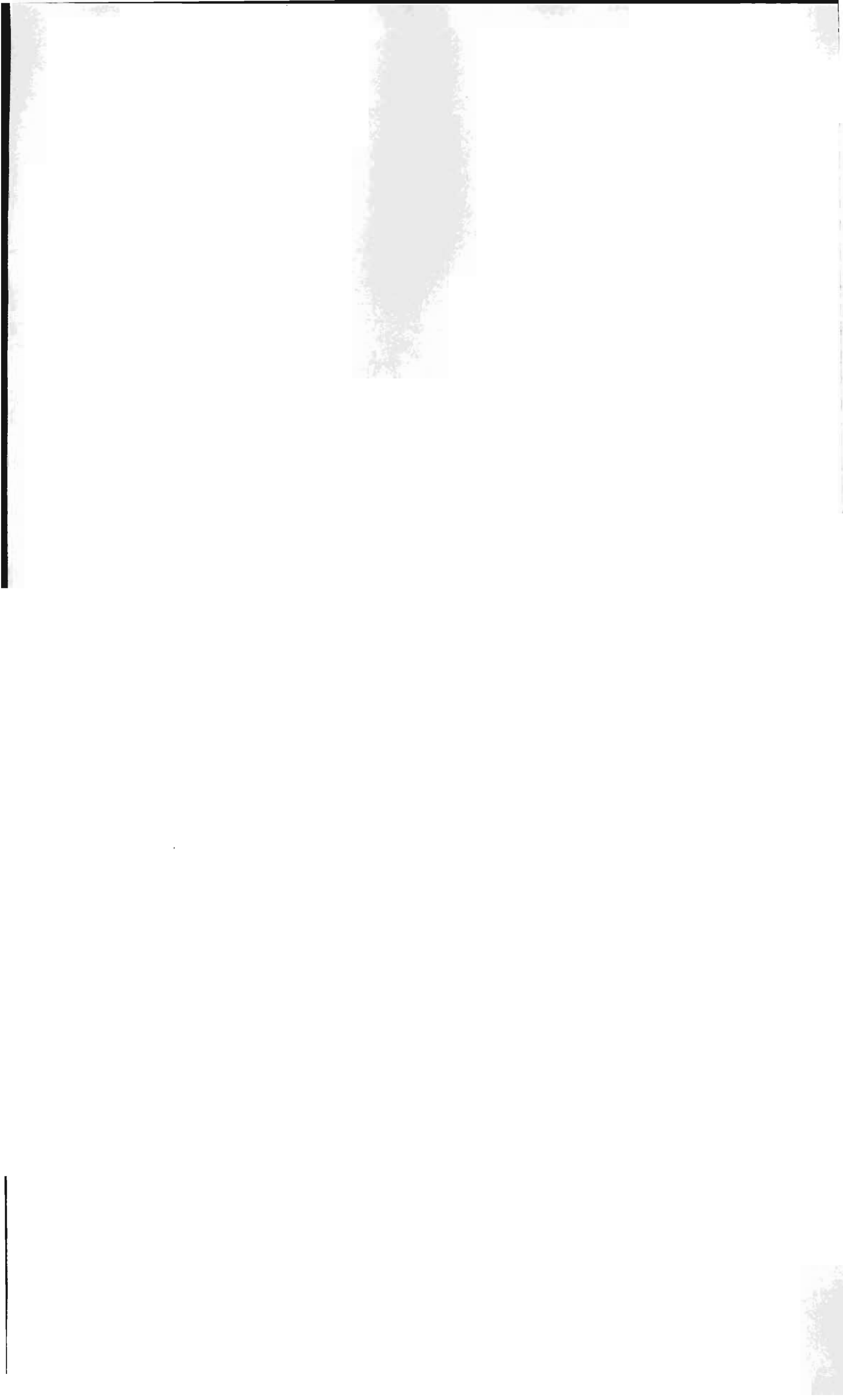

In the Privy Council

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