(Privy Council Appeal No. 40 of 1981)

A.M.P. Fire & General Insurance Co. Limited – – *Appellant*

v.

Marinus Miltenburg – – – – – – – – *Respondent*

(and Cross-Appeal)

FROM

THE SUPREME COURT OF NEW SOUTH WALES COURT OF APPEAL

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 9TH MARCH 1982

Present at the Hearing:

LORD DIPLOCK

LORD SIMON OF GLAISDALE

LORD EDMUND-DAVIES

LORD SCARMAN

LORD BRANDON OF OAKBROOK

[*Delivered by* LORD BRANDON OF OAKBROOK]

This appeal concerns the total amount of the indemnity payable by insurers under the law of the State of New South Wales as it was in 1977 (hereinafter referred to as "the material time") who have, pursuant to the provisions relating to the compulsory insurance of employers' liability contained in The Workers' Compensation Act, 1926, as amended (hereinafter called "the Act"), insured an employer against his liability to pay to any worker of his injured in the course of his employment, first, compensation under the Act and, secondly, damages limited to a specified amount independently of the Act.

Section 7 of the Act provided at the material time, subject to various conditions contained therein, that any worker who suffered injury in the course of his employment should be paid compensation by his employer, whether the injury was caused by the actionable fault of the employer or not.

Section 63 of the Act contained at the material time the following further provisions:—

> "63.(1) Nothing in this Act shall affect any civil liability of the employer where the injury was caused by the personal negligence or wilful act of the employer or of some person for whose act or default the employer is responsible.
>
> (2) In such case the worker may proceed both under this Act and independently of this Act but where in proceedings independently of this Act he accepts money brought into court by his employer or he

obtains judgment against his employer he shall not be entitled to any compensation under this Act other than compensation paid to him before such acceptance or judgment.

(3) . . . . . .

(4) . . . . . .

(5) Where any payment by way of compensation under this Act has been made, the payment shall, to the extent of its amount, be a defence to proceedings against the employer independently of this Act in respect of the injury."

The effect of these provisions, as between worker and employer, is clear. The first effect is that, where a worker suffers an injury in the course of his employment which was caused by the actionable fault of his employer, his servants or agents, such worker is entitled to pursue two separate remedies against his employer: first, compensation under the Act and, secondly, damages at common law. The second effect is that, although such a worker is entitled to pursue both such remedies, he is not allowed to recover twice over in respect of the whole or any part of the loss or damage caused to him by the injury concerned.

The Act, besides providing that a worker injured in the course of his employment by the actionable fault of his employer should be entitled to pursue both the remedies referred to above, also provided for compulsory insurance by all employers against their liability arising from the pursuit by their workers of either of, or both, such remedies.

With regard to such compulsory insurance section 18(1) of the Act provided at the material time:—

" 18.(1) . . . every employer shall obtain . . . a policy of insurance or indemnity . . . for the full amount of his liability under this Act to all workers employed by him and for an amount of at least one hundred thousand dollars in respect of his liability independently of the Act for any injury to such worker."

The form of policy required to satisfy an employer's obligations under section 18(1) above was prescribed by regulations made under the Act. At the material time the relevant parts of the form of policy so prescribed were these:—

" WHEREAS by virtue of the Workers' Compensation Act 1926, as amended (hereinafter called " the Act ") it is provided that every employer shall obtain from an Insurer licensed under the Act to carry on business in the State a policy of insurance or indemnity for the full amount of his liability under the Act to all workers employed by him and for an amount of at least one hundred thousand dollars in respect of his liability independently of the Act for any injury to any such worker.

. . . .

NOW THIS POLICY witnesseth that in consideration of the payment by the Employer to the Insurer of the above-mentioned Premium . . . IF . . . the Employer shall be liable to pay compensation under the Act to or in respect of any person who is or is deemed by the Act to be a worker of such Employer or to pay any other amount not exceeding one hundred thousand dollars in respect of his liability independently of the Act for any injury to any such person,

THEN and in every such case the Insurer will indemnify the Employer against all such sums for which the Employer shall be so liable; the Insurer will also pay all costs and expenses incurred with the written consent of the Insurer in connection with the defence of any legal proceedings in which such liability is alleged.

> . . . and the Insurer shall be (a) directly liable to any worker . . . to pay the compensation or other amount for which the Employer is liable and in respect of which the Employer is indemnified under this Policy; and (b) bound by and subject to any judgment, order, decision, or award given or made against the Employer under the provisions of the Act or in respect of his liability independently of the Act and in respect of which the Employer is indemnified under this Policy . . ."

The facts giving rise to this appeal are these. On 12th October 1977 Marinus Miltenburg (hereinafter called "the worker") was severely injured in the course of his employment by Henry Willem Louwen (hereinafter called "the employer"). The employer held at that time an employer's liability policy issued by A.M.P. Fire and General Insurance Co. Limited (hereinafter called "the insurers"), which was in the form prescribed by the regulations made under the Act. The limit of the indemnity in respect of the employer's liability for damages independently of the Act had, however, been agreed at $150,000 instead of the statutory minimum of $100,000.

Following his injury the worker brought an action against the employer in the Common Law Division of the Supreme Court. That action was defended by the employer and one of the matters of defence pleaded for him pursuant to section 63(5) of the Act was that the worker had been paid by him or on his behalf, by way of compensation under the Act, the sum of $63.709·10, as was in fact the case.

The action was tried by Toose J. who on 9th November 1979 held that the worker's injuries had been caused by the negligence of the employer and assessed his total damages at $521,030. From this sum he deducted the sum of $63,709·10 which had been paid earlier to the worker by way of compensation under the Act and directed that judgment should be entered for the worker for the difference, namely $457,320·90, together with the worker's costs, which were taxed in the sum of $18,556·58.

Following this judgment of Toose J. the insurers paid to the worker the sum of $86,290·90, such sum being calculated on the basis that the insurers were entitled to deduct the sum of $63,709·10, which had been paid earlier by or on behalf of the employer by way of compensation under the Act, from the maximum sum of $150,000 specified in the policy in respect of the liability of the employer independently of the Act.

The worker's legal advisers took the view that the insurers had no right to deduct the sum of $63,709·10 in this way, and further that the insurers were also liable to the worker for his taxed costs of $18,556·58.

Difficulties arose with regard to the procedure by which, and the tribunal before which, these matters of dispute between the worker and the insurers should properly be determined. In their Lordships' view, however, it is not necessary for them to go into these difficulties. It is sufficient to say that, in the upshot, the substantive matters of dispute came before the Court of Appeal, consisting of Moffitt P., Glass J.A. and Samuels J.A., for hearing and determination in proceedings begun by summons in which the worker was plaintiff and the insurers were defendants.

In those proceedings the Court of Appeal decided, first, that the insurers were not entitled to deduct the sum of $63,709·10 from the maximum sum of $150,000 which they were obliged to pay in respect of the employer's liability independently of the Act; and, secondly, that the insurers were not liable to pay to the worker the costs taxed at $18,556·58 for which judgment had been entered for the worker against the employer by Toose J. In accordance with that decision the Court of Appeal gave judgment for the worker against the insurers for $63,709·10 with interest and for seven-tenths of the worker's costs.

The Board now has before it an appeal by the insurers against the judgment for \$63,709·10 with interest in favour of the worker, and, formally at least, a cross-appeal by the worker against his failure to obtain judgment for the costs in the sum of \$18,566·58 payable to him by the employer.

The reasons for the decision of the Court of Appeal on both the matters in dispute concerned are contained in the judgment delivered by Samuels J.A., with which both Moffitt P. and Glass J.A. expressed their agreement.

The approach adopted by Samuels J.A. appears from the following passage in his judgment: —

> "What is in contention here is the construction of the policy and, although it is a statutory policy which the employer was required to have and the defendant compelled to issue in the terms laid down by the Act, it is to be construed according to its terms; although it is legitimate to take into account the provisions of the Act and its legislative intention."

Adopting that approach to the two matters in dispute, Samuels J.A. reached the decision on them stated earlier.

In their Lordships' view the approach adopted by Samuels J.A., as set out in the passage from his judgment above, was an entirely correct approach in the circumstances. The primary task of the Court of Appeal was to construe the policy, on which the insurers' obligations depended, according to its terms. But, since the policy was in a form prescribed by regulations made under the Act, it was legitimate for the Court to take into account the provisions and legislative intention of the Act.

Adopting, therefore, the same approach, their Lordships turn to consider the first of the two questions of construction raised, namely, that relating to the amount of the indemnity payable by the insurers in respect of the employer's liability to the worker independently of the Act.

There have been set out earlier in this judgment the relevant parts of the form of employer's liability policy prescribed by regulations made under the Act. Reference has also been made earlier to the insertion by agreement in the form of policy used in the present case of a limit to the amount of the indemnity payable by the insurers in respect of the employer's liability independently of the Act of \$150,000 in place of the statutory minimum of \$100,000.

When the statutory form of policy so adapted by agreement is examined, it is apparent that it imposes on the insurers an obligation to indemnify the employer in respect of three different kinds of liability which the employer may incur. The first kind of liability in respect of which the insurers are obliged to indemnify the employer is a liability to pay to an injured worker the full amount of the compensation to which he is entitled under the Act. The second kind of liability in respect of which the insurers are obliged to indemnify the employer, but only up to a maximum amount of \$150,000, is a liability to pay damages to an injured worker independently of the Act. The third kind of liability in respect of which the insurers are obliged to indemnify the employer is a liability for all such costs as he may incur, with the written consent of the insurers, in connection with the defence by him of any legal proceedings brought against him by an injured worker in order to recover either compensation under the Act, or damages independently of the Act, or both.

In respect of the first kind of liability referred to above, the employer in the present case became liable to pay to the worker the sum of \$63,709·10 by way of compensation under the Act. There is no dispute that the insurers were obliged under the policy to pay, and did pay, that sum either to the employer or directly to the worker.

In respect of the second kind of liability referred to above, the employer became liable, under the judgment of Toose J., to pay to the worker the sum of $457,320·90 by way of damages independently of the Act. This sum was arrived at, as indicated earlier, by deducting the sum of $63,709·10 paid by way of compensation under the Act from what would otherwise have been total damages of $521,030 independently of the Act. But for the limitation, under the terms of the policy, of the insurers' obligation to indemnify the employer in respect of this second kind of liability to $150,000 the amount of the indemnity which the insurers would have been obliged to pay would have been $457,320·90. Because of that limitation of the insurers' obligation, however, the amount of the indemnity which they were obliged to pay was reduced to $150,000.

It was contended by Mr. Sperling Q.C., as counsel for the insurers, that the amount of the indemnity payable by them in respect of the second kind of liability incurred by the employer was not $150,000, but that sum less the sum of $63,709·10 paid to the worker by way of compensation under the Act.

The argument in support of this contention proceeded in two steps. The first step in the argument was that sums paid by way of compensation under the Act had a dual character: first, that of compensation to a worker under the Act irrespectively of any actionable fault of his employer; and, secondly, that of a discharge or satisfaction, *pro tanto*, of his employer's liability for damages independently of the Act. The second step in the argument was that, since the insurers were only obliged to indemnify the employer in respect of his liability independently of the Act up to a maximum sum of $150,000, the prior payment by the insurers of the sum of $63,709·10 in respect of compensation under the Act should go to satisfy or discharge, *pro tanto*, their obligation to pay that sum of $150,000.

In their Lordships' view this argument is quite untenable. The second kind of liability of the employer in respect of which the insurers were obliged to indemnify him was his liability for damages independently of the Act. The amount of that liability was arrived at by deducting the sum of $63,709·10 paid by way of compensation under the Act from the total damages of $521,030 in accordance with the policy of the Act, given effect to by section 63(2) and (5), that a worker shall not be entitled to recover twice over in respect of the same loss or damage.

Acceptance of the argument for the insurers would involve deducting the sum of $63,709·10 paid by way of compensation under the Act twice over; once in calculating the net liability of the employer for damages independently of the Act, and a second time in calculating the amount of the indemnity payable by the insurers in respect of such liability. It is manifest, however, that credit for that sum of $63,709·10 can only be given once, and that the stage at which it should be given, in accordance with section 63(5) of the Act, is the stage at which the damages recoverable by the worker from the employer independently of the Act fall to be calculated.

Counsel for the insurers sought to derive support for his contention by a detailed examination of the history from 1910 onwards of legislation relating to workers' compensation in New South Wales. In their Lordships' view, since the true meaning and effect of the policy can be readily ascertained from its express terms, any recourse to such legislative history as an aid to its interpretation is unnecessary. In any case, however, such points as emerged from the examination of the legislative history made by counsel for the insurers appeared to their Lordships to support, rather than to contradict, the construction of the policy at which they unhesitatingly arrived by reference solely to its terms.

Counsel for the insurers further relied on what he suggested would be a surprising anomaly if his contention was wrong. In that connection he postulated a case where the total damages for which an employer was held or agreed to be liable independently of the Act was $200,000; where the limit of the indemnity which his insurers were obliged to pay in respect of such liability was fixed by the relevant policy at $150,000; and where a sum of $50,000 had become payable by the employer by way of compensation under the Act. In that situation counsel said that, if the compensation of $50,000 under the Act had not been paid before the liability of the employer for damages independently of the Act had been assessed, the insurers would only be obliged to pay by way of indemnity under the policy $150,000 in all; whereas, if the insurers had honoured their obligations by paying the sum of $50,000 for compensation under the Act first, the amount of the indemnity for which the insurers would be obliged to pay in respect of the employer's liability independently of the Act would still be $150,000, so that the total amount payable by the insurers by way of indemnity would be $200,000, comprised of $50,000 in respect of compensation under the Act and $150,000 in respect of damages independently of the Act.

Let it be assumed for the purposes of argument that by reason of the provisions contained in section 63(2), (3) and (5) of the Act these two alternative results could come about in the situation postulated by counsel for the insurers. The answer to the point appears, however, to be that an injured worker, if he received proper advice from his legal advisers, would enforce his right to compensation under the Act first, and his further right to damages independently of the Act second; and that, if his legal advisers did not advise him to proceed in that way, they might well find themselves at risk for not giving to their worker client the advice which he ought properly to have had.

For these reasons their Lordships do not regard the argument based on the suggested anomaly as having any force.

It is pertinent to observe that the question which has arisen in the present appeal has done so solely because at the material time section 18(1) of the Act only required an employer to insure his liability for damages to an injured worker independently of the Act up to a limit of $100,000. Their Lordships were, however, informed by counsel that, under a subsequent enactment, the limitation on the amount of the insurance which an employer was required to obtain in respect of his liability independently of the Act had been removed, and that an employer is now required to obtain unlimited insurance in respect of such liability. It follows that it will not be possible for the kind of problem which has arisen in the present case to arise in any other case subsequent to the coming into force of such further enactment.

Although, as was indicated earlier, the worker brought a cross-appeal against the dismissal of the Court of Appeal of his claim to recover from the insurers the costs taxed at $18,556·58 which Toose J. had adjudged the employer to be liable to pay to him, their Lordships were informed by Mr. O'Keefe, Q.C., as counsel for the worker, that he had decided, for reasons which are readily understandable, that he would not be justified in pursuing such cross-appeal.

The result of their Lordships' opinion in relation to the insurers' appeal, and the decision of counsel for the worker not to pursue his cross-appeal, is that their Lordships will humbly advise Her Majesty that both the appeal and the cross-appeal should be dismissed. The appellant insurers must pay the costs of the appeal and the cross-appellant worker the costs of the cross-appeal.

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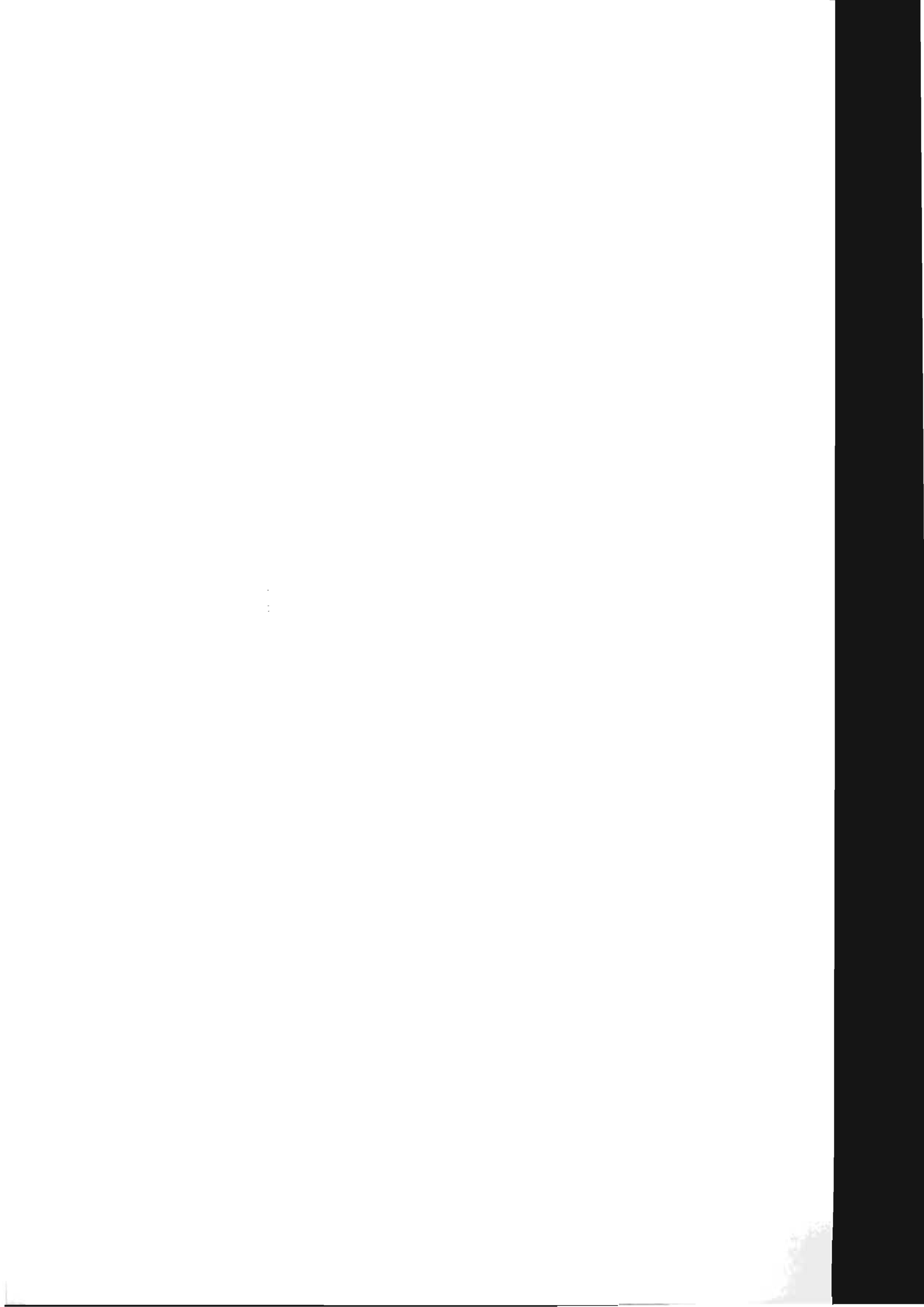

In the Privy Council

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v.

MARINUS MILTENBURG

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