

Harjivanlal Balkison (a firm) - - - - *Appellants*

v.

Radhakison Gopikison (a firm), now represented by
Juthalal Motilal, Receiver - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT BOMBAY

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL, DELIVERED THE 9TH NOVEMBER, 1937.

Present at the Hearing :

LORD THANKERTON.

SIR SHADI LAL.

SIR GEORGE RANKIN.

[*Delivered by* LORD THANKERTON.]

This is an appeal from a decree dated the 25th September, 1934, of the High Court of Judicature at Bombay, Appellate Civil Jurisdiction, reversing a decree of that Court in its Original Civil Jurisdiction dated the 27th July, 1933.

The present suit, which may be conveniently referred to as the Bombay suit, was brought by the respondents, a firm, against the appellants, a firm, on the 15th January, 1929, for the recovery of Rs.3,219-4-6, as the balance due from the defendants in respect of certain transactions between the parties in cotton, wheat and silver and interest thereon up to the date of suit. The above balance was composed of Rs.476-11-9 in respect of transactions during 1927-1928 in cotton and Rs.2,569-4-9 in respect of transactions in wheat and silver. The balance of Rs.476-11-9 in respect of the cotton transactions was arrived at after appropriating to these transactions the remittances by the defendants amounting to Rs.18,000 or thereby referred to in the counter-claim. At a late stage the defendants admitted liability in respect of the wheat and silver transactions, but they maintained a counter-claim for a refund by the plaintiffs of a sum of Rs.18,154, which had been paid to them by the defendants in various amounts during the period over which the transactions took place.

The counter-claim had been made by the defendants in a supplemental written statement, filed on the 3rd December, 1929, in which they also challenged the cotton transactions as void in respect that they did not comply with the statutory form prescribed by the Bye-laws of the

East Indian Cotton Association, Ltd., and were, therefore, rendered void by the provisions of the Bombay Cotton Contracts Act, (XIV of 1922); and they maintained that, accordingly, the plaintiffs were not entitled to appropriate any of the defendants' monies to the losses on such transactions, but were bound to return them to the defendants.

The issue as to the validity of the cotton transactions, along with three of the other issues, which are not now material, was selected for trial in the first instance by Kemp J., who, by a judgment dated the 18th February, 1930, held the cotton transactions subsequent to the 16th January, 1928, to be void; on appeal, the High Court held on the 12th August, 1930, that the whole of the transactions were void. By consent, this decision followed the decision of the High Court in a similar suit also then before them, their decision in which was afterwards affirmed by His Majesty in Council (*Radhakisson Gopikisson v. Balmakund Ramchandra*, L.R. 60 I.A. 63.).

The suit having returned for trial of the remaining issues before Kania J., on the 26th July, 1933, the defendants, as already stated, admitted their liability for the wheat and silver transactions, and the plaintiffs proposed a new issue as to whether the counter-claim was barred by reason of the dismissal of suit No. 113 of 1928 at Cawnpore, which may be conveniently referred to as the Cawnpore suit. The learned Judge disallowed the issue, on the ground that it was not pleaded, that it was too late, and that, although it was a question of law, it would require to be argued on facts which were not pleaded and for which the necessary documents were not disclosed. He further refused an application for amendment of the plaintiffs' reply to the counter-claim in order to raise the issue of *res judicata*, and he declined a tender by the plaintiffs of the plaint, written statement and judgment in the Cawnpore suit as evidence. On the 27th July, 1933, Kania J. held that the plaintiffs were not entitled to any indemnity from the defendants in respect of the losses in the cotton transactions and that the defendants were entitled to recover under their counter-claim. He therefore dismissed the suit, and gave the defendants a decree for the amount of their counter-claim, which was agreed at the figure of Rs.16,244-3-0.

On an appeal by the plaintiffs, the Appellate Court, on the 13th March, 1934, allowed the plaintiffs to amend their reply to the counter-claim so as to raise the plea of *res judicata* in regard to the counter-claim, and remanded the case to Kania J. for trial of the issue. On the 31st August, 1934, the case came on before Kania J., who delivered judgment in favour of the defendants, holding that the Cawnpore suit was confined to the question whether the defendants had lent money to the plaintiffs, whereas the counter-claim was for agency accounts. On appeal, the Appellate Court held in favour of the plea of *res judicata* and dismissed the counter-claim, and passed a decree in favour of the plaintiffs for Rs.2,179-4-3. Rangnekar J.

expressed the opinion that the case fell within section 65 of the Indian Contract Act, and that the plaintiffs were not bound to restore to the defendants monies which the former had applied, or had become bound to apply, in carrying out the instructions of the defendants. The present appeal is by the defendants as appellants from that decree of the High Court and they ask for restoration of the decree of Kania J.

As, in the opinion of their Lordships, the appeal fails on the merits of the counter-claim, it will be unnecessary to express any decision on the plea of *res judicata*.

Their Lordships agree with Rangnekar J. that the counter-claim falls to be dealt with as a claim for the restoration of an advantage under section 65 of the Contract Act, and that, if the respondents have applied the Rs.18,000, or have become legally liable to meet losses arising from the carrying out of the appellants' instructions, the respondents cannot be said to have received an advantage within the meaning of section 65.

The respondents employed a firm in Bombay, Chimaniram Motilal, to put through the cotton transactions in the market; it was admitted that there were no written contracts between them. The appellants sought to maintain (first) that the respondents had failed to prove their liability to Chimaniram Motilal, and (secondly) that the contracts between the respondents and Chimaniram Motilal were void, in respect that they were not in writing, as required by by-law 81 of the East Indian Cotton Association, Ltd.

In their Lordships' opinion, neither of these contentions is now open to the appellants. The respondents proved that these transactions had been entered into with Chimaniram Motilal, and that the resulting losses had been debited as between them. The only points taken by the appellants were that these transactions had not been entered into on their behalf, and that they were void because they were not in conformity with by-law 81. This is made clear by the refusal of Kania J. on the 27th July, 1933, to admit further evidence of the incurring of the liability to Chimaniram Motilal as unnecessary. The first of these contentions is only now maintained to the extent that there was no privity of contract between the appellants and Chimaniram Motilal, but that would make no difference, if the respondents have incurred the liability to Chimaniram Motilal in carrying out the appellants' instructions, which is not now disputed. As regards the argument before the Appellate Court, Rangnekar J. states:

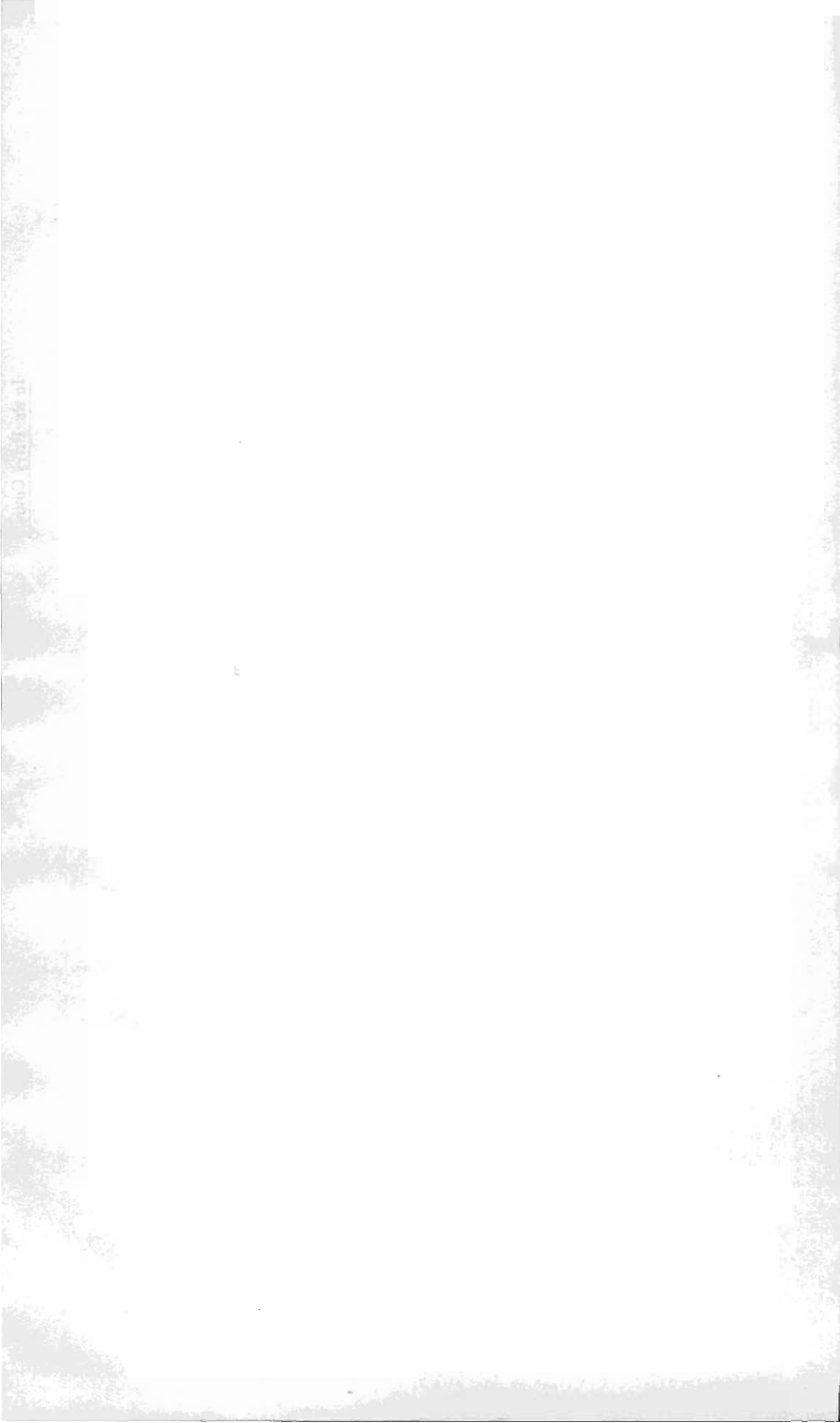
"It was suggested that there was no clear evidence that the appellants paid over the sum to the firm of Chimaniram Motilal. But that there was a loss to the appellants which they were bound to make good to that firm is not challenged. Their liability to Chimaniram Motilal is not challenged, and on principle it makes no difference, particularly as they in fact appropriated the sums received from the respondents in their accounts, which are not challenged."

As regards the alleged invalidity of the contracts between the respondents and Chimaniram Motilal in respect that they were not in writing, this is clearly a matter which should have been raised in the pleadings and put in issue. It is not raised in the pleadings and is not the subject of an issue. As pointed out by Rangnekar J., there are contracts known as hedge contracts which do not require to be in writing, and the respondents were entitled to notice of such a contention, and the exact nature of the contracts in question should have been determined on evidence as to their circumstances. The learned trial Judge appears to have wrongly assumed that by-law 81 necessarily applied to them, as is pointed out by Rangnekar J. Under these circumstances, this contention is not open to the appellants.

The appeal accordingly fails on the merits, and it is therefore unnecessary to deal with the plea of *res judicata*, which raises some difficult questions. The Cawnpore suit was brought by the present appellants on the 3rd September, 1928, just over four months before the present suit was filed on the 15th January, 1929. The Cawnpore suit was dismissed on the 4th April, 1929. Three questions arise in this connection. In the first place, was that dismissal under rule 2 or rule 3 of Order 17? If it was under rule 2, the plea of *res judicata* is not available, but, while the terms of the judgment would seem to suggest that the dismissal was under rule 3, it is not clear whether the granting of time had been before or after the first hearing. In the next place, the two cases were concurrent, and the amendment which added the plea was not applied for until after the respondents had allowed the issue as to the validity of the contracts to be finally determined, which might bring the case within those in which the Court should decline to allow the plea to be raised, on the ground that, though the issue might have been raised in the earlier suit, it could not be held that it ought to have been so raised, as both elements are necessary to the plea under explanation IV of section 11 of the Civil Procedure Code. Lastly, there remained the question as to whether the Appellate Court were right in overruling the refusal of Kania J. to allow the amendment at such a late stage in the case. Their Lordships express no opinion on any of these points.

It should be added that the appellants did not maintain that the payments should be appropriated in the account, which does not deal separately with the cotton, wheat and silver items, under the rule in *Clayton's case*, (1816) 1 Mer. 572, as it would make no material difference in the result.

Their Lordships will accordingly humbly advise His Majesty that the decree of the High Court dated the 25th September, 1934, should be affirmed, and that the appeal should be dismissed with costs.



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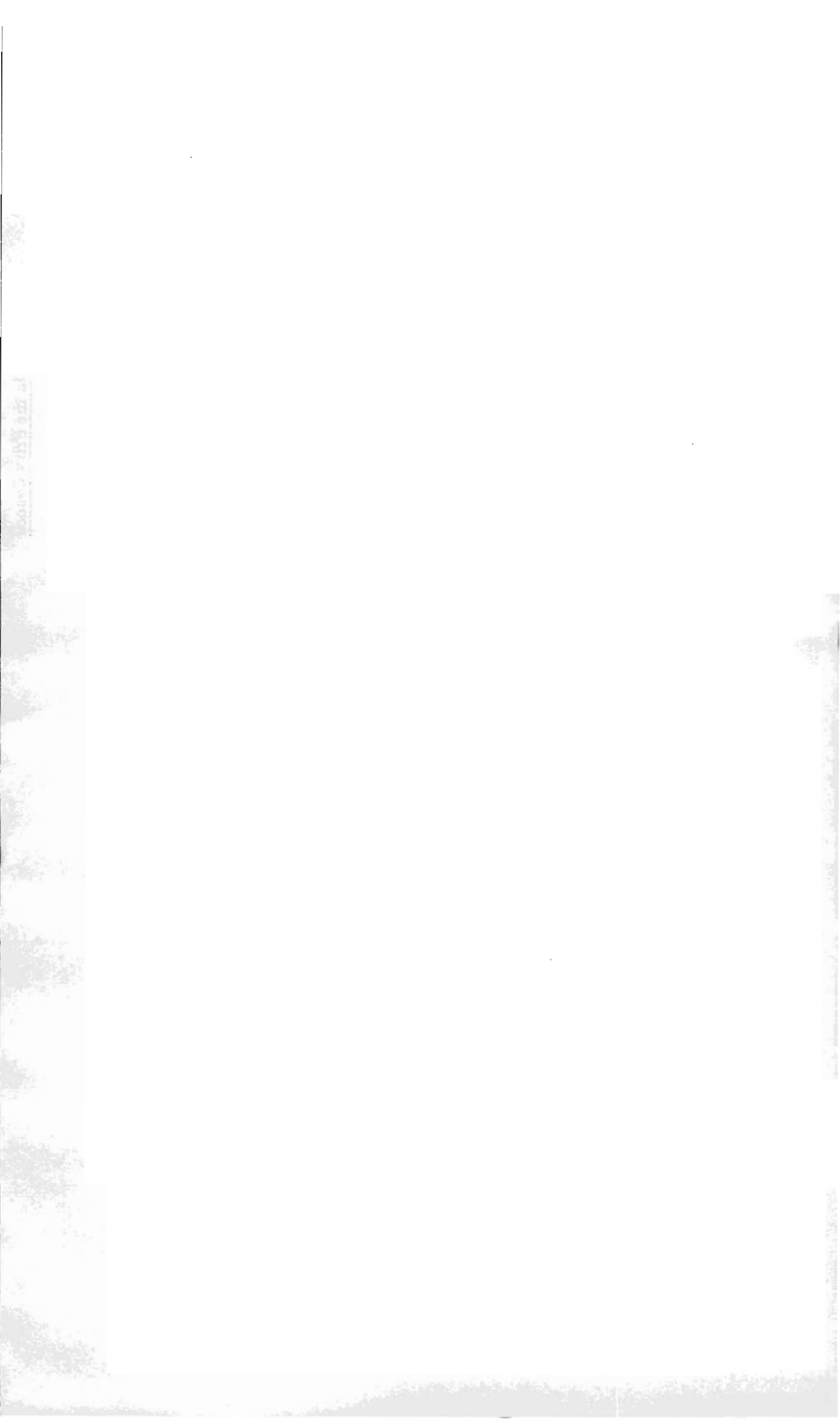
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