

CAS. 22

46, 1954

No. 8 of 1954.

In the Privy Council.

ON APPEAL
FROM THE WEST INDIAN COURT OF APPEAL.

UNIVERSITY OF LONDON
W.C.1.
23 MAR 1955
INSTITUTE OF ADVANCED
LEGAL STUDIES

BETWEEN

GEORGE HANOMAN (Defendant) *Appellant*

AND

ARCHIBALD ROSE (Plaintiff) *Respondent.*

38024

Case for the Appellant.

RECORD.

10 1. This is an appeal by the Appellant (who was the Defendant in the action) from an order of the West Indian Court of Appeal (Perez, Jackson and Bell, C.JJ.) dated the 14th November 1952 made on an appeal from the Supreme Court of British Guiana by which, after hearing Counsel only on a preliminary point raised by the Court of Appeal itself, it was ordered that the appeal of the Respondent (who was the Plaintiff in the action) from the judgment of Boland, C.J., British Guiana (Acting) dated 18th September 1951 be dismissed and that the Respondent's action be dismissed and that the said judgment of Boland, C.J., on the counter-claim of the Appellant be dismissed and that no costs be allowed to either the Respondent or the Appellant in the Supreme Court of British Guiana or in the West Indian Court of Appeal. By his said Judgment Boland, C.J., had dismissed the Respondent's claim and granted to the Appellant on his counter-claim a declaration, an injunction, and a sum of damages for trespass by the cattle of the Respondent, and had ordered the Respondent to pay the Appellant's taxed costs of the action and counter-claim.

20 2. The preliminary point raised by the West Indian Court of Appeal (hereinafter called the Appeal Court) was that the proper parties were not before the Court. The Appeal Court did not enter into the merits of the action or the counter-claim, and by its order in fact set aside the whole
30 proceedings.

In these circumstances since the judgment of Boland, C.J., was in favour of the Appellant and was, the Appellant submits, correct, this Case is confined to the facts and considerations which appear to be material to the jurisdictional point on which alone the Appeal Court founded its judgment.

3. The dispute between the parties related to the rights of depasturing cattle on a piece of land situate in the County of Berbice in the Colony of British Guiana and known as Plantation Susannah.

4. Prior to the year 1917 the law applicable in the Colony of British Guiana was Roman-Dutch law. As from 1st January 1917 by virtue of the Civil Law of British Guiana Ordinance Chapter 7 Roman-Dutch law ceased to apply to the Colony, and it was provided that the common law of the Colony should be the common law of England including therewith the English doctrines of Equity (Section 3 (b) of the Ordinance).

The general abrogation of Roman-Dutch law and the introduction of 10 English law was, however, subject to a number of qualifications. The material qualifications for the purposes of the present case were as follows :—

(A) Existing rights were saved (Section 2 (3)).

(B) The English common law of real property was not to apply to the Colony ; instead there was to be one common law for both immovable and movable property in the Colony ; and all questions relating to such property were to be adjudged determined construed and enforced so far as possible according to the common law of England applicable to personal property (Section 3 (c) 20 and (d)).

(C) An exception was made in respect of mortgages, easements, *profits à prendre* and real servitudes. With regard to these it was provided that the applicable law and practice should be the law (i.e. Roman-Dutch law) and practice then administered in such matters by the Supreme Court of British Guiana (Section 3 (4) (b)). Statutory provision was subsequently made for the method of transferring the ownership of land including easements, *profits à prendre* and real servitudes. This was contained in the Deeds Registry Ordinance Chapter 177. Under Section 12 of this Ordinance 30 the title to immovable property cannot be transferred except by the passing and executing of a transport before the Court which on being passed requires to be registered in the Registry constituted under the Ordinance. By Section 21 of the Ordinance it is provided that a transport shall vest in the transferee the full and absolute title to the immovable property or to the rights and interests described in the transport subject to statutory claims and registered encumbrances and other leases. The procedure for the transfer of land constituted by the Ordinance does not differ substantially from the procedure thitherto prevailing. 40

p. 82.

5. In the year 1862 the ownership of Plantation Susannah became divided into an Eastern Half and a Western Half and subsequently, as from the year 1876, the Western Half was sub-divided into two halves (1) the East Half of the Western Half (referred to in the proceedings and hereinafter as the " Multiple Proprietors portion ") and (2) the West Half of the Western Half.

The devolution of these three portions of Plantation Susannah is dealt with shortly in the next three paragraphs of this Case.

THE EASTERN HALF

6. (1) By a Transport dated 3rd June 1862 one Paris Britton, who p. 126.
on that date had acquired the whole of Plantation Susannah, transported
or transferred the Eastern Half to one Dennis Burns.

The Transport was expressed to be "subject to the condition that
each of the proprietors of the Eastern and Western Halves of the said
plantation shall have the right of grazing cattle over the whole plantation."

(2) The Eastern Half subsequently passed through several proprietors p. 143.
to Bookers Demerara Sugar Estates Limited (hereinafter called "Bookers")
10 who acquired the same under a Transport from one Francis Sam dated
15th March 1937. This Transport contained a reservation or condition in
similar terms to that mentioned in sub-paragraph (1) above, which is
hereinafter referred to as the "Britton-Burns servitude."

(3) The Appellant purchased the Eastern Half from Bookers on p. 148.
25th June 1947 and, having paid the full purchase price, was given
immediate possession thereof.

On 19th December 1947, the date of the issue of the writ in this action,
the Appellant was in beneficial occupation of the Eastern Half; but
Bookers remained the legal owners, since no transport from Bookers to
20 the Appellant had been effected in accordance with the law of British
Guiana.

It was upon the non-joinder of Bookers, the legal owners, in the
proceedings that the Appeal Court based its decision.

THE MULTIPLE PROPRIETORS PORTION

7. (1) By a Transport dated 16th September 1876 Paris Britton p. 127
transported or transferred this portion to one Thomas Howard. This
portion subsequently became sub-divided into a number of small lots.

The Transport to Howard was expressed to be "with right of free
pasturage to Thomas Howard over the whole of the said Plantation and
30 subject to a right of pasturage over the said Eastern Half of the Western
Half of the said Plantation to the said Paris Britton his heirs executors
administrators and assigns." These rights are hereinafter referred to as
"the Howard Reservations."

(2) The Respondent acquired one of these lots by a Transport from
one Marshall dated 21st June 1924. He retained this lot at the date of p. 137.
the commencement of these proceedings, but subsequent to the issue of
his Writ he transported or transferred it to his son.

THE WEST HALF OF THE WESTERN HALF

8. On 8th July 1878, after the death of Paris Britton, this portion
40 passed to one Charles Edwin Hooton under Letters of Decree dated the
8th July 1887 in pursuance of a sale at execution. p. 131.

By a Transport dated 22nd March 1888 the Respondent acquired p. 132.
this portion from one Thomas Dalgleish, assignee of the creditors of
Hooton.

The Letters of Decree and the said Transport both contained an annotation of the Howard Reservations (relating to the Multiple Proprietors portion) but neither contained a transport of the Britton-Burns servitude (relating to the Eastern Half of Plantation Susannah).

9. Between the 31st August and the 1st November 1947 cattle belonging to the Respondent entered on the Eastern Half of Plantation Susannah and were impounded by the Appellant. Boland, C.J., found as a fact that these cattle came from another property of the Respondent called Plantation Bohemia, not from his Susannah lands.

p. 87, l. 6.
p. 111, ll. 3-14.

p. 111, ll. 3-14.

Subsequent to the issue of the Writ herein, cattle from the Respondent's Susannah lands also entered on the Eastern Half: their entry and impounding was allowed to be dealt with by amendments of the Pleadings, but merely as material to the question of whether an injunction ought to be granted and not as a separate ground of substantive relief.

p. 147.

10. On 10th December 1947 the Respondent's Solicitor (Sir Eustace Woolford) wrote to the Appellant's Solicitors (Messrs. Cameron & Shepherd) as follows:—

“ Referring to my conversation with your Mr. Edward de Freitas as regards the proposed transport by Messrs. Booker Bros. McConnell & Co. Ltd., to Mr. G. Hanoman of the portion of Plantation Susannah Rust, Courantyne, Berbice, sold to him and with respect to which Mr. de Freitas promised to furnish me with the date of the agreement of sale. I shall be glad if I may be informed of this as early as possible: and if, as I also understand, Mr. Hanoman has not only already paid the purchase price of the property in full but has also been put in possession, I shall also be glad if you will now confirm these facts and so avoid any necessity for joining Messrs. Booker Bros. McConnell & Co. Ltd. in an action that Mr. A. Rose and others propose to take against Mr. Hanoman for certain acts of trespass committed by him.”

p. 148.

By letter dated 16th December 1947 the Appellant's Solicitors stated that the Eastern Half had been acquired by the Appellant from Bookers and that he had already paid the purchase price in full and was in beneficial occupation of the property and added:—

“ Mr. Hanoman has also instructed us to say that there will be no need to join Messrs. Bookers Demerara Sugar Estates Limited in the action which you say Mr. A. Rose and others propose to take as that Company has no beneficial interest whatsoever in the above-mentioned property.”

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pp. 1-18.
p. 154.

11. The writ in this action was issued on 19th December 1947 and thereafter pleadings were delivered, the Respondent's Statement of Claim being amended three times and the Reply and Defence to Counter-claim once.

By the statement of Claim as finally amended the Respondent, after pleading his title to the West Half of the Western Half of Plantation Susannah and to part of the Multiple Proprietors portion adjacent thereto,

alleged that ever since becoming proprietor of such lands he had depastured his cattle on the whole Plantation as he was entitled to do ; but that the Appellant, who was in occupation of the Eastern Half of the said Plantation as purchaser from Bookers, who by their transport were bound by the Britton-Burns servitude of which the Appellant had express notice, had wrongfully impounded the Respondent's cattle ; and the Respondent claimed an injunction to restrain the Appellant from impounding the Respondent's cattle, a declaration that the Respondent had acquired a prescriptive right to depasture his cattle on the Eastern Half of the said
10 Plantation and damages.

The Appellant by his Defence (*inter alia*) denied that the Respondent had any right by transport or otherwise to depasture cattle on the Eastern Half of Plantation Susannah and alternatively that any right the Respondent had to depasture cattle on the Eastern Half was confined to cattle used on the West Half of the Western Half of the said Plantation, and that the cattle which the Respondent had depastured on the Eastern Half had come from Plantation Bohemia and not from any part of Plantation Susannah. He relied on the Pounds Ordinance Chapter 93 and also
20 of British Guiana Ordinance Chapter 7. The Appellant counter-claimed for a declaration that the Respondent had no right to depasture his cattle on the Eastern Half of the said Plantation or alternatively that any right of grazing the Respondent might have was confined to cattle used on the Western Half of the said Plantation, for damages for trespass and for an injunction to restrain the Respondent from trespassing upon the Eastern Half of the said Plantation.

In his Amended Reply and Defence to Counter-claim the Respondent (*inter alia*) alleged that he had acquired a prescriptive title to graze cattle over the whole of Plantation Susannah under Section 4 of the Civil Law
30 of British Guiana Ordinance Chapter 7.

12. The Action came on for hearing before Acting Chief Justice Boland in the Supreme Court of British Guiana on the 8th May 1951 and the hearing was continued on the 9th, 10th, 11th, 16th, 17th, 18th, 22nd, 23rd, 26th, 29th, 30th and 31st May, the 4th, 5th, 6th, 11th, 12th, 13th, 14th, 18th, 19th, 20th, 21st, 25th and 26th June 1951. In the course of the hearing twenty witnesses gave oral evidence. Their evidence is not material to the preliminary point raised by the Appeal Court.

13. On the 18th September 1951 Boland, C.J., delivered a reserved
40 judgment. By this judgment it was ordered that the Respondent's claim be dismissed, that judgment be entered for the Appellant on his Counter-claim and that the Respondent should pay to the Appellant the sum of \$200 as damages for trespass. It was further ordered and declared that neither by virtue of transport nor prescription was the Respondent entitled to the servitude of grazing his cattle over the Eastern Half of Plantation Susannah. It was further ordered that the Respondent was to be restrained from grazing his cattle on the said Eastern Half and that the Respondent was to pay the Appellant's taxed costs of the claim and counter-claim. pp. 82-112

p. 82, l. 35.

In the course of his judgment Boland, C.J., stated as follows :—

“ On the 25th June, 1947, the Defendant acquired from Messrs. Bookers Sugar Estates Limited the eastern half of Plantation Susannah. He has not yet obtained formal transport, but by letters which passed between Plaintiff’s counsel and Defendant’s counsel, it was agreed that no objection would be taken in this action against the assertion of any right in the Defendant solely on the ground that he is not yet the owner by transport, and accordingly, for the purposes of this case the Defendant is regarded as if transport of these lands had already been duly passed to him at the date of the impounding of the cattle.” 10

p. 111, l. 3.

14. The learned Acting Chief Justice found as a fact that the Respondent’s cattle which had been impounded before the issue of the Writ had all come from the Respondent’s Plantation Bohemia and not from his Susannah lands and held as follows :—

p. 86, ll. 9–13.

(1) The condition annotated on the Britton-Burns transport (i.e. the Britton-Burns servitude) created a real or *praedial* servitude capable to belong and available to be transferred to all persons who might be proprietors of the Western Half entitling such proprietors to depasture their cattle on the Eastern Half. 20

p. 87, ll. 32–37.

(2) On the true construction of the Britton-Burns servitude the right to graze cattle was confined to cattle which would usually be kept on the dominant tenement and did not extend to cattle from elsewhere.

p. 93, ll. 14–16.

(3) The right of pasturage over the whole of Plantation Susannah given to Howard by the Britton-Howard Transport was a personal right which was extinguished by Howard’s death which was presumably many years ago.

p. 98, ll. 17–32.

(4) Where a plaintiff claims by reason of his ownership of land that he has a right of servitude over an adjoining piece of land (not being the original grantee of the servitude) it is essential for him (apart from prescriptive user) to prove that he has acquired not only the dominant tenement but the right to servitude over the servient tenement by virtue of a formal transport transferring to him the servitude also unless he acquired the land and servitude by inheritance. 30

p. 100, ll. 38–45.

But the Letters of Decree on the sale to Hooton (paragraph 9 of this Case) made no reference to the Britton-Burns servitude which accordingly had been extinguished.

p. 109, l. 1.

(5) The Respondent had not established a prescriptive title. 40

p. 109, l. 11.

(6) In any event the Respondent’s claim failed because the cattle impounded before the issue of the Writ came from the Respondent’s Plantation Bohemia.

In conclusion the learned Acting Chief Justice stated as follows :—

p. 111, ll. 3–15.

“ Assuming that the impounding in August and September, 1947 was in violation of Plaintiff’s right of servitude, the evidence

10 “ of these alleged subsequent acts of seizing of Plaintiff’s cattle
 “ was material in determining whether the Plaintiff should be granted
 “ the injunction he claimed. But apart from that, both Plaintiff
 “ and Defendant in their pleadings asked the Court for a declaration
 “ relating to the rights of servitude for grazing cattle over the
 “ eastern half, and although the Court has found the acts of seizing
 “ cattle in August and September 1947, which is the cause of action
 “ in these proceedings, were in respect of Bohemia cattle which as I
 “ hold were never at any time in law included in the right of servi-
 “ tude, yet for the purpose of the declaration asked for by both
 “ sides, it became necessary to admit evidence of those subsequent
 “ acts, some of which admittedly were the seizing of animals that
 “ came from Plaintiff’s Susannah lands.”

15. By Notice of Appeal Motion dated the 6th December 1951 the Respondent appealed to the West Indian Court of Appeal. The Appeal came on for hearing before Chief Justices Mathieu Perez, Jackson and Bell on 7th November 1952, whereupon the Appeal Court of its own motion raised the preliminary point that the proceedings were wrongly constituted in the absence of Bookers who were the legal owners of the Eastern Half of Plantation Susannah, and at the request of counsel granted an adjournment to 11th November to enable them to consider the point. At the resumed hearing on 11th November 1952 Counsel for the Respondent adopted the point and Counsel for the Appellant argued against it and finally submitted that the Appeal Court should direct Bookers to be served with the notice of appeal, if the Appeal Court held that they were necessary parties to the proceedings, pursuant to Rules 5 (1) and 16 (1) of the West Indian Court of Appeal Rules 1945. p. 113.

First Supplemental
Record.

These Rules provide as follows :—

30 “ 5. (1) A true copy of the notice of appeal shall be served
 “ upon all parties directly affected by the appeal and it shall not be
 “ necessary to serve any party not so affected ; but the Court of
 “ Appeal may direct notice of appeal to be served on all or any
 “ parties to the action or other proceeding, or upon any person not a
 “ party, and in the meantime may postpone or adjourn the hearing
 “ of the appeal upon such terms as may be just, and may give
 “ such judgment and make such order as might have been given or
 “ made if the persons served with such notice had been originally
 “ parties.”

40 “ 16. (1) The Court of Appeal shall have all the powers and
 “ duties as to amendment or otherwise of the Court . . .”

By Rule 2 of these Rules “ the Court ” is defined as being the Supreme Court in the Colony.

The practice and procedure of the Supreme Court of British Guiana is regulated by the Supreme Court of Judicature Ordinance Chapter 10. But the rules of court still in force are the British Guiana Rules of Court 1900 as subsequently amended which are substantially in English form. Rule 13 of Order 14 provides *inter alia* that “ no action shall be defeated by reason

of the non-joinder of parties “and that” the Court may at any stage of the proceedings order that the names of any parties who ought to have been joined or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all questions involved in the action be added.”

p. 116.

p. 117, l. 7.

16. On 14th November 1952 the Appeal Court delivered a single reserved judgment the substance of which was as follows : After referring to the facts, the Court prefaced its reasons by observing that the trial had been conducted as if the question of servitude or no servitude was the only point for decision, and that it was clear that this question was the main if not the only point to which attention was directed, and that at no time was the question of trespass as divorced from servitude discussed. After pointing out that according to the law of the colony the transfer of land required completion by transport, the Court in its judgment proceeded as follows :—

p. 118, ll. 21-32.

“ The action in this case proceeded by the consent of counsel on both sides on the basis that the transfer from Bookers Demerara Sugar Estates Limited, to the Defendant had been implemented by transport, and as if the Defendant was, in fact and in law, the proprietor. The action was based upon a complete misconception of the legal position of the Defendant. The proceedings were started and were continued upon that basis from which the trial judge was led by both parties to arrive at an erroneous conclusion as to their position. 20

“ It is manifest therefore that if judgment had been given on the claim for the Plaintiff it would have been of no value as the owner, i.e., the proprietor of the alleged servient tenement was not before the Court and the judgment given in favour of the Defendant on the counter-claim in so far as it relates to the declaration and injunction is of no value as the defendant was not at the time and is not now the owner of the servient tenement. 30

“ This Court is bound to take notice of the fact that the proper party was not before the Court.”

The Appeal Court then cited the following cases which the Court considered to be authority for the proposition that there was no other course open to the Court but to dismiss the appeal and adjudge that the action and counter-claim be dismissed :—

(A) *Fausett v. Mark*, 1943 L.R. B.G. p. 354.

(B) *Connecticut Fire Ins. v. Kavanagh* (1892) A.C. p. 473.

(C) *Glasgow Navigation Co. v. Iron Ore Co.* (1910) A.C. p. 293. 40

(D) *Sun Life Assurance Co. of Canada v. Jervie*, 60 T.L.R. p. 315.

(E) *Sutch v. Burns* 60 T.L.R. p. 317.

p. 119, ll. 16-23.

The Appeal Court concluded their judgment as follows :—

“ We are not unmindful of the fact that the original cause of the action was the alleged trespass of the plaintiff’s cattle on the

“ tenement of the defendant ; that question was never pursued at
 “ the trial. Whether the entry of the cattle was or was not a
 “ trespass is so inextricably interwoven in the case as presented
 “ with the existence or non-existence of the servitude claimed that
 “ we are of the opinion that until the question of servitude be
 “ considered with the proper parties before the Court the judge
 “ should have declined to decide the question of trespass or no
 “ trespass.

10 “ The proper parties were not before the Court, and, therefore,
 “ there is nothing for us to do but to follow the cases already
 “ mentioned and to dismiss the appeal and adjudge the action in the
 “ Court below to be dismissed and that the judgment on the counter-
 “ claim be set aside and that no costs be allowed to either side here
 “ or in the Court below.

“ Taking the view that we have done, we think it unnecessary
 “ and in fact inexpedient to deal with the other points raised in the
 “ case and we refrain from expressing any opinion thereon.”

The Appeal Court did not make any reference in its judgment to the
 submission of the Appellant’s Counsel under West Indian Court of Appeal
 20 Rules, Rules 5 (1) and 16 (1).

17. It is respectfully submitted that the Court of Appeal erred in its
 view that the action proceeded on the basis that the transfer from Bookers
 to the Appellant had been implemented by transport and as if the Appellant
 was in fact and in law the proprietor. It was not alleged in any of the
 pleadings that the Appellant was the legal owner but merely that he was
 the beneficial owner ; and as appears from the letters referred to in
 paragraph 10 of this Case the only agreement between the parties was that
 no objection would be taken because of the non-joinder of Bookers. It is
 also submitted that in this respect the observations of Boland, C.J., set out
 30 in paragraph 13 of this Case did not with complete accuracy describe the
 agreement between the parties.

18. The Appellant respectfully makes the following submissions on
 the judgment of the Appeal Court :—

(1) At all material times Bookers had no beneficial interest of
 any kind in the Eastern Half of Plantation Susannah. The Appel-
 lant had paid the purchase money for the property and had received
 possession thereof : Bookers had nothing more than a “ *nuda*
proprietas ” in the property. In these circumstances it is sub-
 mitted that both the Supreme Court and the Appeal Court had
 40 power to grant the declarations prayed for. Even if such a
 declaration would not have been binding upon Bookers nor operated
 as a judgment *in rem*, it would have been of value to the parties as
 defining their mutual position.

(2) Even if (contrary to the Appellant’s submission) there was
 no jurisdiction to grant a declaration, it was, nevertheless, the duty
 of the Appeal Court to deal with the case in such a manner as not
 to render the proceedings completely abortive. The trial in the

Supreme Court had lasted for no less than 26 days : 20 witnesses were called to give evidence : and all the issues had been dealt with by the Judge of first instance in what, it is submitted, was a most comprehensive and exhaustive judgment. The costs incurred must necessarily have been very heavy.

(3) The Appeal Court, if it was right in holding that there was no jurisdiction to grant a declaration should, it is submitted, have adopted one or other of the following courses :—

(A) The Appeal Court should have heard the appeal on its merits and granted to the successful party the relief prayed for 10 by him other than the claim for a declaration, or alternatively

(B) The Appeal Court should have exercised its power under the West Indian Court of Appeal Rules, Rules 5 (1) and 16 (1) and directed notice of the Appeal to be served on Bookers and directed that the hearing be adjourned for such period and on such terms as the Court might think fit. The present case was, it is submitted, pre-eminently a case in which such power ought to have been exercised.

19. The Respondent humbly submits that this Appeal should be allowed with such consequential directions as may seem proper, for the 20 following, amongst other

REASONS

- (1) BECAUSE Bookers were not a necessary party to the proceedings.
- (2) BECAUSE there was jurisdiction to grant the whole of the relief prayed for by the Appellant or the Respondent without Bookers being joined as a party to the proceedings, or alternatively there was jurisdiction to grant the injunction and other relief claimed by the Appellant or the Respondent (other than a declaration) without 30 Bookers being joined as a party to the proceedings.
- (3) BECAUSE it was common ground that the Appellant was in actual beneficial occupation of the whole of the eastern half of Plantation Susannah and an occupier is entitled to maintain an action for trespass against anyone other than the legal owner and to have his occupation protected by injunction if necessary without being under any obligation to prove a legal title.
- (4) BECAUSE none of the reported cases relied upon by the Appeal Court is any authority for the order which 40 the Appeal Court made.
- (5) BECAUSE if Bookers were a necessary party to the proceedings the West Indian Court of Appeal in exercise of the power conferred by Rules 5 (1) and 16 (1) of the

West Indian Court of Appeal Rules ought to have directed notice of appeal to be served on Bookers, and directed an adjournment to give Bookers an opportunity to appear.

- (6) BECAUSE the judgment of the learned Acting Chief Justice of British Guiana was right and the judgment of the Appeal Court was wrong and ought to be reversed in so far as it varied the order of the Supreme Court.

ANDREW CLARK.

G. C. D. S. DUNBAR.

In the Privy Council.

ON APPEAL
from the West Indian Court of Appeal.

BETWEEN

GEORGE HANOMAN . . . *Appellant*

AND

ARCHIBALD ROSE . . . *Respondent*

Case for the Appellant.

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