ABSTRACT OF THE PROCEEDINGS

COUNCIL OF THE GOVERNOR GENERAL OF INDIA

LAWS AND REGULATIONS.

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ABSTRACT OF THE PROCEEDINGS

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Abstract of the Proceedings of the Council of the Governor General of India, assembled for the purpose of making Laws and Regulations under the provisions of the Act of Parliament 24 & 25 Vic., cap. 67.

The Council met at Government House on Monday, the 15th March 1875.

PRESENT :

His Excellency the Viceroy and Governor-General of India, G. M. S. I., *presiding.*
His Honour the Lieutenant-Governor of Bengal.
His Excellency the Commander-in-Chief, G. C. B., C. S. I.
The Hon'ble B. H. Ellis.
Major-General the Hon'ble Sir H. W. Norman, K. C. B.
The Hon'ble Arthur Hobhouse, Q. C.
The Hon'ble E. C. Bayley, C. S. I.
The Hon'ble Sir W. Muir, K. C. S. I.
The Hon'ble R. A. Dalyell.
The Hon'ble H. H. Sutherland.
The Hon'ble J. R. Bullen Smith.
The Hon'ble Sir Douglas Forsyth, K. C. S. I.

PORT-DUES BILL.

The Hon'ble MR. HOBHOUSE presented the final Report of the Select Committee on the Bill to consolidate and amend the law relating to Ports and Port-dues, and moved that the reports on that Bill be taken into consideration. He said that this was the motion which was postponed on the last occasion, and he would briefly refer to the points which the Select Committee on the Bill had since considered. The Committee met and discussed the matters for the sake of which the Bill was postponed, and the result was that two small, and as he thought purely verbal, alterations had been introduced in the Bill. The first of these was in section 5, where the Committee had altered the explanation by saying that " high-water-mark was the highest point reached by ordinary spring-tides at any season of the year." As he believed, that was exactly the meaning which would have been assigned to the expression which was used before. Then they spoke of "ordinary spring-tides," and all that would have to be shown was that a tide was an ordinary spring-tide; then the high-water-mark of that tide would designate

the limits of the port. At all events the limits of the port would not be of less extent than the high-water of that tide. But as it appeared that there were in Calcutta two ordinary spring-tides, and as it was possible to doubt whether each class of such tides was entitled to be called "ordinary spring-tides," or whether some calculation would be made as to which class of tides was most frequent, so as to call that which was most numerous the "ordinary spring-tide," the Committee had introduced the words "at any season of the year," so that the ordinary spring-tide of any season might be taken as marking the limits of the port. He was sorry to see from a memorial which came in that morning, that the riparian owners were of opinion that they were injured by this alteration. His belief was that they were not injured. If Act XXII of 1855 was to be interpreted in a Court of law, he thought there was as much chance of its being construed more unfavourably to the riparian owners, as there was of its being construed more favourably to them, than was actually done by the Bill. The present law said that "high-water-mark" was to be the limits of the port, and it was just as easy to construe "high-water-mark" to be the highest mark that the water ever reached, as to construe it to be anything less than what the Bill construed it to be. What the Bill did was to eliminate one element of uncertainty. He would not enter again into the arguments upon which the Committee had arrived at the principle imported into the Bill, but nobody had come forward to say that it was not a reasonable principle, or that it was not necessary for the protection of the public who use a port, to bring under public control all those pieces of ground which, under the ordinary operations of nature, were covered with water.

The next alteration was also, as it seemed to him, of a verbal character: it was in section 60, where, instead of saying merely that hospital port-dues might be applied for providing medical aid for the shipping and seamen in a port, the Bill now said that it might be applied for providing sanitary supervision and medical aid for the shipping and seamen. As he had explained before, if sanitary supervision was necessary for the physical healthiness of the shipping and seamen, it would come under the words "medical aid;" but the Committee had put in the words "sanitary supervision" in order that there might be no dispute but that medical aid did include the more remote operation of sanitary supervision as well as the more direct and immediate modes of aiding the sick.

There was only one other point which the Committee had to consider—whether any exception should be made in the section which said that no

port-due should be levied except under the authority of the Act. That was section 45 which enacted as follows:—

"No port-dues or fees shall hereafter be levied in any port except under the authority of this Act."

The question was whether we should take notice of a port that was about to be made at Madras, in which the Madras authorities would desire to levy dues exceeding the maximum fixed by the Act, and whether some exception should be made which would leave the Madras authorities at liberty to levy larger dues. The matter stood thus. According to the present law, Act XXII of 1855, the Local Governments were forbidden to levy any port-dues or fees excepting what might be levied under the authority of the Act. That Act was passed in 1855. Then came the Indian Councils' Act and gave power to the local legislatures by which they might set aside any Act of Council passed previously to 1861; so that in that way the Madras legislature might at this moment set aside any requirement in the Act of 1855 and make an enactment of their own. The principle of the present Bill was to bring the matter back to the position of 1855, and to make the levying of port-dues rather a matter for the supreme legislature than for the local legislatures to consider; and that principle he thought had better prevail even with regard to such a case as the port of Madras. When we knew what was required, we might then relax the limits placed by this Bill. In the first place it would be some few years before the Madras authorities would be in a position to levy dues; the port would not have been made, and they could not judge now what would be the maximum dues they would desire to be levied. It was clear that the maximum would be fixed according to the amount spent in making the port: and that could not be foreseen. As the Bill went on the principle of fixing the highest charges which were to prevail throughout India, it was on the whole better that the scale so fixed should not be altered until we saw exactly what was to be done.

The Hon'ble MR. SUTHERLAND had to apologize to His Excellency the President for venturing at the last moment to trouble the Council with any remarks on this Bill. Although he had not previously addressed the Council on the subject, he had followed with interest the progress of the Bill before the Select Committee, and his hon'ble and learned friend, Mr. Hobhouse, had permitted him to attend the meeting of the Select Committee when he proposed to bring forward the rights of the riparian proprietors as affected by the fifth section of the Bill. Mr. Hobhouse explained there, as he had done

previously at a sitting of the Council when MR. SUTHERLAND was not present, that this Bill was a consolidation Bill and altered in no way the existing law. The hon'ble and learned member had pointed out that conflicting interests were at stake, and that was not the time to interpose in favour of either of the litigants. MR. SUTHERLAND admitted the reasonableness of the position taken up by the hon'ble member, and he was content to say nothing further upon the subject; and it was only with reference to the definition of "high-water-mark" that he now desired to say a few words. As he believed, this last definition affected the rights of the riparian proprietors in a way which the previous definition did not. He admitted that the absence of definition in the existing law by no means prevented this last view being taken by the Courts of law. But if His Excellency would allow him, he would read to the Council the definition under section 5 in the Bill as introduced:—

"In this section 'high-water-mark' means the line of the medium high tide between the springs and the neaps."

That definition was altered in the Bill as published on the 19th December last, which enacted that—

"In this section 'high-water-mark' means the high-water-mark of ordinary spring-tides."

The definition was unaltered in the Bill as printed on the 6th March. In the Bill now before the Council, issued on the 12th instant, as the Hon'ble Mr. Hobhouse had explained, the definition stood thus:—

"In this section 'high-water-mark' means the highest point reached by ordinary spring-tides at any season of the year."

He would submit that this last definition affected the private rights of river-side proprietors. Their contention was, as hon'ble members were aware, that their rights to the foreshore extended to low-water-mark. It was not for him to discuss the question, but he did know that in certain high legal quarters it was thought that their rights were good. Therefore, whilst he admitted that the present definition was much more precise than any of the previous definitions, he submitted that precision was attained at the expense of private rights, and he thought that the definition of 19th December and 6th March should be retained.

His Honour THE LIEUTENANT-GOVERNOR thought it desirable that he should say a word or two in reply to the remarks which had just fallen from his hon'ble friend, Mr. Sutherland. It appeared to him that the remarks which had been made by the hon'ble and learned Mover of the Bill exactly met the point touched. The question was, what should be the definition of "high-water-mark?" We contended that high-water-mark meant the highest point which the water reached at regular and periodically recurring intervals; that if some tides were higher than others, the term "high-water-mark" meant the highest point which was reached by any tide, except of course cyclone-waves and extraordinary physical disturbances: with the exception of those unusual and abnormal occurrences, high-water-mark meant the highest point which the water reached at regularly and periodically recurring intervals. If that were the sound and reasonable acceptation of the term, it seemed right, when you came to consolidate the law and to make every question as indubitable and as indisputable as possible, to make that definition perfectly clear. He therefore concurred with the hon'ble and learned Mover in stating that the Bill did nothing more than give clear expression to the law as it stood since 1855.

His hon'ble friend Mr. Sutherland maintained that certain riparian proprietors had rights not only below high-water-mark, but down to low-water-mark.

The Hon'ble MR. SUTHERLAND—That was their contention.

HIS HONOUR continued:—that certain riparian proprietors contended that they personally and individually happened to have rights not only down to high-water-mark, but down to low-water-mark. The exact fact was that that contention depended upon certain proceedings taken by certain Settlement Officers some years ago. If those proceedings virtually had given away to particular persons rights which belonged to the public or the Government, and the Government now took those rights away, that would be a proper question perhaps of equity, or perhaps for litigation, to determine whether those gentlemen had a claim to compensation or not. The claim to compensation would arise, not in any way from an interpretation of the general law, but merely in regard to the legal consequences of certain acts of the Revenue Officers of Government. If that, then, was the exact question, their proper remedy was first to appeal to the Local Government as a matter of equity, and failing that, to try the question in a Court of law. The question was not at all the effect of a definition in this Bill upon the Act of 1855, but simply a question as to what were the

results and legal consequences of certain fiscal acts of the officers of the Bengal Government: on behalf of the Bengal Government we were entirely prepared to take that question into precise and accurate consideration; and if the riparian proprietors were dissatisfied with the decision obtained from us, they had their remedy in law. But it was not right for them to ask this Council to legislate beforehand on the possible issue of a legal trial, when the Council could not have both sides of the question before them. It was premature to raise the question here, because the Local Government had never refused to give any compensation which a Court of law or even a Court of equity might give. We had had to support the Port Commissioners in the execution of their duty under the Bengal Act of 1870, the said duty being to take up land on the river-bank for certain important public purposes.

Well, then, he had only a very few words more to trouble the Council with, and that was with reference to section 60, as to which the hon'ble and learned Mover had been good enough to explain that the words had been enlarged so as to include sanitary superintendence as well as medical aid to be provided for the port. His HONOUR desired to say that that extension of the wording of the Act was extremely necessary, for, as the Council might be well aware, the health of the seamen and mariners who frequented this port was quite as much dependent upon good sanitary supervision as upon medical aid. It was the application of the old proverb that prevention was better than cure, and he was sanguine that the power which the Bill gave the Government to apply hospital-port-dues to the sanitary supervision of ships and of the waters in which ships lay at anchor, would be the means of great improvement, and tend to the welfare of a very important class of British seamen and the mariners of other nations who frequented the port of Calcutta.

Major-General the Hon'ble SIR H. W. NORMAN having been on the Select Committee on this Bill, desired to say that he entirely agreed with what had fallen from his hon'ble friend Mr. Hobhouse and His Honour the Lieutenant-Governor. Infinite trouble had been taken with the Bill, and he did not think it was possible to arrive at a better definition of high-water-mark than that to which the Committee had come, when it was considered that the Bill had to deal with all the varying circumstances of ports and rivers in British India. He thought the riparian proprietors would certainly be in no worse position if this clause were passed than they were in at present. He desired to draw the attention of the Council to the way in which private rights were guarded by the Bill. Clause *(d)* of section 2 provided that nothing contained

in the Bill should "deprive any person of any right of property or other private right except as hereinafter expressly provided." Then, in the latter part of clause *(c)* of section 5, it was enacted that the limits of a port to be laid down were "subject to any rights of private property therein;" and by section 6 the Local Government was empowered from time to time, with the like sanction, and subject to the rights referred to in section 5, to alter the limits of any port. Certainly it had been the desire of the Committee to protect in the fullest manner the rights of private owners, and it appeared to him that this was sufficiently done in the Bill.

The Hon'ble MR. BULLEN SMITH having made one or two observations on the last occasion upon the first two points which had been referred to by the hon'ble and learned Mover of the Bill, thought it would not be right for him to let this meeting pass by without expressing his entire satisfaction at the changes which had been made; and further he would assure the Council that, in dealing with the question of high-water-mark, they were not dealing with a matter of theory, but that in this particular port of Calcutta at least the difficulty was already met face to face. The Port Commissioners found, some months ago, that it was absolutely necessary to apply to Government for some definition of the term high-water-mark, and altogether apart from this Bill as a general Bill, if the work of the Port Commissioners of Calcutta was to be carried on, it was absolutely necessary for them to receive from the Government some clear definition for their guidance. Since the Council last met he had been looking further into the matter, and it might be satisfactory to the members, as it was to him, to know that the definition which the Select Committee had decided upon, and which he hoped would be accepted by the Council, was quite analogous to that which stood in the Bombay Port Trust Act, where high-water-mark was defined to be the high-water-mark of the monsoon-months; and further it would be satisfactory to the Council to know that in the Mersey River Trust Act the definition was nearly analogous to that given by the Select Committee. The Mersey Port Trust Act said that the point of high-water-mark should be the highest point which the water reached except when driven up by high winds, thereby expressly agreeing with this Council as to unusual and extraordinary tides. He entirely approved of the definition as it now stood, and hoped that the Bill would be passed.

The Hon'ble MR. HOBHOUSE only wished to make a few observations upon one topic which had been adverted to by his hon'ble friend Mr. Sutherland. His hon'ble friend contrasted the definition now found

in the Bill with that which was in the Bill as it was introduced. The point was a perfectly fair one for the hon'ble member to take, and MR. HOBHOUSE was very much at his mercy on that subject. He quite agreed that the present definition included a great deal more ground than the definition in the original Bill did. All that he had to say in answer was that the first definition was a mistake: it was put in without sufficient consideration, and if it was necessary to apologize for such errors, MR. HOBHOUSE must apologize to the Council for this. It was one of those mistakes which were made on the introduction of a Bill; which were made in the stage before discussion, in the stage when the *idola specûs* prevailed. But those were just the mistakes hit in Select Committee, when the Bill was thoroughly threshed out with the advantage of having a number of different minds applied to it, and with the further advantage of the comments of local authorities and of those members of the public who interested themselves in the business. The fact was that he had too hastily taken up the decision given by a Court of Judicature in England without sufficiently looking at the circumstances under which that decision was given. That decision was not a definition of a phrase occurring in any Statute; it was not for the purpose of ascertaining how far the control of the public was to go in any place used for public objects, but was for the purpose of ascertaining and applying the old Common Law expressions, by which the rights of the Crown, not specially in ports, but in the open sea-beach, were said to extend to high-water-mark; and of settling how far minerals belonged to the Crown, and how far to private owners, all along the British shore. The circumstances were entirely different. When you came to construe the expression 'high-water-mark' in the Ports Act, you must construe it for the purposes of the Ports Act, and if you found that the Act gave to the Government great powers of control for the purpose of protecting the public in the use of the port, then you would say—and it was the duty of a Court of Justice to say—that the words should receive that one of their natural constructions which would afford the full amount of protection aimed at by the Act. His belief was that, if the Act of 1855 was now to be construed, it would not be construed in a less extended way, but might be construed in a more extended way, than was done by the Bill.

He mentioned at the outset that no one had come forward to say that the principle laid down in the Bill was an unreasonable one. He would add that in cases like this, where property was at stake, it was by no means uncommon for those who were asserting the rights of private property to take a legal opinion as to the incidence of the existing law and the rights which they had

under it. We had no such opinion here; the riparian owners here had not consulted any lawyer as to the meaning of the expression 'high-water-mark' in the Act of 1855, or else, if they had, they had not communicated to the Council the result of that consultation. Moreover, if we took the more contracted limit provided by the Bill as introduced, we should find that, in point of fact, powers were exercised beyond the limits allowed by that definition, and the definition now taken was, so far as he knew, in accordance with the facts, and it was certainly more in accordance with the facts and a more accurate definition than the one adopted at first.

The Motion was put and agreed to.

The Hon'ble MR. HOBHOUSE moved that the Bill as amended be passed.

His Excellency THE PRESIDENT said :—"In my judgment this is a measure which the Council may pass with confidence. The subject-matter is of considerable importance. To preserve ports and harbours from injury and encroachment, and to regulate their use, are among the most obvious functions of Government. In India, as in other countries, these duties in regard to ports of any considerable importance are usually delegated to public bodies, to whom certain legal powers are given. Here in Calcutta the duty, as I believe, has been very well performed by the Port Commissioners, and from what I have seen and from what I have heard, the arrangements of the port are highly creditable to the Commissioners and to the Hon'ble Mr. Schalch, who has occupied so long the office of Chairman. The Bill we are about to pass places the law on the subject of ports and port-dues upon a sound and intelligible basis. It is now to be found scattered throughout a variety of enactments, and in the second schedule of the Bill we are about to repeal seventeen Acts which now deal with the subject.

"From my experience in Parliament at Home I can fully appreciate the difficulty of consolidating and amending the law on any subject of importance. It is a work of great labour and responsibility, of which much notice is not taken, but which is of the highest benefit to those affected by the law, for, by such consolidation, their duties and responsibilities are placed clearly before them. It has been the constant aim of the Legislative Council of the Governor General of India to pass from time to time measures of consolidation and amendment of the law. My hon'ble and learned friend Mr. Hobhouse has continued with great success the work of consolidation which he found in

progress when he succeeded to the office of Law Member of Council. Many measures of consolidation have been passed within the last few years. I have obtained a list of those measures, and I find that since my hon'ble and learned friend Mr. Hobhouse assumed his present office, eighteen Acts of the Legislative Council of the Governor General have been passed for the purpose of consolidating and amending the law. In these Acts twenty-one Statutes of the Imperial Parliament of England have, under the powers given to this Council, been repealed so far as they affect India; one hundred and sixty-seven Acts of the Indian Legislative Council have been repealed, besides one hundred and fifteen Regulations which had the force of law. The effect, therefore, of passing these eighteen measures of consolidation has been to repeal three hundred and three Laws and Regulations, and the eighteen now on the Statute-book stand in the place of the three hundred and three. A great deal has been done in this direction; something more remains to be done, and I do not doubt that my hon'ble and learned friend will continue to direct his attention to this subject.

"I think it is only right and fair to express the sense which I am sure the Council entertain with me of the services rendered in preparing this Bill and others by the learned Secretary in the Legislative Department, with whom the real work of consolidation must of course naturally rest, who has carried it on with great zeal and remarkable ability, and to whom it comes, as I know, as a labour of love. Contrary to the feeling which is supposed to animate some lawyers, our learned Secretary desires to see the law made as clear as possible to those whom it affects."

The Motion was put and agreed to.

PANJAB COURTS AND OFFICES BILL.

The Hon'ble Sir Douglas Forsyth introduced the Bill to amend the law relating to certain Courts and Offices in the Panjáb, and moved that it be referred to a Select Committee with instructions to report in six weeks. When he asked leave to introduce the Bill on the last occasion, he had explained what the object of the Bill was, and he had nothing to say now. The Bill was a short one. Section 2 repealed section 20 of the Panjáb Courts Act only for the purpose of further extending the powers of the officers to whom the Executive Department had contemplated to give certain powers for the purpose of trying suits in the appellate and original Courts.

The Hon'ble Mr. Ellis had no intention of opposing the motion before the Council. But he desired to say a few words lest it might be supposed

by his silence that he considered the scheme to which the Bill proposed to give effect the best possible one which could be devised for the purpose. He gathered from the speech of his hon'ble friend Sir Douglas Forsyth that he was not altogether without doubts on the subject himself, and if MR. ELLIS was correct, he believed his hon'ble friend only shared with a great many others the opinion MR. ELLIS held in the matter. He regretted his hon'ble friend was not able to bring in a Bill to give effect to a more thorough separation of the judicial and executive services in the Panjáb. He was quite convinced that the fear which existed in some quarters, that a separate judicial service in a country where a strong Government was desirable, could not be kept in subordination to the Executive, was not one which had any foundation: means might easily be devised for keeping the two branches in their proper places. In fact there was already a distinction with regard to the relations which the Chief Court of the Panjáb held to the Government, as distinguished from the relations which the High Courts of other provinces held to their Governments. To his mind it was clear that the combination proposed under the new system was one which, in the present state of the Panjáb, would be to the eye only. There must, in the present state of business, be a division of labour. The only difference under this scheme would be, that persons who by taste and qualifications were better adapted to one particular class of work would be dealing with both kinds of work. Moreover, the difficulty experienced before, and which the Bill was intended to remedy, would remain, namely, the difficulty of working the Chief Court in harmony with the Executive; whereas in the other scheme both difficulties would be avoided. MR. ELLIS had great doubts whether the proposed scheme would work; but he hoped the Council would give effect to the Bill so as to try what had been decided upon by the Government, though he regretted that this scheme was to be carried out, instead of the one which he desired to see, involving a more complete separation of the judicial and executive services in the Panjáb.

His Excellency THE PRESIDENT said:—"There can be no doubt that this is one of the most difficult problems which the Government of India has to consider. As my hon'ble friend Mr. Ellis has mentioned or indicated, some years ago the opinion of the Government of India was expressed to the effect that the time had arrived for the complete separation of the judicial and executive services in the Panjáb. The Government at home expressed a doubt whether this course should be adopted, and I was instructed shortly after my arrival in India to take the subject into consideration. I had the advantage in the autumn of 1872 of conferring with the Lieutenant-Governor of the Panjáb, and almost every one of the officers upon whose opinion the greatest

value is to be attached in that province, both from their ability and their position, and I found the balance of opinion to be decidedly against the separation of the judicial and executive branches of the service at the present time. Having that opinion before them, the Government of India decided not to recommend a complete separation, and the measure which has been subsequently adopted with the approval of the Secretary of State in Council, has taken a course between a complete separation and the entire amalgamation of the duties which previously existed. The Bill is brought before the Legislative Council in order to carry out a portion of the executive arrangements which have been thus decided upon.

"Although I quite admit that there are difficulties in the question, and that there are arguments to be used in favour of an immediate and complete separation of duties, I must say that the balance of argument to my mind, and in the opinion of the Government of India, is in favour of not making so great a change at present."

The Motion was put and agreed to.

PROBATES AND LETTERS OF ADMINISTRATION BILL.

The Hon'ble MR. HOBHOUSE moved that the Reports of the Select Committee on the Bill to amend the law relating to Probates and Letters of Administration, be taken into consideration. This Bill had been introduced last November for the purpose of extending the local area over which the grant of probate operated; and the opportunity was also taken of giving to certain persons who had paid too high a Court-fee on probates and letters of administration the right to recover the excess. As regards the main object of the Bill, which was the extension of the area of probate, he might say that the Bill had remained unaltered since it was introduced; the Committee had only added to it one or two provisions for the purpose of preventing any clashing between the different High Courts which might grant probates extending all over India. For those provisions we were indebted to the High Court of Bombay, which sent in a very able paper by Mr. Orr, their Ecclesiastical Registrar, a gentleman of great experience in such matters, who had taken pains to study the subject and to send some suggestions which were now embodied in the Bill.

There were one or two further alterations made for the purpose of putting into the Bill a few additional cases in which a remission of the fee should be granted. With those alterations the Bill was republished, and Mr. Orr had

again sent in a paper with one or two practical suggestions which seemed to MR. HOBHOUSE to be very useful. These were not put in the Bill because they were rather matters to be dealt with by the Executive Department than by this Council, and the paper would be forwarded to the Chief Revenue Authorities in order that they might deal with Mr. Orr's recommendations with respect to the fees on probates.

The only other alteration of substance was this. Besides making provision for the remission of the fee when too high a fee was paid, the Committee had introduced a provision taken from the English law for the recovery of the remainder of the fee when too low a one was paid. That seemed to be only fair: if it was just in the one case to allow a remission when too high a fee was paid, it was just in the other to recover the balance in case of the fee paid being insufficient.

They had also altered the shape of the Bill by making it in form what it was before in substance, an amendment of the Succession Act and of the Court Fees Act. For that suggestion they were indebted to the learned Advocate General of Madras, and the Bill would now read as a part of those two Acts, so many sections being inserted in their proper places in those Acts.

The Motion was put and agreed to.

The Hon'ble MR. HOBHOUSE then moved that the Bill as amended be passed.

The Motion was put and agreed to.

The following Select Committee was named :—

On the Bill to amend the law relating to certain Courts and Offices in the Panjáb——The Hon'ble Mr. Hobhouse and the Mover.

The Council then adjourned *sine die*.

WHITLEY STOKES,
Secretary to the Government of India,
Legislative Department.

CALCUTTA ;
The 15th March 1875.

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