THE ESTABLISHMENT OF DIVORCE LAWS IN NEW SOUTH WALES

A Legislative Councillor of New South Wales, speaking in 1859, prophetically disposed of colonial Divorce legislation by saying "that this was one of the subjects that would come directly under the principle of Federation".[1] He doubtless did not realize that his vision would be a full century in materializing as the Federal Matrimonial Causes Act of 1959.[2] Amidst the national discussion which took place before, during and immediately after the passing of this "notable piece of legislation"[3] there was scarcely a suggestion that Divorce law was unnecessary or undesirable. Indeed, in this country it would be almost unthinkable to most members of twentieth century society, and to lawyers in particular, that the utility of such a law should be challenged or even doubted. It may then be a source of surprise to recall that it was virtually impossible to obtain a divorce on any ground in New South Wales until 1873, because the British Government declined to confer jurisdiction and because many local politicians opposed the introduction of the appropriate law.

There was no provision for the dissolution of marriage at the founding of the Colony as the Imperial Legislature deliberately withheld authority from the First and Second Charters of Justice[4] and refused to allow the adoption of British Divorce statutes.

> The Supreme Court has no jurisdiction excepting that which it derives by Act of Parliament and by the Charter of Justice founded upon that Act, in both of which the extent of its powers and especially of its powers in Ecclesiastical causes is distinctly defined. Upon reference to those Instruments, there will be found no allusion in either of them to matrimonial causes, or to the offences which Spiritual Courts in England visit with Ecclesiastical Censures. This subject was duly considered when the Act and Charter were originally passed, the omission was not accidental but intentional, and, if it be fit to supply it, it can be done by no other authority than by Act of Parliament.[5]

The deficiency was a source of genuine grievance from very early times. Field, J. submitted to Commissioner Bigge in 1820 that the Supreme Court required an Ecclesiastical Jurisdiction similar to that at Ceylon, "not for the purpose of pronouncing divorces in a society like that of New South Wales, but for the sake of decreeing alimony to maltreated or discarded wives".[6] The Commissioner adopted this opinion, but it was not approved in England.

James Stephen Junior in advising Under-Secretary Horton presumed that the danger of powers to award divorces being abused was the chief reason for their being withheld from most of the Colonies: "otherwise it might seem difficult to assign any good reason why the parties should be indissolubly united, notwithstanding the most aggravated case of adultery which can be

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[1] *Journal of the Legislative Council* (hereinafter cited *J.L.C.*) Vol. 5, Part 1, 13.
[2] No. 104 of 1959.
[3] *Sydney Morning Herald*, 7th January, 1963.
[4] Letters Patent dated respectively 2nd April, 1787 and 4th February, 1814.
[5] *Historical Records of Australia* (hereinafter cited *H.R.A.*), I/XII, 56.
[6] *H.R.A.* IV/I, 861.

supposed, merely because they reside in a distant Colony".[7] In Sydney, Attorney-General Saxe Bannister submitted a number of questions to Earl Bathurst on the operation of the Colonial laws and enquired whether the Court acquired Divorce jurisdiction "under the ancient principle of Law that Justice shall not fail by the failure of one of many Courts", or whether enabling legislation was to be awaited. "The necessity of a Court for the relief of Wives is very great," he said, "perhaps Legislation will do but little to remedy an evil, which is caused by a physical fact, the disproportion of the Sexes. Individual misery would however sometimes be assuaged by a Court of Almonry, and individual depravity be exposed by a Court of Coercion upon gross incontinencies. The subject is not an easy one. I have been applied to very frequently to prefer informations in cases of extreme Villainy, and could only find a doubtful jurisdiction for a Common Law Misdemeanour."[8] Earl Bathurst's reply, quoted above, was prepared in substance by Stephen, who had obviously been instructed in unequivocal terms since expressing his own view of colonial divorce. His advice was as follows:

> It is . . . asked whether, as long as no ecclesiastical Court exists for the punishment of incontinency, or for allowing a separate maintenance and alimony to married women, the Supreme Court does not acquire a jurisdiction for those purposes. It is difficult to understand how such a view of the Subject should be seriously maintained. The Supreme Court has no jurisdiction at all, except by the Act of Parliament, and the Charter of Justice; in both of which the extent of its powers in ecclesiastical causes is distinctly defined. There is no reference, in either of these Instruments, to matrimonial causes, or to the Offences which Spiritual Courts in England visit with ecclesiastical censures. This subject was discussed when the Act and Charter were framed, and the omission was not accidental but intentional. It can be supplied (if it be fit to supply it) by no other authority than that of Parliament.[9]

Likewise the Letters Patent constituting the Colony an Archdeaconry within the Diocese of Calcutta expressly prevented Archdeacon Scott or his successors from exercising "any Authority or Jurisdiction whatsoever in causes . . . Matrimonial".[10] So that the matter might be beyond question, the very detailed instructions given to Governor Darling directed "that you do not, upon any pretence whatsoever, propose the Enactment of any Law or Ordinance . . . for the divorce of persons joined together in Holy Matrimony".[11] There the matter rested for many years.

In 1853 an attempt was made to procure a divorce by the only possible method in the Colony—a private Act of Parliament. W. C. Wentworth introduced a Bill to annul the marriage of Patrick Mehan and Emmeline Blake.[12] The Council immediately asked the Judges whether such an enactment was within its competence, the Judges asserted that it was, so the Council passed the Bill but Royal assent was never given.

Lord Stanley in 1858 sent a despatch to all colonial Governors transmitting a copy of the Imperial Act "to amend the law relating to Divorce and Matrimonial Causes in England". On the grounds that uniform legislation in all Colonies was desirable, the letter declared with unintentional irony:

> It is . . . the wish of Her Majesty's Government that you should consult

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[7] *Id.* 596.
[8] *H.R.A.* I/XI, 497.
[9] *H.R.A.* IV/I, 616.
[10] *Id.* 548.
[11] *H.R.A.* I/XII, 112.
[12] Quoted in C. H. Currey, *Chapters on the Legal History of New South Wales* 1788-1863 (unpublished) 407.

> your Council as to the expediency of at once introducing a measure which shall incorporate, as nearly as the circumstances of the Colony will admit, the provisions of the Act recently passed in England.[13]

Governor Denison placed the matter before the Executive Council of New South Wales which deferred its consideration because of a then impending dissolution of Parliament and particularly because it encountered vigorous opposition from Attorney-General Martin on the surprising ground that the Imperial statute was not working satisfactorily in England.[14]

The want of any adequate law having thus been brought to public attention, moves were soon made to bring down legislation and on Friday, 6th June, 1862, Mr. Holroyd presented "A Bill to amend the Law relating to Divorce and Matrimonial Causes in New South Wales".[15] It was read twice but became lost in Committee. It was a comprehensive measure, reciting that it was expedient "to confer upon the Supreme Court of New South Wales jurisdiction in matters matrimonial and also authority in certain cases to decree the dissolution of a Marriage". This was in no true sense a proposed *amendment* of any existing statute, but a constitution of a jurisdiction where none had existed before.

An immediate public response was felt to the Bill, evident in the presentation to the Legislative Assembly of many petitions from clergy and their congregations, objecting to the likely "deplorable injury to public morality, and to the permanency of those family relations which lie at the base of all Christian civilization".[16] As against this, some citizens of Sydney petitioned the House to proceed with the measure as a potential benefit—

> Your Petitioners beg most respectfully to state, that there are many persons, at present residents of this Colony, to whom the adoption of the Bill would have been a most beneficial measure, as by that means they would have been enabled to free themselves from the abject misery and degradation they at present have to encounter.[17]

The Bill did not come into operation but the failure seems to have inspired David Buchanan to take up the cause of the Bill which he did with ultimately successful results. His first attempt in 1862 was a Bill to amend the law relating to Divorce and Matrimonial Causes which was read once, qualifying instantly for a number of public petitions of protest, but withdrawn and discharged on the second reading.[18] In July of the following year he moved for leave to introduce a Bill of identical terms which was also read once but discharged before the second reading. In 1870 he introduced the same Bill again when it was passed by the Assembly and sent to the Council where it was not passed, the Council postponing its second reading for six months at the expiration of which time it was "inadvertently not set down amongst the Orders of the Day".[19] The usual petitions had been made—dozens in identical terms—protesting "that judicial separations *a mensa et thoro* would provide all relief that can reasonably be asked for by persons who are themselves innocent; that no consideration for the interests of guilty persons should have weight against the interests of society at large; and that to give such liberty as this Bill contemplates to divorced persons to intermarry with the partners of their crime, would be directly to stimulate the very evil which the Legis-

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[13] 12th April, 1858, in *Votes and Proceedings of the Parliament of N.S.W.* (hereinafter cited *V. & P.*), 1859-1860 (4), 1169.
[14] *J.L.C. loc. cit.*
[15] The text of the Bill is preserved in the Parliamentary Library (N.S.W.).
[16] *V. & P.* 1862 (1), 959.
[17] *V. & P.* 1863-1864 (5), 711.
[18] *V. & P.* 1866 (1), 357.
[19] *J.L.C.* 1870-1871, 161.

lature is attempting to alleviate and to sanction the crime which no doubt it desires to condemn".[20]

In March, 1871, Buchanan moved:

> (1) That, in the opinion of this House, the law of this country in reference to Divorce should be assimilated to the law of England and the adjacent Colonies, with the exception of that part of the English Divorce Law which denies to the woman equal rights to those of the man.
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> (2) That the present state of the law of this country, in denying adequate relief, remedy or redress in cases of infidelity to the marriage vow, is inconsistent with justice, and has necessitated application to this House for the remedy by private Bill which should be obtainable on application to the Courts of Law.
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> (3) That under such circumstances this House is of opinion that the Government should introduce a Bill, either this Session or early next, or at their convenience, to assimilate the law of this country in the matter of Divorce to that of England, with the important exception above stated.[21]

This was rejected by the Legislative Assembly, but the earlier Bill to amend the law relating to Divorce and Matrimonial Causes when again put to the Assembly in that year was passed and referred to the Council. It was not returned and neither was an identical Bill passed by the Assembly in 1872. An attempt by Mr. Stewart to bring in a Bill to authorise Matrimonial Divorce in certain cases reached a second reading, but expired on the counting out of the House. At Buchanan's seventh attempt, a Bill introduced in November, 1872, "to confer jurisdiction on the Supreme Court in Divorce and Matrimonial Causes" was returned by the Council with some amendments and Royal assent was reported in March, 1873.

As the Matrimonial Causes Act this measure became the foundation of the Supreme Court's jurisdiction in Divorce. The Act, also known as 36 Vic. No. 9, conferred jurisdiction in respect of "matters matrimonial" and enabled the Court to decree dissolution of marriage in limited cases. The Court's power extended to divorces *a mensa et thoro,* suits of nullity or for dissolution of marriage, suits for restitution of conjugal rights or for jactitation and "in all causes suits and matters matrimonial (except in respect of marriage licences)".[22] In cases where a divorce *a mensa et thoro* would previously have been pronounced in England the colonial Court was enabled to pronounce a decree for judicial separation which had the same effect as a decree for a divorce *a mensa et thoro* prior to 21 Vic. c. 85. The Chief Justice or one of the Puisne Judges was to exercise the jurisdiction, with provision for an alternate Judge to represent him during his absence or illness. A right of appeal to three or more of the Judges was reserved by section 5 of the Act. Provision was also made for jury trial of questions of fact and general or special verdicts could be returned with liberty to the parties to apply for a new trial. In all suits and proceedings other than for dissolution the Court was to apply as nearly as possible the principles and rules of the Ecclesiastical Courts in England effective before the passing of 21 Vic. c. 85.

The administration of the Act was left to the Divorce Judge. "I was appointed the first Judge in the Divorce Court," said Hargrave, J., in *Ex parte Shepherd,*[23] "and on me devolved the burden of framing rules and regulations for the conduct of the business under that Act. The rules were framed with

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[20] From the Selwyn Papers (A737) in the possession of the Trustees of the Mitchell Library, Sydney, 284.

[21] *V. & P.* 1870-1871 (1), 595.

[22] Section 2.

[23] (1880) 1 N.S.W.R. Div. 1.

much care, and after some little trouble, by me, together with the able assistance of the late Mr. Robert H. Owen. As the rules now stand they are condensed from those framed by Lord Penzance under the English Act, and from those in force in the neighbouring Colony of Victoria".[24]

In an attempt to widen the provisions of the statute, Buchanan proposed in 1873, 1874 and 1875 a Matrimonial Causes Act Amendment Bill. This was eventually returned by the Council but the Royal assent was refused in England. Further proof of the rigid control which the Imperial Legislature continued to wield over this branch of the law is afforded in the disallowance of an amending Act, 40 Vic. No. 21 in 1878. This measure was called the Matrimonial Causes Act Amendment Bill and was based on Buchanan's proposals. It had been reserved in 1877 and was simply intended to equate the rights of men and women in respect of divorce and particularly to allow a wife to petition for dissolution of marriage on the grounds of her husband's adultery.

In 1878 a short amending statute was passed as 42 Vic. No. 3. This repealed the provisions of the principal Act whereby no appeal on the subject of costs only could be heard. It further prescribed that when appeals were brought solely on the question of costs, no security would be required from the appellant. In 1881 another short Act, styled the "Matrimonial Causes Act Amendment Act" was reserved for approval. Its intention also was to allow equal rights to women as to men in connection with divorce. Thus, a wife was enabled to present a petition for dissolution on the grounds of her husband's adultery, achieving what the British Government had refused in recommending the disallowance of 40 Vic. No. 21.

The Matrimonial Causes Act Amendment Act of 1884 was formally styled the 48 Vic. No. 3. It enabled the Court upon decreeing dissolution against a husband to order him to pay maintenance to his wife by weekly or monthly instalments if it appeared that he was unable to provide security for payment in a lump sum: it extended the provisions of section 28 of the principal Act relating to the avoiding of suits for nullity on the ground of collusion: and it gave the Court a discretion in awarding costs to the Crown Solicitor when intervening or showing cause against a decree nisi. It also made important changes regarding the trial of jury issues.[25] Mr. Justice Hargrave, who prepared the Bill for the amending Act, had also included a provision extending the time within which desertion was deemed to have occurred to three years. Realizing, however, that this would cause the whole Bill to be reserved for Royal assent, the Judge arranged for the draft clause relating to desertion to be withdrawn by the Legislative Council in committee.[26] There followed a short Act in 1886—50 Vic. No. 12—which recited that doubts had arisen as to the rights of parties to have contested matters of fact tried by a jury in Matrimonial Causes. The Act went on to declare that such rights were to apply in cases where a decree was sought for the dissolution of marriage.

Just as Royal assent was given in 1886 to 50 Vic. No. 12, a simultaneous move was made for even wider relief by the introduction in the Legislative Assembly of a Divorce Extension Bill. It was the same Bill which six years later was to be confirmed as 55 Vic. No. 37. Perhaps the most remarkable circumstance of the tussle which ensued between Church and State during those six years was the championship of the Bill by the elderly Sir Alfred Stephen, former Chief Justice and a sitting member of the Legislative Council. The same Sir Alfred almost twenty years before had outspokenly criticized

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[24] At 4.

[25] These had been necessitated by the decision in *Horwitz* v. *Horwitz* 5 N.S.W.R. Div. 1.

[26] Alfred Stephen's Book of Press Cuttings re Divorce Extension Bill in the possession of the Trustees of the Mitchell Library (Q 347.6/N) 16.

David Buchanan's Divorce Bill (enacted as 42 Vic. No. 3) and, as Buchanan himself remarked, it was curious that the Chief Justice who had so vigorously condemned a Divorce law with only one ground for divorce, should take up the cause of a later enactment having several grounds.[27] Sir Alfred Stephen spared no energy in pressing his cause: he published pamphlets, addressed public meetings, rallied the support of influential politicians and maintained a stream of press publicity which at length won success. The achievement was the more remarkable as the great majority of the Colony's religious denominations and their spokesmen denounced the proposed law.

Public opinion was clearly in favour of extensions to the Divorce Law[28] and the clerics failed in their strenuous appeals and decrees because they were themselves so divided on selecting the appropriate remedy. *The Argus* of Melbourne made this comment on one such brush between the Churches of England and Scotland:

> The ecclesiastical world of Sydney, usually somewhat torpid, has been suddenly fluttered by the introduction of Sir Alfred Stephen's bill for amending the law of divorce. Bishop Barry denounced the proposal from the pulpit, and hastily summoned a conference of clergy and laymen to concert measures against the dangerous innovator who is willing to annul the marriage tie in confirmed cases of desertion, drunkenness and crime. According to the bishop's interpretation of Scripture there is only one cause for which divorce ought to be granted, and to go beyond that limit is to precipitate society into perdition. But the fervid denunciation of the Anglican prelate has not been allowed to pass unchallenged. Doctor Steel, a Presbyterian of renown and unquestioned orthodoxy, comes to the rescue of the bill which has incurred the episcopal censure, and boldly contradicts the bishop's theology.[29]

The *Sydney Morning Herald* somewhat severely reduced the differences of opinion to this formula:

> We must either take a theological settlement of this question or not; if we are to do it, then we must abide by somebody's interpretation. But whose interpretation is it to be? Cardinal Moran says "Take mine", the Bishop of Sydney says "Take mine", Dr. Steel says "Take mine", and the President of the Baptist Union says "Take mine". Sir Alfred Stephen shakes his head at them all, and says that amid this diversity of interpretation he cannot accept any one of them as sufficient authority, and therefore, as a statesman, he rests his case on the ground of social expediency.[30]

Of greater interest to the legal and political historian is the chapter of misadventures which the Bill encountered in the Parliaments of the Colony and in England. One cannot but admire the resolute persistence of Stephen who, time after time, reformed his campaign as he had in turn to overcome the strongest pressures from the Church, from the unrelenting countermands of the English Government and from colonial politicians who either opposed or did not care about the measure. When the Bill was first introduced in 1886 in the Legislative Council it was carried, but on being referred back to the Assembly was lost in Committee for want of a quorum. Stephen had the same measure brought forward in the following year and it passed with a little difficulty through both Houses. Paradoxically the Bill was supported in the Assembly but found its opposition this time in the Council where Knox, on the third reading, proposed the deletion from the measure of all the words after the word "that" with a view to substituting "this day six months" for

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[27] *Sydney Morning Herald*, 21st March, 1888.
[28] *Daily Telegraph*, 26th October, 1887.
[29] Stephen's Book of Press Cuttings cited *supra*, 9.
[30] 29th April, 1886.

"now" in the text. The supporters of the Bill allowed it to be counted out, but it was subsequently resubmitted and passed.[31]

The Bill was obliged to be reserved for Royal assent, but the Queen was advised not to give her consent for three chief reasons. First, that the Bill was in general principle at variance with the established Divorce law of the Empire; secondly, that the Bill could be read in a manner allowing of any British subject's obtaining a divorce in New South Wales regardless of domicile; and, thirdly, that a mandate should be sought from the colonists in general election before approval could be considered.[32] "I have only to repeat", the Secretary of State wrote to the Governor, "that her Majesty's Government would strongly urge upon your advisers the inexpediency of enlarging the grounds upon which a divorce can be obtained, until it has been fully established that the general feeling of the colony is decidedly in favour of the change, and until after communication with the other Australian colonies it is made clear that they are prepared to adopt a similar alteration to their laws".[33]

The exercise of the prerogative in this fashion served temporarily to unite the Houses of the Parliament of New South Wales and when an identical Bill to that of 1887 was introduced in the lower House in 1888, the Council gave every indication of support. However, they became preoccupied with a virtual vote of censure against the Colonial Office which was carried by a large majority, but the principal Bill was delayed long enough to be lost by dissolution.[34] When again introduced it was "run over by the prorogation and killed".[35] Exactly the same befell it in 1889.[36] Introduced again in the Council on the first day of the 1890 session, the Bill was referred to the Assembly for a second reading and there failed to secure a quorum despite the appeal of Parkes to the members that "they were bound by every sense they had of the value of the right of self-government to send this Bill back as a protest against the interference of the Imperial Government even once, let alone time after time".[37] Summarizing the history of the measure at that period, a contemporary newspaper observed:

> The Bill has passed through the Legislative Council three times, and has also passed through the Assembly three times. It has been before Parliament in each of five successive years. It has passed through the Assembly in a session following a general election, and it has never yet been defeated in either house by an adverse vote.[38]

After all of these vicissitudes, the Bill at last became law in 1892. The Assembly carried its second reading on 8th February by 36 to 20 votes and in the following week the third reading passed by 38 to 18 votes. By 25th February the Council read the Bill a second time on a narrower margin of 16 to 12 votes and a third time on 15th March by 18 to 7 votes. Royal assent was this time obtained on 9th May, but the colonial authorities failed to proclaim the allowance of the Act in the *Government Gazette*. A notification to rectify this was much delayed and the Act did not take effect until 30th August, 1892.[39]

For a measure which had been won with such difficulty, the Act was short enough. It contained only seven sections of which the first was the most substantial. Any married person having been domiciled in the Colony for

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[31] *The Evening News*, 23rd May, 1887.
[32] *Sydney Morning Herald*, 24th June, 1892.
[33] Despatch of 27th January, 1888.
[34] Stephen's Book of Press Cuttings, cited *supra*, 71.
[35] *Id.* e.
[36] *Id.* 83.
[37] *Sydney Morning Herald*, 6th December, 1890.
[38] Stephen's Book of Press Cuttings, 4.
[39] *Sydney Morning Herald*, 31st December, 1892.

three years could present a petition for the dissolution of his or her marriage or for judicial separation on any one or more of four grounds. The grounds were continuous desertion for three years and upwards; habitual drunkenness for three years and upwards coupled, in the case of a husband, with leaving a wife unsupported or being guilty of cruelty to her; or, in the case of a wife, with neglecting or being unable to discharge her domestic duties; the imprisonment of the respondent for prescribed lengths of time on being sentenced for the commission of some crime; the conviction of the respondent within one year of the presentation of the petition for the attempted murder of the petitioner, or assault and cruel beatings. The remainder of the Act was of trifling importance. So far as they could consistently stand, the provisions of the Matrimonial Causes Act of 1873 and its amendments were to remain in operation and, in particular, the previous rights of appeal and jury trial were preserved.

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Most branches of legal history in New South Wales have some claim to curiousness. The singularity of the colonial Divorce laws certainly lay in the studied persistence of successive English Governments in withholding this form of social relief. When the laws were ultimately acquired, their legal and political implications were very great. The Colony's statesmen made it plain to their counterparts at Westminster that they would no longer tolerate a subordinate position but would insist upon being masters of their own destiny, at least in domestic matters. Their outspokenness was without comparable precedent in the history of the Colony. From a religious point of view the repercussions of the various Matrimonial Causes Acts were just as significant. The failure of the Churches to prevent the passing of Divorce laws was a loss of prestige appreciably damaging to the aura of respect which, in that generation, usually attached to ecclesiastical edicts.

The morality of divorce is still a live issue, but its utility is not. To this extent it is startling to reflect that as recently as 1886 a Justice of the Supreme Court at Sydney was obliged to make what he described as a "mocking answer" to those who sought of him relief from their marital mistakes:

> My good woman, you have been legally married. . . . True it is that your husband, having done his best to degrade you to his own level, has deserted you; but . . . you must patiently submit to this misery. If you are friendless and poor, your children must be beggars in the street, or surrendered as children of the State. If the bailiffs are in your house, beware of the libertine who offers you his protection and a home; and keep at a safe distance the upright man who, knowing your character and virtues, sympathises with you in your misery and if you were free to marry might offer you an honourable escape from the wretchedness of of your lot. The State regards marriage as a civil contract . . . and though the civil contract has been destroyed, you have no redress under the law, and practically no sympathy from the Church.[40]

J. M. BENNETT.*

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[40] W. C. Windeyer, J., letter to Stephen, 19th April, 1886. Stephen's Book of Press Cuttings, 16.

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