

BOOK REVIEWS

THE TAXATION OF SMALL INCOMES. By Paul J. Strayer. The Ronald Press Company, New York, 1939. Pp. ix, 210. Price: \$3.00.

Should the lowest incomes be subjected to personal income taxation? What would the effects of such taxation be? Is the direct taxation of small incomes administratively feasible, or are the complications insuperable? Would the revenues which could be obtained from the incomes of workers and farmers, furthermore, be large enough to warrant an attempt to tax them? To these questions Professor Strayer addresses himself in an analysis of the proposal, which is quite popular in certain quarters, that the Federal Government should dip down into the low incomes in order to increase its revenues and approach a budgetary balance.

The author has undertaken his study with a broad social, rather than a narrow fiscal, point of view. He is not averse to progressive personal income taxes upon the wealthy in a program of lessening inequalities in the distribution of personal incomes, nor is he opposed to the taxation of incomes above the subsistence level. But he argues forcibly that the lowest incomes, which are inadequate to provide the necessities of life, are not the proper objects of income or other taxes. The very poor, he is convinced, have no surplus income to sacrifice in tax payments and are properly the wards of the State rather than its financial supporters. In arguing for the exemption of subsistence income from taxation the author frankly admits his bias in favor of such exemption, but he also joins a large group of economists who have previously contended that personal incomes must first be large enough to maintain the individual in his existence before they have a taxable capacity, and that taxes upon subsistence incomes have deleterious social consequences.

The low income groups already pay indirect taxes which are shifted to them, but they have been exempt from income taxation because of administrative and political considerations. The application of the personal income tax to small incomes above the subsistence level would be permissible if the present indirect taxes were removed. If the federal exemptions were cut in two, between \$200,000,000 and \$500,000,000 additional revenues could be obtained, but this would not be enough in itself to balance the federal budget. Much of the increase in revenues, moreover, would come from those already paying the personal income tax and less than one-half of the total would be derived from those now exempt.

The substitution of a personal income tax for the indirect taxes now placed upon small incomes would have several advantages. The taxes paid by the numerous low income classes would be of known amounts, adjustments could be made in tax payments for variations in individual circumstances, progression throughout the tax structure could be accomplished, and greater tax consciousness would be aroused among the masses.

But some disadvantages would also be encountered. The personal income tax has been somewhat unstable in its yield, and a greater reliance upon it might increase its instability. The conscious payment of personal income taxes by the numerous low income groups might incite them to demand the abandonment of desirable social expenditures. Serious administrative problems would also have to be surmounted because of the complications attendant upon the collection of personal income taxes from millions of persons with small incomes.

Nevertheless, the cautious extension of the income tax to modest incomes would be a worth-while experiment. The author proposes an exemption, to begin with, of \$2,000 for heads of families, \$800 for single persons, and \$300 for each dependent. After some experience, the costs of collecting taxes from the lower incomes and the revenues to be procured from this step would be known. To accomplish his goal of progressive taxation of incomes above subsistence, the present inequitable taxes upon commodities, property, and other objects which are ultimately paid by the low income classes would necessarily be abandoned. The tax system would more and more take on the form and have the effects of a single, progressive, personal income tax. This conclusion is implied in the author's analysis and conclusions.

Professor Strayer's study reveals his familiarity with the theory and social problems of personal income taxation as it would apply to small incomes. He has also undertaken to analyze at some length the administrative problems arising in the taxation of low incomes. There may be much disagreement over the definition of a minimum of subsistence, but it could be fixed arbitrarily at a reasonable level in the beginning, and the exemption for subsistence could be modified as experience proved changes to be warranted.

Tax increases in the United States are no doubt inevitable if our governments are to balance their budgets. Eventually the base of the personal income tax will have to be broadened. It is well that thought should be expended in an analysis of the present burdens of taxation on the smallest incomes and their social effects, and that the very poor should not further be impoverished by crushing taxes. If incomes at or below the subsistence level are depressed by taxation, governmental expenditures for social relief will inevitably rise. Much evil may accompany shortsighted taxation policies.

Alfred G. Buehler.†

CASES ON THE LAW OF PROPERTY. Volume I. By William F. Walsh and Russell Denison Niles. Bobbs-Merrill Co., Indianapolis, 1939. Pp. vi, 676. Price: \$5.50.

Of the casebooks designed by Professors Walsh and Niles of New York University Law School as vehicles for covering the subject of Property only the first volume has been published. It is announced that three more volumes are contemplated.

The present volume consists of three parts divided into seven chapters. Part One deals with Definitions and Fundamental Distinctions in the first chapter and with Relation of Possession to Ownership in the second. Part Two has three chapters headed Acquisition of Title to Personal Property, Security Interests in Personal Property, and Fixtures. The two chapters making up Part Three deal with Waste and Enjoyment of Land.

The editors state in their Preface that the second volume ". . . will deal with the various estates and important relationships in the law of property, with chapters on estates of inheritance, life estates, concurrent estates, and tenancies of less than freehold". The remaining two volumes will develop conveyancing, servitudes, and future interests.

It will be observed that the arrangement does away with Personal Property as a separate course. The editors declare that such a separate

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course is no longer desirable ". . . because it takes a disproportionate amount of the limited time available and is not a satisfactory introduction to the law of property from either the analytical or the historical point of view". Despite this they do cover practically all the ground dealt with in the standard casebooks on Personal Property. Whether the subject is listed in an Announcement as a separate course is probably not a matter of large moment, and surely the time consumed in dealing with the material is not going to vary much depending upon whether it is so listed. The important questions would seem to be: (1) should the law school curriculum include what has commonly been taught under that head; (2) should it be given as part of the course in Property; and (3) if the answer to the last question is in the affirmative, how should it be worked into the course.

Several years ago there was a rather common tendency to split up the Personal Property material, assigning much of it to courses not bearing the property label. There is evidence that upon experimentation a counter tendency developed. What may be workable allocations in one school are quite unsuited to other curricula. For example, in a school covering Bailments in a distinctive course, it would naturally not be found necessary or desirable to give Bailments in Personal Property. So a school with a course in Securities might well take at least Pledges and possibly Liens out of Personal Property.

It is the belief of this reviewer that somewhere in the curriculum most, if not all, of the topics normally considered in Personal Property ought to be taught. The questions are intensely practical, and the cases in the field are good teaching material in the sense that students acquire a sound groundwork. Whether it should be given as an independent course he does not think it tremendously important, but on the whole he prefers it as a part of the course in Property. Wherever it is possible, the law applicable to chattels and to land should be considered together, but that is feasible only as to limited areas.

Possession is such a basic concept in the law of Property that, difficult as it is, students must deal with it early. The editors have wisely made that the first topic for detailed consideration, being preceded only by some very general observations. It is the reviewer's opinion that attention in this phase should be directed to possessory interests in chattels and land and their protection rather than to the relation between possession and ownership, as the editors indicate is the purpose of their second chapter. The difference, though, may not be as great as it seems, for in the development of the possession concept one cannot avoid observing the relation between it and ownership.

Part Two, though not called "Personal Property", is devoted to that subject, taking up the topics not already covered in the chapter on Possession and omitting only Emblements, which is postponed to Part Three.

It is difficult to see why Waste should precede the material on Enjoyment of Land. In the chapter dealing with the latter, one finds material chiefly on what Gray called "Natural Rights", in other words, the scope of the privileges of use of land by a possessor. Traditionally this material develops that while possessors have a large measure of freedom of use, their privileges are materially affected by the fact that their neighbors who also are possessors must be allowed a like measure of freedom, which means that each one must be restricted. Thus we get much of the law of Nuisance, by which possessors are restricted in their claimed privileges of use. The law of Waste also sets limits upon their freedom of use, in the interest of the future possessor, and it would seem that, pedagogically speaking, it might better come after the Nuisance material.

After all, a casebook is only a basis for a course. What may be suitable materials for one teacher's course may be quite inadequate for one by somebody else. Surely it is the personality of the instructor that determines more the effectiveness of the course than do the particular content and arrangement of the casebook he uses, assuming, of course, a certain irreducible minimum in the way of materials in the book.

In reviewing a casebook one may have opinions about the apparent stress put upon the various topics and as to the content and arrangement of the book. If one is quite familiar with the subject, he may have pretty definite notions as to the selected cases and other materials. But without actual use in the lecture room he can have only very general opinions as to the teachability of the book. The book now being reviewed has many features to recommend its trial.

Ralph W. Aigler.†

LEGAL EDUCATION IN COLONIAL NEW YORK. By Paul M. Hamlin. New York University Law Quarterly Review, New York, 1940. Pp. xxv, 262. Price: \$4.50.

This beautiful volume is the result of several years of labor in public and private collections of sources for the colonial history of New York. Mr. Hamlin is manifestly possessed by a true demon of research, and everyone interested in the historical study of American law will cheer his entry into the field. Moreover, the book is published by the New York University Law Quarterly Review, and Mr. Hamlin has become the Director of Research in Colonial Laws and Institutions in that school. Even more, then, one must cheer the evidence that another has been added to the very few law schools that have definitely assumed responsibility for research in American legal development.

The volume consists of an essay of 132 pages, followed by a slightly lesser bulk of appendices. The sum total of definite information gathered by the author regarding his precise subject, despite his vast industry, is very limited. On various points we are left to conjectures. For example, various Americans enrolled in the Inns of Court, but whether they really studied (there was no requirement)¹ cannot be said. Such Americans, and likewise English barristers, did not stand high at the New York Bar.² Legal education in an office at home, miserable as it might be even for a Livingston,³ was perhaps superior⁴ to that obtained in London. Another chapter, on The Law Student's Curriculum, tells us only what certain worthies had, from 1600 on, *advised* students to study; Mr. Hamlin has found no records of what practitioners actually did to aid apprentices. Still another chapter on Library Facilities makes it clear that in the 1700s there were several law libraries of considerable size, that some distinguished practitioners used them, and that perhaps any serious student (for the bar was a select social class)⁵ *might* have done so.

It is, at all events, clear that in the eighteenth century there was a rising level of pre-legal education, the need of collegiate training being emphasized alike by bar and courts. Indeed, with 39 per cent. of its members

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1. Pp. 15-17.

2. Pp. 4-5, 11, n. 22, 19-20, 26, n. 8.

3. Pp. 43, 167.

4. P. 20.

5. Pp. 6, 38-39.

college graduates in 1776 and 49 in 1785, the bar has never since been so well educated.⁶ It is clear that the mounting influence of the profession in public life⁷ explains the strong preference shown by college men for law as contrasted with the church and medicine.⁸

Francis S. Philbrick.†

THE INTERNATIONAL LAW OF JOHN MARSHALL. By Benjamin Munn Ziegler. The University of North Carolina Press, Chapel Hill, 1939. Pp. x, 386. Price: \$3.50.

Informed persons think of Marshall as the great expounder of the Constitution and therefore they associate his name with constitutional law. Consequently, we are likely to experience a moment of surprise when we see a book entitled *The International Law of John Marshall*. But that surprise is only momentary. On second thought we may wonder that such a book was not written long ago, for there is much here to write about and what Mr. Ziegler has written is well written and very much worth writing. Here we see in panorama the first third of a new century which measures the duration of Marshall's judicial career; while a new nation was cautiously finding its place in the family of nations and was often confronted with difficult and perplexing problems in the realm of its relations with other nations and beset with perils which might have overwhelmed it.

The author states that during Marshall's tenure of the bench the Supreme Court decided 1215 cases, of which 62 involved constitutional questions and 195 involved questions of international law or international relations. Of the latter Marshall delivered the opinions in 80 cases. And be it remembered that Marshall was not a novice in international affairs even at the beginning of his judicial experience, for had he not been America's envoy during the XYZ affair? He had appeared before the Supreme Court as advocate in several cases involving complex questions of international law, and, of course, had been Secretary of State, as well as Secretary of War. The law of nations, as it is called in the Constitution of the United States, was then in a more formative period, and it is shown that Marshall had no small part in giving it form and stability. Many of his decisions in international law established abiding principles which have been followed by judges in other lands and which remain the law today.

Mr. Ziegler divides his book into thirteen chapters, of which four are divided into sections, there being seventeen sections in all. After the introductory chapter, comes one on General Concepts, followed by these titles: Acquisition of an International Status; Acquisition of Territory; Jurisdiction; Nationality and Expatriation; Consuls; War and its Effect on Belligerents; War and its Effect on Neutrals; Piracy; The Slave Trade; Extradition; Treaties. It will be seen from this that the material is not arranged in chronological order but in categories pertaining to the subject matter concerned. Consequently, the volume becomes a textbook on international law. Very properly, the longest chapter in the volume is entitled War and its Effect on Neutrals. Marshall's views and decisions in that field are very significant and throw light on the vexing problems of today.

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6. P. 117.

7. P. 36.

8. Pp. 114, 133.

It is shown that his decisions tended to enlarge the rights of neutrals at the expense of those of belligerents. This was in line with the ultimate interest of America, since America for the most part has assumed the role of neutral, or at least non-belligerent.

Strange as it may seem, the eighteen page chapter on Piracy is one of the most interesting and revealing in the book. It is shown that out of the generally disturbed condition in the Western Hemisphere during the first quarter of the Nineteenth Century, piracy assumed alarming proportions and became one of the more serious calamities of the period. In this branch of the law, Marshall proved to be well informed and able to help in steering America's course through one of the most dangerous international situations in its history. Marshall had made a study of this subject during his legislative service in the House of Representatives. He had felt it to be his duty to do so because the Constitution of the United States had provided that "Congress shall have power— . . . To define and punish piracies and felonies committed on the high seas, and offenses against the law of nations." As a member of the Supreme Court his decisions on the subject of Piracy were wise and far-seeing and probably saved America from serious involvement in controversies with other governments.

We find in the chapter on The Slave Trade one of the very few instances in which Marshall and Story held opposite views on important questions of law. On the Circuit, in 1822, Story had held that the African slave trade is contrary to the law of nations. Three years later when the same question, for the first time, came before the Supreme Court, Marshall wrote the opinion of the Court establishing the rule that the slave trade cannot be considered contrary to the law of nations, but is unlawful only in so far as it contravenes municipal law. The author states that Marshall's position on this question remains the law even today.

The volume contains an adequate index, a table of some 160 American cases cited and a separate table of more than 50 English cases cited. Another feature is a considerable list of authorities which is said to contain only the more important materials used and cited in the work. The four page preface is excellent. Altogether the reviewer has found this volume not only interesting but also instructive.

Robert McNair Davis.†

CASES AND MATERIALS ON FEDERAL JURISDICTION AND PROCEDURE. By Armistead M. Dobie and Mason Ladd. West Publishing Company, St. Paul, 1940. Pp. lxiv, 1091. Price: \$6.00.

Of the earlier edition of this casebook by former Dean Dobie, published in 1935, it was said that it was "a collection which, as a tool for training technicians in litigation, has probably never been surpassed."¹ Perhaps for teachers who prefer in this field a book which views "the subject in the grand manner as the historic battlefield of the forces of nation and state",² the new work may be of slight interest. But for teachers who have as their objective training in federal practice, rather than a study of the role of the national courts in a federal state, the publication of the book at this time fills an immediate need, as "seldom has any field of law experi-

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1. McCormick, Book Review (1936) 22 VA. L. REV. 368.

2. Wechsler, Book Review (1936) 45 YALE L. J. 1330, 1331.

enced the number of basic changes in so short an interval of time as Federal Jurisdiction and Procedure."³

The new work, following very closely the chapter and section arrangement of the earlier edition of 762 pages, consists of 1045 pages of classroom material. This increase of 283 pages is due in part to the expansion of the chapter on procedure from 45 to 170 pages, to the consideration of such problems as interpleader jurisdiction, third-party practice, class actions and declaratory judgments, to more comprehensive footnotes, and to the inclusion of more extracts from texts and law reviews and of comments by the editors.

There are omissions, of course. For example, the general venue statute does not include the 1936 amendment;⁴ the act on jurisdiction when a federal reserve bank is a party is not referred to.⁵ *Treimies v. Sunshine Mining Co.*,⁶ which deals with the Federal Interpleader Act of 1936, might have been cited in a footnote. The statute which adopts the laws of the state in which federal territory is located for punishment of wrongful acts in such territory, not made penal by laws of Congress, is cited as the 1909 act.⁷ This act was amended in 1935 and changes the state laws from those in force on January 1, 1910, to those in effect on April 1, 1935.⁸

The earlier edition of 762 pages was criticised by a reviewer because of the difficulty of satisfactorily discussing that much material in thirty-two class hours, the time allotted to this course in most schools.⁹ A book of 1045 pages presents an even greater problem. Though the same reviewer said that teachers in university law schools should not devote much time to the narrow details of pleading and practice, as set out in the new rules, the recent rules cannot be entirely ignored by those who use the new work. Since "many of the new procedural rules are so interrelated to the problems of federal jurisdiction and venue",¹⁰ eighteen of them have been considered in the parts of the book where they properly fit into the exercise of federal jurisdiction.¹¹ But even if the chapter on procedure of 170 pages, in which are presented some fifty of the rules not closely associated with the problems of jurisdiction and venue but pertaining primarily to pleading, pre-trial procedure, trials and judgments, is omitted, most teachers will be confronted with a book of 875 pages to be discussed in thirty-two class hours.

3. P. vii.

4. P. 502. 49 STAT. 1213 (1936), 28 U. S. C. A. § 112 (Supp. 1939).

5. P. 138. 48 STAT. 184 (1933), 12 U. S. C. A. § 632 (1936).

At p. 363, the 1937 amendment to the act on original jurisdiction of district courts, limiting the power to enjoin the collection of state taxes, might have been included. 50 STAT. 738 (1937), 28 U. S. C. A. § 41 (1) (Supp. 1939). In the index, pp. 1071, 1072, the Johnson Act set out on p. 363, limiting injunctions in public utility cases, is described as limiting injunctions in labor cases. Another minor error appears on p. xi in the title to Chapter 2.

6. 308 U. S. 66 (Nov. 6, 1939). *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U. S. 165 (Nov. 22, 1939), decided two weeks later, was inserted on page 504.

7. P. 291.

8. 49 STAT. 394 (1935), 18 U. S. C. A. § 468 (Supp. 1939).

9. Atkinson, Book Review (1936) 1 Mo. L. Rev. 291. See also HANDBOOK, ASSOCIATION OF AMERICAN LAW SCHOOLS (1933) 152; *ibid.* (1938) 312, 316; Leflar, *Survey of Curricula in Smaller Law Schools* (1939) 9 AM. L. SCHOOL REV. 255, 259.

10. P. vii.

11. Pp. viii, 49. On page 604 is a list of the rules, not included in the chapter on procedure, with references to the sections where they are dealt with.

This new casebook therefore presents a challenge to the teacher who stresses training in federal practice.¹² Certainly the significant procedural reforms of the new federal rules cannot be neglected in the law curriculum. And the rules, as a model system of procedure, deserve even more attention than the 170 pages in the chapter on procedure. In fact, an editor of a casebook on federal procedure has stated that the new federal procedural machinery "can best be appreciated apart from the collateral constitutional and statutory problems of jurisdiction and venue."¹³ If the chapter on procedure be omitted in the course on federal jurisdiction, the responsibility in part still rests on the teacher of federal practice to see that the new rules are dealt with adequately in procedural courses.

Even though the teacher of federal practice omits the chapter on procedure, careful discussion of the remaining 875 pages on federal jurisdiction will require either generous omissions or expansion of the course. Efforts to expand the course in federal jurisdiction, in view of the crowded and shifting law curriculum, will no doubt meet the opposition of vested pedagogical interests. It would seem that an expanded course in federal jurisdiction is worthwhile, for, as stated by the editors "with the enlarged functions which Federal courts are performing in the present day, a study of Federal Jurisdiction and Procedure seems indispensable to a well rounded legal education."¹⁴ For teachers then of federal jurisdiction with a practical objective, the new casebook should prove an excellent one, if sufficient time can be allotted to the course, as the basic changes and the older problems have been adequately dealt with down to the winter of 1939¹⁵ by a careful selection of cases, supplemented by a wise choice of text material, valuable footnotes and incisive comments by the editors, Judge Dobie and Dean Ladd.

Julian S. Waterman.†

THE BENCH AND BAR OF OTHER LANDS. By William L. Burdick. Metropolitan Law Book Company, Inc., Brooklyn, 1939. Pp. xii, 652. Price: \$5.00.

Dean Burdick has given us the results of his observations of courts in foreign lands, gleaned on visits abroad during a period of fifty years. If the world ever becomes safe again for a traveling lawyer, this will be his indispensable guide. It describes, with of course varying thoroughness, the system of courts and the work of lawyers in England, France, Italy, Germany, Russia, Egypt, Palestine, India, China and Japan. Thus it will be a fit companion for a lawyer's trip around the world.

Evidently the author, as would be expected, has seen more at first-hand of the courts in England than in the other countries named, for he dwells upon the history and rich picturesque pageantry of the English courts with more knowledge and more evident affection than in his chapters on the other countries.

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12. Moore, *The Place of the New Federal Rules in the Law School Curriculum* (1939) 27 GEO. L. J. 884.

13. PIKE, *CASES AND MATERIALS ON NEW FEDERAL AND CODE PROCEDURE* (1939) vi.

14. P. ix.

15. (1940) 88 U. OF PA. L. REV. 487; (1940) 53 HARV. L. REV. 883.

In each country, he attempts to give the highlights of legal history, to describe the noteworthy buildings in which courts are held, to outline the court-system and the procedure, and to tell of the training of law students and the organization of the profession.

In reading this survey one is struck by the wide prevalence of the division of the profession into two branches, a division that with our different background seems to us so artificial and so costly to the client. Both in France and in Italy, as well as in England, the advocate is set apart as a superior class, though in France the advocate may, as the barrister may not, be directly employed by the client, and in Italy the advocate may even exercise the functions of solicitor. Again, our conception that the judging and the prosecuting functions should be quite independent, a notion that we are more and more strongly insisting on even with respect to administrative commissions, runs counter to the practice almost universal on the Continent. There the prosecutor is a member of a special branch of the judiciary itself, the *parquet*. We are struck also by the fact that the single judge sitting in a higher trial court to hear civil cases is unknown, as jury trial is likewise unknown in such cases. The judges always sit in a group of three or more. Again, the advocate may never flash to fame by his inspired cross-examination, for he does not cross-examine at all. He may seldom go further than to suggest a question to the judge, who conducts the examination if witnesses are examined at all.

Some of the descriptions of Continental law schools are especially noteworthy. Of the 35,000 students at the University of Paris, 10,000 are enrolled in the School of Law. There are departments for those who wish to become (a) magistrates; (b) advocates; (c) appointees in the civil service, and (d) law professors. The lecture rooms are large enough to accommodate only a third of the students, but this is quite sufficient for the actual number who attend. The lectures are accompanied by a quaint and pleasing ceremony which would make American law students gasp and stare.

"The students being assembled, the professor, clad in gown and hood of scarlet silk, wearing a round cap, and preceded by a beadle, enters amid their applause. . . . At the conclusion of the lecture it is customary for the students again to applaud."

The description of the legal systems of Italy, and especially of Germany and Russia, give the impression of picturing the conditions obtaining during a visit of the author to those countries in 1933, rather than the situation immediately before the present war, but enough appears to make amply clear the plight of judges and lawyers in a totalitarian country. In Italy the jury in criminal cases, which had been borrowed from the French, has been swept away under Fascism; judges hold their office at Mussolini's pleasure and "offences against the Fascist State" are triable by military tribunals. In Germany, by the legislative decree of June 28, 1935, the requirement that an act must be violative of a specific law in order to be punishable was abrogated, and the Minister of Justice in an address in the same year is reported as saying, "For the judges of Germany the Nazi philosophy of life will be the guiding light." In Russia the author attended a trial which was an international event, the trial in 1933 of six British engineers and eleven Russians, charged with wrecking activities at various power stations. As in later celebrated Russian trials, the Russian defendants signed confessions. Most of the Englishmen did not. The author attaches much importance here to the Russian tempera-

mental tendency to discouragement, as contrasted with the Englishman's fighting stubbornness.

One of course can find deficiencies. The style of the book, though serviceable, is somewhat pedestrian. The author has not lightened his tale by humor, or by picturing colorful personalities of judges and lawyers he has encountered. There is no index. But there is a full feast of knowledge about our profession in other countries, which has been skilfully and carefully prepared, and for which we may well be grateful.

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