SPIES AND PLOTTERS: Chamberlain Defends Drastic Bill Which He ...
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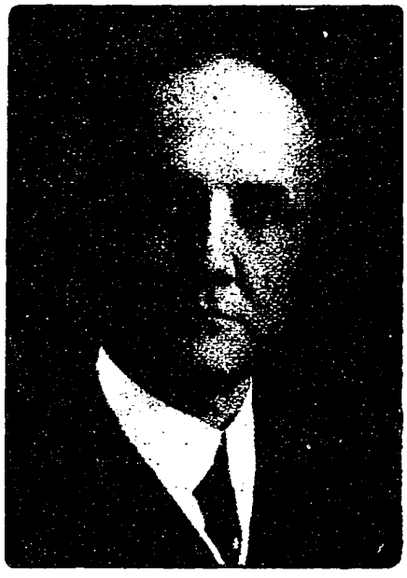
New York Times (1857-1922); Apr 28, 1918; ProQuest Historical Newspapers: The New York Times
pg. 76

SPIES AND PLOTTERS

Chamberlain Defends Drastic Bill Which He Withdrew—The Trials of Enemies in England, France, and Italy

Rice.

Senator Overman of North Carolina, to Whom President Wilson Sent His Letter Refusing Finally to Approve the Military Court-Martial Bill.



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Attorney General Gregory, Who Contends That His Department Has Handled Enemy Plotters as Effectively as the Existing Laws Permitted.

Paul Thompson.

Charles W. Warren, Who Ceased to be Mr. Gregory's Assistant After Showing Active Interest in Furthering the Court-Martial Bill.

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Senator Johnson of California, One of the Emphatic Supporters of Mr. Wilson's Assertion That the Court-Martial Law Would Be Unconstitutional.

CATCH and punish the spies, but how? There is wide difference of opinion as to what legislation is required to lessen, and, if possible, to eradicate the activity of those who work in this country for Germany and Austria against the United States.

The arguments resulting from this difference of opinion reached a climax in Washington last week, and the spokesmen of the divergent views were President Wilson and Senator George E. Chamberlain. Before the Senate Committee on Military Affairs was the bill introduced by Mr. Chamberlain providing for trials by court-martial in sedition cases. It was the most drastic measure yet proposed. The Administration's determined opposition to it was assured when the President announced through a letter to Senator Overman that in his opinion the bill was "unconstitutional * * * unnecessary, and uncalled for." Senator Chamberlain forthwith announced that he would withdraw the measure, as the President evidently would veto it, even if it should pass Congress.

As the question of constitutionality had been raised from the first, and those in opposition had stated reasons why they deemed it not to be constitutional, Mr. Chamberlain was asked if he would give his reasons for believing the bill to be constitutional.

"To begin with, the term 'spy,'" said the Senator in reply, "has had a very limited meaning in the past. It is unknown to the criminal law of the United States. A spy as such may only be punished by military law. Article 82 of the Articles of War of the United States authorizes the punishment of a spy by a general court-martial or by a military commission as follows: 'Any person who in time of war shall be found lurking or acting as a spy in or about any of the fortifications, posts, quarters, or encampments of the armies of the United States, or elsewhere, shall be tried by court-martial, or by a military commission, and shall, on conviction thereof, suffer death.'

"The question arises, Who under this definition are not spies? For example, a person 'who comes secretly within the lines with a view to the destruction of property, killing of persons, robbery and the like is not such a spy,' according to a civil war decision. One Kennedy, who attempted to burn the City of New York in 1864, was held not to be punishable as a spy by military law; a similar decision was rendered in the case of one Beall, whose crimes, committed during the civil war period, consisted mainly in attempting to throw passenger trains off the track in New York and seizing and destroying steamers and cargoes on Lake Erie. Equally persons who trade with the enemy, or who give information to the enemy, if not in disguise or introduced or acting behind the lines by practice or deception, are not spies.

"This illustrates the limitation placed on a spy at a time when the mode of warfare adopted by our present enemy was unknown. Therefore the question arises whether the word 'spy' is not capable of a broader definition on account of the changed methods of warfare. Our enemy of today uses very different tools from those employed at the time when spies were used to obtain information from the enemy. Germany has introduced new devices. The greatest injury wrought on us is not by the technical spy, but by sabotage, the destroyer of property by violence, the spreader of propaganda, and in other insidious and injurious ways. Hence the question whether the term 'spy' may not be applied to enemy agents guilty of harmful practices of any kind within our lines and punished according to the degree of the offense.

"In essence the question is whether the action of the enemy agent constitutes a danger to our country. Seeking to injure property of military use or value is an injury, as well as the seeking of information for the benefit of the enemy. By the Act of 1806 it was shown that Congress had the constitutional power to subject to court-martial civilians who acted as spies, as the word was then employed; in my opinion, it has the same power today to subject to court-martial civilians who commit acts just as injurious to the members of our army and navy.

"What is the basis for the trial of civilians by court-martial under Article 82 of the Articles of War? It is that at times the safety of the nation depends on the exercise of military power. These are represented by the army and the navy, and those who endangered the safety of the army and navy, in acting as spies, were made subject to military control and punishment. It is to accomplish this purpose that the rules of military law have grown up and the articles of war have been enacted by Congress. Military law should not be confounded with martial law. Martial law is not statutory in character and received its origin from strict military necessity. Military law is, on the other

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Spies and Plotters---How Shall We Treat Them?

(Continued from Page 1)

hand, largely statutory; its general application is to members of the land and naval forces and to certain classes of civilians whose acts affect the safety of the army and navy. This distinction is clearly set forth in briefs submitted to the Senate Committee on Military Affairs, from which, I here desire to state, the subject matter of this interview is drawn—following closely, in fact, one of them, with which I am in accord.

"Under the acts of Congress the number of those amenable to military law has been broadened to meet the appearance of new needs for the protection of the army and navy. Civilians made subject to military law include spies, persons giving relief to the enemy, army contractors, inspectors of army supplies, persons operating, or interfering with operation of, Government railroads and telegraph lines, under certain conditions.

"Similarly there has been an extension of the meaning of the word spy. Section 2 of the Act of 1806 provided: 'That in time of war, all persons not citizens of the United States of America, who shall be found lurking as spies, in or about the fortifications or encampments of the armies of the United States, or at any of them, shall suffer death, according to the law and usage of nations, by sentence of a general court-martial.'

"There was a restriction to persons not citizens or owing allegiance to the United States and a further limitation of 'lurking as spies in or about the fortifications or encampments of the armies of the United States.'

"The section just referred to was broadened by various amendments, both as to the class of persons who could commit the crime and as to the crime itself, until under the Act of March 3, 1863, 'an act for enrolling and calling out the national forces and for other purposes,' Section 38 provided as follows:

"'That all persons who, in time of war or of rebellion against the supreme authority of the United States, shall be found lurking or acting as spies, in or about any of the fortifications, posts, quarters, or encampments of any of the armies of the United States, or elsewhere, shall be triable by a general court-martial or military commission, and shall, upon conviction, suffer death.'

"Attention is called especially to the addition of 'or elsewhere.' With reference to the addition of these two words Winthrop says that the jurisdiction was thus made general, 'applicable to offenses committed anywhere in the United States or in another country during a foreign war.' Under this section, now 1343 of the Revised Statutes, it would seem to be within the authority of the army to try by general court-martial or by military commission any person who, when this country is at war, is found acting as a spy anywhere in the United States, that is 'or elsewhere.'

"The Milligan case, decided by the Supreme Court in 1866, has been cited as a precedent against the constitutionality of this bill by those opposed to it. The Milligan case, I hold, was a decision on the right to establish martial law in localities where the courts were open, and not a decision as to the power of Congress to legislate under Article I., Section 8, of the Constitution. The following seems to contain the gist of that decision:

"'It follows from what has been said on this subject that there are occasions when martial rule can be properly applied. If in foreign invasions or civil war, the courts are actually closed, and it is impossible to administer criminal justice according to law, then, on the theatre of active military operations, where war still prevails, there is a necessity to furnish a substitute for the civil authority, thus overthrown, to preserve the safety of the army and society; and as no power is left but the military, it is allowed to govern by martial rule until the laws can have their free course. * * * Martial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction. It is also confined to the locality of actual war.'

"This statement has been freely criticised by many jurists, although the actual decision of the Milligan case has been accepted as fundamental. The statement, it should be noted, uses the expression 'martial rule,' and does not necessarily limit to 'the theatre of active military operations' the application of military law to civilians.

"Further, under the new system of warfare introduced by Germany and her allies, what is the 'theatre of active military operations'? When an enemy supplements the former method of waging war by the use of troops and spies with the sending or the enlisting the services of hosts of civilians in the country it is fighting, to cause all the injury posible by undermining propaganda, by destruction of property, and in many other ways, the question arises whether the whole country thus attacked has not become a part of the zone of operations of the war, that is 'in the theatre of military operations.' It was on an interpretation of this very kind that Noel Hans Lody, a spy, was tried by court-martial in England, soon after the beginning of the war in 1914, and shot.

"England, it should be said, was brought face to face with much the same legal problems with regard to spies as the United States is at present. In fact, England had less law on the subject. There was criticism in the newspapers of the failure to enforce the 'law against spies'; it was pointed out that spies were being shot every day in Germany, France and Belgium, while the British Government was inactive.

"The first English Defense of the Realm act, passed in August, 1914, made legal the trial by court-martial of persons violating regulations issued under the act by his Majesty in council, with regard in general to acts of assistance to the enemy. The act provided that such persons be treated 'as if persons subject to military law.' Under this statute the heaviest sentence was imprisonment for life. A standard English law magazine correctly stated soon after the passage of the act: 'By this provision every British subject has become subject not to martial law, but * * * to military law as administered by courts-martial, as if he were a soldier in active service. * * * It is an entirely new departure from constitutional practice and can only be justified by military necessity.'

"This act, it should be stated, was amended in March, 1915, owing to the opposition of British subjects to the provisions as applied to them. The amendment gave them the right to claim jury trial. With regard to spies, however, England continued to try them by court-martial under military law.

"We admit the necessity of the trial of spies by court-martial, in order to afford protection to the army and navy and therewith to guard the safety of the country. But in our present situation it is asserted, and I think with a good deal of truth, that the greatest injury done to us in this country is not done by enemy agents who would come under the technical description of spies, but by those enemy agents who cause injury to aircraft, munitions of war, &c., or by those who spread the poison of German propaganda. We control the lines of communication between this country and Europe, so that the spy, in the literal legal sense, is at least much hampered in sending any information from this country to Germany. If it is our safety that is primarily concerned, and I contend that it is, why may not offenders certainly working as much injury to us as the technical spy be made subject to trial by court-martial? In doing this Congress would be doing no more than it did during the civil war, when, in order to meet successive new dangers, it made subject to military law certain classes of persons who were a menace to the safety of the army and navy.

"Of one thing I have no doubt; that is the power of Congress to subject the enemy to trials by court-martial. Chief Justice Marshall held 'that war gives to the sovereign authority full right to take the persons and confiscate the property of enemy aliens wherever found' and, 'that when the sovereign authority shall choose to bring it into operation the judicial department must give effect to its will.'

"This plenary power of Congress was exercised in the Alien Enemy act of 1798, and it is under the Revised Statutes of the original act that the President is interning enemy aliens. Congress is not limited, with reference to enemy aliens, to the Fifth and Sixth Amendments, and may order the trial and punishment of offending enemy aliens by court-martial.

"Without intending to raise any question as to the efficiency of the Department of Justice, it is my contention that the court procedure of peace times is not equal to dealing with the situation in a war like this. By way of illustration, a man guilty of the most treasonable utterances is indicted by the Grand Jury, tried by the petit jury, and sentence is passed. Then he is admitted to bail. The case drags along on appeal, while the man goes back to the same practices he indulged in before indictment and trial. Under a military tribunal such a condition of affairs would be impossible.

"In my opinion some such legislation will eventually have to be passed to meet the situation of disloyal propaganda and other enemy agent acts in this country. It should be kept in mind that the military tribunal as provided in the bill does not displace the civil courts, but is supplementary to them."

One hears often, in connection with the discussions about whether civil or military courts should try enemy plotters, the question: "How are spies and other enemy agents treated by our allies?"

In France all cases of espionage or "dealing with the enemy" are tried by court-martial.

In Italy a like course is pursued; such cases are prosecuted before a military tribunal under military law.

In England not only spies and actual enemy agents, but persons arrested on various charges of giving aid or comfort to the enemy, are liable to trial by court-martial; but a civilian British subject has the right to claim a trial by jury. In such trial, however, whenever it is deemed to be in the interest of the national safety, the public may be excluded from "any part" of the proceedings, and the trial conducted "in camera." Minor offenses under the Defense of the Realm act are tried by courts of summary jurisdiction, and no claim for a trial by jury is allowed.

The courts of all these countries pass severe sentences upon persons whose speech or action has been such as to interfere in any way with the successful prosecution of the war.

In the United States spies are, under the Articles of War, subject to trial by court-martial, as pointed out by Senator Chamberlain. But what is a spy? There are in this country plotters, seditionmongers, dangerous propagandists, corrupters of soldiers and sailors, obstructors of war operations, enemy aliens of suspicious activities, who are interned or tried by civil courts. In the Department of the East, for example, the United States Army has tried by court-martial, since we entered the war, just one man who was accused of being a spy, and he was found not guilty of that particular charge.

In view of the discussions in this country, the present provisions of England's wartime law offer a commentary. These were mentioned only briefly by Mr. Chamberlain.

"England has abrogated the right of trial by jury for aliens charged with the offenses named in the Defense of the Realm act; while she allows British subjects the right, on claim, of trial by jury, this trial may, if the court decides, be conducted in violation of that other ancient right of public procedure. A person accused and tried under these regulations is sentenced publicly; but where the evidence of the trial is such that it is deemed dangerous to the national safety to allow the information to be spread abroad, the trial is conducted behind closed doors. England, unlike France and Italy, is like the United States on the question of the Milligan precedent—no enemy army has marched across her soil.

The Defense of the Realm Consolidation act of 1914 has been frequently amended and enlarged. It deals with the intricacies of complicated and sometimes vexatiously detailed matters. The following are quotations from it:

"His Majesty in council has power during the continuation of the present war to issue regulations for securing the public safety and the defense of the realm, and as to the powers and duties for that purpose of the Admiralty and Army Council and of the members of his Majesty's forces and other persons acting in his behalf; and may by such regulations authorize the trial by court-martial, or in the case of minor offenses by courts of summary jurisdiction, and punishment of persons committing offenses against the regulations and in particular against any of the provisions of such regulations designed:

"To prevent persons communicating with the enemy or obtaining information for that purpose or any purpose calculated to jeopardize the success of the operations of any of his Majesty's forces or the forces of his allies or to assist the enemy; or

"To secure the safety of his Majesty's forces and ships and the safety of any means of communication and of railways, ports, and harbors; or

"To prevent the spread of false reports or reports likely to cause disaffection to his Majesty or to interfere with the success of his Majesty's forces by land or sea or to prejudice his Majesty's relations with foreign powers; or

"To secure the navigation of vessels in accordance with directions given by or under the authority of the Admiralty; or

"Otherwise to prevent assistance being given to the enemy or the successful prosecution of the war being endangered."

To convict under the fourth paragraph above quoted it is not necessary to prove that the report actually did cause disaffection; if in the judgment of the court the report was of such nature that disaffection might be expected to result, the offense comes under the Defense of the Realm act. Moreover, the offense, of this or another kind, might be part of a definite enemy plot, or a piece of thoughtless folly; in the latter case the court would of course be lenient in its action; but the point is that things that endanger England's force in the war must not be done; they are in any case punishable.

In regard to the court-martial, courts of summary jurisdiction, and appeal for trial by jury, the act and its amendments continue:

"For the purpose of the trial of a person for an offense under the regulations by court-martial and the punishment thereof, the person may be proceeded against and dealt with as if he were a person subject to military law, and had on active service committed an offense under Section 5 of the Army act:

"Provided that where it is proved that the offense is committed with the intention of assisting the enemy a person convicted of such an offense by a court-martial shall be liable to suffer death.

"For the purpose of the trial of a person for an offense under the regulations by a court of summary jurisdiction and the punishment thereof, the offense shall be deemed to have been committed either at the place in which the same actually was committed or in any place in which the offender may be,

Karl Buenz, the Aged German Who Managed to Keep Out of Jail More Than Two Years by Pleading Ill-Health After His Conviction in the Federal Courts.

and the maximum penalty which may be inflicted shall be imprisonment with or without hard labor for a term of six months, or a fine of £100, or both such imprisonment and fine."

The act goes on to state, by reference to a previous Summary Jurisdiction act, that the right to claim trial by jury in certain offenses "otherwise triable summarily" is herein excluded, but that a summary conviction may be appealed. An amendment continues:

"Any offense against any regulations made under the Defense of the Realm Consolidation act, 1914, which is triable by court-martial may, instead of being tried by court-martial, be tried by a civil court with a jury, and when so tried the offense shall be deemed to be a felony, punishable with the like punishment as might have been inflicted if the offense had been tried by court-martial."

Punishment on trial by civil court, which is to be a like punishment to that of court-martial, is penal servitude for life, "or any less punishment," or if the offense was committed with the intention of assisting the enemy, death "or any less punishment," with, in addition in either case, forfeiture of any goods in respect of which the offense may have been committed.

In the act, the term "British subject" includes a woman who, a British subject before her marriage, is the wife of an alien.

The "summary offenses," which the act explains in detail, are briefly listed as follows:

Noncompliance with order of Army Council requiring information as to agricultural holding, or giving false information; allowing bells to be rung or chimed or clocks to strike in areas and during hours where lights are obscured or extinguished; noncompliance with order of Minister of Munitions regulating and restricting building and construction work, or false statement or representation to obtain license for such work; noncompliance with order as to management or user of canal; noncompliance with order restricting possession of celluloid and cinematograph films; false representation as to controlled establishment; noncompliance with coursing-meeting restrictions; British subject leaving United Kingdom as member of crew of outward neutral ship in violation of regulation; failure by occupier to cultivate land in England or Scotland in accordance with notice or direction; contravening restrictions on embarkation at ports in the United Kingdom; taking part in prohibited fair; contravention or noncompliance with orders of Food Controller as to articles or food, &c., or of Board of Trade as to other articles of commerce; contravention or noncompliance with regulations as to foreign securities; melting down or using as currency current British or foreign gold coin; noncompliance with health or safety rules for factories, &c., where explosives are manufactured or stored; failure by employer to give equivalent holiday as provided; noncompliance with order of Board of Trade regarding information as to goods suspected of being held for enemy [illegible] or disclosing information; disclosing or making use of information given to Admiralty, Army Council, or Minister of Munitions by person engaged in production, manufacture, purchase, sale, distribution, transport, storage, or shipment of war material, food, forage, or stores, except as authorized; noncompliance with law prohibiting supplying of liquor or drugs to members of his Majesty's forces, or unauthorized possession, &c., of opium or cocaine; alien or British subject coming to the United Kingdom after March 1, 1916, proceeding to or found in Ireland after prohibition by a secretary of State, Admiralty, or Army Council; noncompliance with order for extinguishment or obscuration of lights; leaving employment of general lighthouse or pilotage authority without six months' notice, or consent, or disobedience to orders; noncompliance with any one of a number of rules regarding military service; noncompliance by owner, manager, &c., with rules about mines; noncompliance with order requiring information as to motor spirit used or kept, or using motor spirit for charabancs, &c., outside regulations; contravention of provisions for testing accuracy of information to Ministry from munitions establishment; nonproduction of national registration certificate to police; unauthorized possession of certain ores and metals; refusal by person arrested on suspicion to allow photograph or fingerprint impression to be taken; noncompliance with rules regarding disabled carrier pigeons, closing orders for places of amusement, prohibited race meetings, railway travel, details of shipping, evening shop hours, use of sound signals, transmission of money or credit to or from enemy country; disturbing wounded soldiers or sailors by whistling or other noises.

The detailed specification of "offenses against these regulations" in the Defense of the Realm act occupies many printed pages. Unless they are minor offenses specifically classified as "summary," decision rests with a naval or military authority as to whether they shall be tried by summary court, civil court, or court-martial, saving always the British subject's claim against a court-martial trial. Alien spies are tried by court-martial.

In France a sharp line is drawn between offenses that bespeak actual dealing with the enemy and less culpable acts. The Secret Service and the military courts co-operate. All alleged spies are tried by court-martial. The distinction between civil and military cases was explained by a French intelligence officer here:

"If a man speaks against the war, or against France, or goes about saying that France is beaten and discouraging the people, he may be only expressing his personal opinion or he may be in the enemy's pay. If there is no reason to believe that he is an enemy agent, he is dealt with by the Tribunal Correctionel; if he is suspected of having German money, or working in an enemy plot, he is tried by court-martial. Generally, everything that has to do with the spy business is handled by court-martial, while propaganda offenses are taken up by the civil courts. When it is a case of dealing with the enemy, it is a case for the court-martial."

In some parts of France, near the line of invasion, towns are entirely under army jurisdiction; here all courts are military, and any sort of sedition, propaganda, &c., is much more severely dealt with them in, say, the south of France, or elsewhere under operation of civil law. Severe sentences are the natural order in France, however, whether passed by civil or military courts, for any action that may interfere with the successful prosecution of the war. Sentences of fifteen, twenty, even twenty-five, years' hard labor are not unusual for sedition and enemy plotting in France.

As is known, all Germans in France are interned, no matter how rich or prominent they may be. There has been much "spy trouble," however, with people from Spain, Switzerland, Holland, Norway, and Sweden. Severe measures have reduced that peril to a minimum.

In Italy many amendments to existing laws and creations of new regulations have worked out a detailed system for the graduated treatment of sedition and the like; generally speaking, Italy's mode of procedure is like that of France—court-martial for "dealings with the enemy."

Senator Chamberlain's bill, now withdrawn, was in part as follows:

Be it enacted, &c., that, owing to changes in conditions of modern warfare, whereby the enemy now attempts to attack and injure the successful prosecution of the war by the United States, by means of civilian and other agents and supporters behind the lines spreading false statements and propaganda, injuring and destroying the things and utilities prepared or adapted for the use of the land and naval forces of the United States, thus constituting the United States a part of the zone of operations conducted by the enemy, any person, whether citizen or subject of the enemy country, or otherwise, who shall anywhere in the United States, in time of war, endanger or interfere with, or attempt to endanger or interfere with, the good discipline, order, movements, health, safety, or successful operations of the land and naval forces of the United States (a) by causing or attempting to cause insubordination or refusal of duty by any member of such land or naval forces, or (b) by delivering or transmitting, or causing to be delivered or transmitted, to any member of such land or naval forces, any written or printed matter which shall support or favor the cause of the enemy country or of its allies in the war, or which shall oppose the cause of the United States therein, or which shall contain any false reports or false statements intended to interfere with the successful operation of such land or naval forces, or (c) by printing or publishing any such printed matter, or (d) by performing, or attempting to perform, any act made an offense against the United States by Section 1 (a), Section 1 (b), Section 1 (c), Section 1 (d), or Section 2 of Title 1 of the act entitled "An Act to Punish Acts of Interference with the Foreign Relations, the Neutrality, and the Foreign Commerce of the United States, to Punish Espionage, and for Other Purposes," approved June Fifteenth, Nineteen Hundred and Seventeen, as amended, or (e) by performing, or attempting to perform, any act made an offense against the United States by the act entitled "An Act to Punish the Destruction or Injury of War Material and War Transportation Facilities by Fire, Explosives, or Other Violent Means, and to Forbid Hostile Use of Property During Time of War and for Other Purposes," approved April —, Nineteen Hundred and Eighteen, or (f) by performing, or attempting to perform, any act made an offense against the United States by Section 12 or Section 13 of the act entitled "An Act to Authorize the President to Increase Temporarily the Military Establishment of the United States," approved May Eighteenth, Nineteen Hundred and Seventeen, shall be deemed to be a spy and be subject to trial by general court-martial, or by a military commission of the army, or by a court-martial of the navy, and, on conviction thereof, shall suffer death, or such other punishment as said general court-martial, or military commission, or court-martial shall direct.

Section 2. Nothing herein contained shall be deemed to repeal the provisions of Sections 1,342, as amended, 1,343, and 1,624 of the Revised Statutes.

The Sabotage bill, passed by the Senate April 16, carries penalties up to thirty years' imprisonment and a fine of $10,000 for injuring war materials or interfering with war industry.

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