IN THE SUPREME COURT OF SIERRA LEONE

CORAM:

The Hon. Mr. Justice E. Livesey Luke, C.J. - Presiding
The Hon. Mr. Justice O.B.R. Tejan, J - J.S.C.
The Hon. Mrs. Justice A.V.A. Awunor-Renner - J.S.C.
The Hon. Mr. Justice S. Beccles Davies - J.S.C.
The Hon. Mr. Justice F.A. Short - J.A

CIV. APP. No. 8/81

BETWEEN:-

AMADU WURIE - APPELLANT

AND

EDWARD WILSON SHOMEFUN - 1ST RESPONDENT
FODAY BANGURA - 2ND RESPONDENT

Mr. Garvas Betts and with him Mr. Taylor-Kamara for Appellant
Mr. J.H. Smythe Q.C. and with him Miss Patrice Wellesley-Cole for Respondent

JUDGMENT DELIVERED THIS 29TH DAY OF DECEMBER, 1983

TEJAN, J.S.C.:- The events leading to this appeal can be stated briefly:-

The story according to the appellant started on the 7th day of February, 1976 when the appellant, a motor apprentice, boarded a Mazda Van WR. 8967 driven by the 2nd respondent and owned by the 1st respondent to convey him to Waterloo village. The appellant was to pay the sum of twenty cents as the fare for the journey. The second respondent, arriving at Tombo village stopped the van and took some passengers. The second respondent then continued his journey, but because of the number of passengers when he arrived at Mama Beach, he asked the appellant to assist in loading the goods of the passengers on the carrier of the van. The appellant obligingly did so, and the second respondent told him to sit on the right side of the vehicle, the steering wheel being on the other side. The second respondent continued the journey and when he drove towards a slope in Jumu Town, the vehicle developed speed and got into a gallop. The result was, that the appellant fell off the vehicle and was unable to get up. The attention of

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the second defendant was called, and on reversing the vehicle, rode over the leg of the appellant who fainted and gained consciousness at the Connaught Hospital where he was treated by the Senior Specialist Surgeon Mr. Ulric Jones and later by Senior Specialist Surgeon Mr. Abu Kargbo. When the appellant was discharged from the hospital he went to Waterloo Police Station to make a statement in respect of the accident, but to his dismay he was told that he had already made a statement and the matter had been disposed of in the Magistrate Court.

Being dissatisfied with the manner in which the matter was handled, the appellant on the 31st day of January 1977, instituted proceedings against the 1st and 2nd respondents, claimed damages for negligence and also special damages.

The respondents denied negligence on the part of the 2nd respondent, denied that the 2nd respondent reversed, and contended that if there was negligence on the part of the 2nd respondent (which was categorically denied) the appellant contributed to the negligence.

The case was heard by Williams J. and the first witness for the appellant was Mr. Ulric Jones. This witness testified that on the 7th February 1976, he examined the appellant and he found the following injuries:-

1. He had sustained a crush injury to the right lower limb.
2. Swelling on his left ankle.
3. Multiple bruises and abrasions of the left leg.
4. Severe strain of his back.
5. Shock.

The appellant was admitted in hospital on the same day, and after the witness had removed a lot of dead tissues and cleaned the wound, he had grave doubt whether the limb would be saved and on the 14th day of February, 1976, he had to perform an electric amputation. Following this the appellant had general treatment and was later transferred to Murray Town Hospital on the 9th day of March, 1976 for measurement and assessment for an artificial limb.

Between the 7th day of February, 1976 and 14th day of February 1976, the appellant was ill, and the witness had great doubts as to whether the appellant had full powers of memory, consciousness and awareness. The appellant had impaired consciousness up to the 24th day of February, 1976, indicating that, he had had a toxic illness. This necessitated the administration of pre-medication drugs on the 12th day of February, 1976. The witness was confiden that between the 12th day of February 1976 and 14th February 1976, and in particular on the 13th day of February 1976, the appellant was not in any condition to undergo any high task of memory. The witness put in evidence exhibit "A" for which he had received the sum of Le20.00 and that he recommended the use of artificial limbs the cost of which ranged at the time from Le800.00 to Le2,000.00 for each limb. According to the witness, the amputation of the appellant's limb would affect his activities and he would continue to suffer pain on the knee from time to time, and that even with an artificial limb, the appellant would not be able to drive a vehicle unless it is a specially adjusted vehicle.

Dr. Abu Bakarr Kargbo Senior Surgeon Specialist attached to the Connaught Hospital examined the appellant on the 7th day of September 1976 and found that the appellant had permanently lost his right leg due to amputation following a crushed injury. The appellant complained of intermittent pain in his lumbo-sacral spine and also restricted movement on that part of his spinal column. The appellant was tender on the medial aspect of his left ankle, and he complained of pain in his joint. His evidence corroborated to a large extent the evidence of Mr. Ulric Jones. He admitted that he was paid the sum of Le100.00 and he then put the residual assessment of the appellant disabilities at 70%.

The appellant having told the Court how the accident happened, was cross-examined on behalf of the respondents. He denied that he was an apprentice working for the second respondent on the day in question. He said that he paid Mr. Kargbo the sum of Le100.00

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and Mr. Jones the sum of Le40.00 but Mr. Jones said that the amount paid to him was the sum of Le20.00 for which he produced a receipt. While he was in the hospital, he bought food to the tota amount of Le100.00, and that he spent more than Le50.00 while he was attending hospital. He said that he did not know one Eku and one Mr. Jalloh.

He denied that while the van was in motion he climbed to its roof in order to steal fish.

The 1st respondent neither gave evidence nor called any witness, but the second respondent gave evidence and called witnesses. His evidence was that on the 7th February, 1976 he drove van WR, 8967 and that it was one James Bernie who hired him to drive the van. When the van was handed to him, one Eku and the appellant were the apprentices. He recalled the 7th February 1976 when the van was involved in an accident at Jumu Town while he was proceeding from Mama Beach. There were hills and pot holes on the road. He closed the van after his apprentices had entered it as this was his usual custom. While he was driving, Eku stopped him by shouting "one bell". He stopped after travelling a short distance and alighted. He then saw the appellant lying on the road with one of the baskets. He did not know what had happened when he heard the call for "one bell" and he did not reverse the van. In answer to Mr. Betts, learned Counsel who appeared for appellant at the trial, he said that he made a statement to the Police a day after the accident. He denied that he told the Police that he loaded seven large baskets of fish on the carrier. He said that Eku was not called Abu and he denied that he told the Police that it was his apprentice named Abu who signalled to him that the appellant had fallen off the van. He denied that he was charged with the offence of carrying passengers at the entrance and also for carrying passengers without proper sitting accommodation.

Ekundayo Taylor gave evidence on behalf of the respondents. This witness deposed that he knew the 2nd respondent and the appellant. About two years previously, a Mazda Van driven by the 2nd respondent was involved in an accident at Jumu Town.

That at the material time, he and the appellant were apprentices attached to the 2nd respondent and that both of them were on the van at the time of the accident. He said that the 2nd respondent was driving the van from Tombo village. At Tombo village, the 2nd respondent loaded the van, closed the door, went to the driver's seat and drove off. The witness and the appellant were on board the van when the 2nd respondent closed the door. When the van got to Jumu Town, the appellant climbed up to the carrier.

At Jumu Town, the appellant fell down with a basket. The witness shouted "one bell" indicating to the driver to stop. The 2nd respondent stopped the van and did not drive backwards after he had stopped. The witness, the 2nd respondent and the passengers alighted. The witness and the 2nd respondent put the appellant into the van but the passenger refused to board the van. The witness and the 2nd respondent took the appellant to the hospital at Waterloo and later brought him to the Connaught Hospital in Freetown. The 2nd respondent left the witness at the Connaught Hospital, saying that he was going to report the accident at the Police Station.

The next witness for the respondents was Jaiah Kaikai, a Police Constable attached to the Traffic section at Masiaka Police Station. This witness recalled the 7th day of February, 1976 when a report of a road accident was made by the driver of Mazda Van WR.8967 Foday Bangura of Tombo Village. The scene of the accident had been visited by other Police officers, but on the 8th February, 1976 he took over the investigation of the accident. He visited the scene together with the 2nd respondent on the same day he took over the investigation. He obtained voluntary statements from both the 2nd respondent and the appellant. He opened a Police file containing all statements and other documents pertaining to the accident. He put the file in evidence and it is exhibit "D". Folio 2 of exhibit "D" was the statement of the appellant and it was obtained on the 13th day of February, 1976 at the Connaught Hospital.

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In answer to Mr. Betts, Counsel for the appellant, the witne said that he conducted the investigation and charged Foday Bangur with the offence of carrying one adult passenger at the near entrance door of the van while in motion and for carrying passenge without proper sitting accommodation. The witness was shown Folic 1 page 2 of exhibit "D". He said that the name of Abu was there a an apprentice and he did not have the name of Ekundayo Taylor as an apprentice. According to the witness, the name of Ekundayo Taylor was not mentioned as one of the passengers on board the van and he did not have the name of Ekundayo Taylor as an apprentice.

In dealing with the evidence, the learned Judge referred to the Statement of Defence filed and delivered by the respondents admitting that the appellant was a passenger on board the van, and disbelieved the evidence of the 2nd respondent and Ekundayo Taylor that the appellant was an apprentice on board the van at the time of the accident. The Learned Judge referred to Exhibit "D" the statement of the 2nd respondent made a day after the accident, and in that statement the 2nd respondent said that the name of Ekundayo Taylor was never mentioned to him. It is significant that Ekundayo Taylor said in his evidence that he continued as an apprentice to the 2nd respondent after the accident. It is also strange that the 2nd respondent never mentioned the name of Ekundayo Taylor when he made the statement to the Police. It is quite clear that the Learned Judge did not believe the defenee. The Learned Judge's view on the matter is expressed thus:-

> "On the whole I do not for one moment believe that the plaintiff climbed to the carrier of the vehicle whilst it was in motion and it was from there that he cut out and fell down. I believe that owing to the inadequacy of sitting accommodation in the van at the material time the plaintiff cut out from where he was sitting in the van and fell over. I believe also that after the alarm had been given that the plaintiff had fallen off, the driver the second defendant, stopped the van and reversed it to where the plaintiff was lying down and rode over the latter's right leg.

> The description of the injury to the plaintiff's right leg cannot by any stretch of imagination be consistent with mere falling down to the road from off the van. Since his right leg was crushed to the extent of having it amputated as being useless and unserviceable, some heavy force must have been applied on that right leg whilst it was lying on the road. Such crushing injury can only be consistent with the story that the vehicle reversed and rode over the plaintiff's right leg."

The Learned Judge dealt with the evidence of Ekundayo Taylor in the following terms:-

> "As regards the evidence of the said Ekundayo Taylor apart from his demeanour in the witness box which made his evidence very suspect, his narrative of the accident and the alleged behaviour of the plaintiff to say the least, was so hazy that such a man can only be described as inveterate liar."

In the end the Learned Judge gave Judgment in favour of the appellant and awarded him the sum of Le35,000.00 as General Damages and the sum of Le250.00 as Special Damages.

It is against that Judgment that the respondent appealed to the Court of Appeal on four grounds:-

(1) That the Trial Judge erred in law in failing to give consideration to the entire evidence of the Plaintiff/ Respondent in that he accepted those portion of his statement which are favourable to him whilst completely ignoring in his Judgment the portion of evidence which supported the case for the defence.

(2) That the Learned Trial Judge was biased in law in failing to consider the entire evidence of the Plaintiff/Respondent thus disenabling him from making a fair and accurate evaluation of the whole evidence before him.

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(3) That the Judgment is against the weight of evidence.

(4) That in all the circumstances the sum of Le35,250 .00 awarded as damages was excessive.

The appeal was heard on the 22nd day of January 1981 before During, Cole and Turay JJ.A. The Court of Appeal, after having heard arguments on both sides, delivered judgment on the 15th day of April 1981. Cole J.A. who delivered the judgment of the Court, after giving a summary of the contentions and submissions of both sides, concluded that the immediate issue which arose out of the subtle and enlightened arguments by both Counsel, was to determine whether the Learned Trial Judge in reviewing the evidence, drew proper inferences and evaluated the evidence correctly. The Learned Justice stated this aspect of the law as he understood it, and after making references to several authorities, which I do not consider necessary to deal with, set aside the judgment of the trial judge.

The appellant, being dissatisfied with the judgment of the Court of Appeal has now appealed to this Court. His grounds of appeal are:-

(1) That the Court of Appeal drew the wrong inference from the judge's primary finding of fact that since sitting accommodation had been provided for P.W.1 (the Appellant herein) with the Defendant's vehicle that the accommodation so provided was safe, adequate and satisfactory, and constituted a complete discharge of the defendant's duty of care to the plaintiff.

(2) That in determining the question of the 2nd defendant's manner of driving, the Court of Appeal failed to consider that the duty of care of a driver to his passenger was not fixed or absolute but was referable to all the circumstances of the case.

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(3) That the Court of Appeal erred in law in impliedly excluding from its consideration the statement allegedly made by the 2nd defendant, on the basis that the statement had been withdrawn by Counsel for the second defendant, when the said statement was tendered by Counsel for the second Defendant in Exhibit "D".

(4) That in excluding from its purview the said statement of the second defendant, it disabled itself from evaluating accurately, the evidence of P.W.3 (Ekundayo Taylor) and appreciating and or agreeing with the Learned Judge's conclusions on the weight to be attached to his evidence.

(5) That the Court of Appeal's conclusion that the "Respondent was the author of his own misfortune, was based on a totally wrong evaluation on the evidence before it and the wrong premises.

(a) That since P.W.1 was seated within the vehicle if in the course of the journey, he fell out of it, it could only have been through his own fault.

(b) Secondly, that the learned trial Judge ought not to have regarded the evidence of D.W.2 Ekundayo Taylor.

(6) That in failing to state positively, whether P.W.1 fell off from the canopy of WR 8967, which was the contention of the Defendants in the Court below, the Court of Appeal declined to indicate whether it believed the story of the Plaintiff or the Defendants and thereby precluded itself in law from coming to the correct inferences from the learned trial Judge's finding of fact.

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(7) That in observing that nowhere in the evidence, the 2nd defendant admitted that he pleaded guilty in the Magistrate's Court, the Court of Appeal erred in law, when it failed to have regard to the fact that there was evidence before the learned presiding Judge which could properly have led him to the conclusion that the 2nd Defendant had been charged and convicted of carrying passengers on the tail piece and failing to provide adequate sitting accommodation for his passengers.

Mr. Betts, Counsel for the appellant submitted that the Court of Appeal had acted as if it were a Court of first instance rather than an Appeal Court. There is some justification for the submission. The Court of Appeal, after stating that the finding of fact by a trial Judge should not be lightly interfered with, then referred to Section 9(1) of the Court of Appeal Rules which stipulates that all appeals shall be by way of rehearing and then cited Benmax v. Austin Motors Co. Ltd. (1955) 1 All E.R. 366 where it was observed that "an Appellate Court, on an appeal from a case tried by a judge alone, should not lightly differ from a finding of a trial Judge on a question of fact, but a distinction in this respect must be drawn between the perception of facts and evaluation of facts".

The learned Judge, after a careful and meticulous review of the evidence believed the appellant. He disbelieved the respondent and his witness Ekundayo Taylor on their credibility.

It should be noted that in rule 9(1) of the Court of Appeal Rules, the expression "by way of rehearing" is used. The expression does not mean that the parties and their witnesses are to appear before the Court of Appeal and to give their evidence. The words "by way of rehearing" express the practice of the Old Chancery appeal (which was not strictly an appeal so much as a rehearing before a higher Court. See Quilter v. Walpleson (1882) 9 Q.B.D. at page 676; See Order 58 Rule 3 of the English Rules (1959) Edition. It is simply a rehearing on the printed record.

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In this connection, I think it is necessary to refer to the case of Warren v. Coombes (1979-1980) 142 C.L.R. at page 531. In the course of the joint judgment of Gibbs Ag. C.J. Jacobs and Murphy JJ., the question was posed as to what is the duty of an Appellate Court when questions of credibility have been decided and the matter which remains for decision is what inferences should be drawn from the facts which have been found and are no longer in contest? Their Lordships then proceeded thus at p.537: "We are concerned of course with an Appellate tribunal to which there is an appeal by way of rehearing.....and which has the powers and duties of the Court from which the appeal is brought including those of drawing inferences and making findings of fact .....The appeal, although by way of rehearing is conducted on the transcript of the evidence taken at the trial, and the witnesses are not called to give their evidence afresh, but the appeal is a general appeal and is not limited, for example, to questions of law....." In the case of S.S. Hontestroom v. S.S. Sagaporack (1927) A.C. 37 at page 47 Lord Sumner discussed what Lord Wright in Powell v. Streatham Manor Nursing Home (1935) A.C. 243 at page 264 called "the antimony which arises when the Court which is judge of fact has neither seen or heard the witnesses. In such a case, there is conflict between two principles, each of which has to be given effect. The first is that the appeal is a rehearing, and, as Lord Sumner said, it is not "a mere matter of discretion to remember and take account of this fact: it is a matter of justice and of judicial obligations". The second principle, again to quote Lord Sumner is that "not to have seen the witnesses puts the appellate Judges in a permanent position of disavantage as against the trial Judge, unless it can be shown that he has failed to use or has palpably misused his advantage, the higher court ought not to take the responsibility of reversing conclusions so arrived at, merely on the result of their own comparison and criticisms of the witnesses and of their own view of the probabilities of the case". The House of Lords

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has held in Powell's case (supra) that "but the appeal, although a rehearing, is a rehearing on documents and not, as a rule, on oral evidence, and where the Judge at the trial has come to a conclusion upon the question which the witnesses, whom he has seen and heard, are trustworthy and which are not, he is normally in a better position to judge of this matter than the appellate tribunal can be: and the appellate tribunal will generally defer to the conclusion which the trial Judge has formed." Again in Powell's case (supra) at Vol. 152 L.T.R. Lord Wright stated the principles succintly in precise terms. He said the "two principles are, I think, clear that in an appeal of this character, that is from the decision of the trial Judge based on his opinion of the trustworthiness of witnesses whom he has seen, the Court of Appeal in order to reverse must not merely entertain doubts whether the decision below is right, but he convinced that it is wrong." ✳

In the appeal before this court, the learned trial Judge definitely and categorically rejected the evidence of the respondents and that of Ekundayo Taylor who was aptly described as an inveterate liar. The 2nd respondent visited the scene on the 8th day of February, 1976. A plan was drawn which showed skid marks and distances. There was evidence that the accident took place when the van entered a slope, developed speed and galloped. Moreover, there were pot holes on the road. Perusing the evidence carefully, I am of a considered opinion that the trial Judge in his capacity as Judge and Jury came to a reasonable conclusion that the 2nd respondent was negligent. Yet with such abundant and overwhelming evidence, I am at a loss how the Court of Appeal could have arrived at such a blatantly erroneous conclusion that the evidence of the appellant was romantic and that the appellant was the author of his own misfortune.

I think it is necessary to refer to the case of Elnasr Export and Import Co. Ltd. vs. Mohie Eldeen Mansour S.C. Civ. App. No. 3/73 when this Court dealing with the function of an appellate Court with regard to finding of facts said:- ".....It is

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true that Rule 21 of the Court of Appeal Rules (Public Notice No.28 of 1973) gives very wide and sweeping powers to the Court of Appeal even to the extent of rehearing the whole case. At the same time it is settled law and good sense that it should be in the rarest occasions and in circumstances where the Appellate Court is convinced by the plainest considerations, that it would be justified in finding that the trial Judge had formed a wrong opinion".

The Court then considered Watt (or Thomas) v. Thomas (1947) A.C. at page 487 and Benmax v. Austin Motor Co. Limited (1955) 1 All E.R. 326. In Watt (or Thomas) v. Thomas (supra), the following propositions were laid down:-

"1. Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion.

2. The Appellate Court may take the view that, without having seen or heard the witnesses it is not in a position to come to any satisfactory conclusion on the printed evidence.

3. The Appellate Court, either because the reasons given by the trial Judge are not satisfactory, because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the Appellate Court."

The above propositions make it abundantly clear that before an Appellate Court can properly reverse a finding of fact by a trial judge who has seen and heard the witnesses and can best judge not merely of their intention and desire to speak the truth but of their accuracy in fact, it must come to an affirmative conclusion that the finding is wrong. There is a presumption of its correctness which must be displaced.

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A careful survey and analysis of the reasoning of the Court of Appeal in this case clearly show that this appeal does not come within any of the permissible exceptions, and it would not be said that this is "one of the rarest cases or circumstances in which the Appellate Court have been convinced by the plainest considerations". See El Nasrs' case.

Throughout the judgment of the Court of Appeal, there have been grave and serious errors. I only need to quote a few of the passages in the judgment:-

> "From the respondents own account of how he became connected with the vehicle on the day in question, and what subsequently followed and leading to his unfortunate fate, a proper evaluation of the evidence should have disclosed that the respondent was not a passenger but one of the apprentices to the 2nd appellant on board the said vehicle."

The learned Judge dealt with the credibility of the respondents, and he did not believe their evidence. When then did the question of evaluation of evidence enter into the matter?

Another passage in the judgment which is startling is this:-

> "I venture to ask what further ordinary duty of care did the 2nd appellant owe to the Respondent? What else could the 2nd Defendant have done to discharge his ordinary duty of care owed to the respondent? To my mind, there is nothing more the 2nd defendant could have done to discharge that duty."

Surely, there could be no doubt that the duty of care owed by the 2nd respondent did not end by closing the door of the van.

Another offending passage in the judgment is this:-

> "As a matter of fact, the plan of the scene of the accident which is a folio in Exhibit "D" and forms part of these proceedings and which binds the respondent, reveals that the 2nd appellant was in no way driving unreasonably and without care in those circumstances."

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I have seen the plan. No evidence was called to explain it. Skid marks and sistances were indicated on it. In my view if at all it has any evidential value, it seems to me that it supported the case of the appellant rather than that of the respondent, and this was the plan which greatly incluenced the judgment of the Court of Appeal.

I need not refer to the case of Simpson v. Peer (1952) 1 All E.R. 447 at page 448 cited by the Court of Appeal because it is patently obvious that the Court of Appeal misconceived the judgment of Lord Goddard in that case.

No doubt the Court of Appeal considering itself free by virtue of Rule 9(1) of the Court of Appeal Rules, felt itself at liberty to go beyond the learned Judge's finding of fact, and in particular when the finding relates to credibility, but such an approach should absolutely be discouraged.

I have carefully read and re-read the judgment of the Court of Appeal with every legitimate and lawful desire to support its finding and conclusion in this appeal, if it can be reasonably supported, but I find myself quite unable to do so. In the circumstances, I would set aside the judgment of the Court of Appeal and restore the judgment of the High Court as regards liability and award the special damages. On the question of damages, I am of the view, that having regard to all the circumstances, the award of the sum of Le35,000.00 as General Damages was excessive. I consider an award of the sum of Le15,000.00 as General Damages reasonable in the circumstances. I would therefore award the sum of Le15,000.00 as General Damages. I would award costs to the appellant in this Court and in the Courts below.

(Sgd.) Hon. Mr. Justice O.B.R. Tejan, J.S.C.

I agree ..... (Sgd.) Hon. Mr. Justice E. Livesey Luke, C.J.

I agree ..... (Sgd.) Hon.Mrs.Justice A.V.A.Awunor-Renner,J.S.C.

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