Conversations with Professor Stroud Francis Charles (Toby) Milsom
by
Lesley Dingle¹ and Daniel Bates²

Fourth Interview: Cambridge – Published Works

Date: 11th December 2009

Between October and December 2009, Professor Milsom was interviewed four times at his home in Newnham to record his reminiscences of over sixty years of an illustrious academic career, the majority of which was spent in the Faculty of Law at Cambridge.

The interviews were recorded, and the audio version is available on this website with this transcript of those recordings. The questions and topics are sequentially numbered in the three interviews for use in a database of citations made across the Eminent Scholars Archive to personalities mentioned therein.

Interviewer: Lesley Dingle, her questions and topics are in bold type
Professor Milsom’s answers are in normal type.
Comments added by LD, in italics.
All footnotes added by LD.

230. Professor Milsom this is our fourth interview and we’ve come to the point where we can discuss your published work. Everything I’ve learned from scholars who have reviewed your books indicates that you are, to quote Professor Ibbetson³, “The lawyer’s legal historian par excellence”. Today I hope we can talk in general terms about the background of the writing of your books and perhaps we can turn over some stones to reveal a few aspects hitherto not discussed in more scholarly fora.

Your life’s work seems to me to read like a long journey in a carriage during which you constantly sought true meaning from situations for which most, maybe all of your fellow passengers, initially accepted the conventional Maitlandian view. As you discerned what you saw as the truth you patiently, repeatedly presented your evidence to convince, dare I say, convert them. This has been an heroic, perhaps a lonely exercise of forensic legal investigation, and in his review 2003 of your’re A Natural History of the Common Law, your last book, Professor David Ibbetson said that some of your heresies have now become orthodoxies. Do you believe, Professor Milsom that you have by now converted most of your fellow passengers to your way of thinking?

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³ David J. Ibbetson, Regius Professor of Civil Law; Chair of the Faculty Board
I’ve no idea. I’ve honestly no idea. I don’t talk to anybody. I’m sure I haven’t altered John Baker’s views on many things. I’ve really no idea.

231. In terms of your tools of trade so to speak, it is a crucial aspect of your work, and to do what you’ve done you must have been proficient in both Latin and Anglo-Norman. Your original training at school was in science, yet by 1958 when you took over from Plucknett’s Elsie Shanks’s manuscripts that became the Novae Narrationes you must have already been very well versed. At what point in your training did you acquire these vital language and calligraphy skills?

I’ve no idea. I never set out to learn anything. If I had something that I had to make out then I had to make it out, it’s as simple as that. So to that extent I just learned as I went along.

232. As you went along. Because all the reviews of your books comment on your great scholarship and Professor van Caenegem suggests, in his review of your 1985 Studies of the History of the Common Law, that your research is based on translations of hundreds of cases. So physically, what did these actually consist of, Professor Milsom, these cases that you went through? Were they rolls of parchment or...?

Well years ago I did a lot of work on plea rolls, and those are on parchment. You take a sheepskin and write on both sides of it and when you fill it up you put another on top, and if you’re me it all ends up with your going into the Public Record Office and asking the brown coated men for the roll for whatever term and year it is, and two brown coated men stagger in carrying on a stretcher between them a sort of coffin like object, which is the roll for one term, which may be up to 1000 membranes and weighs a ton.

233. Extraordinary. I wondered about that.

And parchment was expensive so they used both sides. So that when you’ve finished one side you get strong men to turn the damn thing over and to start on the backs, as it were.

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5 Theodore Frank Thomas Plucknett (1897-1965), Professor of Legal History, London School of Economics, Literary Director of Selden Society (1937-63).
7 Raoul Charles Joseph van Caenegem, Professor of History, University of Ghent
8 1985 Studies in the History of the Common Law (collected papers), Hambledon Press
234. Where did you say these were kept Professor Milsom?

In the Public Record Office, now in Kew. In my day it was all in Chancery Lane, which was much more convenient than Kew. And it’s all there. I think, I doubt whether any society… oh, the Chinese probably, have kept their records better than us, but I’m sure otherwise we’re the best in the world.

235. Because I assume that in the compilation with Professor Baker he did a lot of the work, the 1986 Sources of English Legal History, but for your earlier work you must have worked alone long hours in these… I suppose they must have been fairly, sort of, dusty archives.

They have a reading room. I haven’t been to Kew: the one in Chancery Lane was an enormous round room with a big round table in the middle, and I suppose probably nearly 20 people could sit at this table and work. My plea rolls were never popular because when you’ve read a bit you flick it over to get the next bit, and the dust of ages is shot into the face of the person opposite. There’s nothing you can do about that except avoid sitting opposite me.

They’re hard work and the writing is tiresome. Once one’s learned it, it’s not as tiresome as one might think, but it is highly abbreviated, so you get the first two letters of a word and then a squiggle meaning there’s more. I’ve got a lot of photocopies but they’re all in the basement of this house. I can no longer get into the basement and I’m not going to encourage you to go and look because you won’t find them. Also it’s dangerous, it’s a dangerous staircase.

236. Professor Milsom a repeated theme in your works are allusions to evolution and I cannot but assume that in a curious way your legal historical researches were an extension of your youthful interests in natural history, and that you have found that there were in fact many analogous lines of thought in their respective methods of investigation.

I don’t know. I’ve always worked on the basis that if I need to read this damn thing I’d better read it, and so one ploughs through that way. The plea roll clerks were, because parchment was expensive, they were as brief as they could be and as many words as possible were abbreviated, so reading them wasn’t like reading a book, and one struggled through. I never worked on manuscript yearbooks, because everything I needed was in print, and why bother? I mean if you suspect that whoever edited it has got something wrong; you can generally guess what it ought to have been without actually going and looking.

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9 The Public Record Office (PRO) was established in 1838 and placed under the control of the Master of the Rolls. It was originally located in the mediaeval Rolls Chapel (the former Domus Conversorum) on Chancery Lane at the boundary of the City of London with Westminster. The first Master of the Rolls to take on this responsibility was Lord Langdale, while his Deputy Keeper, the historian Sir Francis Palgrave, had full-time responsibility for running the Office. A purpose-built archive (1851-58) was extended onto the site of the Rolls Chapel (demolished 1895-1902). Growing interest led to a second building at Kew (1977) with transfer of all records thereto by 1997. The Chancery Lane building is now the Maughan Library of King’s College London. (Summary from http://en.wikipedia.org/wiki/Public_Record_Office)
237. In the preface to your 1985 book, *Studies in the History of the Common Law* you talk of a Darwinian kind of ecological system in the thinking that led you to your early works, for example, your 1954 *Cambridge Law Journal* paper on Trespass, and this is again brought out in your 1981 2nd Edition of *Historical Foundations*, where you talk of the law changing slowly in piecemeal, and you say that what really changes is not so much the law as the context.

Yes, I think I stick by that. But of course it puts you into an incredibly difficult position in trying to work out what the hell was happening. One can get quite a lot out of yearbooks and plea rolls but one needs always to remember that you may be missing all kinds of things.

238. Do you think that your scientific interest has been crucial to your being able to make progress where perhaps others previously haven’t seen perhaps the wood for the trees?

I’ve no idea of the answer to that. If I read something and can’t understand it, that bothers me, so I read it again and turn it upside down and smell it, you know what I mean. I don’t think it’s anything more than a sort of innate curiosity.

239. One of the reviewers of your *Natural History of the Common Law*, somebody called Elliot Gardner, said that your analyses highlighted two pitfalls that had ensnared historians – wrong assumptions that they had about the true meanings of words, and lost assumptions of the time periods that they’d studied, and he compared you to a natural historian analysing a somewhat patchy fossil record. If we use this analogy, Professor Milsom you must feel that you’ve discovered several Darwinian so called “missing links” during your career. What would you say was the most important find that influenced your work?

It’s so long since I’ve found anything, really. I do remember once in the round Reading Room of the old Public Record Office, reading something and suddenly an awful lot of things fell into place. I was so excited I got up to walk around in the corridors - and I was so excited that I turned into the corridor before I was actually through the door with the result I got the most colossal bang on the head. That brought me to my senses. I’ve no idea what it was.

240. In your eulogy to Maitland in Westminster Abbey in 2001, you mentioned that Maitland was originally spurred to action by a visiting Russian academic who said that a wealth of data lay in England that no one had bothered to analyse properly. You have followed Maitland’s example, Professor Milsom, and done your own, if you like, unearthing. Do you think that there are still other un-investigated collections of medieval legal records waiting to be discovered?

I think they’ve probably mostly been discovered. There’s probably a lot of, or a fair number of, local records of either Manor Courts or County and Hundred Courts that people know about, but haven’t used properly yet. They tend to be in provincial record offices, not very comfortable to work on. So I guess people probably just leave them alone, as I did

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10 1954, Not doing is no trespass: a view of boundaries of case. *CLJ*, 105
11 Lawyer at Galex Wolf LLC, North Brunswick, New Jersey, ex. Columbia University
really. I did work in [one] that is the most luxurious scholarly reading room I’ve ever been in - the City of London’s Record Office with its own records - wonderful almost like the House of Lords with red leather chairs and God knows what. I think I only went there once because they were forward looking people and most of the stuff that they see as important, they have printed.

241. There must have been a huge amount of careful sifting over the information, carefully going through these old manuscripts, painstakingly…
   One came across a question and went to look at the likely sources of information, and then got stuck in to those sources and forgot why you’d gone there probably, if you know what I mean.

242. Yes. It sounds like a very enjoyable period in your professional life Professor Milsom, where you became lost in your subject.
   Quite hard work yes. It was fun, yes. When I was working in Oxford, I was the law tutor at New College, getting to the PRO [LD: Public Record Office] then meant getting a train up in the morning and back in the evening and that got so tiring that I went up on a Monday and back on Tuesday night and up on Thursday and back Friday night I think, and taught all my Oxford pupils on Wednesday, you know. Yes, I couldn’t do it now.

243. It must astonish you to look back on what you’ve achieved. I mean, when one thinks back to the effort one put in?
   One doesn’t have much time for looking back; one’s looking for one’s spectacles, if you know what I mean.

244. Professor Milsom you made a point repeatedly in your work about how others had perhaps failed to understand the clues in the records that enabled you to put a new gloss on the significance of legal regulation of medieval society, and your key phrase on this issue, and its from your Introduction to Pollock & Maitland is and I quote: “It was what was assumed (obviously by the actors at the time) that we need to know and not what was said”, and it was misunderstanding these signals that caused the mistakes, if I can call them that, on which you parted company with scholars such as Maitland. They led to a sort of heresy that you spoke of in your introductory essay in the second edition of Pollock & Maitland. In fact you suggested in your 2001 eulogy that Maitland may have realised that he’d under-estimated this problem in his later years in the Canary Islands, but that he had not had time to address it.
   I think all that’s pure speculation. We do know that he was occasionally frustrated that he was in the Canaries and had to be there to stay alive, and all the stuff was in London, you know, and this was… I mean in his day there was photocopying of a sort, but it was very primitive and rather expensive, and I don’t think he managed to take much with him to work on.
245. You don’t think that perhaps he rather, in a way, wasted his remaining time on the book about letters to his friend Leslie Stephen, rather than looking into the other matters?

Well that’s of course a personal choice on my part. The stuff on this [LD: Stephen] did take a great deal of time, but then of course he was deeply devoted to Stephen, partly because of his marriage. I wish he’d spent less time on Stephen and more time on the materials in London, but there you are, I mean people do what they think they ought to do, and he thought he owed it to Stephen and to his wife to get that job done. And he, and I’m speaking entirely from highly imperfect recollection, but he corresponded with heaven knows how many people over Stephen. Everybody Stephen was known to have been in contact with or written to I think, he wrote and got material that way. So that it was for him a huge research effort.

246. When you think of the distances in those days, it must have been a considerable effort actually.

He must have had immense strength of mind I think to do as much as he did in his state of health. I mean, most of us would have got to the Canaries and relaxed in the sun. I would have.

247. Professor Milsom your analyses have been pored over by both legal historians and historians and your conclusions have great significance for our understanding of mediaeval history as much as law. For example, the Assize of Novel Disseisin and how its introduction by Henry II was, in truth, for a very different purpose than had been previously assumed by Maitland, and the fact that it altered society in a way Maitland assumed it was meant to was a coincidental aberration according to the Milsomian school. Such contentious points have given many reviewers plenty to write about. Could I ask, maybe in a naïve way, whether further resolution on such issues can be gleaned from the manner in which similarly feudal societies in Europe evolved?

Like most of my answers this afternoon, I don’t know.

248. Perhaps none were analogous to England.

Well, there was something similar in Normandy which was plainly relevant and I don’t think anybody has… There was a Frenchman called Marc Bloch who did a bit about it and then van Caenegem looked into it, up to a point, but he is really only interested in the English, if you know what I mean.

249. I found one particularly intriguing comment by you in the preface to your 1985 Collected Papers, you were commenting on parallels between the Common Law and the Roman Law and you said that in Rome private law was based on the idea of private


14 Sir Leslie Stephen, KCB (1832-1904), English author, critic and mountaineer. Father of Virginia Woolf and Vanessa Bell.

15 Marc Léopold Benjamin Bloch (1886-1944): mediaeval historian, Professor of Economic History at the Sorbonne, French Army officer. Captured and shot by the Gestapo during the German occupation of France for his work in the French Resistance.
property and this pitted man versus man as legal equals; feudal law in England pitted man versus his lord and this was your three dimensional society, and that only later did the Common Law evolve our modern concept of man against man as more or less equals. You said that in today’s society we seem to be going backwards?

We are, aren’t we, though? Blasted planning officer...sort of latter day lord, yes.

250. Do you think this trend is inevitable and perhaps irreversible, Professor Milsom?

Probably. I mean to say, since we seem to be persuaded that we have to regulate so much. Our great grandparents would be absolutely horrified. Really would be horrified I think, even my old grandfather “It’s my land me boy, it’s my land” he said. He was an old nuisance.

251. Do you remember him Professor Milsom?

Not very well, but yes. Yes, I remember all, no not all my grandparents, because my father’s mother died when he was born, but I do remember his father’s second wife who was a sweet Christian scientist and got pushed off a bus in Bath during the war, broke an ankle, wouldn’t go to a doctor, hobbled about on that ankle; luckily her brother was a doctor and he succeeded in slipping in some medication inside chocolates, you know what I mean…but she was an indominatible woman – “Just hold the right fork dear...”

252. I probably have more reviews and opinions on your 1981 2nd Edition, the one I brought along with me, than any other of your books. It’s still a prescribed text and you said in the Introduction that you were reluctant to do a Second Edition because the First Edition had failed to hit its intended target. In truth you did not say it was for beginners, but all the reviewers, and I read six of them, gave it very good reviews. They described it as very readable, exciting, sense of adventure, absorbing. Was it originally meant for undergraduates, Professor Milsom, the First Edition?

Well, Butterworth’s commissioned it as a student book, so I suppose it was, but I was just writing for myself I’m afraid. And I think time has shown that students find it a very difficult book.

253. Yes. Similarly the Second Edition, You had rave reviews; it was described as gratifying, exciting, a tour de force, remarkable, unorthodox, ambitious, and one reviewer, Freedman16, at Vanderbilt University said that your book is very important and difficult, but a wonderful book, and he said that one of your refrains is that traces of English feudalism are still with us. He didn’t say where you said this, but if this is so, Professor Milsom what did you mean by this?

Well hard to make sense of it to somebody who’s never done any English land law. But English Land Law is sort of deep frozen feudalism, if you know what I mean, to a large extent. I mean there are all kinds of features of it that can only be explained in terms of its remoter history, and that if one was starting afresh, one wouldn’t dream of doing that, but of course you can’t start afresh because far too much of the wealth of far too many people depends upon it, so... And any way I shudder to think what a rational Frenchmen would make of a nice new, modern, shiny English land law.

16 Professor Paul Freedman
Another reviewer, Professor Clanchy of Mediaeval History at Glasgow discussed your notion that the Yearbooks, being written in the vernacular, gave good insight into the true social legal position because, as you put it, they were unadulterated native discussions, and they were centuries older in spirit, and Professor Clanchy said that the vernacular was French and he asks why French, rather than Latin, should have this effect because writing Law Reports in French epitomised modernity at that time. Do you think he has a valid point, Professor Milsom?

Yes. Well I mean the whole history of legal language is… in England, it’s a very English story, only the English would have stuck to Latin and French for so long. I really can’t remember now when the plea rolls began to be written in English, but it’s probably in the 1800s. Ludicrous. So it kept lots of people in gainful employment.

If I could just come back to what seems to me the most pervasive and innovative theme of your legal research, your very subtle combination of analogues of biological and legal evolution, which seems to me a very unique feature of your work. Could I ask your opinion on some criticism on this concept leveled by Professor Ibbetson in his review of your last book, Natural History of the Common Law? In particular, he questions your notion of the evolution of legal rules being achieved as an accumulation of incremental shifts. He wonders if there may not be a significantly larger role than you admit for sudden conscious shifts in rules, for example, by legislation.

Well it depends what time you’re talking about. Legislation, until the 19th Century; legislation played a tiny part, absolutely tiny part in the development of English law, and a good thing too probably. The Judges have really done us quite well. And partly because of the obvious point that they are always dealing with a real situation and real people, whereas the legislator is often just dreaming stuff up.

In retrospect, your most productive period for writing books, Professor Milsom seems to have been while you were at the London School of Economics. Was this because, as you said in an earlier interview, during this period – it was 1964 to 1976 – you were more or less on your own in the department and you could get on with your work undisturbed?

I suppose so. I really don’t remember. I never did much legal history in my office or room in College or whatever, it all went on at home. And I daresay the thing about the LSE was that largely, that I could compress my teaching into a day and a half and spent the rest of the time at home, yes.

How disruptive it is to faculty members to have to teach heavy teaching loads in term time. You wonder they manage sometimes to do any research at all.

Well, indeed. When I was in New College – that was the time of the heaviest teaching load I ever had – my ambition was not to let go of whatever I was trying to write in term time, do a tiny bit every day or at any rate every week, just so as not to slip back to the starting point.

Yes, and I mean teaching does sometimes clear one’s mind in the most wonderful way, mainly because of questions from various stupid undergraduates, they’re the profitable

17 M T Clanchy Professor of Mediaeval Hist Glasgow (1964-85), now Emeritus Prof Institute of Historical Research (London University).
ones, as it were. Clever undergraduates they know what you’re talking about and they don’t question you. The stupid ones can’t make head or tail of it and their questions can be very helpful.

I’ve also always thought that there’s nothing like lecturing for making one sort out one’s own thoughts.

258. You crystallized your ideas?

Well, you’ve got to work out what they are. For a long time in my first Cambridge life, I was lecturing four days a week at 9 o’clock in the morning, and that was horrific because I couldn’t prepare a lecture really ahead, so I would start about midnight and prepare the lecture and then give it, as it were.

Well I suppose it meant that it came fresh off the cooker, as it were.

259. It’s very interesting.

What would you consider to be your most important book, the one that perhaps best sums up your life’s work Professor Milsom?

Oh, I think the *Historical Foundations* probably. It’s the one where I look most widely at....there’s only two to choose between. I think probably the *Historical Foundations* was the one that made me think most.

260. Do you think it is true to sum up your view on the beginning of the demise of the signorial world with the notion that the Assize of Novel Disseisin forced, and this is a very quotable quote “What had been done must now be undone in favour of what ought to have been done.” It was your quote Professor Milsom, one of your lovely quotes.

That’s interesting. I mean the Assize of Novel Disseisin has an extraordinary history from starting as a kind of grandiose peace keeping device, it ended up as the forum of the way in which most land disputes were settled. It’s not that chaps went and threw each out and then had a fight, as it were. Very often a disseisin would be dreamed up in the lawyer’s office in order to start a law suit.

261. Professor Milsom there’s one last question. During my research into these interviews, I came across a reference to an article by someone called Makdisi at Loyola University in New Orleans, and he suggested perhaps some of the institutions of the Common Law can be traced back to Islamic foundations and I wondered if you’d come across these notions in the past and whether you have any comments on whether this is a possibility?

Well almost anything is a possibility, even if only because of Spain. The Islamic law did have tremendous influence, but honestly I’ve no idea.

262. I think that Professor Baker might have done some work on this perhaps.

I must ask him one of these fine days. I haven’t seen John for ages. Do you see him?

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263. Not a lot, no, but I think he’s away quite a bit. I know that he’s often, or used to go to New York.

Yes, he used to spend a lot of every summer in New York, as did I before him. The New York University Law School, they had what was an interesting idea. Ages ago they founded a course for law teachers. It wasn’t really aimed at teachers in law school, but people teaching law in business schools and they would come for six weeks in August to New York City. So they were brave and hardy people as it were, and those who went to lectures of them were brave and hardy people too.

I have it in mind that Peter Stein21 did it once or twice and I was regular, every third year for many years, and then John Baker took over and John was there when the twin towers were attacked [LD: 2001].

264. Really?

And the Law School’s in Washington Square, which is not all that far from downtown New York and he had the most extraordinary description of what he saw. Frightening actually.

265. Well, Professor Milsom I must thank you again for so kindly talking to me about your scholarly work. I’m extremely grateful to you and I’m looking forward very much to preparing these for your tribute, and in that regard I wondered whether you had a chance to perhaps find a photograph that I might borrow or two.

I had a snapshot of Sam Thorne22 and me talking in Cambridge, Massachusetts and I’ll look and see if I’ve still got a copy. I know I... the loose copy I had I gave John Baker, because I thought it was kind of appropriate as it were, and I expect he put it in the bin, but I’ll look and see if I can find it.

266. Thank you so much. I mean if you wish I can come and help you to look for some photographs, that would be a pleasure.

No, you couldn’t. Everything is in such a mess in this house that it will take some assorted ferreting. There was a studio photograph of me done, gosh, I should think in the early 1950s, and if I’ve got a copy of that I’ll dig that out too.

It was extraordinary. When we were in London I used to get my hair cut in a place in Bond Street, and the entrance to the barber’s had in it a display window of a professional photographer, and she was a very famous photographer actually, she was called Lotte Meitner-Graf23 and she was about 95, I should think, when she took me.

And I was terrified because she didn’t have great studio cameras she used the Rolleiflex and to get her angles she would stand on packing cases and that sort of thing, and this old lady swaying to and fro.

She was an old lady at any rate [LD: she died aged 75, so she must have been ~57 at the time she met Toby Milsom] and I think probably I was still in Trinity at that time, and I

21 Peter Gonville Stein, b. 1926-., Regius Professor of Civil Law, University of Cambridge (1968-1993).
22 See Q. 54. 1907-94, Professor of Legal History, University of Harvard.
23 Lotte Meitner-Graf, (1898-1973), born in Vienna. Emigrated to England when the Germans invaded Austria in 1938. She photographed many celebrities, including politicians, authors, classical musicians, actors and scientists both in Vienna, and at her studio at 23 Old Bond Street, W1 London.
probably told her this, and she told me all about her cousin [LD: nephew-in-law] a physicist called Otto Frisch24 who was a Fellow of Trinity and a very famous man, and she was very well connected. I mean she had all kinds of famous relatives, and she was a lovely lady actually.

My wife took me, my first visit, and the old lady said “Well that’s you done; now I want to do your wife” and she took some beautiful photographs of Irène, who was of rather striking appearance, as it were.

267. If you would be prepared to let us have a photograph of your wife that would be wonderful.

I’ll see what I can find, yes. I may only have the one that I’ve got in the frame, in which case perhaps you could borrow it and ..

268. We can very easily scan a picture in a frame. In fact, when I interviewed Mickey Dias several years ago, we photographed, in his home, paintings of his grandfather and his uncle, who were also in the Judiciary.

They were Judges in Sri Lanka weren’t they? Ceylon in those days, yes.

I think you told me – is he still alive?

269. No, in fact I’m going to his memorial, his service tomorrow. Sadly he died about three weeks ago.

Right. It’s a service in Magdalene is it? I won’t try to get there, but I wish I could. He was a very nice man.

270. I shall be very pleased to tell that to Julia, his daughter.

Do tell Julia I’m sorry I can’t come.

Years ago I met Julia.... I think she came to my lectures for heavens’ sake.

271. She did – she remembers that. Yes, she’s a Barrister in London. And the other daughter is a pianist. She lives somewhere in Germany.

I’m going to visit her [Julia] in London. She’s going to lend me some photographs of her father as a young man for the archives.

I suppose I first knew Mickey when I came up, which I think was probably 1941.

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