

# Martin Commercial Fueling Inc. v. Virtanen

Between

Martin Commercial Fueling, Inc., petitioner (appellant), and  
Jerry Morgan Virtanen, Kashmir Gill, Nirmal Gill, Sunny Gill,  
Russell Gill, Vancouver City Savings Credit Union and Mohan  
Singh Jaswall, respondents (respondents)

[1997] B.C.J. No. 581

144 D.L.R. (4th) 290

[1997] 5 W.W.R. 330

90 B.C.A.C. 161

31 B.C.L.R. (3d) 69

8 R.P.R. (3d) 1

69 A.C.W.S. (3d) 672

Vancouver Registry No. CA017894

**British Columbia Court of Appeal  
Vancouver, British Columbia  
Cumming, Ryan and Newbury JJ.A.**

Heard: February 4, 1997.

Judgment: filed March 11, 1997.

(18 pp.)

*Sale of land — Position of parties pending completion — Risk — Remedies of purchaser — Specific performance — Effect of encumbrances and changes in subject matter — Remedies of third parties — Judgment creditors.*

Appeal from a decision that a judgment attached to proceeds of sale of lands, but not to the lands themselves. The appellant Martin registered a judgment against real property of which the judgment debtor Virtanen was a one-third owner. The lands were subject to two prior mortgages and a tax sale notice. Unbeknownst to Martin, Virtanen and his co-owners agreed to sell the lands to the other respondents, free and clear of all financial charges and encumbrances. Upon closing, the previous encumbrances were discharged, but a search failed to disclose the existence of Martin's judgment. Martin petitioned for an order that a one-third interest be sold in realization of the judgment. A master ordered that \$150,000 be placed in trust to stand in place of the lands and as security for Martin's costs.

**HELD:** Appeal dismissed. The agreement was subject to specific performance and so a constructive trust was available. Martin's judgment attached "subject to the equities" in favour of the purchasers, notwithstanding that their interest was not and could not have been registered prior to closing. The creditor could attach only what remained in the debtor's hands after the conveyance.

**Statutes, Regulations and Rules Cited:**

British Columbia Supreme Court Rules, Rule 18A.  
Court Order Enforcement Act, R.S.B.C. 1979, c. 75, s. 79.  
Execution Act, 1924.  
Execution Act, R.S.B.C. 1936, c. 91.  
Execution Act, R.S.B.C. 1960, c. 135, s. 35.  
Land Registry Act, R.S.B.C. 1924, c. 127, s. 34.  
Land Registry Act, R.S.B.C. 1936, c. 140, s. 34.  
Land Registry Act, R.S.B.C. 1960, c. 208.  
Land Title Act, R.S.B.C. 1979, c. 219, ss. 20, 27.  
Real Estate Act, R.S.B.C. 1979, c. 356, s. 48(1).  
Territories Real Property Act.

**Counsel:**

D.A. Hobbs, for the Appellant.  
A. Chaster, for the respondents.

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Reason for judgment were delivered by **Newbury J.A.**

¶ 1 NEWBURY J.A.:-- The issue raised by this appeal is one discussed, although by no means conclusively, in a host of venerable Chancery cases dating back more than 150 years: what is the nature of the interest, if any, acquired by a person who has contracted to purchase land, but who has not yet completed that purchase? More specifically, is such a purchaser vulnerable to the interest of a creditor who obtains and files a judgment against the registered owner of land prior to the date of transfer of title?

¶ 2 The question arose in this case as follows: on October 25, 1991, the appellant Martin Commercial Fueling, Inc. ("Martin") registered a judgment in the amount of some \$140,000 in the New Westminster Land Title Office against certain real property (the "Lands") of which the judgment debtor Mr. Virtanen was a one-third owner. The Lands were already subject to two prior mortgages and a tax sale notice. Unbeknownst to Martin, however, Mr. Virtanen and his co-owners had also signed an agreement on October 10, 1991 to sell the Lands to the "Gill" respondents for \$275,000, free and clear of all financial charges and encumbrances. The Gills had paid an initial deposit of \$1,000 and an additional \$4,000 in trust to a real estate agent. Under an addendum to the agreement dated November 5, 1991, the purchasers were authorized to pay the net proceeds to the vendors' lawyer or notary in trust, on undertakings to "pay and discharge the financial charges" therefrom, and to remit any balance to the vendors.

¶ 3 The sale and purchase of the Lands closed on November 6, 1991. The previous encumbrances were discharged from the purchase proceeds and a new mortgage granted by the purchasers was filed in the Land Title Office. Thus, following closing, the Gills appeared as the registered owners of the Lands, subject to Martin's judgment as a first registered charge, followed by the new mortgage.

¶ 4 It appears, however, that the notary acting for the purchasers did not carry out the appropriate pre- and post-index searches in the Land Title Office that would have disclosed the existence of Martin's judgment. In fact the judgment may not have come to the new owners'

attention until June of 1992 when Martin petitioned in Supreme Court for an order that a one-third interest in the Lands (the proportion previously owned by Mr. Virtanen) be sold in realization of the judgment. The Gills resisted the application and eventually, a Master of the Supreme Court ordered that \$150,000 be placed in trust to stand in place of the Lands and as security for Martin's costs in the proceeding. (No question was raised before us as to the Master's jurisdiction to so order.) The issue of the extent to which the Lands were liable to satisfy Martin's judgment was ordered to be heard pursuant to R. 18A. In the meantime, Martin was to have all the rights and remedies available to a judgment creditor, including those available under the Court Order Enforcement Act, R.S.B.C. 1979, c. 75, notwithstanding the removal of its judgment from title. That occurred on April 2, 1993.

¶ 5 The question of law before the Chambers judge, then, was whether the registration of the judgment in Martin's favour was effective as against the purchasers, whose transfer was registered subsequent to the registration of the judgment. After an extensive review of the English and Canadian case-law and various texts, Mr. Justice Coultas held that the judgment attached only to Mr. Virtanen's "interest in the proceeds of sale of Lands to the respondents, but not to the Lands itself". In so holding, he adopted the view that the vendors had held the Lands on a constructive trust for the purchasers, which trust "related back" to the date the agreement was executed. On this analysis, at the time Martin registered its judgment, Mr. Virtanen had only an interest in the net proceeds of sale after payment of the prior charges. He and his co-owners held the Lands in trust for the purchasers, and the creditor could attach only what the debtor had.

¶ 6 The "relation back" theory is attributed to James, L.J., who in his dissenting judgment in *Rayner v. Preston* (1881) 18 Ch.D. 1, said this:

I am of opinion that the relation between the parties was truly and strictly that of trustee and cestui que trust. I agree that it is not accurate to call the relation between the vendor and purchaser of an estate under a contract while the contract is in fieri the relation of trustee and cestui que trust. But that is because it is uncertain whether the contract will or will not be performed, and the character in which the parties stand to one another remains in suspense as long as the contract is in fieri. But when the contract is performed by actual conveyance, or performed in everything but the mere formal act of sealing the engrossed deeds, then that completion relates back to the contract, and it is thereby ascertained that the relation was throughout that of trustee and cestui que trust. That is to say, it is ascertained that while the legal estate was in the vendor, the beneficial or equitable interest was wholly in the purchaser. [at 13; emphasis added]

¶ 7 The theory was not universally accepted by the Courts of Equity in the 19th century; nor were the Chancery judges unanimous in describing as a constructive trust the relationship between the vendor and purchaser in the interim between their execution of a binding contract and the date of completion. In *Rayner v. Preston* itself, the majority was strongly critical of the trustee/beneficiary analogy. Brett, L.J. said this:

What is the relation between [vendor and purchaser], and what is the result of the contract? Whether there shall ever be a conveyance depends on two conditions; first of all, whether the title is made out, and secondly, whether the money is

ready; and unless those two things coincide at the time when the contract ought to be completed, then the contract never will be completed and the property never will be conveyed. But suppose at the time when the contract should be completed, the title should be made out and the money is ready, then the conveyance takes place. Now it has been suggested that when that takes place, or when a Court of Equity decrees specific performance of the contract, and the conveyance is made in pursuance of that decree, then by relation back the vendor has been trustee for the vendee from the time of the making of the contract. But, again, with deference, it appears to me that if that were so, then the vendor would in all cases be trustee for the vendee of all the rents which have accrued due and which have been received by the vendor between the time of the making of the contract and the time of completion; but it seems to me that that is not the law. Therefore, I venture to say that I doubt whether it is a true description of the relation between the parties to say that from the time of the making of the contract, or at any time, one is ever trustee for the other. [supra at 11; emphasis added]

¶ 8 From the vantage point of the 20th century, at least three different theories can be seen at work in the Courts of Equity as to the nature of a would-be purchaser's interest. Keeton and Sheridan in *The Law of Trusts* (10th ed., 1974) summarize them as follows:

Waters points out that Lord Hardwicke would not accept the existence of a constructive trust until title had been accepted, and the money paid into court. During Lord Eldon's Chancellorship, however, there was a return to the earlier view that the trust arose at the moment of the execution of contract, and the purchaser was therefore to be regarded as the equitable owner.

A further problem was discussed by Plumer, V.-C. in *Ackland v. Gaisford* [sic; *Acland v. Cuming* (1816) 56 E.R. 245]. Until the purchase-money was paid, the vendor was entitled to retain possession. It might be that he was never under a duty to convey at all. Accordingly, in his view in *Wall v. Bright* [(1820) 1 Jac. & W. 494], a constructive trust would only arise when the uncertainties had been resolved and the duty to convey unqualifiedly existed. Before that date, the vendor was merely a trustee sub modo, a term which apparently was intended to mean that the vendor, though not yet a trustee, was on his way to becoming one. *Dowson v. Solomon* [(1859) 1 Dr. & Sm. 1] advanced yet a third view, i.e. that the vendor only became a trustee for the purchaser at the date fixed for completion. Whether, in these circumstances, Plumer, M.R., and Kindersley, V.-C. would have agreed that conversion operated from the moment of the contract, having regard to the shadowy nature of the trusteeship until the resolution of uncertainties in the one case, or of the date fixed for completion in the other, does not appear. [at 195-6]

Given this apparent uncertainty, Mr. Hobbs on behalf of the judgment creditor argued before us that even if one accepts that a trust of some kind arises between a vendor and purchaser between the signing of a contract for the sale of land and the completion of the transaction, that trust is subject to many qualifications. The vendor remains entitled, for example, to receive the rents and other income of the property during the interim period; he must continue to pay property

taxes thereon; and, Mr. Hobbs says, would be entitled even to mortgage the property as long as the mortgage was discharged on or before the date fixed for transfer. Mr. Hobbs also emphasizes that the constructive trust remedy in this context was always tied to the availability of specific performance to the person seeking to enforce the contract of sale: as was said by the Privy Council in *Howard v. Miller* [1915] A.C. 318, a case on appeal from British Columbia, the constructive trust description is "only true if and so far as a Court of Equity would under all the circumstances of the case grant specific performance of the contract". [at 326] (See also *Holroyd v. Marshall* (1862) 10 H.L.C. 191, at 209; *Keeton and Sheridan, The Law of Trusts*, supra, at 195; *Cornwall v. Henson* [1899] 2 Ch. 710 at 714; *Buchanan and James v. Oliver Plumbing & Heating* (1959) 18 D.L.R. (2d) 575 (Ont. C.A.) at 579.) In Mr. Hobbs' submission, specific performance would not have been available to the purchasers in this case because of the existence of Martin's charge indeed, the Gills' contract of purchase has not yet been performed, in that they received something far less than title free and clear of all financial charges. The Lands are subject to a registered judgment for \$147,000. On this basis, the foundation for the existence of a constructive trust, whether arising by virtue of contract or strictly as a remedial mechanism, arguably falls away.

¶ 9 As Mr. Chaster notes, however, had the Gills been informed of the existence of the judgment before completion, they would have been entitled in an action for specific performance to accept what title was "made out" by the vendors, encumbered by the judgment. In the words of Jessel, M.R. in *Lysaght v. Edwards* [1876] 2 Ch.D. 499, ". . . however bad the title may be the purchaser has a right to accept it, and the moment he has accepted the title, the contract is fully binding upon the vendor." [at 507]

¶ 10 As for the larger issue of the interest of a would-be purchaser of land in this context, it is obviously too late in the day to doubt that at Equity, such a person is entitled to many rights, as against his vendor and as against third parties, that closely resemble the rights of a beneficial owner. Once the contract has been performed, those rights become less vulnerable to attack, on any of the theories posited by the old English cases. The more relevant question, however, is how those rights or the constructive trust, if such it be comport in a modern-day Torrens jurisdiction such as British Columbia. If the register is intended to govern, should not a judgment creditor who takes all reasonably prudent steps to give notice of his charge prevail over persons such as the purchasers in this case, who (through their notary) neglected to check the register but who are deemed to have had notice of the judgment? Certainly one would not expect the holder of an unregistered transfer to prevail over the holder of a registered mortgage on the basis of constructive trust.

¶ 11 In approaching this issue, Canadian courts have generally declined to enter the debate described above concerning constructive trust. Indeed, none of the leading cases cited to us referred to that debate. They have focussed instead on the provincial land titles and execution legislation, and on the nature of a judgment as a charge that is distinct from other types of charges most notably, a mortgage. Except for one period when the statutes dictated the contrary (see *Bk. Hamilton v. Hartery* (1919) 45 D.L.R. 638 (S.C.C.), discussed in *Gregg v. Palmer* [1932] 3 D.L.R. 640 (B.C.C.A.)), courts in these jurisdictions have held consistently that a judgment creditor takes "subject to the equities" arising between a registered owner and a third party. (Arguably, the "equities" closely resemble the constructive trust discussed in the English authorities.)

¶ 12 The seminal case on this point is *Jellett v. Wilkie* (1896) 26 S.C.R. 282, which involved plaintiffs who had purchased certain land in Saskatchewan in 1891 but had never registered their transfers under the Territories Real Property Act, R.S.C. 1886, c. 51. In 1893, a writ of execution was filed by Jellett against the lands with the Registrar of the appropriate registration district. The plaintiffs later sought to register their transfers, but the Registrar refused to issue certificates of title unless they were marked as being subject to Jellett's writ of execution. The plaintiffs sought a declaration that the execution was a cloud on their titles, and cancellation of the execution from the register. They succeeded in their action. The Court ruled that it was an undoubted proposition of law that "an execution creditor can only sell the property of his debtor subject to all such charges, liens and equities as the same was subject to in the hands of his debtor" a principle the Court found had not been displaced by the Territories Real Property Act. The rationale for this result was described as follows:

According to the ordinary rules of courts of equity the appellant could have made his execution a charge on, and have sold for the satisfaction of his judgment, just what beneficial interest the execution debtor had in these lands and nothing more. And this, which is said to be a "broad rule of justice" and to depend . . . upon the obvious distinction between a purchaser who pays his money relying on getting the specific land he buys and a creditor who is in no such position, was from early times enforced by courts of equity in order to protect the title of equitable owners and chargees. And it must have been the obvious right of the respondents to have the benefit of this protection in the way in which the judgment now impugned afforded it to them, unless the statute has abrogated the principle. . . .

The construction of it seems to me to be obviously plain. The effect to be given to the entry on the register of the memorandum of the writ of execution is clearly and precisely stated in the section itself to be to operate as a caveat or warning to persons who might subsequently purchase or be about to purchase from the execution debtor, that he could only sell or transfer an interest subject to the lien of the writ. This in so many words is what Parliament has declared to be the effect and consequence of the registering of an execution. Surely there is nothing in this abrogating or pointing to the abrogation of prior interests. It follows therefore that the rights of prior parties remain as they were before the execution was registered, and these entitled the respondents to have their transfers registered without any reference being made in the certificate to the execution, and to have the sheriff's sale restrained. [at 290-1; emphasis added]

¶ 13 This reasoning was restored and applied by this Court after certain amendments were made in 1924 to the Execution Act and the Land Registry Act of British Columbia. In particular, s. 34 of the latter statute, R.S.B.C. 1924, c. 127, regarding the non-effectiveness of unregistered instruments, was made subject to the well-known exception ("Except as against the person making the same . . .") that now appears in the opening words of s. 20 of the Land Title Act, R.S.B.C. 1979, c. 219, ("Except as against the person making it . . ."). In *Gregg v. Palmer*, *supra*, this exception, and the particular procedures that must be followed by a creditor in executing on a judgment, were found to support the application of an unregistered mortgagee for the registration of his charge in priority to a judgment already registered. Macdonald, J.A. reasoned as follows:

What alteration, if any, was effected by the addition of the words in 1921, after the decision referred to, "except as against the person making the same" in s. 34 of c. 26? It means that against the maker, i.e., the judgment debtor, some estate right or interest at law or in equity in the land passes to the holder of an unregistered instrument. The latter acquired the beneficial right to the fee with a statutory right to apply to register it. That the debtor under his hand and seal parted with some interest is I think indisputable. It is equally clear that whatever interest passed to the appellant by grant from the debtor cannot also pass to someone else except by the act of appellant. The judgment creditor can only sell the property of his debtor as he finds it. He cannot "take A's land to pay B's debt". (*Entwisle v. Lenz* (1908) 14 B.C.R. 51, at 56). [at 655]

¶ 14 In *Davidson v. Davidson* [1946] 2 D.L.R. 289, the Supreme Court of Canada applied this reasoning to hold that an unregistered transfer of land executed prior to the date on which a judgment creditor obtained judgment, was entitled to priority. The Court again emphasized the mechanics of execution set forth in ss. 174-177 of the then Execution Act, R.S.B.C. 1936, c. 91, and the opening words of s. 34 of the Land Registry Act, R.S.B.C. 1936, c. 140, as intended to retain the common law rule with respect to the rights of judgment creditors. In the words of Estey, J.:

. . . in s. 177 it is provided that where the instrument is entitled "to priority over the registered judgment" that the Court may nevertheless allow costs to the judgment creditor "if in the opinion of the Court the judgment creditor was justified under the circumstances . . . in requiring the applicant to have judicially established the bona fides and validity of the execution of the instrument under which the applicant claims". These sections indicate that upon such applications the question of priority shall be determined, a matter which, prior to the amendments of 1921, was settled by the provisions of the sections corresponding to ss. 34, 36 and 37. Indeed, the implication appears to be that if the instrument is found to be bona fide and validly executed that it is entitled to priority over the judgment creditor under circumstances such as obtain in this case.

These statutory provisions, read as they must be in association with s. 34, retain the common law rule with respect to rights of judgment creditors. Under that rule the execution creditor can only attach that interest which exists in the execution debtor. The respondent, having disposed of his entire interest before the registration of the judgment, this judgment cannot attach the land in question as certified by the Registrar. [at 299-300]

¶ 15 These decisions leave little doubt that at least under the Execution Act formerly in force in this province, the claim of a judgment creditor, although registered, was nevertheless subject to the "equities" in favour of an unregistered instrument granted by the owner prior to the obtaining and registration of the judgment. But Mr. Hobbs has yet another argument, this one based on s. 79 of the Court Order Enforcement Act, R.S.B.C. 1979, c. 75, which replaced the Execution Act some years ago. Section 79 was not referred to by the Chambers judge in his reasons. The relevant portions read as follows:

79. (1) After October 30, 1979, a judgment entered or obtained in the Province may be registered against the title to specified land in any or all of the land title offices in the manner provided in section 80.

(2) From the time of its registration the judgment forms a lien and charge on the land of the judgment debtor specified in the application referred to in section 80 in the same manner as if charged in writing by the judgment debtor under his hand and seal,

- (a) to the extent of his beneficial interest in the land;
- (b) whether an owner is registered as a personal representative or trustee, to the extent of the interest of a beneficiary who is judgment debtor; and
- (c) subject to the rights of a purchaser who, prior to the registration of the judgment, has acquired an interest in the land in good faith and for valuable consideration under an instrument not registered at the time of the registration of the judgment.

(3) The time of registration or the renewal of registration of a judgment is the day and hour when the application under section 80 to register the judgment or the renewal of it is received by the registrar.

(4) Where a judgment is registered under this section against a particular interest in land of the judgment debtor, and he subsequently acquires a further registered estate or interest in the same land, the registration of the judgment, if subsisting on the register, without any further application or other act on the part of the judgment creditor, shall be deemed to be enlarged so as to include the beneficial interest of the judgment debtor in that further registered estate or interest.

(5) After registration under this section, the judgment creditor may proceed at once on the lien and charge created by subsection (2). [Emphasis added]

Under s. 27 of the Land Title Act, the registration of a charge is deemed to give notice of the charge to any person dealing with the land.

¶ 16 Obviously, s. 79 gives to a creditor who registers his judgment against title to specified land, a specific lien and charge against that land. (Previously, the holder of a judgment was simply listed in a "judgment book" maintained in the Land Title Office, although the judgment was said by s. 35 of the Execution Act, R.S.B.C. 1960, c. 135, to form a lien and charge on all the debtor's land in the registration district: see ss. 174-180 of the Land Registry Act, R.S.B.C. 1960, c. 208.) At least on its face, the conclusion of the Chambers judge that Martin had only an interest in Mr. Virtanen's net proceeds of sale runs contrary to this principle.

¶ 17 Bringing together the strengthened wording of the statute and the qualifications that surround the constructive trust theory, Mr. Hobbs contends on behalf of Martin that the

purchasers here did not "acquire an interest in the land" within the meaning of s. 79(2)(c) merely because the vendors had signed an interim agreement. He suggests that many of the cases discussed above are distinguishable because, he says, they involved agreements for sale rather than contracts or agreement of sale. Further, no consideration was actually paid to the vendors in this case prior to registration of the judgment because the purchasers' deposit was required to be held by an agent or "stakeholder" pursuant to s. 48(1) of the Real Estate Act, R.S.B.C. 1979, c. 356.

¶ 18 With respect, I do not find these arguments persuasive. I have reviewed the many cases to which we were referred and I see no basis for inferring that the constructive trust was restricted to cases involving agreements for sale. To the contrary, the remedy appears to be available whenever there is a "valid contract" that Equity would enforce against the conscience of the person who signed the document: see in particular *Lysaght v. Edwards*, supra, at 506, per Jessel, M.R. If, and only if, Equity would grant specific performance, the trust will be imposed or, in the language of James, L.J. in *Rayner v. Preston*, supra, "ascertained". No reason has been suggested to us why the agreement at issue in the case at bar would not have been open to specific performance, although that remedy would not be granted prior to the agreed closing date. The fact that the deposit was required to be held by a stakeholder in the meantime surely does not change the fact that consideration had passed from the purchasers to the vendors for their promise to convey the Lands on the closing date.

¶ 19 Even apart from any argument based on constructive trust, the specific exception made by s. 79(2)(c) of the Court Order Enforcement Act for persons in the very position of the purchasers in this case precludes the creditor's argument. Subparagraph 79(2)(c) states that the lien and charge of a judgment creditor are "subject to the rights of a purchaser who, prior to the registration of the judgment, has acquired an interest in the land in good faith and for valuable consideration". (Mr. DiCatri notes in *Registration of Title to Land*, vol. 2, para. 9310, n. 49, that this provision is a legislative restatement of the rule in *Davidson*, supra.) It is clear that the purchasers in this case acquired an interest in the Lands for valuable consideration, and it has not been contended that the "contract of sale" was not entered into bona fide by any of the parties or was otherwise invalid.

¶ 20 It follows, in my opinion, that Coultas, J. was correct in his conclusion that Martin's judgment attached "subject to the equities" in favour of the purchasers, notwithstanding that their interest was not (and could not be) registered prior to closing. The creditor could attach only what remained in the debtor's hands after the conveyance in this case some \$5,000 of net proceeds.

¶ 21 I reach this conclusion with some reluctance, given the larger policy considerations that were argued on the creditor's behalf. As Mr. Hobbs notes, in a Torrens jurisdiction persons dealing with the registered owner of land are generally expected to take note of charges on the register. The result of the dismissal of this appeal is that the purchasers in this case will retain their title free of the charge which Martin prudently registered against the Lands. Mr. Hobbs contends that the decision may lead to mischief that an owner who anticipates a judgment being registered against him, may quickly sell to a friendly third party and that the two may then conspire not to register the transfer unless and until the creditor attempts to realize on its judgment. I suppose this is a possible mischief, but one hopes that the law relating to bona fide purchasers or fraudulent transfers would be applied so as to invalidate any such scheme and

protect the creditor's position. In any event, if this is a mischief that could arise, it has been one that could arise for many decades and which the Legislature has not seen fit to address. Indeed, persons in the position of the purchasers in this case have been consistently protected in this province, formerly by the Execution Acts and now by the Court Order Enforcement Act, against the claims of persons in Martin's position.

¶ 22 I would dismiss the appeal, with thanks to both counsel for their helpful submissions.

**NEWBURY J.A.**

**CUMMING J.A.:**— I agree.

**RYAN J.A.:**— I agree.

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