BOTH SIDES OF THE FIRE BOARD CASE

BOARD IS ENJOINED

Judge Estelle Renders Decision in Favor of Chief Redell.

APPEAL WILL BE TAKEN AT ONCE

Court Holds that Power of Trial is Vested Jointly in Mayor and City Council-Based on Former Decision.

Judge Lee Estelle granted a temporary injunction yesterday which prevents the Board of Fire and Police Commissioners from hearing charges brought against Chief Redell of the fire department and taking any steps for his removal.

By an agreement entered into by City Attorney W. J. Connell and the attorneys for the fire chief the hearing was considered final and the restraining order was declared an injunction. This makes it possible to take the case to the supreme court without further delay. The attorneys announced that the transcripts will be prepared at once and the case will be taken to the higher court in a few days.

Judge Estelle's action was based upon the decision of the supreme court which declared a portion of section 166 of the city charter unconstitutional. This section provided that Omaha should have a Board of Fire and Police Commissioners named by the governor. It was held by the supreme court that the appointment of such a board by the governor violated the guaranty of municipal home rule and that the commissioners should receive their authority from the people whose affairs they administered. Consequently the board was reorganized and the members were appointed by the mayor.

Text of the Decision.

In the case of John Redeil against Moores and others there are before me for construction the following sections of the chapter of the Compiled Statutes governing cities of the metropolitan class, namely: Sections 166 to 168, inclusive.

Section 166 reads as follows: "In each city of the metropolitan class there shall be a Board of Fire and Police Commissioners, to consist of the mayor, who shall be ex-officio chairman of the board, and four electors of the city, who shall be appointed by the governor."

Interprets Judge Harrison simply said that the provisions of 168 which specify or name the qualifications of police commissioners were not an inducement, as I think, to the passage of the act. He says: "It would not affect the due enforcement of the other portions of the law." But this question that is before me now, namely, whether the appointment by the governor was an inducement to the passage of the act, was not before Judge Harrison; it was not before the supreme court in the case of State against Stuht, and, so far as I am able to learn from an investigation of the reports of the Stuht case and of the case in the 55th Nebraska, this is the first time it has been up for adjudication.

I have given this more than usual attention.

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I have given this more than usual attention and I have been aided and assisted by some of my associates on the bench. Judge Norval very properly says in one case that if it be determined that one part of an act is unconstitutional and if, by an inspection of the act, you can determine that that was an inducement to the passage of the act, then the whole act must fail. That, however, I do not think is a limitation on the power of the court to investigate and determine whether an act is unconstitutional. It may be determined by something outside of the act itself, in my judgment, and I am supported in that and led to believe that by an investigation of Dwaris on statutory construction, by an investigation of Bishop on statutory crimes and various cases and also by Cooley on constitution limitations.

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"It must be obvious, in any case where part of an act is set aside as unconstitutional, that it is unsafe to indulge in the same extreme presumptions in the support of the remainder that are allowable in support of a complete act when some cause of invalidity is suggested to the whole of it." That is, applied to this case, it having been determined that that provision which says that the governor shall appoint is unconstitutional we shall not indulge in the same presumptions to sustain this act that we would otherwise if the act were before us for the first time. "In the latter case we know the legislature designed the whole act to have effect, and we should sustain it, if possible; in the former we do not know that the legislature would have been willing that a part of the act should be esuitained if the remainder were held void, and there is generally a presumption more or less strong to the contrary." I take it by that that he means that the legislature passed this whole act, intending and expanding this whole act, intending and expanding this whole act, intending and expanding the same and the passed this whole act, intending and expanding the same and the same and the passed this whole act, intending and expanding the same and the same and the same are all the same and the same are all the same and the same are allowed to the same and the same are allowed to an act of the same and the same are allowed to an act of the same and the same are allowed to an act of the same are allowed to an act of the same and the same are allowed to an act of the same and the same are allowed to an act of the support of the same are allowed to an act of the support of the suppor

pecting that all of it would stand, and that there is a presumption to that effect. "While, therefore, in the one case the act should be sautained unless the validity is clear, in the other the whole should fail unless it is manifest the portion not opposed to the constitution can stand by itself, and that in the legislative intent it was not to be controlled or modified in its construction and effect by the part which was void."

Bishop, in "Statutory Crimes," page 77, says: "Courts do not close their eyes to what they know of the history of the country and of the law, of the state of the law at a particular time, of public necessities felt and other like things."

Judge Davis, in a case in the 91. S. at page 72, says: "Courts, in construing the statutes, may with propriety recur to the history of the time when it was passed, and this is frequently necessary in order to ascertain the reason as well as the meaning of particular provisions of it.

There is no more striking illustration of that, as I recall it, than the various statements that were made on the questions involving the fourteenth and fifteenth amendments of the Constitution of the United States; and every time that has been before the supreme court of the United States they have gone into the history of the country and the condition of affairs and have not looked merely at the words of the constitution in order to constitute it.

So that, in this case, I think that we have

So that, in this case, I think that we have two things to aid us in passing on the constitutionality of this act, or of this section 166, namely: An inspection of the section itself; second, the history of this city at the time this act was first passed, which I believe was in 1887; that is my recollection

When it comes to an investigation of this, and applying the history of this act to the act itself, there can be no two minds in regard to it; that is, so far as those people are concerned who are living in the city of Omaha and conversant with the history of this city in 1887, and prior thereto.

Up to 1887 as I recall it, the mayor and the city council controlled absolutely the fire and police forces of this city. Now, I am speaking of what is known by every man within the sound of my voice that was here at that time and who took any interest in the weifare of the city of Omaha. At that time a considerable number of the people of the city of Omaha thought that the fire and police forces of the city of Omaha ought to be, to use their own expression. Taken out of politics. I was one of those who did not believe that that was an efficacious remedy that they were suggesting, and I was one of the few who opposed this act, and it is known by all of us that it was urged and insisted that the control and government of the fire and police forces of the city of Omaha should be placed in the hands of a board of fire and police forces of the city of Omaha should be placed in the hands of a board of fire and police commissioners, to be appointed by the governor. We all know that.

Matter of Politics. When it comes to an investigation of this

section 166 treads as follows: "In each city of the metropolitan class there shall be a Board of Pire and Folice Commission of the exodition chairman of the board, and four electors of the city, who shall be \$p\$-to inted by the sovernor."

In the argument of this case it seems to the politics of the city of the city of Comah and that the provision of the city of the city of Comah and the content of the city of the city of Comah and the content of the city of the city of Comah and the content of the city of the city of Comah and the content of the city of the city of Comah and the content of the case of the city of Comah and the content of the case of the city of Comah and the content of the case of the city of Comah and the content of the case of the court has upen held the constitutionality of the case of the court has upen held the constitutionality of the case of the court has upen held the constitutionality of the case of

the sections which Judge Estelle's decision declared to have been annulled by the supreme court's decision, it takes the wind out of the sails of Yeiser's clients. As far as the firemen are concerned this case has been tried before Judge Estelle' and the firemen were defeated. Yeiser is perfecting an appeal to the supreme court. The case involving the rights of the ex-policemen has not yet been tried.

There are two other bunches of ex-policemen and ex-firemen who have brought suits in court protesting against being relieved from service in the respective departments. In one of them, which was the first case of the kind brought, the men removed were reinstated and they were given judgment for back pay during the time they were out of the service. It has been suggested that under the decision of Judge Estelle all of the men who have been removed from service in the two departments will be trying to break in again.

ICEMEN CONDEMN CHIEF REDELL

Adopt Resolution Denouncing His Conduct and Endorsing Board. At a meeting of the Ice Deliverers and Wagon Drivers' union, held at their hall. Sixteenth and Cuming streets, last night the fire department matter came up for some discussion. Before the meeting was ended a resolution was adopted condemning Fire Chief Redell for his alleged brutal treatment of the firemen under his command and extending a vote of thanks to Mayor Moores and the Board of Fire and to fire Police Commissioners for interfering on behalf of the eighty-three firemen who signed the petition asking for relief. Chris Wenz, secretary, and Henry Chors, president of the union, signed the resolution.

ARGUMENT FOR THE BOARD

City Atterney Files a Brief with the Henorable Court.

CONTENDS AGAINST REDELL'S STAND

Authority and Responsibility of the Fire and Police Board Set Forth Fully and Clearly by Counsel for Defense.

In handing down the decision in the case wherein Fire Chief Redell asked for an order to restrain the Board of Fire and Police Commissioners from trying him on charges preferred against him, Judge Estelle referred to a brief that had been handed him by the counsel for the defendant. Following is the full text of the brief, which was prepared by W. J. Connell, city attorney:

Section 160 of the charter expressly provides that all powers and duties connected with and incident to the appointment, removal, government and discipline of the officers and members of the Fire and Police

officers and members of the Fire and Police departments of the city, under such rules and regulations as may be adopted by the Hoard of Fire and Police Commissioners, shall be vested in and exercised by said board. The duties of said board and the power and procedure of said board with reference to appointments and removals are set forth with much detail.

Is this section void?

It is claimed by counsel for plaintiff that all the provisions relating to the Board of Fire and Police Commissioners are void.

It is claimed by counsel for defendants that only so much of any of said provisions as assumes to confer authority upon the governor to appoint the members of said board is void.

The contention of counsel for the plaintiff is based on the assumption that the provision contained in section 166 of the act of 1897 authorizing the governor to appoint

vision contained in section 166 of the act of 1897 authorizing the governor to appoint four members of the board was the inducement for the passage of the act. In other words, it is claimed that the power of the governor to appoint formed such an essential part of the provisions relating to the Board of Fire and Police Commissioners as to require that all of such provisions should be declared invalid.

In a Former Case.

relation of Wheeler agency Stutch reported by the No. S. and around about the No. S. and a present state of the state has we had ever that before the state that we had ever the before the state that we had a present state of Fire and Dollec Commissioners, and the other characteristic production of the control of the state state where the state of the state sta

Upholds Board's Contention. Not only is the general principle con-tended for by counsel for defendants de-termined by the supreme court in the Stuht case, but the identical provisions intended for by counsel for defendants determined by the supreme court in the Stuht case, but the identical provisions involved in this action were considered by the supreme court and the question here involved settled.

The following is also from Judge Harrison's opinion in the Stuht case: "In regard to the appointment of fire and police commissioners the law provides for four, not more than two of whom shall be of the same political faith or allegiance; and further, in this connection in section 18s. as follows: "No person shall be appointed a police commissioner who is engaged in the sale of malt, spirituous or vinous iliquors, or who is engaged in the business of dealing in tobacco or articles manufactured therefrom, or who is an agent for any fire insurance company or companies, or interested therein, or in the business of soliciting fire insurance, or who shall have been engaged in any of such callings or business within one year previous to the date of appointment. No person shall be qualified to hold the office of police commissioner while he holds any county, city or school district office." It is claimed that this last is class legislation and not permissible under our constitution. A question which might arise in regard to the political qualification was considered in State against Seavey. 22 Neb., 454: State against Bemis, supra, and determined, and we have not been asked to re-examined and we have not been asked to re-examine it here. In regard to the portion of section 168 which we have quoted, speaking of it as a general proposition and not in a legal sense, personally I should condemn it as opposed to the true genius and spirit of the republican principles of our government, both state and national; but we need not discuss or decide whether it is vicious and hore currently in the determination of such question does not enter into the decision of the ultimate issue herein."

Local self-Government.

Local Self-Government.

In deciding the question of local self-government in accordance with the con-

tention of the city (State against Moores, 55 Neb., 480), the court was very careful in its consideration of the several provisions relating to the Board of Fire and Police Commissioners to limit its statement regarding the invalidity of the same to that portion of the act conferring authority upon the governor to appoint the commissioners.

The following is a copy of the syllabit. "The act of the legislature of 1897 (Session Laws 1897, chapter 19; Compiled Statutes, chapter 12a), insofar as it assumes to confer authority upon the governor to appoint fire and police commissioners in cities of the metropolitan class, is void, as being an unlawful attempt to deprive the people of such cities of the right of local self-government."

The opinion of the court contains section 189 in its entirety. No intimation is made that by reason of the invalidity of that portion of the act conferring authority on the governor to appoint the commissioners section 189 would also be invalid. On the contrary, this section as well as others relating to the duties and powers of said board is recognized as a valid exercise of legislative discretion. This appears from the syllabi following: "The right to maintain a fire department in a city of town is one of the rights vested in the people of municipalities, and is to be exercised by them, without legislative interference, except to the extent the lawmaking body may prescribe rules to said the people of the municipalities in the exercise of such right."

Covered in Another Case.

It also appears from the following extracts from the opinion of the court: "The act before us, as well as the one construed in State against Seavey, supra, denied to the people of Omaha the power to choose a portion of their own local officers, and insofar as it did so is unconstitutional, for the right to provide and maintain a fire department in a city is one of the powers vested in the inhabitants of such municipality as an element of local self-government and is to be exercised by them without legislative interference, except to the extent that the lawmaking body may create rules to assist in the exercise of such right.

extent that the inwmaking body may create rules to assist in the exercise of such right.

"It will be observed that section 165 of chapter 12a. Compiled Statutes, attempts to make persons engaged in any one of certain enumerated vocations ineligible to the office of police commissioner. The omission to discuss that provision must not be construed as impliedly sustaining its constitutionality. We merely refrain from now expressing an opinion on the subject.

Purpose of the Engetment. How can it be said that the provision con-How can it be said that the provision conferring authority on the governor to appoint the commissioners was the inducement for enacting the several provisions relating to a board of fire and police commissioners for the city of Omaha? If it is claimed that such inducement was the placing of additional political power in the governor, a negative is given to such contention by the fact that the law provides that "not more than two of said commissioners shall be of the same political faith or party allegiance."

It is manifest that the purpose of the enactment was to create a board for the It is manifest that the purpose of the enactment was to create a board for the management of the fire and police department and that the manner of the appointment of the members of such board was merely incidental to such purpose.

Section 166 expressly declares that in each city of the metropolitan class there shall be a board of fire and police commissioners. This is a distinct provision which can stand independent of the manner of appointment.

Section 167 relates mainly to the appointment of members of the board by the governor, and is within the decision of the supreme court in the Moores case.

Section 168 prehibits the appointment of persons engaged in certain kinds of business and under the intimation of the court is probably void.

Section 169 relates to the powers and duties of the board and is clearly within the decision of the supreme court in the Moores case, which recognizes in terms that the lawmaking body may properly make and prescribe rules to aid the people of a metropolitan city in the exercise of the right to maintain a fire and police department.

Section 170 provides that the chief of

ment.
Section 170 provides that the chief of police shall be subject to the orders of the Board of Fire and Police Commissioners.
Section 187 authorizes the Board of Fire and Police Commissioners to create the police relief fund. police relief fund.
Section 188 provides that the Fire and Police Commissioners shall be trustees of the police relief fund and shall invest the same from time to time.

Section 189 provides for the disbursement of police relief fund under such rules and regulations as shall be approved by the Board of Fire and Police Commissioners.

If the blunderbuss of counsel for plaintiff is really loaded it would knock out each and all of the foregoing provisions and would practically overrule the supreme coirt.

Not only this, but the consequences would be generally disastrous.

The officers and men of the fire and police departments would practically be without control or discipline. The provisions of law relating to the park board would also be yold. It is admitted that the judges, under

the decision in the Moores case, have right to appoint the members of the park right to appoint the members of the park board.

The provision relating to their appointment by the district judges, like the provision relating to the appointment of the members of the Board of Fire and Police Commissioners, is void. If such provision in the latter case were the inducement for the passage of the other provisions relating to the same subject, then it would be equally so in the park board case. As a necessary result the authority of the park commissioners to designate lands for park, parkway and boulevard purposes would not exist; the issue of park bonds would be unauthorized, and the right to remove the superintendent of parks or other park omicials or employes would not exist.

BOARD PROMISES MEN PROTECTION.

Instructs Police Force to Prevent Fire Chief from Assaulting Men. Chief Redell's salary has been reduced from \$3,000 to \$2,000 a year and the chief of police has been instructed to protect the men of the fire department from assault by Redell at fires, engine houses and other places.

At a special meeting of the Board of Fire and Police Commissioners last night, with Mayor Moores presiding, and all of the members present, the following resolution was introduced by Commissioner Kennedy and unanimously adopted:

whereas, Certain charges and specifica-tions have been filed with the Board of Fire and Police Commissioners of the City of Omaha charging Chief Redell with brutai, tyrannical and overbearing conduct toward the officers and men of the fire de-partment of said city, and that without cause he has used obscene, abusive, pro-fane and threatening language toward said officers and men and has also used personal violence upon and toward them, whereby fane and threatening language toward said officers and men and has also used personal violence upon and toward them, whereby they have been humiliated and injured in person and feelings, and by reason of their dread and fear of said Redell and of unjustifiable personal abuse and violence on his part toward them, a number of said officers and men have become greatly incapacitated to do effective and efficient work at fires occurring in said city, and Whereas. The honorable Lee Estelle, a judge of the district court, has seen proper to issue an order of injunction restraining and enjoining this board from hearing or considering said charges or removing or suspending said charges or removing or suspending said Redell, and Whereas. A petition signed by eightyone members of the fire department has been filed with the said board asking for the removal of said chief for their self-protection and the good of the fire service by reason of his tyranny and brutal treatment of the officers and men of said department, and Whereas, Under said order of Judge Estelle no action can properly be taken by this board with reference to said charges.

Estelle no action can properly be taken by this board with reference to said charges or the removal or suspension of said chief until said order is reversed by the supreme

or the removal or suspension of said chief until said order is reversed by the supreme court, and

Whereas. Until such reversal is obtained the officers and men of the said fire department are entitled to protection against unjustifiable assaults and injury by said Redell; therefore, be it.

Resolved, by the Board of Fire and Police Commissioners of the City of Omaha. That the officers and members of the fire department of the City of Omaha, so far as possible, avoid any controversy or conflict with said Redell and continue to render the most efficient service possible in the protection of property from fire and in the care and management of the property of said department.

The chief of police is hereby required to give to said officers and men all protection possible in the discharge of their duties at fires and at engine houses and other places against unlawful assaults upon them by said Redell, and be it further.

Resolved, That a copy of these resolutions be furnished by the clerk of this board to each member of the fire department and also to the chief of police and a copy thereof be posted in each of the engine houses of the city.

Cuts Down His Salary.

Cuts Down His Salary. After the adoption of this resolution is

was suggested that as the salary of the chief of police is only \$2,000, the compensation of the chief of the fire department should be reduced to a similar figure. Commissioner Heafey prepared the following

adopted.

Resolved, That the salary of the chief of the fire department be and hereby is fixed at \$2.000 per annum, payable monthly, and that the salary of the assistant chief of the fire department be and hereby is fixed at \$1.800 per annum, payable monthly, and that the rule relating to salaries be and hereby is changed and modified accordingly.

Fred L. Bugbee of truck No. 4 filed new charges against Chief Redell, in which he specified that the chief assaulted him at a fire at 2213 Dewey avenue early last Saturday morning. Bugbee declares that Redell, without cause or provocation, grabbed him by the neck, choked him viciously, tore his coat collar and then ordered him away from the fire.

It was resolved to defer action on the Bugbee charges until the right of the board to hear and consider the same has been determined by the supreme court

HOT AIR WEALTH STORIES

Herman Kountze Denies Story of Omaha Strike in Texas

Herman Kountze has returned from a rip to the Texas oil fields and denounces as a fabrication the report that he has realized any profits from the recent discoveries near Beaumont. He says:

"Three companies in which I am interested own considerable land in that part of Texas. The property of the Texas Land and Cattle company is mostly rice land; that of the Sabine Pass Land and Improvement company consists in part of the site of the town of Sabine Pass and land surrounding that town. This land is within twenty-five miles of the recent discoveries and is believed to contain oil. I went down there in consequence of the recent oil discoveries to look over the situation. I found that all of the oil discovered so far is confined to an area of probably 125 acres and that while much prospecting has been done and is being done in other parts of what is believed to be the district none of the wells have produced oil.

"Our company has had many offers from prospectors who desire to develop the land, but so far we have made no contracts. We may lease a part of the land and will probably develop some of the ground on our own account, but so far we have formed no definite plans. I learned, with surprise, that it was reported in Omaha that Mr. Creighton and Mr. McShane had made a large amount of money in oil lands in Texas in the last few weeks. I asked Mr. Creighton about it today and he said that there was not a word of truth in the report, so I expect it was on a par with he one respecting our company.

"Many thousands of acres have changed hands at fabulous prices and some of the people have paid more than they can ever get out. At the same time the discovery is a good thing for that part of the state and will have a considerable influence in its commerce. The oil is now being shipped for fuel, as there are no refineries at which it could be prepared for illuminating purposes, although it is claimed that the oil is of a quality which could be profitably refined.

holera Morbus a Dangerous Disease. In many instances attacks of cholera morbus terminate fatally before medicine can be procured or a physician summoned. The safe way is to keep at hand a reliable medicine for use in such cases. For this purpose there is nothing so sure as Chamberlain's Colle, Cholera and Diarrhoea Remedy. W. E. Bosworth of Lafayette. Alabama says: "In June, 1900, I had a serious attack of cholera morbus and one dose of Chamberlain's Colic, Cholera and Diarrhoea Remedy gave me relief in fifteen minutes." For sale by all druggists.

VOCAL RECITAL AT BELLEVUE Pleasing Feature of Ceremonies Con-

nected with Annual Commencement. The recital of the vocal department of

Bellevue college, in connection with the ceremonies of the eighteenth annual commencement week of that institution, was yesterday afternoon, under the direction of Thomas J. Kelly, vocal instructor.

The first part of the program was devoted to the pupils of the department, the program opening with "The Rosary" of Sthelbert Nevin, sung by Miss Fingade. The second number, by Miss Kallstrom, was "The Swallows," by Frederick Cowen. Miss Stutsman rendered a double number, "Sweetheart," by Frank Lynes, and "Were I a Star." by Charles B. Hawley. The first half closed with Reginald de Koven's "My Hame is Whaur the Heather Blooms," sung by Miss Mary Kerr.

The second part of the program presented representative songs, sung by Mr. Kelly, including an aria from the oratorio, 'Samson," "Du bis wie eine Blume," Rubenstein, "Drink to Me Only With Thine "Dites-moi," Eyes." a chansonette, Nevin, and an Irish folk-song, "Over Here." Mrs. Kelly sang three songs 'Dear, When I Gaze Into Thine Eyes,' Bendemeer's "Stream" and "I Know a Place Where the Sun is Like Gold." The program closed with the singing of Francis Allitson's "Song of Thanksgiving," by Mr

Nothing equal to Prickly Ash Bitters for removing that sluggish, bilious feeling, so in hot weather. It creates common vigor, appetite and cheerful

DANIELS COME TO JUDGMENT

selves Honorably and Are Admitted to the Bar.

A class of six Omaha law students has just undergone the ordeal before the State Examining board and has been authorized to practice at the Nebraska bar. The successful aspirants are John G. Kuhn, O. C. Wilson, C. J. Backus, M. P. Goodrich, H. G. Wernimont and O. E. Johnson. The

young lawyers will open offices in this city, where they have already become known in serving their apprenticeship.



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Greater

Union

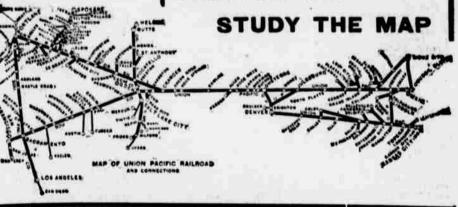
Pacific

Railroad

CHOICE of ROUTES -PUTS-**Union Pacific First on List**

President McKinley's

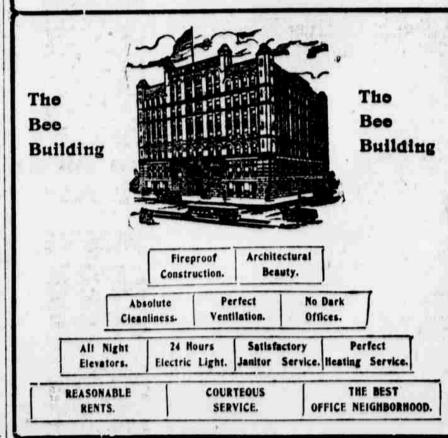
After full arrangements had been made to return another way the head of the Federal Government changed all plans by selecting the Union Pacific for Mrs Mc-Kinley's homeward journey, thus placing his official seal of approval on the Union Pacific as the quickest, safest and most comfortable route between the Atlantic and Pacific Coasts.



New City Ticket Office, 1324 Farnam. Tel. 316 Union Station 10th and Marcy, Tel. 629.



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