JUDGE MERRIMON ON THE AMENDMENT

An Address Delivered Before the Zeb Vance Democratic Club in Asheville.

Judge James H. Merrimon's argument in behalf of the proposed amendment to the constitution at the court house Saturday evening is presented in full below. Seldom has an address of such a character been followed so closely and listened to with such interest, and it was very evident that the speech made a deep impression on those who heard it. The meeting was held under the auspices of the Zeb Vance Democratic Club and was called to order by Vice President John M. Campbell.

Resolutions of thanks were offered by Hon. Locke Craig to Senator Morgan for his splendid speech in behalf of Anglo-Saxon rule recently delivered in the United States Senate. These were unanimously adopted and a copy ordered sent to the Senator by Messrs. Craig and Brown, a committee for that purpose.

Judge Merrimon Speaks.

Judge Merrimon, being introduced, referred to the many political questions which would have to be settled this year, those of finance, the trusts, etc. However, the speaker said, he would discuss only one question, that of the constitutional amendment, and would limit himself to its legal phase. Continuing, he said:

The chief, if not the only issue, engrossing the attention of the people of the State at this time is the proposed amendment to the constitution of the State in relation to suffrage and eligibility to office. The amendment has been published in all the newspapers of the State, and the people have become familiar with its provisions.

Its adversaries base their opposition upon the ground that it violates the fourteenth and fifteenth amendments to the Constitution of the United States and present their objections to the public with a double aspect.

They insist, in the first place, that it is repugnant to the Constitution of the United States for the reason that it disfranchises the negro because he is a negro, or, in the words of the fifteenth amendment, "on account of race, color or previous condition of servitude;" but not convinced that this point is well taken, and still less satisfied that, if it were it would avail to defeat the adoption of the amendment by the people, they pretend to be greatly alarmed less the fifth section or "Grandfather Clause," as it is styled, might be declared unconstitutional and void, and the other provisions left in full force, and thus the poor white men of the State deprived of the right to vote.

It is incumbent upon the friends of the proposed amendment to satisfy the people that if adopted, it will be a valid part of the fundamental law of the State, and not in conflict with any provision of the Constitution of the United States. If the advocates of its adoption cannot do this it would be best for the Legislature when it meets, to repeal the act proposing the amendment, and providing for its submission to the people for their adoption or rejection.

Let us then consider dispassionately the two objections urged, and see whether there be any merits in them or in either of them.

As stated in the outset the enemies of the amendment present their objection to its adoption with a double aspect. It will therefore be best in discussing it to divide the issue into two:

1. Will the proposed amendment, if adopted, be repugnant to the Constitution of the United States?

2. If not unconstitutional, as a whole, will the fifth section violate the Constitution of the United States?

It has been suggested that the General Assembly in passing the act proposing the amendment failed to comply with the usual forms of legislative procedure, nor has any one, so far as I know, attempted to point to anything apparent upon the face of the act or proposed amendment that renders it obnoxious to any provision of the Constitution of the United States. As is commonly understood, the contention is that the necessary effect of the amendment, if ratified, will be the disfranchisement of the negro, and, although there is nothing in the language of the amendment to show it, yet nevertheless the courts will hold that the manifest purpose is to deny or abridge the negro's right to vote, "on account of race, color, or previous condition of servitude," and that what is expressed is a bald subterfuge—"a delusion and a snare."

It is Unconstitutional.

As it is my purpose to be as brief as possible I will take up at once the first of the question for discussion:

Will the propsed amendment if adopted be repugnant to the Constitution of the United States?

No one will contend that there is anything in the Constitution of the United States which forbids or prohibits a State from regulating the right to vote in its own way unless it be found in the XIV or XV amendments to that instrument. As was said in "Civil Rights Cases," 109 U. S., 23, the XIII amendment simply abolished slavery.

It is important in the outset to get a clear understanding of the rules of construction to be applied to the amendment, and in order to do this we cannot do better than to resort to the highest authorities upon questions of this character, and in this country there is no higher authority as a text writer than Judge Cooley and it will be conceded on all hands that there can be no higher authority than the Supreme Court of the United States.

Judge Cooley speaking of the construction of a State constitution, says: "Nor is it lightly to be inferred that any portion of a written law is so ambiguous as to require extrinsic aid in its construction. Every such instrument is adopted as a whole, and a clause which standing by itself, might seem of doubtful import, may yet be made plain by comparison with other clauses or portions of the same law. It is therefore a rule of construction that the whole is to be examined with a view to arriving at the true intention of each part.

"Effect is to be given, if possible, to the whole instrument and to every section and clause. If different portions seem to conflict the courts must harmonize them if practicable, and lean in favor of a construction which will render every word operative, rather than one which will make some idle and nugatory. This rule is especially applicable to written constitutions, in which the people will be presumed to have expressed themselves in careful and measured terms, corresponding with the immense importance of the powers delegated, leaving as little as possible to implication.

"Another rule of construction is that when the constitution defines the circumstances, under which a right may be exercised * * * the specification is an implied prohibition against legislative interference to add to the conditions." pp. 57, 64.

Again this author says: "We have elsewhere expressed the opinion that a statute cannot be declared void because opposed to a supposed general intent or spirit, which it is thought pervades or lies concealed in the Constitution, but wholly unexpressed, or because, in the opinion of the court, it violates fundamental rights or principles, if it was passed in the exercise of a power which the constitution confers. Still less will the injustice of a constitutional provision authorize the courts to disregard it, or indirectly to annul it by construing it away. It is quite possible that the people may, under the influence of temporary prejudice, or mistaken view of public policy, incorporate provisions in their charter of government infringing upon the right of the individual man or upon principles that ought to be regarded as sacred and fundamental in a republican government; and quite possible also that obnoxious classes may be unjustly disfranchised. The remedy for such injustice must rest with the people themselves through an amendment of their work when better counsels prevail. Such provisions when free from doubt must receive the same construction as any other." pp. 72, 73.

"The object of construction as applied to a written consultation is to give effect to the intent of the people in adopting it. In the case of all written law it is the intent of the law maker that it is to be enforced. BUT THIS INTENT IS TO BE FOUND IN THE INSTRUMENT ITSELF. It is to be presumed that language has been employed with sufficient precision to convey it. * * * Where a law is plain and unambiguous whether it be expressed in general or limited terms, the Legislature should be intended to mean what they have plainly expressed, and consequently no room is left for construction. Possible or even probable meanings when one is plainly declared in the instrument itself, the courts are not at liberty to search for elsewhere. Whether we are considering an agreement between parties a statute, or a constitution, with a view to its interpretation, the thing which we are to seek is the thought which it expresses. * * * That which the words declare is the meaning of the instrument, and neither courts nor legislatures have the right to add to or to take away from that meaning."

Supreme Court's Language.

Now the Supreme Court of the United States have stated the rules in as strong, if not stronger, language than Judge Cooley. In Lake County vs. Rollins, 130 U. S., at page 670, it is said: "Why not assume that the framers of the constitution, and the people who voted it into existence, meant exactly what it says? At the first glance its reading produces no impression of doubt as to the meaning It seems all sufficiently plain; and in such case there is a well settled rule which we must observe. THE OBJECT OF CONSTRUCTION APPLIED TO A CONSTITUTION IS TO GIVE EFFECT TO THE INTENT of its framers, and of the people in adopting it. THIS INTENT IS TO ITSELF; and when the text of a constitutional provision is not ambiguous, the courts, in giving construction thereto, are not at liberty to search for its meaning beyond the instrument.

"To get at the thought or meaning expressed in a statute, a contract or a constitution, the first resort, in all cases, is to the natural signification of the words, in the order of grammatical arrangement in which the framers of the instrument have placed them. If the words convey a definte meaning which involves no absurdity nor any contradiction of other parts of the instrument, then that meaning, apparent on the face of the instrument, must be accepted, and neither the courts nor the Legislature have the right to add to it or take from it. So, also, where a law is expressed in plain and unambiguous terms, whether those terms are general or limited, the Legislature should be intended to mean what they have palinly expressed, and consequently no room is left for construction. There is even stronger reason for adhering to this rule in the case of a Constitution than in that of a statute, since the lattter is passed by a deliberative body of small numbers, a large proportion of whose members are more or less conversant with the niceties of construction and discrimination, and fuller opportunity exists for attention and revision of such a character, while constitutions, although framed by the votes of the entire body of electors in the State, the most of whom are little disposed, even if they were able, to engage in such refinements. The simplest and most obvious interpretation of a constitution, if in itself sensible, is the most likely to be that meant by the people in its adoption. * * * Words are the common signs that mankind make use of to declare their intentions to one another; and when the plainly, distinctly and perfectly, we have no occasion to have recourse to any other means of interpretation."

In our own Supreme Court, in the case of McAdoo vs. Benbow, 63 N. C., foot of page 64, Pearson, Chief Justice, said: "Here it may be remarked, in putting a construction upon an instrument, the question for the court is, not what the draftsman meant, but what the words of the instrument mean. It sometimes happens for this reason that the draftsman is less to be relied on than almost any person to construe an instrument, whether it be a constitution, statute, deed or will." This was said by the Chief Justice in a case involving the construction of a provision of the Constitution of the State.

It may be thought that I have stated these rules at too great length, but I think the importance of the subject under discussion justifies me in calling attention to these well settled rules, and I undertake to say that if these rules are applied to the proposed amendment, there is not a possibility of its ever being held by any court before which the question may be presented that there is a word, a sentence, a clause of a section in ti that can be constructed to deny or abridge the right to vote of any one "on account of race, color, or previous condition of servitude;" and I expect to show that the amendment is absolutely to all intents and purposes valid and constitutional.

Citizens and Voters.

I wish in the first place to show that the XIV amendment of the Constitution of the United States, while it was intended and had the effect to confer citizenship upon the negroes, did not undertake to confer upon them the right to vote, nor did it undertake to protect them in that right. The Supreme Court of the United States, in the "Slaughter House Cases," in discussing the effect of this amendment said that "The distinction betweeen citizenship of the United States and citizenship of a State is clearly recognized and established. Not only may a man be a citizen of the United States without being a citizen of a State, but an important element is necessary to convert the former into the latter. He must reside within the State to make him a citizen of it, but it is only necessary that he should be born or naturalized in the United States to be a citizen of the Union."

The court then, after stating the distinction between the privilege and immunities of a citizen of the United States and a citizen of a State, proceeds: "We think this distinction and its explicit recognition in this amendment of great weight in this argument, because the next paragraph of this same section, * * speaks only of privileges and immunities of citizens of the United States, and does not speak of those of citizens of the several States. The argument, however, in favor of the plaintiffs rests wholly upon the assumption that the citizenship is the same, and the privileges and immunities guaranteed by the clause are the same.

"The language is, 'No State shall make or enforce or abridge the privileges or immunities of citizens of the United States.' It is a little remarkable, if this clause was intended as a protection of a citizen of a State against the legislative power of his own State, that the word citizen of the State should be left out when it is so carefully used, and used in contradistinction to citizens of the United States in the very sentence which precedes it. It is too clear for argument that the change in phraseology was adopted understandingly and with a purpose. Of the privileges and immunities of the citizen of the United States, and of the privileges and immunities of a citizen of the State, and what they resepctively are, we will presently consider; but we wish to state here that it is only the former which are placed by this clause under the protection of the Federal Constitution, and that the latter, whatever they may be, are not intended to have any additional protection by this paragraph of the amendment."

Now the next clause of the amendment which is considered by the court in these cases is as follows: "Nor shall any State deprive any person of life, liberty or property without due process of law, nor to deny to any person within its jurisdiction the equal protection of the law;" and there is nothing in the language of the court which intimates that this clause has any application whatever to questions like the one under discussion. The court in these cases enumerates many of the privileges and immunities of a citizen of the United States, such as the right "to come to the seat of government, to assert any claim that he may have upon that government, to transact any business he may have with it, to seek its protection, to share its offices, to engage in administering its functions.

"He has the right of free access to its seaports through which all operations of foreign commerce are conducted, to the sub-treasuries, land offices, and of courts of justice in the several States, to demand the care and protection of the Federal government over his life, liberty and property on the high seas, or within the jurisdiction of a foreign government, to peaceably assemble and petition for redress or grievances, to use the navigable waters of the United States," etc.

Now the right to vote is expressly held by the Supreme Court of the United States in the case of Minor vs. Happersett, 21 Wall., 162, to be not a privilege or immunity of a citizen of the United States. The opinion in that case is closed as follows:

"Being unanimously of the opinion that the Constitution of the United States does not confer the right of suffrage upon any one and that the Constitution and laws of the several States which commit that important trust to men alone are not necessarily void. We affirm the judgment of the court below," which was the Supreme Court of the State of Missouri, that a woman was hot guaranteed the right to vote by the XIV amendment.

The Supreme Court said further in this case: "By article IV., section 2, (Constitution U. S.) it is provided that 'the citizens of each State shall be entitled to all the privileges and immunities of the citizens in the several States.' If suffrage is necessarily a part of citizenship, then the citizen of each State must be entitled to vote in the several States precisely as the citizens there. This is more than asserting that they may change their residence and become citizens of the State and thus be voters. It goes to the extent of insisting that while retaining their original citizenship they may vote in any State. This, we think, has never been claimed. And again, by the very terms of the amendment we have been considering (XIV), 'representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed, but when the right to vote at any election for the choice of electors for President and Vice-President of the United States * * * * is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in the rebellion or other crimes, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.'

"Why this, if it was not in the power of the Legislature to deny the right of suffrage to some male inhabitants? And if suffrage was necessarily one of the absolute rights of citizenship, why confine the operations of the limitation to male inhabitants. Women and children are, as we have seen, 'persons.' They are counted in the enumeration upon which apportionment is to be made, but if they were necessarily voters because of their citizenship unless clearly excluded, why inflict the penalty for the exclusion of males alone? Clearly, no such form of words would have been selected to express the idea here indicated if suffrage was the absolute right of all citizens. And still again, after the adoption of the XIV amendment it was deemed necessary to adopt the XV as follows: 'The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color or previous condition of servitude.' The XIV amendment had already provided that no State should make or enforce any law which should abridge the privileges or immunities of citizens of the United States. If suffrage was one of these privileges or immunities why amend the constitution to prevent its being denied on account of race, etc? Nothing is more certain than that the greater must include the less, and if all were already protected why go through with the form of amending the constitution to protect a part."

It was held in Duncan vs. Missouri, 152 U. S., 382, that the "privileges and immunities of the citizens of the United States protected by the XIV amendment are such as arise out of the nature and essential character of the Federal government, and granted or secured by the Constitution."

Suffrage Not Conferred.

But as a direct, positive and emphatic authority that the XIV amendment, so far as the constitutionality of the proposed amendment to the State Constitution is concerned, has no possible application, I call your attention to the case of the United States vs. Reese, 92 U. S., 217, where it is held:

"The XV amendment does not confer the right of suffrage upon any one. It prevents the States, or the United States, however, from giving preference, in this particular, to one citizen of the United States over another on account of race, color or previous condition of servitude. Before its adoption this could be done. It was as much within the power of a State to exclude citizens of the United States from voting on account of race, etc., as it was on account of age, property or education. Now it is not. If citizens of one race having certain qualifications are permitted by law to vote, those of another having the same qualifications must be. Previous to this amendment, there was no constitutional guarantee aganst the discrimination; now there is. It follows that the amendment has invested the citizens of the United States with a new constitutional right, which is within the protecting power of Congress; that right is exemption from discrimination in the exercise of the elective franchise on account of race, color or previous condition of servitude. This, under the express provisions of the second section of the amendment, Congress may enforce by appropriate legislation. * * * * It is only when the wrongful refusal at an election is because of race, color or previous condition of servitude, that Congress can interfere for its protection."

The XIV amendment was declared to be a part of the Constitution of the United States on the 21st of July, 1868; the XV amendement did not become a part of the constitution until March 30, 1870. Therefore under the decision just cited it was within the power of the Legislature of any State from the date of the adoption of the XIV amendment to that of the adoption of the XV amendment to exclude citizens on account of race, etc. This would not have been so, of course, if the XIV amendment affected the question in any way whatever. I may therefore with perfect confidence take the position here that unless the opponents of the proposed amendment to the constitution of the State can show from what appears in the amendment itself, its effect, if adopted, will be to exclude the negro from voting on account of race, etc., in violation of the XV amendment their objections are groundless. There is no claim or pretence that any other portion of the constitution of the United States has anything to do with the question. But it may be as well to say that it has been repeatedly decided by the Supreme Court of the United States that the prohibitions contained in the first twelve amendments to the Constitution of the United States were not designed as limitations for the State governments in reference to their own citizens, but exclusively upon Federal power

Senator Pritchard, the very head and front of the opposition to the proposed amendment, concedes that there is nothing in section five which in so many words declares that those of African descent shall not be entitled to vote. His objection to it is that if contains "a provision * * * which attempts to confer the right of suffrage upon those whose ancestors were entitled to vote in the year 1867," and from this he concludes that it "can only be construed as an effort to exclude all citizens from the enjoyment of that right who were not entitled to vote in that year." These positions of the Senator are utterly without foundation. In the first place section five does not confer the right of suffrage upon those whose ancestors were entitled to vote in the year 1867 without qualification, but they are still left subject to all the qualifications of the preceding sections, except the educational qualification. And his other statement that this provision can only be construed as an effort to exclude all citizens from the enjoyment of the right to vote who were not entitled to vote in that year, is further from the truth than the other.

Again he says: "It is an historical fact of which the courts will be compelled to take judicial notice that in the year 1867 the colored people were not entitled to vote." It is true that they were not entitled to vote in North Carolina, but it is not an historical fact that they were not entitled to vote in any other State in the Union, and the fifth section exempts from the educational qualifications "all male persons who were on January 1, 1867, or at any time prior thereto entitled to vote under any of the laws of any of the States of the United States."

Pritchard Contradicts Himself

Again the Senator contradicts himself emphatically when he admits in his Statesville speech that "there are about 50,000 negroes in North Carolina who can read and write and who would be entitled to vote in the event the proposed amendment is adopted, provided they can pay their poll tax on or before the 1st day of March."

The truth is the speech of the Senator is an admission that if the proposed amendment is construed according to the well settled rules which I have already stated there is nothing in it that conflicts with the XV or any other amendment or provision of the constitution. His policy is to have the courts construe it according to historical facts, as he contends these facts to be, and not according to the uniform and immemorial rules of construction. There can be no doubt that if the Senator and those who agree with him can prevail upon the courts to hold an inquest over this proposed amendment and call witnesses and prove facts, and decide according to the facts they shall be able to prove, and without regard to the plain meaning of the language of the amendment itself, the amendment will be declared to be unconstitutional But the courts will never do anything of the kind.

Look at the question from any standpoint you may, the conclusion is inevitable that the negro's right to vote is not denied or abridged on account of his race, etc., but only because of the disqualifications enumerated in the several sections of the proposed amendment.

Under the fifth section the negro stands precisely upon the same foot that every other man stands who was not a citizen of the United States on the 1st of January, 1867. He was not a citizen at that time and was not a citizen until he was made such by the XIV amendment. Why section five should be held to discriminate against him and not against the thousands of others in this State who were not entitled to vote and whose ancestors were not entitled to vote on the 1st of January, 1867, it is impossible to see.

The opponents of the amendment had just as well say at once, for their whole argument comes to that at last, that when the courts get hold of this question, and especially the courts in whose hands they propose to place it, they will decide that the fifth section affords proof positive that the preceding sections, prescribing qualifications, were a fraud. There is no other way for them to get along.

In the case of Williams vs. Mississippi, 70 U. S., 213, a question like the present one was before the Supreme Court of the United States, and it quoted from a decision of the Supreme Court of Mississippi as follows:

"Within the field of permissible action under the limitations imposed by the Federal Constitution, the convention swept the field of expedients to obtsruct the exercise of suffrage by the negro race. By reason of its previous conditions of servitude and dependencies this race has acquired or accentuated certain peculiarities of habit, of temperament and of character which clearly distinguish it as a race from the whites. A patient, docile people; but careless, landless, migratory within narrow limits, without forethought; and its criminal members given to furtive offences rather than the robust crimes of the whites. Restrained by the Federal Constitution from discriminating against the negro race, the convention discriminates against its characteristics and the offences to which its criminal members are prone."

And the Supreme Court of the United States commenting on this language of the Supreme Court of Mississippi says: "But nothing tangible can be deduced from this. If weakness were to be taken advantage of, it was to be done within the field of permissible action under the limitations imposed by the Federal Constitution, and the means of it were the alleged characteristics of the negro race, not the administration of the law by the officers of the State. Besides, the operation of the constitution and always is not limited by their language to one race. They reach weak and vicious white men as well as weak and vicious black men, and whatever is sinister in their intention, if anything, can be prevented by both races by the exertion of that duty which voluntarily pays taxes and refrains from crime."

Pritchard Makes New Laws.

Senator Pritchard quotes from this case as follows:

"It cannot be said therefore that the denial of the equal protection of the law arises primarily from the constitution and laws of Mississippi, nor is there any sufficient allegation of an evil and discrimination of them, etc."

The Senator then says that the case in question was decided solely on what appeared in the constitution, and that there was no evidence that there had been an evil administration of its provisions. Suppose there had been an evil administration of its provisions, how could that make a law which was constitutional unconstitutional? It could only subject to punishment those who had been guilty of the evil administration and redress the rights of those who had been injured.

Again the Senator quotes from the case: "Though the law itself is fair on its face and impartial in appearance yet if it is applied and administered with an evil eye and an unequal hand so as to practically make unjust and illegal discrimination between persons in equal circumstances material to their rights the denial of equal justice is still within the prohibition of the constitution."

No one denies this. But what is it that is "still within the prohibition of the constitution?" Certainly not the law; but the denial of justice under the law. The law will not be overthrown because bad men undertake to administer it in such a way as to deny equal justice to all men subject to said law. And here the Senator, as if he thought he had scored a strong point asks: "Will any one deny that the proposed amendment is capable of being administered with an evil eye and an unequal hand?"

Why should any one deny such a thing? The thing for the Senator and his friends to do is to wait until the law has been adopted and become a part of the constitution, and those charged with its administration have begun to administer it with an evil eye and an unequal hand, and then it will be their turn to take a hand and put a stop to the administration of it "with an evil eye and an unequal hand." But the Senator and his friends are afraid to wait. They know that, although the law may be capable of being administered with an evil eye and an unequal hand, as might any other law, it is also capable of being administered with an evil eye and an unequal hand, and if its administration should be characterized by equal justice to all, their occupation would be gone, their mouths would be closed. No court has ever held that a law was void simply because those who might happen to administer it might do so with an evil eye or an unequal hand.

The distinction is clearly drawn in the Williams case, where it is said: "To make the possible dereliction of the officers the dereliction of the constitution and laws the remarks of the Supreme Courts of the State are quoted as to their intent. * * * * It cannot be said therefore that the denial of the equal protection of the laws arises primarily from the constitution and laws of Mississippi." There is nothing in the Constitution of the United States nor of any State that authorizes a court to declare a law void (which is not unconstitutional), merely because those charged with the administration of the law are guilty of wrong doing

Moreover it is not within the jurisdiction of any court to inquire into the motives which prompted the Legislature to pass a valid law, or a law which is valid upon its face. The rules of construction already laid down fully sustain this position, and as I have already said, I now repeat, that neither Senator Pritchard nor any opponent of the proposed amendment has any hope whatever that any court will ever declare it unconstitutional on account of anything that the law contains. If it is ever declared unconstitutional at all it will be only when the courts make out of it what the Legislature did not make, and make its language mean what it does not mean If it is possible for a court to do this then there is a chance for the enemies of the amendment, and only then.

The Fifth Section.

I will now take up the second issue:

2. If not unconstitutional as a whole, will the fifth section violate the constitution of the United States?

The contention is that if the fifth section should be held to be in conflict with the Constitution of the United States thousands of poor white men who cannot write would be deprived of the right to vote.

This is not the first time in the world's history that the expression of deep concern for the poor proceeded from an unworthy motive. Nineteen hundred years ago Judas Iscariot, Simon's son, affected to be highly offended because a pound of ointment of spikenard was devoted to a sacred use that he did not approve of, and he demanded to know:

"Why was not this ointment sold for three hundred pence and given to the poor?"

But—

"This he said, not that he cared for the poor, but because he was a thief, and had the bag and bear what was put therein."

Such was the judgment pronounced upon this arch traitor and hypocrite by One who knew him well, and no one who knows the men who are using this argument to frighten the ig-

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