THE CIVIL LAW OF INSURANCE OF THE PROVINCE OF QUEBEC: PROPOSAL FOR REFORM*

The subject of this paper is the reform of the civil law of insurance—that part of the law which deals with the rights and obligations arising out of a contract of insurance. It does not include the administrative law—the incorporation of insurance companies, the control and licensing of companies, agents and brokers, etc., not the legal differences between the various types of insurers—joint stock companies, mutuals, Lloyd's etc. It is concerned only with the rules of law that, in principle, are independent of both the administrative law and the legal structure of the insurers, or, in brief, with the rules whose proper place is in the Civil Code.

I propose to indicate, in broad outline only, the evolution of insurance since the promulgation of the Code; various defects in the law, as related to the present practice of insurance; the need for reform and the possible directions that a reform may take. In conclusion I shall submit to you certain recommendations upon the subject of such a reform.

The Evolution of Insurance

Insurance is a contract whereby a person protects himself against certain risks that may damage him in person or estate, by stipulating for the payment of a pecuniary indemnity if the risk is realized. (This is not put forward as a legal definition.)

Since we have freedom of contract insurance varies with the contracting parties. And since risks depend on circumstances, it changes with changing circumstances. Hence, variety and evolution.

The part of the Civil Code which deals with insurance was drafted in 1864. It reflects the practice of the period. According to article 2479 insurance is divided into three principal kinds—marine, fire, life. Since then insurance has evolved under the influence of many factors. Scientific inventions and their exploitation have created new risks. Investment, especially through joint stock companies, has enlarged the market. Insurers have been able to extend their field of action because experience has brought

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confidence, and because of the increase in the capital at their disposal. Competition has encouraged the development of new forms of insurance and of improvements in existing forms. And so on.

To illustrate this evolution, consider some of the effects of the development of transport facilities. Railway accidents gave rise to accident insurance. The idea of civil responsibility (liability in tort for negligence) was popularized by the automobile, with resultant profit to insurers (the word "profit" is used figuratively). Greater facilities for travelling and transportation brought into being floater policies to cover personal effects and commercial property wherever such effects and property might be. The increase in the tonnage of ships due to the steam-engine resulted in changes in the fundamental rules of marine insurance and made necessary new forms and procedures.

To illustrate another aspect of this evolution, consider the head of a family in comfortable circumstances. In 1864, our starting point, he insured his house and furniture against fire, and he insured his life. Today he insures his house against fire and a number of other perils as well, or if he is not an owner, he may cover his interest as a tenant (his risk of liability for the destruction of the house by fire, etc.). He insures his moveables against practically all risks, wherever they may be. He carries personal accident and sickness insuance, and automobile insurance (against loss and liability). He covers his liability for damage to the person and property of others (including servants) in connection with his dwelling and the personal acts of his family and himself. Under the heading of life insurance he not only protects his estate against his premature death but he makes investments.

As a final example, and for the purposes of this paper a more significant one, let us consider briefly the evolution of the insurance of things (non-marine). In 1864, speaking generally, the only example of this kind of insurance was the fire policy. Since then insurers have added, one by one, a long series of other policies—one for explosion, another (or an endorsement) for riot, others for flood, wind-storm, etc. Recently the practice has been simplified by combining a number of perils in a single policy. Thus the fire policy, with the so-called Supplemental Contract added, covers fire, lightning, wind-storm, hail, explosion, riot, impact of vehicles, smoke, and (by means of an endorsement) malicious damage.

Fire insurance came into being as a result of conflagrations such as the Great Fire of London in 1666. The most serious menace to property was fire, and along with measures to prevent and control it, the most practical answer was insurance. The policy covered this one hazard, and continued to be thus limited for a long time. Underwriting meant the measuring of the risk of the property being damaged by fire—a single peril. This original direction—the underwriting of isolated perils—dominated the development of insurance up to quite recent times. When the demand arose for protection against hazards other than fire a separate policy was created for each new peril (lightning excepted); and even when these separate policies were later combined in one, the contract still covered specifically named perils.

Note however that as the number of insured perils increases, one approaches the idea of the insurance of the *thing*, that is, insurance against every hazard of an insurable nature. In point of fact, since its beginnings about ten years ago, this stage is now passably advanced. For moveables one may obtain a policy containing a list of all the real perils to which the insured object is exposed, or, in certain cases, a policy covering expressly "all risks" and excluding only the risks that are uninsurable by their nature.

Furthermore, in addition to the broad coverage of such policies in the matter of risks, they have another distinctive mark in that they cover the object insured wherever it may be. One finds such phrases as "anywhere in the world" or "anywhere on the continent of North America."

Such is the nature of the evolution of the insurance of things. A parallel development is beginning in the field of liability insurance. (Since it is parallel I may be excused from dwelling upon it.)

At the present time three factors are operating strongly in favour of this freedom and fluidity in insurance—competition, an increasing recognition by insurers of their proper function, and the efforts of brokers who act for assureds.

With this brief outline of the evolution of insurance we may turn to the law, to see how it responds to the present practice.

The Law of Insurance

The texts of the law are, as you know, Title V of Book 4 of the Civil Code, the Quebec Insurance Act, the Husbands' and Parents' Life Insurance Act, and certain other statutes of less importance.

A study of these texts will, I suggest, show the need for reform. Within the limits of a lecture such a thesis obviously cannot be proved; but I shall point out certain of the defects of form and substance that, I hope, will make the conclusion plausible.

My criticisms are based on two postulates:

First: Insurance exists for the assured. It has for its essential purpose the protection of the assured, and to that end it must take account of realities and offer a reasonable contract. For its part, the law should not impose or supply conditions too onerous for the assured to bear, and in a general way it should not unduly restrict the coverage. On the other hand, it must be recognized that even the exclusions and conditions in a policy derive from the idea that insurance exists for the assured, because premiums depend on losses, and so assured and insurer have a common interest in controlling the risk.

Second: The realization of the first postulate, that insurance exists for the assured, would be promoted if the texts of the law were drafted in conformity with the (not always respected) principles of legislation of the civil law—the enunciation of general principles, an integral structure, and order and clarity in the texts. (This is not to claim for the civil law a monopoly of such principles).

The defect of form in the present texts that immediately strikes the eye is the lack of order, the scattering. For example, suppose one has to form an opinion on a question of life insurance. One begins with the Code. One reads Chapter I—General Provisions. Then Chapter IV—Of Life Insurance, noting that the first article makes life insurance subject to the rules for marine insurance "when these can be made to apply and are not inconsistent with the articles contained in this chapter." Thereafter there is the Quebec Insurance Act, largely administrative but still containing a good deal of civil law: for example, section 213, of public order, which defines the contracts that are deemed to have been made in the Province of Quebec and which must therefore be construed according to the laws of the Province; and section 216, dealing with the thirty days of grace for the payment of the premium, and with the limitation of actions. It might then be necessary to consult the Husbands' and Parents' Life Insurance Act.

Clearly there is a lack of order, making research difficult and creating problems of interpretation.

So much for the form—which is of course secondary to the substance. As to the latter, here are some examples of defects,

that is, uncertainties, undesirable rules, lacunas, that have developed or been revealed as a result of evolution and experience:

1. Insurable interest.—Chapter 1 of the Title Of Insurance contains the following articles on insurable interest:

"2472. All persons capable of contracting may insure objects in which they have an interest and which are subject to risk.

"2473. Incorporeal things as well as corporeal, and also human life and health, may be the object of insurance.

"2474. A person has an insurable interest in the object insured whenever he may suffer direct and immediate loss by the destruction or injury of it.

"2475. The interest insured must exist at the time of the loss unless the policy contains the stipulation of lost or not lost.

"This rule is subject to certain exceptions in life insurance."

—and the last paragraph of 2480:

"Wager and gaming policies, in the object of which the insured has no insurable interest, are illegal."

It would appear that in the drafting of these texts the codifiers contemplated specially, if not exclusively, the insurance of things and life insurance, and that the rules do not apply to liability insurance. As Mr. Justice Rinfret said in delivering the judgment of the Supreme Court in the *Hallé* case [1]:

> It may be pointed out that art. 2472, in terms, would appear to contemplate only insurance upon objects, while by force of the definition of insurance given by art. 2468 C.C. not only the perils to which an object may be exposed are stated to be valid subject-matter of an insurance contract, but also the "liability from certain risks . . . from the happening of a 'certain event'."

Ordinarily, as a question of interpretation, given that article 2468 mentions "loss or liability" expressly, and that the rules of insurable interest, articles 2472 *et seq.*, say nothing about liability, one would conclude that they do not apply to liability insurance. However, the learned judge took a common sense view of the matter and came to the opposite conclusion:

> Be that as it may, the true interpretation of art. 2472 C.C. is that one may become insured against loss or liability from certain risks or perils only if he has an interest in the objects exposed to such risks or perils, or in the happening of the event from which such risks or perils result. For art. 2472 must necessarily be read together with

[1] [1937] S.C.R. 368, 378.

2468; and they must complete one another. In the insurance world as well as in legal parlance, the rule laid down in art. 2472 is that, in order to be legally and validly insured, one must have an insurable interest in the object or the risk insured against for his benefit. That rule is, of course, rudimentary insurance law; and it is significant that, in the Civil Code, it is nowhere stated as essential to the validity of a policy, unless it is to be found in art. 2472, and, in our view, that is precisely where the Codifiers and the Legislature intended to lay down the rule.

"Insurable interest" is defined in art. 2472 as follows: (See above). There again, it may be pointed out, the article speaks only of insurance upon an object (la chose), while it must be beyond dispute that the definition also applies to an insurance against the risks resulting "from the happening of a certain event." and that here also art. 2474 must be read with art. 2468.

One cannot criticize the holding that a person who is exposed to a risk of liability has an insurable interest. But one may criticize the text that forced the learned judge to have recourse to the above reasoning in order to reach his conclusion that the contract was legal.

It is worth while to examine the postulates on which the reasoning is based:

(a) In liability insurance the insurer is bound to indemnify the assured if the latter incurs a liability covered by the policy. This is the rule of indemnity. Nothing is due if the assured is not liable; and when he is liable the insurer's obligation is limited to an indemnity—the assured is not entitled to a profit. So it rarely happens that a person pays a premium for protection against a liability to which he is not exposed, or in other words, when he has not an insurable interest. In liability insurance insurable interest is essentially a fact, a motive. Given that the insurer's undertaking is limited to an indemnity, and that it cannot be invoked without liability on the part of the assured, is it necessary that (independently of the rule of indemnity) the law be concerned with the existence of the risk of liability? The liability itself proves the risk, or the insurable interest. In a word, is it necessary that insurable interest be a rule of law for liability insurance as well as insurance of things. That was the learned judge's first postulate; and without approving or disapproving it, one may remark that a codifier should examine it critically before making a law of it.

(b) The second postulate is the assumption by the learned judge that articles 2472 to 2475 are limitative—that a legal contract of insurance can be based only on an interest recognized

(expressly or impliedly) by those articles. In other words, that an assured must not only in fact be exposed to a risk of liability covered by his policy, but that the interest must be within the purview of articles 2472 to 2475. Article 2468 recognizes the legality of liability insurance; but according to this postulate such recognition is ineffective if the risk of liability is not also recognized as an insurable interest by articles 2472 *et seq.* Again there seems to be scope for critical examination of the texts.

I do not claim any particular value for the foregoing observations on insurable interest, but put them forward to illustrate the fact that the rules of insurance are susceptible of critical analysis; and I think they would be improved by it.

Other observations may also be made about insurable interest. For instance one finds cases that deny the indemnity when the assured did not have an insurable interest at the time the policy went into force. A person takes insurance on a house he is about to buy. After he acquires it, it burns. According to certain judgments of our courts, including the Court of Appeal, the policy is void. This is obviously unfair. Also, it is probably not the law. But the important point is that the text should not lend itself to such an interpretation.

Time does not allow me to continue on the subject of insurable interest, so I shall turn briefly to some other examples of defects.

2. False representations, concealments, changes in the risk. Article 2487, which is of general application, provides that:

> "Misrepresentation or concealment either by error or design, of a fact of a nature to diminish the appreciation of the risk or change the object of it, is a cause of nullity. The contract may in such case be annulled although the loss has not in any degree arisen from the fact misrepresented or concealed."

Article 2574 reads in part, as follows:

> "Any alteration in the use or condition of the thing insured from those to which it is limited by the policy, made without the consent of the insurer, by means within the control of the insured and which increases the risk, is a cause of nullity of the policy. . . . . ."

Are not these rules now too rigorous? The assured can be deprived of his rights notwithstanding his good faith. In the French law of July 13, 1930,[2] the rules are modified. Thus, for example, by virtue of article 22, an omission or an incorrect

[2] Duvergier et Bocquet, Lois et décrets, (1930), p. 500.

declaration does not void the policy. If it is brought to light before a loss the parties may keep the contract in force at a corrected rate of premium, or the insurer may go off the risk, retaining the earned premium. If discovered after a loss the indemnity is reduced in the proportion of the rate of premium paid to the rate that should have been paid. It would improve our law to adopt such a rule. It is lawful to insure against losses caused by the assured's negligence; it is unreasonable to impose a very harsh penalty on his negligence in the attention he gives to his insurance (and on his ignorance as well).

3. The transfer of a contract of insurance, the appointment of a delegate to receive payment of the indemnity, the naming of a beneficiary under a life insurance policy.—These three different concerpts are not clearly distinguished by the law.

4. Subrogation is inadequately treated. The subrogation clause should be supplied by the law throughout insurance, with the exception of personal insurances that are not contracts of indemnity; but on the other hand its effects should be limited. To illustrate what I have in mind I shall read the subrogation clause found in a certain policy:—

> "The insurer shall not be subrogated in or receive transfer of the rights of an insured against the consort of the insured or against an ascendant, descendant, brother or sister, related or allied, of the insured or of his or her consort. The right of an insured to recover his damages from a third party, apart from the damage for which he has been indemnified by the insurer, shall not be prejudiced by the subrogation or transfer; and as between himself and the insurer his rights are preferred to those of the latter."

(I should add that this clause is not in common use.)

5. There are a number of defects in the chapter on marine insurance. For example, a marine policy on a ship covers damages caused by collision, but not, according to article 2525, if the collision is caused by the fault of the master or mariners of the insured ship.This rule, if applied, would defeat one of the main purposes for which hull insurance exists. The defects in the chapter on marine insurances are one of the reasons why in practice there is almost a tacit convention to settle cases according to the Marine Insurance Act of the United Kingdom, which is an exceptionally good codification.

6. Another example:

Article 2505: "It is an implied warranty in every contract of marine insurance that the ship shall be seaworthy at the time of sailing. She is seaworthy when she is in a fit state, as to repairs, equipment, crew, and in all other respects, to undertake the voyage."

This rule, an absolute warranty, applies to cargo insurance as well as to insurance on ships. It harks back to the period when traders carried their goods in their own ships and accompanied them on the voyage. Today it is absurd to require a skipper to warrant the seaworthiness of the ship (a fact that is now indeed recognized generally in cargo policies). Furthermore the burden of the warranty if often too great even for the shipowner.

8. The rules of general average, articles 2551 to 2567, are out of place under the title of insurance. General average is a matter of maritime law, independent of insurance and older. Sacrifices and contributions in general average give rise to claims on marine policies—that is the sole connection. It would be equally logical to include the law of tort under the title of liability insurance because it gives rise to claims on liability policies.

9. There is no chapter on liability insurance, and there are a number of points that ought to be dealt with. For instance, when the assured becomes bankrupt the indemnity under some policies falls into his estate, the victim receiving an ordinary dividend. Other creditors profit from the latter's injuries. The law should earmark the indemnity for the victim. Again the action in warranty against the insurer should be legitimated, with its corollary, a right of intervention by the insurer in the principal action.

10. As I have mentioned, the Code is silent as to the rights of beneficiaries under insurances of the person that are not contracts of indemnity. In remedying this lacuna it would be proper to incorporate into the Code the provisions of the Husbands' and Parents' Life Insurance Act (or, if preferred, the corresponding provisions of the Uniform Life Insurance Act).

While this list of defects is not exhaustive (as you undoubtedly know from experience), I hope that I have indicated enough of them to create a presumption that the texts need revision.

The Uniform Insurance Acts

Another circumstance is frequently invoked in favour of reform, namely, that insurance is practiced, not on a provincial

scale, but on a national and even international scale, and that all the Canadian Provinces except Quebec have nearly uniform insurance laws (the standard ones being known as the Uniform Insurance Acts).

There is a tendency in favour of uniformity in the practice of insurance — forms, classifications, precedures, and so on. Insurers extend their operations across political boundaries; members of their staffs often receive training in more than one jurisdiction; trade periodicals circulate everywhere; brokers and companies, for the benefit of their assureds and for purposes of competition, introduce improvements that have developed elsewhere; economy favours uniformity. You will appreciate that uniformity is profitable to assureds as well as to insurers.

Obviously, the practice of insurance is affected by the law, and so there is a tendency in favour of uniformity of law.

Since the insurance laws of the other Canadian Provinces are nearly uniform it is natural that there should be pressure, especially on the part of the insurance companies, in favour of the adoption of the uniform Insurance Acts by the Province of Quebec. Serious efforts in this direction have in fact been made; I refer particularly to the Bill B that was put before the Legislative Council in 1940, which bill contains a code of automobile insurance law, inspired by the corresponding Uniform Act.

Considering on the one hand the defects in our law and the need for reform, and on the other the existence of the Uniform Insurance Acts and the pressure in favour of their adoption by the Province of Quebec, I feel justified in speaking of the urgent need for considering the question of reform.

Directions that the Reform may Take

I have stated the postulates that insurance exists for the assured, and that to that end a law is to be preferred that is drafted according to the canons of legislation of the civil law. To me the essential question presents itself thus: Is the adoption of the Uniform Acts compatible with these postulates? If not, are the advantages of uniformity great enough to warrant their adoption notwithstanding?

For the reasons that I shall indicate (though not in detail), I suggest that there is incompatibility, and further, that the civil law can offer a more desirable solution than the Uniform Acts.

Under the heading of incompatibility there is an immediate objection, namely, that a given text will not necessarily have the

same effect here as under the common law. To literal uniformity the objection is peremptory. However, for present purposes I adopt, under reserve, the hypothesis that by modifying certain details of the texts one could achieve uniformity of sense. So let us suppose that the legislature adopted the Uniform Acts, with adaptations proper to preserve the meaning—what would we have?

In the first place these Acts are a series of statutes. The proper place for the civil law is the Civil Code. However, the champions of the Uniform Acts would not want them incorporated into the Code (they would almost invariably lose a measure of their uniformity in the process); and even the most easy-going civilian would object too. So the present scattering would be preserved. And as the Uniform Acts contain certain principles of wide application, and many special rules, the importance of the Code would be diminished. So in this regard there is incompatibility between the adoption of the Uniform Acts and the civil law principles of legislation.

Again, the Uniform Acts are not an integral codification. They are independent statutes, each for a special class of insurance —fire, life, automobile, accident and sickness, etc. There is no statute for insurance against loss (of things), but there is a Fire Insurance Act, and another for weather insurance. There is no Liability Insurance Act; there is an Automobile Insurance Act. And so on. This is obviously not civil law legislation. So if the Uniform Acts are to prevail, they should not carry too many other disadvantages.

I will pass over an examination of the internal structure of these Acts—the relation between general and special rules, the order of the sections, the forms of expression. Nor do I propose to examine the specific solutions offered by the Acts. They may be quite acceptable; the Uniform Acts are more up to date than our own law. If it were only a matter of criticizing the rules as specific solutions we should probably be well advised to adopt them, with little modification. But, in my opinion, when we consider a general reform of our civil law of insurance (which must come sooner or later), there are other considerations that ought to be taken into account.

Since these Acts bear upon special classes of insurance, the practical effect of a contract will depend upon its classification. For the judge, lawyer, claims manager, or adjuster, who is called upon to deal with a claim, it is not a matter of deciding that the contract or the insuring agreement concerned falls into one of the great categories of insurance—loss, liability, marine, or insur-

ance of the person. Rather, he has to determine whether it falls into one of the special classes as defined by the statutes—fire, weather, automobile, accident and sickness, etc. The latter task obviously, will more often present difficulties than will the former. It may be noted also that cases outside the special classes—cases that are in fact created by modern policies—fall into a less developed, or less explored, region of the common law.

A typical problem arose a few years ago, the question being whether the fire coverage in an automobile policy was subject to the statutory conditions for fire policies. To my knowledge there are on this question six reported Canadian cases[3] and an opinion by the Attorney-General of Quebec.

The most important perhaps of these questions is now under discussion—whether the statutory fire conditions apply to the fire coverage in "all risk" and multi-risk policies of the Inland Marine group. Not only have lawyers differed in opinion, but on claims by one assured arising out of one fire two courts of first instance in Ontario recently rendered judgments that are squarely opposed. For one judge the statutory conditions applied; for the other they did not. In the result, through having too much insurance, the assured was held not entitled to a full indemnity.[4]

The important point, in the examples cited and in principle, is that the assured's claim depends upon the classification of his contract (otherwise it would not be in issue), and that by its nature the classification does not bear upon the merits, the justice, of the claim. Putting the matter in practical terms, if a certain legal provision is sound for fire insurance, why should it not be sound for a wider field?

This disadvantage of special legislation has been created by the modern development of insurance. It has another aspect as well.

I have outlined the evolution of the practice of insurance towards broader categories and more flexibility in wordings—forms that cover several risks of loss or liability in one policy, or in certain cases all risks. Fire and other single-hazard policies are being displaced by "all-risk" policies, special liability policies by comprehensive or blanket liability policies. I emphasize this

[3] *Boudreau* v. *Imp. Guarantee & Acc. Ins. Co.*, [1923] 2 D.L.R. 57; *Journeay* v. *Ry. Pass. Ass. Co.*, [1924] 1 D.L.R. 308; *Rockmaker* v. *Motor Union Ins. Co.* (1922), 70 D.L.R. 360; *Western Ass. Co.* v. *Caplan*, [1924], 2 D.L.R. 935, S.C.R. 227; *Konovsky* v. *Pac. Marine Ins. Co.*, [1924] 2 D.L.R. 1029; *Johnson* v. *Br. Can. Ins. Co.*, [1932] 4 D.L.R. 281, S.C.R. 680.

[4] *Wasser* v. *Urbaine Fire Ins. Co. of Paris* (1942), 9 I.L.R. 304; *Wasser* v. *Scottish Union & National Ins. Co. of Hartford* (1942), 9 I.L.R. 302.

development because it is in conformity wih the essential purpose of insurance—to protect the assured, and so may be expected to prevail.

The problem of the application of statutory fire conditions to policies that are not fire policies should not, I think, be considered as unique (and therefore best met by an ad hoc amendment of the law), but rather as an example of the sort of problem to be expected when the law makes special rules for restricted classes of insurance and practice offers policies that do not fit into these classes. And the existence of a problem such as this impedes the development of the new forms.

In a word, practice has advanced beyond the stage to which the Uniform Acts correspond, and these Acts are in some degree an obstacle to progress. (The same is true of the Code, and it should be included in the list of defects that make reform advisable.)

For these reasons I submit that the advantages that would result from the adoption by Quebec of the Uniform Acts would not compensate for the disadvantages.

Recommendations

Our own laws are defective and should be revised. The Uniform Acts do not offer a desirable solution. But to my mind the reasons for these conclusions suggest a solution, namely, an integral redrafting of the civil law of insurance, based upon critical analysis of existing laws and upon the practice of insurance, and made in conformity with the principles of the civil law.

As the only categories of insurance now effectively observed are those that are inevitable—loss, liability, marine, personal insurance—the law should be divided in the same fashion.

As the Civil Code is the proper place for the civil law, the civil law of insurance should be there.

Specifically, I suggest that the present texts of the civil law of insurance be replaced by a New Title V of Book 4 of the Civil Code, divided in the following fashion:

Chapter 1—The contract of insurance.

Section 1—general rules;
" 2—rules special to insurance against loss and damage;
" 3—rules special to liability insurance;
" 4—rules special to marine insurance;
" 5—rules special to insurance of the person.

Chapter 2—Intermediaries (agents, brokers).

The drafting should be done in conformity with the following principles (you will pardon my making a few obvious remarks):

1. The rules of draftsmanship, apart from syntax, are to be found in the rules for the interpretation of laws.

2. Since insurance is a contract it is subject to the general law relating to contracts. Hence the draftsman should not repeat rules contained in the latter, but should lay down rules applying specially to insurance—special applications of the general rules, derogations from these rules, rules peculiar to insurance.

3. The text should confine itself to principles—rules of wide application, leaving it to the policies to deal with narrow categories and particular cases.

Such a codification would remedy existing defects, and in the breadth of its categories it would apply equally well to the old and to the new forms of insurance, without impediment for either.

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