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Criminal Law Cram Notes

1st Edition



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1. INTRODUCTION

A. HOW TO USE CRAM NOTES

The Criminal Law Cram Notes are formatted into a step-by-step guide, which you can use as a checklist in your exams to ensure that every element of the exam question is answered. You may find the Table of Contents to be a quick and useful overview of the law to be applied.

You should also answer the exam question using the ILAC method, which will ensure your answer is comprehensive.

- Issue** State the legal issue relevant to the problem
- Law** Identify the relevant case law and legislation
- Analysis** Analyse and apply the law to the legal issue. This is the most important part, so ensure your legal analysis is very thorough.
- Conclusion** Form a conclusion based on your analysis and application of the law, giving some practical advice to the hypothetical client.

It is very important to spend time perfecting your analysis section, as this is the part that examiners are most interested in. Do not worry if you reach the correct conclusion (there often isn't one clear answer) – examiners will give more weight to your legal analysis, and sometimes may even reward answers that propose an innovative and unconventional answer!

2. BACKGROUND – DO THE COMPONENTS OF THE CRIMINAL OFFENCE EXIST?

A. ACTUS REUS

The actus reus is an essential element in establishing that a criminal offence has been committed. The main question to ask is whether a wrongful act has been committed, by apply the following steps.

i. IS THERE AN ACT OR AN OMISSION?

Consider if the relevant act, as identified in the relevant offence, has been committed. In some cases, an omission is also relevant (e.g. manslaughter by omission). The relevant act for each offence is listed in section 3 below.

ii. WAS THERE VOLUNTARINESS?

Even if the act (or omission) has been committed, the prosecution must prove that the act is voluntary. Voluntariness is presumed for all offences, and the defendant has an evidentiary burden to bring evidence to show the court that voluntariness is an issue in the case. If the evidentiary burden is satisfied, the burden is shifted on the prosecution to prove beyond reasonable doubt that there was voluntariness.

Involuntary actions include reflex actions, epileptic fits, unconscious acts and startle responses. These categories are narrow, as they must involve entirely involuntary muscle spasms which takes place without processing by the accused's mental faculties.



- Mistake vitiates consent (*Middleton*)
- Where property is passed over to the accused in circumstances where the person hands the property over believes the accused is entitled to it but the accused knows that he is not (unilateral mistake).
- Where at the time the property is handed over, both the person handing over the property and the accused believe that the accused is entitled to it but the accused later discovers that he is not and resolves to keep it (mutual mistake)

Mens Rea

- Requirement 1 (Intent to permanently deprive, 'I wanted only to borrow the item') - The intention must be one to deprive the owner wholly of his property (*Holloway*).
 - An intention to return the property or (in the case of money) an equivalent amount of money to the owner is not a defence to a charge of larceny if the accused has appropriated the property for his own use or benefit or for that of another person.
 - The accused may avoid prosecution if it could not be proved that the borrowing was dishonest, but the borrowing would not cease to be dishonest if the accused merely had a hope of being able to repay the funds in the future (*Williams*).
 - Condition appropriation – the element of intention to permanently deprive will be made out even if there is an intention to return which is conditional (*Lowe v Hooker*, returning stolen property for a refund).
 - Exhausting the virtue of the property – temporary borrowing (normally ok) will only amount to larceny when the borrowing causes the good to significantly lose value. (*Beecham*)
 - Changing the nature of the property – intention to permanently deprive can include the defendant's conduct is wholly changing the nature of the property (*Smails*) significant modifications to the sleepers.
- Requirement 2 (Fraudulently or dishonestly) – an intent to permanently deprive will not be sufficient Mens Rea unless there is also some dishonesty or moral obloquy attached to the taking of the property (*R v Weatherstone*).
- Larceny by finding - it is a situation in which a person who finds lost property and keeps it.
 - Reasonably supposed by the finder that the goods had in fact been lost by the owner and he cannot be found, then it is not larceny (*Thurburn*). However if he takes them with a like intent, reasonably believing that the owner may be found, it is larceny. Thus whether such a belief was in fact held is an objective test to be determined by the jury: assessing what a reasonable person would believe in such circumstances.
 - Finder's belief shall be determined in reference to the surrounding circumstances of the case but also what the accused omits to do that might reasonably be regarded as consistent with the actions of an honest man finding goods. Consider actual state but also whether the accused took reasonable steps to find the owner than whether they believed that the owner could be found (*McDonald*).
- Defence of 'claim of right' – there are steps involved in order for the accused to establish a claim of right. (*Fuge*)
 - Involves a belief as to the right to property possessed by another (*R v Langham*)
 - The claim must be genuinely, ie honestly held, it not being to the point whether it was well founded in fact or law or not. (*Nundah*)
 - The belief does not have to objectively reasonable, yet a colourable pretence/claim is insufficient (*Nundah*)
 - The belief must be one of legal entitlement to the property and not simply a moral requirement (*Bernhard*)



- Claim of right may be a defence where the means used to take the property involved an assault or use of arms (*Salvo*)
- Claim of right is not confined to the specific property but can also extend to cases where what is taken is their equivalent in value (*Langham*)
- Claim must extend to the entirety of the property taken (*Astor*)
- Where the accused is an accessory, what is relevant is the existence of a bona fide claim in the principal, since there can be no accessorial liability unless the principal offence is proven (*Gregory*)
- It is for the crown to negative a claim of right where it is sufficiently proven by the defence of the evidentiary burden (*Lopatta*).
- An Aboriginal will not be able to rely on a claim of right defence in relation to a claim to their traditional land (*Yunupingu*).

ii. ROBBERY

s 94, imprisonment of 14 years – Aggravated form of larceny

The prosecution must show beyond reasonable doubt (*Woolmington*) that the victim had robbed or assaulted with intent to rob any person or steal chattel, money or valuable security from the person or another.

- Requirement 1 (An intent to deprive, Mens Rea element of the offence) – same requirement as the basic larceny offence.
- Requirement 2 (some degree of threat or force putting the person in fear) - The force used must be either before or at the time of the taking and must be of such a nature as to show that it was intended to overpower the party robbed, and prevent his resisting, and not merely to get possession of the property stolen (*Gnosil*)
 - not sufficient that threat or actual violence is made after the property is taken (*Foster*)
 - An intention to permanently deprive must be proved (*Salameh*) legislation aimed at protecting both property and the person.
- Requirement 3 (a taking from the person) - Does not require that the property be literally in the hands of the victim, it has been extended to instances 'where the victim has sufficient care or personal possession of the goods to allow the court to say that constructively the goods were taken in his presence' (*Smith v Desmond*)

iii. OBTAINING MONEY OR PROPERTY BY DECEPTION

s 178BA, imprisonment for 5 years.

The prosecution must prove beyond reasonable doubt that the accused by any deception dishonestly obtains for himself or herself or another person any money or valuable thing or any financial advantage of any kind

- Requirement 1 (object of the fraud be money, valuable thing or financial advantage of any kind).
 - Valuable thing - the subject matter of the offence is not the same as that for larceny or false pretences and could include interests in land, both freehold and leasehold, as well as debts, patents and copyrights. 'Control of the property' is not required.
 - Financial Advantage – not to be given a narrow construction. Person obtains services, money or property by means of a bogus cheque amounts to the person gaining a financial advantage (*Murphy*). Not merely a state of affairs.
 - Non-delivery of good may also constitute a financial advantage (*Murphy*)
 - Financial advantage can be transitory (*Murphy*)



- Evasion of debt (*Matthews*) – telling creditors to get off your back
- However, there was no financial advantage where the accused merely secured the deferral or repayment of money owed by giving a valueless cheque: (*Fisher v Bennett*) because the interest continued to accrue and the debt continued to be existed.
- The word 'financial' may have a limiting effect – to obtain a registration of a vehicle is not to be considered a financial advantage (*Coelho*)
- Requirement 2 (The method of deception) - deception as to the present intentions. The key difference is that the statement need not be known by the accused to be false. Recklessness as to truth will suffice, but the courts have yet to determine the definition or level of such recklessness (*Mattingley v Tuckwood*).
 - Someone who may in the future be 'prepared to do' certain acts may be covered under 'present intentions' (*Bennett*).
 - Deception by conduct and silence – well established that conduct without words could amount to a form of false pretence or deception (*Barnard* – handing in another person's uniform).
 - No criminal law doctrine which imposes a liability on the maker of a misrepresentation to correct it (*Nelson*)
 - Sudden change in intention which creates a false representation would be deception.
- Requirement 3 (Causation: object of the fraud be obtained by reason of the deception) - *Ho and Szeto* – cause of payment or the gaining of the financial advantage must be the product of the deception.
 - Indifference to a representation will not give rise to an action in deception, putting wrong name on a hiring form (*Clemesha*). – victim couldn't care less whose name it was
- Requirement 4 (Mens Rea – deception in dishonestly obtaining) – the term dishonestly in a statutory offence may be employed in its ordinary meaning or in some special sense (*Macleod*). The question to be considered was whether the accused believed he had a legal right to the property obtained and not whether he believed he had a legal right to practise the particular deception in order to obtain the property. In such a case the issue is whether the accused honestly held a belief in the legal right to the property (*R v Love*). This is a subjective test.

iv. FALSE PRETENCE

s 179, 5 years imprisonment

For the offence of False Pretences to be proved under section 179 of the Crimes Act 1900, the prosecution must prove beyond reasonable doubt that the accused used false pretence with intent to defraud and as a result obtained from any person property.

- Requirement 1 (object of the fraud - Property) - May include intangible property not covered under section 4 of the Crimes Act (*Preddy*)
- Requirement 2 (that there was a use of a) false pretences or b) wilfully false promises or both) –
 - False pretence can only be as to existing facts and not in relation to the future. *Greene*.
 - Wilfully false promise is one that they did not intend to keep, made "consciously and intentionally" (*Harrison*)
 - A wilfully false promise will include a case where there is no false representation as to present facts but merely false representations as to future facts or matters. A promise,



the fulfilment of which lies outside the power of the promisor, is within the section:
Freeman v R

- A false pretence can be made by words or conduct (*Beattie*).
- A pretence is a representation of fact (not law (exception lies in property rights, *Lotse*) and can be made by words or conduct, express or implied. A representation can in some circumstances be made by the failure to supply information: *R v Evans*
- Deception by conduct and silence – well established that conduct without words could amount to a form of false pretence or deception (*Barnard* – handing in another person's uniform).
 - No criminal law doctrine which imposes a liability on the maker of a misrepresentation to correct it (*Nelson*)
 - Sudden change in intention which creates a false representation would be deception.
- Requirement 3 (Mens Rea – intent to defraud) - Mens Rea of the offence is that there must be intent on the part of the accused to defraud. (*Greene*). So the statement made must be at least known to the accused to be false (*Greene*).
 - False statements – can either be factually false, or omissions within the statement creates a false impression.
 - Wilfully means “consciously and intentionally” but a reckless promise with disregard of the likelihood that it can be fulfilled may justify the conclusion that there was no intention to keep it: (*R v Harrison*)
 - Mens Rea – intention to defraud (*Greene*)/ intent to deprive another by deceit (*Balcombe*). This is the only factor which needs to be proved (*Balcombe v De Simoni*). It is not necessary to prove that someone intends to use the money for purposes different to which the deception occurred.
- Requirement 4 (Causation: object of the fraud be obtained by reason of the deception) (*Ho and Szeto*) – object of fraud obtained by reason of false pretence or wilfully false promise.
 - Indifference to a representation will not give rise to an action in deception, putting wrong name on a hiring form (*Clemesha*) – victim couldn't care less whose name it was.

G. DRUGS

i. TERMINOLOGY

Plants – roots in ground, alive, cultivate

Drugs – plants pulled out of ground and plant dies, becoming a drug

Discrete dosage units (DDUs) – really small amounts that are below the smallest category

Administer – includes self-administering or administering to others

ii. SUMMARY OFFENCES

Summary offences under the *Drug Misuse and Trafficking Act 1985 (NSW)* and their relevant sections are listed here. However, similar offences exist in other jurisdictions and under the Commonwealth's Model Criminal Code.

1) Possession

s 10 Possession of prohibited drugs

Possession includes considerations of physical control and awareness.



Physical control – minimum degree of physical control to establish possession

Filipetti v R (1978) (6 occupants in small house, each with equal access to the property)

- Exclusive possession - evidence must prove beyond reasonable doubt that the prohibited substance was in accused's exclusive physical control, and must produce evidence that negates possession of the other occupants

R v Dib (1991) (third party access to premises)

- Prove that accused has the legal right to exclude all persons (not acting in concert) from the premises in which the property (drug) is situated
- Must also prove that other persons with access did not have exclusive possession
- Joint possession - Where multiple accused, all must have that legal right

Judges can by inference or by circumstantial evidence (drug dealing history) to decide, whether in one's physical control or a place where one can exert the control (*Micallef v The Queen [2004]*)

2) Awareness

Factual question – jury has to be convinced of awareness (arising from the facts)

He Kaw Teh - prove the accused at time of physical custody or control, knew or was suspicious of the existence and nature of the narcotic goods in question

Saad v R

- intent is established if accused knew or was aware that an article which was intentionally in his possession comprised or contained a narcotic drug
- not actual knowledge/awareness – but relevant to *existence* of the necessary intent
- Belief, falling short of actual knowledge, would sustain an inference of intention (*Lau* - significant or real chance)

3) Minute quantities

R v Williams

- The question to be asked is whether the Parliament intended it to be an offence where such a minute quantity is involved?
- Where the Act creates an offence without adverting to quantity, not a reference to microscopically or scientifically detectable quantities not visible to the naked eye.
- Must be possession of such a quantity that suggests the person is in actual possession of greater quantities of a drug.

iii. INDICTABLE OFFENCES

1) Prohibited drugs and plants

Prohibited Plants

- cultivating or knowingly taking part in cultivation (s 23 (1)(a) and (2)(a))
- supplying or knowingly taking part in supply (s 23 (1)(b) and (2)(b))
- possessing a prohibited plant (s 23 (1)(c) and (2)(c))

Cultivation includes planting, nurturing and harvesting (s 3) of a prohibited plant (s 23).

Eager v Smith - watering of germinated/ungerminated seed in order to keep it alive until planted, with the intention of producing fully grown plants = cultivation

Harvesting - not only the actual removal of plant but also ancillary activities of laying out, stacking, removal to nearby premises and placing in sheds (*Giorgi & Romeo*).



iv. NOT SELF-INDUCED INTOXICATION

A person cannot be held criminally liable for an offence if the relevant conduct resulted from intoxication that was not self-induced (s 428G (2)).

F. SELF-DEFENCE

In order to raise the defence of provocation, the defence has at first instance an evidentiary burden, to satisfy the judge at trial that the issue is of relevance.

The general rule is that self-defence is only available when 'the person believes the conduct is necessary to defend himself, and the conduct is a reasonable response in the circumstances as he or she perceives them' (s 418 (2)). A successful raising of the defence will result in a full acquittal for the accused.

- Requirement 1 - Is there a reasonable possibility that the accused believed that his or her conduct was necessary in order to defend himself or herself - this is a subjective test, considering all personal characteristics of the accused including intoxication. (*Katarzynski*, s 418 (2))
- Requirement 2 – if requirement 1 is satisfied, is there also a reasonable possibility that what the accused did was a reasonable response to the circumstances as he perceived them (*Katarzynski*). This is dealt with on an objective standard but takes into account subjective elements of the accused at the time of the offence. Must be a necessary and reasonable response (s 418(2))
- Paranoid beliefs are excluded (*Kurtic*).
- Imminence and seriousness of the threat are important factual considerations to the accused's belief and reasonableness of his belief (*Burgress; Saunders*).
- The Crown will negate self-defence if it is proved beyond reasonable doubt that (*Katarzynski*):
 - o The accused did not genuinely believe that it was necessary to act as he or she did in his or her own defence (don't need reasonable grounds as long as it is genuine).
 - o That what the accused did was not a reasonable response to the danger, as he or she perceived it to be.

G. VOLUNTARINESS

Note also that lack of voluntariness is also a defence, negating actus reus and mens rea (see section 2.A.ii above).

6. DEFECTS IN THE CRIMINAL PROCESS

A. WAS THERE A MISCARRIAGE OF JUSTICE?

Davies and Cody 1937 HCA - miscarriage of justice does not have to be when the defendant is innocent, does it lead to 'substantial miscarriage of justice' – it is to do with relevant law explained to the jury, rule of procedure and evidence strictly followed



B. WAS THERE A FAIR TRIAL? WAS THE ACCUSED'S CONVICTION CONSTITUTIONAL?

i. TRIAL BY JURY

1) Kingswell (1985)

The case of *Kingswell* brought to light the role of s 80 of the Australian Constitution. It was held in this case by the majority of the High Court that the legislature enjoys the power to define the elements of offences against the Commonwealth, including whether an offence will be indictable or merely summary. In *Brown's case 1986*, the High Court held that s 80 guarantees jury trial on indictment irrespective of the defendant's wish. *Cheng (2000)* tried to re-open and abolish the principle in *Kingswell* but was unsuccessful as the judges believed that the decision in *Kingswell* was correct, as s 80 'is not a great guarantee of trial by jury for serious matters'.

2) Cheatle (1993)

It was held in this case that s 80 of the Constitution implicitly requires unanimity of juries. However, note that the decision in *Cheatle* only applies to Commonwealth offences.

ii. PREVENTATIVE DETENTION

1) Kable v DPP (NSW) (1996)

In this case, Kable was held in detention under a specially enacted law, as he was not judged to be fit for society. The decision to keep him in state preventative detention was given to the Supreme Court of NSW. It was held that as the Supreme Court is part of the Chapter III constitutional arrangement for federal courts, the doctrine of separation of powers applied, such that the *Community Protection Act* attempted to vest non-judicial functions onto the Supreme Court in breach of the separation of powers doctrine.

7. THEMES TO BE EXPLORED IN ESSAY QUESTIONS

A. DISCRETION IN CRIMINAL PROCESSES AND THE JUDICIAL SYSTEM

- The ubiquity of discretion
 - o As there are many decision makers in the criminal process, discretion by police and judges is an inevitable part of the system.
 - o Discretion begins with police determining whether a particular act can be deemed a crime. In serious cases, the DPP has discretion as to which criminals to pursue. Discretion then shifts to the magistrates and judges in regard to procedural and legal justice. The theory resonates through many facets of the criminal process, such as administrative guidelines, institutional & managerial pressures, and the wider set of economic, social ideologies. By reason of this, with all the various players within the system being invested with discretion, the criminal law is far from the certainty that it is held out to be.
- Regulating discretion
 - o There have been calls for discretion within the system to be exposed openly and for fair treatment. The recommendations of the *The Phillips Commission* inquiry included:
 - Fair – bringing to trial only those for whom there is an adequate and properly prepared case,
 - No arbitrary & inexplicable differences in local and national cases,
 - Ensure an open & accountable process,
 - Efficiency in regards to resources and time.



- Due to the law being vague and flexible, the basis for 'reasonable suspicion' is entirely discretionary, in relation to police powers such as stop and search powers and detaining suspects. However if the law was very specific, it would leave it vulnerable to clear distinctions and loop holes. The law does not name the steps or requirements for an accused act to be deemed as criminal, it names the offences and credits the police with the majority of discretion in the arrest process. The police are not concerned with criminal justice or similar objectives; theirs is broader, pertaining very closely to social values of the time:
 - o The imposition of order
 - o The assertion of authority
 - o The acquisition of information
- Cases
 - o *Carr's case (2002)* – the accused used offensive language which gave police the power to control the situation by using the offensive language offences. The accused resisted arrest and assaulted police officers. This is called a trifecta, being a charge for offensive language, resisting arrest, and assault. However, note that the situation was escalated by the police in choosing to exercise police powers over the accused due to his offensive language, such that it gave rise to the accused committing two further offences. This is used by the police as a tool to aggravate the situation, making it easier to charge the accused.
 - o *S and J* – this was a case regarding whether two Aboriginal youths thought that they were arrested and whether the information gained through confessions were admissible under the relevant Evidence Act. Mitchell J found that the evidence sought by the trial judge, which amounted to a non-arrest was followed. He found that it was made sufficiently clear to the youths by the police that they were not under arrest. The dissenting judgment of White J lists two factors that they police must satisfy.
 - They must inform the suspect that he/she is not under arrest (this was found to be satisfied)
 - They must also inform the accused that they are free to refuse to accompany, and free to leave at any time (this was found to be the factor that was not satisfied).
 - In this case, the actions of the police conveyed an explicit message – that the two were under arrest.

B. THE TWO TIERED JUSTICE SYSTEM

- McBarnet's theory of the two tiered justice system is that the lower court system "flouts the principles of justice legally", while the higher courts act as an arena for public consumption, for the demonstration of justice. The lower courts are directly structured to ignore the ideology of justice and direct control.
- This division is dangerous to the credibility of the criminal law system, due to the disproportionately shorter time spent in the lower courts and the emphasis on efficiency rather than upholding the law.
- The ideology of triviality (McBarnet) – Due process does not exist in lower courts, because the offences and the penalties are so trivial. There is a lack of spectacle (and thus infringes a key aspect of due process: that the administration of the law should be public) and majesty about the whole process, as it is very much about efficiency of the legal system in the lower courts.
 - o The trivial aspect of the penalties suggests that the defendant's liberty need not be examined, because the range of sentences available to the magistrate are limited and thus there is less protection needed for the defendant.



C. PRE-TRIAL PROCESS

i. THE ROLE OF THE POLICE

- The police play a key role in the criminal process, especially at the summary level.
- As police are required to fulfil both an investigative and accusatorial role, there is a fundamental tension as police collect evidence and aim to charge accused, and are thus biased as to the evidence they collect and use.

ii. THE ROLE OF THE PROSECUTOR

- The prosecutor is to act as a minister of justice, be independent and represent the community. However, the prosecutor is also subject to many ethical, common law, statutory duties in relation to assembling evidence and conducting a case.
- As the adversarial system necessitates a legal battle based on evidence, courts have generally upheld the tactics used by prosecution, such as where the prosecutor deliberately fails to call known witnesses (*R v Apostilides (1984)*) and where indemnities are given to witnesses whom the defence intended to call (*R v Jamieson (1992)*).

iii. GUILTY PLEAS & PLEA BARGAINING

- Most defendants plead guilty because of the sentence concession, concurrent running of charges, charges reduction, and dropping of charges.
- Plea Bargaining, charge bargaining, sentence bargaining/indication involve an agreement to plead guilty after negotiation with either prosecution or police as to the charge. Sentence indication bargaining is where there is a change of plea to guilty after an indication of the likely sentence or type of sentence from the judge.
- The trial judge does not have a power to set aside plea bargains that the judge determines to be too great a concession (*Andrew Foster Brown (1989) 17 NSWLR 472*). The decision of the prosecutor to charge a lesser offence does not constitute an abuse of process of the court, and will be upheld.

D. TECHNOCRATIC JUSTICE

Technocratic justice is the promotion of the concept of 'efficiency' in the criminal system. This push for efficiency has largely come about due to the increase in the number of summary cases (larger range of summary offences along with the declassification of many indictable offences).

i. CRIME CONTROL MODEL

- Crime Control Values - the values held by the Crime Control Model is that the most important function of the criminal process is the repression of future criminal conduct. If laws go unenforced, then public disregard for the law will occur. Thus the emphasis is on the quick and efficient administration of justice, so that no gaps are left and thus laws continue to be enforced in a most efficient manner.
- How CCM model operates – A good example of CCM is when facts are established quicker through police interrogation rather than tedious testifying and cross-examination in court.
- The aim of CCM is to achieve a series of routine operations whose success is gauged primarily by their tendency to shift the case along to a successful conclusion. The model is centered on the theory that most of the work should be done before the trial process.



- 'On the Spot' fines are a demonstration of several factors advocated by the CCM model. The alleged offender through a payment discharges their chances of potential criminal liability.

ii. DUE PROCESS MODEL

- The due process model stands for the concept that despite the amount of crime, the individual shall be granted all chances possible, because not all evidence gathered through the pre-trial process may be true. As such, the alleged offender will not be guilty unless found to be guilty through a stringent process.
- Presumption of innocence applies in the due process model, being both normative and legal. The operation of the criminal justice system has nothing to do with if the particular person is innocent or guilty, but rather it centers on the fact that the process is fair and just. The focus is on the quality and fairness of the procedural process especially before trial due to pre-trial processes being discretionary and constructive.
- The due process model has a lower emphasis on efficiency, unlike the CCM which is more outcomes driven. Due process generates justice through procedural fairness, instilling confidence within the system.
- The due process model creates many opportunities for innocent suspects to be filtered out of the system, such that the true objectives and resources of the criminal justice system can be devoted to those who are truly guilty.



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