

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of G. W. Davis v. Maung Shwe Go, from the Chief Court of Lower Burma; delivered the 14th June 1911.

PRESENT AT THE HEARING :

LORD ATKINSON.

LORD ROBSON.

SIR ARTHUR WILSON.

MR. AMEER ALI.

[DELIVERED BY MR. AMEER ALI.]

This Appeal arises out of an action brought by the Plaintiff-Respondent in the Chief Court of Lower Burma in the exercise of its original civil jurisdiction to enforce the specific performance of an agreement alleged to have been executed by the Defendant-Appellant on the 4th of April 1906, and in the alternative for damages.

The First Court dismissed the suit, "being unable to hold that the agreement set up had been proved." The Chief Court on appeal has arrived at a totally different conclusion; it has found that the document was signed by the Defendant, and it has accordingly reversed the decision of the First Court, and decreed the Plaintiff's claim. The Defendant has appealed to His Majesty in Council, and the only question for determination relates to the genuineness of his signature on the agreement in suit.

Although the parties are at issue on this, the vital point in the case, there is otherwise singular

unanimity on the general facts. In the conflict of opinion between the Courts in Burma, it seems necessary to their Lordships to examine the admitted facts and circumstances as furnishing the safest guide to a correct conclusion.

When the Defendant in 1901 acquired the land regarding which he is said to have executed the agreement, he was, on his own admission, in pecuniary difficulties. He had bought the land, which was mostly waste and undeveloped, with money borrowed on its mortgage. In 1905 he was undoubtedly in difficulties; one creditor appears to have taken out execution, the principal mortgagee was pressing for repayment, and although, according to his statement even at that time, he had received good offers for the property, they had all fallen through, as each time he had increased his price. It was in these circumstances that he applied to the Plaintiff for accommodation. The arrangement entered into, as one of the learned Judges in the Chief Court observes, was onerous even for Burma. The Defendant was to obtain Rs. 50,000 from the Bank of Bengal on the credit of the Plaintiff; he was to draw, in conjunction with a Burmese broker Ba Pe or Hpay, who appears only to have lent his name for a small consideration, five bills for Rs. 10,000 each, payable at three months after date in favour of the Plaintiff, who was to endorse them over to the Bank of Bengal, to enable the Defendant to get them discounted by the Bank. For this accommodation he was to pay the Plaintiff interest at the rate of 6 per cent. on the amount of the bills.

This arrangement was duly carried into effect on the 30th September 1905; the Defendant drew five bills and received from the Bank Rs. 50,000 less its charge for discounting. On the same date he executed in favour of the Plaintiff, as security for the money he had

received, a mortgage on the land binding himself to repay the amount in three months.

The bills fell due on the 2nd of January 1906. Admittedly the Defendant was not in a position to meet them nor to pay the interest for which he had made himself liable to the Plaintiff. He was still unable or unwilling to sell the land which, so far as can be judged from the record, was his only asset. Under the circumstances there appears to have been no alternative left for him but to obtain from the Plaintiff a renewal of the bills. The Plaintiff assenting, the bills were accordingly renewed for another three months on the same terms as before. As the Plaintiff had to meet the interest charged by the Bank on the renewed notes, the Defendant executed in his favour a promissory note (Exhibit E.) for the interest due to him and the interest which he paid or for which he made himself liable to the Bank of Bengal. These bills were drawn on the 3rd of January and were due on the 6th of April following. It is abundantly clear on the evidence that before the due date arrived the Plaintiff began pressing for settlement. His own evidence is distinct on the point and is substantially corroborated by the Defendant's witnesses.

Ma Mi, a Burmese lady who is stated to be the adopted daughter of the Defendant, and her friend Ma E Byu, a female broker, both say in substance that they, on several occasions, went to the Plaintiff when he told them the interest on the bills was mounting up and that the Defendant should be advised to pay up within the three months or let him "have the land for a lakh."

The letter of the 14th February 1906 (Exhibit F.) was a request to the Defendant to call at the Plaintiff's office "on receipt," as he wished to see him urgently. The Plaintiff states, and it is not denied, that it was with regard to payment.

Exhibit G., which bears date the 3rd of March, is a preremptory demand for payment by the 5th of March of the promissory note (Exhibit E.), in default of which legal proceedings were threatened. Although there is no definite statement as to what actually took place between the 3rd and 30th March, there can be little doubt upon the general evidence that during this interval whilst the Plaintiff was pressing for his money the Defendant was equally anxious for time.

The Defendant has produced two letters dated the 31st and 30th March respectively (Exhibits 3 and 4). Exhibit 4 is addressed by him to the Plaintiff and is in these terms :—

“I write to ask you if you are willing to keep the Rs. 50,000 on my property the Zainganaing grant for six months longer if I pay you all money due on receipt and the interest on the Rs. 50,000 every three months in advance. Please let me know by letter without delay.”

Exhibit 3 purports to be a reply to Exhibit 4 written by Ba Pe as follows :—

“As you requested I agree to wait for the principal of Rs. 50,000, provided if you will pay up all the due interest, say about three months. Please let me know as soon as possible.”

How Exhibit 4 came to be produced by the Defendant is not clear. The Plaintiff does not appear to have been asked about these two letters, but their Lordships have little doubt on the evidence of Ba Pe or Hpay that the Defendant did in fact write Exhibit 4, and received the reply, Exhibit 3, written by Ba Pe probably with the knowledge or acquiescence of the Plaintiff. Admittedly, however, nothing was done to carry out the arrangement suggested by the Defendant in Exhibit 4.

The material divergence between the parties begins at this stage. The Plaintiff says he was not willing to renew the bills unless the Defendant agreed that on failure to meet them a third time the property should be conveyed to him for a lakh

of rupees, that he accordingly sent the broker with Exhibit H. for the Defendant to sign, that it was brought back to him with the Defendant's signature, and that thereupon he renewed the bills taking a promissory note (Exhibit J.), as before, for the interest due to himself and to the Bank. His evidence regarding the instructions to the broker is very clear. He says :—

“ Finally I sent a letter by the broker for signature by Davis on the terms that I would not renew the hundis unless he signed the letter. This is the letter which I sent, Exhibit H. I accepted the proposal in that letter.”

(“ I ” evidently is a misprint for “ he.”) Then the Plaintiff goes on :—

“ I would not have renewed the hundis on any other terms. After Davis had signed I renewed the hundis. These are the fresh hundis then given The second set were returned to me after I endorsed the third. I had to pay interest on the third lot, and I got from Davis this pro-note for interest (Exhibit J.) as he could not pay me in cash. Nya Bwa and his daughter told me he could not pay cash.”

In cross-examination he added :—

“ I told Nya Bwa that. I told him to tell Davis that I would only renew the hundis if the agreement was made for a lakh. I sent the letter, Exhibit H., with Nya Bwa. I may have sent him to speak about it before that, on an earlier day. I think I may. When I sent him to talk about renewal of hundis I sent him with Exhibit H. I sent Nya Bwa to tell Davis that I would not renew the hundis unless he did sign. I only sent Nya Bwa once that day, the time I sent him with the letter. He brought back the letter with Mr. Davis' signature as it is now.”

With regard to the instructions given to him by the Plaintiff, the broker, Nya Bwa, states as follows :—

“ Shwe Go gave me this letter in his office and said, ‘ If the letter is not signed the hundis will not be signed.’ I took this letter and the hundis. I took the letter to Mr. Davis at his house in Sule Pagoda Road. I went with Ko Ba Pe who also signed the hundis. He is a broker. I found Mr. Davis in his house. I went inside and upstairs. His daughter Ma Mi was also present. I showed Mr. Davis the letter (Exhibit H). I told him

“ ‘If this is not signed hundis will not be signed.’ We
 “ were all sitting round a round table. Mr. Davis then
 “ signed the letter in my presence.”

He says further that after the Defendant signed the document, he put his signature on it as witness. Whether the Defendant's signature be genuine or not, the cross-examination of this witness shows clearly that there was considerable discussion and a good deal of going to and fro before the Plaintiff renewed the bills. Nya Bwa says :—

“ The first time I went and spoke about hundis—about
 “ signing hundis. Davis asked me to go to Shwe Go and
 “ get him to sign them. He refused, and I went back and
 “ told Davis. I went back and told Davis, and said, “ You
 “ ought to repay.” Then I went and called Ba Pe to speak
 “ to Shwe Go to sign the hundis. I took Ba Pe to Shwe
 “ Go. It was not on this occasion that the letter was
 “ written, I and Ba Pe had to go to Davis again. Before
 “ we went Ba Pe tried to persuade Shwe Go to sign. Shwe
 “ Go refused. So we, Ba Pe and I, went back to Davis and
 “ told him that Shwe Go would not sign. Davis said, “ What
 “ is to be done ? I have no money.” I went back to Shwe
 “ Go and this letter Exhibit H. was found (*sic*). Shwe Go
 “ brought it upstairs ready typed.”

Maung Ba Pe or Hpay, who had joined the Defendant in drawing the bills, and whose name appears on the renewed bills also, states that he had accompanied Nya Bwa when he went to Davis with Exhibit H. and the “ Hundis.” The Defendant and his adopted daughter, Ma Mi, deny Ba Pe's presence on the occasion the bills were brought. Their Lordships think that Ba Pe's statement as to his having gone with Nya Bwa is more likely to be true than the denial of Ma Mi or of the Defendant, for it must be observed that although the Defendant does say that Ba Pe did not sign the hundis at the same time as he did, and that he believed he signed them afterwards, he does not say, so far as their Lordships can see, that he did so at any other place than his (the Defendant's) house.

With reference to the alleged execution of Exhibit H., Ba Pe says as follows :—

“There was first some conversation, it went on some time before he signed. Davis agreed and signed because he thought that during the three months he would be able to raise money on the mortgage. He said so, and I told him that money could be obtained. He did not ask me to borrow money for him, but after that I often met him, and we used to discuss whether he had got the loan or not.”

The Defendant, on the other hand, stoutly denies the signature on Exhibit H. to be his. The Defendant's story of the circumstances leading up to the renewal of the bills must be given in his own words. He says :—

“Early in April Nya Bwa came to me and said they wanted the hundis paid up and I said I was short of money. Nya Bwa produced this letter, Exhibit 1. I can't be certain if it was written there or not. I said 'If you sign this it will be all right.' I first altered 'three' and wrote 'twelve.' Then reading on I came to one lakh and said 'No, I won't sign anything like this. I will write another,' and gave Exhibit 1 back to him. It was eventually left in my copy book. Then I wrote out Exhibit 2. I made a fair copy of it and gave it to Nya Bwa in a cover to take to Shwe Go.”

With regard to Exhibit 1, Nya Bwa says it is in his writing; that he wrote it in Davis's house on the 4th April, but he could not tell at what interview it was written. Exhibit 1 is in these terms :—

“Rangoon, 4th April 1906.

“My dear Ko Nyah Bwah,—If I not succeed within ^{“twelve} ~~“three~~ months I agree to sell my Zainganine land to Shwe Goh (for) a lakh of Rupees. Try and settle upon Shwe Goh as his promise to advance more money if I require.—
Yours,

There can be little doubt that Exhibit 1, as drafted by Nya Bwa, represented what the Plaintiff wanted. The Defendant says that it was left behind in his copybook when the broker took away the fair copy of Exhibit 2 to give to the Plaintiff.

Exhibit 2 is in these terms :—

“ Dear Sir,—As I am not prepared to pay you the interest, &c., due, beg that you will wait six months from this date. I will then pay you the interest, and the two small bills I owe you. Should I fail to pay you then the interest I will agree to sell you the land at Pegu for whatever then is offered if you wish to purchase. I am offered now Rs. 2,20,000 and Rs. 2,40,000, but will not sell. My price is Rs. 3,00,000.—G.”

The Plaintiff swore he never received the letter, the copy of which (Exhibit 2) was read to him. Nya Bwa's recollection about this document is hazy, and his statement certainly is not satisfactory. Speaking of Exhibit 1 he says :—

“ Exhibit 1 is not signed. I don't think Davis refused to sign. I think I asked him to sign it. He must have signed this Exhibit 1. I had forgotten all about it till I saw it. Davis did not refuse to sign Exhibit 1. He may have signed a fair copy. If I see it I can say if a fair copy was written. I can say that a fair copy of Exhibit 1 was made, but I cannot say who wrote it, whether I or Davis or Ba Pe. I can't say what became of the fair copy. It will have been signed ; I am not sure. I don't know if this letter, Exhibit 2, was written then or not. I cannot say, and do not remember, if a fair copy of Exhibit 2 was given to me to take away.”

The Defendant's case is that the bills were renewed on the basis of the arrangement proposed by him on the 4th of April by Exhibit 2, and that his signature on Exhibit H. is a forgery.

In dealing with a case of this kind in which the parties are at issue on a vital question of fact, the safe principle is to consider which story fits in with the admitted circumstances. Now the Defendant and his witnesses state that the next day, or the day after, he sent the fair copy of Exhibit 2 to the Plaintiff by Nya Bwa, the same Nya Bwa brought to him a document which he was asked to sign. “ Its terms,” he says, “ were something like those in Exhibit H. ; it “ was an agreement to sell for a lakh.” In

cross-examination he adds the document offered to him for signature was not Exhibit H. ; “ that
 “ had an eight anna stamp, but was similar to
 “ Exhibit H. in terms, and in the form of a letter ;
 “ I think a little different in the heading ; it was,
 ‘ I think, ‘ from Shwe Go, Dear Sir.’ ”

And again :—

“ I threw the document down in disgust on the table,
 “ and went to the back. Then I came back and Nya Bwa
 “ read out the document in Burmese. Then he took it
 “ away.”

Their Lordships will reserve till later their remarks on the statement that the paper shown to him was stamped. But it does seem difficult to conceive why or how a document, which was “ something like ” Exhibit H. in its terms, was brought to the Defendant for execution by the same broker who had taken away his proposal contained in Exhibit 2, and on the basis of which it was understood the further transaction was to take place, or how it came to be presented to him without any introductory remark in the calm manner described by him.

The Defendant’s story is that on reading that paper so presented to him he became very angry, used strong language, refused to sign it, and went to the back of the house. He was called back, and when asked by his witness, the female broker Ma E Byu, as to the cause of his anger, he made the following statement :—

“ You don’t know what is written. If I sign that and I
 “ die to-night my children would be beggars—would be
 “ robbed. Or if Shwe Go dies the same result. If Shwe
 “ Go cannot trust me I cannot trust him. I sent him a letter
 “ last night asking for six months. If he will not wait go
 “ to Court and I will get six or twelve mouths.”

Ma E Byu tells the story of what took place on that occasion in a slightly different form, but she introduces into it a statement made by Nya Bwa to the Defendant when he refused

to sign the paper, which is of importance. She says that when Davis read the paper he became angry, banged about, and spoke about his throat being cut; he then said "let him (meaning, "presumably, the Plaintiff) accept what I offered yesterday if he likes; I am not a child, I won't do like that." "After that" continues the witness "Nya Bwa said, 'it is for "three months which is a long time; you will be able to make other arrangements; we will see that you are not cheated.'"

Ma E Byu goes on to say that the Defendant, after he was called back, persisted in his refusal to sign the paper, and eventually Nya Bwa took it, folded it up, and put it in his pocket.

The suggestion is that although up to that time the Plaintiff had clearly and admittedly not accepted the Defendant's "offer" contained in Exhibit 2, he quietly and without demur or question consented to the renewal of the bills on the Defendant's terms. He had all along been pressing for immediate payment of the monies that had already become due; he had been trying to get a definite agreement from the Defendant that if he did not meet his liabilities at the end of three months the property should be transferred for a lakh. The Defendant admits that "a lakh was the Plaintiff's limit." Ma Mi, too, says that when she and Shwe Go (the Plaintiff) had a talk about the sale of the land, he said "he thought it was worth about a lakh and that he would offer that but no more." The evidence of Ma E Byu is to the same effect. She says Ma Mi, in her presence, told Shwe Go that the Defendant had received an offer of a lakh and a half, on which the Plaintiff replied:—

"Who will offer 1½ lakhs or 2 lakhs? He will be lucky if he gets a lakh. Tell him to sell it for a lakh."
 "I said 'don't speak about 1 lakh. He would not sell for

“ ‘ 1½, not even for Rs. 2,20,000, he said he would not go
 “ ‘ below 3 lakhs.’ Shwe Go said ‘ If he can get so much
 “ he had better sell quick, why wait ?’ I said ‘ He did not
 “ sell; what can I do ?’ He said to Ma Mi ‘ It is a long
 “ time and he has not paid interest, what is he doing ?’
 “ Ma Mi said ‘ He will pay he is looking about him.’ Shwe
 “ Go said ‘ Very well, the sooner he pays the better as we
 “ have to pay interest.’ ”

And yet without any objection or further discussion the Plaintiff, it is suggested, remained content with the proposal in Exhibit 2, to wait for six months for his interest, payment of which he had been demanding all the time, with a right of pre-emption at an indefinite price far above his limit. The suggestion seems hardly consistent with the admitted facts.

The statements of the Defendant in cross-examination regarding Exhibit 2 are by no means satisfactory, and their Lordships are not prepared to say that the Chief Judge’s comment is altogether unwarranted.

The bills were admittedly renewed on the 6th April and were due on the 9th of July following. Before the due date, however, on the 16th of June, the Plaintiff wrote to the Defendant a letter, Exhibit K., in these terms :—

“ I beg to inform you that since the death of my brother
 “ Maung Shwe Oh on the 5th instant, the nature of the
 “ circumstances regarding our business has changed. So I
 “ wish you to bear in mind that you should not fail to fulfil
 “ your promise according to your letter dated the 4th April
 “ 1906. I expect you will strictly make good the promise
 “ on or before the appointed date.”

The Defendant admits receipt of this letter, but says he took that letter to refer to his letter of the 4th April which he had given to Nya Bwa. The terms of Exhibit K, however, in their Lordships’ opinion are not consistent with those of Exhibit 2. Exhibit K. contemplates an early fulfilment of an undertaking or promise of an explicit character; whereas under Exhibit 2 the Defendant was not liable for any payment until 4th October. Under

Exhibit 2 the Plaintiff had only an option to purchase the land for whatever was then offered for it, which left it open to discussion and enquiry. There was nothing in it which could be "strictly made good."

Again, Exhibit 2 contemplated that the relative legal position and rights of the parties should remain unchanged for six months, but admittedly when the hundis fell due on the 9th July the bills were not renewed for another three months; no document was executed for the interest; and nothing was done by the Defendant to keep matters in *statu quo*. He admits that "in the ordinary course the Plaintiff would have wanted more hundis to do that." The only explanation the Defendant has to offer of the unusual course adopted is that he thought the Plaintiff had taken up the loan himself.

There was an interview between Shwe Go and the Defendant after the bills fell due. Shwe Go says it was on the 11th of July when Davis told him he could not pay and asked him to pay. Whereupon the Plaintiff said he had to pay and would pay, but that the Defendant would have to abide by the conditions of the letter of the 4th of April to which the latter replied he would. The Defendant admits the interview; he says Nya Bwa came to his daughter who spoke to him and he went and saw Shwe Go; that he told him he was short of money and could not pay the interest and asked him to pay it for him, to which the Plaintiff agreed; and he adds "that was for a further renewal for three months." As a matter of fact the bills were not renewed, nor does the Defendant appear to have concerned himself any more with his obligation on them. They were paid off by the Plaintiff on the 12th July, viz., the day after the interview, with three days' extra interest.

In their Lordships' opinion neither the conduct of the Defendant nor the acts of the Plaintiff are consistent with the arrangement in Exhibit 2; they appear to be in accord with the agreement in Exhibit H. which was substantially to the effect that if the Defendant failed a third time to meet his liability on the bills for the payment of all interest thereon, the matter was to be treated as concluded, and that the land would be sold to him for the amount stated.

What transpired shortly after is also of importance in the consideration of the case. Four weeks later the Defendant wrote to the Plaintiff for a loan of Rs. 1,000, which he said he urgently needed for the funeral of his wife. In the letter (Exhibit L.) he mentioned that he had sold his Pegu land for Rs. 300,000, and that the loan would be repaid on receipt of the earnest-money on the following Friday. There is no reference, however, either to the liability on the bills and the promissory notes which, according to his story, were outstanding, or to the Plaintiff's pre-emptional right under Exhibit 2.

The Plaintiff's reply, through his lawyer, was prompt and significant. The letter (Exhibit M.), dated the 11th of August, stated that it was well known to the Defendant that he could not sell the land to others as he had contracted to sell to the Plaintiff under whose instructions the writer had commenced drafting a conveyance more than a week before and warned the Defendant that, unless he carried out his agreement, he would be sued for specific performance. He also demanded the name of the intending purchaser. To this the Defendant replied, through his solicitor, on the 13th of August, denying any such agreement. But the writer adds: "our client did offer to sell, but your client will not agree to pay the price." Their Lordships' attention has not been called to any evidence in support of this statement.

After some further correspondence between the lawyers on the two sides this suit was launched on the 17th of August.

So far the admitted facts and circumstances point to one conclusion. The facsimiles of two admittedly genuine signatures of the Defendant, together with the facsimile of the disputed signature, are on the record, and their Lordships have had an opportunity of examining them. With reference to the latter (the signature on Exhibit H.), the Defendant says as follows:—

“ From the signature alone I would not be able to swear whether it was mine or not. The flourish of the ‘D,’ however, goes further to the left than mine generally do. In Exhibit I.(3) I have flourished a little more than usual.”

The Judge in the Court of First Instance says that he had examined it carefully and that it revealed no obvious signs of forgery except that there was a mark of double writing or correction in the second of the three initials which occurred below the name. Nor do their Lordships perceive any difference between the admitted signatures and the disputed signature.

The mark of double-writing to which the learned Judge refers might be purely accidental; in their Lordships’ judgment much importance cannot be attached to it. But his finding does not show that he had formed, on a comparison of all the admitted signatures of the Defendant with the disputed signature, a decided opinion that it was a forgery, for, in summing up the case, he expresses himself in these terms:—

“ It seems therefore improbable that Davis would have agreed to sell his land for one lakh simply in order to induce Shwe Go to wait three months for the interest due—a sum of not more than Rs. 5,000. On the other hand it seems improbable that a man in the position of Shwe Go should commit or abet the commission of forgery in order to obtain possession of the land mortgaged to him.”

He seems to have been a good deal influenced in his view by the improbability of the Defendant

agreeing to sell the land for which it was stated large offers had been made, for only a lakh and a temporary accommodation for a comparatively small sum. The learned Judge appears to have overlooked that the whole question of the renewal of the bills was involved in whatever arrangement was arrived at on the 4th of April. The Defendant had either to take them up or get them renewed. Had no arrangement been come to, an action on the bills would have jeopardised his prospects of selling the property to advantage. He evidently hoped, and probably was assured by the brokers, that within the three months he would be able either to dispose of the land or raise money by mortgage. The evidence of Ma E Byu already referred to coupled with the statements of Nya Bwa and Ba Pe strongly confirms this view.

Ma Mi admits that about the time when the bills were renewed, the Plaintiff told her that he was "going to send Nya Bwa with a document," for the transfer of the land for a lakh. "There was a letter on the table before them with a stamp."

It has to be noted that the Defendant as well as his witnesses say the paper which was brought by Nya Bwa, and which Davis refused to sign, though in the form of a letter, bore a stamp. Nya Bwa swears he never saw any stamped agreement in the form of Exhibit H. Their Lordships think it is hardly likely that if a forgery was going to be perpetrated, the Plaintiff or his agent after presenting a stamped agreement would forge the signature on an unstamped paper. If the forgery was not successful on one stamped paper, another could have been as easily substituted as an unstamped paper. The story about the letter that was presented to the Defendant for execution being stamped seems due to a desire to give it additional coloring or is

the outcome of imagination consequent on the bills bearing stamps.

Their Lordships have, after the most careful consideration, come to the conclusion that the defence set up is not true.

But it has been strongly urged by counsel on behalf of the Defendant that as a decree for specific performance is discretionary their Lordships, having regard to the onerous character of the bargain, should not affirm the decision of the Chief Court. In the absence of any evidence of fraud or misrepresentation on the part of the Plaintiff which induced the Defendant to enter into the contract, their Lordships see no reason to accede to the argument. The bargain is onerous but there is nothing to show that it is unconscionable. The Defendant knew all along that a lakh was the Plaintiff's limit; it is in evidence that he had frequently urged the Defendant's daughter to advise him to sell the land if he was getting a higher offer. It is difficult to say under the circumstances that he took an improper advantage of his position or the difficulties of the Defendant.

On the whole their Lordships are of opinion that the decree of the Chief Court is correct and that this Appeal should be dismissed with costs, and they will humbly advise His Majesty accordingly.



In the Privy Council.

G. W. DAVIS

v.

MAUNG SHWE GO.

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