

Privy Council Appeal No. 68 of 1923.

Charles W. Gunning and others - - - - - *Appellants*

v.

Charles A. Lusby and others - - - - - *Respondents*

FROM

THE SUPREME COURT OF NOVA SCOTIA.

JUDGMENT OF THE LORDS OF JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 23RD OCTOBER, 1924.

Present at the Hearing :

LORD ATKINSON.

LORD SUMNER.

SIR ADRIAN KNOX.

[*Delivered by* LORD ATKINSON.]

This is an appeal from the unanimous judgment of the Full Court of the Supreme Court of Nova Scotia dated the 6th February, 1922, allowing an appeal from a judgment of Harris, C.J., dated the 1st June, 1921. The Court of Appeal was composed of Ritchie, Russel and Chisholm, JJ.

The action was brought by the plaintiffs suing on behalf of themselves and all other members (except the defendants) of a Syndicate called "the Great West Land Syndicate" No. 2 (hereinafter referred to as "the Syndicate") against (1) the three first named defendants Lusby, Smith and Fage by reason of their alleged breach of duty and neglect as Trustees under an agreement hereinafter mentioned constituting this Syndicate, and (2) against the other two defendants Vail and Silliker by reason of their breach of duty and neglect as managers or agents of the Syndicate under such agreement. The statement of claim claimed (among other things) against all the defendants (1) the return of \$151,159.37 or thereabouts with interest and (2) damages for the breaches of trust set forth in paragraph 7 of the statement of claim to the amount of \$25,000—the \$151,159.37 being the amount alleged to have been paid in by the members of the Syndicate under the circumstances hereinafter set forth.

It is clear from the statement of claim that the plaintiffs' claim for relief was based upon the averment that Marshall B.

Vail and Clarence J. Silliker, acting as agents for and on behalf of the Syndicate entered into an agreement with one Greer to purchase from him certain lands belonging to him for 187,500 dollars. If this averment had been proved at the trial, then, in the events which happened, the benefit of the contract so made was lost in the manner hereinafter set forth, and the Syndicate would have been entitled to repayment by their agents of all the sums received by the latter out of the funds of the Syndicate after giving credit for all sums properly paid by these agents to Greer in discharge of the purchase money of his land and also giving credit for all expenses by these agents properly incurred. The appellants failed at the trial to establish this case. The Court of Appeal held that this was the fair result of the evidence, and apparently as soon as this was realised the relief asked for was based upon a wholly different ground, namely, that Silliker and Vail having acquired from Greer at all events in the point of view of a Court of Equity the proprietary interest in the latter's land, secretly and without making to the body for which they were trustees a full disclosure of the facts, contracted to re-sell to this body, their cestuis que trust, the same land at a greatly enhanced price.

If this was really what happened, the course open to the Syndicate on discovering the deception of their trustees towards them was clear. They could have either rescinded the alleged contract of sale to them, repudiated it altogether, or affirmed it thereby becoming bound by it; but they could not at the same time do both of these things either in whole or in part. In *Re Cape Breton Co.* 26 C.D. 221 on appeal 29 Ch. D. 795, *Burland v. Earle* [1902] C. 83. Of course, the rescission of such a contract as this may be express or be implied from the conduct and action of the parties after the facts are known to them, and one of the main questions for decision in this case may resolve itself into this, did the Syndicate rescind the contract alleged to have been made with them by their trustees touching this land, or did they with full knowledge of the facts affirm it? To decide that question the whole of the transactions taking place between the parties must be considered. The story of them, to be told adequately, cannot be told shortly.

In the month of November, 1912, a firm composed of two persons named Tretheway and Pugsley acquired for a sum of 500 dollars an option to purchase from Samuel A. Greer a tract of land in Saskatchewan, 640 acres in extent, less 15 reserved for a homestead, which for convenience sake may in this judgment be, from its propinquity to the town of Moose Jaw, styled the Moose Jaw estate. It was one of the terms upon which this option was acquired that it might be exercised either by letter, or by the tender on the 7th of March, 1913, of a sum of 4,500.00 dollars. In case it should be exercised the purchase price was fixed at 112,000 dollars, payable by the instalments mentioned. After the payment of this sum of 500 dollars made to secure this option, two persons named Clarence J. Silliker and Marshall B.

Vail, who carried on the business of real estate brokers in the town of Amherst, in Nova Scotia, entered into negotiations with Tretheway and Pugsley for the acquisition by Silliker and Vail of their option to purchase Greer's lands. The ultimate arrangement took this form. Tretheway and Pugsley, in consideration of a sum of 15,000 dollars to be paid to them by Silliker and Vail, were to step aside, as it were, and permit Greer to give to the two latter an option to buy his Moose Jaw estate at the increased price of 118,500 dollars. But the increase of 6,500 dollars over the first-named price was to be paid, not to Greer the owner, but to Tretheway and Pugsley, who would, therefore, upon the deal, if it went through, receive in all a sum of 21,500 dollars.

To finance this arrangement, if fully carried out, Silliker and Vail would have to find ultimately two sums of 118,500 dollars, plus 21,500 dollars, making in all 140,000.00 dollars, which, from what thereafter took place, it is plain they could not procure by ordinary borrowing on any security they had to offer.

In this state of things it is clear, upon the evidence given in the case, that Silliker and Vail resolved to adopt the plan of creating a syndicate which was to purchase Greer's Moose Jaw estate at a greatly enhanced price, hoping that, by concealing the fact that they themselves had acquired an interest in it, and were, in truth, in the view of a Court of Equity the owners of it, they would get from the funds of the Syndicate enough money to pay Greer and realise for themselves a handsome profit on the whole deal. The initial step which they took in this project, was to procure three gentlemen resident in Amherst of such good position and repute as was likely to inspire confidence in the Syndicate, to consent to become trustees of the Syndicate when formed. The names of these gentlemen were Chas. R. Smith, Barrister, Chas. A. Lusby, Manufacturer, and J. N. Fage, then Mayor of Amherst.

The next step was to have, on the 2nd of January, 1913, an agreement drawn up and executed between these gentlemen who are described as the trustees of the Great West Land Syndicate No. 2 of Moose Jaw, of the one part, and the several subscribers whose names were inscribed in the schedule thereto of the other part.

To realise the relation in which Silliker and Vail, as well as the trustees, would stand to this Syndicate when created, the duties, they would respectively have to discharge, and the trust and confidence necessarily reposed in each and all of them, it is essential to keep in mind some of the main provisions of this agreement. It begins with the recital, "Whereas it is the intention to establish a syndicate for the purpose of purchasing and acquiring a certain piece or parcel of land situate at Moose Jaw, in the province of Saskatchewan, and disposing of the same at a profit," it then proceeds thus:—

"NOW IT IS HEREBY AGREED between the several subscribing parties hereto, each one with the others of them and with the said Trustees, as follows :

(B 40—2292—2)T

A 2

" 1. The parties hereto shall constitute a Syndicate to be called ' The Great West Land Syndicate No. 2 of Moose Jaw ' with the object and for the purpose of purchasing and acquiring all that piece or parcel of land situate at or near the City of Moose Jaw, in the province of Saskatchewan, and comprising the east half of section (22) and west half of section (23) Township Sixteen (16) Range Twenty-six (26) West Second Meridian, and containing six hundred and forty acres, less 15 acres reserved for homestead, more or less, for the sum of one hundred and eighty-seven thousand five hundred dollars (\$187,500.00) and for the disposing of same at a profit.

" 2. The capital of the Syndicate shall be one hundred and eighty-seven thousand five hundred dollars (\$187,500) and shall be considered to be divided into 93 $\frac{1}{4}$ shares of two thousand dollars each. The holder for the time being shares (*sic*) shall be members of the Syndicate. The shares are to be transferable subject to the consent of the Trustees. A transfer must be registered. Each of the subscribers is to be entitled to the number of shares set opposite his signature.

" 3. The said Trustees shall act as Trustees for the Syndicate members and shall hold the property of the Syndicate in trust.

" 4. In entering into any contract for the acquisition of the above described lots, pieces and parcels of land the said Trustees shall be deemed to be acting on behalf of the Syndicate, and the Syndicate shall forthwith repay them any deposit they may advance thereon or in connection therewith and shall indemnify said Trustees against their liability thereunder.

" 5. M. B. Vail and C. J. Silliker, of Amherst, County of Cumberland and Province of Nova Scotia, Real Estate Brokers (hereinafter called the Managers), shall be the Managers of the Syndicate and shall have the active management and control of the business affairs of the Syndicate subject however to the orders of the Trustees.

" 6. Six hundred dollars (\$600.00) per share shall be paid to the Managers forthwith and the balance, one thousand four hundred dollars (\$1400.00) shall be paid in the following manner one year from date, seven hundred dollars (\$700.00), and the balance two years from date seven hundred dollars, (\$700.00), each payment shall bear interest at seven per cent. from date on all unpaid balance.

" 7. All moneys paid to the Managers hereunder shall be applied by them for the purpose of the Syndicate.

" 8. It is expressly declared and agreed that time is the essence of this agreement and if any member shall fail to pay any instalment of capital on or in connection with his shares on the day when the same shall become due to the said Managers as provided for in clause six hereof, the said Trustees may serve a notice on such member requiring him to pay to the said Managers any such overdue instalment of capital within ten days after the date of such notice, and if at the expiration of such notice the requisitions thereof are not complied with, the said Trustees may thereupon at their discretion cancel all the rights of such member under this agreement and forfeit his share or shares on or in connection with which instalment is unpaid together with any sums which have been previously paid thereon by such member.

" 9. It is expressly declared that the Managers, with the consent of the said Trustees or of a majority thereof, if they see fit.

" (a) may sell the property or any portion or portions thereof to any person or persons, firm or firms, company or companies, and for this purpose may engage the services of real estate agents or other persons for the purpose of obtaining a purchaser or purchasers and paying such reasonable and usual commissions to such real estate agents or other persons for such services as they may render.

“(b) may fix the price or prices and agree to accept any part of it in instalments or in notes or in fully paid-up shares, debentures, or otherwise.”

It will be observed that in the first paragraph of the agreement the purchase of these lands is treated as something thereafter to be effected, not as something already effected. The name of the intended vendor is not given, and the purchase price is 69,000 dollars in excess of that arranged to be paid to Greer.

The next document to be considered bears date four days later, the 6th January, 1913. It purports to be an agreement between Alexander Greer, therein described as vendor, and Silliker and Vail, described as purchasers. The parcels are described precisely as in the document dated the 2nd of January, and it is set forth that the vendor has agreed to sell and the purchasers have agreed to purchase these parcels for the sum of 118,215 dollars in gold or its equivalent, to be paid at Moose Jaw as follows: 500 dollars on the execution of the agreement, 7,000.00 on the 7th March, 1913, 6,890 on the 7th of June, 1913, and the balance, 103,825 dollars, to be paid by five equal annual payments of 20,765.00 each on the 7th of June in each year. The agreement further provided that the purchasers should have the option of paying the whole of the principal sum or any part thereof without notice or bonus, with interest at 6 per cent. from the 7th March, 1913, and that, if default should be made by the purchasers in making these payments at the times mentioned, or on the breach by them of any of the covenants or conditions in the agreement contained, the vendor should have power to determine the agreement and to retain the sum or sums paid thereunder as liquidated damages. Several other clauses are contained in the agreement providing for its determination, but they are immaterial for the purposes of this case. The accuracy of the respective dates of these two documents was not questioned by any witness who was examined.

On the 2nd of January, 1913, Silliker and Vail were, therefore, then, in the words of the agreement, constituted the agents of the Syndicate to control and manage its business affairs. Its most important business affair was the acquisition by purchase of Greer's Moose Jaw estate. It was the special affair the Syndicate was created to accomplish. The option to purchase Greer's lands must have either vested in Silliker and Vail some equitable interest in those lands or failed to do so. In the latter case the purchase of these lands by Silliker and Vail from Greer upon the 6th of January, 1913, must have been a purchase by agents in a fiduciary position on behalf of their principals, the Syndicate. The Syndicate would then be the real purchaser. It is admitted by both Courts that, in that event, Silliker and Vail would have no defence to an action at the suit of their principals for fraudulently exaggerating the price they bought at by a sum of 69,000.00 dollars, but if by this option, as is

actually the case, these men had acquired from Greer an equitable interest in the latter's estate, then Silliker and Vail were secretly selling that interest to their principals, the Syndicate, at a much enhanced price, and thereby attempting to acquire at their principals' expense a secret profit of 69,000.00 dollars.

To make an agreement of this latter kind between principal and agent binding there should be a full disclosure by the agent to the principal of all the facts before it is entered into. If this be not done, the principal, on discovering the true facts, may, as has been already stated, either rescind or repudiate the agreement or affirm it. In the present case the Syndicate has evidently not expressly repudiated or rescinded it or attempted to do so. It would appear to their Lordships that the evidence goes to show that, on the contrary, the Syndicate has with full knowledge of the facts, affirmed it and tried to make the best of a bad business. Before dealing with this crucial question, it is desirable to refer to several matters dealt with in argument for the purpose of now putting them aside. There can be no doubt that, up to 1914, as the Committee found, the managers had received enough money belonging to the Syndicate to pay Greer the purchase money of his land in full, but having regard to the provisions contained in the agreement of the 6th of January touching the payment of that money by instalments, it by no means follows that they were bound to apply the funds of the Syndicate which were in their hands to the payment of those instalments before they became legally due and payable. Again, this action is a representative action. It purports to be brought by the three appellants suing on behalf of all the members of the Syndicate other than the defendants, *i.e.*, other than the three trustees and the two managers. In a representative action the persons suing must have a common interest with those they claim to represent (*Duke of Bedford v. Ellis*, [1901] A.C. 1), but in this case some of the members of the Syndicate have paid for their shares; others are defaulters and have not paid, and some, a considerable number of them, have repudiated these proceedings altogether and disapproved of them. The plaintiffs in a representative action cannot sue on behalf of persons who object to be represented by them. Had an ordinary partnership action for an account been brought instead of the action which has been brought, the defaulters would no doubt have had to pay up what they owed upon their shares, but none of the difficulties just mentioned would have arisen. The remedy in fact adopted has, in the view of their Lordships, been misconceived. In addition, it is clear that, if the defaulting shareholders had paid the debts they owed to the Syndicate, all Greer's claims could most probably have been discharged and his foreclosure proceedings defeated. So that the Syndicate have from this point of view brought their misfortune upon themselves.

Up to the year 1917, when Silliker and Vail resigned, the trustees appear to have interfered but little in the management of the affairs of the Syndicate. They certainly did not investigate

the dealings of these managers with its assets in such a way as would naturally be expected from business men. On the 22nd of October, 1918, a Mrs. H. K. Stonehouse, wife of F. O. Stonehouse, sent to a Mr. Charles A. Gunning, one of the plaintiffs in this action, a letter containing two enclosures. The first is a receipt signed by one of the trustees, Charles R. Smith, the second is part apparently of a profit and loss account. They respectively run as follows:—

Amherst, Nova Scotia, Nov. 10th, 1916.

“Received from H. K. Stonehouse and F. O. Stonehouse the sum of two hundred and thirty-six dollars and twenty-five cents (\$236.25) being a call on one-half share and a quarter share in the Great West Land Syndicate—Moose Jaw property—as per statement and postcard issued by the Trustees. This amount of \$236.25 represents a full payment of \$262.50 less 10 per cent. discount as allowed by Mr. Thorley Pugsley as per card.

(Signed) Chas. R. Smith.”

“ Holding Group Syndicate No. 2.

PROFIT AND LOSS.

Amounts of Profits.

Difference between amount paid Greer and amount at which property was turned over to Syndicate.

Price paid \$115,675.00

Price realised \$187,500 \$71,875.00.

Dr.

10 per cent. commission paid to selling agents. \$18,750.00 ”

This profit and loss account was apparently the “ statement ” referred to in the receipt, and it is difficult to suppose that any business man when signing the receipt would not have looked at this statement. If he had looked at it he must have been struck by the words, “ turned over to the Syndicate,” and would have insisted on being informed by the managers what these words meant: who was the person by whom the property was “ turned over,” and who were the selling agents to whom 10 per cent. commission on 187,500 dollars was—or was to be paid?

On the 20th of April, 1917, the three trustees addressed a letter to one, G. E. M. Stephens, of Halifax, who owned half a share in the Syndicate, but had not paid for it, informing him that a few months previously Silliker and Vail had ceased to be managers of the Syndicate, that at a largely-attended meeting of its shareholders the business of the Syndicate had, by a unanimous vote, been placed in the hands of the trustees, that this business included the collecting and disbursing of all moneys, and that, according to the books and papers handed to them by Silliker and Vail, Stephens owed 194.56 dollars in respect of his half share, which they asked him to pay. Further on in the letter it is mentioned that the trustees were desirous of paying off the balance due and that, “ as all the business connected with the Syndicate, the amounts paid on the property, as well as the balance remaining unpaid, were fully gone into at the recent meeting of the shareholders, these trustees feel there is nothing to add.”

There was much to add: the amount of the "balance" due which they desired to pay off, the amount actually paid on the property of the Syndicate, and to whom it was paid. It is much to be regretted that some of the time spent at the trial in asking the trustees and the managers page after page of irrelevant questions, was not devoted to a close and searching cross-examination of the signatories to this letter upon its contents, with a view to discover what was the nature and what were the contents of the papers placed in the hands of the trustees by Silliker and Vail, what were the accusations made against these latter functionaries before they resigned, and, above all, what, if anything, they disclosed touching the alleged sale to the Syndicate of Greer's land at the enhanced price of 187,500 dollars. Greer, not unnaturally, desired to be paid the balance of the purchase money of his land by the purchasers of it, and he accordingly wrote on the 7th of January, 1916, to Silliker and Vail stating that the balance due, including interest up to the 7th of June, 1917, was 56,281.93 dollars, but offering to take 50,000.00 dollars in full discharge of his debt if paid before the 1st of May, 1917, and to give a clear title to the land sold. This offer was not accepted, and the purchasers of his land having ceased to be the managers of the Syndicate's business, Greer, on the 10th of April, wrote to Smith, Lusby, W. B. Murdock and T. J. Allen, described as trustees (the two latter apparently newly-appointed), a letter, stating that the balance of the purchase money of his lands due was the amount already mentioned, but that if the trustees or the Syndicate would, on or before the 7th of October, 1918, pay to him a sum of 38,000 dollars in cash, he would accept the same in full discharge of his debt and make clear title to the land sold free of all encumbrance, after the Silliker and Vail caveats have been released—which he stated the trustees were to have done. It would appear to their Lordships to be almost inconceivable that when Greer looked to these people for the payment of the purchase money of his land, instead of to the actual purchasers, they must not have ascertained how this demand came to be made and that, too, for an amount less by 69,000.00 dollars than the price charged to the Syndicate by Silliker and Vail in respect of the purchase of this same land. Smith, one of the trustees, was at a later period requested by the members of the Syndicate to visit Greer at Moose Jaw with the object of negotiating a settlement with him. He did so. On the 24th of August, 1918, he writes to one, H. W. Cameron, giving an account of his visit. This letter begins with a statement designed obviously to conceal the real nature of the dealing with Greer's land, but which, if true, would go to show that Silliker and Vail purchased the lands, not for themselves, but as agents for the Syndicate. The statement runs, "As you are aware, the property at Moose Jaw, in which your Syndicate is interested, . . . was purchased through Silliker and Vail from S. A. Greer, of Moose Jaw, the price the Syndicate agreed to pay being 187,500 dollars." If that means agreed to be paid to Greer, as it is apparently intended

to suggest, it is absolutely untrue. The letter goes on to state that "Messrs. Silliker and Vail, under their agreement of purchase and sale then held by them, now held by your trustees, leased the property back to Mr. Greer, our Syndicate receiving one-third of the crop or its equivalent in the way of yearly rent." If the writer had only looked at the agreement of the 6th January, 1913, with the contents of which he was apparently familiar, he must have seen that the purchase price of Greer's land was 118,500 dollars, not 187,500.

He goes on in this letter to state that he interviewed Greer at Moose Jaw in April, 1918, that from a full examination of Greer's books he found that the sum due to him (Greer) up to and including the year 1917, was 57,486.51 dollars, and that after many pleasant interviews with Greer, he (Smith) induced Greer to reduce his claim to 38,000 dollars provided that sum was paid to him in Moose Jaw not later than the 7th of October, 1918. The letter goes on to state that all the above was put into writing by Mr. Smith when in Moose Jaw, and was signed by Mr. Greer, "so, taken altogether," he wrote, "your trustees think it was a good investment. Mr. Smith and our Syndicate are to be congratulated upon the success of his mission." The true nature of this settlement was, in their Lordships' view, this: that Greer, who had no contract whatever of sale or purchase of this land with the Syndicate, was, out of the funds of the Syndicate, to be paid the unpaid balance of the purchase money owed to him by Silliker and Vail, reduced to 38,000.00 dollars, for the purpose of completing the contract of sale of the 6th of January, 1913. If that be so, there could be no more effective way of affirming a contract than, with full knowledge of its nature, providing the means of implementing it. Smith was examined at great length at the trial. He gives at pages 180-181 his account of what took place at the meeting of the Syndicate in January, 1917, after which Silliker and Vail resigned. He said that Silliker handed in a statement of the Syndicate's affairs, that he had not got it, but remembered its contents, which he then proceeded to state without any objection being made to his evidence. He said the statement showed the amount Silliker agreed to pay Greer, something like 118,000 dollars, and the unpaid balance of this sum, and also the amount that the Syndicate agreed to pay for the property; that a letter from Greer showing the balance was also read; that a motion was made in reference to the acceptance of Silliker's report and Greer's letter; "that the matter should be left in the hands of the trustees, to which an amendment was moved that the offer made by Silliker and Vail should be accepted so as to end and close the matter right there without any further trouble; and that Silliker, after his resignation, moved a motion, which was carried, that the future management of the Syndicate be placed in the hands of the trustees."

Smith further stated that, at a meeting held in January, 1918, when the question of Silliker and Vail transferring their agreement with Greer to the Syndicate came up for consideration, the Syndicate were anxious to take an assignment of this agreement. Silliker, on behalf of himself and Vail, refused to assign it until they were paid the balance, amounting to 5,000 dollars, of a sum they claimed to be due to them; that after considerable discussion, a resolution was moved and carried that the matter should be left in the hands of the trustees to make the best arrangement they could with Messrs. Silliker and Vail; that in consequence of this resolution, Smith entered into negotiations with Silliker, which resulted eventually in the offer to square off the 5,000 dollars being accepted, that Vail and he then executed an informal assignment of Greer's agreement for the benefit of the Syndicate. After this, namely, in the month of April, 1918, he (Smith) went to Moose Jaw and had with Greer the negotiation already mentioned. There is nothing in the evidence of the other witnesses in conflict with this testimony of Smith's. The only reasonable conclusion to draw from this evidence, coupled with the facts already detailed, is that the trustees, duly authorized to act for the Syndicate in that behalf, deliberately and with full knowledge of all the facts elected to affirm the contract dated the 6th of January, 1913, purporting to be a contract between Silliker and Vail for the sale by the latter to the Syndicate of those Moose Jaw lands, known as Greer's land, for the sum of 187,500 dollars. Of course, the Syndicate would not be entitled to call for a transfer of those lands till this sum was paid by them. It was never paid. It was never subscribed. As Silliker and Vail were in the position of vendors to the Syndicate, they were not under an obligation to deal with any money in their hands in any particular way provided they were in a position to transfer the lands when the Syndicate was entitled to call for a transfer. Greer continued to demand the unpaid balance of the purchase money owed him. He was not paid. He brought his foreclosure suit and succeeded. The Syndicate has undoubtedly lost both the money paid to Greer in discharge of the purchase money and the Moose Jaw lands, but it has not been by any means established that the loss was due to a breach of any duty by the managers, entitling the Syndicate to recover damages against them. Greer was willing to accept 38,000 dollars in discharge of the unpaid balance of the purchase money due to him. It does not appear from the report of the Committee of Investigation dated the 7th May, 1919, page 272, that this sum was realizable, and, if it be so, it was the failure or refusal of the members of the Syndicate to contribute the full amount of its capital which really brought about this loss, not the breach of duty alleged. The amounts for which judgment was at the trial entered up against the two Trustees (Lusby and Smith) for 710 dollars in each case are, in their Lordships' view not recoverable in the form of action

adopted, which is not a properly constituted action for dissolution and winding up of the Syndicate. On the whole case their Lordships are of opinion that the judgment appealed from was right and should be affirmed, and the appeal be dismissed with costs, and they will humbly advise His Majesty accordingly.

In the Privy Council.

CHARLES W. GUNNING AND OTHERS

v.

CHARLES A. LUSBY AND OTHERS.

DELIVERED BY LORD ATKINSON.

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