

NOTE.—Please substitute for copy of Judgment previously issued.

*Privy Council Appeal No. 9 of 1926.*

The Corporation Agencies, Limited - - - - - *Appellants*

*v.*

The Home Bank of Canada - - - - - *Respondents*

FROM

THE SUPREME COURT OF CANADA.

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE  
PRIVY COUNCIL DELIVERED THE 18TH JANUARY, 1927.

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*Present at the Hearing :*

VISCOUNT HALDANE.

VISCOUNT FINLAY.

LORD WRENBURY.

LORD DARLING.

LORD WARRINGTON OF CLYFFE.

[*Delivered by* LORD WRENBURY.]

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The appellants, Corporation Agencies, Limited (hereinafter called the Company), are a limited company incorporated under the statutes of Canada. They carried on business in the city of Montreal as registrar and transfer agents for registering and transferring shares of the capital stock of certain commercial companies and agents and trustee and financial agents in reconstruction of certain companies. The Merchants' Bank of Canada were their bankers. The President of the Company was one C. H. Cahan, Senior, one of His Majesty's Counsel, a lawyer of wealth and position in Montreal. His son, C. H. Cahan, Junior, who was also one of His Majesty's Counsel, was a director of the Company. One B. F. Bowler was Secretary-Treasurer. The respondents, the Home Bank of Canada, were the bankers of Cahan, Junior. Between the plaintiff Company and the defendant bank no relation, contractual, fiduciary or other, existed, save such as arose from the transactions presently mentioned.

This action was brought by the Company against the defendant bank, claiming payment of a sum of \$209,028.12 (afterwards corrected to \$205,960.37), being the amount of 94 cheques amounting to the sum last above mentioned drawn upon the Company's account with the Merchants' Bank of Canada, collected by the defendant bank through the Montreal Clearing House, and debited to the Company's account with the Merchants' Bank. These 94 cheques were drawn at various dates between the 29th March, 1919, and the 20th December, 1919, and were as follows :—

Number of cheques.	Amounts.
	\$
In March, 1919—One cheque ... ..	500.00
„ April, 1919—Three cheques ... ..	1,096.89
„ May, 1919—Nine cheques ... ..	4,728.75
„ June, 1919—Seven cheques... ..	9,680.00
„ July, 1919—One cheque ... ..	3,500.00
„ Aug., 1919—Two cheques ... ..	1,850.00
„ Sept., 1919—Ten cheques ... ..	14,668.96
„ Oct., 1919—Twenty-one cheques ... ..	46,445.00
„ Nov., 1919—Twenty-six cheques ... ..	79,220.27
To 20th Dec., 1919—Fourteen cheques ... ..	44,270.50
	<hr/>
Total—Ninety-four cheques ... ..	\$205,960.37
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Cahan, Junior, who, as already stated, was a director of the Company, was during 1919 engaged in very extensive speculative dealings in stocks and shares on his own private account, and he in fraud of the Company made use of the Company's account with the Merchants' Bank of Canada to assist his operations.

There is a device known in Canada as “kiting,” which is described as follows :—

“Kiting is a term used with regard to obtaining money by cheques passed through banks without value being deposited against the cheque—that is, kiting is an effort to obtain the use of money during the process of a cheque passing through one bank or through a clearing house to another, and perhaps through many more.”

To this Bowler, who was examined as a witness for the defendant bank, adds that kiting is a means of getting credit for the time it takes to clear a cheque from one bank to another bank. Cheques are passed from one bank account to another, and credit is obtained at the bank into which they are paid, for which they are debited at the bank on which they are drawn.

During 1919 Cahan, Senior, was much engaged in business which took all his attention off the proceedings of the Company. Cahan, Junior, and Bowler were substantially in complete control of the Company's affairs, and it was in that state of things that the frauds of Cahan, Junior, which it is necessary to describe, were perpetrated.

The Company's bye-laws contained a bye-law as follows :—

“54. Contracts and engagements on behalf of the Company may be made, and cheques, bills of exchange, promissory notes, drafts and other

negotiable paper may be made, drawn, accepted or endorsed by the Secretary-Treasurer acting jointly with the Manager or with any Director of the Company, or by the Manager acting jointly with any Director of the Company; or by any two Directors acting together; provided, however, that cheques, drafts, bills of exchange, promissory notes or other negotiable paper may be endorsed for deposit only in the Company's bank account by either the Manager or the Secretary-Treasurer acting alone."

The following is a copy of the first of the cheques in question, that of the 29th March, 1919 :—

No. 6080.

Montreal, Mar. 29, 1919.

Corporation Agencies, Limited.

Pay to the order of C. H. Cahan, Junior, \$500.00 Five Hundred Dollars.

Corporation Agencies, Limited.

C. H. Cahan, Junior, Director.

B. F. Bowler, Secretary-Treasurer.

To the Merchants' Bank of Canada,  
Montreal.

Of the 94 cheques, 67, amounting to \$146,429.87, were drawn as above; six, amounting to \$16,530.50, were similar, except that they were drawn payable to the order of the defendant bank. The rest, 21 in number, amounting to \$43,000, were drawn in the same way and were made payable to Cahan, Junior, or to agents of his, or to bearer. A few of the cheques, some 18 in number, were cashed over the counter. In all other cases the cheques were duly endorsed and were paid into Cahan Junior's account with the defendant bank, and were collected in ordinary course by the defendant bank through the Montreal Clearing House from the Merchants' Bank of Canada. In the case of six cheques, "E. Wright, Director," instead of B. F. Bowler, was the second signature in addition to that of Cahan, Junior. No importance is attributed to this fact.

On the night of the 26th-27th December, 1919, Cahan, Junior, absconded, and his whereabouts were subsequently unknown. The facts of the frauds he had committed then came to light.

Cahan, Junior, held a power of attorney from his father to draw upon three banking accounts which his father had, in each of which there was a substantial credit balance. He had also power to draw on the banking accounts of several companies. He was thus in a position to draw on some twelve banking accounts or more and to carry on "kiting" operations, and did so to a very large extent. The general effect of his operations may be described as follows :—He and Bowler (who was throughout a party to his proceedings) drew a cheque on the Merchants' Bank of Canada. Cahan, Junior, paid it into his own private account at the defendant bank. At the moment when they drew that cheque there was in most cases no sufficient balance at the Merchants' Bank to meet it. But on the same day Cahan, Junior, paid into that account a cheque drawn by him on some of the other accounts on which he had power to draw, with the result that the plaintiffs' account with the Merchants' Bank was or at any rate became by the end of the

day in credit to an amount sufficient to meet the cheque in his favour. An illustration may be given by taking the case of the first cheque, that of the 29th March, 1919, for \$500. On the 29th March the credit balance at the Merchants' Bank was only \$61.74. The cheque of the 29th March was cleared on the 31st March. On the 29th March \$270 and on the 31st March \$250 were paid by Cahan, Junior, into the credit of the account, with the result that on the 31st March there was enough to meet the cheque for \$500 and to leave a credit balance of \$81.74. This is a fair sample of what was done throughout. The 94 cheques were never met by moneys of the plaintiffs. Cahan, Junior, simply paid in and drew out money which he was obtaining by fraud from his father's accounts or the other accounts which have been already mentioned. The plaintiffs' account with the Merchants' Bank was never overdrawn except on one or two occasions to very small amounts. The cheques that came in and went out always offset each other. From March to December, 1919, no more than \$5,890.34 was paid into the Merchants' Bank and \$8,402.35 drawn out in respect of the regular business of the Company. The difference between these two sums came out of the funds irregularly deposited by Cahan, Junior.

During the whole of that time the Company was practically dormant. All the rest of the payments into the account and the whole of the amount which was by the 94 cheques drawn out of the account had nothing to do with the Company's business or the Company's moneys. The Trial Judge found as a fact that none of the 94 cheques were paid out of the Company's funds.

Having thus sketched the facts upon which the question arises, their Lordships go on to consider what is the law applicable to the case. The question here is whether the defendants had notice or knowledge. This is question of fact. In *John v. Dodwell*, 1918, A.C. 563, 569, Lord Haldane, in delivering the judgment of this Board, said, "When an agent is entrusted by his principal with property to be applied for the purposes of the latter and to be accounted for on that footing, he is . . . in a fiduciary position, and any third person taking from the agent a transfer of the property with knowledge of a breach of duty committed by him in making the transfer holds what has been transferred to him under a transmitted fiduciary obligation to account for it to the principal." And again at p. 570, "If the appellants received such money with notice of the trust affecting it, they would be bound to account for it to the respondents." In *John v. Dodwell*, Williams, the manager for Dodwell and Co., who was authorized by Dodwell and Co., the plaintiffs (respondents) to draw, and who drew the cheques on the plaintiffs' account, employed the defendants (appellants) as his brokers and gave them cheques on the plaintiffs' account in payment for shares, and they received them with knowledge that Williams, without apparent authority, was drawing for his own purposes on the plaintiffs' funds. The case turned, as does the

present case, on knowledge. If there was no knowledge, it has no application.

By virtue of article 54 of the Company's bye-laws Cahan, Junior, as a director, and Bowler as secretary-treasurer, were authorized to draw on the Company's account at the Merchants' Bank of Canada, and they did so. Mr. Justice MacLennan, the Judge before whom the action was first tried, considered that the form of the cheques on their face was notice of the fact that Cahan, Junior, was appropriating to his own use the Company's moneys. Mr. Justice Duff and Mr. Justice Newcombe (the minority Judges on the appeal) were of the same opinion. Their words are "having notice, of which the cheques themselves were *prima facie* evidence, that Cahan, Junior, the defendants' endorser, was not entitled to the cheques." And again, "The cheque on its face is evidence of the absence of authority for the exercise of his powers for a purpose which is incompetent to him." Their Lordships do not agree. In their opinion, Duclos, J., in the Superior Court, was right in holding that the form of the cheques did not give notice and that the defendants had not notice.

For by way of illustration, take again the first cheque, that for \$500, of the 29th March, 1919. When Cahan, Junior, paid that cheque into his account at the defendants' bank, suppose the bank had asked, "For what is this cheque given for?" would he have been bound to answer? The cheque might have been for salary or for a sum due to Cahan, Junior, on any other account. The defendant bank had no duty to enquire as to the obligation in respect of which it was given. They would in ordinary course of business take the cheque and if on presentation to the Merchants' Bank payment were refused, they would debit their customer with the amount.

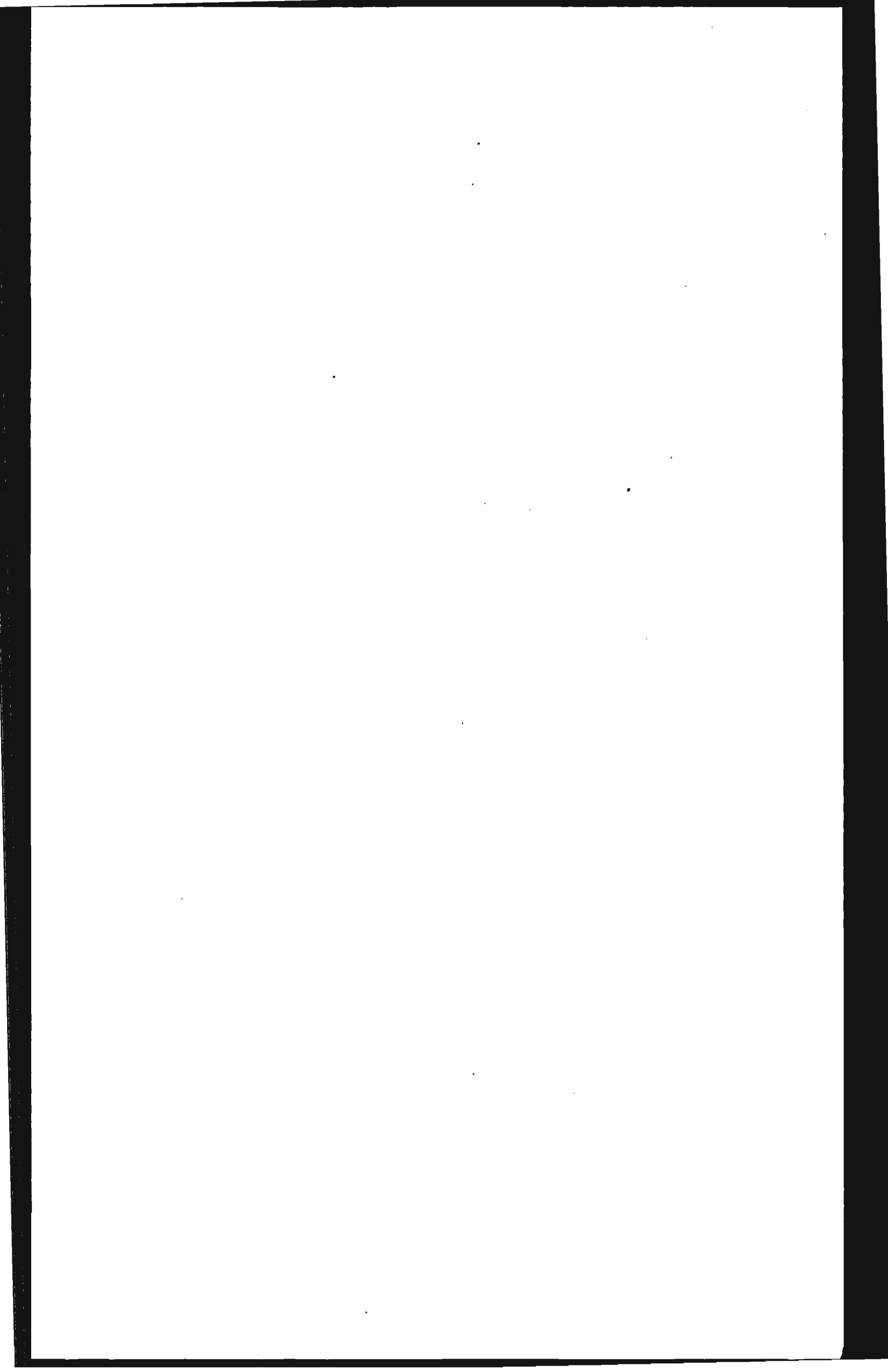
During April three like cheques for \$300, \$498.74, and \$298.15 were endorsed and handed to the defendant bank by Cahan, Junior. The practice of the Merchants' Bank was not to issue a pass-book, but to render monthly accounts. Such monthly accounts were duly rendered for March and April, 1919, to the Company. These contained the cheques above referred to. Thus the plaintiffs knew (so far as the defendant bank had knowledge or reason to believe) that the March and April cheques, drawn as they were in favour of Cahan, Junior, were being accepted by the Company as being on their face in order. And so matters went on during the subsequent months, and *a fortiori* the defendant bank had every reason to believe, as successive monthly accounts were sent and no objection raised, that the cheques were legitimate and not in fraud of the Company. The Company were, unfortunately for them, in the hands of fraudulent agents, but the defendant bank had neither knowledge nor notice that that was so, and, in fact, from the unquestioned acceptance of the monthly accounts, were entitled to believe the contrary.

Moreover, the fact was that the plaintiffs' moneys were not being appropriated and applied by Cahan, Junior, at all. His

father's moneys and the moneys of the various companies on whose accounts he was entitled to draw and did draw were no doubt being misappropriated, but so far as the plaintiffs were concerned Cahan, Junior, was doing no more than paying into their account moneys which did not belong to them and drawing out to the like amount moneys with which the Company, in fact, had no concern. Neither the payments into nor the drawings out of the Company's account were authorized acts. The Company cannot repudiate the one and take the benefit of the other. They are, in fact, not concerned with either. The plaintiffs lost nothing by the kiting transactions. If they now recovered the \$205,960.37 from the defendant bank they would be making that sum as a profit if they kept it, and if they did not keep it, but were compelled by action brought by those whom Cahan, Junior, defrauded to pay it over to Cahan, Senior, or others whom Cahan, Junior, defrauded, they would be giving effect to rights whose existence the Board cannot in this proceeding investigate or determine, and with which in this proceeding they have nothing to do, for Cahan, Senior, and the companies concerned are not parties to this litigation.

Upon both grounds, viz., that the defendant bank had not notice or knowledge and that, in fact, the Company have sustained no loss, their Lordships are of opinion that the majority in the Supreme Court are right, and that this appeal must be dismissed with costs.

They will humbly advise His Majesty accordingly.



In the Privy Council.

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THE CORPORATION AGENCIES, LIMITED,

v.

THE HOME BANK OF CANADA.

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DELIVERED BY LORD WRENBURY.

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