Overview | **(1876) 2 Ch D 463**, | 40 JP 532, | 45 LJ Ch 777, | 24 WR 594, | 34 LT 607

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# DICKINSON v. DODDS. [1874 D. 94.] (1876) 2 Ch.D. 463

[CHANCERY DIVISION]

BACON, V.C.

[COURT OF APPEAL]

JAMES and MELLISH, L.JJ., BAGGALLAY, J.A.

**Vendor and Purchaser — Contract — Specific Performance — Offer to sell — Withdrawal before Acceptance — Sale to another Person — Notice.**

An offer to sell property may be withdrawn before acceptance without any formal notice to the person to whom the offer is made. It is sufficient if that person has actual knowledge that the person who made the offer has done some act inconsistent with the continuance of the offer, such as selling the property to a third person.

*Semble*, that the sale of the property to a third person would of itself amount to a withdrawal of the offer, even although the person to whom the offer was first made had no knowledge of the sale.

*Semble*, that the acceptance of an offer to sell constitutes a contract for sale only as from the time of the acceptance. The contract does not relate back to the time when the offer was made.

The owner of property signed a document which purported to be an agreement to sell it at a price fixed. But a postscript was added, which he also signed - "This offer to be left over until Friday 9 A.M.":-

*Held*, that the document amounted only to an offer, which might be withdrawn at any time before acceptance, and that a sale to a third person which came to the knowledge of the person to whom the offer was made was an effectual withdrawal of the offer.

Decision of *Bacon*, V.C., reversed.

ON Wednesday, the 10th of June, 1874, the Defendant *John Dodds* signed and delivered to the Plaintiff, *George Dickinson*, a memorandum, of which the material part was as follows:-

---------- *(1876) 2 Ch.D. 463 at 464*

"I hereby agree to sell to Mr. *George Dickinson* the whole of the dwelling-houses, garden ground, stabling, and outbuildings thereto belonging, situate at *Croft*, belonging to me, for the sum of £800. As witness my hand this tenth day of June, 1874.

"£800.

(Signed) John Dodds."

"P.S. - This offer to be left over until Friday, 9 o'clock, A.M. *J. D*. (the twelfth), 12th June, 1874.

"(Signed) *J. Dodds.*"

The bill alleged that *Dodds* understood and intended that the Plaintiff should have until Friday 9 A.M. within which to determine whether he would or would not purchase, and that he should absolutely have until that time the refusal of the property at the price of £800, and that the Plaintiff in fact determined to accept the offer on the morning of Thursday, the 11th of June, but did not at once signify his acceptance to *Dodds*, believing that he had the power to accept it until 9 A.M. on the Friday.

In the afternoon of the Thursday the Plaintiff was informed by a Mr. *Berry* that *Dodds* had been offering or agreeing to sell the property to *Thomas Allan*, the other Defendant. Thereupon the Plaintiff, at about half-past seven in the evening, went to the house of Mrs. *Burgess*, the mother-in-law of *Dodds*, where he was then staying, and left with her a formal acceptance in writing of the offer to sell the property. According to the evidence of Mrs. *Burgess* this document never in fact reached *Dodds*, she having forgotten to give it to him.

On the following (Friday) morning, at about seven o'clock, *Berry*, who wag acting as agent for *Dickinson*, found *Dodds* at the *Darlington* railway station, and handed to him a duplicate of the acceptance by *Dickinson*, and explained to *Dodds* its purport. He replied that it was too late, as he had sold the property. A few minutes later *Dickinson* himself found *Dodds* entering a railway carriage, and handed him another duplicate of the notice of acceptance, but *Dodds* declined to receive it, saying, "You are too late. I have sold the property."

It appeared that on the day before, Thursday, the 11th of June, *Dodds* had signed a formal contract for the sale of the property to the Defendant *Allan* for £800, and had received from him a deposit of £40.

---------- ***(1876) 2 Ch.D. 463 at 465***

The bill in this suit prayed that the Defendant *Dodds* might be decreed specifically to perform the contract of the 10th of June, 1874; that he might be restrained from conveying the property to *Allan*; that *Allan* might be restrained from taking any such conveyance; that, if any such conveyance had been or should be made, *Allan* might be declared a trustee of the property for, and might be directed to convey the property to, the Plaintiff; and for damages.

The cause came on for hearing before Vice-Chancellor *Bacon* on the 25th of January, 1876.
**Kay, Q.C.**, and **Caldecott**, for the Plaintiff:-

The memorandum of the 10th of June, 1874, being in writing, satisfies the *Statute of Frauds*. Though signed by the vendor only, it is effectual as an agreement to sell the property.

Supposing it to have been an offer only, an offer, if accepted before it is withdrawn, becomes, upon acceptance, a binding agreement. Even if signed by the person only who is sought to be

charged, a proposal, if accepted by the other party, is within the statute: *Reuss v. Picksley* (1), following *Warner v. Willington* (2).

In *Kennedy v. Lee* (3) Lord *Eldon* states the law to be, that "if a person communicates his acceptance of an offer within a reasonable time after the offer being made, and if, within a reasonable time of the acceptance being communicated, no variation has been made by either party in the terms of the offer so made and accepted, the acceptance must be taken as simultaneous with the offer, and both together as constituting such an agreement as the Court will execute." So that, not only is a parol acceptance sufficient, but such an acceptance relates back to the date of the offer. This is further shewn by *Adams v. Lindsell* (4), where an offer of sale was made by letter to the Plaintiffs "on receiving their answer in course of post." The letter was misdirected, and did not reach the Plaintiffs until two days after it ought to have reached them. The Plaintiffs, immediately on receiving the letter, wrote an answer accepting; and it was held that they were entitled to the benefit of the contract.

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(1) Law Rep. 1 Ex. 342.

(2) 3 Drew. 523.

(3) 3 Mer. 441, 454.

(4) 1 B. & A. 681.

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The ruling in *Adams v. Lindsell* (1) was approved by the House of Lords in *Dunlop v. Higgins* (2), as appears from the judgment of Sir *G. Mellish*, L.J., in *Harris' Case* (3); and it is now settled that a contract which can be accepted by letter is complete when a letter containing such acceptance has been posted. The leaving by the Plaintiff of the notice at *Dodds*' residence was equivalent to the delivery of a letter by a postman.

That *Allan* is a necessary party appears from *Potter v. Sanders* (4); and if *Allan* has had a conveyance of the legal estate, the Court will decree specific performance against him.

**Swanston, Q.C.**, and **Crossley**, for the Defendant *Dodds:-*

The bill puts the case no higher than that of an offer. Taking the memorandum of the 10th of June, 1874, as an offer only, it is well established that, until acceptance, either party may retract; *Cooke v. Oxley* (5); *Benjamin* on Sales(6).

After *Dodds* had retracted by selling to *Allan*, the offer was no longer open. Having an option to retract, he exercised that option: *Humphries v. Carvalhn* (7); *Pollock* on Contracts(8); *Routledge v. Grant* (9).

In delivering judgment in *Martin v. Mitchell* (10), Sir *T. Plumer*, M.R., put the case of a contract signed by one party only. He asked(11), "What mutuality is there, if the one is at liberty to

renounce the contract, and the other not?" and in *Meynell v. Surtees* (12), the distinctions between an offer and an agreement in respect of binding land were pointed out: *Fry* on Specific Performance(13).

The postscript being merely voluntary, without consideration, is *nubum pactum*; and the memorandum may be read as if it contained no postscript.

**Jackson, Q.C.**, and **Gazdar**, for the Defendant *Allan*:-

**Allan** is an unnecessary party. If *Dodds* has not made a valid

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(1) 1 B. & A. 681.

(2) 1 H. L. C. 381.

(3) Law Rep. 7 Ch. 587, 595.

(4) 6 Hare, 1.

(5) 3 T. R. 653.

(6) 2nd Ed. p. 52.

(7) 16 East, 45.

(8) Page 8.

(9) 4 Bing. 653.

(10) 2 Jac. & W. 413.

(11) Page 428.

(12) 1 Jur. (N.S.) 737.

(13) Page 80.

---------- ***(1876) 2 Ch.D. 463 at 467***

contract with the Plaintiff, he is a trustee for *Allan*; if *Dodds* has made a binding contract, rights arise between *Allan* and *Dodds* which are not now in controversy.

We agree with the co-Defendant that, in order that the Plaintiff may have a *locus standi*, there must have been a contract. If the postscript is a modification of the offer, it is *nudum pactum*, and may be rejected.

It may be conceded that if there had been an acceptance, it would have related back in point of date to the offer. But there was no acceptance. Notice of acceptance served on Mrs. *Burgess* was not enough.

Even if it would have been otherwise sufficient, here it was too late. *Dodds* had no property left

to contract for. The property had ceased to be his. He had retracted his offer; and the property had become vested in some one else: *Hebb's Case* (1).

The Plaintiff would not have delivered the notice if he had not heard of the negotiation between *Dodds* and *Allan*. What retractation could be more effectual than a sale of the property to some one else?

The Defendant *Allan* was a *bonâ fide* purchaser without notice.

**Kay**, in reply:-

The true meaning of the document was a sale. The expression is not "open," but "over." The only liberty to be allowed by that was a liberty for the Plaintiff to retract.

But, taking it as an offer, the meaning was, that at any day or hour within the interval named, the Plaintiff had a right to indicate to the Defendant his acceptance, and from that moment the Defendant would have had no right of retractation. Then, was there a retractation before acceptance? To be a retractation, there must be a notification to the other party. A pure resolve within the recesses of the vendor's own mind is not sufficient. There was no communication to the Plaintiff. He accepted on two several occasions. There could have been no parting with the property without communication with him. He was told that the offer was to be left over.

The grounds of the decision in *Cooke v. Oxley* (2) have been

(1) Law Rep. 4 Eq. 9, 12.

(2) 3 T. R. 653.



abundantly explained by Mr. *Benjamin* in his work on Sales. It was decided simply on a point of pleading.

I consider that to be one agreement, and I think the terms of the agreement put an end to any question of *nudum pactum*. I think the inducement for the Plaintiff to enter into the contract was the Defendant's compliance with the Plaintiff's request that there should be some time allowed to him to determine whether he would accept it or not. But whether the letter is read with or without the postscript, it is, in my judgment, as plain and clear a contract for sale as can be expressed in words, one of the terms of that contract being that the Plaintiff shall not be called upon to accept, or to testify his acceptance, until 9 o'clock on the morning of the 12th of June. I see, therefore, no reason why the Court should not enforce the specific performance of the contract, if it finds that all the conditions have been complied with.

Then what are the facts? It is clear that a plain, explicit acceptance of the contract was, on Thursday, the 11th of June, delivered by the Plaintiff at the place of abode of the Defendant, and

ought to have come to his hands. Whether it came to his hands or not, the fact remains that, within the time limited, the Plaintiff did accept and tesuify his acceptance. From that moment the Plaintiff was bound, and the Defendant could at any time, notwithstanding *Allan*, have filed a bill against the Plaintiff for the specific performance of the contract which he had entered into, and which the Defendant had accepted.

I am at a loss to guess upon what ground it can be said that it is not a contract which the Court will enforce. It cannot be on the ground that the Defendant had entered into a contract with Allan, because, giving to the Defendant all the latitude which can be desired, admitting that he had the same time to change his mind as he, by the agreement, gave to the Plaintiff - the law, I take it, is clear on the authorities, that if a contract, unilateral in its

---------- ***(1876) 2 Ch.D. 463 at 469***

shape, is completed by the acceptance of the party on the other side, it becomes a perfectly valid and binding contract. It may be withdrawn from by one of the parties in the meantime, but, in order to be withdrawn from, information of that fact must be conveyed to the mind of the person who is to be affected by it. It will not do for the Defendant to say, "I made up my mind that I would withdraw, but I did not tell the Plaintiff; I did not say anything to the Plaintiff until after he had told me by a written notice and with a loud voice that he accepted the option which bad been left to him by the agreement." In my opinion, after that hour on Friday, earlier than nine o'clock, when the Plaintiff and Defendant met, if not before, the contract was completed, and neither party could retire from it.

It is said that the authorities justify the Defendant's contention that he is not bound to perform this agreement, and the case of *Cooke v. Oxley* (1) was referred to. But I find that the judgment in *Cooke v. Oxley* went solely upon the pleadings. It was a rule to shew cause why judgment should not be arrested, therefore it must have been upon the pleadings. Now, the pleadings were that the vendor in that case proposed to sell to the Defendant. There was no suggestion of any agreement which could be enforced. The Defendant proposed to the Plaintiff to sell and deliver, if the Plaintiff would agree to purchase upon the terms offered, and give notice at an earlier hour than four of the afternoon of that day; and the Plaintiff says he agreed to purchase, but does not say the Defendant agreed to sell. He agreed to purchase, and gave notice before four o'clock in the afternoon. Although the case is not so clearly and satisfactorily reported as might be desired, it is only necessary to read the judgment to see that it proceeds solely upon this allegation in the pleadings. Mr. Justice *Buller* says, "As to the subsequent time, the promise can only be supported upon the ground of a new contract made at four o'clock; but there was no pretence for that." Nor was there the slightest allegation in the pleadings for that; and judgment was given against the Plaintiff.

*Routledge v. Grant* (2) is plainly distinguishable from this case upon the grounds which have bden mentioned. There the contract

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(1) 3 T. R. 653.

(2) 4 Bing. 653.

---------- *(1876) 2 Ch.D. 463 at 470*

was to sell on certain terms; possession to be given upon a particular day. Those terms were varied, and therefore no agreement was come to; and when the intended purchaser was willing to relinquish the condition which he imposed, the other said, "No, I withdraw; I have made up my mind not to sell to you;" and the judgment of the Court was that he was perfectly right.

Then *Warner v. Willington* (1) seems to point out the law in the clearest and most distinct manner possible. An offer was made - call it an agreement or offer, it is quite indifferent. It was so far an offer, that it was not to be binding unless there was an acceptance, and before acceptance was made, the offer was retracted, the agreement was rescinded, and the person who had then the character of vendor declined to go further with the arrangement, which had been begun by what had passed between them. In the present case I read the agreement as a positive engagement on the part of the Defendant *Dodds* that he will sell for £800, and, not a promise, but, an agreement, part of the same instrument, that the Plaintiff shall not be called upon to express his acquiescence in that agreement until Friday at nine o'clock. Before Friday at nine o'clock the Defendant receives notice of acceptance. Upon what, ground can the Defendant now be let off his contract? It is said that *Allan* can sustain his agreement with the Defendant, because at the time when they entered into the contract the Defendant was possessed of the property, and the Plaintiff had nothing to do with it. But it would be opening the door to fraud of the most flagrant description if it was permitted to a Defendant, the owner of property, to enter into a binding contract to sell, and then sell it to somebody else and say that by the fact of such second sale he has deprived himself of the property which he has agreed to sell by the first contract. That is what *Allan* says in substance, for he says that the sale to him was a retractation which deprived *Dodds* of the equitable interest he had in the property, although the legal estate remained in him. But by the fact of the agreement, and by the relation back of the acceptance (for such I must hold to be the law) to the date of the agreement, the property in equity was the property of the Plaintiff, and *Dodds* had nothing to sell to *Allan*. The property

(1) 3 Drew. 523.

---------- *(1876) 2 Ch.D. 463 at 471*

remained intact, unaffected by any contract with *Allan*, and there is no ground, in my opinion, for the contention that the contract with *Allan* can be supported. It would be doing violence to principles perfectly well known and often acted upon in this Court. I think the Plaintiff has made out very satisfactorily his title to a decree for specific performance, both as having the equitable interest, which he asserts is vested in him, and as being a purchaser of the property for valuable consideration without notice against both *Dodds*, the vendor, and *Allan*, who has entered into the contract with him.

There will be a decree for specific performance, with a declaration that Allan has no interest in

the property; and the Plaintiff will be at liberty to deduct his costs of the suit out of his purchase-money.

From this decision both the Defendants appealed, and the appeals were heard on the 31st of March and the 1st of April, 1876.
**Swanston, Q.C.** (*Crossley* with him) for the Defendant *Dodds*.

***Sir H. Jackson, Q.C.*** (*Gazdar* with him), for the Defendant *Allan*.

**Kay, Q.C.**, and **Caldecott**, for the Plaintiff.

The arguments amounted to a repetition of those before the Vice-Chancellor. In addition to the authorities then cited the following cases were referred to: *Thornbury v. Bevill* (1); *Taylor v. Wakefield* (2); *Head v. Diggon* (3); *Palmer v. Scott* (4).

The document, though beginning "I hereby agree to sell," was nothing but an offer, and was only intended to be an offer, for the Plaintiff himself tells us that he required time to consider whether he would enter into an agreement or not. Unless both parties had then agreed there was no concluded agreement then made; it was

(1) 1 Y. & C. Ch. 554.

(2) 6 E. & B. 765.

(3) 3 Man. & Ry. 97.

(4) 1 Russ. & My. 391.



in effect and substance only an offer to sell. The Plaintiff, being minded not to complete the bargain at that time, added this memorandum - "This offer to be left over until Friday, 9 o'clock A.M., 12th June, 1874." That shews it was only an offer. There was no consideration given for the undertaking or promise, to whatever extent it may be considered binding, to keep the property unsold until 9 o'clock on Friday morning; but apparently *Dickinson* was of opinion, and probably *Dodds* was of the same opinion, that he (*Dodds*) was bound by that promise, and could not in any way withdraw from it, or retract it, until 9 o'clock on Friday morning, and this probably explains a good deal of what afterwards took place. But it is clear settled law, on one of the clearest principles of law, that this promise, being a mere nudum pactum, was not binding, and that at any moment before a complete acceptance by *Dickinson* of the offer, *Dodds* was as free as *Dickinson* himself. Well, that being the state of things, it is said that the only mode in which *Dodds* could assert that freedom was by actually and distinctly saying to *Dickinson*, "Now I withdraw my offer." It appears to me that there is neither principle nor authority for the proposition that there must be an express and actual withdrawal of the offer, or what is called a retractation. It must, to constitute a contract, appear that the two minds were at one, at the same moment of time, that is, that there was an offer continuing up to the time of the acceptance. If

there was not such a continuing offer, then the acceptance comes to nothing. Of course it may well be that the one man is bound in some way or other to let the other man know that his mind with regard to the offer has been changed; but in this case, beyond all question, the Plaintiff knew that *Dodds* was no longer minded to sell the property to him as plainly and clearly as if *Dodds* had told him in so many words, "I withdraw the offer." This is evident from the Plaintiff's own statements in the bill.

The Plaintiff says in effect that, having heard and knowing that *Dodds* was no longer minded to sell to him, and that he was selling or had sold to some one else, thinking that he could not in point of law withdraw his offer, meaning to fix him to it, and endeavouring to bind him," I went to the house where he was lodging, and saw his mother-in-law, and left with her an acceptance of the



offer, knowing all the while that he had entirely changed his mind. I got an agent to watch for him at 7 o'clock the next morning, and I went to the train just before 9 o'clock, in order that I might catch him and give him my notice of acceptance just before 9 o'clock, and when that occurred he told my agent, and he told me, you are too late, and he then threw back the paper." It is to my mind quite clear that before there was any attempt at acceptance by the Plaintiff, he was perfectly well aware that *Dodds* had changed his mind, and that he had in fact agreed to sell the property to *Allan*. It is impossible, therefore, to say there was ever that existence of the same mind between the two parties which is essential in point of law to the making of an agreement. I am of opinion, therefore, that the Plaintiff has failed to prove that there was any binding contract between *Dodds* and himself.

I am of the same opinion. The first question is, whether this document of the 10th of June, 1874, which was signed by *Dodds*, was an agreement to sell, or only an offer to sell, the property therein mentioned to *Dickinson*; and I am clearly of opinion that it was only an offer, although it is in the first part of it, independently of the postscript, worded as an agreement. I apprehend that, until acceptance, so that both parties are bound, even though an instrument is so worded as to express that both parties agree, it is in point of law only an offer, and, until both parties are bound, neither party is bound. It is not necessary that both parties should be bound within the *Statute of Frauds*, for, if one party makes an offer in writing, and the other accepts it verbally, that will be sufficient to bind the person who has signed the written document. But, if there be no agreement, either verbally or in writing, then, until acceptance, it is in point of law an offer only, although worded as if it were an agreement. But it is hardly necessary to resort to that doctrine in the present case, because the postscript calls it an offer, and says, "This offer to be left over until Friday, 9 o'clock A.M." Well, then, this being only an offer, the law says - and it is a perfectly clear rule of law - that, although it is said that the offer is to be left open until Friday morning at



9 o'clock, that did not bind *Dodds*. He was not in point of law bound to hold the offer over until 9 o'clock on Friday morning. He was not so bound either in law or in equity. Well, that being so, when on the next day he made an agreement with *Allan* to sell the property to him, I am not aware of any ground on which it can be said that that contract with *Allan* was not as good and binding a contract as ever was made. Assuming *Allan* to have known (there is some dispute about it, and *Allan* does not admit that he knew of it, but I will assume that he did) that *Dodds*

had made the offer to *Dickinson*, and had given him till Friday morning at 9 o'clock to accept it, still in point of law that could not prevent *Allan* from making a more favourable offer than *Dickinson*, and entering at once into a binding agreement with *Dodds*.

Then *Dickinson* is informed by Berry that the property has been sold by *Dodds* to *Allan*. Berry does not tell us from whom he heard it, but he says that he did hear it, that he knew it, and that he informed *Dickinson* of it. Now, stopping there, the question which arises is this - If an offer has been made for the sale of property, and before that offer is accepted, the person who has made the offer enters into a binding agreement to sell the property to somebody else, and the person to whom the offer was first made receives notice in some way that the property has been sold to another person, can he after that make a binding contract by the acceptance of the offer? I am of opinion that he cannot. The law may be right or wrong in saying that a person who has given to another a certain time within which to accept an offer is not bound by his promise to give that time; but, if he is not bound by that promise, and may still sell the property to some one else, and if it be the law that, in order to make a contract, the two minds must be in agreement at some one time, that is, at the time of the acceptance, how is it possible that when the person to whom the offer has been made knows that the person who has made the offer has sold the property to someone else, and that, in fact, he has not remained in the same mind to sell it to him, he can be at liberty to accept the offer and thereby make a binding contract? It seems to me that would be simply absurd. If a man makes an offer to sell a particular horse in his stable, and says, "I will give you until the day after to-morrow to

---------- ***(1876) 2 Ch.D. 463 at 475***

accept the offer," and the next day goes and sells the horse to somebody else, and receives the purchase-money from him, can the person to whom the offer was originally made then come and say, "I accept," so as to make a binding contract, and so as to be entitled to recover damages for the non-delivery of the horse? If the rule of law is that a mere offer to sell property, which can be withdrawn at any time, and which is made dependent on the acceptance of the person to whom it is made, is a mere *nudum pactum*, how is it possible that the person to whom the offer has been made can by acceptance make a binding contract after he knows that the person who has made the offer has sold the property to some one else? It is admitted law that, if a man who makes an offer dies, the offer cannot be accepted after he is dead, and parting with the property has very much the same effect as the death of the owner, for it makes the performance of the offer impossible. I am clearly of opinion that, just as when a man who has made an offer dies before it is accepted it is impossible that it can then be accepted, so when once the person to whom the offer was made knows that the property has been sold to some one else, it is too late for him to accept the offer, and on that ground I am clearly of opinion that there was no binding contract for the sale of this property by *Dodds* to *Dickinson*, and even if there had been, it seems to me that the sale of the property to *Allan* was first in point of time. However, it is not necessary to consider, if there had been two binding contracts, which of them would be entitled to priority in equity, because there is no binding contract between *Dodds* and *Dickinson*.

I entirely concur in the judgments which have been pronounced.

JAMES, L.J. :- The bill will be dismissed with costs.

*Swanston*, Q.C.:- We shall have the costs of the appeal.

*Kay*, Q.C.:- There should only be the costs of one appeal.

Sir *H. Jackson*, Q.C.:- The Defendant *Allan* was obliged to protect himself.

---------- ***(1876) 2 Ch.D. 463 at 476***

MELLISH, L.J. :- He had a separate case. There might, if two contracts had been proved, have been a question of priority.

JAMES, L.J. :- I think the Plaintiff must pay the costs of both appeals.
Solicitor for Appellants: *O. B. Wooler*.
Solicitor for Plaintiff: *R. T. Jarvis*, agent for *Hutchinson & Lucas, Darlington*.

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