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CASES THAT MADE AMERICA FLETCHER V PECK AND THE COMMERCIALIZATION OF AMERICA'S SOCIAL CONTRACT

This paper examines the emergence of U.S. contract law with his roots in English common law, as it differs from European concepts derived from Roman law that focus more on fairness in the transaction. It addresses the first case among contentious contract parties to wind its way to the U.S. Supreme Court. In Fletcher v Peck, the high court was forced to sort out a series of misbegotten transactions that ensued after land speculators bribed Georgia legislators to sell millions of acres – in what is now Alabama, Mississippi and Tennessee – to them for less than 2 cents an acre. When this criminal conspiracy was discovered, new legislators sought to rescind the transaction, while the speculators were rushing to sell as many parcels of the land as possible before that could happen.

In Chief Justice John Marshall's opinion in the Fletcher case, the Court sustained the constitutional challenge to Georgia's rescinding act, thus establishing a number of important precedents for the new country:

1. The Contracts Clause of the U.S. Constitution was read so broadly as to make the power of contract so absolute that no one, including a state government, could intervene to impair the obligations of contract.

2. At the same time, the sale and transfer of properties, normally the domain of contract as opposed to legislation, were treated the same as private agreements even when conducted by a government

3. In another twist, the nature of property interests transferred – though treated as a private agreement governed by contract law – was established as coming exclusively from the governments established in the English colonies by the Crown – to the exclusion of the Native American who were there before them.

4. The U.S. Supreme Court established its authority over states – to the extent that it could void their laws.

5. Perhaps most importantly, all this transpired without any tangible recognition of the underlying corruption in the Yazoo Land Fraud, in effect ratifying its criminality for the sake of commercial stability.

In the spirit of liberal arts education, it is important for students to understand the theories and causes behind the law they practice – from history. In that torch-passing process, the author finds it gratifying to be able to cite several of former professors from the University of Alabama, the University of Georgia School of Law, and Princeton University.

For centuries, Anglo-American common law tradition traveled under the dominant notion that Contracts constitute private law-making by the parties to the transaction, diverging from the European trend via Roman statutory law that weighs the fairness of the transaction [1]. While the common law tradition pretended the influence of the state is far removed[1], precious little recognition has been afforded to an opposing strain, the heavy hand of government intervention, in the guise of a prescient laissez-faire[2] philosophy, laid down at the founding of the American republic in *Fletcher v Peck* [2].

The case between Robert Fletcher and John Peck arose out of the infamous Yazoo Land Fraud, in which land speculators bribed the Governor and members of the Georgia legislature to vote, in January of 1795, to sell for a bargain-basement price the vast frontier, then-unsettled except by Native Americans, that comprises much of modern-day Alabama and Mississippi. After this corruption was discovered, in which less than two cents apiece was the selling price for 35 million acres of virgin territory, outraged Georgians voted Governor John Gunn and many of his conspirators in the legislature out of office.

In 1796, a new legislature passed a rescinding act, voiding the prior legislative give-away, and thus taking away ownership of the land, including that of supposedly innocent third-party purchasers who had bought parcels of land from the original grantees (the ones who committed the bribery). This resulted in a challenge to the constitutionality of the 1796 act that tried to undo the corruption.

Ironically, it was the buyer of a parcel, Robert Fletcher, who challenged the power of John Peck to convey it[3]. Robert Fletcher, a resident of New Hampshire, bought his Yazoo tract from John Peck, a resident of Massachusetts, which shows the degree to which this sweet deal for Southern lands sparked a national feeding frenzy of wilderness land

[1] In fact, early English courts were slow to take contract issues under their jurisdiction. Id.

[2] This term refers to the American judicial trend of the late nineteenth century, in which the courts intervened to block legislation meant to improve working conditions for American laborers, under a supposed theory of freedom of contract – where workers had no real bargaining power against the trusts, or giant conglomerates and monopolies of the time. The reader should understand the counterintuitive thrust of the term, since one branch of government, the judiciary, was not in truth passively leaving things be, but rather intervening against the legislative branch, under this pretended principle of non-intervention.

[3] Normally a possessor of property would seek to protect his interest in it, not argue that it was void. One might assume that here, the buyer, Robert Fletcher, believed he had been swindled in his purchase price, upon learning of the token sum for which the seller had obtained the property. In hindsight, he paid $3 000 for land worth a minimum of $13 million today.

speculation. Peck traced his title back to the state of Georgia through supposedly innocent purchasers. In connection with the land transfer, Peck promised Fletcher that the title had not been constitutionally impaired by the 1796 rescinding legislation[4]. When that proved to be in doubt, Fletcher sued Peck. Peck argued the 1796 act was unconstitutional, so that no breach of his contract promise to Fletcher had occurred.

It took the U.S. Supreme Court, where the case wound its way 15 years after the Yazoo Land Act was passed, to sort out this contractual, commercial, and constitutional tangle – in a way that set the course of the nation as a legal, social and commercial entity, in a way that went far beyond the scope of the seemingly simple land transfer agreement at issue.

Aftermath of the Yazoo Land Fraud

It was alleged that all Yazoo land purchasers – beyond the original grantees, who bribed the legislators – were purchasers without notice. This begs the question, and perhaps defies credulity, that no one outside the original criminal conspirators knew about this sweetheart deal. That is especially vexing considering the public nature of the transaction, which involved additional documentation in the public record in the form of a mortgage with recorded deeds. Presumably, no one had to reside in the inner circle of this cabal to do the simple arithmetic and surmise that 1.5 cents an acre, even in 1795, was not fair market value for property in such high demand [4, p. 421] during the "Alabama fever" [3] of the early 1800s.

In fact, when the public learned of this scandal, the public outrage swept the offending legislators out of office in the next election. In 1796, Jared Irwin was elected Governor of Georgia and, with the help of Senator James Jackson and other reformers, the first order of business for the succeeding legislature was to repeal the bill by which the Yazoo Land Fraud, as it came to be known, was transacted.

This was no ordinary repeal in the form of mere words committed to paper and entered into the public record. As only UGA Law of Legislative Government Professor R. Perry Sentell, Jr. could recount: Outraged Georgians gathered at the statehouse grounds of the then-capital of Georgia, Louisville, and set up a giant magnifying glass and affixed its beam to the offending parchment on which the text of the Yazoo Land Fraud legislation was inscribed, to

[4] For purposes of this discussion of the nature of contract rights in early America, it is not necessary to get into all the complications arising from the attempt to unwind the corrupt sale of 1795. The 1796 Act rescinded the prior legislation, and returned the $500,000 purchase price, purporting to undo the contract of sale embodied in the tainted 1795 Act, thereby depriving subsequent buyers and sellers of their titles. In the chaos that ensued, Georgia ended up ceding to the federal government its prior title to the lands (after it had already conveyed them!) in a Southern parallel to the Northwest Ordinance, which undid claims of the Atlantic colonies to lands stretching as far as the Pacific Ocean. This cession of potential slave territory ended up being one of the aggravating factors leading to the Civil War in 1861. See Dred Scott v. Sandford, 60 US 393 (1857). The sacrosanctity of contract pronounced in Fletcher v Peck was diluted by the fact that Georgia reneged on a prior grant to land speculators, based on a disagreement over construction of the contract, when currency fluctuations rendered the deal unfavorable to the State. We cannot chase all those rabbit trails here, but this partial summary gives some idea of the magnitude of the multiple dilemmas facing the Supreme Court in 1810.

torch it with "Holy Fire from Heaven" [5]. Thus, the tale was passed down in the lore of Georgia's beginnings as the "Repeal by Incineration"[5]. The point is the much public attention was called to this scandal, making the idea that Fletcher had no idea about the questions surrounding the original transfer even more improbable.

Despite the dramatic effect of the public incineration, the rebellion against the mercenary crassness of the legislature was relatively short-lived. In 1803, Peck sold Fletcher 13,000 acres for $3 000, almost three times the original selling price, seven years after the emphatic repeal. It took seven more years for the resulting dispute to be finally decided by the U.S. Supreme Court.

In Chief Justice John Marshall's opinion in the Fletcher case, the Court sustained the constitutional challenge to Georgia's rescinding act – based largely on the doubtful principle that subsequent buyers were innocent purchasers without notice of the original tainted sale and the subsequent attempted undoing – thus establishing a number of important precedents for the new country.

Don't mess with our Contracts

Relying on the Contracts Clause of the U.S. Constitution[6], the US Supreme Court sent a clear message that the protection and preservation of contracts was next to inviolable, even where they were the product of criminality in the public realm.

In the Constitution of Georgia, adopted in the year 1789, the court can perceive no restriction on the legislative power which inhibits the passage of the Act of 1795. The court cannot say that, in passing that Act, the Legislature has transcended its powers and violated the Constitution. *Fletcher v. Peck*, 10 U.S. 128–129.

This reason for upholding the legislation that doubled as contract of sale was that the legislature had the authority to enact the bill. It conveniently overlooks the fact that the legislature of 1796 likewise had the authority to pass a bill rescinding the original act. What was the legal, constitutional difference? Only the intervening private contract – which was held more inviolable than an act of the legislature. That laid down a serious marker. The Yazoo land transfer was a hybrid phenomenon, a combination of a legislative act and a sales agreement. The legislature couple repeal a prior act but it could not break a contract.

It was symbolic that the "contract" the court protected was the transfer of a seemingly boundless and slovenly wilderness. The court created a fiction of certainty in the midst of territories that were still largely unknown and unexplored in a vast continent that stretched out before the young country. At the time of the illicit transfer, Georgia claimed the lands stretching all the way from the Atlantic Coast where Savannah was founded.

That was a wilderness in which life itself was far from a certainty. In fact, in 1813, three years after the Fletcher decision, an entire settlement in the territory of Alabama, not yet a

[5] See Fred Hobson, The Savage South, VQR, Summer 1985 for a discussion of how the actual fact of this folklorical dramatic flair pervading the American South's pre-history inevitably "morphed into the Sun Belt" of "air conditioning and strip malls" in the same way the rebellious Repeal by Incineration was overwhelmed by the dull commercial logic of Fletcher v Peck.

[6] Article I, Section 10 states that, No state shall pass any Law impairing the obligation of contracts.

state admitted to the Union, was wiped out in a Creek Indian raid. Every man, woman and child was massacred at Fort Mims, a settlement hacked out of sprawling forest lands that were part of the Yazoo deal. Yet even in this wild and precarious state of nature, metes and bounds were certain, and the seal on a contract was an unbreakable bond. Over bird and bush, the invisible lines of the law took dominion everywhere.

The Fort Mims Massacre shocked the fledgling nation with dreams of manifest destiny. But under the Supreme Court decision, the bond of contract remained unshakeable. The principle for which the case is now cited, that contracts are enforceable and inviolable, except in extreme circumstances – or, rather, even in extreme circumstances, such as bribery of public officials – may seem obvious in a settled commercial world. It was not so obvious then, in a country hanging by a thread, with order threatened to be overturned by every kind of chaos and violence. It is more understandable that it bore repeating three years before the nation's capital was sacked by British invaders in the War of 1812. And can we say the notion of stability is so obvious in 2023 – in the face of Putin's bloody disregard for borders, self-determination, and sovereignty? Do we think the former American president could enforce his memorandum of understanding – to build an eponymous Tower in Moscow – in Russian courts? That represents a challenged world in which no contract is ever fully formed. In the face of such prospects for instability, the U.S. Supreme Court completely rejected that possibility.

Even legislation is a contract

Are laws passed by a legislature and a contract for sale of land between private parties the same thing? While the equivalence is not certain or obvious, the Supreme Court treated it as such [6].

The important point is that the inviolability of contract is assumed against the legislature acting in an official government capacity in the same manner as it would be applied to a private land speculator. That stands in contrast to the state law notions of contract that still exist today, in which states claim immunity for claims brought against them in contract [7].

That is just one of many inconsistencies that filter their way down through legal history, largely ignored. Yet it is not at all shocking, in this day and age in America, that a government entity would be bound by its contractual agreements. Again, that is only because that is our accepted norm. It again invites the comparison with a Putin state, which is not bound by anything, including the truth. Even the ill-gotten gains of the oligarchs are not secure in a society that only exists through cross-border wealth transfers to more stable economies.

Title to land derives from the title of nobility

The court ignored perhaps the most important issue in the case – an issue that was not placed legally before the court by the litigants Fletcher and Peck. What they all ignored, including the corrupt legislators who entered the contract of sale, were the thousands of Native Americans living on the land before the English transplants got there.

Without deciding the issue, Fletcher v. Peck hinted that Indians might not hold title to their own lands. While the Supreme Court held contracts between the white settlers

inviolable, it also took a dim view of another form of contract, the treaties with the Native Americans over the lands they inhabited. The opinion focuses exclusively on title came from the Crown, via a trans-Atlantic edict that superseded the actual use and possession of the Creeks and Cherokees. In fact, when the Cherokees decided they would use the U.S. judicial system to enforce their treaty rights against the Georgia legislature – that passed another bill stripping the Cherokees of their title – the U.S. Supreme Court turned the Cherokees down, denying them jurisdiction. Justice John Marshall wrote an opinion stating that, as wards of the State, the Indians were in no position to dispute their White "guardians" [8].

The U.S. Supreme Court reversed direction on the question of Indian autonomy in *Worcester v. Georgia*. In that case, Georgia authorities sought to prosecute white settlers living in Indian territory – now Gwinnett County, which some still say remains uncivilized – in violation of a statute that barred non-Indians from living there to escape the authority of the state government. In the *Worcester* case, the Supreme Court held that Georgia could not intermeddle in the affairs between the United States and a sovereign Indian nation. This contradicted the dependent-ward outcome of *Cherokee Nation v. Georgia*, but President Andrew Jackson ignored the high court's ruling and ordered the removal of the Cherokees, anyway.

Of course, this ultimate result, treating the Indians as dependents, constituted more sinister foreshadowing of the later road to Jim Crow white supremacy and the doctrine of separate but equal. It is not coincidental that one of the incidents of inequality under this discriminatory system was the incapacity to enter contracts, particularly for the sale of land. Under the later laws of the State of Alabama, it was forbidden for African Americans to own land, contrary to the freedom of contract impetus of *Fletcher v Peck* [9].

But the Supreme Court did not ignores the other party lurking in the background behind Fletcher and Peck. That third party was the King of England, through whom all right and title, and power to transfer originated. Fletcher v Peck reminds us that we hold all land and property at the pleasure of the new government – a government standing in the shoes of the King.

This should remind us of the contrasting Enlightenment notions behind the American Revolution that contractual agreement lies at the foundation of nation-states themselves, that the body politic of a nation is based on a Social Contract, like a contract of sale based on the intent of the parties, in this case the consent of the governed. Fletcher turned this notion sideways, if not on its head. The strings that bind society still come from the top down, the Supreme Court said.

These are latent and remaining conflicts that persist today in nation whose Constitution explicitly rejects titles of nobility[7]. That conflict can be traced all the way back to Hamilton's statement that the rejection of noble titles should be "denominated the corner-stone of

[7] US Const., Art. I, Sec. 9, Clause 8: No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.

republican government" [10]. Yet the young republic retained a healthy infusion of royal blood in the title to every inch of virgin ground.

No doubt another disconnect between the Yazoo contracts for the sale of lands and the contractual treaty agreements with the Creek and Cherokee Indians was the disparity between the Native American practice of preserving lands in their natural state and the European drive property development and exploitation of natural resources that left the first photographic evidence of the South showing a denuded landscape.

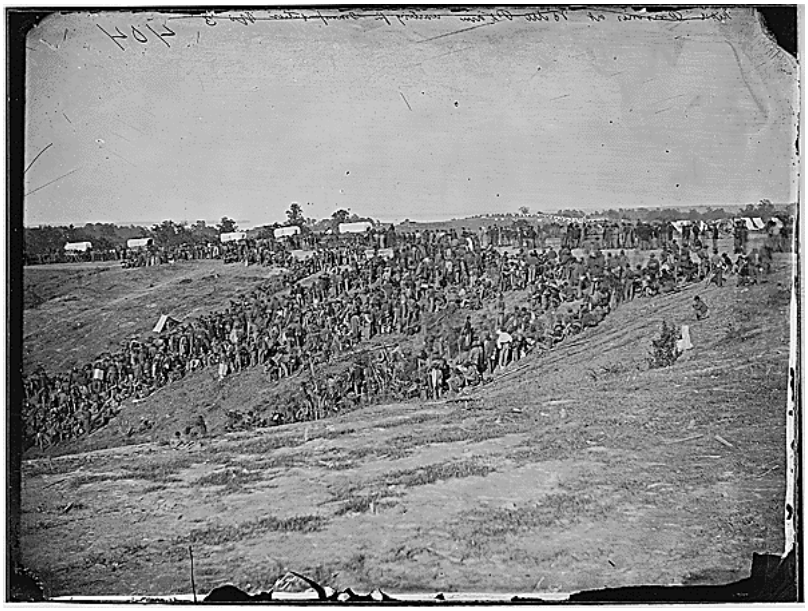

Photo № 1. Matthew Brady, Confederate Prisoners of war Awaiting Transportation, National Archives 524824

The Supreme Court can overrule state laws

The other important principle established by this decision, validating the sanctity of contract (while ignoring the criminal origins), was that the U.S. Supreme Court firmly established its authority to invalidate state laws. The Court declared a right to federalize contracts, which are otherwise creatures of state law, by leveraging the Contract Clause. This went way beyond John Marshall's flexing of the court power to interpret law in *Fletcher v Peck*'s more famous cousin, *Marbury v Madison*. This represented a deep conflict between government authorities, in a power struggle that continues to this day.

It should not be lost on the reader that the high court determined it had the power to annul the second cleansing act of the Georgia legislature, only after it determined that no means existed to void the original corrupt act of the legislature by which the fraud was committed. This is yet another inconsistency passed over by history to create America's national identity.

The Supreme Court based its power to undo the second act of the legislature on equitable principles:

If the Legislature of Georgia was not bound to submit its pretensions to those tribunals which are established for the security of property, and to decide on human rights, if it might claim to itself the power of judging in its own case, yet there are certain great principles of justice, whose authority is universally acknowledged, that ought not to be entirely disregarded.

In other words, while the legislature had the authority to engage in the original corrupt transactions, it had no power to undo its own wrongdoing – because that might lead to wrongdoing by the legislature.

If the reader finds this circular logic less than convincing, bear in mind that the issue the court was really focused on, the feeding frenzy of land sales that had already sprung from the fruit of this poisonous tree by the time the case reached the Supreme Court.

The lands in controversy vested absolutely in James Gunn and others, the original grantees, by the conveyance of the Governor, made in pursuance of an act of assembly to which the Legislature was fully competent. Being thus in full possession of the legal estate, they, for a valuable consideration, conveyed portions of the land to those who were willing to purchase. If the original transaction was infected with fraud, these purchasers did not participate in it, and had no notice of it. They were innocent. Yet the Legislature of Georgia has involved them in the fate of the first parties to the transaction, and, if the act be valid, has annihilated their rights also.

In the end, the enforceability of private contracts comes from the very top echelon of government power. Conversely, protection of contracts for sale and transfer of land became the fountainhead of the federal court's power to override the states. And that is consistent with the parallel notion in *Fletcher v Peck*, that the title to property – the subject of the contract in question – originated in the Crown. In the end, that is what matters, not who is hacking vines and chopping trees to clear the land, be they buyers or sellers, farmers or fishermen, native Cherokees or born Englishmen the Court claimed to be protecting.

Corruption enshrined at the founding

As the court blandly phrased the issue:

The original grantees from the State of Georgia promised and assured divers members of the Legislature, then sitting in General Assembly that if the said members would assent to, and vote for, the passing of the Act, and if the said bill should pass, such members should have a share of, and be interested in, all the lands purchased from the said State by virtue of such law.

In fact, in addition to the promises of pecuniary gain made to Georgia legislators, the Yazoo land company from which Peck gained his title was comprised of two congressmen, one territorial governor, three judges including one U.S. Supreme Court Justice, and two U.S. Senators with advance knowledge that Spain would release its claims to the same territory in an impending treaty [11].

The court threw a lot of words, which were ultimately meaningless, at its troubling conclusion that the corrupt and criminal origins of the legislative contract were immaterial:

That corruption should find its way into the governments of our infant republics and contaminate the very source of legislation, or that impure motives should contribute to the passage of a law or the formation of a legislative contract are circumstances most deeply to be deplored.

The court directly confronted the issue of corruption only in the sense that it skirted it:

It would be indecent in the extreme, upon a private contract, between two individuals, to enter into an inquiry respecting the corruption of the sovereign power of a State. If the title be plainly deduced from a legislative act, which the Legislature might constitutionally pass, if the act be clothed with all the requisite forms of a law, a court, sitting as a court of law cannot sustain a suit brought by one individual against another founded on the allegation that the act is a nullity in consequence of the impure motives which influenced certain members of the Legislature which passed the law.

The presumed bona fide purchaser trumped the glaring criminal vicissitudes. It is an open question whether this is an innocent foundation for the law or a jaded premise. The decision as far as possible, placed private agreement off limits to outside intervention in a nation built on the principle of unfettered commerce and forward-looking prosperity [12]. Ironically, it required an extreme government intervention, against another government, to bring about the result we live with today as we inch in traffic past the rows of condos and shopping malls generated by all this commercial stability.

Conclusion

Few law cases can claim more formative impact on the very concept of the United States than *Fletcher v Peck.* It arose from corruption that followed transplants who beat a path to New World America seeking freedom from the stratified tyranny of the Old World or Europe. It established an ambivalent rule of law between the two diverging strains of law. It did that by elevating absolute autonomy of property interests over principles of self-determination and accountability. That is because the Supreme Court's interpreted principles of contract to determine the course of constitutional law. It can even be said that the court reduced the Social Contract ideals of the Enlightenment to purely commercial concepts.

In a more jaundiced view, the court approved form over substance. If the legislature was authorized to enact laws, and it enacted a bill to transfer this property, there is no further looking behind the form to discern improper motives or a substantive problem. That means procedural form can paper over corruption, a dangerous notion that still troubles us today.

Between the competing goals of overall social justice and overall economic stability, the commercial interest won out. That gave us the America we know today, a republican government espousing ideals of democracy and accountability, tempered by financial pragmatism. Arguably, both are consistent with the American frontier ideal of self-reliance at the time. Fittingly, this entente was realized in the first contract dispute between individual citizens that rose to the highest court in the land, calling for a nation-wide and nation-building resolution. Unfortunately, this accord left space open for grifting in the most successful economy the world has ever seen [13]. In the balance between bona fide purchasers and

corrupt government actions, the court chose a rule of stability in property interests and expectations. America's real contract was with the dream of wresting riches out of the slovenly wilderness. Nothing would impede it.

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Стівен Хамфріс. Справи, які збудували Америку. «Флетчер проти Пека» та комерціалізація американського суспільного договору

У статті досліджується становлення договірного права США, яке бере свій початок з англійського загального права, оскільки воно відрізняється від європейських концепцій, що походять від римського права, які здебільшого зосереджуються на чесності угоди. Також у статті йдеться про першу справу між сторонами контракту, яка дійшла до Верховного суду США. У справі «Флетчер проти Пека» суд був змушений розібратися в декількох незаконних угодах, які були укладені після того, як земельні спекулянти підкупили законодавців Джорджії з метою отримання мільйонів акрів землі на території Алабами, Міссісіпі та Теннессі менш ніж за 2 центи за акр. Коли цю кримінально протиправну змову було виявлено, законодавці намагалися скасувати угоду, а спекулянти поспішали продати якомога більше земельних ділянок, перш ніж це вдасться.

На думку головного судді Джона Маршалла у справі Флетчера, суд задовольнив можливість оскарження рішення про скасування вищевказаної угоди, у такий спосіб створивши ряд важливих прецедентів для країни:

1. Положення про контракти у Конституції США протлумачено досить широко, що надало абсолютної сили контракту. Тепер ніхто, включаючи представників урядів штату, не має права порушувати зобов'язання за контрактом.

2. Водночас питання щодо продажу і передачі майна, як правило, розглядалися так само, як приватні угоди, навіть якщо вони здійснювалися представниками уряду.

3. Природа переданих майнових інтересів хоча і розглядалася як приватна угода, що регулюється договірним правом, проте була встановлена як така, що походить виключно від урядів, заснованих в англійських колоніях Короною – за винятком корінних американців, які жили там перед ними.

4. Верховний суд США встановив свою владу над штатами настільки, наскільки він міг анулювати їхні закони.

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