

# HIGH COURT OF AUSTRALIA

King

Vs.

Smithers

(Griffith C.J., Barton and Isaacs JJ.)

20.12.1912

## JUDGMENT

### GRIFFITH C.J.

The applicant in this case attacks the validity of sec. 3 of the *Influx of Criminals Prevention Act 1903* N.S.W., which provides that: "If any person (other than a person who has been resident in New South Wales at or prior to the commencement of this Act), has before or after such commencement, been convicted in any other State" (a) of an offence against the *Immigration Restriction Act 1901 of the Commonwealth*, by reason of his being a prohibited immigrant within the definition in section three, subsection (e) or (f) of that Act, and being found within the Commonwealth in contravention or evasion of subsection (e) or (f) of that Act; or (b) of an offence for which in such State he was liable to suffer death, or to be imprisoned for one year or longer; and if before the lapse of three years after the termination of any imprisonment suffered by him in respect of any such offence, such person comes into New South Wales, he shall be guilty of an offence against this Act."

He contends that any law providing for the exclusion of any person seeking to enter a State from another State is contrary to the provisions of [sec. 92](#) of the *Constitution*, which enacts that "on the imposition of uniform duties of Customs, trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free."

To this contention several answers were set up: (1) That the provisions of [sec. 92](#), which is found in Chapter IV. of the *Constitution* relating to Finance and Trade, are enacted altogether *alio intuitu*; so that the enactment relied on is not relevant to the question; (2) That, if it is relevant, the term "free" as applied to intercourse cannot properly be applied to non-restriction of the movements of the

criminal population; (3) That if the widest meaning should be given to the word "intercourse" standing alone, its operation is cut down by the provisions of [sec. 107](#), which provides that:â€”

"Every power of the Parliament of a Colony which has become or becomes a State, shall, unless it is by this [Constitution](#) exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State, continue as at the establishment of the Commonwealth, or at the admission or establishment of the State, as the case may be." It is urged that this section continues to the States the general power of regulation of internal affairs which in the United States of America is commonly called the "police power," and which was described in the case of *Railroad Co. v. Husen*<sup>[1]</sup> as "a right founded in the sacred law of self-defence," and that if there is any apparent conflict between [sec. 92](#) and [sec. 107](#), the former must be read in such a sense as will reconcile the conflict. This, it is urged, can be done in accordance with the doctrines laid down in *Russell v. The Queen*<sup>[2]</sup>, in which Sir *Montague Smith*, delivering the opinion of the Judicial Committee, pointed out that regard must be had to the real subject matter with which Parliament is dealing. In that case the law under consideration was the *Canada Temperance Act 1878*, which, wherever it was put in force, would have prohibited the sale of intoxicating liquors except under certain conditions, and the question was whether that Act was an invasion of the field of "property and civil rights" <sup>[3]</sup>:â€”"What Parliament is dealing with in legislation of this kind is not a matter in relation to property and its rights, but one relating to public order and safety. That is the primary matter dealt with, and though incidentally the free use of things in which men may have property is interfered with, that incidental interference does not alter the character of the law. Upon the same considerations, the Act in question cannot be regarded as legislation in relation to civil rights. In however large a sense these words are used, it could not have been intended to prevent the Parliament of Canada from declaring and enacting certain uses of property, and certain acts in relation to property, to be criminal and wrongful. Laws which make it a criminal offence for a man wilfully to set fire to his own house on the ground that such an act endangers the public safety, or to overwork his horse on the ground of cruelty to the animal, though affecting in some sense property and the right of a man to do as he pleases with his own, cannot properly be regarded as legislation in relation to property or to civil rights. Nor could a law which prohibited or restricted the sale or exposure of cattle having a contagious disease be so regarded. Laws of this nature designed for the promotion of public order, safety, or morals, and which subject those who contravene them to criminal procedure and punishment, belong to the subject of public wrongs rather than to that of civil rights." So, it is contended, in this case the Act in question belongs to the subject of the preservation of public safety, and not to that of restricting intercourse between the States.

All these questions are worthy of serious consideration, but in the view which I take of the present case, it is not necessary to express any decided opinion upon them.

The applicant also relies on [sec. 117](#) of the [Constitution](#), which provides that:â€”"A subject of the Queen, resident in any State, shall not be subject in any other State to any disability or discrimination which would not be equally applicable to him if he were a subject of the Queen resident in such other State."

To this contention it is replied (1) that for the purpose of the section the residence which is made a ground of disability or discrimination must be contemporaneous with the attempt to enforce the disability or make the discrimination, and (2) that an exemption from a penalty for an act on the ground of a previous residence is not within the section. There is much weight in both arguments, but again, I do not find it necessary to decide the question.

There is, however, another point which is sufficient to dispose of the case.

The so-called "police power" of the Colonies before the establishment of the Commonwealth extended to the exclusion of any person whom the Colonial Parliament might think an undesirable immigrant. It is clear that the continuance of such a power in its full extent after the federation is inconsistent with the elementary notion of a Commonwealth. On that point I adopt the language of *Miller J.* in the case of *Crandall v. State of Nevada*[\[4\]](#) . After referring to the right of federal officers to free access to, and transit through, the States for federal purposes he proceeded: "But if the government has these rights on her own account, the citizen also has correlative rights. He has the right to come to the seat of government to assert any claim he may have upon that government, or to transact any business he may have with it; to seek its protection, to share its offices, to engage in administering its functions. He has a right to free access to its seaports, through which all the operations of foreign trade and commerce are conducted, to the sub-treasuries, the land offices, the revenue offices, and the Courts of justice in the several States, and this right is in its nature independent of the will of any State over whose soil he must pass in the exercise of it." This passage was referred to with approval by the majority of the Court in the *Slaughter-House Cases*[\[5\]](#) . The right of the States to exclude convicts, paupers, idiots, and lunatics has, however, been assumed: *Railroad Co. v. Husen*[\[6\]](#) .

In my opinion, therefore, the former power of the States to exclude any persons whom they might think undesirable inhabitants is cut down to some extent by the mere fact of federation, entirely irrespective of the provisions of secs. 92 and 117.

The extent to which it is cut down, and the line of demarcation which should be held to separate a justifiable from an unjustifiable exclusion, may be hard to determine, and yet it may be possible to say on which side of it a particular case lies. The basis of the discrimination, so far as it does not depend upon positive enactment, must be the necessity of the continuance of the power, to use the words of Sir *Montague Smith*[\[7\]](#) , to make laws "designed for the promotion of public order, safety, or morals."

In the present case, the offence committed in Victoria by reason of which the applicant was convicted on his coming into New South Wales was "being a person having insufficient lawful means of support," which offence may by the law of Victoria be punished by twelve months' imprisonment. I do not think that the exclusion of an inhabitant of another State for such a reason can be justified on any such ground of necessity as I have referred to.

I think that on this application the Court is entitled to go behind the formal words of the Statute attacked, and inquire as to the real reason of the interference with the applicant's freedom of migration from one State to another.

Barton J.

I am of the same opinion. The reasoning of the Supreme Court of the United States in the case of *Crandall v. State of Nevada*[\[8\]](#) , as expressed by *Miller J.*, portion of which, quoted by my learned brother, has been expressly adopted by the same Court in a later decision, is as cogent in relation to the [Constitution](#) of this Commonwealth, as it was when applied to the [Constitution](#) of the United States. The whole of that memorable judgment is instructive upon the rights of the citizens of a federation. The reasoning shows that the creation of a federal union with one government and one legislature in respect of national affairs assures to every free citizen the right of access to the

institutions, and of due participation in the activities of the nation. In my opinion the reasons for the decision are conclusive as to all parts of Australia. A great deal of that which it is usual to call the "police power," the "right of self-defence" in respect of such matters as internal order, or the safety, health and morals of the people of the State, is probably affected by this new right. It is not for us to-day to determine the extent to which that may be the case, and, indeed, it can only be determined in concrete cases as they arise. It is probable that the right of the citizen, so far as it may be described by the word "intercourse," is not carried much further by sec. 92 of the *Australian Constitution* than the fact of union necessarily carried it, though the express prohibition of that section against restriction no doubt makes the Australian Charter much stronger than the American in respect of trade and commerce. I must by no means be thought to say, and it is quite unnecessary to decide, either that the fact of federation or that the language of [sec. 92](#) destroys the right of individual States to take any precautionary measure in respect of the intrusion from outside the State of persons who are or may be dangerous to its domestic order, its health, or its morals. But whatever may be the residue of power left to the State in this regard, it is clearly limited by the existence of some necessity for the defensive precaution. And this, I think, is where the answer to the application fails. Sec. 3 of the State Act of 1903, now in question, brings within its interdict any person who, subject to the exception with which the section begins, has been convicted in any other State, "(b) of an offence for which in such State he was liable ... to be imprisoned for one year or longer." This provision, if valid, authorizes the punishment of such a person, though the offence of which he has been convicted outside the State has been of trivial import; though it has deserved and received a punishment of only a few hours or days, and though for nearly three years he has as a free man led a blameless life, so long as, under some arbitrary classification, the offence is one for which in an extreme case an imprisonment for one year might have been allotted.

In this instance the applicant was convicted in Victoria of being a person "having insufficient lawful means of support," and as, in Victoria, that offence may be punished by imprisonment for one year, he came within the terms of the Act of 1903 so soon as he set foot in New South Wales. If his offence had deserved and received an inconsiderable sentence, still the mere liability to imprisonment for one year would have brought him within the ban.

I repeat that I am far from deciding that the police power of the States in the case of undesirables has become non-existent. But I do think that the face of the State Act and the reasons by which its validity is supported do not indicate such a necessity as might entitle it to be held a valid exercise of the power.

I agree, therefore, that the writ must go.

Isaacs J.

The lawfulness of the conviction depends upon the validity of that provision in the New South Wales Statute No. 6 of 1903, which makes it an offence for any person (with certain exceptions) to come into New South Wales within three years after the termination of his imprisonment in another State for any offence punishable with imprisonment for a year or longer.

The legality of the whole Act is challenged as conflicting both with sec. 92 and sec. 117 of the *Commonwealth Constitution*.

As to [sec. 92](#), which is the only section I find it necessary to deal with, the applicant contends that the words "intercourse" is unlimited, and refers to all transit of persons, and that the words

"absolutely free" are so large as not to be susceptible of reduction by exceptions.

On the other hand, it is said for the respondent that [sec. 92](#) must be read as subject to what is called the "police power" of the State, or in other words, the right of the State to safeguard the health, morals and safety of its inhabitants.

How are we to approach the [Constitution](#) to decide the question?

Lord *Loreburn* L.C., speaking for the Privy Council in *Attorney-General for Ontario v. Attorney-General for Canada*[\[9\]](#) , said:â€”"In the interpretation of a completely self-governing [Constitution](#) founded upon a written organic instrument, such as the British North America Act, if the text is explicit the text is conclusive, alike in what it directs and what it forbids. When the text is ambiguous, as, for example, when the words establishing two mutually exclusive jurisdictions are wide enough to bring a particular power within either, recourse must be had to the context and scheme of the Act. Again, if the text says nothing expressly, then it is not to be presumed that the [Constitution](#) withholds the power altogether. On the contrary, it is to be taken for granted that the power is bestowed in some quarter unless it be extraneous to the Statute itself (as, for example, a power to make laws for some part of His Majesty's dominions outside of Canada) or otherwise is clearly repugnant to its sense. For whatever belongs to self-government in Canada belongs either to the Dominion or to the provinces, within the limits of the British North America Act."

Before commenting on that passage I again quote portion of the invaluable canon of constitutional construction enunciated by Lord *Selborne*, also for the Privy Council, in *The Queen v. Burah*[\[10\]](#) . His Lordship there states the duty of Courts of justice in ascertaining whether a Statute violates a written constitution, in these terms:â€”"The only way in which they can properly do so, is by looking to the terms of the instrument by which, affirmatively, the legislative powers were created, and by which, negatively, they are restricted. If what has been done is legislation, within the general scope of the affirmative words which give the power, and if it violates no express condition or restriction by which that power is limited (in which category would, of course, be included any Act of the Imperial Parliament at variance with it), it is not for any Court of justice to inquire further, or to enlarge constructively those conditions and restrictions."

I apply both those authoritative utterances in the following manner:â€”"This falls within the first case mentioned by Lord *Loreburn*, namely, the case where the text is explicit: "trade, commerce, and intercourse ... shall be absolutely free." All that requires to be done is to ascertain the meaning of the words in that provision. The other two cases mentioned by that learned Lord are inapplicable to this case.

Then, assuming the meaning of the terms in [sec. 92](#) to be known, the matter comes within Lord *Selborne's* canon. The Act impeached is made under a sufficiently ample power contained in the State [Constitution](#), so far as that instrument is unaffected by the Commonwealth Act, and it violates no express condition or restriction in the State [Constitution](#). But it has to meet the limitation in the Imperial Act of the Federal [Constitution](#) contained in [sec. 92](#). If the express words of that section (or any other section) properly construed cut down the original State power, it is by so much diminished, but I am unable consistently with the canon quoted to cut it down by any indefinite estimate I may make of the general character of the [Constitution](#), apart from the true construction of some specific provision.

We then have to inquire what is meant by "intercourse" in [sec. 92](#). We have not to consider, and I

offer no opinion, whether or not that word in its fullest acceptation is included in the first subsection of [sec. 51](#). It is found in [sec. 92](#) expressly enacted, and according to all accepted rules of interpretation—particularly strong in the case of a self-governing constitution—the word must have some meaning additional to the other words in the same section. What is the extent of that additional meaning? Does it include the present case?

Its natural meaning is explicit and carries it as far as the applicant contends. To limit it to commercial intercourse would make the right of personal freedom to pass a State line depend on the fact of whether the individual was engaged in trade or commerce, and if that were to be given a restricted signification, the people of the Commonwealth would have to rest their right to cross a State line, not on their personality or their common citizenship, but on the sordid fact of some inter-State business transaction. In that case, however, "intercourse" would carry no signification and might as well be omitted. But, if once it be conceded that it does carry some additional meaning, where is the line to be drawn? Is it possible to draw any line? Once admit that the word includes a personal right in an Australian as such, and independent of any commercial attributes he may possess to pass over this continent irrespective of any State border as a reason in itself for interference, then I turn in vain to the [Constitution](#), to find any limitation whatever in the word.

The learned Attorney-General of New South Wales spoke of the police power being still preserved in its entirety for the preservation of the health, morals and safety of the people, and he pointed to [sec. 107](#). But the simple answer is that the powers of State Parliaments referred to in that section cannot be larger than they have under the State Constitutions; and by [sec. 106](#) those Constitutions are confirmed but "subject to this [Constitution](#)," and, further, [sec. 107](#) itself while confirming the powers of State Parliaments does so with two exceptions, one of which is as to powers "withdrawn from the Parliament of a State." So that applying the first case mentioned in Lord *Loreburn's* canon, "the text being explicit is conclusive." Whatever then is found to be the fair meaning of anything *elsewhere* enacted, is by virtue of the clear enactments of secs. 106 and 107 so much qualification of the State [Constitution](#) and State parliamentary powers. I can, consequently, not find in those sections any suggestion of a line of demarcation.

The learned Attorney-General referred to some American cases in which it was held in certain circumstances by the Supreme Court of the United States, that the States might validly enact laws that were in furtherance of the police power, and did not unreasonably interfere with the federal trade and commerce power, and he suggested this as a true line of division. But the American position is made quite plain by late decisions. I referred during the argument to some of them, and read extracts, as the *Compagnie Fraŕçaise &c. v. Board of Health*[\[11\]](#), and *Reid v. Colorado*[\[12\]](#), and I need not repeat those passages. But the effect is this: that it has long been a judicial doctrine of the Supreme Court that has passed into a definite canon of constitutional construction that the trade and commerce power, being national, is in its nature exclusive; and that consequently the silence of Congress is equivalent to a positive declaration of freedom. But the cases show that a qualification is grafted on to that doctrine of silent prohibition, namely, that the constructive prohibition does not go so far as to forbid the States from passing health and quarantine laws for example, and if they do merely that, they are not in conflict with the [Constitution](#) simply because there is some incidental interference with inter-State commerce. See also *Martin v. West*[\[13\]](#). But there is no doctrine that the federal power is subject to any reservation of the State police power—an error it is absolutely necessary to guard against. If that were so, Congress would have no right to legislate so as to prevent the exercise of the State power assumed to be "reserved." But the contrary is shown in both the cases I have referred to at the places cited. And in *Keller v. United States*[\[14\]](#) the Court makes some quotations from previous cases which are exactly in line with the canons of construction laid

down by the Privy Council. One is: "Generally it may be said in respect to laws of this character that, though resting upon the police power of the State, they must yield whenever Congress, in the exercise of the powers granted to it, legislates upon the precise subject matter, for that power, like all the other reserved powers of the States, is subordinate to those in terms conferred by the [Constitution](#) upon the nation." Another is: "Definitions of the police power must, however, be taken subject to the condition that the State cannot, in its exercise, for any purpose whatever, encroach upon the powers of the general government, or rights granted or secured by the supreme law of the land."

There is no trace of any such doctrine as that contended for by the learned Attorney-General, that whatever is granted to the Commonwealth the police power of the States is reserved out of the grant. First, I construe the express grant or prohibition and construe it by every line on the document. But there is nothing in [sec. 107](#) to cut down anything found elsewhere: it assumes a true interpretation of this [Constitution](#) elsewhere ascertained, and then confirms *other* Constitutions subject to the true meaning of *this*, and confirms *other* parliamentary powers subject to the grants and restrictions of *this*. I, therefore, am unable to assent to the view so earnestly and clearly presented by the Attorney-General.

A minor contention for the respondent should be noticed. It was urged that the true meaning of an Act may be ascertained by considering its purpose or object or intention, by reference to the supposed motives or aim of its framers. The Canadian cases decided by the Privy Council and cited by the learned Attorney-General have, in my opinion, little relevance. The question there was, within which of two mutually exclusive classes of powers, possibly covering the same ground, an Act made properly fell. That is Lord *Loreburn's* second case. I know of only one lawful method of ascertaining the intention and purpose of an Act, and that is by ascertaining the meaning and effect of the words actually used. The meaning of the words may depend upon the subject matter and the circumstances with reference to which they are used, and the words in one part may modify those in another, but once that meaning is ascertained the effect of the language cannot be modified by any conjectural motive or purpose behind them and independent of them. As Lord *Loreburn* said in *Attorney-General for Ontario v. Attorney-General for Canada*[\[15\]](#): "A Court of law has nothing to do with a Canadian Act of Parliament, lawfully passed, except to give it effect according to its tenor." And he adds that considerations of public policy can never be applied to an Act of Parliament. So, in *Reid v. Colorado*[\[16\]](#), it is said: "The purpose of a Statute, in whatever language it may be framed, must be determined by its natural and reasonable effect." And in *Berryman v. Whitman College*[\[17\]](#), *White* C.J. says: "We must be controlled by the power which the Act manifests, not by a consideration of the mere motive which initially energized the bringing of the power into play." So construing the New South Wales Act it purports to make it an offence for any person (not specially excepted) to enter New South Wales even for inter-State trade and commerce, if he answers the given description. He may have entered upon a wholly reputable and honourable life; he may be regarded in his State as a useful and not dangerous citizen; he may be desirous of passing, say, from Brisbane to Adelaide for the transaction of ordinary honest business; and yet, by the terms of this Act, he is liable to imprisonment, not only if he wishes to do business in New South Wales, but even if he merely passes through upon a railway, or comes to Sydney to take ship to his destination, or after his imprisonment, say, in Victoria, he may wish to rejoin his family in New South Wales, where he is permanently resident, or to exercise his vote in a federal electorate, or attend a sitting of this Court, or desire access to any federal office. Is he to be prohibited in the face of sec. 92, which stands as a definite and absolute guarantee of freedom of "intercourse," whatever that means? I do not think so. If he can be prevented for the sake of preserving the morals of the people, then I am unable to see any limitation upon the power of the

State to exclude whatever persons or property they choose to declare prejudicial to their people. *Mala fides* cannot be imputed to the King and his Parliament, and no Court can imagine it. If this Court can, every Court can, for all alike are bound to administer the law. And if there be no limitation, it must be all or none. In my opinion, the guarantee of inter-State freedom of transit and access for persons and property under sec. 92 is absolute—that is, it is an absolute prohibition on the Commonwealth and States alike to regard State borders as in themselves possible barriers to intercourse between Australians.

The order, therefore, should be made absolute.

Higgins J.

In my opinion, [sec. 92](#) of the [Constitution](#) affords sufficient ground for the release of the prisoner; and it is unnecessary to consider the precise effect of [sec. 117](#).

[Sec. 92](#) provides:—“On the imposition of uniform duties of customs, trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free.” This section is found under Chapter IV., headed “Finance and Trade” ; and, therefore, at first sight, it would seem to relate to finance and trade only. But this is only the first appearance; and if the words clearly show that the section covers more than finance and trade, effect must be given to it accordingly. To my mind, it is impossible to give any adequate meaning to the word “intercourse” added to “trade” and “commerce” unless we resort to the meaning based on its origin (*intercurrere*), the meaning which is not limited to intercourse of trade, the general meaning which is in modern use more common.

It is curious that the section seems to overlook the possibility that a man may walk across the border into another State, as well as be carried “by internal carriage or ocean navigation;” but these words must be merely meant to exhaust all kinds of carriage, if there be carriage. If not, they qualify the words “trade” and “commerce” as well; and a State might, then, impose a duty on, or obstruct the passage of, cattle driven over the border: a result which would be absurd. No due effect can be given to the word “intercourse” unless it be treated as including all migration or movement of persons from one State to another—of children returning for their holidays, of friends visiting friends, as well as of commercial travellers returning to their warehouse.

I base my decision on the fact that the New South Wales Statute in this case ([sec. 3](#)) is pointed directly at the act of *coming* into New South Wales—makes the coming into New South Wales an offence on the part of the ex-criminal. The questions how far the Parliament of New South Wales may deal with ex-criminals when within the borders of the State, how far that Parliament may deal with ex-criminals of other States when dealing with ex-criminals of New South Wales, how far the “internal police” powers are preserved to that Parliament in the face of this section and of the [Constitution](#) as a whole, had better be left open for decision when the facts of a case render a decision on these points absolutely necessary.

The cases which have arisen under the United States [Constitution](#) tend rather to perplex than to assist us; for there are no such words in that [Constitution](#) as in the Australian. It is our duty meekly to ascertain the meaning and application of the words used in our own [Constitution](#), as they stand, as the words of an instrument which is complete in itself, and which has to be construed, as a will is construed, by an examination of its own language within its own four corners. But the United States decisions are useful as showing that the power “to regulate commerce with foreign nations and

among the several States" has been treated as involving a power to regulate the transport of passengers and immigration; and that, apart from this power to regulate commerce, and without any such section as [sec. 92](#), the Supreme Court treats restraint on the movement of persons from one State to another as being inconsistent with the whole scope and system of the Federal [Constitution](#). According to the words of *Taney*[\[18\]](#) , approved by the Supreme Court in *Crandall v. State of Nevada*[\[19\]](#) : "We are all citizens of the United States; and, as members of the same community, must have the right to pass and repass through every part of it without interruption, as freely as in our own States." This result of the [Constitution](#) is said to be implied in the American [Constitution](#); it is expressed in [sec. 92](#) of our [Constitution](#), so far as regards State boundaries; but how far this result has to be qualified by the reserved powers of the States as to matters within their own borders, is a question which caution enjoins us to leave open for future examination.

Order absolute for certiorari. Conviction to be quashed on return without further order. Security to be returned.

Solicitor, for the applicant, C. Powers, Crown Solicitor for the Commonwealth.

Solicitor, for the respondent, J. V. Tillett, Crown Solicitor for New South Wales.

1. 95 U.S., 465, at p. 471.
2. 7 App. Cas., 829.
3. 7 App. Cas., 829, at p. 838.
4. 6 Wall., 35, at p. 44.
5. 16 Wall., 36, at p. 79.
6. 95 U.S., 465, at p. 471.
7. 7 App. Cas., 829, at p. 839.
8. 6 Wall., 35.
9. (1912) A.C., 571, at p. 583.
10. 3 App. Cas., 889, at pp. 904-905.
11. 186 U.S., 380, at p. 391.
12. 187 U.S., 137.
13. 222 U.S., 191, at p. 198.
14. 213 U.S., 138, at p. 146.
15. (1912) A.C., 571, at p. 583.
16. 187 U.S., 137, at p. 150.

17. 222 U.S., 334, at p. 350.

18. 7 How., 283, at p. 492.

19. 6 Wall., 35, at p. 49.

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