

1962

# Ray Tanner v. Utah Poultry & Farmers Cooperative et al : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

RAY TANNER,

Plaintiff and Appellant,

vs.

UTAH POULTRY & FARMERS  
COOPERATIVE, a corporation,  
GEORGE RUDD and CHARLES  
P. RUDD,

Defendants and Respondents.

Clerk, Supreme Court, Utah

CASE  
NO. 9721

UNIVERSITY OF UTAH

JUL 29 1963

BRIEF OF APPELLANT

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Appeal from the Judgment of the Third District Court  
for Salt Lake County, Honorable Merrill C. Faux,  
Judge.

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## TABLE OF CONTENTS

	<u>Page</u>
STATEMENT OF THE CASE. . . . .	2
DISPOSITION. . . . .	3
RELIEF SOUGHT. . . . .	3
STATEMENT OF FACTS . . . . .	3
ARGUMENT. . . . .	7
POINT I. THE EVIDENCE DOES NOT SUPPORT THE FOLLOWING FINDINGS.	7
POINT II. THAT THE TRIAL COURT ERRED IN NOT HOLDING AS A MATTER OF LAW THAT THERE EXISTED A FIDUCIARY RELATIONSHIP BETWEEN THE PLAINTIFF AND DEFENDANT. . . .	21
POINT III. THAT THE TRIAL COURT ERRED IN REQUIRING THE PLAINTIFF TO PRODUCE THAT DEGREE OF PROOF OF FRAUD NECESSARY TO TOLL THE STATUTE OF LIMITATIONS UNDER AN ARMS LENGTH TRANSAC- TION . . . . .	23
POINT IV. THAT THE TRIAL COURT ERRED, NOT FINDING FRAUD, IN RE- FUSING TO CONSIDER MISTAKE AS A	

	<u>Page</u>
BASIS FOR TOLLING THE STATUTE OF LIMITATIONS AS PROVIDED IN SECTION 78-12-25 UCA 1953. . . . .	23

POINT V. THAT THE TRIAL COURT ERRED IN REFUSING TO ACCEPT EVIDENCE RELATING TO ILLEGAL- LY WITHHELD SURPLUS IN THE FORM OF MARGINS FOR EACH OF THE YEARS INVOLVED IN THE ACTION . . . . .	25
---	----

POINT VI. THAT COUNSEL FOR DEFENDANT WRONGFULLY PRE- JUDICED THE COURT AGAINST THE PLAINTIFF BY ACCUSING THE LATTER OF SURREPTITIOUSLY REMOVING AN EXHIBIT FROM THE COURT WHEN THERE WAS NO PROOF OR JUSTIFICATION OF FORESAID ALLEGATION. . . . .	27
--	----

SUMMARY AND CONCLUSION . . . . .	28
----------------------------------	----

### CASES CITED

Mountain States Beet Growers Marketing Co. v. Monroe, 84 Colo. 300 - 269 P. 886 . . . . .	22
Rhodes v. Little Falls Dairy Co., 230 App. Div. 571, 245 N.Y. Supp. 432 .	21-22

Page

Spencer Coop Livestock Shipping Association, 209 Wis. 344, 245 N.W.	
99. . . . .	22

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BRIEF OF APPELLANT

## STATEMENT OF THE CASE

**This is an action to recover proceeds from the handling and marketing of plaintiff's turkeys. The defendant Utah Poultry & Farmers Cooperative is a cooperative association organized under the laws of the State of Utah, while Charles P. Rudd and George Rudd were employees of said defendant. Ray Tanner at and during the time involved in this law suit was a member and patron of the defendant Utah Poultry & Farmers Cooperative (Exhibit 57-P). There are six causes of action covering a period of time from 1942 through 1951; 1942-1943, 1947-1948, 1949, 1950, and 1951. The sixth cause of action relates to each of the years above and seeks recovery of reserves, margins and assets which belong to the plaintiff as a member and patron of the cooper-**

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tive association. Plaintiff contends that all transactions were governed by a written agreement (Exhibit 2P) the articles and by-laws (Exhibit 48P) and the statutes of the State of Utah. Prior to 1949 the agreement was not in effect.

### DISPOSITION

The case was tried without a jury. From a verdict and judgment for the defendants, plaintiff appeals.

### RELIEF SOUGHT

Plaintiff seeks reversal of the judgment and judgment in his favor as a matter of law, or that failing, a new trial.

### STATEMENT OF FACTS

Although the plaintiff has dealt with and through the defendant Utah Poultry & Farmers Cooperative for many years, the scope of this



appeal is limited to the period of time from 1947 through 1951. The crux of the contention between the parties centered around the questions, "May the defendant, a cooperative organization, make a profit from the business transacted with the plaintiff, one of its members, independently of said member?" and if it may, "Did the defendant and its employees wrongfully withhold proceeds of said business? "

The record and evidence shows the plaintiff delivered turkeys to the defendant in each of the years commencing with 1947 through 1951. On August 17, 1949, a tri-party agreement was executed by the parties with an organization, Utah Cooperative Turkey Producers. At its inception, the plaintiff was the President of said organization as indicated by the articles of incorporation,

(Exhibit #1). The organization was sponsored by the Utah Poultry and Farmers Cooperative to foster production of turkeys in the area (Exhibit 44P).

Generally speaking, the defendant in its turkey operation receives turkeys and processes them which consists of killing them and removing their feathers. In this condition, they are classified as New York dressed. From there, the birds are eviscerated and then finally marketed. There is approximately 13-14% shrinkage in weight from N.Y. dressed birds to eviscerated birds.

Plaintiff brought this action to recover for proceeds from the marketing and for margins as set out in the Articles of Incorporation and the By-Laws.

The lower court previously granted summary judgment to the defendant on the basis of a release which this Court reversed with instructions to proceed as if no summary judgment had been granted.

The above case was tried without a jury and evidence received on first five causes of action but refused evidence on the sixth cause of action stating that it came too late in the trial to be considered. The court entered its conclusions of law, after 12 days of trial, that all causes of action were barred by laches and by the statute of limitations and that the fifth cause of action was barred by an accord and satisfaction. Judgment was entered accordingly and plaintiff appeals.

## ARGUMENT

POINT I. THE EVIDENCE DOES NOT SUPPORT THE FOLLOWING FINDINGS.

(a) The evidence does not support Finding No. 2 that the defendant did not market turkeys in 1947 and 1948 for plaintiff. As to the year 1947, the defendant admits in his answer T 15 that it marketed turkeys in 1947 for the plaintiff. This amount is verified by Exhibit 56 which indicates the plaintiff processed 101,082 pounds in 1947 through defendant.

As to 1948 Exhibits 37-P and 38-P, which are on paper stock used by Utah Poultry & Farmers Cooperative, which were also identified by defendant employees, indicate defendant did process and eviscerate turkeys in 1948 for the plaintiff. In addition, a notation

on the top of Exhibit 38-P shows that after evisceration, plaintiff's turkeys were sent to Utah Ice & Cold Storage. Further corroboration of defendant handling plaintiff's turkeys after processing at American Fork is found in Exhibits 39-P, 40-P, 41-P and 42-P. All are dated November, 1948, and show conclusively that Ray Tanner, the plaintiff, and the defendant were associated in the disposition of plaintiff's turkeys. Exhibit 41-P is referred to by Lot #512 by Exhibit 42-P. This information in addition to plaintiff's own testimony as admitted in defendant's finding, certainly contradicts Finding No. 2.

(b) The evidence does not support Finding No. 3a that plaintiff was not shorted turkeys in the marketing of his 1949 turkeys. Exhibit 3-P makes an accounting and settlement on the basis

of 5232 head or 71,215 pounds. Exhibit 5-P is a copy of an eviscerating invoice showing the actual number of turkeys the defendant had in Ray Tanner's name. This record was obtained from defendant's own record by an order of the court pursuant to a deposition of George Rudd, co-defendant and poultry manager, on February 9, 1960. When the figures of Exhibit 5-P, the actual head and pounds of turkeys in Ray Tanner's name, are compared with Exhibit 3-P, the number the defendant acknowledged and paid for, there is a shortage of 460 birds or approximately 7385 pounds. The latter is arrived at by applying a 13% loss to the eviscerated pounds and then comparing with the pounds on Exhibit #3.

Exhibit 4-P indicates that plaintiff's turkeys were graded into various sizes by the defendant in

order to obtain different prices for different size birds. The settlement sheet, Exhibit 3-P, however, lumps all the birds into only three classifications and does not make allowance for different size birds. Exhibit 2-P, the turkey marketing contract under which the birds were handled provides in the last paragraph on the front side, "The association will endeavor to obtain the best possible market price and will be responsible to the producer after making the deductions noted below for the proceeds of the sale." Plaintiff contends that Exhibit 3-P does not represent the full market price and that he was entitled to an accounting for actual price received on each classification of birds. Exhibit 6-P, dated September 15, the same date of settlement sheet, which was

received in evidence through stipulation of counsel T.282, indicates that the market price for young hens eviscerated ranged from .61 to .68 in opposition to the prices ranging from .375 to .475 paid plaintiff as shown on Exhibit 3-P. It is vital to also note that in addition to deductions shown on bottom of Exhibit 3-P that plaintiff was charged .045 cents per pound or \$3,077.67 for evisceration of this flock of turkeys as shown on the bottom of Exhibit 5-P. Exhibits 11-P, 19-P, and 61-P, while not connected with the first flock considered in Finding 3a, do show that making advances or down payments was an established practice of the defendant. Page 2 of Exhibit 50-P, dated November 1951, coupled with plaintiff's own testimony refutes



the finding that plaintiff did not question the failure of the defendant to make an account sale until 1958.

(c) Exhibit 2-P dated August 17, 1949, the agreement under which plaintiff marketed his turkeys through the defendant, outlines procedure to be followed is contrary to Finding 3b that plaintiff withheld his turkeys from the market and insisted that defendant purchase them out right. Paragraph two of the agreement states:

"And the Association (defendant) agrees to receive said turkeys when delivered, dressed, graded and packed in standard turkey boxes for market. Upon such delivery, the entire title to such turkeys shall pass to the Association. When making delivery of one or more complete carloads, the producer may, if he chooses, direct that such shipment be handled

on an account sales basis and not co-mingled. Except as noted in the next preceding sentence, the Association (defendant) is hereby given full power and authority to pool and co-mingle, sell and deliver said turkeys with the turkeys delivered by other producers. The Association shall have the right to sell such co-mingled turkeys and also the turkeys handled on an account sales basis to such purchasers, at such times and places, upon such terms and through such agencies as it may see fit and to collect and receive all moneys due therefor. "

The same instrument Exhibit 2-P in the last paragraph on the first page provided that one cent half/be deducted for a revolving fund. There was no evidence introduced that the turkeys handled were being handled in a different manner than that

provided in Exhibit 2, the agreement which had just been signed two months prior to this time.

Plaintiff did show that defendant received turkeys in 1949 for which they did not pay plaintiff as set out in b above. Exhibit 7-P, which was the document upon which settlement was made, showed a total of 3,738 birds. Exhibits 9-P consisting of 3 eviscerating invoices showed a total of 3,753 or a difference of 15 birds. Exhibit 9-P was obtained from the defendant in the same manner as 5-P in a deposition from George Rudd on February 9, 1960. Exhibit 50-P and 51-P indicate that plaintiff was asking concerning these transactions in 1951 and demanding account sales.

Exhibit 10-P is a copy of Urner Barry Producers Price Current which is accepted by the turkey industry as a reliable price quotation. This exhibit indicates that the price of eviscerated young hens as of December 12, 1950, ranged from .66 to .74. Exhibit 7-P and 12-P indicate defendant settled with plaintiff on a price ranging from .39 to .49 and did not show a breakdown as to size nor where the birds were sold. In addition Exhibit 9-P and 12-P show that plaintiff paid for the eviscerating and Exhibits 7-P and 12-P show plaintiff paid for processing, hauling, selling commission and other expenses. Exhibit 10-P indicates the market price of young toms on December 12, 1949, ranged from .54 to .62 cents while Exhibits 7-P and 12-P show defendant settled with plaintiff on a price ranging from

33-1/2 to 36-1/2 and did so without breaking the turkeys down into their component numbers and sizes.

There was no evidence presented as to where the turkeys were marketed.

(d) Findings No. 8, 9 and 10 are not supported by the evidence. Exhibits 5-P, 8-P, 9-P, 13-P and 20-P were obtained from the defendant through a deposition of George Rudd, February 9, 1960, P. 38-47. Plaintiff had asked for an accounting in 1951 and had been refused as shown by Exhibits 50 and 51.

(e) Findings No. 11 and 12 are not supported by the evidence. Subheadings b and c set out above refute finding as to 1949. Exhibit 21-P indicates defendant settled with plaintiff on the basis of 54, 928 pounds A young hens (prime)

in 1950. However, Exhibit 20-P, copies of eviscerated invoices from defendant's own records received in deposition of George Rudd, indicates defendant received 57,435 pounds of prime or A young hens, showing a short to plaintiff of 2,507 pounds.

The 57,435 pounds of prime was arrived at as follows:

<u>Turkey Eviscerating Invoice No.</u>	<u>Pounds</u>
5103	8268
5104	5453
5105	6371
5106	2534
5112	2520
5113	9559
Total	<u>57,435</u>

Exhibits 21-P, 23-P and 24-P indicate that defendant settled with plaintiff on eviscerated A young toms on the basis of 215,977 pounds:

21-P	63,888
23-P	9,054
24-P	143,035
	<u>215,977</u>

However, Exhibit 20-P shows that defendant received 217,234 pounds of eviscerated prime young toms showing a shortage of 1257 pounds.

These figures were arrived at as follows:

<u>Invoice No.</u>	<u>Pounds</u>
5101	38,130
5102	12,233
5103	14,359
5104	27,569
5106	2,260
	1,647
5107	22,645
5108	15,733
	28,933
5109	10,978
5110	25,343
5111	17,404
Total	<u>217,234</u>

Exhibit 21-P indicates that defendant paid plaintiff .475 per pound for eviscerated A-Y toms (Prime). However, Exhibit 25-P, Urner Barry Price Current, quotes the price of eviscerated prime turkeys on same date as that on settlement sheet at .55 to .58 per pound.

Exhibit 21-P shows defendant paid plaintiff .58 per pound for eviscerated young hens on December 21, 1950. Exhibit 25-P shows the top market prices of young turkey hens to be .78 per pound. Again defendant refused to show the breakdown as to weight so as to accurately determine the price or where the turkeys were sold.

Defendant attempted to explain the shortage in 1950 by introducing processing invoices but failed to explain the difference in the invoices after the turkeys had been eviscerated. Defendant attempted to justify the difference in price between price paid the plaintiff and that of the market by adding freight charges and cost of evisceration. This was not effective as the record shows the plaintiff paid for the evisceration himself, and there was no evidence that the turkeys were ever ~~shipped outside of~~ local area.



**(f) The evidence does not sustain finding  
No. 15.**

**All the evidence that the plaintiff has  
obtained from the defendant has been involuntarily  
given by the defendant. This is proven by the  
file which shows that the defendants and their  
counsel have been found in contempt, fined and  
censored for failing to bring forward records  
requested by the plaintiff and have not been  
cooperative and open. (P. 54, 67, 69, p. 79,  
80, 85, 86, 272, 272)**

**There was no evidence before the court  
that plaintiff's auditor had access to documents  
that plaintiff received after forcing the defendant  
to deliver the evidence cited in a, b, c, and d  
above.**

**(g) In each of the years that plaintiff did**

business with the defendant under the terms of Exhibit No. 2, he was to receive 0-1/2 per pound for which a certificate of interest would issue. There was no evidence presented that plaintiff ever received these certificates although the settlement sheet shows the deduction was made (3, 7, 12 and 21).

POINT II. THAT THE TRIAL COURT ERRED IN NOT HOLDING AS A MATTER OF LAW THAT THERE EXISTED A FIDUCIARY RELATIO. . IP BETWEEN THE PLAINTIFF AND DEFENDANT.

Fundamental of this suit and to the relationship of a member marketing his produce through the cooperative organization that he belongs to is the fiduciary relationship that exists between them. This relationship is imposed by law because a producer is all but helpless after delivering the fruit of his labors and efforts to a cooperative. Rhodes v. Little Falls Dairy Co.

230, App. Div 571, 245 N.Y. Supp. 432, Mountain  
States Beet Growers Marketing Co. v. Monroe,  
84 Colo. 300 - 269 P 886.

In the case of Spencer Coop Livestock  
Shipping Association, 209 Wis. 344, 245 N.W. 99,  
it was held that a contract under which each  
member agreed to market his livestock to the  
association, to pay the cost and expense incurred  
by the association in handling and marketing the  
livestock, and that the association should collect  
for his account money due him on the sale of  
livestock and receipt therefor in his name was a  
contract of agency and not a contract of sale.

The situation at hand is not dissimilar  
from the above case. Exhibit #2 contains the  
very provisions mentioned above, and an  
examination of the settlement sheets will show

that the plaintiff paid the expenses incident to the handling and marketing of his turkeys by the defendant.

POINT III. THAT THE TRIAL COURT ERRED IN REQUIRING THE PLAINTIFF TO PRODUCE THAT DEGREE OF PROOF OF FRAUD NECESSARY TO TOLL THE STATUTE OF LIMITATIONS UNDER AN ARMS LENGTH TRANSACTION.

It is obvious from examining line 23-30, p. 367 that the court did not consider that the case involved a confidential or fiduciary relationship. That it set out the normal and ordinary requirements of fraud in an arms length transaction.

POINT IV. THAT THE TRIAL COURT ERRED, NOT FINDING FRAUD, IN REFUSING TO CONSIDER MISTAKE AS A BASIS FOR TOLLING THE STATUTE OF LIMITATIONS AS PROVIDED IN SECTION 78-12-25 UCA 1953.

Appellant alleges that the discrepancies set out under point I are sufficient to raise the question of fraud especially between a principal

and its agent where there is a strict duty to account, but in any event the most favorable contention to the defendant and respondent is that a mistake occurred.

The court rejected this possibility and proceeded in the trial as if this jurisdiction were still under code pleading. Line 11-30, p. 368, counsel asked that mistake be considered. Line 23, p. 368:

"The Court: I have had to listen to this evidence and hear this case and look at it through the window of fraud because that is the basis upon which you bottomed your case, that the plaintiff had been subject to and the victim of fraud and for that reason the statute of limitations should not run against him.  
\* \* \* All right then that being the window through which I have looked in this case, I am not going to now look at it through another window, and try to evaluate the testimony through another window--that of mistake--as you now urge."

Section 78-12-26 (3) UCA 1953 provides:

"An action for relief on the ground of fraud or mistake; but the cause of action in such case shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake. "

POINT V. THAT THE TRIAL COURT ERRED IN REFUSING TO ACCEPT EVIDENCE RELATING TO ILLEGALLY WITHHELD SURPLUS IN THE FORM OF MARGINS FOR EACH OF THE YEARS INVOLVED IN THE ACTION.

The trial court refused to accept evidence as to plaintiff's claim for margins on the basis that the proffer came too late in the trial and that the issues had not been developed. (Line 1 -30, page 364 of the transcript) The evidence proffered included evidence that the defendant had illegally distributed margins; that the Articles of Incorporation and its By-Laws had not been followed (p 318-322 Trs.)

All the pleadings including the pre-trial

order contemplate issues involving margins which the plaintiff declared were due him. Plaintiff contends that the trial was conducted in an orderly and logical procedure; that the proffer of evidence which was rejected came in a reasonable sequence in the presentation of the evidence. This position was called to the court's attention, line 3-30, p. 362, line 23-30, p. 335.

If the defendant was surprised, it was his own responsibility as the avenues of discovery were available to him from the first mention of margins. Plaintiff in its conduct of the trial first presented evidence relating to the first five causes of action and admittedly was nearing the end of its presentation when he reached the sixth cause relating to margins.

The position of the plaintiff is that the

defendant has not distributed margins as required by its By-laws and Articles and requests the indulgence of the court to examine the entire transcript, p. 309 to 365. The By-Laws and Articles referred there to are in Exhibit 48-P.

POINT VI. THAT COUNSEL FOR DEFENDANT WRONGFULLY PREJUDICED THE COURT AGAINST THE PLAINTIFF BY ACCUSING THE LATTER OF SURREPTITIOUSLY REMOVING AN EXHIBIT FROM THE COURT WHEN THERE WAS NO PROOF OR JUSTIFICATION OF FORESAID ALLEGATION.

This accusation is contained in Finding 17(e). There were over a hundred exhibits received in evidence, and these together with records and files of both parties were all over the court. Exhibit 29-P was plaintiff's exhibit, and a copy of this exhibit was brought forth by plaintiff after the original was discovered missing.



Defendant's counsel greatly prejudiced the plaintiff without justification by such accusation. The list of exhibits indicates that 29-P was misplaced.

### SUMMARY AND CONCLUSION

In all the business that plaintiff transacted with the defendant, he did so as a member and a patron of a cooperative organization. Relying on the relationship between a cooperative and its members, the plaintiff believed defendant's representation that it would market his produce at the highest price possible and make an accounting; that he would be entitled to all profits from the sale of his turkeys above the cost of handling and marketing; that the defendant would not profit at his expense. Defendant, however, now contends that it was dealing with plaintiff

at arms length; and instead of marketing turkeys, it purchased them outright and was not obligated to account for the prices received.

The evidence cited above shows discrepancies in the amount of turkeys the defendant had in its freezers and the amount for which it paid the plaintiff. In addition, the market price of these turkeys compared with the price paid plaintiff shows a deficiency in all instances to the plaintiff. The defendant breeched its contract with the plaintiff by refusing to tell him where his turkeys were sold and the price it actually received for them. Defendant denies the shortage but is unable to explain the discrepancy because the records used are the defendant's own records. The defendant, however, glibly states if there was a discrepancy, plaintiff knew it in 1951. This

allegation is not supported by the facts which show plaintiff had to bring the defendant into court on several occasions to get the freezer records or eviscerating records which only the defendant possessed. Prior to the discovery procedures used after the initiation of this action, plaintiff did not have any records which demonstrated the shortages. The plaintiff did feel that something was wrong with the prices received but was told that an accounting would be made.

It is inconceivable that plaintiff's auditor in 1951 had possession of the records the plaintiff obtained from the defendant by court order through a deposition of George Rudd. If the defendant had given the auditor the records in 1951, why did it so strenuously refuse to give the plaintiff the desired information. The con-

duct of the defendant has certainly not been that of a principal to an agent.

The defendant through its general manager states that it has destroyed all of its old records even though it has large amounts of undistributed assets (Exhibits 75-P through 82-P) accumulated through the business transacted with its members including the plaintiff. These assets can only be distributed on basis of the records which defendant alleges it does not have.

Plaintiff contends that the unexplained discrepancies in the defendant's own records in light of the fiduciary relationship existing between the parties is sufficient to show enough fraud to toll the Statue of Limitations. But this together with the illegal departure of the defendant from its By-Laws and Articles of Incorporation in the

distribution of margins makes an overwhelming case. Plaintiff contends that if for some reason the court could not find fraud, that these facts demand an explanation which could only be answered by a holding of mistake. However, as indicated the court refused to even consider this possibility.

It is difficult to understand how the defendant can allege that it purchased turkeys outright from the plaintiff when in the same breath they admit charging the plaintiff a selling commission. And also in light of the nature of its organization when the purpose of the cooperative as set out in its Articles is: (Article 12, Exhibit 4B)

**"This Association shall be operated for the mutual benefit of its patrons, and all net margins, excess deductions, savings or increments, and the proceeds realized in excess of costs not needed to establish or maintain reasonable reserves for contingencies, operating capital, or other necessary purpose of**

the business shall be credited annually to the patrons of the association upon the basis of the respective contribution of each patron during such year to the business and margins of the association, or the permanent records of the association shall annually provide the necessary information for doing so at a later date; and such net margins, deductions, savings or increments, and excess proceeds, shall at all times be the property of the patrons, and not the property or profits of the Association. "

Purchasing products outright and reselling for a profit as the defendant alleges it did is inconsistent with the tax status the defendant enjoys as a non-profit organization and doubly so with the contract it signed with the plaintiff.

Respectfully submitted,

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