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The Principle of Mechanical Equivalents as Applied in Patent Cases

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THESIS

The Principle of Mechanical Equivalents as applied in Patent Cases.

By

ROLLIN HUGH REID,

Cornell University,
1892.
The aim of the present article is to explain the nature of a mechanical equivalent, what it is, and how its principles are applied in the patent law. In order to do this, it will be necessary at the outset to define an equivalent, using for this purpose short quotations from some of the many decisions in our federal Courts which have grown up since the passage of the act of April 10, 1790. In doing so I will confine myself to the decisions of our Federal Courts, as the discussion of the English cases would lead us far outside of the scope of the present article. The cases involving only mechanical equivalents will be referred to, though many if not all of the rules asserted, relating to mechanical equivalents would likewise, by analogy,
apply to chemical equivalents. After coming to a thorough understanding of what an equivalent is, I will endeavor to show who can invoke its doctrine, and the extent to which it applies, whether depending upon the fact that the inventor is a pioneer in his art, or only improver of an already known device.
The term "equivalent" is used in the decisions in two different ways, and meaning two distinct things, which must be kept constantly in mind while reading the cases. First, then in its ordinary sense it is synonymous with identity (1). It denotes the correspondence between agencies which perform the same functions, and have the same operative means, relating to a combination or device as a whole, rather than to any particular part or ingredient of the combination (2). In its second and more restricted or technical sense, denoting the means or mechanism which is used to accomplish the same result. Judge Sprague in the celebrated case of Johnson v. Root, reported in 1 Fisher, 357, very carefully and clearly shows this distinction. He says, "The term equivalent as used in this class of cases, has

1 May v. Don Bd of Lee County 1 7 Pa 691.
2 Id; Gaffney v. Breunig Co. 17 O. 675; passengers Root 166, 351."
two meanings. The one relates to the results that are produced and the other to the mechanism by which those results are produced. The two things may be equivalent, that is, the one equivalent to the other as producing the same result when they are not the same mechanical means.

Let us next pass to the subject of a mechanical equivalent what it is and what are the elements which compose it.

At the present state of the law it is impossible to lay down general principles, accurately defining what a mechanical equivalent is, all the elements composing it, or any test which will meet every situation that may arise, so that, we can readily distinguish whether a particular machine is an equivalent of another one or whether it is not. The cases in the United States Circuit and District Courts, while many and voluminous, aid us very little in the complete solution of this problem.
It is likewise evident to the thoughtful reader that as machinery grows more and more complicated the difficulty of determining what does and what does not constitute an equivalent, however accurately it may be defined, becomes more and more difficult especially so when we remember that the decision must be reached by a Judge who has made a special study of machinery. So it becomes desirable as it is necessary, that the law upon this subject be left free and it a measure open, thus allowing the court, in its judicial discretion or to the jury, should there be one, to determine upon all the facts of the case being presented before it, whether the particular device in question does or does not infringe the device of the plaintiff.

In a general way an equivalent may be said to be, any act or substance which is known by one skilled in the particular art, as a proper substitute for some other act or substance employed as an element in the invention, the substitution of which in no manner varies
the idea of means, such substance being known at the date of the invention.

To be a mechanical equivalent then it must be known by one skilled in the art as a proper substitute for the element in question from his knowledge of the art (1).

Mr. Justice Sawyer in Carter v. Baker,(2) says "When in mechanics one device does a particular thing or accomplishes a particular result, every other device which skilled and experienced workmen know will produce the same result, is a known mechanical substitute for the first device. It is sufficient when a skilled mechanic sees one device doing a particular thing, that he knows the other devices, whose use he is acquainted with, will do the same thing." If a person has an invention, in which he is called upon by the patent law, to make a full and clear description he has invented, and if another person

(2) Carter v. Baker, 4 Fish., 404.
looking at that, can from his knowledge of the subject pass to the other thing that is used without any invention. The thing substituted is an equivalent. (1)

That is to say that if a mechanic see that a particular result is accomplished by a weight he knows, at once, that the same object can be accomplished by the spring. Or if the object to be accomplished is to move by force a particular body as close to the other as possible, and he sees that this is done by means of a wedge. The mechanic knows from his knowledge of the art, that a screw will accomplish the same result. As, for example, we desire to level up the platen of an ordinary printing press, this is usually done by means of four set-screws, each placed half way from the center of the platen and the corner, now if we substitute for our set-screws, wedges, the wedge is a mechanical equivalent of the screw. Because the wedge and the screw would both accomplish the desired purpose, namely, the"leveling up" of the platen. It is true that the

(1) Sprague J., in Johnson v. Root, supra.
wedge and the screw act on entirely different principles, yet as to the particular object had in view, we can readily see that either the wedge or the screw would accomplish the desired result and for our purpose nothing more nor less. If this be so, the screw is the equivalent of the wedge or vica versa. But it does not necessarily follow that all cases the screw is the equivalent of the wedge, or that the wedge is of the screw.

Secondly, it must perform the same office or function as the instrument for which it is substituted, that is to say, that it must perform this office in substantially the same way.

A late case in the Supreme Court, Crochrane v. Deener, (1) is a good illustration in point. The case involves a construction of Cochrane's invention for bolting flour. Crochrane's invention it seems has revolutionized the process of making flour. His patent was infringed by the defendant Deener and others.

(1) Crochrane v. Deener, 94 U.S., 780; 4 Otto.
In the course of the opinion the Court said; "Although the defendant use a flat bolter instead of a reel, and used different kinds of valves for feeding and delivering the meal without allowing the air to pass, yet they employ the combination of devices described in their claim. They use the collecting chamber for the same purpose as that pointed out in the patent and used it in connection with a boiler, air pipe, and valves for feeding and delivering the meal without allowing the air to pass therewith, each effecting the same separate purpose, and all combined effecting the same general purpose, which the like parts are intended to accomplish in Crochrane's bolting apparatus. These parts having the same purpose, and in the same combination, and effecting that purpose in substantially the same manner are the equivalents of each other in that regard."

The Court in the case of May v. Fon De Lac Co., cited supra, (1) says, the question is whether the given effect is produced substantially by the same mode of

operation and by the same combination of powers and devices in both machines. The inquiry should be whether the defendant's device is in substance and effect only a colorable evasion of the plaintiff's contrivance, or whether it is really a new and substantially different thing. If the defendant has taken the same general plan and applied it for the same purpose, and produced the same effect in substantially the same mode, it will be in contemplation of the patent law the same thing.

In order to avoid the charge of infringement the substituted ingredient must be a new one, or must perform a substantially different function. (1) Prof. Robinson in his valuable work upon Patent Law discusses the whole doctrine of equivalents quite thoroughly. I take a short quotation from section 253, of that work. "A change in the idea of means is a change of substance, demanding an operation of the creative faculties, and producing either a new invention or an improvement on the old."

It is evident from our discussion that mere colorable or evasive differences cannot defeat the right of the original inventor. (1) Thus the substitution of an iron frame for one made of wood, all the other parts of the two combinations being identical, is an infringement (2). To the same effect is the case of Putnam v. Hutinon, (3) where the use of rubber stoppers in bottles was held the equivalent of ordinary plugs. Another illustration is that of a mowing machine for cutting sea weed; (4) the plaintiff used a vertical vibrating lever pivited near the center—the defendant substituted in its place a vertical revolving shaft with a crank attached. The Courts held that the crank and shaft being an equivalent of the vibrating lever; infringement was established.

That two machines produce the same effect will not justify the assertion that they are substantially the same.

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(1) May v. Fon De Lac Co, supra pp. 6, 9.
(2) Holbrook v. Smali, 10 O.G., 508.
same, or that the devices is used by one are therefore equivalents for those of the other (1). But nevertheless mere formal changes will not avoid the charge of infringement. This was one of the earliest established principles of patent law (2). The doctrine is now well settled as a citation of authorities will show. (3) Mr. Justice Clifford, the jurist to whose ability the development of the patent law may be said to be largely due, said in the early case of the Whip Co. against Lombard (4), "Mere formal alterations of a combination of latters patent do not constitute any defence to the charge of infringement." If two machines be substantially the same and operate in the same manner, though they differ in form, proportions and utility they are the same in principle. (5) The doctrine is repeated in

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(1) Burr v. Duryer, 1 Wallace, 551.
(2) Vincent v. Mathison, 3 Wash., 602; Odine v. Winkley, 2 Gill., 54.
(4) Whip Co. v. Lombard, 4 Cliff., 504.
(5) Odiezne v. Winkley, 2 Gill., 54.
two late case to quote; "The mechanism of the two machines in various particulars is quite unlike in form, and their dissimilarity is more apparent from the fact that defendant's machine is one where the cutting apparatus is forward of the axile wheel.- - - - - - I am of the opinion that the difference between defendant's and complainant's machines are differences of form and not of substance."(1) The real invention in Walker v. the City of Terre Houte,(44 Fed., 70), consisted in the combination of the designated elements acting in co-operation to accomplish a specified result, and the patent was not limited to the precise forms of the elements shown in the drawings. Elements possessing the essential qualities and performing the same functions as those described, although differing in mere mechanical form were covered by the original patent. A combination patent cannot be evaded by a mere formal variation of all or part of the elements.

Our next question whether the omission of a part of

the device of a patent retaining the remainder is sufficient to avoid the charge of infringement. Presents a question of some difficulty. In this class of combination patents the statement, that the charge of infringement is not made out, unless all the parts or elements of the plaintiff's patent are used, (1) is perhaps not to be quoted for a general proposition, with the limitation that if some of the parts of the plaintiff's combination can be proved to be entirely unessential to the complete working of the combination, the immaterial part or parts may be omitted, and the use of the remaining parts will be an infringement. (2) A good illustration of this proposition is the celebrated case in the Supreme Court of Pouty v. Ruggles, (3) where these facts are present. The plaintiff invented a plow which was so arranged that when the point of the plow while cutting through the earth struck a stone or other substance that it could not plow through, the


(2) West Lake v. Carter, 4 O.G., 636; Vause v. Campbell, 1 Black, 427.

point of the plow would slip back leaving the obstruction in the ground. His device was a patent for a combination as follows: first an ordinary plow fastened to a wooden beam in such a manner that the point of the plow formed an angle with the ground thus tending to hold the plow in the ground when actually plowing, about half way from the point of the plow, and the end which was pivoted to the horizontal beam, was an arm extending backward running upward so as to pass through the end of the beam which was morticed to receive it. His third element was a bolt and arm which passed through this beam just in front of and at right angles to this mortice, so that by screwing up the bolt the friction upon the arm passing through the mortice was increased until it was sufficiently tight to hold the standard of the plow in its place when in use. A stone or other immovable substance resting the point of the plow instead of stopping the horses, would push upon this point sufficiently to move it back away from its original posi-
sition by driving the back arm of the plow up through the mortise of the shaft: in this way the plow would pass over the obstruction without stopping the team or throwing the driver off of his feet.

The device of the defendant omits entirely the arm of the plaintiff's plow. having the standard on which the shire is fastened, pass up through the mortice in the horizontal beam then curving forward and pivoted to the beam. He thus accomplishes the same result as did the plaintiff, to wit; providing a means whereby the point is allowed to pass obstructions without the necessity of stopping the horses, backing up (to remove the plow) and starting over again.

But his plow is not as strong as that of the plaintiff's, the arm in the plaintiff's device acted as a brace and materially increased the strength of the plow. The defendant in order to get the strength required to make his plow useful, is obliged to largely increase the size of the standard on which the shire is attached,
making it heavy enough to stand the necessary strain to which plows are subject.

The elements used by the plaintiff being all old, his patent is for the combination of the three. The Court says, (1) "The use of any two of the three parts confined with a third is substantially different in form or in the means of its arrangement and connection with the others, is, therefore, not the thing patented. It is not the same combination if it substantially differs in any of its parts. The jogging of the standard into the beam, and its extension backward from the bolt, are both treated by plaintiff as essential parts of their combination for the purpose of brace and draft, consequently the use of either alone, by the defendant would not be the same improvement nor infringe the patent of the plaintiff."

The Circuit Court in Voss v. Fisher, (2) discussing the same question says, "where one patented combination is asserted to be an equivalent of another device in one,

(1) Pouty v. Ruggles, supra, see page 341 of case.  
to be an equivalent of a - a device in the
other, must perform the same functions. And therefore
there is one element of the plaintiff's patented combi-
ation which the defendants do not use, and for which the
they do not employ an equivalent. It follows that
they do not infringe the plaintiff's patent. This
principle has recently been approved by the Supreme
Court in Roswell v. Lindsay, 113 U.S., at page 102,
where the authorities are collected and discussed.

So a patent is not infringed by a combination which
varies from that patented in the omission of one of the
operative parts and the substitution of another part
substantially different in its construction and oper-
ation notwithstanding the fact it serves the same
purpose.(1)

But a combination will be infringed if parts of the
elements are employed and for others mechanical equiva-

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(1) Eames v. Godfrey, 1 Wall, 78; Schmidt v. Truse;
Tobey v. Coly, 54 O.G. 1276; Smith v. Marshall, 10 O.G.375,
all, is constantly met with in practice and for the purpose of the practitioner is of more importance than the general rule. We shall have reason to refer to it more in detail later (1).

Where the change is merely colorable, infringement is of course is present—this appears to be so evident that the citation of the numerous authorities is unnecessary.

If the instrument besides being an equivalent, accomplishes something useful beyond the effort or purpose accomplished by the first patentee; it will still be an infringement as respects what is covered by the prior patent. (2) Because as between a device conceded to be new and a device claimed to be infringed, the alleged infringer could not protect himself by showing that although his device was the equivalent of the patented device in all its functions, and a construction and mode of operation, yet by other additional features it possessed other and further useful functions, though it be an improvement upon the patented one, is as between the

(1) See page...
parties an appropriation of the former device. Though
the improvement of course would be patentable as an im-
provement upon the former.(1) So it may be said to be
immaterial to show that the device accomplishes more,
but if it accomplishes less it is not an infringement.(2)

Our last question, under our definition, is whether
the particular device must be a known equivalent at the
date of the invention of the patent. Mr. Walker, in
his treatise upon the Law of Patents, undertakes to dis-
tinguish the cases and show that while abundant authority
can be found for the affirmative of the question yet the
decisions on this point are purely dicta, and in view of
some authorities which he cites, he comes to the con-
clusion that the date of the invention has nothing to do
with the question of equivalents.

In the fall of 1865, Mr. Justine Clifford, while at
Circuit first introduced this element into the defin-
ition, in the case of The Union Sugar Refinery v. Mat-
thussen, (3) where he said instructing the jury "You are

(1) Cases in proceeding notes.
(2) Walker on Patents, #251 & notes.
(3) The Union Sugar Refinery v. Matthussen, 2 Fish. 629.
instructed, that if you find from the evidence, that
the means of causing pressure at the nozzle used by the
defendants, were, at the date of the invention and of the
patent, commonly known as a substitute for the means of
causin pressure at the nozzle, which were particularly
discussed in the specification, and that consequently	hose skilled in the art to which the invention appertains, then the defendant cannot successfully defend him
self against the charge of infringement." The entire
defense in this case was, first, that their assignor, is
the original and first inventor; secondly, that they do
not infringe. So we may say that the question was
fairly before the Court and a material question for
decision.

The next case that is cited in support of this
proposition is Roberts v. Harden (1). Mr. Walker say
that this question is not presented in the case. The
counsel conceded during the trial and at the argument,
that the date of the invention was a material question

(1) Roberts v. Harden, 2 Cliff., 506.
tending to define what an equivalent was. But the case hinged upon the fact that the differences between the ice-chests of the two refrigerators was merely formal, they being found by the Court to be substantially the same.

The Court in the case of the Whip Co. v. Lombard, (1) said "if the defendant omits entirely one of the elements or ingredients of the patented combination without substituting any other in its place, he does not infringe the plaintiff's patent; and if he substitutes another in place of one omitted, which is new, or which performs substantially different functions even if it is old, was not known at the date of the plaintiff's patent as a proper substitute, then the charge of infringement is not maintained." In this case evidence failed to satisfy the Court that the supposed invention was ever completed, and consequently the statement of the Court must be regarded as dicta.

See also Carter v. Baker,(2) Fisher v. Craig (3),

(1) Whip Co v. Lombard, 4 Cliff., 405.
(3) Fisher v. Craig, 3 Saw., 79.
Conover v. Roach, (1), where the doctrine is clearly recognized, but the decision may be supported on other grounds. Burden v. Corning (2), the doctrine was not laid down in the opinion, but the importance of the date of the invention is constantly kept in mind by the Court, in its determination of the controversy. The same may be said of Smith v. Dowling, 1 Fish., 64, where House's telegraphic instrument was held not to be the equivalent of that of Prof. Morse.

The third of Mr. Walker's cases is that of Leynor v. Ostram(3), this being the decision of the Supreme Court. The opinion in this case is exceedingly long and somewhat obscure. Justice Clifford undertakes to explain and clear up many of the noted questions in the patent law. The judgment of the Circuit Court was reversed, and an injunction was granted against the defendants for infringing the Harvester of the plaintiff. While the doctrine was laid down, that one device in order to be an equivalent of another must be known at

(1) Conover v. Roach, 4 Fish., 23.
(2) Burden v. Corning, 4 Fish., 477.
(3) Leynor v. Ostram, 11 Wall., 516. at p. 556.
the date of the patent. It appears not a necessary point for decision as the infringement could be sustained on other grounds.

In Johnson v. Root, 2 Cliff., 123, the case was reversed by the Court on the ground that the verdict of the jury was contrary to the evidence. The real question being, whether the plaintiff had abandoned his patent. One of the questions presented in the argument before the Circuit Court was, as to the correction of the charge that, "If the plaintiff did not make any such inventions as that described in the third claim of his reissued letters patent in 1848, or if he did, and did not reduce the same to practice in the form of an operative sewing machine, then the jury were not authorized to find that the patented invention takes date prior to the time when he filed application on his original patent." The Court approved this charge.

Pouty v. Ruggles (1) appears to be cited as authority to sustain the proposition, we have already sufficiently

discussed this case in another connection (1). Suffice to say that this question was not decided here.

Gould v. Rees (2), is one of the well known cases of the patent law, two issues were raised, first that there was no infringement, second that the plaintiff was not the first inventor of the improved device. The case was reversed and sent back because of an incorrect charge to the jury. The patent was for a combination all the elements of which were old. The doctrine was again laid down here, but the case as already said, had to be reversed because of an incorrect charge. The court said, "Where the defendant in constructing his machine, omits entirely one of the ingredients of the plaintiff's combination without substituting any other, he does not infringe; and if he substitutes any other in the place of the one omitted, which is new, or is old, but not known at the date of the plaintiff's invention as a proper substitute for the omitted ingredient, then he does not infringe."

(1) Page 125
(2) Gould v. Rees, 15 Wal., 187.
Mr. Justice Clifford in Gills v. Wells (1), puts the proposition in this form, "Repeated decisions of this Court have settled the rule in such cases that if the ingredient substituted by the defendant for the one left out in the defendant's machine was a newly discovered one, or even an old one, performing some new function, and also not known at the date of the plaintiff's patent, or a proper substitute for the ingredient left out, the charge of infringement cannot be maintained." The proposition is supported by seven cases.

Let us examine one not already referred to (2).

In Simpson v. Baltimore R.R. and Brooks v. Fisher, (3) the point is not raised, but could be established without being inconsistent with these decisions. In the later case the question for the jury had been whether the defendant had omitted one of the elements of the complainant's device.

(1) Gills v. Wells, 22 Wal., 1 at page 31.
The case of Vouse v. Campbell (1), already referred to in another connection (2), the question of the omission of an immaterial ingredient in the combination came before the court for adjudication.

Our next case is Imhauser v. Buerk, reported in 101 U.S., 656. In 1865, Jacob Burke received a patent for a watchman's time indicator, the patent was infringed by the device of Meyer who set up as a defense that Buerk was not the first and original inventor of the indicator, and a general denial of the infringement. The Court decided the case on this point and said; "Patentees of an invention consisting merely of a combination of old ingredients are entitled to equivalents, by which is meant that the patent in respect to each of the respective ingredients comprising the invention covers every other ingredient which in the arrangement of the parts will perform the same function, if it is well known as a proper substitute for the one described in the specification at the date of the patent. Hence it

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(1) Vouse v. Campbell, 1 Black, 427.
(2) Page /4.
follows that a party who merely substitutes another ingredient for one of the ingredients of the patented combination is an infringer if the substance substituted performs the same function as the ingredient for which it is so substituted, and it appears that it is well known at the date of the patent that it was adaptable to that case."

It is not necessary to carry this discussion farther other than to say that the rule appears to be well settled in England. Union v. Heath, 5 H.L.Cas., 505, where Justice Williams said that he fully agreed with the doctrine which has been repeatedly laid down in the course of this discussion, that although the use of a chemical or mechanical substitute, which is a known equivalent to the thing pointed out by the specification and claimed as the invention, amounts to an infringement of the patent yet if the equivalent were not known to be so at the date of the patent and specification, the use of it is no infringement.
Having now a general idea of the definition of an equivalent, together with the elements composing it; it only remains to determine who is entitled to invoke the doctrine and to what extent.

There was at one time an attempt to prevent the inventor of a combination from applying the doctrine of mechanical equivalent to protect his patent, the decisions at the present time are uniformly in favor of its application. In Whip v. Lambard, supra, it was contended by the complainants, that the patentee or owner of a patent for a combination is an much entitled to an equivalent, as the patentee or owner of any other invention. Doubt at one time existed as to the correctness of this proposition, but it is now well settled in accordance with the views of the complainant. Citing Gould v. Pees and Gill v. Wells. In the former it was said, "Bona fide inventors of a combination are as much entitled to equivalents as the inventors of other patentable improvements." It is of
course obvious that while the combination patentee is entitled to the benefit of the doctrine, yet from the inherent nature of this patent—the application cannot be as broad as that of a discoverer.

The material question however is to determine whether the inventor is a pioneer in his field, whether he is the one who first conceived the idea and made it practicable, or whether he merely an improver, finding the idea in a previous device and by his ingenuity perfecting and making it more useful. If he is the first or original inventor he can apply the doctrine of equivalents in its broadest and most comprehensive sense, even to the exclusion of one who improves and perfects his device, thus keeping to himself, in a large measure free from competition that which he has made. This doctrine was recognized and applied very far in Clough v. Gilbert Co., (97 U.S., 34), the opinion of the Court is by Mr. Justice Blatchford. Here Clough was the first person who applied a valve regulation of any
kind to the combination, "And he is entitled under the decisions heretofore made by this court to hold as infringements all valve regulations, applied to such a combination, which perform the same office in substantially the same way, and were known equivalents for his form of valve regulation."

In McCormick v. Talcott (1), a leading case, which has already been referred to, the Court say that if he be the original inventor of the device or machine called the divider, he will have a right to treat all infringers who make dividers operating on the same principle and performing the same functions by an analogous means or equivalent combinations, even though the infringing improvement machine being an upon a known machine by a mere change of form or combination of parts, The patentee cannot treat another as an infringer who has not improved the original machine by use of a different form or combination performing the same functions. The inventor of the first improvement cannot invoke

the doctrine of equivalents to suppress all other improvements which are not mere colorable evasions of the first.”

But in dealing with improvers we must narrow and restrict our doctrine. Because an inventor, who is only an improver and not the first in the art, is not entitled to invoke, broadly, the doctrine of mechanical equivalents so as to cover devices not specifically named (1). The reason for this restriction appears to be this. The improver and the alleged infringer as to the prior devices stand in the same position as to its use, neither being entitled to a patent for the prior device and each (for our purpose) having a right to use it; this patent is for their element or instrument which improves the prior device, and not for the entire device as improved, so when the Courts say that their patent is to be strictly construed they mean, that their patent is necessarily narrow being for this improvement only. So that a person to infringe their patent must use their improved combination, or an equivalent thereof.

(1) Tobey Co. v. Colby, 34 O.G., 1276.
A good illustration of this proposition is the case of Taylor v. Garreston, 18 Blatch., where the plaintiff's invention being only an improvement of certain parts of a known machine, he cannot treat another as an infringer because he has improved the previously existing machine or machines, by using a form, construction, device or combination substantially different from that invented and patented by the plaintiff, though performing the same functions.

For further illustrations see Prof. Robinson's work on Patents sec. 256-7.
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