REVIEWS


Lord Hewart's "The New Despotism" has acquainted the American bar with the fact that not all English lawyers view with equanimity the vast extension of administrative power which has taken place in the birthplace of the Common Law. However, Government by Commissions, by J. Toulmin Smith, Barrister-at-Law of Lincoln's Inn, a vigorous polemic aimed at much the same evils against which Lord Hewart inveighed, seems generally to have been overlooked. So striking is the resemblance between what Mr. Smith has written and the utterances of those who deplore current trends in this country, that I have requested the editors of the Journal to permit me to bring this work to its readers' attention. I am confident that those who will pursue this review to its end will agree that Mr. Smith's volume points a lesson—although as to the nature of that lesson I anticipate less unanimity of opinion.

While it is the aggrandizement of power in the hands of commissions that forms the substance of Mr. Smith's study, in his preface he makes clear that he regards this as only an evil means essential to a still more pernicious end: centralization of power in the national governments, with the conse-
quent diminution of responsibility in local government. In “the fast-encroach-
ing and all-grasping system of Centralization”¹ he finds not only a menace
to Great Britain but an explanation of unrest and revolution in continental
Europe. In the author’s development of this thesis the parallel to the American
scene is less close than in other portions of the work, for in England, of
course, the distribution of powers between state and nation is not in issue;
but his reiterated charge that local self-government is the object of “especial
dislike to those who delight in nostrums and new experiments”² has a familiar
ring.

Britain’s lack of a written constitution does not deter the author from
basing his argument on “fundamental law,” and his first three chapters are
devoted to a lawyerly and philosophical consideration of the laws and insti-
tutions fundamental to the British body politic. In his opinion, encroach-
ment on those laws and institutions “is going on at the present day at least
as rapidly and as deeply as ever it has done at any former period of [British]
history”³— and this tendency is “more really subversive . . . than any
openly aggressive cause ever ventured . . . by any king or party.”⁴ This
is due to the fact that “the motives of many of those most active in the
work . . . are undoubtedly not personally selfish.”⁵ The encroachers
“profess liberal views and politics; but,” he adds, “it is always with them
a condition precedent that they are to manage entirely in their own way
everything that is proposed for the benefit of the people . . . It is essential
to the working out of their notions of liberal institutions, that the people
should be bound hand and foot except in the region of the breeches-pocket.”⁶

The encroachments are serious not only in and of themselves but because
of the disrespect for fundamental law which is fostered. “Anything which
tends to lessen confidence in the permanence of that law, anything which
exposes its authority to doubt or disregard, must, of necessity, tend to the
disorganization of society.”⁷

In his arraignment of “government by commissions,” Mr. Smith charges
two offenders, commissions of inquiry and administrative commissions. The
extended attention devoted to the former type of commission will, perhaps,
come as a surprise to American students of British institutions, for the
Royal Commissions of Inquiry, those fact-finding bodies whose labors under-
lie so much British legislation of the past century, are normally not bracketed
with the administrative body familiar in American law. But while the insti-
tution has had few close counterparts in this country, the inquisitorial powers
of congressional committees and of permanent administrative agencies are
analogous to those of the Royal Commissions. The analogy becomes clearer
when one examines the charges which Mr. Smith levels against the Com-
missions of Inquiry. Mr. Pecora would find them reminiscent.

1. P. vi.
2. P. 52.
4. P. 11.
5. Ibid.
6. Ibid.
7. P. 2.
The author's basic complaint is that these commissions, far from constituting an impartial effort to arrive at a true understanding of a problem, represent a contrivance to give propaganda the semblence of authoritative truth. To begin with, the commissions are "packed" by the Crown with persons known to favor contemplated legislation. The procedure employed by them—"their taking no evidence but what they please . . . their not allowing cross-examination; . . . their allowing no opportunity of answer; . . . their adjudicating in the absence of all parties charged" results in "every means being present . . . by which it shall be next to impossible for any opposite view to have any hearing at all." Their unfairness to hostile witnesses is cited, and in illustration Mr. Smith draws on his own experience before them. The cost of investigation also comes in for attack, with figures stated. But what most distresses Mr. Smith is the success which attends the efforts of these commissions in influencing the growing class of those who find it "far less trouble to adopt the opinion of others than to think for themselves . . . Commissions of Inquiry are a godsend to persons of such disposition. The pictures of horror artfully put together in the pages of blue books are greedily devoured, and serve as food for the sentimental philanthropy of the reader; while the reports themselves are accepted as infallible gospel.

Space is not available to particularize Mr. Smith's charges against the administrative commissions—creatures of "act-of-parliament humanity." He finds that to these bodies "are daily being more and more given over, the arbitrary management and control of the properties and liberties of every Englishman . . . The property and person of every man are subjected to harassment and vexation by unlimited and invariable powers given to such Commissions to proceed . . . 'to hear and determine [causes] by their discretion.'"

From the scores of timely and quotable passages in Mr. Smith's book, only two more can be given. "Where uncertainty prevails as to permanence of property or security of person there can be no inducement, there is every check to improvement and industry and effort. To supply the want of the hour will be all that any man will do. If the political quack and experimenter is dangerous to the permanence of national union, the legislative quack and experimenter is fatal to individual prosperity . . . What is wanted is the unfettering of all individual effort; the taking off of those trammels that bind down skill and enterprise and all self-depending energies, and are daily binding them down harder; the release from the oppressive and presumptu-

15. P. 250.
ous dictation of Commissions — those chosen instruments of the arbitrary and degrading system of Centralization." 17

The future of a nation which failed to heed this counsel, which persisted in the subversion of its fundamental law and institutions by continuing or, still worse, extending the powers of commissions and thus the centralization of national government and executive power, would seem to be a gloomy one. Yet there is comfort for those who fear for Britain. Mr. Smith's polemic was published in 1849. And since then, the "nostrum-mongers", the "legislative quacks and experimenters" have kept right on, year in and year out, subverting fundamental laws and institutions, 18 and still those laws and institutions stand, ready to be subverted anew. Indeed, I'm beginning to wonder whether it isn't just that capacity for perennial subversion which makes a fundamental law or institution fundamental.

Durham, N. C.

David F. Cavers†


These two casebooks represent the recent trend in single semester law school courses in administrative law. That trend is in the direction of studying the law governing the procedure of administrative commissions with particular emphasis upon those to be found in the national government rather than those to be found in the state and local governments. Both books are well done and both represent a very considerable advance in the materials available for a relatively short course in the subject.

Professor Goodnow's early work in administrative law announced the general scope of administrative law as a general subject of study. Those who have come later have been breaking down the field into subdivisions, and in time we doubtless will have worked the smaller segments with sufficient thoroughness so as to be able to reconstruct the subject in its modern aspects along the broad lines originally marked out by Professor Goodnow.

17. P. 316.

18. Even the Ten Hours Law, regulating hours of labor "of non-adult operatives" and thus "dooming A and B to hunger lest C and D should labour for more than the time prescribed" by law, even that "worse than idle folly", has survived and has been made still more drastic, despite Mr. Smith's happy report of the "early exposure" of its "mischiefs." P. 294.

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Professor Freund chose to work in powers and remedies—two phases of the same subject under a common law system. Professors Frankfurter and Davison chose to work in the fields of the separation and delegation of powers and of the scope of judicial review of administrative action under existing constitutional limitations. Professors Stason and Maurer have chosen to delve more deeply into the field of the law governing administrative procedure, and in this they have reflected the interest that has been manifesting itself in many quarters as, for example, at Wisconsin, under Professor Brown, and at Drake, under Professor Tollefson. These remarks are not to be taken to indicate that procedure alone has been dealt with in these two casebooks, but nevertheless it is clear that it is around the central core of procedure that both authors have tried to work out their conceptions of the scope of administrative law.

Professor Maurer, after a preliminary section on the nature and growth of administrative law, approaches the subject through the grant of administrative discretion, mixing constitutional and statutory questions. This he follows with a chapter on the constitutional aspects of delegation of legislative power to administrators which is accompanied by a chapter on the legal as distinguished from the constitutional aspects of the power to make rules and regulations. This last chapter is an original contribution to the casebook materials on administrative law and should forever make a place for this topic in the subject. To discuss only the constitutional aspects of a subject which to those in actual administration is only incidentally constitutional, but which is primarily a question of statutory interpretation, has always left the treatment of this phase with an air of unreality. Chapter Five takes up administrative adjudication and contains cases on hearings, findings, and evidence of record.

Professor Stason, after presenting some introductory materials on the nature and growth of administrative law, takes up a series of cases under a variety of titles, most of which will be found to present questions of a constitutional character—primarily separation, delegation, and due process. Emphasis is placed in the comments and classification of materials upon the statutory language, but, with only a few exceptions, it is the constitutional language that is really involved. The statutory language is of importance because of its bearing upon constitutionality, rather than because of its bearing upon administrative action. Section One of Chapter Three deals with the latter problem primarily. Part Two, beginning with page 192, plunges into procedure before administrative tribunals, i.e., the same thing that Professor Maurer calls adjudication. Professor Stason's book contains only a negligible amount of material on administrative legislation in its legal as distinguished from its constitutional aspects. Notice and hearing get a full treatment from Professor Stason, and his fifth chapter on the methods of securing information to be used as the basis for administrative action is also excellent. Rules of evidence are awarded several cases. Rules and orders and their enforcement constitute the subject matter of chapters Six and Seven, and the latter particularly is a welcome addition to the available casebook materials.
When the editors arrive at the problem of judicial relief from administrative action they part company to some extent. Professor Maurer feels the need of giving special treatment to the extraordinary legal remedies as well as according special chapters to the constitutional and statutory problems in judicial review as such. Professor Stason concentrates more particularly upon judicial review, both in its constitutional and statutory aspects, although he is unable to omit entirely the special remedies. Both editors seem troubled by officers' liability and governmental liability, and both have something on these subjects. But the approach is different throughout this section. Professor Maurer selects certain federal commissions as the subject matter for special chapters, while Professor Stason deals with them by subject-matter groups.

Both casebooks make use of abundant footnotes. Both contain numerous comments and introductory notes that often run to several pages in length. These vary in quality but on the whole should prove to be very helpful to both teacher and student. By this method the editors are able to make a more comprehensive treatment of the subject than they could have done otherwise. And finally both make much more general use of statutes and administrative orders and regulations than their predecessors. In some instances condensations have been made of statutes, and these have been well done insofar as this reviewer has compared them with the full text of the statutes.

The introductory chapters might well have been omitted, particularly those in Professor Stason's book. Some day lawyers will discover that administrative law did not originate in the United States with the Interstate Commerce Commission. Some day they may discover that administrative law has increased or developed because public administration has developed and expanded and that if one is to look for the causes of expanded administrative law they are to be found only in the causes for expanded public administration. For the time being it may be well and good to think of administrative law as the law governing commissions, but in the long run it will have to be realized that commissions form only a part of legally significant public administration. There is nothing either more important or more difficult in the law governing the commissions than in the law governing hierarchically organized administrative departments. The rapidly reviving government corporation is almost totally ignored as a problem of administrative law by both editors.

For a time it may be necessary to compress the subject of administrative law into a single semester course, but in the long run this subject will have to take its place alongside property, contracts, constitutional law, as it has in all continental countries, because it is their equal in both technical and cultural importance. For the present, perhaps, the law of public officers and of civil service and of administrative organization and of finance may be omitted, but eventually these subjects will have to be included in the law school curriculum if lawyers are to go into the public service prepared for it as they are for private practice. Administrative law is neither so broad as Professor Stason suggests in his introduction nor so narrow as he chooses.
to deal with it in his casebook, and his choice of a title accurately describes
his approach to the subject. Professor Maurer really seems to have much
the same concept in mind but uses the more general term administrative law.

Both editors have done such a fine job, however, that they should not be
taken to task for having chosen to limit their work to the fields of their
primary interest or to their concepts of that which is important in adminis-
trative law. Teachers in the field are so much better off with these two books
than they were before that the editors should be thanked rather than berated
by any reviewer.

Minneapolis, Minn.

OLIVER P. FIELD†

PAPERS ON THE SCIENCE OF ADMINISTRATION. Edited by Luther Gulick
Pp. 195. $3.00.

It is interesting to wonder why so few writers on the subject of public
administration have turned to the literature of business management for help.
One reason may be, as Professor White has suggested, that government was
comparatively simple until recently and that therefore the administrative
hierarchy, a normal business form, developed late in the field of public man-
agement.1 Another reason may be that business itself has not yet gone as far
as it might in formulating basic principles of administration which govern-
ment might find useful.

This volume offers evidence that cooperation between the two fields is
developing. The editors have collected eleven essays by English, French, and
American authors, and while only four of these deal directly with the prob-
lems of government, it is not hard to see the relation of the others to that
field. Indeed, the editors' foreword says that the essays were reprinted in
this form because they were not readily available when the President's Com-
mittee on Administrative Management needed them for its staff.

One who reads this book to find a definitive statement of a "science" of
administration will be disappointed. It is true that one of the authors states
that "The possibility of a science of management . . . is the only concrete
hope before humanity of an ordered and satisfactory solution of its economic
and social problems."2 The authors of two other essays seem more realistic,
however, when they speak of an "art" of management rather than a science.3
What the volume does is to make available some very competent analyses
of the problems and processes of administration. For this contribution, the
authors and editors deserve the thanks of the administrator who has to organ-

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1. White, Trends in Public Administration, 143 (1933).
2. Urwick, p. 118.
ize his enterprise and the student of administration who is trying to bring order and substance into this new and difficult field.

Almost all the writers in this collection turn their attention first to an enumeration of the principal elements in the administrative process. This has been done before, of course, and there are as many different lists as there are writers on the subject. Notice, for example, Professor Friedrich's division into integration, pyramid arrangement, and professionalization, Mr. Mooney's coordinative, "scalar," and functional principles of organization, and Professor Walker's use of the terms function, unified direction, and integration. The contributors to the present volume emphasize coordination and, to a lesser extent, the hierarchical or "scalar" principle and functional division or specialization. A number of other items are given consideration. Thus Dr. Gulick writes that the duty of the administrator is "POSDCORB:" planning, organizing, staffing, directing, coordinating, reporting and budgeting. Dr. Gulick also points out that the division of labor in an enterprise may take place according to one or more of four principles: major purpose, major process, clientele, and place.

The difficulty for the reader is that he gets very little guidance as to how to harmonize the many elements which are discussed. It may be true, as Henri Fayol says, that the manager "must be a good administrator, able to plan, to organize, to command, to coordinate and to control." Just how shall he "organize" so as to combine specialization of work, geographical subdivision and the pooling of certain operating facilities? The problem of geography, for instance, has caused much difficulty in our national administrative management. The reader is left in a similar quandary as to "coordination" and "control."

The authors of these essays are not greatly to be blamed for this incompleteness. Perhaps they should be chided a little for being sententious about their definitions and their "principles." Perhaps they made too great an effort to avoid what one of them called the "practical man fallacy," and their work might have been more helpful if it had been simpler and less Olympian. Dr. Gulick's two essays achieved this goal of desirable deflation better than most of the others. On the other hand, we need sound principles of administration as well as case-histories, and these writers seem to be making sincere and helpful efforts in what is bound to be a tremendous undertaking.

Two other points should be mentioned because of the emphasis which this volume gives to them. Almost every writer commented on the importance of the "staff" services, and several mentioned the interesting problem of the "span of control." Urwick illustrated the first point by the General Staff of the British army. It is illustrated also by the proposal of the President's

5. Mooney and Reiley, Onward Industry, 1, cc. 3-5 (1931).
11. P. 64.
Committee on Administrative Management to give the President six assistants who would advise and assist him but who would not be in the direct hierarchical line of authority. This idea of differentiating "staff" and "line" has been developed by many writers, and it is interesting to see evidence in this volume of its very wide appeal to students of administration.

The problem of the "span of control" takes administration almost into the field of psychology. V. A. Graicunas presents a number of charts to show that the addition of subordinates directly responsible to the executive complicates the latter's job in geometrical, not arithmetical, proportion. Since an executive's "span of attention" and his capacity for work are limited, his subordinates should be kept down to a manageable number. There seems to be general agreement on the "rule of six," that an executive should not have more than six subordinates who report directly to him. It is obvious how completely this principle is ignored in our national government, as well as in most of our state and local governments.

There are certain advantages in a collection of essays by various authors which are not possible in more extended studies by single writers. These advantages seem to be increased in the present instance by the fact that the various papers were not written with any expectation that they would be found eventually within the proximity of a single volume. The field of public administration can use more collections of this kind.

PATTERSON H. FRENCH

New Haven, Conn.


This monograph presents a picture of the National Institute of Health. Several phases of this seldom publicized organization are of general interest especially with regard to the problem of research in pure science under public auspices.

The National Institute occupies a sheltered position within the government. This the author regards to be of primary importance. "Scientific workers are sensitive flowers and do their best in cloistered seclusion," a director of the Institute once informed a Senator. The writer believes that the Institute provides an environment peculiarly well-suited to scientific research. The organization is not only removed from politics and pressure groups, but also from the necessity of producing publishable results until the investigators deem the time ripe. Even well-endowed private agencies seldom enjoy such conditions. As the author shrewdly observes, it is not


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simply the inconspicuous little niche occupied by the Institute in the Public Health Service that alone accounts for its relative immunity. The Director, Dr. McCoy, is enough of a politician to recognize that a give-and-take is essential in all human relations—even among scientists themselves and between scientists and those they may be called upon to regulate. Therefore, since this research institute must, somewhat paradoxically, administer the laws licensing serums and antitoxins, Dr. McCoy has sanctioned the licensing of serums possessing no known therapeutic value, rather than antagonize the manufacturers. Mr. Kramer justifies the practice on the ground that by not bucking the manufacturers the research workers can the more peacefully carry on their studies.

While this may be doubtless true it leaves the consuming public in a rather unfortunate position. A group of scientists seeking for their own work peace at any price are obviously not the people to enforce a law calling for the regulation of serum manufactures. Perhaps the answer lies in leaving them in their scientific Garden of Eden unhampered by law-enforcing responsibilities. Science for science's sake is the goal.

As the author indicates, "the entire Public Health Service serves as a recruiting field for the laboratory." From the officers who come to study at the Institute a few men are selected from time to time who show marked ability in research. The Institute clearly occupies a favored position and one that could rarely be paralleled. The author argues that salaries substantially above the existing range would be inexpedient since men might be attracted who are more interested in money than in research.

Mr. Kramer has performed a useful service in describing for students of administration the characteristics of this interesting agency which has been quietly but effectively tackling basic research problems under governmental auspices. The Institute's formal organization, recruitment scheme, etc., may prove suggestive for other limited areas of public administration. To those who would question the capacity of the government to provide suitable working conditions for purely scientific endeavor Mr. Kramer's study provides an effective rejoinder.

Cambridge, Mass.

E. Pendleton Herring†


It is certainly not an easy task for a German to review for an American public a book on English administrative law written by a Dutch author, and the reviewer has serious doubts in more than one sense with respect to the usefulness of his undertaking.

In a review of a book by a foreign writer upon a foreign subject matter, the crucial question always arises: How should the author have written? Should he have tried to write exactly as a native writer would have done it? This might be impossible, or would certainly be impracticable with respect to the author's own countrymen (presumably his main readers), and prob-

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ably of little value to the foreign reader as well. Should he have approached the subject entirely from his own legal background? The “distorting prism of his own legal categories,” as Professor Fuller once phrased it in a splendid book review,¹ may cause an entirely erroneous picture. The goal is to find the golden middle, i.e., to “get the hang” of the foreign system and present it critically even from the point of view of his own system. It might be that then, even foreign readers would benefit “by the approach of their law from the perspective of an alien system.”

Dr. Poelje evidently has tried to write in part, at least, for the benefit of the Anglo-American public. Therefore, he begins his work with a short summary in English. But nothing proves better the inherent difficulties of the task than this summary. The trouble starts in the very title. Dr. Poelje translates it with “administrative jurisdiction.” This, however, in the light of the specific use of jurisdiction in Anglo-American terminology, is either meaningless or misleading. The author really means “administrative justice” or “administrative adjudication” in the usual Anglo-American sense.²

In good continental fashion the author tries to describe the English system of administrative justice within a neatly worked out systematic-analytical frame. His first chapter, therefore, is concerned with an investigation of the concept of “administrative justice” or “administrative jurisdiction.” He begins with a reference to the doctrine of the separation of powers and to the almost classical³ distinction between “function” and “organ,” and tries, principally on the basis of the studies of Kelsen, Duguit, and Bonnard, to set forth the material characteristics of the judicial function. Within this general domain of adjudication, the field of administrative justice takes a special department. Administrative justice, to the author, is nothing outside or besides the judicial function, but merely a species of adjudication, i.e., adjudication qualified by the adjective “administrative.” This qualification is found principally on the nature of the litigants, because one of them is a public authority, and on the nature of the law administered, because it is public law. The author concedes that there might be border-line cases, but thinks that his definition is generally true, since the law is no jig-saw puzzle.


2. The term “administrative justice” should have offered itself very easily to a continental author, because the French speak in the same sense of justice administrative, the Italian of giustizia amministrativa, and the Germans of Verwaltungsjustiz (as is proven, for example, by the title of Darestè’s, La Justice Administrative en France (1896), the Periodical La Giustizia Amministrativa (1890–1920), and Wächter’s Review of Weiler’s, Uber Verwaltung und Justiz (1826), in 1 Krit. Zeitschr. f. Rechts-wissenschaft 86, 89).

3. This distinction, developed seemingly first by Schmitt-Henner, Grundlinien Des Allg. Oder Idealen Staatsrechts (1845) 474 is now accepted by German, American, British, Italian and French writers. See, e.g., Jellinek, Allgemeine Staatslehre (5th ed. by Jellinek, 1929) 609; Goodnow, Comparative Administrative Law (1903) 25; Sharp, The Classical American Doctrine of the Separation of Powers (1935) 2 Univ. of Chi. L. Rev. 344; Brown, The Separation of Powers in British Jurisdictions (1921) 31 Yale L. J. 24; 2 Duguit, Traité de Droit Constitutionnel (2d ed. 1923) 514; Ranelletti, Le Guarantie Della Giustizia Nella Pubblica Amministrazione, (4th ed. 1934) i.
On this basis Dr. Poelje begins to explain the English system of administrative justice. Theory, of course, marches in the first row. The second chapter of the book is dedicated to the English concept of administrative law and administrative justice. The starting point is Dicey. Poor, long deceased Dicey takes a terrific beating, lasting sixty pages, administered with the usual clubs that are also dear to American books and courses in administrative law: that he was all wrong with respect to his own law; that he was not up-to-date with respect to French law, and that, horribile dictu, he confused administrative law and administrative justice.

Maitland, Finer and Post, as continental in their outlook, are passed briefly. The next writer to be criticized is Gordon. Dr. Poelje calls his view "English-legalistic." To me this seems rather curious, because it is, in its essential points, only a combination of ideas which were advanced by Professor Mittermaier in Germany and the Duc de Broglie in France more than a hundred years ago—a fact which also escaped Gordon.

Dr. Poelje turns, in the third chapter, to the English practice with respect to the administration of administrative justice, understood, in the broad sense of the author, as adjudication of litigations involving public authorities and public law. He devotes his attention first to the work of the courts of justice in this respect and treats the scope of judicial power in general, the particular limitations on it in the field of administrative law. In the next chapters, he discusses administrative justice as administered by organs of the active administration; describes the work of the specialized courts, ministerial tribunals and domestic tribunals. The concluding chapter deals with the future of administrative justice and a comparison between the English and Dutch system indicating extremely interesting parallels.

The reviewer must confess he is very much puzzled by the book. It is on the whole carefully done; but even though the reviewer is not bitten by the New-Realism worm which seems mainly to require the sticking in of catchwords like "group pressure" or "social implications" in at least every fifth sentence, he feels during the long chapters of the book as though he were moving in thin air. The discussion of the concept of administrative justice seems to be pale conceptualism, and is not even original or thorough. Mittermaier and Wächter in many respects have done a much better job more than a century earlier. The description of the actual practice, of course largely based upon the Report of the Ministers' Powers and Dr. Robson's book, is clear and accurate. But why did the author not use this material, which he mastered quite well, and discuss, on this ground, critically the basic problems of feasibility, scope and methods of judicial control of the administration, or give to his readers an echo, at least, of the discussions regarding this point, instead of hanging the description of the actual system on a half-baked theoretical discussion and an overlengthy fight with Dicey's shadow?

STEFAN RIESENFELD

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