IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA - A.D. 2022

CORAM: PWAMANG JSC (PRESIDING)
DORDZIE (MRS.) JSC
TORKORNOO (MRS.) JSC
HONYENUGA JSC
KULENDI JSC

CIVIL APPEAL
NO. J4/56/2021

15TH JUNE, 2022

1. EBENEZER DARKWA
2. ELIZABETH DARKWA } **PLAINTIFFS/APPELLANTS/RESPONDENTS**

VRS

ADONTENG COMMUNITY
BANK LTD. .... DEFENDANT/RESPONDENT/APPELLANT

JUDGMENT

HONYENUGA JSC:-

This appeal is essentially against the judgment of the Court of Appeal which was delivered on the 26th January, 2020. The Court of Appeal allowed the appeal and set

aside the Judgment of the High Court. In this appeal, the Plaintiffs/Appellants/Respondents would be referred to as the first and second Respondents and the Defendant/Respondent/Appellant as the Appellant.

The background of this appeal is not complex. On the 7th October 2014, the appellant issued out a writ of summons against the 1st respondent and two others at the High Court, Koforidua claiming from them jointly and severally the recovery of an amount of GH¢128,167.04 and interest on the said amount from the 1st August, 2014 to the date of judgment. Summary judgment was applied for and entered in favour, of the appellant herein. With judgment entered in their favour the appellant attached the Engen Petrol Filling Station fitted with pumps at Old Tafo along the Koforidua - Kumasi road, Toyota Tacoma vehicle with Registration Number GH 7635-Y and another item which was not listed on the writ of fifa but was nevertheless attached in execution. Dissatisfied with the action of the appellant, the respondents herein causeda Notice of Claim to be filed at the court pursuant to Order 44 rule 13 of C.I. 47 which resulted into hearing of arguments in the court. Upon hearing arguments, the court, on the 11thMarch 2015, released the Engen Filling Station from attachment and on the 13th July 2015, released the other attached properties of the respondents from attachment.

Feeling that the attachment was wrongful, the respondents caused a writ of summons to be issued out accompanied by a statement of claim against the appellant claiming:-

"a. Special damages;

i. Loss of anticipated revenue from the fuel station on fuel sales between 23rd day of January 2015 to 18th day of March, 2015 =GH¢1,093,917.00

ii. Loss of rent from January, 2015 to July 2015
= GH¢5,600.00

iii. Loss of use of Tundra pick-up vehicle from January 2015 to July 2015 = GH¢86,000.00

iv. Interest in the special damages from 23rd day 2015 till date of final payment.

b. General (substantial) damages for unlawful attachment and seizure of plaintiff's properties.

c. Punitive, exemplary and aggravated damages.

d. Cost inclusive of legal fees of 15% of the total sum claimed."

The respondents filed their statement of claim while the appellant filed an appearance and a statement of defence denying the claim. The appellant pleaded that the respondents were estopped from bringing the suit, as the issue of the ownership of the attached properties was determined in the interpleader suit and consequential reliefs ought to have been sought in the interpleader suit.

The respondents filed their witness statements as ordered by the court but the appellant failed to comply and rather brought an application to set down the issue of estoppel raised in their pleading for arguments. Upon hearing the parties, the learned trial judge ruled that the law frowns upon piece-meal litigation and that the respondents should have brought their whole case before the court for determination once and for all but failed to do so. The learned trial judge opined that it was the fault of the respondents who should have sought the reliefs in the instant action in the interpleader action and that their action is caught by issue estoppel. She dismissed the action in its entirety with costs of GH¢5,000.00 in favour of the appellant.

Being aggrieved with judgment of the trial High Court, therespondents appealed to the Court of Appeal. The Court of Appeal upheld the appeal and set aside the judgment of the High Court on the grounds that the suit could not be described as piece-meal litigation and the issue of damages was not res judicata. The Court of Appeal ordered the instant suit to be tried at the High Court differently constituted.

Dissatisfied with the judgment of the Court of Appeal, the appellant has filed the instant appeal to this court based on the following grounds:-

1. The judgment is against the weight of evidence.
2. The learned justices of the Court of Appeal misdirected themselves on the rule in **Henderson v Henderson** as it applies in interpleader proceedings.

It is noted that the appellant did not file additional grounds of appeal and they are considered abandoned.

SUBMISSION BY COUNSEL FOR THE APPELLANTS

Learned counsel cites **Martin Alamisi Amidu v. the Attorney-General**; **Waterville Holdings (BVI) Ltd** and **Alfred Agbesi Woyome and UT Bank** (in Receivership) and **Anator Holdings Co. Ltd and Anor** (2019) DLSC 6497where this court recognized two forms for the determination of an interpleader under Order 44 Rules 12 and 13. One is by affidavit evidence if the court opts to do a summary hearing under order 44 rule 13 (1) (a) or under Order 44 Rule 13(1) (a) or viva voce evidence if it directs a triable issue and conducts a full-blown trial. Counsel submits that this court corrects the misstatement of the law and come to the conclusion that what transpired between the parties in the High Court regarding the interpleader was regulated by Order 44 rule 13.

Counsel submits that by the decision of this court in **Republic v. High Court, Accra** Ex parte: Anyam (Platinum Holdings Interested Party) [2009] SCGLR 255 it is legitimate for a party to claim damages in an interpleader action. Counsel contends that where a trial court gives a ruling under Rule 13 (4), he has 14 days to appeal under Rule 13 (4), he should be prudent to lodge a claim for damages for wrongful attachment and not wait for 3 years before bringing a fresh action. Counsel further submits that a law maker envisages other reliefs available to the claimant or judgment creditor hence the words "or any other matter as it considers just" in subrule (4).

Counsel contends that the issue of damages came to the notice of the respondents 3 years after the interpleader has been settled. Finally counsel submitted that the trial judge by the rule in **Henderson v. Henderson** was right in her conclusions that it was not permissible for the respondents to conduct their case in piece meal and that the Court of Appeal was wrong in disturbing the decision of the trial judge.

SUBMISSION BY COUNSEL FOR THE RESPONDENTS

Learned Counsel for the respondents submits that estoppel per rem judicatam does not arise at all and that the appellant failed to establish the conditions for estoppel because the parties herein are not the same and the subject matter is different.

Counsel contends that the interpleader action was sought in affidavit evidence and it is not the mode of proving special damages among other reliefs. Counsel cites **Hajar v. Staveley & Co** (Motors) [1968]GLR 114 **Agyekum v Alawiye** [1987-88] GLR 1 to the effect that wherethere is wrongful execution, an action could lie against same. Counsel also cites **Dahabieh v S. A. Turqui & Bros** [2001-2002] SCGLR 498 at 509 and **Badu v Adampa** [1976] 2 GLR 450 at 453 that a declaratory judgment or ruling confers a right upon which a fresh action may be mounted. Counsel prays that the judgment of the trial court be set aside and the matter placed before a court differently constituted.

ISSUES FOR DETERMINATION OF THE APPEAL

The core issue(s) to be resolved is whether the Respondents are estopped per rem judicatam from claiming special damages in the instant suit and whether or not the respondents are caught by the principle in Henderson v Henderson [1843] Hare 100 by pursuing the issue of damages in piecemeal.

DETERMINATION OF THE APPEAL

After a perusal of the record of appeal it is our candid opinion that both grounds of appeal could be determined and subsumed under the omnibus ground that is the judgment is against the weight of evidence. There are a plethora of decisions of this

court on the subject. In **Eric Kofi Asamoah & Anor v. Stephen Nyamekye & Anor** [2019]DLSC 6355 at page 3, Marful-Sau JSC. (blessed memory) in his judgment stated the principle of law that the onus is on the appellant who so alleged this ground of appeal to demonstrate from the record that the court whose decision is impugned erred in its evaluation of evidence on record or that the court misapplied a law in its judgment occasioning substantial injustice. See **Tuakwa v Bosom** [2001-2002] SCGLR 61,**Djin v. Musa Baako [2007 – 2008] 1 SCGLR 686, Oppong Kofi v. Awulae Attibrukusu III** [2011] 1 SCGLR 176 and In re **Asamoah (Decd) Agyeiwaa & Ors v. Manu**, [2013-2014] 2 SCGLR 909. Indeed, since an appeal is by way of rehearing, we look at the totality of the evidence on record and draw the necessary inferences fromthe factswhich were clearly established by both oral and document evidence adduced at the trial and come to our own conclusion.

In the instant appeal, were the respondents caught by estoppel per rem judicatem?

In paragraph 12 of the Statement of defence on page 10 of the record of appeal, the respondents pleaded as follows:-

> "12. In further contention the defendants shall contend that the plaintiffs action is caught by issue estoppel as they had the opportunity to make those claims at the time the issue came up for determination by the court."

It was this pleading that influenced the learned trial judge to set down the issue of estoppel to be determined as a preliminary argument for which the parties filed their written submissions. The learned trial judge after hearing the parties on their written submissions dismissed the entire action and held at page 148 of the record of appeal as follows:-

> "it is the opinion of the court that to allow the prosecution of the instant action would amount to piece-meal litigation which the law frowns upon. Plaintiffs have

had the opportunity in the interpleader action to bring their whole case before the court for determination once and for all but they failed to do so. Failure to seek the reliefs in the present action in the interpleader action is plaintiff's own fault aid cannot be basis to open the matter again, the instant action flowing from the interpleader action. There are no exceptional circumstances such as fraud to warrant the reopening of the case between the parties.In the result, the plaintiffs are caught by issue estoppel. Consequently, the instant action is dismissed in its entirety."

Indeed, the learned trial judge misunderstood what interpleader stood for and also the principle of estoppel per rem judicatam. The Court of Appeal in our view rightly stated the position of the law when the learned Justices set aside the judgment of the trial court and held that:-

> "In the circumstance, it is our view that the instant suit which followed the interpleader proceedings under Order 44 rule 12 and 13, did not seek a relief that ought to have been sought in the said interpleader proceedings. The instant suit could therefore not be described as piece meal litigation, and the issue of damages was not res Judicata as was held by the learned trial judge."

Order 44 rule 13 (1) (a) and (b) of C.I. 47 provides:

> "Powers of Court hearing application for relief
> (1) Where on the hearing of proceedings pursuant to an order made under rule 12(4) all the persons by whom adverse claims to the property in dispute, in this rule referred to as "the claimants" appear, the court may
> a) summarily determine the question in issue between the claimants and execution creditor and make an order accordingly on such terms as may be just; or

b) order that any issue between the claimants and the execution creditor be stated and tried and may direct which of them is to be plaintiff and which defendant.

(4) For the purpose of this rule, the court may give judgment or make such order as may finally dispose of all questions arising between any claimant and the execution creditor."

It is noted that Order 48 of C.I. 47 is one of the modes of interpleader proceedings known as stakeholder interpleader and the one under order 44 is called the Registrar's interpleader. In these instances, it is order 44 that is relevant to this case. Proceedings like any other interpleader under order 44 rules 12 and 13 is initiated by the Registrar of the court after the judgment creditor files a writ of fiera fiecias. The Registrar in his duties as the sheriff, may attach propertywhich does not belong to the judgment debtor but belonged to a different owner. To avoid embarrassment, the Registrar is compelled to seek relief by way of interpleader from the court to pronounce on the ownership of the properties claimed by two owners; with the judgment creditor alleging that the properties belonged to the judgment debtor and the claimant. Interpleader proceedings were clarified **in Salama v. Sharani**[1974] 2 GLR 364 at 367 which was decided under the old High Court (Civil Procedure Rules) LN 140 but relevant under the new C.I. 47 as follows;-

> "Interpleader proceedings should not be confused with an ordinary action. The most important object of these interpleader proceedings is to enable the [registrar], who has seized the property and is now in possession thereof, to obtain a relief and to get a decision of the court regards the person to whom he has to release the property. The claims in respect of the property seized are made against the [registrar] and he is in the technical sense, the defendant since the rival claims are being made against him. So that in a way, the interpleader proceedings are intended for the benefits of the [registrar], inasmuch as the decision of the court in the

proceedings, as I have stated would give him a relief and would also enable him to know the right person to whom he should release the property to. The [registrar] therefore issues out the interpleader summons to compel all the parties making the claims against him to come to court to establish the validity of their respective claims; and since he has no title himself, he drops out of the subsequent proceedings altogether."

See also the dictum of Apaloo JSC (as he then was) in R. T. Briscoe Ghana Ltd v Pfeko [1964] GLR 322 at 329.

Further, In Republic v High Court, Accra Ex parte Anyan [2009] SCGLR 255 at 561, the Supreme Court adopted the definition of a sheriff interpleader thus:-

"'Interpleader' is a proceeding by which a person, frown whom two or more persons claim the same property or debt or land who does not himself claim the property or dispute the debt can protect himself from legal proceedings by calling upon the two claimants to interplead that is to say, claim against one another so that the title to the property or debt may be decided. Interpleaders may be divided into two types; the first is where a sheriff seizes or intends to seize goods by way of execution and a person (other than the judgment debtor) claims them. Here the sheriff initiates the proceedings to determine whether the property belongs to the judgment debtor (and therefore can be seized) or to the claimant."

It must also be noted that it is the court that exercises its discretion to direct as to which of the claimants should be in the position of a plaintiff or a defendant but in the technical sense the matter is not an action.

Further, there are two modes for the determination of an interpleader under C.I. 47.The first is under 44 rules 12 and 13 which contain a simple procedure. The second is under Order 48 rule 1 (b) which provides for the determination of an interpleader claim by the

registrar where a third party lays claim to the property taken in execution, which the judgment creditor disputes.

Indeed, Order 44 rules 12 of C.I. 47 prescribes the procedure the Registrar must adopt in case ofa claimant whose property had been seized in execution. Order 44 rule 13(1) (a) and (b) provides the mode of hearing the Registrar's application for relief as when the execution creditor as well as the claimant appear before the court, the court may either determine the matter summarily between the parties and make an order accordingly, or order that any issue between them be tried and may direct which of them is to be plaintiff and which defendant. In the latter case, the proceedings are transformed into an interpleader action in which the court is given power to give such judgment or make such order as may finally dispose of all questions between any claimant and the execution creditor under Order 44 rule 13 (4). The position under Order 44 rule 13 was succinctly explained in **Martin AlamisiAmidu v the Attorney-General**, Waterville Holdings (BVI) Ltd and Alfred Agbesi Woyomi and UT Bank Ltd (in Receivership/and Anator. Holdings Co. Ltd and Anator Quarry Co. Ltd [2019] DLSC 6497 at page 4 per Benin JSC held that it is reasonable to say that the court cannot make determination just by looking at the notice of claim, it requires some form of evidence, by affidavit (if it opts to a summary hearing under rule 13(1) (a) or viva voce evidence if it directs a triable issue and thus decided to conduct a full-blown trial in complex cases, under rule 13 (1) (b). Consequently, the court is duty bound to have regard to both the notice and affidavit of interest filed by a claimant in making a determination of a claim. Thus where a claimant fails to disclose his right to or interest in some property in the notice of claim but does so in the affidavit of interest, it is not a fatal mistake or omission, and could be cured applying the provisions of Order 81 of C.I. 47. The reasons are two-fold: (1) that the judgment creditor has sufficient notice and the opportunity to react to the affidavit of interest by claimant before the court takes a decision under rule 1 (2) to avoid multiplicity of such claims. Admittedly, it is advisable for a claimant to disclose whatever interest he has in their notice of claim to enable the execution creditor to admit or dispute the claim, yet failure to do as already stated is not fatal in the light of the reasons given herein.

A perusal of the record of appeal indicates that although the judgment creditor was notified of the claimant's interest by the Registrar as required under Order 44 rule 12 rule (1) (3) (a) and (b), the judgment creditor failed to admit or dispute the claimant's claim. It is on record that after the Registrar applied to the court under Order 44 rule (1) (4) for relief, the learned counsel for the judgment creditor upon viewing the documentation submitted by the claimants admitted the wrongful execution. Further, it was this admission that led the court to deliver a ruling in which the court ordered the release of the wrongfully attached property tothe claimants. It is worthy of note that in the circumstances, the court did not find it necessary to order an interpleader action but rather restored the wrongfully attached properties to the rightful claimants. The matter did not end up as an interpleader action with designated parties that is a plaintiff and a defendant which would have brought the matter to a finality as required under order 44 rule 13 (4) of C. I. 47.

The issue is whether or not the respondents could have claimed for damages and their failure to claim damages in the earlier suit constitutes an estoppel per rem judicatam. While the learned trial judge held that estoppel per rem judicata arises, the learned justices of the first appellate court thought otherwise.We have held earlier in this judgment that the court's summary determination of the claimants' claim occurred when the judgment creditors' counsel admitted the wrongful execution, terminated the proceedings and dispensed with the need for trial in the ownership between the parties the learned trial judge at page 147 of the record of appeal had in her judgment, held that the claimants could have made claims for damages to be determined in the interpleader action but failed to do so and the instant action flowing from the interpleader action, the claimants were caught by issue estoppel.

Estoppel per rem judicatam is of two kinds, namely cause of action estoppel and issue and issue estoppel. In re Asere Stool: Nikoi Olai Amontia IV (substituted by Laryea Ayilai

II [2005-2006] SCGLR 637 Holding (1), this court stated the law on estoppel per rem judicatam as follows:

> "Estoppel per rem judicatam is a generic term which in modern law, includes two species. The first species is called "cause of action estoppel" which prevents a party to an action from asserting or denying, as against the other party, the existence of a particular cause of action, the non-existence or existence of which has been determined by a court of competent jurisdiction in previous litigation between the same parties. If the cause of action was determined to exist, i.e. judgment given on it, it is said to be merged in the judgment, the Latin phrase being transit in rem judicatam. If it was determined not to exist, the unsuccessful party can no longer assert that it does; he is estopped per rem judicatam. This is simply an application of public policy expressed in the Latin maxim nemo debet bis vexari pro uno et eadem causa, meaning literally, that no man ought to be twice put to trouble, if it appears to the court that it is for one and the same cause. The second species is called "issue estoppel" which is an extension of the same rule of public policy. This will arise where apart from cases in which the same cause of action or the same plea in defence is raised, there may be cases in which a party may be held to be estopped from raising particular issues if those issues are precisely the same as the issues which have been previously raised and have been the subject of adjudication."
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> See also In re Sekyedumase Stool Affairs: **Nyame v. Kesse alia Konto** [1998-99] SCGLR476, **Poku v. Frimpong** [1972] GLR 230 **Dahabieh v. S A Turqui**& Bros [2001-2001] SCGLR 498 **Justice Gilbert Quaye (substd by Daniel Quaye) v. Koiwah Investment Co. Ltd** & 3 others {2019-2020] SCGLR 658 Holding(1).

In the instant case, we would adopt the holding of the learned justices of the Court of Appeal who ruled on the issue estoppel at page 176 of the record of appeal as follows:-

"the learned trial judge held that although arising out of the execution of judgment in the main suit the parties to the interpleader proceedings were same as in subsequent suit thus grounding estoppel. But we have already indicated in that the proceedings that took place in the interpleader proceedings did not end up in the trial of an issue between the parties. It remained an application for relief brought by the Registrar although the ownership of the attached goods was pronounced upon when counsel for the execution creditor declared himself to be satisfied that the properties did not belong to the judgment debtor but to the claimants, and it resulted in the release from attachment of wrongful attached goods."

Indeed, a perusal of the record of appeal meant that the parties in Suit NO.C2/21/2015 are not the same, the suit was not determined to finality and the issues are not the same and therefore issue estoppel would not arise.
Further, the earlier action was fought on affidavit evidence which could not be the mode for proving damages and the ruling on the relief granted did not award damages.

Moreover, a ruling, having arisen out of proceedings relating to an execution process can only be interlocutory. While interpleader proceedings may determine the rights of the parties in relation to the ownership of the items seized in execution, such proceedings have been held to be interlocutory.
See **Network Computer Systems (NCS) Ltd v. Intelsat Global Sales & Marketing Ltd** [2012] 1 SCGLR 218 at 226 citing **Agoti v. Agbenoku** [1978] GLR CA which held that a decision on an interpleader summons is interlocutorysince it arises out of some other matter.
What constitutes interlocutory was decided by this court **in Republic v High Court (Fast Track Division) Accra**; Ex parte State Housing Co. Ltd (No.2), (Koranten-Amoako Interested Party) [2009] SCGLR 185 wherein Georgina Wood CJ delivered the judgment as follows:-

"In our view… an interlocutory' order has also been defined in Halsbury's Laws of England (4th ed.), Vol. 26, paragraph 506 as:
'An order which does not deal with the final rights of the parties, but either (1) is made before judgment and gives no final decision on the matters in dispute but is merely on a matter of procedure; or (2) is made after judgment, and merely directs how the declarations of right already given in the final judgment are to worked out, is termed 'interlocutory'."

See also **Network Computer System Ltd v Intelsat Global Sales & Marketing Ltd (supra) Holding (1).** In this case, it is thus clear that the proceedings as determined by the trial court were interlocutory which did not finally dispose of the rights of the parties.

Learned Counsel cited **Republic v. High Court, Accra,** Ex parte Anyan (Supra) to the effect that this court had held that it is legitimate for a party to claim damages in an interpleader action. A perusal of the said case did not hold that damages could be included in interpleader actions.

Now, the learned counsel for the appellant submitted that the trial judge was right in her conclusion that it was not permissible for the respondents to conduct their case in piecemeal and therefore the Court of Appeal was wrong in misapplying the law. Abuse of judicial process in the context of estoppel is sometimes described as the principle in Henderson v. Henderson [1843] Hare 100 and was rephrased in modern terms in **Barrow v. Bankside Agency Ltd** [1966] 1 WLR 275 at 260 CA in the following terms:

"It requires the parties, when a matter becomes the subject matter of litigation between them in a court of competent jurisdiction, to bring their whole case before the court so that all aspects of it may be finally decided (subject of course to any appeal) once and for all. In the absence of special circumstances, parties cannot return to the court to advance arguments, claims or defences which they

could have put forward for decisions on the first occasion but failed to raise. The rule is not based on res judicata in the narrow sense, or any strict doctrine of issue or cause of action estoppel. It is a rule of public policy based on the desirability that litigation should not drag on forever and that a defendant should not be oppressed in successive suits when one would do. That is the abuse at which the rule is directed."

The principle has been applied in **Sasu v. Amua-Sakyi & Anor**[2003-2004] 742 at 769 where Date-Bah JSC expatiated on the doctrine in Henderson v. Henderson as follows:

"As Lord Bingham of Cornhill observed in Johnson v. Gove Woodard Co. [2002] AC 1 at 31, the three doctrines of cause of action estoppel, issue estoppel and the rule in Henderson v. Henderson have a common purpose".

His Lordship further stated:

"But Henderson v. Henderson, abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same; that there should be finality in litigation and that a party should not be twice vexed in same matter."

See also In re Kwabeng Stool; **Karikari v. Ababio II** [2001-2002] SCGLR 515 and **NAOS Holding Inc. v. Ghana Commercial Bank Ltd** [2017] tech GLR 492 at 762: **Nana Amua Gyebu v. Ebusuapanyin Ahmed Nandeen Aziango v. Frank Isaac Mensah** [2018] DLSC 5635 at page 6.

The rationale behind the principle is that parties should bring their case to the court at one and give the court the chance to adjudicate on it once and for all based on the full facts should not be allowed to litigate piecemeal. If that is done, there will be no end to litigation. The principle is expounded in the Latin maxim as interest reipublicae at sit finis

litium which mean that it is in the interest of the state that litigation should be brought to an end and not protracted indefinitely.

In our view, the instant suit which followed the interpleader proceedings under Order 44 rule 12 and 13 did not seek a relief that ought to have been sought in the said interpleader proceedings and interpleader proceedings being interlocutory could not have resolved or taken care of the issue of special damages. It is our candid opinion that a perusal of the record of appeal indicate that the proceedings and judgment which followed was not a final judgment and the issues are not the same. The instant proceedings cannot by any stretch of imagination be described as piecemeal litigation and the issue of damages was not res judicata to constitute issue estoppel. Moreover, where there is wrong execution, an action could lie against same. See Hajar v. Staveley & Co. (Motors) [1968] GLR 114.The instance of piece-meal litigation does not is arise in this appeal.

In conclusion, the appeal isdismissed as without merit and the judgment of the Court of Appeal dated the 26th January 2020 is hereby affirmed. A further order is hereby made for the instant suit to be tried at the High Court differently constituted.

C. J. HONYENUGA
(JUSTICE OF THE SUPREME COURT)

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(JUSTICE OF THE SUPREME COURT)

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