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*430 De Francesco v Barnum

Positive/Neutral Judicial Consideration

Court
Chancery Division

Judgment Date
5 August 1890

Report Citation
[1889 D. 1890.]
(1890) 45 Ch. D. 430

ICLR

Chancery Division

Fry , L.J.

1890 Aug. 4, 5

Infant—Apprenticeship Deed—Validity—Unreasonable Provisions.

By an apprenticeship deed between an infant, her parent, and the Plaintiff, the infant was bound apprentice to the Plaintiff for seven years, to be taught stage dancing, upon certain terms, by one of which the infant contracted that she would not accept any professional engagement or contract matrimony during the said term without the consent of her master. The deed also contained mutual covenants by the master and the parent that the master would properly instruct the infant, and make certain payments to her for all dancing engagements in this country and in foreign or colonial countries; in return for which the infant's services were to be entirely at the disposal of the master. But there was no stipulation that the master should provide engagements for the infant or maintain her while unemployed. There was also a provision that the master might put an end to the apprenticeship if the infant should be found after fair trial unfit for the work of stage dancing, or should break any of the engagements of the deed, or in any way misconduct herself. The infant having made a professional engagement with the Defendant *B.* , the Plaintiff brought an *431 action against *B.* , the infant, and her parent, to enforce the provisions of the deed and for damages for breach of it:—

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Held, that the provisions of the deed were unreasonable, and could not be enforced against the infant or her parent; and consequently that no action would lie against *B.* for enticing her away from the Plaintiff's employment.

THIS was an action brought by the Plaintiff, George Giuseppe de Francesco, a teacher of stage dancing, against Phineas T. Barnum, S. A. de Parravicini, Elizabeth Parnell, widow, and Ada Parnell and *Helen Maude Parnell* , infants, alleging that the two infant Defendants had been bound apprentices to the Plaintiff to learn the art of stage dancing for a period which had not elapsed, and that they had been enticed away from his service by the Defendants *Barnum* and *Parravicini* , and claiming all sums earned by the infant Defendants while in the service of P. T. Barnum; and an injunction to restrain the infant Defendants from performing in the service of the Defendant *Barnum* ,, and for damages against all the Defendants, except the infants.

By an indenture of apprenticeship, dated the 6th of December, 1886, and made between the Defendant *Helen Maude Parnell* , an infant of the age of fourteen years, of the first part, Elizabeth Parnell, the mother of the infant, of the second part, and the Plaintiff of the third part, it was witnessed as follows:

> "That in pursuance of the said agreement in this behalf the said apprentice, by and with the consent of the parent, doth put herself apprentice to the said *Giuseppe Venuto de Francesco* to learn his art, and with him (after the manner of an apprentice) to serve from the 6th day of December, 1886, until the full end and term of seven years from thence next following, and to be fully complete and ended, during which term the said apprentice her said master faithfully shall serve, his secrets keep, his lawful commands everywhere obey. She shall do no damage to her said master, nor see it to be done by others, but that she to the utmost of her power shall let or forthwith give warning to her said master of the same. She shall not waste the goods of her said master, nor lend them unlawfully to any. She shall not contract matrimony within the said term. She shall neither contract professional engagements, nor accept such unless with the full written ***432** permission of her said master. She shall not absent herself from her said master's service unlawfully; but in all things as a faithful apprentice she shall behave herself toward her said master and all his during the said term. And the said Giuseppe de Francesco, in consideration of the faithful services of the said apprentice in the art of choreography, which he useth, by the best means that he can, shall teach and instruct, or cause to be taught and instructed, his said apprentice during the said term, but subject in all respects to the stipulations hereinafter mentioned. And this indenture also witnesseth, that in pursuance of the said agreement in this behalf, and in consideration of the premises, the parent and the said *Giuseppe Venuto de*

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Francesco hereby mutually covenant and agree with each other as follows, that is to say:

"1. That the said *Giuseppe Venuto de Francesco* , in conjunction with qualified assistants, shall instruct the said apprentice in the higher branches of the choreographic art for the term of seven years, to be computed from the date of these presents.

"2. That the said *Giuseppe Venuto de Francesco* shall pay to the said apprentice the following remuneration for all or any choreographic engagements of the said apprentice during the said term, viz.: in *London* and suburbs, for the first three years, 9d. per night, and 6d. for each *matinée* ; and for the remainder of the said term, 1s. per night, and 6d. for each *matineé* ;. The said *Giuseppe Venuto de Francesco* shall have the right to engage the said apprentice for performances in *America* or in any colonial and foreign state, and shall pay to the apprentice during the continuance of such engagement the sum of 5s. per week, and also provide the said apprentice with board and lodging during such last-mentioned engagement.

"3. In the event of there not being sufficient dancing the apprentice may be required for utility business, and shall be paid for such service at the rate of 6d. per night, or for such *matinée* .

"4. The services of the said apprentice shall be entirely at the disposal of the said *Giuseppe Venuto de Francesco* ; and the said apprentice shall not during the said term of seven years enter into any professional engagements without the permission in writing of the said *Giuseppe Venuto de Francesco* .

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"5. The said apprentice shall take and receive lessons daily (of one hour's duration), except Saturdays and Sundays, and except in case of ill-health, during

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performances, rehearsals, public holidays, or when otherwise unavoidably prevented.

"6. The said apprentice shall abide by and conform to the rules, orders, and regulations of the theatre where the said apprentice shall be engaged.

"7. The parents and apprentice shall conform to all the requirements of the *Education Acts* ; and the parents shall furnish the said *Giuseppe Venuto de Francesco* on the first day of each month with a governess' certificate that the said apprentice's scholastic obligations are strictly adhered to.

"8. In case the said *Giuseppe Venuto de Francesco* shall at any time during the said term be of opinion (after a fair trial) that the said apprentice is unfit from any cause whatever (either physical or otherwise) to pursue the avocation of stage dancing, the said *Giuseppe Venuto de Francesco* may put an end to these presents and every matter and thing herein contained by giving to the parents and the said apprentice notice in writing to that effect.

"9. Should the parents fail in the fulfilment of any of the terms of these presents on his or her part herein contained, or if the said apprentice shall fail to comply with. the rules and regulations which may be necessary for the fulfilment of any engagement, or accept any engagement without having previously obtained the written consent of the said Giuseppe Venuto de Francesco, or practise the art Or stage dancing under the direction of any person or persons other than the said Giuseppe Venuto de Francesco, or his assistants, or withhold her talents and best endeavours, or by direct or indirect insubordination, or fail to attend practice or rehearsal regularly and punctually, or decline to accept any engagement or stage business of which the said *Giuseppe Venuto de Francesco* may approve, or not give proper attention to her duties at the theatre or elsewhere; and above all, should the conduct of the apprentice be liable to blame in or out of school, the said *Giuseppe Venuto de Francesco* may by notice in writing, addressed in a

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> registered letter to the parents, or the survivor of them, put an end to these **434* presents; and the parents shall thereupon pay as and for liquidated damages to the said *Giuseppe Venuto de Francesco* the sum of £50."

The other deed, by which the Defendant *Ada Parnell* , then of the age of twelve years, was bound apprentice to the Plaintiff, was of the same date and in precisely similar terms.

In August, 1889, the infant Defendants entered into agreements with the Defendant *Parravicini* , as the agent of the Defendant *Barnum* , to perform as stage dancers at his show called *Olympia* at a salary of 21s. a week each.

On the 7th of November, 1889, the Plaintiff ascertained that the infant Defendants had signed agreements to perform for the Defendant *Barnum* , and he thereupon commenced the present action.

As soon as the action was commenced the Plaintiff moved for an injunction in terms of the writ. The motion was heard on the 22nd of November, 1889, by Mr. Justice *Chitty* , who refused the application with costs on the ground that the negative clause of an apprenticeship deed could not be enforced either at law or in equity against the infant apprentice [1] .

The Defendants *Barnum* and *Parravicini* in their defence denied that they had at the time when they engaged the infant Defendants, any knowledge that they were apprenticed to the Plaintiff, or that they had any intention to injure the Plaintiff in making the engagement. All the Defendants resisted the Plaintiff's claim on the ground that the stipulations in the deed were unreasonable and oppressive and against public policy, and that the deeds were void.

The action now came on for trial before Lord Justice *Fry* , sitting as an additional judge of the Chancery Division.

Both parties went into evidence. It was proved that the Plaintiff's establishment was well-conducted, and that he exercised proper care over his female apprentices. There was no satisfactory evidence that either of the Defendants *Barnum* and *Parravicini* had at the time of making the engagement with the infant Defendants any knowledge that they were the Plaintiff's apprentices.

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Neville , Q.C., and *Kalisch* , for the Plaintiff:—

We admit ourselves bound by the decision of Mr. Justice *Chitty* in this case [2] , that the Plaintiff has no right which he can enforce by injunction; but we contend that *Barnum's* inducing the infants to break their engagement is an actionable wrong, for which we are entitled to recover damages. That *Barnum* did not at first know of the apprenticeship is, we submit, immaterial, for he continued to employ the infants after he knew of it. This was held in *Blake v. Lanyon* [3] , which decided that such an action lies in the case of a servant. It also lies in the case of an employment of this nature: *Lumley v. Gye* [4] ; *Bowen v. Hall* [5] . [*Burnard v. Haggis* [6] , was also referred to.]

Warmington , Q.C., and *Lemon* , for the Defendant *Barnum* :—

Meriton v. Hornsby [7] , *Till v. Allen* [8] , and all the other cases where the right of the master to the profits made by an apprentice has been enforced, have been cases where there was no doubt as to the validity of the contract of apprenticeship. Here we contend the contract is one which cannot be enforced, as it is not beneficial to the infants.

[FRY, L.J.:—If the Plaintiff is a very distinguished teacher, might it not be a very advantageous bargain for the pupils?]

There were not such advantages as to make the bargain good as being beneficial to the infants. There is no contract for maintenance, no engagement to find employment for the infants, and no contract for wages except while they are employed. The statutes 5 Eliz. c. 4; 54 Geo. 3, c. 96; 38 & 39 Vict. c. 86, s. 17; 38 & 39 Vict. c. 90, do not apply to an employment of this description. The case then is governed by common law, and such a one-sided agreement as this cannot be supported: *Reg. v. Lord* [9] ; *Meakin v. Morris* [10] , in which latter case doubt ***436** is thrown upon *Leslie v. Fitzpatrick* [11] . [*Webb v. England* [12] , and *Cooper v. Cooper* [13] , were also referred to.]

T. L. Wilkinson , for the Defendant *Parravicini* :—

I will only add, that clause 8 of the agreement gives the Plaintiff such an arbitrary and unreasonable power that the agreement cannot stand. *Parravicini* did not know of the agreement with the Plaintiff when he as agent for *Barnum* negotiated for the services of the infants, and after the agreement he made had been entered into he was *functus officio* . There is, therefore, no possible right of action against him.

W. H. Stevenson , for the infant Defendants:—

The deeds are not for the benefit of the infants, and are therefore wholly void. The only ground on which an apprenticeship deed is binding on an infant is that it is for his benefit; but il the deed contains such provisions that it is not for the infant's benefit, but for his detriment, the reason for upholding the deed is gone, and it is void both against the infant and against all other parties. No

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doubt these deeds contain provisions for the instruction of the infants in dancing; but the question is whether, taken on the whole, the contract was prejudicial to them.

When the clauses in the deeds are looked at they are most unfair to the infants: they were to be absolutely in his power; they could make no engagement without his permission; and, on the other hand, he was not bound on his part to find them engagements, or to maintain them in any way when unemployed; so that he had the power to deprive them altogether of their livelihood. And even during the engagements which he might provide for them, the remuneration was unreasonably small. The Plaintiff also had the power at any time of putting an end to the engagement if dissatisfied with the infants for any reason, while they had no corresponding power on their part. The whole bargain was one-sided and oppressive, and cannot stand.

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Sinclair-Cox , for Mrs. *Parnell* :—

The provisions in the deeds are not only oppressive to the infants, but are against public policy. They are a restraint on trade; they are a restraint on matrimony; they are in derogation of the rights of the parent; and they give the Plaintiff power to take the infants out of the jurisdiction.

Kalisch , in reply.

FRY, L.J.:—

This is an action brought by Signor *De Francesco* , who is the proprietor and manager of a large school for the teaching of ballet-dancers, against several Defendants. Those Defendants are, in the first place, Mr. *Barnum* , who, at the time this action was brought, was described as proprietor of a certain show, known as *Barnum's* show, at *Olympia* . The next Defendant is a Signor *Parravicini* , who is a theatrical agent in *London* , and who was employed by Mr. *Barnum* to engage ballet-dancers for him. The next Defendant is Mrs. *Parnell* , who is the mother of the two infants, the ballet-girls; and lastly come the two infant Defendants, who have been apprenticed to Signor De Francesco; those are the parties to the action.

In the first place, with regard to the two infants, the case appears to me to have been determined by Mr. Justice *Chitty* when it came before him on the motion. I say that for this reason, that he pointed out in his judgment, that so far back as the reign of *Charles* I. it had been determined that an infant could not be sued at law upon an apprenticeship indenture; that there are other remedies which the master may have recourse to, but that he cannot sue the apprentice at law, and, furthermore, that there is no case in which the apprentice has been sued in equity; and he came to the conclusion that that authority was binding on him, unless after the various statutes, the statute of *Elizabeth* and the subsequent statutes, with regard to apprenticeship were all examined, there were some explanation given of that authority. Mr. *Neville* very candidly stated, that after examining the statutes, he was unable to offer any explanation of that authority, and, therefore, he very wisely and rightly ***438** suggested that I should probably not want to reconsider that branch of the argument, but consider myself bound by what Mr. Justice *Chitty* had done in this case. Therefore, the case has not been

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elaborately argued on that point; and I only, on this part of the case, follow Mr. Justice *Chitty* , at the same time saying, that nothing that has been said has created in my mind any reasonable belief that the decision of Mr. Justice *Chitty* was not perfectly in accordance with the law. For my own part, I should be very unwilling to extend decisions the effect of which is to compel persons who are not desirous of maintaining continuous personal relations with one another to continue those personal relations. I have a strong impression and a strong feeling that it is not in the interest of mankind that the rule of specific performance should be extended to such cases. I think the Courts are bound to be jealous, lest they should turn contracts of service into contracts of slavery; and therefore, speaking for myself, I should lean against the extension of the doctrine of specific performance and injunction in such a manner. So much for the case against the infants.

With regard to the first Defendant, Mr. *Barnum* , the case stands in this way. It is alleged that he has enticed away the apprentices of Signor *De Francesco* ; that he has done so with the knowledge of their engagement with Signor *De Francesco* , and consequently that what he did was in law malicious; and that he would be liable in damages for the malicious act. To that his defence is this, that the indentures of apprenticeship which were entered into between the infants and Signor *De Francesco* were not valid and binding in law, and that that being so the whole structure of the case against him fails; and he further argued that he had not done anything which was malicious, and that there was no employment in fact of which they were deprived, or from which they were enticed away. He has further urged that there is no evidence of damage before me to justify my pronouncing a judgment against him for damages.

The most important question in this case is the first of those propositions which has been urged at the Bar on Mr. *Barnunm's* behalf. Is there or is there not in this case a valid contract between the infants and Signor *De Francesco* ? Now, from a ***439** very early date it has been held that one exception as to the incapacity of an infant to bind himself relates to a contract for his good teaching or instruction whereby he may profit himself afterwards, to use Lord *Coke's* language. There is another exception, which is based on the desirableness of infants employing themselves in labour; therefore, where you get a contract for labour and you have a remuneration of wages, that contract, I think, must be taken to be, *primâ facie* , binding upon an infant. At any rate, it is plain that the contract by which an infant binds himself to learn an art or trade to his own future profit is, *primâ facie* , valid and binding. But no doubt the law has grafted on that general principle certain well-known and defined exceptions. It has been held from the time of Lord *Coke* , that an infant cannot bind himself to be liable to a penalty; that the contract to impose a penalty on an infant is void. Again, it has been held that a contract by which an infant renders his vested interest subject to forfeiture is void against the infant; and again, I think it may be taken that, wherever you find extraordinary or unusual stipulations contained in a contract, either of apprenticeship or of service, there the Court at least must be on the watch lest the infant should be held to be bound by a contract which is not reasonable and which is not good in law and which is not maintainable.

Now I approach this subject with the observation that it appears to me that the question is this, Is the contract for the benefit of the infant? Not, Is any one particular stipulation for the benefit of the infant? Because it is obvious that the contract of apprenticeship or the contract of labour must, like

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any other contract, contain some stipulations for the benefit of the one contracting party, and some for the benefit of the other. It is not because you can lay your hand on a particular stipulation which you may say is against the infant's benefit, that therefore the whole contract is not for the benefit of the infant. The Court must look at the whole contract, having regard to the circumstances of the case, and determine, subject to any principles of law which may be ascertained by the cases, whether the contract is or is not beneficial. That appears to me to be in substance a question of fact. ***440**

Now in the present case I must bear in mind that the two girls who were apprenticed in the year 1886 were at that time not ignorant of the art of dancing. It appears they had learnt something of it from their mother, who herself had been connected with the theatre, and also from friends who were familiar with the art of dancing. By this indenture, which I have already mentioned, dated December, 1886, the Defendant, Helen Maude Parnell, with the consent of her parent, put herself apprentice to Signor *De Francesco* , to learn from the 6th day of December, 1886, until the full end of the term of seven years from thence next following, during which term the apprentice should her master faithfully serve, and so forth, with the usual stipulations with regard to faithful service. There is the further stipulation that she shall not contract matrimony within the said term, and further that she shall not accept professional engagements unless with the full written permission of her master. Now, so far, the contract, with the exception of the stipulation about matrimony, seems to be of a usual description. But then we come to the clauses by which Signor *De Francesco* undertakes his duties towards the child. In the first place, he agrees that he will, with qualified assistants, instruct the apprentice in what are described as “the higher branches of the choreographic art,” which I understand to be dancing, “for the term of seven years.” Then he agrees to pay the apprentice “the following remuneration for all or any choreographic engagements of the said apprentice during the said term, namely, in London and suburbs, for the first three years, 9d. per night, and 6d. for each *matinée* ; and for the remainder of the said term, 1s. per night, and 6d. for each *matinée* .” Then, further, he shall have the right to engage the apprentice to performances in *America* or any foreign or colonial state, and shall pay to the apprentice, during the maintenance of such engagement abroad, the sum of 5s. a week, and provide the apprentice with board and lodging during such last-mentioned. engagement.

It is obvious that that is a very unusual stipulation. There is no provision for remuneration of any sort or kind, except during the engagement. There are no wages to be paid to the girls except during the engagement. The matter, therefore, ***441** rests with Signor *De Francesco* as to how far those children shall take any wages at all. Nor can it be entirely put out of consideration that he has a right to send these apprentices for performances to any foreign state or foreign country, a power which, if exercised, would remove the infants, or probably would remove the infants from maternal care. Now perhaps it is right at this point that I should say that, so far as the evidence goes, I am satisfied that the establishment of Signor *De Francesco* is carried on in a thoroughly careful and respectable manner. It appears that whenever the girls go anywhere out of *London* they are placed under the care of matrons, whose duty it is to look after them, and that a similar care has been extended to them when there has been a performance at the Crystal Palace, and they had to take the journey between *London* and *Sydenham* . The mother, who was in the witness-box, says explicitly, so lar

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as regards the care whilst the children had been under Signor *De Francesco's* management, she has no complaint to make whatever. I say that by way of parenthesis. At the same time it is obvious that the clause I have read places a very large power indeed in the hands of Signor *De Francesco* .

The next provision is, that if there is not sufficient dancing the apprentice may be required to do utility business and receive certain remuneration. That would not seem unreasonable. Then it is provided: “The services of the apprentice shall be entirely at the disposal of Signor *De Francesco* , and the said apprentice shall not during the said term of seven years enter into any professional engagements without the permission in writing of the said Signor *De Francesco* .” Be it observed there is no corresponding obligation on the part of Signor *De Francesco* . He requires the infant to enter into no engagements without his permission, but does not in any corresponding way bind himself to any extent to provide engagements or employment for the infant.

Then comes the provision with regard to the apprentices receiving lessons, and a provision as to the rules and regulations of the theatre. They all seem reasonable; and then there is a provision which is praiseworthy, requiring the infant to conform to the *Education Act* , and then comes the 8th clause: “In case ***442** the said *Giuseppe de Francesco* shall at any time during the said term be of opinion (after a fair trial) that the said apprentice is unfit from any cause whatever (either physical or otherwise) to pursue the avocation of stage dancing, the said Signor *De Francesco* may put an end to these presents and every matter and thing, herein contained by giving to the parents and the said apprentice notice in writing to that effect.” Now, be it observed that that clause is provided to operate throughout the whole seven years. It might be put in force at any time, subject only to this, that it must be after a fair trial. But what is a fair trial? How long, after the fair trial this notice may be given is not stipulated for in any manner whatsoever. We have therefore, to put it shortly, the contract under which the infant is placed, I might almost say absolutely, at the disposal of the teacher. The child may be required to undertake any engagements at any theatre in *England* , or any theatre in the *United Kingdom* , or anywhere else in the world. The child is to receive no remuneration, no maintenance except when employed; there is no correlative obligation on Signor *De Francesco* to find employment for the child; there is power in him to put an end to a child's chances of success at any time after trial.

Those are stipulations of an extraordinary and an unusual character, which throw, or appear to throw, an inordinate power into the hands of the master without any correlative obligation on the part of the master. I cannot, therefore, say that on the face of this instrument it appears to be one which the Court ought to hold to be for the benefit of the infant.

Now, I will suppose myself sitting in Chambers administering the jurisdiction in this division of the Court over infants; and I ask myself whether I should approve of such a contract as that as being for the benefit of an infant ward of Court—assuming of course, in so doing, that the infant ward of Court was one whom it was desirable to apprentice to the art of a ballet-dancer. I cannot say that I should hold anything of the kind. It may be that evidence could be tendered which would shew me that no other form of contract is available, that the same contract prevails in every school, and that no person can hope to enter the profession of a ballet-dancer except by apprenticeship

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in these terms. ***443** That may be so. But no evidence of the sort has been tendered before me. I have undoubtedly this in favour of upholding it, that the school of the Plaintiff is said by Mrs. *Parnell* to be a very excellent school, and, for anything I know, it may be the best in *London* , and, I have already said, Signor *De Francesco* is a person who is well able to, and does, protect the interest of the girls who are under his care. At the same time, this contract seems to me to place in his hands an inordinate power, which, except under the pressure of some evidence which has not been given, I cannot help being of opinion is not for the infants' benefit.

I hold, therefore, this instrument is one by which the infants are not bound; and consequently Mr. *Barnum* , having only en ticed them away from an employment or contract of a nature which is not binding upon them, no action can be maintained against Mr. *Barnum* .

[His Lordship further stated his conclusion that it had not been proved that *Parravicini* did anything whatever with any knowledge of the engagement between the Plaintiff and the girls, and dismissed the action against all Defendants with costs to be paid by the Plaintiff.]

Representation

Solicitors for Plaintiff: Brandon & Nicholson .
Solicitors for Defendants: E. Levy ; Clinton & Co.

(M. W.)

Footnotes

1 *43 Ch. D. 165* .
2 *43 Ch. D. 165* .
3 *6 T. R. 221* .
4 *2 E. & B. 216* .
5 *6 Q. B. D. 333* .
6 *14 C. B. (N.S.) 45* .
7 *1 Ves. Sen. 48* .
8 Ibid. 83.
9 *12 Q. B. 757* .
10 *12 Q. B. D. 352* .
11 *3 Q. B. D. 229* .
12 *29 Beav. 44* .
13 *13 App. Cas. 88* .

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