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Justice Frankfurter had dissented in *Lincoln Mills*, expressing a fear of the legislative power exercised by virtue of "judicial inventiveness"[14] creating a body of law peculiar to collective-bargaining agreements. Justice Frankfurter dissented again in *Benedict*, stating that Section 301 (b) of the Taft-Hartley Act specifically protects individual members from *money judgments* rendered against them solely by "virtue of their union membership,"[15] while Section 302(c)(5) of the same Act was passed to insure that welfare agreements be couched in specific terms assuring receipt of the benefits by union members.[16]

In conclusion, Justice Frankfurter fails to find any justification, either in the nature of the agreement or in legislative policy expressed in the Taft-Hartley Act for "jettisoning principles of fairness and justice"[17] applicable to *all contracts*. In his view a "new law of collective bargaining agreements"[18] has been created.

[14] Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 465 (1957). Justice Frankfurter's opinion that § 301 is a strictly procedural provision is set out in great detail in Employees v. Westinghouse Corporation, 348 U.S. 437, 441 to 449, 452 to 459 (1955).

[15] Lewis v. Benedict Coal Corporation, 80 S.Ct. 489, 497 (1960).

[16] Justice Frankfurter quotes at 498 from Arroyo v. United States, 359 U.S. 419 (1959).

[17] Lewis v. Benedict Coal Corporation, 80 S.Ct. 489, 498 (1960).

[18] As was prophesized in Cox, The Legal Nature of Collective Bargaining Agreements, in Collective Bargaining and the Law (Univ. of Mich. Law School), pp. 121–122, and quoted by Justice Frankfurter in *Benedict* at 498, 499.

CONTRACTS–UNIQUE TRI-PARTY PROMISE: "I PROMISE THAT X WILL DRAIN THE MARSH" HELD BINDING

Plaintiff was in the market for a new home. A real estate salesman directed him to a lot fronting on a marsh. The salesman assured plaintiff that the original developer of that area intended to convert the marsh into a lake and that the realty company was "going to see it was done" because the company owned other lots in the vicinity. Similar assurances came from Barcroft Woods, Inc., owner of the lots in question, and defendant in the ensuing litigation. Plaintiff and the real estate dealer both testified that the original developer of the subdivision orally indicated his firm intention that he would lower the marsh water. The developer denies this.

All references to the anticipated lake culminated in provision for it in a contract between defendant Barcroft Woods, Inc., and plaintiff purchaser, for the sale of a lot improved by a newly constructed house and a forty-foot beach. The contract provided: "It is further understood that the lake

is to be 'cleaned out' up to lot 685 by [the original developer]. Beach is to be forty feet wide and not to be installed until lake is lowered by [original developer]. "Plaintiff paid a greater price for his lot than other lots in the subdivision would cost, due to its location near the lake. However, the original developer refused to convert the marsh into a lake. The Virginia Supreme Court held that the inability to control developer's actions did not release promisor from its obligation. *Barcroft Woods, Inc. v. Francis,* 111 S.E.2d 512 (Va., 1959).

"A promise is an undertaking . . . that something shall happen or that something shall not happen in the future."[1] American courts have historically indicated that the "something" shall happen or not happen because of the action or inaction of the promisor either as a primary actor[2] or as a surety.[3] Recently, however, the Supreme Court of Appeals of Virginia, in deciding the *Barcroft* case, announced that: "Contracts frequently carry provisions whereby the promisor binds himself to procure *the performance of an act by a third party,*"[4] and consequently bestowed the title "promise" on a most unique grammatical structure.

Thus, the defendant acquired its obligation to have a third party drain a marsh. A casual observer might conclude, due to the fact that the "understanding" in regard to marsh drainage was signed by *both* parties, that plaintiff was to arrange for this necessary improvement in order that defendant might install a beach in accordance with the contract. The court, however, relying heavily upon parol evidence, concluded that the assurances made by the sales agent prior to the written agreement, which prompted plaintiff to pay a premium price for the lot purchased, clearly show that the purpose of the "understanding" inserted in the contract was to bind defendant for construction of the lake by the developers.

Further, once it was determined that promisor has this duty, the refusal or failure of a third person to take action essential to the performance did not, according to the Virginia court, excuse the promisor.[5] The court fails to point out that the failure by the third person in cases relied upon, has

[1] Restatement of Contracts, § 2.

[2] E.g., "A promise is a declaration by any person of his intention to do or forbear from anything at the request or for the use of another." Finlay v. Swirsky, 103 Conn. 624, 632, 131 Atl. 420, 423 (1925).

[3] "Suretyship is the relation which exists where one person has undertaken an obligation and another person is also under an obligation or other duty to the obligee, who is entitled to but one performance, and as between the two who are bound, one rather than the other should perform." Restatement of Security, § 82.

[4] Barcroft Woods, Inc. v. Francis, 111 S.E.2d 512, 516 (Va., 1959) (emphasis supplied).

[5] For this principle the court relied on 12 Am.Jur.,Contracts, § 370, pp. 941, 942, and Williston on Contracts, Rev. Ed., Vol. 6, § 1932, pp. 5413, 5414.

invariably been to perform some *preceding act,* which failure rendered action by the promisor impossible. In the instant case, through inaction, the third person has rendered "impossible" its own action which it was not bound to perform, but which defendant had bound itself to procure.

Some twelve years prior to the instant case, a Massachusetts court had occasion to pass upon an equally ambiguous sentence, terming such sentence a mere "prophecy." *Sears Boston Employees Federal Credit Union v. Cummings*[6] involved a letter written by an attorney to his client's creditor. The letter requested the creditor to forebear demanding payments pending the outcome of an injury claim which debtor was prosecuting. The letter continued: "If I am successful in settling this matter, the balance due on this note will be paid at that time."[7] Debtor recovered but creditor did not.

The Massachusetts court noted that the letter did not state *by whom* the balance was to paid. Indeed, it could have been by the client, who owed the debt. In any event, no promise was made by the attorney personally to pay the debt and the Massachusetts court made no attempt to glean an obligation from parol evidence. It is interesting to consider whether the Virginia court would find less of a promise in the phrase "the debt will be paid," than in "the lake will be cleaned out."

Accuracy dictates that it be noted that the statement of the defendant lawyer in the *Sears Boston* case, even if it were found to technically constitute a promise, would be unenforceable as unsupported by consideration. Perhaps the element of a premium price paid by plaintiff, partly in reliance upon a statement—as opposed to a gratuitously made statement—would logically influence the court in characterizing the former as a formal undertaking.

There is only one prior case holding a promisor liable for the actions of third persons, which promisor had promised would not occur. *Tode v. Gross*[8] is possibly the negative version of the instant Virginia case. However, the facts reveal an agency relationship between "actors" and promisors which tends to rob the promise of its triparty nature.

Defendant was engaged in the business of manufacturing cheese by secret process. She sold the business and process to plaintiff, covenanting that she and her agents—her husband, brother-in-law and father—would not communicate the secret process to parties other than plaintiff vendee or sell cheese to such other parties. It was discovered that the husband sold similar cheese and the brother-in-law kept such cheese for sale at his place of business.

[6] 322 Mass. 81, 76 N.E.2d 150 (1947).

[7] Ibid., 82, 150.

[8] 127 N.Y. 480, 28 N.E. 469 (1891).

The element of premium price paid entered the picture when the court said:

> But could she covenant against the acts of those over whom she had no control? She had the right to so covenant by assuming the risk of their actions, and unless she had done so, presumptively, she could not have sold her factory for so large a sum.[9]

Plaintiff's breach was determined to lie in failing to prevent the actions of her former agents. "While it is her exclusive covenant, it relates to the action of others, and if they do what she agreed that they would not do, it is a breach by her, although not her own act."[10] However, in the very next sentence, the court in defining defendant's breach, at least implies that her relationship with her former agents was one making control of their actions plausible, if not possible. "She violated her agreement, not by selling herself, but by not preventing others from selling."[11]

The *Tode* case, due to its clear definite language, has since its decision become a repeatedly cited authority on the validity of covenants protecting secret processes. Most significantly, however, it has always been cited as determining the rights of exclusive use and sale acquired in an assignment of a trade secret, and that such assignment is not in restraint of trade.[12] Contractual considerations per se are never discussed. Thus, neither exact factual similarity nor judicial acknowledgment will characterize the *Tode* case as a twin to the recent Virginia decision.

Another tri-party promise was given consideration in *Sinclair Refining Co. v. Jenkins Petroleum Process Co.*,[13] a case involving a contract which provided that improvements developed by defendant's engineers in familiarizing themselves with apparatus loaned by plaintiff for experimental purposes should accrue to plaintiff and that defendant should cause its employees to execute applications for patents and assign them, with improvements, to plaintiff. The United States District Court for the District of Maine held that the allegation that defendant failed to cause its agent to assign patent application stated a good cause of action.[14] The court stated, more by way of conclusion than explanation, that plaintiff was entitled to recover the full money equivalent of the property of which it had been deprived.

The circuit court did not review the question of whether a cause of action existed, but ruled for defendant because the record was bare of any substantial evidence of new information received by defendants, agents or

[9] Ibid., at 486, 470.

[10] Ibid., at 486, 470.

[11] Ibid., at 486, 470.

[12] E.g., "[A] trade secret protects its owners only against those who have learned the secret under a contractual or confidential obligation to preserve the secrecy." Vulcan Detinning Co. v. American Can Co., 67 N.J.E. 243, 247, 58 Atl. 290, 291 (1904).

[13] 99 F.2d 9 (C.C.A. 1st, 1938).

[14] 56 F.2d 272 (D.C.Me., 1932).

employees under the contract. Terseness on the part of district court and absolute silence of the circuit court prohibit analysis of the nature of the peculiar promise involved in the *Jenkins* case.

It is readily seen that the Virginia court has worked an implied enlargement in the scope of the term "promise." The court did so apparently without notice of the fact or in the belief that a variation in form of a statement of obligation is secondary in importance to its nature as a recital of liability assumed. For this reason, the decision will probably have little weight in a jurisdiction choosing to be more analytical when called upon to ascribe liability predicated upon a similarly constructed "understanding." Until such future judicial examination, it remains an abnormal specie of one of the basic legal concepts, with little reason behind its creation—a mutation in the law of contracts.

CRIMINAL LAW—MANSLAUGHTER CONVICTION FOR FAILURE TO PROVIDE MEDICAL AID TO CHILD BECAUSE OF RELIGIOUS BELIEF REVERSED

The defendants, husband and wife, were convicted of the crime of involuntary manslaughter under a Maryland statute which provides that the father and mother are jointly and severally charged with the "support, care, nurture, welfare and education of their minor children."[1] The state charged that the defendants were guilty of gross negligence in not having furnished medical attention to their deceased minor child. The defense contended that they were conscientious believers in the Church of God and based their belief in divine healing, and when their child became sick they cared for it in accordance with the teachings of the Bible,[2] and that therefore, they were not guilty of any neglect of duty owing to their child. The court of appeals reversed and remanded the cases for a new trial, holding that the state's evidence was not sufficient to show that the gross negligence of the parents was the proximate cause of the child's death. *Craig v. Maryland,* 155 A.2d 648 (Md., 1959).

At common law, a parent, or anyone standing in such a relationship had the duty of furnishing necessaries to his minor unemancipated child.[3] Medical attention, when needed to preserve life or health, is

[1] Md. Code (1957) Art. 72A, § 1.

[2] "James says, if anyone is sick let him call for the elders of the church, and let them, pray over him, anointing him with oil in the name of the Lord, and the prayer of the faith shall save him." Epistle of St. James, 5:14, 15 (King James version).

[3] Mitchell v. Davis, 205 S.W.2d 812 (Tex., 1947); State v. Barnes, 141 Tenn. 469, 212 S.W. 100 (1919); Wallace v. Cox, 136 Tenn. 69, 188 S.W. 611 (1916); Owens v. State, 6 Okla. Crim. 110, 116 Pac. 345 (1911); State v. Chenoweth, 163 Ind. 94, 71 N.E. 197 (1904); Regina v. Anstan, [1893] 17 Cox. C. C. 602.