Chancy # 131

Record No. 4272

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND

W. O. LUCY AND J. C. LUCY, Appellants,

versus

A. H. ZEHMER AND IDA S. ZEHMER, Appellees.

PETITION FOR APPEAL AND *SUPERSEDEAS.*

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of Appeals of Virginia:

Appellants, W. O. Lucy and J. C. Lucy, respectfully represent that they are aggrieved by a final decree, entered by the Circuit Court of Dinwiddie County, Virginia, on October 21, 1953, whereby the court dismissed the bill of complaint of the appellants, and refused to grant them the relief requested, to which action appellants duly excepted.

THE CASE.

This is a suit to enforce specific performance of an agreement to sell and convey a farm in Dinwiddie County, Virginia.

The parties occupy the same positions here as they did in the trial court. The appellants (complainants below) are W. O. Lucy and J. C. Lucy, his brother. The appellees (repondents below) are A. H. Zehmer and Ida S. Zehmer, his wife. All are residents of Dinwiddie County, except J. C. Lucy, who lives in Brunswick County.

On Saturday night, December 20, 1952, W. O. Lucy offered the *Zehmers $50,000.00, cash, for their farm in Darvills
2* Magisterial District, Dinwiddie County, containing 471.6 acres, more or less, known as the Ferguson Farm, which farm Mr. Zehmer purchased in 1943 for $11,000.00, and which is assessed for taxation purposes at $6,300.00. This offer was accepted. The agreement of the parties was reduced to writing by Mr. Zehmer and is in the following words and figures, to-wit:

"We hereby agree to sell to W. O. Lucy the Ferguson Farm complete for $50,000.00, title satisfactory to buyer.

A. H. ZEHMER
IDA S. ZEHMER"

On December 21, 1952, W. O. Lucy advised J. C. Lucy of his purchase of the said farm, and the said brothers agreed that they would own the property jointly, each paying $25,000.00 of the agreed purchase price, and one-half of all costs incident to the title examination and recording fees.

The Lucys had the title to the property examined by B. Hunter Barrow, an attorney of Dinwiddie, Virginia, and, upon his assurance that the title was good, requested the Zehmers to execute a deed to them, and tendered to the Zehmers the agreed purchase price. The Zehmers refused to comply with their agreement and execute the deed. Their only excuse for this refusal is that the agreement was entered into them as a joke. Hence this suit.

ASSIGNMENT OF ERROR.

On the 4th day of November, 1953, appellants filed with the Clerk of the Circuit Court of Dinwiddie County, Virginia, their notice of appeal, and assignment of error. The error assigned is to the action of the court in decreeing that appellants failed to establish their right to *specific performance of the
3* alleged contract, set forth in their bill of complaint, between appellants and appellees, and therefore, say that the decree and judgment of the court, entered October 21, 1953, in dismissing the bill of complaint, is contrary to the law and evidence, and is erroneous.

STATEMENT OF FACTS.

W. O. Lucy and A. H. Zehmer are both middle-aged white men, and have been residents of Dinwiddie County over a long period of years. Mr. Lucy is a farmer and lumberman. Mr. Zehmer is also a farmer, and owns and operates a combination service station—restaurant—motor court. The parties are well-known business men of their county, and both are reasonably active in the economic and political life of their communities.

The Ferguson Farm is located near McKenney, Virginia, and is considered a desirable farm. Mr. Zehmer testified that a great number of people had been interested in purchasing this farm. W. O. Lucy had been interested in buying it for some time, and testified that on a previous occasion, he offered Zehmer $20,000.00 for the property, but that Zehmer, after accepting the offer, failed to go through with the sale. Lucy was unable to require Zehmer to do so, for on that occasion there had been no agreement in writing. (M. R., p. 97) *This testimony was not denied by the Zehmers.*

On Saturday night, December 20, 1952, W. O. Lucy went to McKenney to take one of his employees home. While there, he went to the restaurant operated by Mr. and Mrs. Zehmer. The restaurant was closed, and no one there except the Zehmers and their servant, Ethel J. Chappell, who was cleaning up. Mr. Zehmer and Mr. Lucy had a drink together.

4* The parties *then had a conversation with reference to the Ferguson Farm. Lucy asked if Zehmer had sold the place, to which Zehmer replied in the negative. Lucy then stated that he "bet Zehmer would not take $50,000.00 for the place", to which Zehmer replied, "Yes, I would, too." Zehmer then stated that "you (meaning Lucy) would not give fifty." Lucy replied that he would, and for Zehmer to write up an agreement to that effect. (M. R., p. 94)

Thereupon, Zehmer started to write the agreement, *supra,* using the language "*I* do hereby * * * ". Upon noticing the language, Lucy told him, "you had better change that language to 'we', because you will have to have Mrs. Zehmer to sign it, too." Mr. Zehmer then tore up the first agreement, and wrote the one which he and Mrs. Zehmer signed. (M. R., p. 95)

Up to this point, there is little or no controversy as to what took place between the parties.

There was some discussion of whether or not W. O. Lucy had $50,000.00, to which he replied either that he did, or that he could raise it. After Zehmer wrote the agreement and signed it himself, Lucy testified that Mr. Zehmer took the agreement

back to his wife, and asked if she would sign it, and she said she would for $50,000.00, and did. (M. R., p. 95) At that time she was at the other end of the counter, about ten or twelve feet from where they were talking.

Both Mr. and Mrs. Zehmer now claim that when Mr. Zehmer took the agreement to Mrs. Zehmer for her signature, he whispered to her in an undertone, "It is just a joke." *Both admit that this whispered conversation was not heard by Mr. Lucy, and that it was not intended for him to hear it.* (M. R., p. 39, M. R., p. 77)

5* *After obtaining Mrs. Zehmer's signature, he brought it back to Mr. Lucy, who put it in his pocket.

Mr. Lucy stated that he offered Zehmer $5.00 on account, but that Zehmer replied "You don't need to give me any money, you got the agreement there, signed by both of us." (M. R., p. 95) Lucy stated that that was the entire conversation, and that a few minutes after the agreement was signed, he left the restaurant. He was there about 45 minutes in all.

Mr. Zehmer admits that Lucy offered him $5.00, but claims that when the offer was made, he told Lucy that it was not any deal, and that he was just "bluffing and liquor talking." Lucy denies this.

On the following day, W. O. Lucy and his wife attended a party in McKenney, given by a Mr. Batte. Mr. and Mrs. Zehmer attended the same party. It appears that the news had gotten around the small town of McKenney that the Zehmers had sold their Ferguson Farm the night before to Mr. Lucy. It is reasonable to believe that this information was given out by the Zehmers, since they live at McKenney, and the Lucys live some ten miles distant, at Dinwiddie Courthouse. In any event, Mr. Lucy and Mr. Zehmer had a conversation about the property, in which Zehmer is supposed to have told Lucy that "he did not want to hold Lucy to the agreement" and stated that Lucy was "too tight". To this statement Lucy replied, "No, I was not. I wasn't too tight at all. I knew what I was doing, and I was going through with it." (M. R., p. 98) Mr. Zehmer stated that he "did not want to stick Lucy". To this Lucy replied that "it wasn't the first time he had been stuck." (M. R., pp. 90-98)

Mrs. Zehmer walked by while this conversation was taking place, and exclaimed to Lucy: "You paid too much! What is the matter; we sold it to you too cheap." (M. R., p. 98)

6* Her version of this is she said "With the high *price of liquor you people were drinking last night it should have been more, it was too cheap." (M. R., p. 48)

A Mr. Albert Carr was at the party, and stated that he heard general comments made around that the sale had been made, and that he was present and overheard Mr. Zemher tell Lucy "that he was going to let him up off the deal, because he thought he was too tight, and did not know what he was doing," and Lucy said something to the effect that " I have been stuck before, and I will go through with it." (M. R., p. 90)

On the same day, December 21, W. O. Lucy called his brother, J. C. Lucy, a former Commissioner of Revenue of Brunswick County, and dealer in timber and land, and offered "to go partners" with J. C. Lucy in the purchase, to which the latter agreed, and for that reason is a party here.

On the next day, December 22, 1952, and relying upon the agreement, W. O. Lucy employed B. Hunter Barrow to examine the title to the property. This attorney immediately began the examination of the title, and made his report to W. O. Lucy on December 31, 1952. (M. R., p. 100)

A few days after the conversation at the Batte party, W. O. Lucy was again by Zehmer's restaurant, and asked Zehmer when the deed would be ready, and at that time learned, for the first time, Lucy claims, that Zehmer was claiming that the whole thing was a joke, and that he was not going to sell Lucy the farm. Lucy testified that he stated to Zehmer at the time, "Hardy, you know you sold that place fair and square", to which Zehmer replied, "Oh, that was just whiskey talking." Lucy said that he had no further conversation with Zehmer about the property at that time. (M. R., p. 105)

Following receipt of the report on the title, dated December 31, 1952, W. O. Lucy, on January 2, 1953, wrote to Mr. and Mrs. Zehmer, requesting *deed to the property, and ad-
7* vising that he was ready to pay, in cash, the agreed purchase price therefor. (M. R., p. 82) To this letter Zehmer replied, denying his intention to sell the farm, stating that they had both been drinking, and that the written agreement was scribbled off jokingly, and mainly to see how far Lucy would go in what Zehmer took to be a bluff on Lucy's part. (M. R., pp. 82-83)

On January 27, 1953, W. O. Lucy had his attorney write Mr. Zehmer, requesting deed to the property, and offering to pay the agreed purchase price, to which request there was no response. (M. R., pp. 85-86)

In the bill of complaint filed by the appellants they renew their offer to pay for the property at any time upon receipt of a satisfactory conveyance thereof.

ARGUMENT.

At the outset of this argument, counsel for the appellants would respectfully quote from the opinion of Mr. Justice Spratley, in the case of *First National Exchange Bank of Roanoke, et al* v. *Roanoke Oil Co. Inc.,* 169 Va. 99, 192 S. E. 764, at 770, as follows:

"We must look to the outward expression of a person as manifesting his intention, rather than to his sacred and unexpressed intention. The law imputes to a person an intention corresponding to the reasonable meaning of his words and acts."

In this case, there can be no question of confidential relationship, breach of trust, or unfair dealing. The Lucys and Zehmers stand on an equal footing, and their actions and dealings must be judged in the light of human experience. The intention of the parties can be gathered only from their conduct—both at the time the agreement was entered into, and thereafter. To Mr. Lucy this was an ordinary business transaction. The Zehmers owned a farm which he desired to purchase. This desire on his part was well known to the
8* *Zehmers, for Lucy had attempted to purchase the property on a prior occasion. Apparently it had been rumored about the community that the farm was for sale, for Mr. Zehmer admits that other persons had approached him to buy the property. However, W. O. Lucy is the only man who ever made him a concrete offer for the property in dollars and cents.

It is conceded by Mr. Zehmer that $50,000.00 represents the fair market value of the property. The evidence shows conclusively that there was nothing in Lucy's conduct or conversations to indicate that his offer was made in jest, or that he considered it "as a joke". The conversation had between the parties was the usual conversation between a seller and a buyer. Lucy's offer was to pay cash. $50,000.00 is a considerable sum. It was reasonable for Zehmer to inquire as to his ability to raise the purchase money.

The first agreement written by Zehmer was destroyed because is was in the singular. Here, again, are business men transacting a business matter in a proper manner. Both realized that for the agreement to be legal and binding it would have to be executed by Mrs. Zehmer. For that reason, the first agreement was destroyed and the second agreement written, beginning "*we* do hereby".

The serious discussion of the parties regarding what was on the farm, and the meaning of the language "complete" is pertinent. It developed, as a result of Lucy's inquiry as to the cattle on the property, that there were only two heifers then on the land, and that these would be included if Lucy would pay $50,000.00 for the property.

The conversation of the parties regarding the title examination is significant. Both Mr. Zehmer and Mrs. Zehmer admitted that it was their understanding, at the time they signed the agreement, that if the title was *not good, or if a
9* flaw developed in the title, Mr. Lucy would have a right to reject the purchase, and not take the farm.

The offer made by Lucy, and the acceptance by the Zehmers, constituted an agreement by these parties. The fact that is was reduced to writing—made a formal written document—and signed by the parties, shows that it was no joke. People do not carry a joke involving $50,000.00 that far. Furthermore, regardless of the intention of the Zehmers, there was nothing at the time in their outward expression to manifest any intention on their part contrary to the terms of the agreement.

The completeness of the text of the agreement shows that it was very carefully prepared by a person having some knowledge of contracts, and that it was written by one in full possession of all his faculties. It will be noted that every word of the agreement carries some import, and we analyze it, as follows:

"*We:*" This was substituted in the place of "I", in the original agreement, for the reason that Lucy required both Mr. and Mrs. Zehmer to enter into the agreement.

"*Hereby:*" This indicates that the paper signed was no option, and that it left nothing to be agreed upon in the future; that it was a complete transaction—done at that time.

"*Agree to sell:*" This designated the writing as an agreement, and reduced the oral conversations, and the offer and acceptance, to writing.

"*W. O. Lucy*": Named the other party to the contract.

"*The Ferguson Farm*": Identified the property.

Witness Bridman, a Deputy Commissioner of Revenue, testified that the property in question was known generally in Dinwiddie as "the Ferguson farm", and was the only such place in the county.

10* *"*Complete:*" This word indicated what the sale of the farm included and encompassed.

"*For $50,000.00*": The agreed consideration.

"Title satisfactory to buyer": The usual provision found in a contract of sale.

"A. H. Zehmer"; "Ida S. Zehmer": The signatures of the seller and his wife.

The rumor that was prevalent at the Batte party on the day following the execution of the agreement by the Zehmers was that the Zehmers had sold the Ferguson Farm to W. O. Lucy. At that time, all the parties considered it as a binding sale.

It appears that by the time of the Batte party, Mr. Zehmer had begun to question his wisdom in making the sale, and was then toying with the idea of trying to rescind it. It is significant that in his conversation with Mr. Lucy, he referred to their transaction of the night before as a "deal". The exclamation by Mrs. Zehmer at the same party, that Lucy had purchased the property too cheap, was such a remark as might have been made casually by anyone selling property, to a person who had purchased it. There was nothing in any statement made by either Mr. or Mrs. Zehmer at the Batte party which indicated that they had been acting in jest the previous night.

The happenings at the Batte party show conclusively that Lucy still considered the transaction as a deal, and would comply with it in accordance with his agreement. The fact that Zehmer stated that he (Zehmer) was going to let Lucy off that "deal" indicated and inferred that he (Zehmer) *could* hold Lucy to the deal if he (Zehmer) elected to do so. This he could do only if there were in fact a deal.

11* *The actions of W. O. Lucy following the agreement of December 20, 1952, show that he entered into the agreement in good faith, and intended to comply with his undertaking to purchase the property, and pay for it the sum of $50,000.00. He immediately contacted his brother, J. C. Lucy, and admitted him as a partner in the transaction. He had the title examined, and at some considerable cost to him. He made arrangements with his bank to pay for his half of the property. His brother, J. C. Lucy, also went to his local bank in Lawrenceville, and made similar arrangements to pay for the property. W. O. Lucy, both in person and by letters, requested a deed to the property from Mr. Zehmer.

As conclusive proof of the offer and acceptance, and resulting agreement for the sale of the said Ferguson Farm, we respectfully quote the following extracts from the testimony of appellee Ida S. Zehmer. This party was present throughout the entire negotiations. She had not been drinking. The quotes are from her testimony, rather than the testimony of

A. H. Zehmer, for the reason that the statements made by the latter were so obviously designed to bolster his theory that the transaction was a joke, as to be worthless. It is significant that the only statements from A. H. Zehmer were those elicited by the appellants when they called him as an adverse witness. His own counsel were unwilling to call him as a witness or use him on direct examination.

On the question of the offer, Mrs. Zehmer had this to say:

"Q. Mr. Lucy offered him $50,000.00 for the farm?
"A. Cash, yes, sir.
"Q. $50,000.00 for the farm?
"A. Yes, sir.
12* *"Q. Mr. Zehmer told him he would sell him that for $50,000.00 cash?
"A. I didn't hear him say that, I heard Mr. Lucy say that, 'Will you write it out?'
"Q. You did hear Mr. Lucy offer him $50,000.00 cash?
"A. Yes.
"Q. For the Ferguson farm?
"A. Yes, sir.
"Q. You knew what he meant by the Ferguson farm, didn't you?
"A. Yes." (M. R., p. 35)

This exchange definitely establishes the offer made by Mr. Lucy and the understanding of the appellees as to the property to which the offer referred. Mr. Zehmer also admitted a definite offer for the property was made by Lucy (M. R., p. 72)

On the question of what property the offer included, we invite the Court's attention to the following testimony:

"Q. What did you think the memorandum meant when it said 'The Ferguson Farm complete'? What did that mean?
"A. Entire farm.
"Q. Did that include the equipment?
"A. There was no equipment there.
"Q. Did that include such personal property as was there?
"A. I should think so.
"Q. Wasn't there some discussion about several head of cattle there?
"A. No, not several, it was two.
"Q. Was any discussion about the number of cattle?
"A. Mr. Lucy said, 'You have any cattle out there?' He said, 'I have two calves, I think. Two cows and two calves.'

He said, 'Would you include those?' He said, 'Oh, yes, I would include those.'

"Q. How about the tobacco sticks?

"A. I didn't hear that. I didn't hear that. I did hear about the calves.

"Q. You did hear Mr. Zehmer say, 'Oh, yes, I would include that.'

"A. Yes. He said, 'You can have those.'

13* *"Q. What else did the word 'complete' include, other than the land and buildings thereon?

"A. I know of nothing else except the cows." (M. R., p. 41)

It will be noted that Mr. Zehmer, in giving his interpretation of the word "complete", said:

"It means everything on it." (M. R., p. 72)

When asked what was on the farm at that time, December 20, 1952, he responded: "I think it was a couple of cows on it." (M. R., p. 72)

On the discussion of the title to the property, Mrs. Zehmer had this to say:

"Q. But you are a very intelligent woman, I know personally, and you also know when a transaction this large takes place involving real estate it is usual and customary for the person to have the title examined?

"A. That is right.

"Q. When you wrote that part of it, read that part of it, I mean, before you signed your name, didn't you understand that if the title were good, Mr. Lucy would agree to pay $50,000.00, but if the title were bad, that he would have the right to reject the farm? Wasn't that your understanding?

"A. I didn't hear anything about the title.

"Q. I mean your understanding.

"A. Yes, according to my understandng.

"Q. That was your understanding at the time you signed your name?

"A. Yes.

"Q. If a flaw developed in the title, that Mr. Lucy could reject it. Isn't that true?

"A. Well, that is true.

"Q. If the title were good, he would have to take it. Isn't that true?

"A. Yes.

"Q. And then, with that understanding, Mr. Zehmer signed

his name to it, and you signed your name to it? Is that right?
"A. Yes." (M. R., p. 43)

After testifying as above, Mrs. Zehmer admitted that the agreement was wholly in the handwriting of Mr. Zehmer, and that it was signed by her and her husband. (M. R., p. 44)

14* *With reference to the occurrence at the Batte party, Mrs. Zehmer admitted that the news of the sale of the Ferguson Farm had gotten around the small town of McKenney. Her version of the exchange between her and Mr. Lucy with reference to the sale is as follows:

"Q. What statement did you make, if any?
"A. There were several standing talking about the transaction the night before, and I passed by, was walking around three or four parties there on the grounds, and I passed at the time that $50,000.00 was mentioned. I stepped up and I said, 'Well, with the high-price whiskey you were drinking last night you should have paid more. That was cheap.'
"Q. So your comment was that Mr. Lucy had really gotten a bargain at $50,000.00?
"A. They are the words that I said, and I walked away, and I don't know what took place after that." (M. R., p. 46.)

It will be noted that there was no denial by her of the sale or the agreement, but simply a casual remark that Mr. Lucy "should have paid more", and that he had made a cheap purchase. Mrs. Zehmer also admitted that there were several men standing around when she made her remark, and that the men were talking about the sale, and that as she passed, she heard the sum of $50,000.00 mentioned.

The testimony of Albert Carr, the only disinterested witness, in regards the exchange between the Zehmers and W. O. Lucy, at the Batte party, was as follows:

"Q. Did you hear any conversation with reference to the sale of the Ferguson Farm?
"A. I heard general comments made around that the sale was made.
"Q. Did you hear any statements made by either Mr. Zehmer himself or Mr. Lucy with reference to some deal?
"A. I was standing in their company and Mr. Zehmer was in the group, Mr. Zehmer, W. O. Lucy, and his wife was off from there somewhere, and myself, and I overheard Mr. Zehmer tell Lucy that he was going to let him up off the deal, because he thought he was too tight, didn't know what he was

doing. Lucy said something to the effect that, 'I have been stuck before, and I will go through with it.'

I left their company then and they had further conversation, they were together quite a while after that, a matter of minutes, I don't know, but that is all that I heard said between those two." (M. R., pp. 90, 91)

15* *From Mr. Zehmer's version of the conversation at the Batte party, it is apparent that he and Mr. Lucy had made a "deal", contract, or agreement. However, Mr. Zehmer was beginning to question his wisdom and judgment in making the agreement, and was then and there laying the groundwork to rescind the contract.

For that reason, he assumed the role of a "magnanimous seller", who had it in his power to require Lucy to perform the agreement, but was willing to release him therefrom. Of course, there is no such legal oddity as an agreement of that nature. It was either a contract—agreement—deal, or it was not. If one party were bound, the other was. Neither party had the right to release the other from his solemn obligation without the consent of both.

The only testimony introduced by the appellees was that of witnesses Wynn and Rives—who testified that they had made an unsuccessful offer to purchase the Ferguson Farm from Mr. Zehmer, but admitted that neither had ever made him any concrete offer for the property—and that of a Mrs. Chappell.

We wish to comment here on the testimony of the witness, Ethel J. Chappell. This woman is a servant of the Zehmers, and apparently, works around the restaurant, cleaning up waiting on tables, etc. Her evidence was taken to bolster the "joke" theory of the appellees, and to testify with reference to the intoxication of the parties. A careful examination of her testimony will show that this woman knows absolutely nothing about the transaction which occurred between Mr. Lucy and Mr. Zehmer on the night of December 20, 1952. Mrs. Zehmer testified that she was working about the restaurant, doing her chores for the night; that this waitress was getting ready for the next morning, filling sugar dishes, and doing different things like that. (M. R., p. 33)

16* *The Zehmers operated a lunch room and an adjoining restaurant, which seats approximately fifty people. The witness Chappell was working all over the place—in the lunch room, the dining room and in the kitchen. Her testimony with reference to what happened is so completely at variance with the testimony given by both Mr. and Mrs. Zeh-

mer, and by Mr. Lucy, that it is obvious that her information was gathered from subsequent conversations with the interested parties, and not obtained at the time the agreement was made. She admitted that she was not listening to the conversation, and all she heard was a scattering remark now and then. She admits that she did not see the agreement signed by Mr. and Mrs. Zehmer. She testified that Mr. Lucy picked up the agreement before it was ever shown to Mrs. Zehmer—which is contrary to what is admitted to be the facts. She also claims that Mr. and Mrs. Zehmer and Mr. Lucy were "all three right there together and sitting near each other." The Zehmers testified that Mrs. Zehmer was at the other end of the counter, and that after the agreement was written, it was taken back to Mrs. Zehmer for her signature, and that the Zehmers there had a whispered conversation. All parties interested agree that only one offer was made by Mr. Lucy, and that was $50,000.00 for the farm. The witness Chappell attempted to testify that Lucy would offer so much for the farm, and then would raise it a little more, although she did not know the exact figures. Finally she was forced to admit that $50,000.00 was the only figure that she ever heard. (M. R., p. 133 *et seq.*) This witness was willing and anxious to help her employers in the case, but simply did not pay any attention to what was happening between the parties, and therefore could not testify consistently with the testimony given by the appellees.

17* *ARGUMENT—Continued.

Did the Zehmers Enter Into the Agreement in Earnest?

It is the contention of the appellants that on the night of December 20, 1952, W. O. Lucy made a *bona fide* offer to purchase the Ferguson Farm from the appellees, and that this offer was, at that time, accepted by the appellees, and in good faith. At the time the agreement was written by A. H. Zehmer, and signed by him and his wife, they were entirely satisfied with the sale that they had made, realizing that they had sold their farm for its full market value, and had every intention of living up to their agreement. Appellants believe that their change of heart began to occur on the following day, and that thereafter, the appellees concluded that it would not be to their advantage to sell the farm, and began seeking a way out of the transaction—as Mr. Zehmer had done previously.

It is submitted that the evidence, and the facts and circumstances surrounding the entire transaction, warrant this inference, and fully support the appellants' theory of the case.

There can be no question but that the written memorandum of agreement is in legal form, and is enforceable. The appellees do not claim that it is vague or uncertain. Therefore, we deem it unnecessary to cite any authorities on this point. If appellants' testimony is accepted as true—and we very earnestly feel that it should be—it becomes manifest that the trial court erred in failing to decree specific performance.

In Signing the Agreement, Were the Zehmers Merely Jesting, and Entered Into the Contract As A Joke?

This is the theory of the appellees, and is the sole
18* ground on which *the suit was defended. It was for that reason appellants began this argument with the very pertinent quotation from Mr. Justice Spratley in *First National Exchange Bank of Roanoke, et al.* v. *Roanoke Oil Co. Inc., supra.*

Assuming that the Zehmers did enter into the agreement in jest, or as a joke, the court must then inquire as to whether their conduct, actions and words were such as to have warranted a reasonable person in believing them in earnest. If their words, acts and conduct, judged by a reasonable standard, then manifested an intention to agree to the sale of the farm in question, the agreement is established, and it is immaterial what may have been their real, but unexpressed, state of mind, for mental assent to the agreement is not essential.

For the sake of argument, and waiving, for the time being, all evidence except that offered by the appellees, it is apparent that, up until the time that Mr. Lucy offered $5.00 in part payment of the farm, the Zehmers had done nothing, and said nothing, that would indicate to W. O. Lucy that they were not entirely in earnest about the sale of their property, and were willing to sell it to him for $50,000.00.

Mr. Zehmer wrote out, *in his own handwriting,* a formal, legal and binding agreement, to which he placed his signature. He then obtained the signature of his wife thereto. The Zehmers say that they had a *secret* conversation to the effect that it was a joke. However, *both admit that W. O. Lucy did not hear this conversation, and that it was not intended that he* hear it. Mr. Zehmer then brought back to W. O. Lucy the agreement signed by Mrs. Zehmer. A definite offer to pur-

chase the property had been made. The owners of the property had accepted it. The offer and acceptance had been reduced to writing as a memorandum in writing of the sale.

19* Nothing further *remained to be done except for Mr. Lucy to have the title examined, and, if the title were found satisfactory, to pay for the farm, and receive a deed to the property. *If the Zehmers entertained any secret intention with reference to the sale at that time, they failed to make such intention known to Mr. Lucy.*

Certainly nothing can be found in the conduct of W. O. Lucy to indicate that he was not entirely serious about the whole transaction, or that his actions were not in good faith and in earnest. In fact, A. H. Zehmer, in his answer, admits that W. O. Lucy was serious.

The testimony of W. O. Lucy, and that of the appellees, differs as to Mr. Zehmer's response when the $5.00 was offered. Lucy claims that, in refusing to accept the money, Mr. Zehmer observed that it was not necessary, for Lucy had their signed agreement. Mr. Zehmer claims that he did not accept it for the reason that he realized then, and for the first time, that W. O. Lucy was serious. It matters not whose evidence is believed, for the agreement had been entered into, and the contract made, prior to the offer of the $5.00. The acceptance or rejecting of the money neither strengthened nor weakened the binding agreement which the parties had made—and which was evidenced by the memorandum in writing.

The authorities throughout the country are as one in holding that no party can avoid a contract on the ground that he was jesting, if his conduct and words were such as to warrant a reasonable person in believing him in earnest. *Deitrick* v. *Simmott, et al.* (Iowa) 179 N. W. 424.

On this point, we invite the Court's attention to the following cases and secondary authorities:

20* *In *McConnell* v. *LaMontagne*, (N. H.) 134 A. 718, it was said:

"By the modern law of contracts the mere state of mind of the parties—with reference to the meeting of minds—is not the essential object of inquiry—the terms of the promised act being determined by an external and not by an internal standard."

3 Wigmore on Evidence at page 1971 deals with objective rather than subjective tests in determining the existence of a contract.

"The particular or non-concurring understanding of one of the parties is therefore usually immaterial." 1 Williston on Contracts 20-22A.

In *Higgins* v. *Cauhope* (N. M.) 261 P. 813, the court held that the contract was to be interpreted according to mutual expressed assent, and undisclosed or secretive intent of one party could not be considered, and further said:

"Intention is immaterial till it manifests itself in an act. If a man intends to buy and says so to the intended seller, and he intends to sell, and says so to the intended buyer, there is a contract of sale; and so there would be if neither had the intention."

Baron Bromwell in *Brown* v. *Hare*, 3 Haust and N 484, said:

"To constitute a contract there must in general be a meeting of the minds of the parties and both must agree to the same thing in the same sense, but in so far as their intention is an element it is only such intention as the words or the acts of the parties predicate, and not one secretly cherished, which is inconsistent therewith."

"The entry of the parties into a contractual relationship must be manifested by some intelligible conduct, act or sign. The apparent mutual assent of the parties, essential to the formation of a contract, must be gathered from their outward expressions and acts, and not from an unexpressed intention. It is said that the meeting of minds, which is essential to the formation of a contract, is not determined by the secret intentions of the parties, but by their expressed intentions, which may be wholly at variance with the former. The question whether a contract has been made must be determined from a consideration of the expressed intention of the parties —that is, from a consideration of their words and acts." 12 Am. Jur. sec. 19, p. 516-517.

We quote from 17 *Corpus Juris Secondum*, Secs. 32 and 33, pages 361 and 362, dealing with expressed intention and secret intention::

"The apparent mutual assent must be gathered from the words or acts of the parties, and the secret intention of one who so acts as to manifest assent is of no consequence.

21* *"The apparent mutual assent of the parties, essential to the formation of a contract, must be gathered from the

language employed by them. The undisclosed intention is immaterial in the absence of mistake, fraud and the like, and the law imputes to a person an intention corresponding to the reasonable meaning of his words and acts. It judges of his intention by his *outward expressions* and excludes all questions in regard to his unexpressed intention. *If his words or acts,* judged by a reasonable standard, *manifest an intention to agree to the matter in question, that agreement is established, and it is immaterial what may be the real but unexpressed state of his mind on the subject, as mental assent to the promises in a contract is not essential.* On the other hand, if one sought to be held as having agreed dissented in the ordinary language of business intercourse, it is an absurdity to say that he did agree merely because the other party insists that he did not understand the language.

"Where neither party intends that a contract shall result by what is done, no valid contract results." (Italics supplied)

Communication of Intention:

"The intention of the parties must be communicated one to another but no formality is required.

"To constitute an agreement, the intention of the parties must in some way or form be communicated, for a person's intention can be ascertained by another only by means of outward expressions, such as words and acts. An intention not expressed, not communicated, or withdrawn before communicated, is in general inoperative and immaterial to the question of agreement. The same is true of an intention communicated only to a third person.

"Where the intention is communicated, it does not matter what is the medium of communication, or how informal the words used may be. It may be expressed orally or in writing, by an advertisement, placard, handbill, letter, messenger, or telegram. So a valid contract may be made by a telephone conversation."

In Clark on Contracts, 3 Ed. page 4, this was said on Communication of Intention:

"Agreement further imports that there shall be a mutual communication between the parties of their intentions to agree, for without this neither could know the state of the other's mind. The law, therefore, judges of an agreement between two persons exclusively from those expressions of their intentions which are communicated between them. Mere

uncommunicated intention, though common to both parties, cannot constitute agreement. If a person asks another if he will do something, and the latter makes no reply, there is no agreement, even though he may intend to do it. A secret acceptance of a proposal cannot constitute agreement; nor, it is said, can agreement result where the intention of a party is communicated, not to the other party, but to a third
22* person. So, the *fact that a party has changed his mind after making an offer and does not really intend to contract is of no significance if he does not communicate his change of intention to the other party before acceptance. *And if one party has reasonably led the other to believe that he is making an offer, the other may, by acceptance, convert such apparent offer into a contract although in fact no offer was intended.* In like manner if a person to whom an offer has been submitted makes such statement or does such act with respect thereto as would lead an ordinarily prudent person, acting in good faith, to believe that the proposition had been accepted, and the proposer accordingly acts upon that assumption, a contract results, notwithstanding secret intentions of the offeree not to accept. As we shall see, communication may be by conduct as well as by words." (Italics supplied)

Hudson v. *Columbian Transfer Co.*, 137 Mich. 255, 100 N. W. 402, 109 Am. St. Rep. 679, held:

"The other questions asked for the defendant's understanding of the agreement, and were preferrd upon the theory that, as the minds of the parties must have met, the defendant's failure of understanding would answer plaintiff's claim of a contract. This is a fallacy. What is meant by 'meeting of minds' is the agreement reached by the parties and *expressed.* As is well said in *Brewington* v. *Mesker,* 51 Mo. App. 348: 'The meeting of the minds which is essential to the formation of a contract is not determined by the *secret* intentions of the parties, but *by their expressed intention,* which may be wholly at variance with the former.' See, also, 9 Cyc. 244, 578; *Browne* v. *Hare,* 3 Hurl. & N. 484."

The following will be found in *Franklin W. Allen, Respt.* v. *Bissinger & Company, Appt.,* 62 Utah 226, 219 Pac. 539, 31 A. L. R. 376:

"The inquiry is limited to *evidence of the expressed intention* of the parties, by words or acts, or both, as it is only from

the words and conduct of the parties that a court can form any conclusion as to their intention.

In 13 C. J. 265, the rule is stated as follows: 'The apparent mutual assent of the parties, essential to the formation of a contract, must be gathered from the language employed by them, and the law *imputes to a person an intention corresponding to the reasonable meaning of its words and acts.* It judges of his intention by his *outward expressions,* and excludes all questions in regard to his unexpressed intention. If his words or acts, judged by a reasonable standard, manifest an intention to agree to the matter in question, that agreement is established, and it is immaterial what may be the real, but unexpressed, state of his mind upon the subject.''

In *Home Trust Co.* v. *Shapiro* (Mo. 1933) 64 S. W. (2d) 717, 731, it was said:

23* *''This meeting of the minds is not based upon some secret purpose or intention upon the part of one of the parties, stored away in his mind and not brought to the attention of the other party, but on a purpose and intention which has been made known or which, from all the circumstances, should be known.''

And in *Citizens Bank & Trust Co.* v. *Everbest Shingle Co.,* (Wash.) 238 P. 644, it was said:

''The record is replete with what each actor thought or intended, *but undisclosed intentions cannot bind the opposing party and we therefore must consider only such intent as is to be inferred from the acts shown by* the record.''

From *Brant* v. *California Dairies* (Ca.), 49 P (2d) 13, we quote:

''But it is now a well-settled principle of the law of contract that the *undisclosed intentions of parties* are, in the absence of mistake, fraud, etc., *immaterial,* and that the outward manifestation of assent is controlling. This is the 'objective' standard established by the modern decisions and approved by authoritative writers.''

4 Wigmore Evid. (2d) p. 191
Re-statement of contracts, Sec. 71
1 Williston on Contracts, Sec. 21, page 21.

And from *Benedict* v. *Pfunder,* (Minn.) 237 N. W. 2:

"It is not the subjective thing known as meeting of the minds, but the objective thing, manifestation of mutual assent, which is essential to the making of a contract.

"Not mutual assent, but a manifest indication of such assent, is what the law requires."

We respectfully submit that there was nothing in the conduct, actions or speech of Mr. and Mrs. Zehmer on the night of December 20, 1952, when W. O. Lucy made his offer of $50,000.00 for the Ferguson Farm, to indicate that the acceptance of this offer by the Zehmers, and the reduction of the agreement to writing by Mr. Zehmer, was done in a spirit of banter, or as a joke. The offer was made by Lucy. It was accepted by the Zehmers. The acceptance was not withdrawn. Lucy was bound to the contract the instant it was accepted. No particular form of offer and acceptance is required. It can be inferred from the acts of the parties. Instead of the acceptance being withdrawn, it was made a formal agreement by reducing the oral contract to writing. We cannot conceive of a more definite, binding or legal obligation *than these
24* parties made. For that reason, we again say the trial court was in error in refusing specific performance.

The Condition of the Parties at the Time the Agreement Was Made.

To support the appellees' theory that the agreement was made in jest, appellees claim that both Mr. Zehmer and Mr. Lucy were drinking at the time.

It must be remembered that there were three parties to the agreement, one being Mrs. Zehmer, who admittedly had not had a drink, and who was in full possesion of all her faculties all the time.

With reference to the condition of W. O. Lucy, we invite the Court's attention to the testimony of Mr. Walter Huskey, a white man who operates a service station in McKenney, and who saw Mr. Lucy a few minutes before the agreement was entered into with the Zehmers. Mr. Huskey, when asked with reference to Lucy's sobriety or intoxication, answered:

"A. Well, he was normal as far as I could see. He drove up there and then drove away. I didn't see anything wrong with him.

"Q. Had he had a drink of whiskey or intoxicants, as far as you could tell?

"A. I couldn't say. I couldn't say if he had or that he hadn't. If he had, I couldn't tell it." (M. R., p. 19)

Paul McClelland, a white man and an employee of A. H. Zehmer, testified that he saw Mr. Lucy between 8:30 and 9, and while he was talking to Mr. and Mrs. Zehmer. His testimony was as follows:

"Q. What was Mr. Lucy's condition at the time you saw him, with reference to intoxication.

"A. Just normal. Just spoke and I spoke to him. I mean, so far as intoxication, I couldn't tell." (M. R., p. 21)

And again:

25* *"Q. In other words, would you consider either of the parties, Mr. Lucy or Mr. Zehmer, as having been intoxicated at 8:30 or 9 o'clock on the night of December 20?

"A. No, sir." (M. R., p. 23)

Mr. Lucy admitted that he had had a drink with Mr. Zehmer. When asked if he felt the drink, he answered that he did. No other answer could have been truthfully given by him, or by any other person who takes a drink of alcohol. He further stated that the amount of whiskey he drank had not affected him, so far as his ability to transact business was concerned.

Mrs. Zehmer testified that both Mr. Lucy and Mr. Zehmer were drinking. Admittedly they took one drink during their discussion of the agreement. While she testified that her husband had been drinking to excess, she further testified that when Mr. Lucy left the service station, she suggested that her husband drive him home. Surely she would not have made this suggestion had she believed that her husband was not in full possession of all his faculties, and fully able to operate a car—both with safety to himself and others using the highway. The fact that she was willing for her husband to leave the service station, and go out on the highway, would indicate that at that particular time, she was not apprehensive about his condition, and did not believe he had drunk a sufficient quantity to have affected him. Most assuredly, if Mr. Zehmer were capable of operating a vehicle on the public highways on a Saturday night during the Christmas holidays, he was capable of executing a contract.

Mr. Zehmer now professes to have been very drunk at the time the agreement was made with Mr. Lucy. This is to be consistent with his defense—that the transaction was a joke, and entered into in a spirit of banter. However, in his testimony, he goes into very minute detail as to all the occurrences

of the evening of December 20, 1952. He remembers
26* everything that was *said by the parties; he remembers their position in the restaurant, and where they were standing or sitting; how long Mr. Lucy was in the restaurant; when he left, and when he arrived. He admits the authorship of the written memorandum, which is in his own handwriting and entirely legible—a written memorandum which would do justice to any attorney. His actions and testimony establish the fact that, irrespective of the alcohol that he had consumed, he knew just what he was doing at that particular time, and at that time wanted to do it--regardless of the fact that he may have subsequently changed his mind.

The law applicable to drunkenness as a defense to contractual liability is summarized in 17 *Corpus Juris Secondum*, page 483, as follows:

"Although the rule formerly was that intoxication was no excuse and created no privilege or plea in avoidance of a contract, it is now settled that intoxication which is so deep and excessive as to deprive one of his understanding is a good defense to a contract made while in that condition, even though the intoxication was voluntary, since one in such a condition lacks the mental capacity requisite to contract, and to take advantage of his condition constitutes constructive fraud. If intoxication alone is relied on as a defense, it must be to such a degree that the party who wishes to avoid his contract on this ground must have been deprived of his reason and understanding, to such an extent that he is incapable of comprehending the nature and consequences of his act. When intoxication is superinduced by the other party, with fraudulent intent, a less degree of incapacity may suffice to avoid the contract.

However, in the absence of fraud it has been held *that
26a* a contract may not be invalidated by the mere intoxication of one of the parties, or mere excitment from the use of liquor, even to the extent that the party did not clearly understand the business, could not give proper attention to the contract, could not give the attention which a reasonably prudent man would have given, did not 'fully' realize what he was doing."

To the same effect:

2 Minor's Institutes (4th Edition) 644
Taliaferro et al v. *Emery*, 124 Va. 674; 98 S. E. 627
Duggan v. *Krevonick et al.*, 169 Va. 67; 192 S. E. 737
Loftus v. *Maloney*, 89 Va. 576; 16 S. E. 749
6 Michie's Jurisprudence, page 433

This case may be well summarized in the words of Judge Richardson in *Loftus v. Maloney, supra,* p 604:

"But it is useless to discuss the principles applicable to intoxication as a defense to contracts where, as in the present case, the alleged drunkenness is not only not sustained by proof, but is actually proved not to have existed—the, to say the least, overwhelming weight of testimony being that the appellant was not, at the time of the contract, drunk and incapable of knowing what he was doing, but was sober, and his mental faculties in no way impaired."

27* *There is not the slightest basis for the contention that either Mr. Lucy or Mr. Zehmer were so much under the influence of intoxicants as not to be in a condition to know or appreciate their rights. The most that can be said is that Mrs. Zehmer had not been drinking. Mr. Lucy had had one drink. Mr. Zehmer had had one or more drinks, but apparently not to the extent as to be noticeable to persons who saw him at that time, or to arouse the suspicion of his wife, who was willing for him to operate a motor vehicle on a public highway.

The Intention of A. H. Zehmer.

We have heretofore stated in this petition, and the evidence establishes the fact that on Saturday night, December 20, 1952, the appellees were willing to sell, and did sell, their Ferguson Farm in good faith, and then and there had the intention of going through with the sale. In event such was not their intention, it cannot be denied that W. O. Lucy acted in good faith and made a *bona fide offer* of an amount for the farm which everyone admits is the full value, and any secret intention which the Zehmers had concerning their acceptance of his offer and its reduction to writing was not communicated to Mr. Lucy, and was not intended for him to hear or know.

However, Mr. Zehmer, in his testimony, gives a clue to what may have been his intention at the time, and what may have prompted him to have led Mr. Lucy into making a binding offer, and which prompted the acceptance of the offer and the execution of the contract.

The record is replete with evidence that the Ferguson Farm is a desirable piece of property, and that numerous people were interested in it. Mr. Zehmer says that more than
28* twenty-five had manifested an interest in the *place, and on page 60 of the record, he makes this very interesting

and pertinent statement: "And I wanted to get a price on it at one time * * *."

Perhaps his actions on the night of the sale were prompted by a desire on his part to "get a price on his farm."

The usual way to determine the value of a farm is to have it appraised by persons having a knowledge of land values. Surely no court of equity would countenance a scheme which would result in a prospective purchaser making a *bona fide* offer, the acceptance of the offer and the execution of a written agreement which bound the prospective buyer, but under which the prospective seller could escape liability on the ground that it was a "joke". Such action smacks of entrapment. A seller of property could use this scheme to find out the highest amount that a buyer would pay, and a buyer could likewise use the same scheme to find out the lowest amount the seller would take. Each, after getting the desired information, would be able to avoid the transaction by simply saying "it was all done in jest". Such a holding by the court would be striking at the very foundation of the law of contracts.

In the instant case, all the fundamentals of a legal contract were present. The parties were competent. The subject matter was legal. The consideration was valuable. There was a meeting of minds, and, therefore, mutual assent—or the conduct of the Zehmers was such as to have led Lucy, or any other person, to have believed that there was a meeting of minds and mutual assent. The law presumes that everyone is capable to contract, and accordingly, where exemption from liability to fulfil an engagement is claimed by reason of the want of such capacity, this fact must be strictly established on the part of him who claims the exemption.

29* *If the Zehmers claim that the transaction was in jest, the burden was on them to establish the fact. Their solemn written agreement, and words and actions leading up to its execution, were such as to have warranted W. O. Lucy, as a reasonable person, in believing them in earnest. As stated in 17 *Corpus Juris Secondum,* Section 47, page 390:

"A person, however, cannot set up that he was merely jesting when his conduct and words would warrant a reasonable person in believing that he intended a real agreement."

CONCLUSION.

It is therefore submitted that in view of the evidence and law of this case, the appellants were entitled to specific performance of their agreement with the appellees, and that the appellees have offered no reasonable or satisfactory explanation of their failure to comply with their agreement.

Wherefore, appellants pray for an appeal and *supersedeas* in this case, and that the judgment and decree of the trial court may be reviewed, and that final judgment be here entered for your petitioners, directing specific performance of the said agreement.

This petition is adopted by petitioners as their opening brief, and counsel beg leave of the Court to be orally heard upon the presentation of the petition.

This petition will be filed with the Clerk of the Supreme Court of Appeals of Virginia at Richmond, and a copy thereof was mailed to Morton G. Goode, Esq., Dinwiddie, Virginia, and William Earle White, Esq., Petersburg, Virginia, counsel for appellees, on the 12th day of January, 1954.

30* *Respectfully submitted,

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