SCUDDER & ROBICHEAUX

Attorneys at Law

Memorandum

Re: The Tamerlane

To: Alex Associate

From: Mary Russell Holmes

Our client is a Virginia bookseller named Clifford Richway. Richway is a dealer in rare and valuable books. He does business out of his home by appointment only. Last spring, Richway sold several James Lee Burke first editions to Elliot Hunt. Hunt had recently inherited, at age 30, a considerable fortune.

Hunt's real interest, however, was in a book titled *Tamerlane and Other Poems By a Bostonian*, a first edition published in 1827. The asking price was $670,000.

Richway recounts the following events. On a Friday afternoon, Hunt called Richway and asked for an appointment to see *Tamerlane*. Richway agreed, and Hunt arrived about 5 o'clock. Richway had no further appointments that day. Hunt examined Tamerlane carefully and said, "I will give you $650,000 for it." Richway said, "I accept." Hunt said, "I will bring you a 10% deposit tomorrow, and the balance next Wednesday, which is when I will take delivery." "That will be fine," replied Richway, "but it will have to be Monday for the deposit. Tomorrow is a holiday, and I will be out of town on a backcountry fishing trip until Monday morning." The two men shook hands. Hunt gave Richway his business card, with his address and phone number, and wrote on it "Re the Tamerlane." Then Hunt left.

When Richway drove up to his house on Monday morning, Hunt was already there. Hunt greeted Richway with, "Clifford, I have changed by mind. I do not want *Tamerlane*."

"That is unacceptable," Richway said. "We had a deal. If you want, I can try to resell it for you, but there will be a 10% commission."

"We had no deal," Hunt said, beginning to shout. "We would have a deal if and when I brought you a deposit. That is the way I do business."

"Nobody else does business that way. I expect you to honor your promise," said Richway.

"Eat a bookend!" yelled Hunt as he got in his car and drove away.

Two months after the incident, Richway sold the *Tamerlane* to an east coast collector for $600,000. Richway wants to sue Hunt for $50,000. I have advised him that the costs of litigation could be greater than the recovery, but he is quite angry and insists that we go forward on his behalf.

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Before we do so, I need to know whether, assuming that we can convince a court of the accuracy of Richway's account, he will prevail?

Memorandum

Re: The Tamerlane

To: Alex Associate

From: Perry Paralegal

I collected some materials. I find it somewhat ironic that the best case for you is from Virginia, which is, of course, where Edgar Allan Poe grew up and was educated. The *Tamerlane* was published in the spring of 1827. In 1826, Poe was a student at the University of Virginia, and he may have written this, his first published book of verse, while he was there.

LUCY v. ZEHMER

196 Va. 493, 84 S.E.2d 516
Supreme Court of Appeals of Virginia, 1954

BUCHANAN, J.

This suit was instituted by W.O. Lucy and J.C. Lucy, complainants, against A.H. Zehmer and Ida S. Zehmer, his wife, defendants, to have specific performance of a contract by which it was alleged the Zehmers had sold to W.O. Lucy a tract of land owned by A.H. Zehmer in Dinwiddie county containing 471.6 acres, more or less, known as the Ferguson farm, for $50,000. J.C. Lucy, the other complainant, is a brother of W.O. Lucy, to whom W.O. Lucy transferred a half interest in his alleged purchase.

The instrument sought to be enforced was written by A.H. Zehmer on December 20, 1952, in these words: "We hereby agree to sell to W.O. Lucy the Ferguson Farm complete for $50,000.00, title satisfactory to buyer," and signed by the defendants, A.H. Zehmer and Ida S. Zehmer.

The answer of A.H. Zehmer admitted that at the time mentioned W.O. Lucy offered him $50,000 cash for the farm, but that he, Zehmer, considered that the offer was made in jest; that so thinking, and both he and Lucy having had several drinks, he wrote out "the memorandum" quoted above and induced his wife to sign it; that he did not deliver the memorandum to Lucy, but that Lucy picked it up, read it, put it in his pocket, attempted to offer Zehmer $5 to bind the bargain, which Zehmer refused to accept, and realizing for the first time that Lucy was serious, Zehmer assured him that he had no intention of selling the farm and that the whole matter was a joke. Lucy left the premises insisting that he had purchased the farm.

Depositions were taken and the decree appealed from was entered holding that the complainants had failed to establish their right to specific performance, and dismissing their bill. The assignment of error is to this action of the court. . . .

Mr. and Mrs. Zehmer were called by the complainants as adverse witnesses. Zehmer testified in substance as follows:

He bought this farm more than ten years ago for $11,000. He had had twenty-five offers, more or less, to buy it, including several from Lucy, who had never offered any specific sum of money. He had given them all the same answer, that he was not interested in selling it. On this Saturday night before Christmas it looked like everybody and his brother came by there to have a drink. He took a good many drinks during the afternoon and had a pint of his own. When he entered the restaurant around eight-thirty Lucy was there and he could see that he was "pretty high." He said to Lucy, "Boy, you got some good liquor, drinking, ain't you?" Lucy then offered him a drink. "I was already high as a Georgia pine, and didn't have any more better sense than to pour another great big slug out and gulp it down, and he took one too."

After they had talked a while Lucy asked whether he still had the Ferguson farm. He replied that he had not sold it and Lucy said, "I bet you wouldn't take $50,000.00 for it." Zehmer asked him if he would give $50,000 and Lucy said yes. Zehmer replied, "You haven't got $50,000 in cash." Lucy said he did and Zehmer replied that he did not believe it. They argued "pro and con for a long time," mainly about "whether he had $50,000 in cash that he could put up right then and buy that farm."

Finally, said Zehmer, Lucy told him if he didn't believe he had $50,000, "you sign that piece of paper here and say you will take $50,000.00 for the farm." He, Zehmer, "just grabbed the back off of a guest check there" and wrote on the back of it. At that point in his testimony Zehmer asked to see what he had written to "see if I recognize my own handwriting." He examined the paper and exclaimed, "Great balls of fire, I got 'Firgerson' for Ferguson. I have got satisfactory spelled wrong. I don't recognize that writing if I would see it, wouldn't know it was mine."

After Zehmer had, as he described it, "scribbled this thing off," Lucy said, "Get your wife to sign it." Zehmer walked over to where she was and she at first refused to sign but did so after he told her that he "was just needling him (Lucy), and didn't mean a thing in the world, that I was not selling the farm." Zehmer then "took it back over there . . . and I was still looking at the dern thing. I had the drink right there by my hand, and I reached over to get a drink, and he said, 'Let me see it.' He reached and picked it up, and when I looked back again he had it in his pocket and he dropped a five dollar bill over there, and he said, 'Here is five dollars payment on it.' . . . I said, 'Hell no, that is beer and liquor talking. I am not going to sell you the farm. I have told you that too many times before.'" . . .

It is an unusual, if not bizarre, defense. When made to the writing admittedly prepared by one of the defendants and signed by both, clear evidence is required to sustain it.

In his testimony Zehmer claimed that he "was high as a Georgia pine," and that the transaction "was just a bunch of two doggoned drunks bluffing to see who could talk the biggest and say the most." That claim is inconsistent with his attempt to testify in great detail as to what was said and what was done. It is contradicted by other evidence as to the condition of both parties, and rendered of no weight by the testimony of his wife that when Lucy left the restaurant she suggested that Zehmer drive him home. The record is convincing that Zehmer was not intoxicated to the extent of being unable to comprehend the nature and consequences of the instrument he executed, and hence that instrument is not to be invalidated on that ground. 17 C.J.S., Contracts, §133 b., p. 483; Taliaferro v. Emery, 124 Va. 674. It was in fact conceded by defendants' counsel in oral argument that under the evidence Zehmer was not too drunk to make a valid contract. The evi-

dence is convincing also that Zehmer wrote two agreements, the first one beginning "I hereby agree to sell." Zehmer first said he could not remember about that, then that "I don't think I wrote but one out." Mrs. Zehmer said that what he wrote was "I hereby agree," but that the "I" was changed to "We" after that night. The agreement that was written and signed is in the record and indicates no such change. Neither are the mistakes in spelling that Zehmer sought to point out readily apparent.

The appearance of the contract, the fact that it was under discussion for forty minutes or more before it was signed; Lucy's objection to the first draft because it was written in the singular, and he wanted Mrs. Zehmer to sign it also; the rewriting to meet that objection and the signing by Mrs. Zehmer; the discussion of what was to be included in the sale, the provision for the examination of the title, the completeness of the instrument that was executed, the taking possession of it by Lucy with no request or suggestion by either of the defendants that he give it back, are facts which furnish persuasive evidence that the execution of the contract was a serious business transaction rather than a casual, jesting matter as defendants now contend.

On Sunday, the day after the instrument was signed on Saturday night, there was a social gathering in a home in the town of McKenney at which there were general comments that the sale had been made. Mrs. Zehmer testified that on that occasion as she passed by a group of people, including Lucy, who were talking about the transaction, $50,000 was mentioned, whereupon she stepped up and said, "Well, with the high-price whiskey you were drinking last night you should have paid more. That was cheap." Lucy testified that at that time Zehmer told him that he did not want to "stick" him or hold him to the agreement because he, Lucy, was too tight and didn't know what he was doing, to which Lucy replied that he was not too tight; that he had been stuck before and was going through with it. Zehmer's version was that he said to Lucy: "I am not trying to claim it wasn't a deal on account of the fact the price was too low. If I had wanted to sell $50,000.00 would be a good price, in fact I think you would get stuck at $50,000.00." A disinterested witness testified that what Zehmer said to Lucy was 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.'"

If it be assumed, contrary to what we think the evidence shows, that Zehmer was jesting about selling his farm to Lucy and that the transaction was intended by him to be a joke, nevertheless the evidence shows that Lucy did not so understand it but considered it to be a serious business transaction and the contract to be binding on the Zehmers as well as on himself. The very next day he arranged with his brother to put up half the money and take a half interest in the land. The day after that he employed an attorney to examine the title. The next night, Tuesday, he was back at Zehmer's place and there Zehmer told him for the first time, Lucy said, that he wasn't going to sell and he told Zehmer, "You know you sold that place fair and square." After receiving the report from his attorney that the title was good he wrote to Zehmer that he was ready to close the deal.

Not only did Lucy actually believe, but the evidence shows he was warranted in believing, that the contract represented a serious business transaction and a good faith sale and purchase of the farm.

In the field of contracts, as generally elsewhere, "We must look to the outward expression of a person as manifesting his intention rather than to his secret and unexpressed intention. 'The law imputes to a person an intention corresponding to the reasonable meaning of his words and acts.'" First Nat. Bank v. Roanoke Oil Co., 169 Va. 99, 114.

At no time prior to the execution of the contract had Zehmer indicated to Lucy by word or act that he was not in earnest about selling the farm. They had argued about it and discussed its terms, as Zehmer admitted, for a long time. Lucy testified that if there was any jesting it was about paying $50,000 that night. The contract and the evidence show that he was not expected to pay the money that night. Zehmer said that after the writing was signed he laid it down on the counter in front of Lucy. Lucy said Zehmer handed it to him. In any event there had been what appeared to be a good faith offer and a good faith acceptance, followed by the execution and apparent delivery of a written contract. Both said that Lucy put the writing in his pocket and then offered Zehmer $5 to seal the bargain. Not until then, even under the defendants' evidence, was anything said or done to indicate that the matter was a joke. Both of the Zehmers testified that when Zehmer asked his wife to sign he whispered that it was a joke so Lucy wouldn't hear and that it was not intended that he should hear.

The mental assent of the parties is not requisite for the formation of a contract. If the words or other acts of one of the parties have but one reasonable meaning, his undisclosed intention is immaterial except when an unreasonable meaning which he attaches to his manifestations is known to the other party. Restatement of the Law of Contracts, Vol. I, §71, p. 74.

> The law, therefore, judges of an agreement between two persons exclusively from those expressions of their intentions which are communicated between them. . . .

Clark on Contracts, 4 ed., §3, p. 4.

An agreement or mutual assent is of course essential to a valid contract but the law imputes to a person an intention corresponding to the reasonable meaning of his words and acts. If his words and acts, judged by a reasonable standard, manifest an intention to agree, it is immaterial what may be the real but unexpressed state of his mind. 17 C.J.S., Contracts, § 32, p. 361; 12 Am. Jur., Contracts, § 19, p. 515. So a person 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, 17 C.J.S., Contracts, § 47, p. 390; Clark on Contracts, 4 ed., § 27, at p. 54.

Whether the writing signed by the defendants and now sought to be enforced by the complainants was the result of a serious offer by Lucy and a serious acceptance by the defendants, or was a serious offer by Lucy and an acceptance in secret jest by the defendants, in either event it constituted a binding contract of sale between the parties.

Defendants contend further, however, that even though a contract was made, equity should decline to enforce it under the circumstances. These circumstances have been set forth in detail above. They disclose some drinking by the two parties but not to an extent that they were unable to understand fully what they were doing. There was no fraud, no misrepresentation, no sharp practice and no dealing between unequal parties. The farm had been bought for $11,000 and was assessed for taxation at $6,300. The purchase price was $50,000. Zehmer admitted that it was a good price. There is in fact present in this case none of the grounds usually urged against specific performance.

Specific performance, it is true, is not a matter of absolute or arbitrary right, but is addressed to the reasonable and sound discretion of the court. But it is likewise true that the discretion which may be exercised is not an arbitrary or capricious one, but one which is controlled by the established doctrines and settled principles of equity; and, generally, where a contract is in its nature and circumstances unobjectionable, it is as much a matter of course for courts of equity to decree a specific performance of it as it is for a court of law to give damages for a breach of it.

The complainants are entitled to have specific performance of the contracts sued on. The decree appealed from is therefore reversed and the cause is remanded for the entry of a proper decree requiring the defendants to perform the contract in accordance with the prayer of the bill.

Charles Pharol, Contract Law Basics

Margee Pub. Company

It is a safe generalization that courts enforce a promise given in exchange for another promise. There are rules of formality and overreaching that may trump enforcement, and I do not suggest that these are the *only* promises that courts enforce; but the generalization is sound.

An influential article written about contracts, Fuller & Perdue, The Reliance Interest in Contract Damages, 46 Yale L.J. 52, 84 (1936), sets out the three interests that courts could support in enforcing contracts:

1. The restitution interest. On Tuesday, Peter promises to deliver his Hasselblad camera to Paul on Thursday and Paul agrees to pay Peter $1500 on Friday. Peter delivers, but Paul does not pay (never mind why). Here is the double-whammy: Peter has lost, and Paul has gained. This can be corrected by a return of the camera.

2. The reliance interest. On Tuesday, Peter promises to deliver his Hasselblad camera to Paul on Thursday and Paul agrees to pay Peter $1500 on Friday. On Wednesday, Mary offers to buy the cameral from Peter for $1400. Peter declines, because of his commitment to Paul. On Wednesday evening, Paul calls to announce that he has changed his mind and there is no sale. Mary is not to be found. In “reliance” on his deal with Paul, Peter has lost his opportunity to sell the camera for $1400. If he could easily sell the camera to a local store for $1000, a court might well value his reliance loss at $400.

3. The expectancy interest. On Tuesday, Peter promises to deliver his Hasselblad camera to Paul on Thursday and Paul agrees to pay Peter $1500 on Friday. On Wednesday evening, Paul calls to announce that he has changed his mind and there is no sale. Peter then sells the camera to a local store for $1000. Peter expected on Friday to be without the camera but to have $1500 in hand. Instead, he has $1000 in hand. His expectancy loss is $500.

The choice of interest that courts choose to protect influences the selection of damage measures for breach, but it also affects the matter of whether to enforce a promise at all. So, if Mary never comes along, and the store is Peter’s best bet, should Paul be assessed damages? Why? This is the central question: which promises ought to be enforced? Courts, of course, do not busy themselves with these questions—instead, taking the rules as they are found—but scholars have struggled mightily with them.

Z. Pittes, The Philosophy of Contract Law

Margee Pub. Company

With respect to the enforcement of promises, there are two inquiries and two methods of resolving those inquiries. It is easy to blur which inquiry we are addressing, and to be obscure as to our method.

The first inquiry is under what circumstances are people morally obligated to keep their promises. The second inquiry is when the state, through the courts, is justified in enforcing promises.

The methods are positive and normative. A positive theory is one that explains results, but does not seek to justify those results. A normative theory is one that contends one result is better than another for a stated reason. A theory can be both positive and normative.

Will theories

According to a "will theory," promises are enforceable because the promisor has made a voluntary commitment. This commitment justifies the coercive power of the state in enforcing the promise.

This theory does not explain why we honor the autonomy of the promisor by respecting her *act* of promising, but we do not similarly respect her autonomy when she *changes her mind* and seeks to withdraw the promise.

And because it is true that courts do not enforce all promises, not even all promises seriously intended, a will theory does not answer the positive inquiry of what characteristic distinguishes the enforceable from the unenforceable promise.

Also, under a will theory, the subjective intent of the promisor to be bound is a pre-condition to enforcement. This fails as a positive theory. See Restatement (Second) of Contracts, § 2, where it is the reasonable understanding of the promisee that controls whether something is to be taken as a promise.[1] So, either the will theory fails as a positive tool to explain promissory enforcement, or the theory must be qualified in some essential respect.

Reliance theories

Under a reliance theory, the obligation to keep one's promise and the justification for legal enforcement are grounded in protecting the innocent promisee who has changed his position (reliance) on account of the promise.

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[1] For example, Judge Learned Hand wrote in Hotchkiss v. National City Bank of N.Y., 200 F. 287, 293 (S.D.N.Y. 1911):

> A contract has, strictly speaking, nothing to do with personal, or individual, intent of the parties. A contract is an obligation attached by mere force of law to certain acts of the parties, usually words, which ordinarily accompany and represent a known intent. If, however, it were proved by twenty bishops that either party, when he used the words, intended something else than the usual meaning which the law imposes upon them, he would still be held, unless there were some mutual mistake or something else of the sort.

But there are many acts, other than promises, that lead people to rely. For example, knowing that you are building a new hotel, I lease premises nearby and purchase the equipment for a fly shop. You are aware that I am doing so. You then decide not to build the hotel. If your actions are not compensable even though I have relied to my detriment, why is a promise that causes reliance morally binding?

Next, if the reliance must be "reasonable" in order to support enforcement, there is a circularity problem. One supposes that a person is more likely, at the margin, to rely on a promise if it is enforceable than if it is not. Thus reliance leads to enforcement and enforcement leads to reliance.

As a positive matter, we need a second theory to explain why some acts of reliance make a promise enforceable, but others do not. To be more precise, most[2] promises are communicated with an intent to induce reliance by the promisee. If that is so, then all promises ought to be enforceable. They are not. Instead, enforcement turns on the quality or quantity of the reliance ("substantial, foreseeable, definite"). Thus we require a theory explaining why some reliance counts, and other reliance does not.

Efficiency theory

Efficiency theory holds that when a person makes a promise, the purpose is to make the promisor better off in one way or another. Most of the time, the particular purpose of the promise is to induce action by the promisee, often a return promise, that is valuable to the promisor. If all goes as intended, the promisee acts on the promise and in doing so makes the promisor better off. This state of affairs has the quality of making at least the promisor, and often the promisee, better off. Economists call this an efficient move.

Promisors often want to make a promise more valuable to the promisee by making it more reliable. One can imagine many ways of doing so—deposits, vouching with one's reputation, and so forth—but often legal enforceability can be valuable to both the promisor and promisee because it makes the promise more reliable. So, it is efficient to enforce promises.

Were it only so simple. Efficiency analysis cannot ignore the harm done to a promisor who changes her mind about a promise only to find its performance compelled, in one way or another, by a court.

Perhaps the social good from making promises more reliable is greater than the harm caused by enforcing regretted promises, but that is contestable. And without more, the theory suggests that all seriously intended promises ought to be enforced, and that fails as a positive theory.

No theory of promise enforcement or moral duty to keep promises has achieved wide-spread adherence. Should the student (as we all are) of Contracts despair? I think not. Perhaps one of us will find the "answer." More importantly, if we take the current, complex landscape of promissory enforcement as a (tentative) "given," we can, one hopes, still say something analytically interesting about the rocks and roads that lie within.

[2] I say most because I do not know what to make of this communication from a husband to his wife: "Mary, I promise to stop smoking,"