

英美合同法律实务

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北京市法学品牌专业实践课程系列特色教材 总主编 李仁玉



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Legal Practice on the Anglo-American Contract Law

英美合同法律实务

.....白慧林◎编著.....



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总 序

三十年前,随着改革开放序幕的拉开,中国的法学教育在高等教育中艰难地赢得一席之地,在没有教材、没有法规、没有专著、没有参考资料的艰难局面下,靠着我们前辈的无限热情和不懈努力而蹒跚起步。正如中国人民大学著名史学家戴逸先生所说,那时的法学教育是幼稚的,基本上处于法学教育的启蒙阶段。其表现为老师上课念讲稿,学生上课做笔记,考试背笔记。正如任何大学的长成需要经过幼苗阶段一样,老师的讲授也基本停留在对法学概念的阐释层面。

时至今日,法学学科和法学教育出现了一种全新的局面。目前,全国有近五百所高校设置了法学院系,全国每年招收全日制法学本科生共计十万人左右。在法律规范层面上,社会主义市场经济法律体系已经基本形成,全国人大及其常委会颁布的法律、国务院颁布的行政法规、国务院各部门颁布的政府规章以及最高人民法院、最高人民检察院所作的相关司法解释已经深入到社会生活、经济生活的方方面面,无法可依的局面已经得到彻底改观。在法律研究层面上,几乎有近万部专著出现。面对当下之形势,法学教育何去何从,已是摆在法学教育者面前的一道现实课题。

时值北京市实现教育跨越式发展,建设 100 个市级本科品牌专业的伟大构想之际,我院法学专业作为北京市市级品牌建设专业,提出“本科法学教育强化基础,重视应用”的教学理念,使学生做到学习平时化、目标具体化。为了实现这一理念,我们除了针对教育部核定的法学专业 14 门核心课程推出北京市法学品牌专业核心课系列特色教材之外,同时推出北京市法学品牌专业实践课系列特色教材,以达到重视应用之目的。

本特色教材的特色在于:第一,在教材的编写体例和内容上,以实务中发生的真实案例为基本素材,同时通过该案例启发学生思考的方向,并提出学生实践的具体要求和目标。从宏观意义上讲,法学是经邦治国之学,法学教育以培养经邦治国之才为己任;从微观意义上讲,法学是维护人权之学,法学教育以培养学生为民请命、为民排忧解难之品格和技能为内容。无论是经邦治国还是为民排忧解难,都是解决形形色色的社会问题,而社会问题都集中体现在具体的案例中。因此,以实务中发生的真实案例为素材进行教学是使学生了解社会、认识社会、分析社会和解决社会问题的最佳途径。社会问题是复杂的,对年轻的学生来

说,根据其人生经验和社会阅历往往难以分析、判断,故在教材中编写了启发学生思考方向或路径的内容。学生实践的具体要求和目标使实践课程的目标具体化,是解决学生实践目的、实践步骤、实践内容和实践方法的意义所在。第二,在教材的使用上,不是传统法学教育模式下以教师为中心的讲授,而是以学生为主体的模拟实践行为,老师只是起到组织者和裁判者的作用。模拟实践行为的实现,必然要求学生在课下进行充分的准备,在准备过程中学生会不自觉地将所学理论知识和方法转化为自己的实践能力,这个过程是一个探究法学理论意义的过程,是一个法条分析和运用的过程,是一个剖析社会现象的过程,也是一个由概念法学向问题法学、由理论法学向实践法学转化的过程。学生通过课下的充分准备,将其所准备的材料在课堂上进行展示,这个展示过程必将使学生熟悉法律运用的程序,从而使学生综合运用法律的能力得到提升;在课堂展示过程中,通过老师的点评,指出学生的纰漏和错误,又必将使学生弥补所学之不足,从而进一步激发学生的学习动力。

本系列特色教材全部由北京工商大学法学院长期从事本科教学的教师所编写,是这些教师多年教学经验的总结和教学心得的提炼。本系列特色教材暂定14本,以后根据具体情况逐步增加,暂定的14本教材分别是《庭审实务》、《律师实务》、《税收法律实务》、《房地产法律实务》、《证据法律实务》、《涉外经营管理法律实务》、《法律文书写作》、《法律职业形象设计》(上述8本为中文教材)、《国际贸易法律实务》、《国际投资法律实务》、《商标法律实务》、《专利法律实务》、《英美合同法律实务》、《WTO法律实务》(上述6本为双语教材)。编写本系列特色教材是一项原创性的工作,没有多少经验可供借鉴,难免出现各种纰漏或不足,诚请社会同仁批评指正。

在本系列特色教材即将付梓之际,应当特别感谢北京市教委,他们对本系列特色教材的出版给予了经费支持。应当特别感谢北京工商大学校长沈愉教授,副校长李朝鲜教授、谢志华教授和张耘教授,教务处长黄先开教授以及文科实验中心的秦艳梅教授,他们对本系列特色教材的策划提出了宝贵意见,并给予了大力支持。应当特别感谢北京工商大学法学院的老师们,他们为本系列特色教材的编写贡献了他们的人生智慧和教学心得。

北京工商大学法学院
北京工商大学文科实验中心
2006年1月3日

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✓ | CHAPTER ONE

FORMATION OF CONTRACT
(合同的订立)

Section 1 Mutual Assent(合意)

I. Mutual Assent (合意)

LUCY v. ZEHMER

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

Facts

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.'"

* * *

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, 98 S. E. 627. 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 evidence 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.'"

Issue

Was there a binding contract between Zehmer and Lucy?

Decision

BUCHANAN, J., delivered the opinion of the court.

.....

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." ^①

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. ^②

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.

^① *First Nat. Bank v. Roanoke Oil Co.*, 169 Va. 99, 114, 192 S.E. 764, 770.

^② Restatement of the Law of Contracts, Vol. I, § 71.

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. ① 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.

.....

Reversed and remanded. ②

[Questions]

1. What are the relevant facts in the case?
2. What does the case hold?
3. What is the essence of Lucy's claim?
4. Why does the court give short shrift to Zehmer's intent to play a joke on Lucy? Why doesn't Zehmer's state of intoxication matter?
5. Could the case have been decided in Zehmer's favor?

II. "Objective" Test (客观判断原则)

EMBRY V. HARGADIAN, MCKITTRICK DRY GOODS CO.

St. Louis Court of Appeals, Missouri, 1907.

127 Mo. app. 383, 105 S. W. 777.

Facts

Appellant's written employment contract with Appellee expired on December 15, 1903. He had been unsuccessful in obtaining a meeting with Appellee's president be-

① 17 C.J.S., *Contracts*, § 47, p.390; *Clark on Contracts*, 4 ed., § 27, p.54.

② http://w3.uchastings.edu/martinez_01/lucy_v_zehmer.pdf. (2007-4-10).

fore the expiration date. On December 23, during peak season, Appellant met with the president, Mr. McKittrick, and, according to his testimony, stated that unless he had another contract for the next year he would “quit” then and there. According to Appellant, the president replied: “Go ahead, you’re all right; get your men out and don’t let that worry you.” Appellant thought that the contract had been renewed and made no further effort to find employment. When his employment was terminated on March 1, 1904, Appellant sued for breach of contract. At the trial, the president denied making the “you’re all right statement” and testified that he was pressed to prepare for a board meeting, did not intend at that point to renew the contract and had deferred the renewal issue until a later date.

Issue

Did what was said by McKittrick constitute a contract of re-employment on the previous terms irrespective of the intention or purpose of McKittrick?

Decision

Goode, J.

Judicial opinion and elementary treatises abound in statements of the rule that to constitute a contract there must be a meeting of the minds of the parties, and both must agree to the same thing in the same sense. Generally speaking, this may be true; but it is not literally or universally true. That is to say, the inner intention of parties to a conversation subsequently alleged to create a contract cannot either make a contract of what transpired, or prevent one from arising, if the words used were sufficient to constitute a contract. In so far as their intention is an influential element, it is only such intention as the words or acts of the parties indicate; not one secretly cherished which is inconsistent with those words or acts. The rule is thus stated by a text-writer, and many decisions are cited in support of his text: “The primary object of construction in contract law is to discover the intention of the parties. This intention in express contracts is, in the first instance, embodied in the words which the parties have used and is to be deduced therefrom. This rule applies to oral contracts,