When Money Grew On Trees: The Untold Story of Lucy v. Zehmer

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ABSTRACT

This article reexamines Lucy v. Zehmer, a staple in most contracts courses, and makes the following discoveries: (1) Lucy, acting as a middleman for southern Virginia’s burgeoning pulp and paper industry, sought the Ferguson Farm for its rich timber reserves; (2) Lucy was one of scores of aggressive timber middlemen eager to purchase timberland across the region, in what amounted to a chaotic land grab that left a wake of shady transactions and colorful litigation; and (3) Within the eight years of winning injunctive relief from the Virginia Supreme Court and purchasing the Ferguson Farm from Zehmer for $50,000, Lucy earned approximately $142,000 from the land and its natural resources. These findings bring into question the opinion’s assertion that $50,000 was a fair price, its conclusion that Zehmer’s actions indicated contractual intent, and its confidence that the objective method captured the relevant background in which Lucy’s and Zehmer’s exchange took place. More generally, they suggest that conclusions reached by the objective method are highly dependent on the facts that are retold and the context in which they occur.
WHEN MONEY GREW ON TREES:  
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A farmer and a lumberman are sitting at a bar. The lumberman says: "I would like to buy your farm." The farmer says: "What is this, some kind of joke?"

**INTRODUCTION**

Many good stories begin with two men at a bar. *Lucy v. Zehmer*,\(^1\) “a staple of contracts casebooks since shortly after it was decided” in 1954,\(^2\) is

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\(^1\) Professor of Law and Business Administration, Duke University, and Associate, White & Case LLP (neither White & Case nor its clients espouse the views, if any, expressed in this article). The authors express profound thanks to the many individuals who shared their family histories, archives, and lore, including: John C. Lucy Jr, John C. Lucy III, John C. Lucy IV, James Lucy, Meade Lucy, Emory Lucy, Meade Harrison, Richard Liles, and Ronald Seagrave. Special thanks also goes to Frank Snyder, for sharing an early interest in the project and providing inspiration with his unrivaled slideshow, and to Paul Haagen, who reviewed an earlier version of this manuscript with exceptional care. Additional thanks to Jonathan Calmore, Jacob Johnson, Sarah Kahn, Laura Lucas, Lyndsey Morgan, Donna Nixon, and, especially, Jennifer Behrens for exceptional research support, and to the Fuller-Purdue Endowment for financial support.

no exception. As generations of law students have learned, the case of Lucy v. Zehmer involves two men talking over a bottle of liquor the weekend before Christmas.\(^3\) Adrian Hardy Zehmer, allegedly drunk and joking, scribbles a contract for the sale of a farm he owns on the back of a receipt.\(^4\) Welford Ordway Lucy accepts and leaves, insisting that Zehmer is bound to the sale.\(^5\) The Virginia Supreme Court of Appeals ultimately agrees with Lucy, ruling that a signed contract, even one signed by two men drinking at a bar, is no laughing matter.\(^6\)

That is, at least, the conventional story of the case, as told by the court, subsequent casebooks, and scholarly articles.\(^7\) For the most part, Lucy

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\(^3\) Lucy, 196 Va. at 497 (“I was already high as a Georgia pine, and didn't have any more better [sic] sense than to pour another great big slug out and gulp it down, and he took one too.”). *Id.* (quoting Hardy Zehmer).

\(^4\) *Id.* at 494-96.

\(^5\) *Id.* at 495.

\(^6\) See *id.* at 503. The Virginia Supreme Court of Appeals was the highest Court in Virginia at the time. Due to changes made in the Virginia Constitution of 1970, the Court today is known as the Supreme Court of Virginia. *The Supreme Court of Virginia: History*, [http://www.courts.state.va.us/scov/cover.htm](http://www.courts.state.va.us/scov/cover.htm) (last modified Apr. 21, 2004).

\(^7\) See, e.g., Edwin W. Patterson, *An Apology for Consideration*, 58 COLUM. L. REV. 929, 957 (1958) (noting that the Court in Lucy v. Zehmer held that a promisor who “signed [a] document as a joke although he kept a straight face to the promisee” was bound to keep to that promise). Patterson’s use of the case is particularly significant given that his casebook on Contracts was among the first, if not the first, to include the case. *See Edwin W. Patterson, George W. Goble, & Harry W. Jones, Contracts 22* (4th ed., 1957). The questions following the case in that casebook asked whether it mattered whether Lucy knew that Zehmer was joking. *Id.* Since that time, it has been alleged that “[t]he case best known
v. Zehmer is narrowly read to represent its final holding: that a court will only look to the outwardly-manifested conduct of the parties to determine contractual intent. This principle, also referred to as the “objective theory of contracts,” remains as solidly entrenched in law today as when the court’s opinion was written more than five decades ago. Yet it would be a
to most lawyers and judges in which a party attempted to avoid contractual liability on the basis that it was only kidding when it made the alleged promise or formed the alleged contract is Lucy v. Zehmer.” Keith A. Rowley, Beware of the Dark Side of the Farce, 10-JUN NEV. LAW. 15, 15 (2002). See also Lauren E. Miller, Note, Breaking the Language Barrier: The Failure of the Objective Theory to Promote fairness in Language-BARRIER Contracting, 42 IND. L. REV. 175, 183 (2009) (citing Lucy v. Zehmer for the principle that a contract is still enforceable when a party claims to have been joking when it was signed).

8 See, e.g., Timothy S. Hall, Magic and Contract: The Role of Intent, in Harry Potter And The Law, 12 TEX. WESLEYAN L. REV. 427, 466 (2005) (noting that Lucy v. Zehmer is “studied by many first-year law students” to demonstrate the “elementary principle of contracts that the relevant intent is the objective, expressed intent of the actor, not his secret, subjective intent”); Laura E. Little, Regulating Funny: Humor and the Law, 94 CORNELL L. REV. 1235, 1258 (2009) (citing Lucy v. Zehmer for the proposition that a person cannot claim he was just joking where his words and conduct would lead a reasonable person to believe otherwise).


10 See Solan, supra note 9, at 354-55 (summarizing the objective theory’s influence on the law as follows: “[F]or generations law students have been taught that the law governing the formation of contracts is by and large objective in nature, although it has some subjective elements. It is the appearance of intent that matters most. Many casebooks say so, as do texts and treatises. The Restatement incorporates a largely objective approach to contract formation as well, although its key provision dealing with the interpretation of contracts is both objective and subjective. While it often refers to mutual assent, the Restatement makes clear that its concern is only with outward manifestations of mutual assent. Such manifestation occurs through promising or performing, and promising is itself defined as a manifestation of a commitment. The actual states of mind of the parties are not the subject
mistake to assume that one can fully understand what was really at stake in \textit{Lucy v. Zehmer} by confining our understanding of the case to that basic principle and the information contained within the four corners of the court’s opinion.

In part, the court’s opinion in \textit{Lucy v. Zehmer} has drawn so much attention because of its colorful fact pattern. Although it presents a straightforward legal issue stemming from what appears to be a remarkably simple contract,\textsuperscript{11} its story has become an instructive and entertaining “classic case” used to introduce foundational principles related to intent in contracts.\textsuperscript{12} For the same reasons, the case also has received considerable attention as favorite example in undergraduate business law courses.\textsuperscript{13} Despite this attention, academics do not appear to know much more about the case today than could be found in the opinion by the Virginia Supreme Court of Appeals.\textsuperscript{14} While there is some debate about how and when this state of affairs developed, there is little controversy about its existence”\textsuperscript{15}).

\textsuperscript{11} See Stephen M. Edwards, \textsc{Drafting Commercial Real Estate Documents in Massachusetts}, Volume I, Chapter 2, §2.2 (MCLE, 2004) (noting the admirable succinctness of the agreement involved in the case), available at Westlaw at DCREDMMAI MA-CLE 2-1.


\textsuperscript{13} See, e.g., \textsc{Roger LeRoy Miller \\& Gaylord A. Jentz}, \textsc{Fundamentals of Business Law: Excerpted Cases} 177-78 (2d ed. 2009) (using the case to illustrate principles related to contract formation and consideration); \textsc{Roger LeRoy Miller \\& Galord A. Jentz}, \textsc{Business Law Today: Text \\& Summarized Cases E-Commerce, Legal, Ethical, \\& International Environment} 252 (8th rev. ed. 2007) (same); \textsc{Mark E. Roszkowski \\& Christie L. Roszkowski}, \textsc{Business Law: Principles, Cases, \\& Policy} 140-41 (7th ed. 2006) (relying on the case to illustrate principles of contractual intent and the Objective Theory of Contracts); \textsc{Frank B. Cross \\& Roger LeRoy Miller}, \textsc{The Legal Environment of Business: Text \\& Cases: Ethical, Regulatory, Global, \\& E-Commerce Issues} 200-202 (7th ed. 2007) (discussing how the case illustrates how courts approach contractual intent); \textsc{Donald L. Carper, Bill W. West \\& John A. McKinsey}, \textsc{Understanding the Law} 411-413 (5th ed. 2007); \textsc{Arnold J. Goldman \\& William D. Sigismond}, \textsc{Business Law: Principles \\& Practices} 14-45 (8th ed. 2010) (addressing issues relating to parties’ capacity to contract); \textsc{John E. Adamson}, \textsc{Law for Personal \\& Business Use} 168 (18th ed. 2008) (same); \textsc{Henry R. Cheeseman}, \textsc{Business Law: Legal Environment, Online Commerce, Business Ethics, \\& International Issues} 167 (6th ed. 2007) (offering the case’s fact pattern as an example and asking whether the contract is enforceable without offering the court’s final decision).
Court of Appeals. Given the case’s prominence in contracts casebooks for more than half a century, and given a growing body of “stories” research into other prominent and classic cases, the dispute between W.O. Lucy and Hardy Zehmer begs to be included in the archive of “stories.”

We delve into the story of *Lucy v. Zehmer* and, like many of the other “stories” inquiries, we find surprises and lessons that both inform the contemporary understanding of the case and generate deeper insights into contract law. First, just as scholarly articles have suggested that the famous property case about a stolen fox was not really about the fox and that a famous contracts case about a bridge was not primarily about the bridge, this Article will present evidence that the dispute in *Lucy v. Zehmer* was not primarily about the Ferguson Farm. Instead, the dispute was part of a larger upheaval over the control of increasingly-valuable timber resources in the wake of a southern revolution in pulp and paper production. Moreover, it was no accident that this underlying context of the case remained secret for so long. The relative obscurity is a testament to a deliberate and successful decision by the southern timber industry, in order to minimize public outcry, to acquire timber and timberlands through intermediaries like Welford

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14 See, e.g., CONTRACTS STORIES (Douglas F. Baird, ed., 2007) (gathering eleven different articles providing newly uncovered facts about and insight into eleven principle cases used by many contracts casebooks).

15 Professors Scott and Kraus have offered an initial hypothesis about what motivated the parties to this dispute, relying on unsubstantiated rumors relayed by a former student who grew up in Dinwiddie, but note that even that hypothesis leaves numerous questions unanswered. ROBERT E. SCOTT & JOSEPH S. KRAUS, CONTRACT LAW AND THEORY C.5 (Teacher’s Manual, 4th ed.) (2007). We address their hypothesis—and the questions they pose—in our first section below.

16 Bethany R. Berger, *It’s Not About The Fox: The Untold History of Pierson v. Post*, 55 DUKE L.J. 1089, 1089 (2006) (arguing that “the heart of the conflict [in that case] was a contest over which community would control the shared resources of the town and how those resources would be used” rather than the literal ownership of the dead fox that was the center of the lawsuit).

17 Barak Richman, Jordi Weinstock, & Jason Mehta, *A Bridge, A Tax Revolt, and the Struggle to Industrialize: The Story and Legacy of Rockingham County v. Luten Bridge Co.*, 84 N.C. L. REV. 1841, 1841-42 (2006) (explaining how the famous case “used to illustrate the ‘duty to mitigate’” in many contracts casebooks was really rooted in “a dispute about the legitimacy of local government”).
Ordway Lucy. It also is a reflection of how economic circumstances and contractual environments can be hidden both from an appellate court’s review and from generations of scrutinizing students.

Although the case is more than five decades old, the trail of documentary evidence is sufficient to tell the full, and to this point untold, story of *Lucy v. Zehmer*. We proceed to tell this story in four parts. First, we take a closer look at the order of the trial court and the opinion of the Virginia Supreme Court of Appeals, identifying inconsistencies in the judicially-told story and other curiosities about the case and the court’s opinion. Second, we describe the parties to the lawsuit, taking care to go beyond the narrow caricatures provided by the court and in particular introducing some important characters—including the lawyers—who are not part of the traditional narrative. Third, we examine the history of the lumber and paper industries of southern Virginia and its industrial revolution through the 1950s, when the dispute and litigation over the Ferguson Farm occurred. The region’s rapid post-World War II industrialization induced significant changes to the region’s technology, business models, and timberland values. These changes led to, among other things, conflicts between neighbors and significant litigation, and they are central in understanding the economic and social context in which Lucy’s momentous meeting with Zehmer occurred. And fourth, we discuss the Lucy brothers’ significant roles in the lumber industry, their success as industry middlemen, and what might have caused them to pursue litigation over the Ferguson Farm. In light of our findings, we reexamine the Virginia Supreme Court of Appeal’s opinion, in particular revisit its conclusion that the transaction was fair and equitable, and aim to appreciate the broader forces at work when Lucy entered Zehmer’s diner on December 20, 1952.

Ultimately, we do not believe that the story we present calls into doubt the reliability of *Lucy v. Zehmer* as a tool for teaching the objective theory of contracts. We do, however, believe that this story might help enhance our understanding of, and identify limitations to, that theory. Perhaps more significant, we reveal that as entertaining and colorful as the case’s classic telling is, the full story is even better.
I. THE VIEW FROM RICHMOND

The view from Richmond was clearly not the same as the view from Dinwiddie, and hints of these different vantage points are revealed by the unusual interplay of the trial and appellate courts. Indeed, even a surface examination of the Virginia Supreme Court’s opinion in *Lucy v. Zehmer* leaves the casual reader with some curiosities.

To begin with, given the amusing and flavorful fact pattern that has made the Virginia Supreme Court of Appeals’ decision in *Lucy v. Zehmer* a staple of contracts casebooks for over half of century, some might be surprised to learn how quickly the trial court initially disposed of the matter. Presiding over the original trial was Judge John Garland Jefferson, Jr., a descendent of prominent colonial families on both parental lines and, reportedly, an enthusiastic farmer. Judge Jefferson was an established jurist, with a law degree from the University of Virginia and nearly twenty years on the bench by late 1953, the year in which Lucy filed for an injunction in Jefferson’s courtroom. The judge, with all his experience adjudicating land disputes in rural Dinwiddie County, swiftly disposed of this case. After hearing initial arguments from attorneys on both sides and reviewing the slim record of evidence (a brief series of depositions taken in Brunswick and Dinwiddie County Courts before trial), Judge Jefferson promptly issued a decree dismissing the action brought by the Lucy brothers. The judge ruled simply that the Lucy brothers had “failed to establish their right to specific performance of the alleged contract. . . .” The decree took up a mere three sentences.
When it came to overturning Judge Jefferson’s concise decree, Justice Archibald C. Buchanan, writing for the higher court, felt compelled to give a more detailed examination of the case in light of the trial court’s failure to set forth the relevant facts of the case. These circumstances placed the court of appeals in the unusual position of being an initial finder-of-fact, producing an appellate opinion many times longer, and much more in-depth, than the trial court’s findings. In discarding the lower court’s decision, Justice Buchanan found the contract to be both legitimate and enforceable, and even ridiculed Zehmer’s lawyers for advancing “an unusual, if not bizarre, defense.” Moreover, rather than remand issues to the trial court, such as whether additional evidence would support the appellate court’s lengthy characterization of the facts, the Virginia Supreme Court of Appeals handed the plaintiff a final victory, allowing him to take possession of the disputed Ferguson Farm.

In addition to the unusual dynamic between the lower and appellate courts, Justice Buchanan’s famous opinion has its own contradictions and mysteries. Even though Buchanan’s story was entertaining enough to make it into contracts casebooks and become renown among contracts students, very few of these contradictions have attracted attention from legal scholars. In the sections below, we identify some more systematic issues

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24 Id. at 504. See also Dinwiddie County Deed Book 90 Page 365 (containing a copy of the deed confirming the transfer of the Ferguson Farm from A.H. Zehmer to W.O. Lucy).
25 Among the few who have given some scrutiny to the famous case is the noted legal scholar Allan Farnsworth, who raised a significant timing issue in the case. E. ALLAN FARNSWORTH, CHANGING YOUR MIND: THE LAW OF REGRETTED DECISIONS 55-64 (1998). Pointing to Hardy Zehmer’s allegations that he reneged on his promise shortly after signing the contract and that he subsequently refused the $5 offered by W.O. Lucy for consideration that same night, Farnsworth questions whether such actions were consistent with the court’s ultimate conclusion that the contract was valid. Professor Farnsworth argues that this almost immediate repudiation of the contract raises crucial questions about exactly when the contract was formed between the parties and what effect Zehmer’s subsequent statements should have before Lucy had relied on that contract. Nonetheless, Professor Farnsworth ultimately defends the court’s decision to uphold the contract despite these issues with timing. As he argues, once a contract is signed, it does not matter when that party renews on that contract, whether that disagreement is expressed two minutes or two weeks later; either case represents a breach of the original contract, regardless of whether
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in Buchanan’s opinion, with the goal of exposing to light what has heretofore remained an oft-told but unexplored legal tale.

A. Matter of Mysterious Motivations

On the surface, the case described by Justice Buchanan appears to be a local dispute between two relatively unsophisticated neighbors, W.O. Lucy, a “lumberman and farmer,” and A.H. Zehmer, who “operated a restaurant, filling station and motor court” and owned the disputed Ferguson Farm. From the court’s opinion the dispute appears to be informal, uncalculated, and driven by liquor—even if the court did not ultimately believe the men were legally intoxicated at the time.26 In Dinwiddie County, this view of the conflict has persisted, with one community leader recently describing the dispute as arising out of “a little alcohol, cards and greed.”27 Few have endeavored to look beyond this simple description of the motivations underlying the conflict.

There is, of course, a reasonable basis in the record from which one could conclude that the dispute was the result of impulsive action. Testifying that he was as “high as a Georgia pine,”28 for example, Hardy Zehmer and his attorneys argued that the alleged contract was only a joke

the other party actually relied on the document. Ultimately, Farnsworth argues that the law presumes reliance in either case. Id. In response, Professor Spiedel points out that W.O. Lucy actually contested these facts and that, ultimately, the court instead accepted as fact Lucy’s statements that W.O. Lucy had already raised the $50,000 and consulted his lawyer about the transaction before Zehmer indicated that he did not intend to sell. Richard E. Spiedel, Changing Your Mind: The Law of Regretted Decisions By E. Allan Farnsworth, 31 Loy. U. Chi. L.J. 255, 267 n. 57 (2000). See also Lucy v. Zehmer, 84 S.E.2d 516, 521-22 (Va. 1954) (providing the disputed text). While only a small issue in the dispute, this timing question is particularly significant to those seeking to understand the overall contours of the court’s final holding; after all, if what matters is the outwardly-manifested “objective” intent, it is important to determine which outward manifestations the court will consider. The timing question is also heavily informed by the context and surrounding circumstances in which the purported assent takes place.

26 Lucy, 196 Va. at 500.
27 Correspondence with Richard Liles, President of the Bank of McKenney, Mar. 6, 2009.
28 Lucy, 196 Va. at 500.
between two “doggone drunks” rather than an actual contract.\textsuperscript{29} Zehmer immediately retracted, and the next day a presumably more sober Zehmer informed Lucy that he had no intention of holding Lucy to the alleged agreement.\textsuperscript{30} Similarly, Welford Ordway Lucy, in his own testimony, expressed some concern about the manner in which the agreement was reached.\textsuperscript{31} Indeed, asked by one of Zehmer’s lawyers whether he felt drunk or happy on the night of the signing, Lucy answered instead that it “[l]ooks like I must have been feeling rich.”\textsuperscript{32}

Taken together, Zehmer’s reluctance to sell and Lucy’s suggestion that the price was too high should have provided sufficient grounds for them to reach an amicable settlement to the supposedly spontaneous and ill-advised agreement. Neither Zehmer nor Lucy appeared, from their words, to be entirely happy with the bargain. But there was no settlement. To the contrary, an aggressive legal battle unfolded that was costly and time-consuming for both parties.

Accordingly, if the procedural history of \textit{Lucy v. Zehmer} tells us anything, it is that Welford Ordway Lucy was not a reluctant buyer, and that his legal actions spoke much louder than his words of regret. When Lucy secured payment for the farm and Hardy Zehmer refused to deliver title, Lucy hired an attorney and brought suit to compel performance. Then, when the trial court invalidated that contract—un-sticking Lucy from any obligation he might have felt to perform—Lucy pursued an appeal before the state’s highest court.

Moreover, Lucy did not just hire any attorney to enforce the contract—he sought Virginia’s best. Albertis S. Harrison, Jr., who

\textsuperscript{29} Id. (quoting Zehmer’s characterization of the encounter as “two doggoned drunks bluffing to see who could talk the biggest and say the most.”) The Court ultimately concluded, of course, 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.” \textit{Id.}

\textsuperscript{30} Id. at 501.

\textsuperscript{31} Id. The Court noted that Lucy had admitted “that he had been stuck before and was going through with it.” \textit{Id.}

\textsuperscript{32} Appellate Record at 63.
represented Lucy at both the trial and appellate level, is a legendary figure in Virginia. At the height of his power, Harrison served as Virginia’s Governor from 1962-1966 and then as a Justice on the Virginia Supreme Court of Appeals. In 1952, Harrison’s political clout had already started to rise. An ambitious State Senator who was first elected to the state legislature in 1947, Harrison’s legendary status began to take shape when he took over as campaign manager for Senator Harry S. Byrd’s 1952 re-election campaign during a tough year for the Senator’s political organization. Depicted in the press as the person who kept the Byrd Machine running smoothly, Harrison was a natural choice five years later

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33 Lucy v. Zehmer, 84 S.E.2d at 517. Lucy was also represented by local judge Emerson D. Baugh, an administrative judge in Brunswick County. Although Baugh did not have the notoriety of Harrison, he evidently was a respected lawyer in Southside Virginia. See Martindale Hubbell Directory (1956) (listing Judge Baugh’s legal ability as “very high”).


35 Materials from this first election are available at the Governor Albertis Harrison Room of the Brunswick County Museum in Virginia. Copies of these materials are on file with the authors.

36 See, e.g., Peter R. Henriques, 87:1 THE VIRGINIA MAGAZINE OF HISTORY AND BIOGRAPHY 18 (Jan. 1979) (explaining how seriously Senator Byrd took a primary challenge from liberal Democrats and that, to counter the challenge, “a knowledgeable state senator and future governor, Albertis S. Harrison, was tapped as Byrd’s campaign manager”).

37 A political cartoon from July 13, 1952 in the WASHINGTON STAR, for example, depicts Harrison sitting with his arm around Senator Byrd in a 1920s-era automobile labeled the Byrd Machine. The caption reads: “The old buggy runs as good as ever, Harry!” Allie Edward Stakes Stephens, another Byrd adviser, is depicted falling off the vehicle. The cartoon appears to show Harrison gaining influence in the Byrd Machine at the expense of Stephens. See exhibit in the Albertis Harrison Room, Brunswick County Museum. While Stephens remained a disciple of Byrd at the time—and was elected as Lieutenant Governor with Byrd’s support—he later broke with the Byrd Machine over school desegregation. Stephens later ran for Governor in 1961 without Byrd’s support, and easily lost the primary to Byrd’s chosen candidate, Albertis S. Harrison. The race was seen as an indicator that the Byrd Machine remained a force in Virginia Politics despite the political in-fighting of the 1950s. See Virginia: Byrd’s Nest, TIME, July 21, 1961, available at http://www.time.com/time/magazine/article/0,9171,897801,00.html (reporting that “the
as the Democratic candidate for Attorney General of Virginia, a post which left him “responsible for handling in court the state’s massive resistance strategy, a plan devised by Byrd to prevent federally ordered integration of the state’s public schools.” In short, Lucy’s lawyer was the man to whom Senator Byrd turned for counsel and to whom Virginia turned in its last stand to defend segregation.

Curiously sandwiched between fixing the Byrd Machine in 1952 and making Virginia’s last stand in defense of segregation in 1958, Harrison became involved as the plaintiff’s lead attorney in *Lucy v. Zehmer*. Presumably, as a counsel of last-resort to Virginia’s most influential politician and his fabled political machine, Harrison’s time was not cheap. Which begs the question: why did Lucy hire such a big name to argue such a small case, and why did Harrison accept the representation? Lucy’s actions belie the cash-strapped buyer depicted in his own testimony and the court’s opinion, and for Harrison, compared to the other statewide challenges he took on, a liquor-induced farm dispute seems downright pedestrian.

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40 Saxon, supra note 34. Harrison reportedly had his doubts about Byrd’s campaign of massive resistance, noting “in a letter to Byrd in August 1958 . . . [that] admission of blacks to white schools probably was inevitable.” Daily Press, supra note 39. That said, Harrison, the consummate attorney, was willing to fight hard to delay this inevitable result. As he wrote in a letter in July 1957, “Before this case was tried, I too had an idea, which I expressed to the Commission . . . that we could literally litigate negro plaintiffs to death and force them to exhaust administrative remedies. At that time, I envisioned appeals to the School Boards, then to the Circuit Court and then to our Supreme Court.” Letter from A.S. Harrison, Jr., to C. Harrison Mann, Jr., July 27, 1957, available at http://mars.gmu.edu:8080/dspace/bitstream/1920/1099/1/mann_03_06_07.pdf. While Harrison was ultimately unsuccessful as Attorney General in preventing desegregation during his tenure, his strategy did delay it. He succeeded, for example, in forcing the NAACP to re-file a constitutional challenge against state laws designed to delay integration, which was successfully litigated in federal court, in a substantially less favorable Virginia state court. See Harrison v. NAACP, 360 U.S. 167, 179 (1959).
Given Harrison’s extensive political activities on behalf of the Democratic Byrd Machine, one might be tempted to look to politics to answer these questions. One possible political explanation points to Hardy Zehmer’s active involvement in the Republican Party, including his role as an alternate delegate from Virginia to the Republican National Convention in 1948, 1952, and 1956 and the bitter fights over segregation that viciously pitted the two parties against each other during this period. Along these lines, one leading casebook speculates that “[a]pparently the Zehmers were infamous as being the only Republicans in this rural south side Virginia county during the era of the Byrd machine and were not ‘well-liked’.” Others might note that Justice Buchanan’s vitriolic opinion in *Naim v. Naim*, which upheld the constitutionality of Virginia’s anti-

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42 Ugly segregation battles unfolded before the Virginia Supreme Court, with Justice Buchanan as a leading antagonist. See infra, note 44.

43 SCOTT & KRAUS, supra note 15, at C.5 (drawing upon information provided by a student from Dinwiddie County). Professors Scott and Kraus ultimately conclude, however, that, “[w]hile that might explain local prejudice against the Zehmers, it doesn’t explain what happened here. The Zehmers won in the Dinwiddie circuit court. They lost at the Supreme Court in Richmond where presumably no one knew anyone.” Id. There is reason to suspect, however, that politically-motivated discrimination against Zehmer might have been more pronounced in Richmond than in Dinwiddie. The Supreme Court would certainly have known Albertis S. Harrison, Jr., the lead attorney for the plaintiff, yet Harrison, originally from Brunswick County, might not have been as well known by the circuit court in neighboring Dinwiddie County as Zehmer’s lawyers, who both spent most of their careers as elected officers of that court, as described in the section below. Accordingly, a political explanation might suggest that Zehmer won in the local forum in which his local counsel were better known while Lucy subsequently won in the state capital where his lead attorney was known as a rising star.

44 197 Va. 80 (1955) (upholding Virginia’s anti-miscegenation law). Buchanan’s opinion includes:

We are unable to read in the Fourteenth Amendment to the Constitution, or in any other provision of that great document, any words or any intendment which prohibit the State from enacting legislation to preserve the racial integrity of its citizens, or which denies the power of the State to regulate the marriage relation so that it shall not have a mongrel breed of citizens. We find there no requirement that the State shall not legislate to prevent the obliteration of racial pride, but must permit the corruption of blood even though it weaken or destroy the quality of its citizenship. Both sacred and secular history teach that nations and races have
miscigenation laws and was issued only one year following *Lucy v. Zehmer*, suggests that he and the rest of the Virginia Supreme Court of Appeals might have been hostile towards parties promoting desegregation efforts or Republicans in general. Moreover, Harrison’s prominent role in statewide Democratic politics at the time of the dispute, including his chairing the Virginia State Senate’s Judiciary Committee that recommends candidates for judicial appointment, might further suggest that the case was politically driven.

Nonetheless, despite an exhaustive search, we have found little evidence that Hardy Zehmer had other political ambitions or for any reason would have been a target of the Byrd Machine. In addition, both Zehmer’s lead defense counsel, Morton G. Goode, and the trial judge who initially dismissed the suit were also prominent local Democrats and members of the Byrd Machine. More important, court records reveal that many other cases involving seemingly pedestrian land disputes found their way into Virginia state courts, including the Virginia Supreme Court, including several argued by Albertis Harrison. The surprising profusion of litigated land disputes turns out to be significant in another way, but it undermines supposition that *Lucy v. Zehmer* was uniquely targeted by politicized Democrats in Richmond. Therefore, if a political explanation to *Lucy v. Zehmer* can be found, it may prove to be more complex than previously suggested by legal

See infra, note 153-174 and accompanying text.

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45 To the contrary, the Byrd organization, while officially maintaining a “Golden Silence” on all three elections in which Hardy Zehmer served as a delegate to the Republican National Convention, implicitly backed Republican presidential candidates in those races. See Dale Eisman, *Gov. Harry Byrd Modernizes Virginia, Then Takes Charge: His Democratic Machine DOMINATES STATE POLITICS FOR ALMOST 40 YEARS*, VIRGINIAN-PILOT & LEDGER STAR, June 13, 1994, B1 (explaining that Senator Harry F. Byrd, Sr., had since 1944 “adopted a policy of ‘golden silence’ on Democratic presidential candidates, essentially inviting his followers to support Republicans. Later, they did, helping to deliver the state to the GOP contender in every presidential election, save one, since 1952”). Accordingly, Zehmer’s activities in support of Republican presidential candidates at the three Republican National Conventions would actually have been in line with the unofficial but well-known policy of Byrd’s organization.
When money grew on trees

scholars and it may be more related to the overall forces propelling Harrison to the governor’s mansion than to the specific identity or political ideology of Hardy Zehmer.

Accordingly, questions about motivation remain.

B. The $50,000 Question

Questions about the motivations underlying Lucy v. Zehmer ultimately lead to questions about the disputed object—the Ferguson Farm—and whether $50,000 was really a fair price for the property. All too often, students and scholars overlook this question, and some casebooks omit the court’s discussion of price altogether. Such an omission is not necessarily illogical. After all, in their initial pleadings, both parties had stipulated that a particular real estate expert, one C.C. Johnson, would, if called, testify that $50,000 was a fair price for the Ferguson Farm. Moreover, casebook authors most often rely upon Lucy v. Zehmer to demonstrate the main theory set forward by the court—the objective theory of contract formation—which dictates that one should look for objective signs of offer and acceptance rather scrutinize the fairness of the transaction.

An assessment of the fairness of the sales price was, however, central in Buchanan’s evaluation of Zehmer’s equity claim, and Justice Buchanan relied on contextual evidence in determining that $50,000 was an objectively reasonable price for the farm. With rather sweeping language,

47 This was the first question asked by one local historian after his initial review of the case. Conversation with Ronald Seagrave, February 27, 2009.


49 Appellate Record at 10.

50 See, e.g., Solan, supra note 9, at 354-55 (summarizing the objective theory of contracts).
Justice Buchanan denied the equity claim because “[t]he 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.” If anything, Justice Buchanan described the deal as a windfall for Hardy Zehmer.

Of course, if the contract created a windfall for Zehmer, it is hard to explain why he invested so much in invalidating it (and, similarly, why Lucy tried so vigorously to enforce it). While Buchanan notes that Zehmer had expressed some interest in giving the farm to his son, his opinion does little to explain why Zehmer wanted his son to have the Ferguson Farm in particular or why Zehmer could not, with his supposed windfall, purchase a similar farm for his son and pocket the difference. Moreover, there are other reasons to question Buchanan’s valuation even though it comes directly from the record. First, Justice Buchanan only provides the historical price at which Zehmer bought the farm and the property’s tax assessment, neither of which are reliable indicators of the fair market value of a real estate asset. At the same time, Justice Buchanan failed to include other

52 Id. at 499. The situation might be different if the Ferguson Farm had been in the Zehmer family for generations. In such circumstances, passing down a particular farm to the next generation might have a more readily recognizable value to a rural farmer and similarly to a local judge. Since Hardy Zehmer had only recently acquired the property, however, it is less clear why he would be so resistant to selling the property. Perhaps Zehmer was merely trying to evoke sympathy from the rural judge by saying he hoped to bequeath the farm.
53 A description of why these values are suspect requires a brief introduction to general accounting principles.

In this case, the $11,000 price Hardy Zehmer originally paid for the Ferguson Farm could be described in accounting terms as the farm’s historical or “book value.” See Vicki O. Tucker, Pattie G. Meire, & Phyllis M. Rubinstein, The RTC: A Practical Guide to the Receivership/Conservatorship Process and the Resolution of Failed Thrifts, 26 U. RICH. L. REV. 1, 17 n. 74 (1990) (explaining that book value is generally historic value). Book values are generally regarded as unrealistic and unreliable, particularly for real estate assets that generally appreciate over time. See Lisa M. Rico, Morris N. Robinson, & Judith A. Saxe, A Practical Guide to Estate Planning in Massachusetts, Volume II, Chapter 10, §10.5.4(a) (MCLE, 2007) (citing book values as “not realistic” because they are at least partially based on historical costs), available at EPII MA-CLE 10-1; Ronald D. Aucutt, Living and Dying With Section 2036(C)(Or Getting Ready For Its Replacement), CS02 ALI-ABA 673, 759 (1990) (indicating that, when “assets consist primarily of real property held for investment, a formula based on book value cannot reasonably be expected to
relevant values, including Lucy’s offer in 1944 or 1945 of $20,000 for the same farm (only a year or so after Zehmer purchased it for $11,000), a fact mentioned earlier in the court’s discussion of enforceability but omitted from the court’s discussion of price.

At times, this appreciation in land value makes fair market values diverge widely from historical book values. See Peta Spender, Guns and Greenmail: Fear and Loathing After Gambotto, 22 MELB. U. L. REV. 96, 99-100 (1998) (providing an example of a case in which the book value of several tracts of land held by a company amounted to $15,035,000, whereas its market value was appraised at a sizably larger $25,977,000). Tax assessments—which rely on many factors unrelated to market prices—can be even more problematic. See William E. Banfield, Real Estate Taxes, in NEGOTIATING THE SOPHISTICATED REAL ESTATE DEAL 2008: HIGH-STAKES STRATEGIES IN CHALLENGING TIMES 218 (PLI 2008) (noting that “value for real estate tax purposes is often different than value for other purposes . . . and in most cases it is very different from purchase price”), available at 554 PLI/Real 215. In the same county where Lucy v. Zehmer took place—Dinwiddie County, Virginia—a recent controversy nicely illustrates this point. By law, Dinwiddie County is required to update tax assessments once every five years. In late December 2008, Dinwiddie County released its most recent assessments. The firm that conducted those assessments, relying on data collected about market prices and land values through 2007, found that “rural acreage in the county and throughout Virginia had increased in market value” such that some “assessments skyrocketed more than 300 percent.” Many Dinwiddie County property owners upset by new assessments: Many Dinwiddie County homeowners are shocked and angry. THE PROGRESS-INDEX, December 28, 2008, http://www.progress-index.com/articles/2008/12/26/editorial/pi_progindex.20081226.a_pg4.pi1226bcedit_s1.2152485_.edi.txt. In reaching these inflated assessments, the county did not factor the turmoil in the real estate market that began in 2008, leading local papers to ask how assessment values could rise so much “when market values of properties across the nation and state are plummeting?” Id. This controversy, if anything, demonstrates that real estate prices can fluctuate heavily, whether up, down, or—as in this example—in both directions, in the short span of five years between tax assessments, and that these swings can be driven by other significant surges or downturns in the national or local economy.

Appellate Record at 2, 56 (referencing Deed Book 69, Page 167).

Lucy v. Zehmer, 196 Va. 493, 495 (1954) (also explaining that Zehmer similarly backed out of that alleged contract for the Ferguson Farm).

Even Buchanan’s best argument for the price’s fairness, that “Zehmer admitted that [$50,000] was a good price,” is questionable because the admission was arguably taken out of context. Zehmer made the statement at a Christmas party the day after the contract was signed. It was an informal environment, and, when Hardy Zehmer saw Lucy, he approached Lucy to tell him that he did not consider what happened the night before to be a deal even though he was “not trying to say this because I think the price is too cheap . . . .”
The mixed circumstantial evidence is enough to question whether Zehmer really did enjoy a windfall—and perhaps suggests instead that it was Lucy who received a windfall. What is clear is that Hardy Zehmer did, at least at first, think that $50,000 was a good price for the farm. The price seemed so good, in fact, that Zehmer allegedly did not believe Lucy was serious. Lucy, by contrast, may have felt that the price was a bargain that was worth pursuing through an expensive appeal. To understand why these men might have viewed the property’s value so differently, it is essential to understand who they were in Virginia society.

II. THE FARMER AND THE LUMBERMAN

“The first farmer was the first man,” Ralph Waldo Emerson wrote, for “all historic nobility rests on the possession and use of land.” Virginia society held the farmer in a similarly glorified status, where legendary family dynasties are often linked to substantial ownership of rural estates. Some Southern aristocrats, like the Harrisons, can trace the ownership of their lands to royal charter. Others, like the dynasty founded by Harry F. Byrd, Sr., rose to political and social prominence through the wise acquisition and management of local lands. The Zehmers of Dinwiddie County fell somewhere in-between.

Instead, Zehmer explained, “if I wanted to sell, I think $50,000 would be a good price, and I think you would get stuck.” Appellate Record at 38. It is unclear, however, how much research Hardy Zehmer had done before making this casual judgment on price. This is evident earlier in the record of that deposition, when Hardy Zehmer made clear that he was not prepared to discuss prices. Id. at 33.

58 See Saxon, supra note 34 (noting Albertis S. Harrison’s “home sat on a tract deeded to an ancestor, Henry Harrison, by King George II in 1732).
59 See, e.g., Harry F. Bird (1887-1966), the Encyclopedia of Virginia, available at http://www.encyclopediavirginia.org/Byrd_Harry_Flood_1887-1966. Byrd also came from an established family of colonial fame, but it was his purchase and efficient management of apple orchards which paved the way for his rise to dominance over Virginia’s political system for decades. Id.
At the time of the dispute in *Lucy v. Zehmer*, the Zehmers had been a prominent fixture in Dinwiddie County for more than a century. The dynasty began with a Captain Charles Zehmer, a Dutch-German merchant from Philadelphia who was reportedly a member of elite circles during colonial times. In addition to a fleet of ships, Captain Zehmer owned a plantation, a tanning business, and extensive land holdings in Virginia and Pennsylvania. Upon his death, Captain Zehmer left all of his property to his sole heir, a son named Charles Grandison Zehmer, who subsequently lost the entire estate in a game of cards. Charles Grandison later attended medical school and returned to his native Dinwiddie County to become its local physician. There Dr. Zehmer raised eleven children, whose descendants prospered in Dinwiddie County for more than a century.

As their prominence grew over time, so did their holdings of land.

The history of the Zehmer family is very much the history of McKenney, the small town in Dinwiddie where the Zehmers lived. Named after William Robertson McKenney, a railroad attorney from Richmond, McKenney was founded when the railroad was built to connect the isolated and rural south of Dinwiddie County to the Richmond market to the north. Many local institutions, such as the local bank, were established during this period to meet the sudden demand generated by this growing commercial link. Among these institutions were several businesses established by the Zehmer family, cementing their influence around the new town.

At first, the Zehmers established a sawmill business to cut lumber for railroad ties, and as the railroad pushed deeper into Dinwiddie, the

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60 Roberta Zehmer Smith, *Zehmer: A Family History* 2-8, 12-16 (Jane C. Arnett, ed., 1984).
61 Id. at 12-16.
Zehmers purchased vast tracks of timberland to keep up with the railroad’s needs. With a sawmill small enough to move from tract to tract, the Zehmers would acquire heavily forested properties to harvest timber, moving their mill quickly from one property to another to keep up with the railroad’s growing demand. This process led the Zehmers to acquire substantial land holdings around the outskirts of what became McKenney, solidifying their influence as a prominent family in the small town.  

This business had a natural limit, and the family looked to use their land holdings for alternative businesses once the local railroad line was established. In the 1920s, the family began to farm tobacco, a profitable cash crop at the time. Less than twenty years later, they supplemented their income by raising cattle, a business that was naturally followed by dairy

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farming. As each business reached what seemed like its natural limit, other family businesses were established, including a local grocery store, a local hardware store, and, ultimately, “Ye Olde Virginnie,” the small “tourist court” operated by Hardy Zehmer.

By his upbringing, Hardy Zehmer was a farmer born into a well-landed farming family, but he also was an educated businessman, attending

\[\text{Sources:}\]

65 Id.
66 Id.
68 Picture provided by Ronald Seagrave. Original source unknown.
southern Virginia’s prestigious Hampden-Sydney College and then briefly working for E. I. du Pont de Nemours as the foreman of a munitions plant during World War I. After the war, Hardy Zehmer returned to conduct business in his native McKenney, where he quickly established a restaurant, service station, motel, and guest cabins. These assorted business ventures primarily catered to travelers along Highway 1, the main north-south thoroughfare at the time, and they were profitable even during the Depression years when so many local businesses failed. As a measure of his success, Hardy Zehmer, in a period when many were losing their farms, had enough disposable income to buy the Ferguson Farm—a property that Zehmer had no desire to seriously operate for commercial purposes.

In spite, or perhaps because, of Zehmer’s wealth, he had a less-than-sterling reputation among McKenney’s residents and is remembered to have been a colorful character. As one neighbor recounts, Hardy Zehmer was known for his drinking even before the fateful December evening in 1952 and had several reported run-ins with state and local officials. He also was the town’s leading Republican in an age where most town residents still thought of the Republican Party as the party of Abe Lincoln and Herbert


70 See Hardy Zehmer’s Draft Card from World War I (a copy is on file with the authors). At the time, the large gun cotton factory in Hopewell reportedly “employed almost all of the employable labor in that area”. Hercules Powder Co. v. Continental Can Co., 86 S.E.2d 128, 129 (Va. 1955).

71 See Snyder, supra note 67.

72 See Appellate Record at 24, 41 (providing Ida and Hardy Zehmer’s deposition testimony stating that at most several cows were kept on the farm). Members of the Zehmer family also confirm Hardy Zehmer’s wealth and that Hardy held the farm as an investment rather than an active business asset.

73 Interview with Meade Harrison, Oct. 15, 2009 (recounting stories about incidents in which Zehmer’s liquor license was suspended for excessive drinking behind his bar and Zehmer supposedly called a local fire department to come out for a fire, only to clarify later that “the fire is in my belly”).
Hoover. The reasons for Zehmer’s political allegiances are not entirely clear, but they made Zehmer a relative outcast in town despite the prominence of his family. This animosity was evidently mutual, as Hardy and Ida Zehmer made no secret of their distaste for “McKenney people,”74 and McKenney people reportedly made no secret of their distaste for Hardy and Ida Zehmer.75 Perhaps it is no surprise that Hardy Zehmer directed his business towards those only passing through town.76

The Lucy brothers came from a world far away from Zehmer’s privilege. While also born into a farming family—their father ran a tobacco farm—the Lucy brothers lost everything when their father’s farm went bankrupt in the early years of the Depression, leaving the six Lucy children to fend for themselves. John Cleveland Lucy (Welford’s older brother and co-plaintiff) never finished the seventh grade and instead went to work in the lumber industry as a teenager. Eventually scrapping together enough money to buy a small sawmill, John enjoyed the freedom that came from running his own business, even though property records disclose that he took on an occasional partner on larger projects.77

In his early years, John C. Lucy bought and cut timber from the land of local farmers, financing the purchases with loans and then selling the cut timber to local lumber companies at a profit. From the start, he relied on one institution in particular—the Farmers and Merchants Bank—to finance most of these activities. His agreements with that bank were in turn drawn up by the bank’s attorney and one of its trustees at the time, a young

74 Appellate Record at [].
75 See SCOTT & KRAUS, supra note 15, at C.5.
76 Whatever the reasons for this mutual distaste, it is unclear that it was shared by the Lucy brothers. Indeed, John C. Lucy, Jr., the son of co-plaintiff John C. Lucy, fondly remembers dining at Zehmer’s restaurant as a child and thinking of Hardy Zehmer as “a very pleasant man.” If the Lucy brothers personally disliked Hardy Zehmer, such feelings were not shared with the rest of their family, leaving the ironic possibility that, at least on the surface, the Lucy brothers were among the few in the area with a positive view of Hardy Zehmer.
77 See, e.g.,
Commonwealth Attorney named Albertis S. Harrison, Jr. The bank’s trust in John’s business clearly grew over time, evidenced by the large number of loans it issued to Lucy and his brothers over the next two decades. For many years, John C. Lucy even sat on the bank’s board along with Albertis S. Harrison, Jr.

Welford, unlike his brother, was not content remaining in his native Brunswick County. Instead, he looked further north to neighboring Dinwiddie County, at first driving a truck for a local businessman and then getting into lumber and cattle farming. He eventually purchased an estate along Highway 1 in the mid-1940s, a location not too far from Hardy Zehmer’s tourist court. It was the first time, but not the last time, that Welford Ordway would feel the need to move to a new community to pursue new business opportunities.

78 A Commonwealth Attorney is the local equivalent of a District Attorney in Virginia. Over the course of his career, Harrison continued to serve as a trustee for the Farmers and Merchants Bank. Indeed, his name is listed as trustee on so many Trust Deeds that Brunswick County has an entire Grantee Deed Index just for the Harrison family.

79 At the same time, Emory Lucy, one of John C. Lucy’s sons, insists that it would be difficult to track his father’s timber-cutting business just by tracking these loans. Instead, he believes that his father usually paid for timber to be harvested in cash, and only took loans when absolutely necessary. Interview with Emory Lucy, Oct. 27, 2009.

80 Despite his humble roots, John C. Lucy saw himself as a gentleman. While heading out to work in the field, John always wore a full suit complete with a bow tie. As one of his son’s recalls, he even wore the suit for breakfast. Beyond business at the bank, John C. Lucy also developed a close bond with Albertis S. Harrison. While the poorly educated businessman might seem a strange match with the well-educated lawyer, John’s descendants recall that the two men were close personal friends. The two regularly played golf together, and John C. Lucy in particular was a true believer in Harrison and his political skill. Emory Lucy, one of John’s sons (who served as a driver for Harrison during one of his early political campaigns), recalls that his father sagely predicted that Harrison would be elected governor long before his victory in 1962. Interview with Emory Lucy, Oct. 27, 2009. A loyal Democrat, John’s brother Welford was similarly supportive of Harrison’s political ambitions. Welford’s Dinwiddie farm had a large barbecue pit with picnic tables where he hosted political fundraisers for Harrison during each election season.

Interview with Meade Lucy, December 10, 2010.

81 Interview with Meade Lucy, December 10, 2010.

82 Id. See Postscript.
Welford arrived in McKenney as an outsider, and although he would become a close associate of several residents—including Harrison Zehmer, a cousin of Hardy Zehmer who would often spend his evenings at his cousin’s restaurant—views vary on whether Welford ever integrated himself into the area. Some current residents recall that Lucy was known to be shady with his business, and that—he was eager to make quick profits off of the land of others. \textsuperscript{83} Perhaps one source fueling mistrust of Lucy was the region’s deep history of land speculators, who capitalized on rising land values and unsuspecting land owners. In fact, the period leading up to and including the dispute over the Ferguson Farm was another period of fluctuating land prices and aggressive speculation. Technological progress that began in the late 1930s and continued through the 1950s drastically increased the price of timber, which created a sudden shock to land prices. Lumbermen like the Lucy brothers\textsuperscript{84} would have followed these commodity price changes closely, but these fluctuations probably would not have been known to local landowners like Hardy Zehmer.

This history of land speculation in the region, along with circumstances in the 1950s that presented opportunities for more speculation, suggests that the motivation underlying the case might have been merely financial, and that the Ferguson Farm was worth sufficiently more than the $50,000 contract price to justify the lengthy and costly litigation that followed. Although Hardy Zehmer may have prided himself on his superior education and business acumen, the region’s economic changes were being driven by market forces far from the tourist court most familiar to Zehmer. These economic changes created new profit

\textsuperscript{83} When asked, for instance, whether Welford’s reputation was hurt by the dispute in \textit{Lucy v. Zehmer}, one neighbor—Meade Harrison responded with a bluntness characteristic of Dinwiddie residents: “What reputation?” Interview with Meade Harrison, Oct. 15, 2009. Welford’s youngest son, Meade Lucy, saw a different side to his father, describing Welford as a complicated man who was strict and a bit distant at home but friendly and out-going with most people in the community. As his son recalls, Welford was the kind of person “who never met a stranger.” Interview with Meade Lucy, December 12, 2010.

\textsuperscript{84} While Justice Buchanan described Lucy as a "lumberman and farmer," Lucy’s actual deposition testimony emphasized his lumber work, only adding "some farming" as an afterthought. [ ]
opportunities for the under-educated but enterprising Lucy brothers, who though starting with only a small mill played a significant role in the timber economy of Dinwiddie and Brunswick counties Virginia in a period of significant industrial expansion.

III. TIMBER PRICES, LAND DISPUTES, AND AN INDUSTRIAL SHIFT IN THE SOUTH

While John C. Lucy first began his career as a lumberman the 1930s, economic trends that began in the 1920s and accelerated through the 1950s were rapidly changing the business of lumbermen across the American South. During much of this period, the lumber industry of southern Virginia—the region’s traditional driver of prices for raw timber resources—was maturing in the face of declining demand. Southern lumber output steadily declined through the late 1940s, and lumbermen were seeking new uses for the region’s substantial timber reserves.

The search for alternative uses for timber brought new investments in wood pulp plants. Wood pulp was a valuable raw material for paper production, and businessmen quickly realized that Southern wood pulp could be used by paper plants in the North where timber resources were more stressed. Before long, companies were also investing heavily in constructing new paper mills in the South. The new capacity for paper manufacturing made harvesting timber for wood pulp very lucrative, which in turn created a shock in local timber prices. Demand for timber spiked, as companies sought to acquire more timberlands to guarantee their timber supplies, and speculation over timberlands became rampant. This rapid increase in land prices—and the accompanying swarm of eager land

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85 In forestry, “timber” is the raw tree that is harvested. Trees in the field are often referred to as “standing timber.” “Lumber,” by contrast, is a finished product for use by an end-consumer (e.g., “lumber boards”). See, e.g., Roberts v. Nevel, 149 Va. 646, 653-54 (1927) (explaining the “clear and definite” technical definitions of the terms timber and lumber as distinct from the “loose inaccurate verbiage of the layman”). While lumber was the main product made from timber in the South, other products (like “wood pulp”) are possible as well. “Wood pulp,” in turn, can be used to produce paper.
purchasers who regularly surrounded landowners—illustrates the importance of the economic context behind the 1952 encounter in Zehmer’s restaurant. This begins to explain both the Lucy brothers’ interest in the Ferguson Farm and Zehmer’s substantial resistance to sell it.

A. When the Farmer met the Lumberman: Timber’s Early Years, 1850-1907

The lumber industry has deep roots in southern Virginia, dating back to at least 1855, when two brothers from Pennsylvania set up a steam-powered sawmill along the Blackwater River between Petersburg and the North Carolina border. That sawmill was, at the time, an isolated outpost in an agrarian economy dominated by tobacco plantations. The larger economy, however, was brought to its knees after the Civil War, when the emancipation of the region’s slaves halted the region’s tobacco economy. This disruption to local agriculture depressed land prices, which thereby drew large numbers of northern sawmill operators eager to take advantage of the region’s vast and suddenly inexpensive timber lands. Since agriculture offered little economic opportunity, local Virginians soon took to the lumber industry as well, realizing that they could pay only a pittance for woodlands and earn back the purchase price after the first harvest of timber. It was through such a business model that Paul Camp and his brothers, the sons of a local planter, amassed the fortune necessary to establish in 1887 what would become the Camp Manufacturing Company, which quickly became Southern Virginia’s largest lumber company and a market leader in what the Virginia Supreme Court later described as “one of the most important industries of Virginia and of the South.”

87 Id. at 15-16.
88 Id. at 29.
89 Id. at 31.
90 Id. at 31, 36, 129.
Home to many dense forests, southern Virginia in particular was a natural attraction for lumbermen. As an official history of the Camp Manufacturing Company explains, “[n]owhere in the world did pine grow better than in the sandy region south of the James River in Virginia, beginning at Richmond and extending southward to the Neuse River in North Carolina.”92 The decentralized pattern of landownership, however, posed considerable obstacles to accessing these dense forests. In 1908, the Circuit Court of Brunswick County described the problem as follows: “the territory in southside Virginia is so divided into ownerships of small tracts, that it is necessary to purchase from hundreds of farmers in order to justify the erection of a modern saw-mill plant.”93

Early on, this divided ownership was not a significant obstacle to the industry’s growth, as farmers were eager to cooperate with lumbermen to extract resources that were valueless without the machinery and know-how to harvest and bring timber to market. “As a rule,” the Circuit Court of Brunswick County wrote, “the farmer welcomed the lumberman, who came to buy something that had not previously been convertible into ready cash.”94 Faced with willing sellers of “immense quantities of timber in the territory,” lumbermen proceeded “to erect large and expensive plants and to build railroads into the territory where the timber stood.”95 This significant capital investment positioned the region to harness industrial technologies and achieve impressive growth, but it also exposed it to the whims of commodity prices.

B. The Legal and Economic Consequences of the Panic of 1907

Although the root causes of financial panics are impossible to identify with precision, the Panic of 1907—which culminated in a 37

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92 Rouse, supra note 86, at 35.
93 Young, 14 Va. Law Reg. at 99 (emphasis in original).
94 Id.
95 Id.
percent decline in the value of all listed stocks and convinced the nation to establish the Federal Reserve—was likely triggered by the San Francisco Earthquake in 1906. The Earthquake’s shockwaves disrupted an apparently overvalued land market, and it later exposed speculation in copper markets, poorly conceived loans by several of New York’s leading financiers, an arguable lack of judiciousness by newly aggressive regulators, and a poorly designed financial architecture. The convergence of these forces, and the lack of an effective policy tool to intervene, led to a “perfect storm” that is all-too-familiar to witnesses of financial crises.

The effects of the Panic of 1907 were felt worldwide, including in southern Virginia, where it caused demand for lumber to plunge and triggered a series of consequences that proved to be significant for the subsequent decades. These consequences offered a crash course in local politics and legal strategy for the region’s major lumber manufacturers. As is often the case when economic upheaval follows a sustained period of prosperity, the previously mutually beneficial relationships between lumbermen and area farmers took an unfortunate turn and led to several litigated disputes. Camp Manufacturing, as much as any other local business, was a recipient of some painful lessons.

The Camp Manufacturing Company was not inexperienced with legal disputes before the Panic of 1907; instead, the company found itself litigating land disputes nearly as soon as the company began harvesting southern wood. As a company historian explains,

98 Southern lumber production temporarily picked up again after the Panic of 1907, but its overall output peaked shortly thereafter in 1909. I. James Pikl, Jr., Southern Forest-Products and Forestry: Developments and Prospects, 42 J. of Farm Econ. 268, 269 (May 1960). At the same time, the Panic marked the end of what had been a relatively unbroken period of tremendous growth and the beginning of a period marked by less stability and more uncertainty in lumber markets.
Like other lumber-cutters, Camp was frequently in court in cases contesting the boundaries of its timberlands. Such litigation usually grew out of ill-defined property lines on recorded land plats, some dating back to colonial years. Often such landmarks as large trees cited by early surveyors had disappeared, creating confusion. Especially troublesome was legal title to remote woodlands . . . which had rarely been timbered.99

The company’s legal disputes with local farmers assumed a new significance, however, after the Panic of 1907 caused lumber demand to dive. The sharp drop in lumber prices made it uneconomic for Camp to harvest timber, and the company subsequently slowed its harvesting of timber it already purchased from farmers under timber deeds. When the economy rebounded, Camp sought to enforce those deeds to harvest that timber.100

The deeds used by Camp Manufacturing were relatively uniform timber contracts the company signed with local farmers in the 1890s.101 These deeds specified that Camp the right to cut and remove timber within a certain period of time, and they additionally reserved for Camp an option for an additional period of time to pay a set interest rate and maintain the right to harvest the timber.102 However, when the company fell behind in removing the timber from many properties, and then sought to extend its rights with interest payments, the farmers claimed that the extension clauses

99 Rouse, supra note 86, at 48.
101 Id. at 90-92.
102 Id. The contract directly considered by the court in Brunswick County specified that Camp shall have 5 years from the date of this deed in which to remove the timber herein conveyed from said land, and if they shall fail to remove said timber in said time, they may have such further time in which to remove the same as they may desire: provided, however, that they pay interest to [the landowners], or their assigns, at the rate of six per cent. per annum on the amount of the purchase price, above mentioned, from the expiration of the said 5 years, until they remove the said timber.

Id.
at issue were, among other things, “void for indefiniteness and uncertainty”\textsuperscript{103} and refused to accept Camp’s money, instead planning to remove and sell the timber themselves.\textsuperscript{104}

Faced with the possibility that hundreds of farmers could repudiate their contracts and choke off the company’s supply of timber, Camp sued to enjoin the farmers from cutting timber from the lands covered by the timber deeds.\textsuperscript{105} The suit to enforce two specific timber contracts in Brunswick County Court served as test cases that would establish “principles which can arise in more than one hundred other cases, and which will settle the title to standing timber valued at perhaps more than one million dollars.”\textsuperscript{106} Although Camp received a favorable ruling in the trial court,\textsuperscript{107} the Virginia Supreme Court found sympathy for the farmers and released the farmers from the contract after a “reasonable” period had elapsed.\textsuperscript{108} The Court specifically objected to the trial court’s taking “judicial notice of the operations of a large manufacturing concern”\textsuperscript{109} and showing deference to Camp for its importance to the local economy.\textsuperscript{110} The Court further

\textsuperscript{103} Camp Mfg. Co. v. Young, 14 Va. Law Reg. 89, 90, 96.
\textsuperscript{104} Id. at 92; Young v. Camp Manufacturing Co., 66 S.E. 843, 843-844 (Va. 1910).
\textsuperscript{106} See id. at 89. While the cases arose in the Circuit Court of Brunswick County, at issue were arrangements related to Camp’s larger operations “in the counties of Dinwiddie, Isle of Wight and Southampton, respectively, in the State of Virginia.” Id. at 90.
\textsuperscript{107} Id. at 100. The Court concluded that refusing to extend the contracts in light of these reasonable concerns, would be to contravene the general intent and purposes of the deeds in the principal cases, to refuse to recognize the nature and necessities of the modern timber business, and to destroy millions of dollars invested in good faith under similar contracts. A ruling so narrow and so harsh could not receive the approval of this court. Id. at 97.
\textsuperscript{108} Young v. Camp Manufacturing Co., 66 S.E. 843, 848 (Va. 1910).
\textsuperscript{109} Id. at 847-848.
\textsuperscript{110} Instead, the Virginia Supreme Court of Appeals explained, [W]e cannot think that the rights of the appellants should be controlled by the magnitude of the business in which the Camp Manufacturing Company is engaged. In determining what is a reasonable time within which the trees . . . should be removed we should consider the circumstances and conditions affecting the parties to the contract; and the rights of appellants are not to be measured by
remarked that the small price paid to the farmers indicated “that the amount of timber conveyed [by those individual farmers] could not have been very great,”\footnote{Id. at 847.} and thus Camp already had had adequate opportunity to harvest the wood.

Camp’s loss in the Virginia Supreme Court of Appeals was accompanied by an identical loss before the North Carolina Supreme Court, which similarly read the contracts favorably to the farmers and extinguished the company’s rights to the timber it had not harvested promptly.\footnote{Id. at 848. Essentially, the Court dictated that the trial court should not have considered the timber amounts in the aggregate and should have determined reasonableness on a case-by-case basis, ignoring the fact that the timber amounts were very sizable when all timber contracts were taken into account.} The loss of access to significant reserves of timber in both states occurred at a time when the company was already teetering on the brink of bankruptcy in the wake of the Panic of 1907,\footnote{See Camp Mfg. Co. v. Young, 14 Va. Law Reg. 89, 101 (noting the parallel litigation in North Carolina and the trial court’s contrary decision there); Brickell v. Camp Mfg. Co., 60 S.E. 905 (N.C. 1908). At the same time, Camp was not entirely unsuccessful before the Virginia Supreme Court of Appeals. Three years later, the Court interpreted the company’s timber rights to include the right to use its railroad lines for transporting timber. See Carpenter v. Camp Mfg. Co., 71 S.E. 559, 559-561 (Va. 1911) (involving the use of railroad lines for transporting timber placed across a property on which the company formerly held timber rights). The Court permitted the company to continue to operate the railroad. \textit{Id.}} and it made Camp realize that similar timber contracts would not secure the company’s assets against the sentiments of local farmers and sympathetic judges. In response to this threat, the company first decided to purchase lands outright, rather than purchase timber rights,\footnote{See ROUSE, \textit{supra} note 86, at 2 (mentioning the company’s financial difficulties during the panic).} but even outright purchases posed litigation risks.
The company found itself in a particularly intense legal battle over unclear rights to just one tract of timberlands and was forced to reappear in the Virginia Supreme Court of Appeals twice between 1909 and 1921.\textsuperscript{115}

As a solution to these problems, and to avoid cumbersome relations with local landowners, the Camp Manufacturing Company began to rely increasingly on local family-owned lumber companies to supply its timber needs from peripheral regions. These lumbermen worked as middlemen to help Camp acquire timber rights without alarming local residents and, should a legal dispute arise, would present the courts with sympathetic parties.\textsuperscript{116} Relying on local lumbermen had the additional benefit of keeping land acquisitions quiet, which proved to be useful when land was undervalued. Other mills followed a similar strategy, and the use of middlemen transformed both the industry’s structure and had meaningful consequences for the region’s smaller lumbermen, including the Lucys.\textsuperscript{117}


\textsuperscript{116} This strategy was apparently successful in shielding Camp Manufacturing from litigation. In spite of its several legal battles in the early 1900s, we could not find a single case involving timber or land purchases argued before the Virginia Supreme Court of Appeals to which the Camp Manufacturing Company or its successor company, the Union-Camp Bag Company, was a party from 1936 to 1956, the years the industry used middlemen to expand their holdings. Indeed, an exhaustive search of cases in state and federal courts in the 1940s and 1950s involving the Camp Manufacturing Company and disputed rights to timber only turns up one case heard before a federal district court in 1942 in South Carolina. See Nelson v. Camp Mfg. Co., 44 F. Supp. 554 (E.D.S.C. 1942). This is in spite of the company’s substantial growth during that period, in which the company more than doubled its land ownership and timber intake, see Camp Manufacturing Co. v. Commissioner, 3 TC, 467 (1944); Ace. 1944 C.B. 4 (noting the size of the Camp land holdings in 1936); Rouse, supra note 86, at 5 (noting the size of the company’s holdings in 1956). Indeed, to our knowledge, none of the major industrial leaders of southern pulp and paper industry litigated cases with farmers over timber or land before the Virginia Supreme Court of Appeals in those years.

The Panic of 1907, in addition to compelling Camp and the region’s other large manufacturers to rely on middlemen, also had significant economic consequences. After lumber prices plummeted, lumber manufacturers were behooved to diversify their product line and reduce their exposure to the lumber market. Several promptly made significant investments in what turned out to be timber’s next cash cow: paper.

Paper production began in the south as early as 1878, when the Marietta Paper Manufacturing Co. of Georgia demonstrated that it was possible to produce paper from Southern pine, and in 1891 the Carolina Fibre Co. of South Carolina went one step further by proving that manufacturing paper from Southern wood pulp was commercially viable. These two plants remained isolated outposts in the South until the Panic of 1907, which induced lumbermen to turn to paper manufacturing in earnest for new sources of revenue. By 1911, the South was home to at least four modern paper plants with additional pulp and paper plants being built across the region. The lumbermen of Virginia assumed a leading role in these developments, with plants opening across the state in the mid-1910s and early 1920s. By 1921, there were at least seven pulp mills operating in

775540 (referencing the “many small logging companies, which stay in business by getting contracts to cut trees from the . . . Union Camps of the industry”).

119 Id.
120 See, e.g., D. H. Killeffer, Paper Goes South, INDUSTRIAL AND ENGINEERING CHEMISTRY 1110, 1111 (October 1938) (providing details about the establishment of two additional plants in Texas and North Carolina).
the state, and only six years later, Virginia companies led the South in annual paper output.

A second shock to regional lumber demand during the Great Depression further fueled investment away from lumber production and towards paper, and Virginia’s pulp and paper industry began to overtake the state’s established lumber interests. By 1936, these trends had attracted the attention of the Camp Manufacturing Company, which formed a joint venture with one of Virginia’s earliest paper producers to search for ways to utilize Camp’s expanding and underutilized timber inventories. The cooperative effort marked a growing unity between paper manufacturers and lumber interests that guaranteed a reliable supply wood pulp for continued paper production and some insulation for lumber producers from the industry’s cyclical booms and busts. It also marked the near-complete transformation of a lumber industry into a pulp and paper industry.

C. The Post-World War II Boom

Virginia ranked fifth in national output of wood pulp in 1937, and although the state’s pulp and paper industries still lagged behind some northern states, many Virginia companies invested their wartime profits in paper manufacturing to close that gap. Efforts to build up the region’s paper manufacturing accelerated when paper demand soared (and lumber demand slumped again) after World War II. In 1951, for example, the Camp Manufacturing Company invested $2,500,000 to build a new paper plant at its Franklin Mill that drastically increased the company’s production capacities. Only three years later, the company allocated another $71

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123 Hitchcock, supra note 121, at 489.
124 Id. at 154.
125 Sven A. Anderson, Trends in the Pulp and Paper Industry, ECONOMIC GEOGRAPHY 195, 198-200 (1942). Actual paper production lagged behind wood pulp production, since the early Virginia wood pulp plants were located on Hampton Roads, where shipping lanes provided easy access to Northern markets. See Hitchcock, supra note 121, at 489. Likewise, many older mills in the Northern states did not make their own pulp, relying instead on other sources like those in Virginia. Anderson, supra, at 200.
126 Pikl, supra note 98, at 273.
127 See ROUSE, supra note 86, at 161.
million to purchase new paper machines for those operations.\textsuperscript{128} Even companies from industries not traditionally tied to lumber were investing in this newly profitable industry. These new market entrants included the Continental Can Company,\textsuperscript{129} which purchased a plant in 1947 and only four years later invested between $22,000,000 and $25,000,000 to increase the plant’s capacity.\textsuperscript{130}

\textbf{ANNUAL WOODPULPING CAPACITY OF MILLS BY REGION (IN THOUSAND SHORT TONS)\textsuperscript{131}}

\begin{tikzpicture}[scale=0.5]
% Diagram code here
\end{tikzpicture}

\textsuperscript{128} Id. at 8. By 1955, observers were already referring to the lumber company as merely the operator of a “paper mill” without any mention of its continuing lumber operations. Camp v. Murray, 226 F. 2d 931, 932 (4th Cir. 1955).

\textsuperscript{129} As its name suggests, the Continental Can Company was primarily a metal container company. See United States v. Continental Can Co., 378 U.S. 441, 445 (1964) (noting that the company in 1955 was “the second largest company in the metal container field,” but that it had also acquired numerous other packaging companies, including fourteen separate producers of paper containers and paperboard”).


\textsuperscript{131} This chart was made from data provided in Pikl, supra note 98, at 271. Pikl notes, however, that these figures may underestimate the capacity of Southern mills, which generally operated non-stop over the course of a year unlike their Northern counterparts. Id. These trends continued into the 1980s, as shown in a similar chart produced by the U.S. Forest Service. See David B. McKeever, \textit{The United States Woodpulp Industry}, Resource Bulletin FPL-RB-18 3 (United States Department of Agriculture, 1987).
Such investments caused pulp and paper operations to expand quickly across the American South, which by the mid-1950s was home to three-fifths of the nation’s growth in paper manufacturing capacity.\(^{132}\) In the industry’s early years, nascent pulp and paper operations in the South only required the timber waste products left behind by the region’s lumber industry to supply its needs, but as pulp and paper capacity grew—ultimately requiring even more timber than the more-established lumber industry—paper manufacturing needed an independent source of woodlands. Paper manufacturers suddenly found their timber inventories to be under-stocked and sought to quickly expand their woodland holdings to meet growing manufacturing demands. The Camp Manufacturing Company alone expanded its local woodland holdings from approximately 106,000 acres in 1936\(^{133}\) to 240,000 acres twenty years later.\(^{134}\) Other companies similarly sought to acquire more timberlands, and these efforts led to dramatic rises in timber prices as more “high-technology firms” entered the market.\(^{135}\)

New demand for timber was such that state officials and manufacturers began fearing an imminent timber shortage in Southeastern Virginia.\(^{136}\) The situation was sufficiently critical that the Virginia State Senate requested testimony from George W. Dean, the State Forrester, to report on depleting forests and the “acute” pine situation.\(^{137}\) Meanwhile,


\(^{133}\) Camp Manufacturing Co. v. Commissioner, 3 TC, 467 (1944); Ace. 1944 C.B. 4. In addition to owned land, the company also had 15,000 acres of contractual timber rights. *Id.*

\(^{134}\) ROUSE, supra note 86, at 5.

\(^{135}\) Id. at 12, 5.

\(^{136}\) *See Hercules Powder Co.*, 86 S.E.2d at 131. *See also* Senate Joint Resolution No. 22, Creating a Commission on Forest Resources of Virginia, Acts 1954, p. 1070 (recognizing that “the volume of merchantable timber in Virginia has been shown by recent surveys to have declined at an alarming rate during the past twelve years” and creating a commission to investigate this decline and develop recommendations for practices and regulatory measures that might alleviate the situation). Virginia State Senate Document 6 (1954).

\(^{137}\) *Hercules Powder Co.*, 86 S.E.2d at 131. Dean reported that harvesting in Virginia’s pine forests had exceeded growth by sixteen percent between 1940 and 1952. *Id.*
timber harvesting and pulp processing proceeded at such a pace that mills attracted new workers faster than the area’s housing supply could keep pace, leading to a land shortage of another sort around larger paper mills, like the Camp Manufacturing Company.\textsuperscript{138} In 1948, under increasing pressure, Hugh G. Camp, a company vice president, was reluctantly persuaded to sell his own personal farmland to be used as residential land for town newcomers and Camp’s new workers.\textsuperscript{139}

\begin{center}
Rapid Increase in Market Price for Southern Pine
\end{center}

\begin{figure}[h]
\centering
\includegraphics[width=\textwidth]{chart.png}
\caption{Source: United States Department of Agriculture\textsuperscript{140}}
\end{figure}

\begin{footnotes}
\textsuperscript{138} See Camp v. Murray, 226 F. 2d 931, 932 (4th Cir. 1955) (describing the severe land shortage in the town at the time).
\textsuperscript{139} Id. The sales also evidently drew Hugh Camp into protracted high-stakes litigation with the Internal Revenue Service. See id.
\end{footnotes}
The rise in demand for timber and feared shortages in supply led to a dramatic rise in timber prices, which naturally led to a corresponding escalation of land prices across the Southern pine belt. By then, the pulp and paper industry was already on its way to becoming the third largest producer of wealth in the South, so despite rising land and timber prices, the industry continued purchasing vast quantities of timber and investing in new timberlands (and even increasing processing capacity). As they pursued the standing timber across vast new tracts of land, they recognized the potential public outcry by communities encroached upon by the paper industry’s expanding reach. Applying the lessons learned from their round of litigation in the earlier part of the century, the industry ultimately followed a business model that relied on middlemen to obtain the timber resources necessary to sustain its tremendous growth—a strategy that would

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\[141\] Rouse, supra note 86, at 12, 5, 48. The market value of the Ferguson Farm appears to have mirrored these trends. In 1938, a judicial sale priced the farm at $3,800, in 1943 Zehmer purchased it for $11,000, about two years later Lucy—in his first attempt to purchase the farm—offered Zehmer $20,000, and then in 1952 the allegedly agreed price was $50,000. See [case or appellate record for price]; Dinwiddie County Deed Book 69, Page 167.

\[142\] Malsberger, supra note 118, at 639.

\[143\] The feared outcry could be compared to the similar political agitation and revolts caused by the English enclosure movements between the thirteenth and nineteenth centuries. As Allison Dunham suggests, early enclosure movements in England were less controversial, and less forceful, than later efforts:

\[G\]iven the apparent economic desirability of consolidation of economic operations in England, the destruction of the system of villages and fields and the voluntary allocation of the rural land of England to consolidated agricultural uses resulted from the normal operation of the market mechanism. Consents were obtained by purchase and the self-interest of the farmers.

Allison Dunham, *From Rural Enclosure to Re-Enclosure of Urban Land*, 35 N.Y.U. L. Rev. 1238, 1241-42 (1960). By the late-eighteenth century, however, the amount of land being enclosed led some local farmers to resist enclosure efforts even where market forces offered strong incentives for farmers to agree to enclosure. As Dunham explains, rural conservatism, as some of the English literature described it, finally produced a situation where not all of those who had rights to pasture in the common waste land would consent to its enclosure, or at least consent at prices which the majority, even given the economic advantage of enclosure, could afford to pay.

*Id.*
eventually bring Lucy and Zehmer face-to-face over drinks a few nights before Christmas.

**D. A New Business with Old Problems: The Rise of the Timber Broker**

As the pulp and paper industry began to displace the lumber industry, it also inherited the lumber industry’s problems. First and foremost among those problems was the region’s divided land ownership. In the words of a contemporary source,

> [t]he small landowner is key to the future of the pulp and paper industry in the South. The industry does not own enough land to support itself, and for the future it appears as though industry experts must expect the small landowner to supply 50 percent of its total requirements. This small landowner looms very large and important whenever southern forestry is deliberated.\(^{144}\)

By the mid-1950s, industrial leaders purchased seventy-five percent of their timber requirements from local landowners.\(^{145}\) Industrial leaders grew increasingly aggravated, however, by the low productivity of forests controlled by small landowners compared to lands owned by industrial interests,\(^{146}\) so pulp and paper companies across the South preferred instead to acquire more direct control over southern timber and timberlands.\(^{147}\)

The problem was additionally complicated by what was described as the farmers’ “sensitiv[ity] to the manner in which markets for wood-stuffs conduct themselves.”\(^{148}\) As such, corporate leaders feared that sudden

\(^{144}\) *Id.* at 642.

\(^{145}\) *Id.* at 641. As late as 1990, these private property owners were still providing more than seventy percent of the timber required by Virginia’s timber consuming industries. Zemel, *supra* note 117.

\(^{146}\) *Id.*

\(^{147}\) *See* Prunty, *supra* note 132, at 52. These attempts were ultimately successful. *See* Zemel, *supra* note 117 (By 1990, “[m]any larger companies rel[jed] heavily on their own timberland”).

\(^{148}\) Prunty, *supra* note 132, at 53.
acquisitions of large tracts of land could anger the same local farmers that they relied upon for a majority of their timber resources.\textsuperscript{149} Such large-scale acquisitions also suggested the mills’ valuation of the timberlands would drive up purchase prices. Industry leaders thus found themselves in an interesting bind: their industrial needs required that they purchase large amounts of timberlands; the only source of supply of such timberlands were small landowners; but large purchases from landowners would cause prices to spike and would inflate the cost of the necessary acquisitions. Large, visible acquisitions also invited the sort of political and legal disputes with local communities that had burdened the mills earlier in the century.

Mill owners navigated through these straits by trying to mask their acquisitions of additional timberlands, both by looking to more remote sources of timber where their activities might arouse less concern and by employing greater use of middlemen to conceal the true purposes of land or timber transactions. A report issued by the state’s Commission on Forest Resources reported in 1955, for example, described the rise of “the pulpwood contractor” who does “the great majority of cutting [of timber] in Virginia . . . predominately on small ownerships of farmers and non-resident investors.”\textsuperscript{150} These contractors, alternatively described as “timber brokers,”\textsuperscript{151} formed networks of individual lumbermen who acquired timber rights and then harvested timber for the state’s large and rapidly expanding pulping operations. As such, several small family-owned businesses whose core business previously was in harvesting timber and producing lumber products transformed themselves from independent manufacturers to middlemen who profited by searching for and securing raw timber materials for Virginia’s burgeoning pulpwood operations.

This strategy had the unintended and very interesting result of inspiring an unrestrained land-grab. The combination of rising land values and the proliferation of aggressive middlemen led to an explosion of quickly

\textsuperscript{149} This was more than a hypothetical fear. A local commentator observed that “[d]espite efforts to avoid undue local concentrations of ownership, some have occurred and criticism has resulted.” \textit{Id.} at 52-53.

\textsuperscript{150} See Commonwealth of Virginia, \textit{Forest Resources of Virginia} 9, 28 (1955).

\textsuperscript{151} See Owen v. Wade, 185 Va. 118 (Va. 1946).
executed and wildly unseemly property sales. Many sales involved shady practices and little disclosure, often causing family sellers to agree to prices far below prevailing market rates. A study commissioned by the Virginia legislature found the problem to be sufficiently problematic to conclude that sawmill operators “have taken full advantage of the landowner’s ignorance of timber matters.”

Several of these disputes over rapid land sales resulted in litigation and left behind a colorful legal history. As early as the late 1920s, and especially in the booming 1940s and 1950s, the Virginia Supreme Court of Appeals regularly heard cases between local landowners, smaller lumbermen, and local lumber companies. These cases often arose in an

152 Commonwealth of Virginia, Forest Resources of Virginia 9, 50 (1955)
153 See, e.g., Elam v. Ford, 145 Va. 536 (1926) (resolving contract dispute concerning measurement of timber to be removed); Moriss v. White, 146 Va. 553 (1926) (finding no cause of action for reimbursement of the value of timber which was removed before property conveyed to plaintiff); English-Ott Co. v. Waddle, 147 Va. 342 (1926) (dissolving trial court injunction which had prevented defendant lumber company from removing timber); Atkinson v. Neblett, 144 Va. 220 (1926) (concerning a fraudulent promissory note to purchase timber land); Kiser v. Hannah, 148 Va. 594 (1927) (resolving boundary dispute in timber conveyance); Stuart v. Johnson, 149 Va. 157 (1927) (amending timber contract due to discrepancy in accounting); Mathews v. Meyers, 151 Va. 426 (1928) (holding that labor lien statute applied to action to recover sales price on timber land); Eggleston v. Crump, 150 Va. 414 (1928) (partitioning proceeds from timber sales to heirs of original party to deed); Brunswick Corp. v. Perkinson, 153 Va. 603 (1930) (affirming trespass by neighbor who removed trees from plaintiff’s property); Whitehurst v. Aygarn, 154 Va. 679 (1930) (resolving dispute over south and west boundary of property conveyed); Altizer v. Jewell Ridge Corp., 157 Va. 1 (1931) (holding that the “reasonable time” to remove timber had elapsed, where duration unspecified in original contract); Parker v. Inge, 157 Va. 592 (1932) (involving allegations of fraud over sale of property); Curtis v. Peebles, 161 Va. 780 (1934) (involving an attempt to rescind sale where defendants reserved more timber acreage than stated in deed); Edwards v. Ritter Lumber Co., 163 Va. 851 (1935) (resolving dispute by coal company over adverse possessors’ removal of timber); Hall v. Ritter Lumber Co., 167 Va. 95 (1936) (determining time limit to remove timber where contract provided for extension); Mitchell v. Carwile, 167 Va. 276 (1937) (concerning mistake in advertising of timber land at public auction); Straley v. Fisher, 176 Va. 163 (1940) (conversion action related to timber sale); Jones v. Hall, 177 Va. 658 (1941) (holding that proceeds of prior timber sales could not be applied to creditor’s lien against landowner); Kiser v. Wm Ritter Lbr. Co., 179 Va. 128 (1942) (action by heirs to recover damages from timber removal where company entered contract with incapacitated landowner); Galliher & Huguely, Inc.
isolated local context that pitted neighbors, families, and even former business partners against each other over the control of the regions trees and timberlands. Even the early history of the Ferguson Farm contributed to this line of land disputes. After M. L. Ferguson, an elderly widow,
bequeathed the property in nine equal shares to members of her family following her death, one of those family members, Dr. J. H. Ferguson, offered to buy the remaining interests from the others. Three ultimately agreed to sell, and Dr. Ferguson sued the remaining five for their shares. Represented by William Earle White, a prominent local attorney, Dr. Ferguson successfully persuaded the court to order a judicial sale of the property in which he, in the “best interest of all parties in interest,” would pay $2,000 to be divided between the five holdouts. Five years later, Dr. Ferguson sold the farm to Hardy Zehmer for $11,000.

Several other land disputes resulted in lively litigation, and one person who regularly was at the fore of such litigation was Albertis Harrison. After becoming a state senator but before his election as Attorney General of Virginia, Harrison began representing landowners in southern Virginia in high profile cases. Harrison, for instance, was the lead plaintiff’s attorney in Jackson v. Seymour, a case that has appeared in textbooks for at least as long as Lucy v. Zehmer and which has been cited to demonstrate principles related to unconscionability, fiduciary duties.

154 J. H. Ferguson v. Craille Ferguson, Dinwiddie County Chancery Order Book. No. 4, Page 501. In resolving the suit, W. Earle White was appointed Special Commissioner to arrange the sale, which was accomplished through by deed on December 14, 1938, in which Dr. Ferguson officially took control over the farm for the sum of $2,000. See Dinwiddie County Deed Book 62, Page 600-01. It should be noted that there was reportedly a “poor market for timber” in 1938—the year of the judicial sale. See Straley v. Fisher, 176 Va. 163, 165 (1940) (explaining why a lumberman had not removed all timber according to a contract between February and December 1938).

155 71 S.E.2d 181, 182 (Va. 1952).

156 PATTERSON, supra note 7, at 306.

157 See, e.g., Unconscionable Business Contracts: A Doctrine Gone Awry, 70 YALE L. J. 453, 453 n.3 (1961) (citing the case as an example of “courts hav[ing] protected widows and simpletons from the machinations of sharp traders by finding that gross inadequacy of consideration has made a contract ‘unconscionable’ and therefore unenforceable”).

158 See, e.g., Todd D. Rakoff, Contracts of Adhesion: An Essay in Reconstruction, 96 HARV. L. REV. 1173, 1249 n. 241 (1983) (mentioning the case as an example of an opinion that straddles the line between “treat[ing] a case as an arm’s-length transaction subject to contract law” and “treat[ing] it as a relationship calling for the application of fiduciary principles”).
and constructive fraud. That case involved a widow whose brother bought land from her, discovered that the property had valuable timber worth ten times what he paid for the land, failed to disclose this discovery to his sister, and then refused to share the profits—or even to disclose what those profits were—when his sister caught wind of the sale. If it is true that “hell hath no fury like a woman scorned,” that widow—Lucy S. Jackson—was proof incarnate, retaining Harrison to take her brother to court over the sale for fraud, claims rejected by the district court at trial. Not dissuaded by this loss, Harrison pursued an appeal to the Virginia Supreme Court of Appeals, which, though agreeing that Harrison had failed to prove actual fraud, took pity on the widow and ordered the contract rescinded and damages paid to the plaintiffs by recognizing a new action for constructive fraud.

Several years later, Harrison was also the lead plaintiff’s attorney in *Barnes v. Moore*, a case that arose out of negotiations between two lumbermen, Barnes and Cabiness, and a man named A.C. Love over a specific tract of property. Barnes, reportedly a “man of honesty and integrity,” was trolling Victoria County for timberlands with Cabiness when the two “found Love near his home.” Eager to purchase the land, Cabiness “obtained a bottle of whiskey for Love, and after the latter had

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160 See, e.g., Ingrid Michelsen Hillinger, 4 HASTINGS L.J. 747, 748 n. 8 (1983) (using the case to support the proposition that “[t]he doctrine of constructive fraud requires a special relationship between the parties”).


162 Paraphrasing a line spoken by Zara in Act 3 scene 5 of William Congreve’s *The Mourning Bride* (1697).

163 Jackson, 71 S.E.2d at 183.

164 Id. at 184-86.

165 98 S.E.2d 683 (Va. 1957).

166 Id. at 684-85.

167 Id. at 685. The court was presumably referring to the incorporated town of Victoria in Lunenburg County, Virginia, which is a one hour drive from McKenney along state highway 40. That route would take a visitor directly through the Ferguson Farm, since highway 40 runs directly through the property.
taken a drink, they began negotiations."Eventually, they reached a deal, and the lumbermen began cutting and removing the timber.

In a predictable plot twist, Love did not actually own the property in question, and the real landowners retained Harrison to file suit for trespass against the lumberman for taking timber from their lands. Harrison argued, and the Virginia Supreme Court of Appeals agreed in *Barnes v. Moore*, that the lumbermen had committed gross negligence. Noting that “Barnes and Love were kinsmen,” the Court chided Barnes for exploiting a member of his own community and doing business upon such shaky grounds. In the end, the Court ordered the lumbermen to pay damages to the real landowners, and Love suffered no consequences from enjoying his free drink.

Between these two representations, Harrison represented the Lucy brothers in *Lucy v. Zehmer*. Together, the three cases paint a colorful picture of disputed land sales, consisting of eager and perhaps unscrupulous purchasers and landowners unaware of their land’s unrealized value. It

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168 *Id.*
169 *Id.*
170 *Id.*
171 *Id.* at 683-84.
172 *Id.* at 685. The reasoning for finding that the lumbermen were grossly negligent in swiftly executing such a land sale comes from the Court’s description of Love, who was eighty-two years of age, blind in one eye, with defective vision in the other, and feeble both physically and mentally. He had given up his business affairs about ten years ago, and such matters were attended to by his wife and other members of his family. He was kindly disposed, addicted to drinking alcoholic beverages whenever available, and easily influenced by other people, especially when drinking. These conditions surrounding Love were generally known in his community.
173 *Id.*
174 *Id.* 684, 687. These cases also demonstrate Harrison’s versatility as an attorney. In both *Jackson v. Seymour* and *Barnes v. Moore*, Harrison represented the landowners and convinced the Virginia Supreme Court of Appeals to rule against the allegedly irresponsible or unethical practices of timber harvesters. In *Lucy v. Zehmer*, by contrast, Harrison convinced the same court that a contract should be upheld on behalf of a timber harvester against a purportedly irresponsible landowner.
further illustrates how an economic shock to asset prices can insert a wedge—and litigation—into intimate social and family relations. For the purposes of this article, the cases most of all suggest that Zehmer’s welcoming of Lucy into his bar took place within a distinct economic context. The region’s large industrial concerns created valuable economic opportunities for land purchasers, and although many farmers were unaware of the land’s worth, many others clearly understood that the timber they owned was rising in value. And as the region’s mills used local intermediaries to acquire the timber resources their growth required, aggressive middlemen trolling for land sales proliferated the county’s farmlands and often found themselves defending their business practices in court. As we describe below, the Lucy brothers had a lucrative run working as such middlemen, and their journey to the Virginia Supreme Court began with a plan to obtain what they believed was the crown jewel of Dinwiddie’s vast timber reserves: the aged timberlands located directly upon the Ferguson Farm.

IV. NOT JUST A TALE OF TWO LUMBERMEN

In part, Lucy v. Zehmer is a tale of two brothers in southern Virginia who, like the Camps—and even the Zehmers—before them, made a fortune by buying undervalued forested properties in remote areas and selling the timber off those properties for more money than they had paid for the properties as a whole. The Lucys’ rise to prosperity, however, was a distinct reflection of the region’s industrialization, as the brothers capitalized on the opportunities presented by Camp Manufacturing and other large mills to serve as timber brokers. The brothers thus contributed to the transformation of southern Virginia’s economy from one relying on farming to one that harvested natural resources for industrial use.

A. The Secret to the Lucys’ Success

Property records reveal that the Lucy brothers signed dozens of land and timber deeds between the 1930s and the 1960s. Though largely
involving properties smaller than the 471.6 acre Ferguson Farm, these deeds reflect a continued pattern of business activity in Dinwiddie and Brunswick Counties in which the Lucy brothers purchased farmland and then harvested the timber for sale to Camp Manufacturing or another large paper mill. Sometimes the Lucys resold the land after removing the timber, but often the immediate returns from harvesting enabled the Lucys to keep much of the land they bought.\textsuperscript{176}

Engaging in such activity required a keen eye for “cruising,” the process of strolling through a property to determine the value its timber, and the descendants of John C. and Welford Lucy describe Welford as a true master of the trade.\textsuperscript{177} Cruising usually involved taking careful measurements of a land’s timber and making calculations based on market prices, but Lucy family lore describes Welford as someone who could stroll around a property and intuitively make an accurate assessment of its value. Indeed, Welford admitted in a deposition that he had driven around Zehmer’s property several times in the years prior to making his offer of $50,000 in December 1952, including one trip three weeks before the disputed sale.\textsuperscript{178} Those trips suggest that Lucy’s eventual offer was based on reasoned and sound analysis of the value of the property’s timber rather than on some impulsive wager.

\textsuperscript{176} John C. Lucy’s descendants recall that he, especially, saw value in accumulating as much land as possible, instructing his sons to “[b]uy land if you can, because it is the one commodity that God is no longer making.” With that philosophy, John C. Lucy left thousands of acres of rural land to his sons when he passed away. Interview with John C. Lucy, Jr., John C. Lucy III, and James Lucy, July 16, 2009.

\textsuperscript{177} Interview with John C. Lucy, Jr., John C. Lucy III, and James Lucy, July 16, 2009; Interview with John C. Lucy III and John C. Lucy IV, Feb. 16, 2007; Interview with Emory Lucy, Oct. 27, 2009; Interview with Meade Lucy, Dec. 10, 2010. See also United States Forest Service, \textit{Cruising}, FOREST MANAGEMENT SERVICE CENTER 2009 STAFF REPORT (“Timber cruising is the process of measuring forest stands to determine stand characteristics, such as average tree sizes, volume, and quality. The primary purpose of cruising is to obtain a volume estimate to appraise and prepare timber sales.”), available at http://www.fs.fed.us/fmsc/annual_report/MeasurementsCruising.shtml.

\textsuperscript{178} Appellate Record at 61-62.
Lumbermen like the Lucys profited not only from intuitive cruising but also by fostering continuing relationships with the region’s mills. When the Camp Manufacturing Company needed to expand its reach further into Brunswick and Dinwiddie Counties, for example, it turned to John C. Lucy and other lumbermen to purchase new lands and then turn over the timber. John first entered into the lumber business on his own, scraping together enough money for a small saw-mill. Before long, his descendants recall, the Camp Manufacturing Company reached out to him to be their “wood agent” in Brunswick County, offering him set prices for all timber shipped. John’s frequent business with Camp led him to build a lumberyard in Brunswick County from which he would send regular shipments of timber to the company using dedicated trains.\textsuperscript{179} It was a good business, John C. Lucy, Jr. recalls. It was “just like picking money off trees.”\textsuperscript{180}

\textbf{B. Answering the $50,000 question}

We now know that when Welford Ordway Lucy approached Zehmer in his restaurant shortly before Christmas in 1952, Welford and his brother both operated healthy businesses as timber brokers for southern Virginia’s large pulp and paper interests. They already had amassed a history of harvesting timber for the companies and of buying and selling timberlands for healthy profits. Their business success was sufficient to give them access to credit lines apparently beyond the imagination of Adrian Hardy Zehmer.\textsuperscript{181}

\textsuperscript{179} Interview with Emory Lucy, Oct. 27, 2009. John C. Lucy, Jr. believes that the arrangement began with an oral contract under which Camp agreed to pay John C. Lucy, Sr. $1 for every cord of pulp wood shipped each week. He estimates that his father was one of Camp’s largest agents, sending between 50,000 and 60,000 cords of timber a year. Interview with John C. Lucy, Jr., John C. Lucy III, and James Lucy, July 16, 2009. The Virginia Department of Forestry defines a cord as the amount of wood contained in a space of 128 cubic feet when pieces are stacked compactly in touching, parallel rows. A “standard cord” measures four feet high, four feet wide, and eight feet long. Virginia Dep't of Forestry, Firewood for Home Heating, http://www.dof.virginia.gov/mgt/firewood.htm.

\textsuperscript{180} Interview with John C. Lucy, Jr., John C. Lucy III, and James Lucy, July 16, 2009.

\textsuperscript{181} One neighbor, Meade Harrison, reports that Zehmer thought Lucy had been bluffing about his ability to get $50,000, but that Zehmer knew he had been cheated as soon as Lucy came forward with the money. Interview with Meade Harrison, Oct. 15, 2009.
The Lucy brothers’ expertise in pricing timber thus dwarfed Zehmer’s knowledge of his own property’s value. Remarkably, the depositions even suggest that the Zehmers thought little of the land’s natural resources—or at least they were much less attuned to the land’s timber value than the nearby community of lumbermen. Ida and Hardy Zehmer, for example, both testified that the farm that had no equipment or value except for the presence of a farmhouse and two head of cattle, saying nothing to suggest that there were valuable natural resources on the property. 182

Meanwhile, two other depositions at the end of the appellate record confirm that the farm contained valuable timber. S.E. Winn, Jr., a local sawmill operator, testified that he had made several past attempts to buy the farm, including an attempt to buy its timber in December 1952 shortly before Welford Ordway made his offer, 183 and John Will Rives, a local Game Warden, reported having “a number of conversations” with Hardy about “the saw timber” on the property. 184 Despite their continued interest in that timber, Hardy Zehmer consistently refused their offers. 185

182 A review of Ida Zehmer’s deposition testimony, for example, reveals a telling exchange in which Albertis S. Harrison pushed Ida Zehmer to describe objects of value on the property:

Q. What else did the word, “complete”, include other than the land and buildings thereon?
A. I know of nothing else except the cows.
Q. There was no farming equipment on the property at the time?
A. Not that I know of.
Q. The property consisted of farm and buildings thereon? And two heads of cattle?
A. That is right.

Appellate Record at 24. Harrison proceeded to ask Hardy Zehmer similar questions, and he received similar answers. 1d. at 41 (“Was there anything else [on the property] except a couple cows?” Harrison asked. “No, sir,” replied Zehmer).

183 Id. at 82-83.
184 Id. at 84-85.
185 Id. at 82-85. As Justice Buchanan explains, Hardy Zehmer testified that he had turned down twenty-five similar offers for the farm. Lucy v. Zehmer, 196 Va. 493, 496 (1954). Zehmer testified that he told Lucy he was turning down the offers “that I want my son to
Moreover, the property’s history leading up to 1952 contributed to its growing value. Owned by a widow, then by an absentee landlord, and then by non-lumberman Hardy Zehmer, its forests had been allowed to grow unchecked for decades.\(^{186}\) As a result, descendants of John C. Lucy recall, the farm “was an excellent tract of timber.”\(^{187}\) One neighbor recalled that the property was not particularly valuable as a farm but that it was valuable instead as land that had for decades been left untouched.\(^{188}\)

Viewing the conversation between Zehmer and Welford in December 1952 through this lens, one can understand why Zehmer first might have thought that $50,000 was an attractive price but changed his mind after realizing that it was so agreeable to Lucy. Zehmer likely became aware of his land’s potential value only after Lucy walked out of Zehmer’s restaurant excitedly waving the restaurant receipt-cum-contract. Lucy’s zeal in enforcing the contract, and Zehmer’s strong resistance to sell, are in tension with Justice Buchanan’s proclamation that $50,000 was, if not a windfall for Zehmer, a fair price for the land. A careful examination of Dinwiddie property records offers reason to question the accuracy of Justice Buchanan’s valuation.

On December 17, 1954, Hardy and Ida Zehmer finally conveyed to Welford and John Lucy the deed to the Ferguson Farm in return for the bargained for price of $50,000.\(^{189}\) On January 5, 1955, less than a month after the final sale, the Lucy brothers executed a timber deed on the property have [the farm].” Id. at 499. Zehmer’s insistence on leaving the lands untouched for his son could be seen as a Zehmer family tradition. Other family members also reportedly let their timberlands sit except when funds were needed, for example, to pay the college tuitions of their children. Registration Form, National Register of Historic Places, Zehmer Farm, McKenney, Dinwiddie County, Virginia, National Register # 09000793, available at http://www.dhr.virginia.gov/registers/Counties/Dinwiddie/257-5008_ZehmerFarm_2009_NR_Draft.pdf.

\(^{186}\) Appellate Record at 82-85.


\(^{188}\) Interview with Meade Harrison, Oct. 15, 2009.

\(^{189}\) Dinwiddie County Deed Book 90, Page 365.
granting the right to all the merchantable timber on the property to the Lumber Distribution Company of Petersburg, Virginia. To execute this purchase, the Lumber Distribution Company borrowed $85,000 from the Petersburg Savings and American Trust Bank, suggesting that at least that much—and perhaps more—was paid to the Lucys.

By April 1956, the Lumber Distribution Company had evidently removed all merchantable timber from the formerly forested portions of the property and filed a deed of release freeing the Lucy brothers from their obligations under the contract and enabling them to otherwise dispose of the property. Immediately thereafter, Welford Ordway Lucy sold the formerly wooded portion of the property, amounting to 367.7 of the original 471.6 acres, to the Continental Timber Lands Corporation, an affiliate of the Continental Can Company. Because the Continental Timber Lands Corporation evidently had no need to secure financing for the transaction, there is no public record of what Welford Ordway Lucy received in his truncated sale of the property.

Dinwiddie County Deed Book 91, Page 40-41. While this deed was officially notarized on January 5, 1955, there is reason to believe it was first drawn up even earlier. For example, the agreement specifically grants the Lumber Distribution Company a period of three years from December 21, 1954, to cut and remove the timber on the property. Presumably this date was chosen for a reason. Since the Lucy brothers only received a deed for the property from the Zehmers on December 17, 1954—a Friday—it appears that the brothers were having papers drafted to sell the property within two business days of having receiving the deed. Id.

This figure is the amount recorded in the trust deed filed by the Lumber Distribution Company, which states the amount the company had borrowed from the Petersburg Savings and American Trust Company to finance the sale. Dinwiddie County Deed Book 91, Page 44-46. Ironically, one of Hardy Zehmer’s attorneys—William Earle White—served as a Trustee for the Petersburg bank in the transaction, and would have accordingly been able to see how much the timber on his client’s farm was worth shortly after his loss before the Virginia Supreme Court of Appeals. Id.

Dinwiddie County Deed Book 95, Page 71-72.

Dinwiddie County Deed Book 95, Page 72-74.

Dinwiddie County Deed Book 103, Page 402.

Had the Continental Timber Lands Corporation borrowed finances to purchase the tract, a bank would have presumably filed a trust deed on the property that would have provided a better estimate of what Lucy received from the transaction. Despite an exhaustive search of local records related to the parties and the property, no such deed was found.
Following this sale, Welford leased the remaining 103.9 acres of the Ferguson Farm—the portion suitable for farming—to W. Franklin Townsend, enabling Townsend to reside on the property as a tenant farmer and granting him an option to buy the property for $12,000 as early as 1962. On May 14, 1962, after Townsend informed Lucy that he intended to exercise his option to buy the property and arranged for the payment of the $12,000, Welford—not one to shy away from a fight or an opportunity—refused to deliver title to the property and demanded a higher payment. The Townsends filed a complaint to compel performance, again in Judge Jefferson’s court, and later settled with Lucy for a revised price of $15,000.

Based on this evidence, we can begin to piece together the profits the Lucy brothers made from their purchase and truncated sale of the Ferguson Farm. Assuming that the Lucy brothers sold the farm’s timber for $85,000—the price that the Lumber Distribution Company borrowed from the Petersburg Savings and American Trust Bank—and that the 367.7 acres of land sold to Continental were sold at the same per-acre price as the price originally agreed to by Welford Lucy and Townsend ($12,000 for 103.9 acres), we estimate that the Lucy brothers earned at least $142,000 by 1962 from their $50,000 investment less than a decade earlier. This is not a scientific calculation. It assumes, for convenience, that the previously wooded 367.7 acres were sold at the same price as the 103.9 acres that was used for farming and that contained the dwellings and farm equipment. It also does not include the income from leasing the farm to Townsend before the sale in 1962. Nonetheless, it is our best approximation based on the

196 Bill of Complaint, William Franklin Townsend v. W.O. Lucy, Dinwiddie County Court Chancery No. 610-A.
197 Id.
198 Dinwiddie County Deed Book 114, Page 302-04.
199 Since the timber was used as collateral for the loan, it is unlikely that the loan would exceed the value of the collateral.
200 At that agreed upon price, $12,000 for 103.9 acres, 367.7 acres would be worth $42,468.
201 $85,000 (our estimated price for the timber) + $42,468 (our estimated price for the 367.7 acres of timberland) + $15,000 (our estimated price paid by Townsend for the farmland) = $142,468.
available evidence. In fact, reports from the Lucy descendants suggest that our estimate might be too conservative. John C. Lucy III, for example, recalls being told that John and Welford had earned at least four times what they had paid for the farm in 1954.\footnote{Interview with John C. Lucy III and John C. Lucy IV, Feb. 16, 2007. Neighbors and members of the Zehmer family also report that there was a grand southern estate house on the Ferguson Farm. The estate house was torn down sometime after the Lucys bought the property. One neighbor suggested that Lucy had taken apart and sold the house piece-by-piece to be shipped and rebuilt by a businessman up North. Interview with Meade Harrison, Oct. 15, 2009. We have not been able to confirm this report, but, if it is true, it also would increase the profit that Lucy made from the Ferguson Farm. The story is consistent with Lucy’s liquidation of other assets on the property.}

Taken together, the evidence convincingly suggests that it was the Lucy brothers, and not Hardy Zehmer, who reaped windfall profits from the sale enforced by the Virginia Supreme Court of Appeals in \textit{Lucy v. Zehmer}.\footnote{Neighbors and members of the Zehmer family also report that there was a grand southern estate house on the Ferguson Farm. The estate house was torn down sometime after the Lucys bought the property. One neighbor suggested that Lucy had taken apart and sold the house piece-by-piece to be shipped and rebuilt by a businessman up North. Interview with Meade Harrison, Oct. 15, 2009. We have not been able to confirm this report, but, if it is true, it also would increase the profit that Lucy made from the Ferguson Farm. The story is consistent with Lucy’s liquidation of other assets on the property.}

**CONCLUSIONS**

Prudent parents have reminded their children for generations that money does not grow on trees. Our investigation into \textit{Lucy v. Zehmer} suggests that prudent legal scholars should revisit that conclusion. Money can grow on trees, and it was doing just that in southern Virginia when Hardy Zehmer and Welford Ordway Lucy met just before Christmas in 1952. The Lucy brothers, understanding that changing circumstances were making southern timberlands more valuable, were quick to capitalize on these developments. Most landowners like Hardy Zehmer, by contrast, were slower to understand these trends even as middlemen like the Lucy brothers expressed considerable interest in what historically were seen as more
remote and less desirable lands. A frequent consequence when the broker met the landowner was a speedy sale that the landowner promptly regretted. A long list of litigated cases, some now famous, memorializes the economic and social turbulence that this industrialization stirred.

It was in this context that Welford Ordway Lucy met Hardy Zehmer for a drink before Christmas in 1952, and understanding this context changes the interpretation of the case. Justice Buchanan, looking plainly at the outward manifestations of Zehmer’s reported conduct and believing that $50,000 was more than a fair price, concluded that Lucy was reasonable in thinking that Zehmer intended to become contractually bound and thus enforced the written instrument. We now know that the value of the farm’s timber alone far exceeded $50,000. We also know that Dinwiddie County was swarming with aggressive timber brokers like the Lucys, many of whom employed unseemly tactics, many of whom clearly had their eyes on the Ferguson Farm, and many of whom—the record indicates up to twenty-five—had been previously rebuffed by Zehmer. Within this context of rapidly rising land values and too-hastily created contracts, many of which frayed family relationships, one can understand Judge Jefferson’s declining to intervene and refusing to enforce the contract. The outward manifestations observed by Justice Buchanan and the Court of Appeals in fact reveal very little of what was known to the parties and perhaps to the district judge as well.

In a sense, *Lucy v. Zehmer* was rooted in an asymmetry of information between the Lucy brothers, industry middlemen who regularly kept apprised of the industry’s growing capacity and demand, and Hardy Zehmer, a local landowner who lacked this critical knowledge. Lucy was certainly not the only lumberman to take advantage of his superior knowledge about the value of timberlands. Indeed, a study commissioned by the Virginia legislature found that small sawmill exploited their market knowledge and the “ignorance” of family landowners, *See supra* note 152. Problems arising out of asymmetric information are nothing new to contract law, and courts have grappled with cases arising out of disparities in knowledge between buyers and sellers at least since the Supreme Court’s seminal opinion in *Laidlaw v. Organ*, 15 U.S. 178 (1817). In that case, Chief Justice John Marshall, writing for the Court, ruled that a buyer was not obligated to share his superior knowledge with a prospective seller “where the means of intelligence are equally accessible to both parties.” Nonetheless, Marshall warned, “each party must take care not to say or do any thing tending to impose upon the other.” *Id.*
Cicero demands that historians, above all, must tell the truth. We, above all, have aimed to tell the true and complete story of *Lucy v. Zehmer*, which we believe enhances, rather than diminishes, the case as a tool for studying the objective theory of contracts. By revealing the unspoken intent of the Lucy brothers, we also uncover the real conflicts that existed between their words of agreement and their desire to profit from Hardy Zehmer’s ignorance. Understanding this fact—that the subjective intent of the parties often differs from their outwardly-manifested intent—is critical to properly understanding the objective theory. Students and scholars must recognize, after all, that the decision to rely on only the outward manifestations of the parties is a distinct choice, and that we can only properly evaluate the wisdom of that choice by coming to grips with the very real issues that the objective theory may miss.

**POSTSCRIPT**

Five decades after Justice Buchanan issued his opinion in *Lucy v. Zehmer*, a law professor at the University of North Carolina in Chapel Hill prepared to discuss the case with his contracts class. Surveying the class to select a student to summarize the facts of the case, one name caught his eye. “Mr. Lucy, would you care to share what you know about this case?” That student was John C. Lucy IV, the great-grandson of the original co-plaintiff, John C. Lucy. Once again, a Lucy was being asked to explain the curious events in a Dinwiddie restaurant just days before Christmas in 1952.

Over that half a century, much has changed in Dinwiddie County. The development of Interstate Highways 85 and 95, for example, have had a devastating effect on local businesses along Highway 1. A drive through the area reveals a virtual rust belt of old hotels and restaurants nearly identical to Zehmer’s place, “Ye Olde Virginie.” As visitors will quickly realize,

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205 Cicero’s rules for Historians: “The first law is that the historian shall never dare to set down what is false; the second that he shall never dare to conceal the truth; the third that there shall be no suspicion in his work of either favouritism or prejudice.”
even Ye Olde Virginie is no longer open to those passing through town; instead, in an ironic twist, Ye Olde Virginie has been transformed into a retirement community. Many of these changes began with the transformation of Virginia’s economy in the 1950s and 1960s. Leading the way was Governor Albertis Harrison, who is fondly remembered as a driving force behind the modernization of industry across the state.206

The Lucy brothers in particular capitalized on these changes. Even as he supplied timber to industry titans, John C. Lucy built his own small timber empire called the Brunswick Box Company. Originally founded in 1952 to produce tobacco boxes, the company soon transitioned to manufacture wood pallets for moving and transporting supplies overseas. The company is still run by Emory Lucy, one of John C. Lucy’s sons. Another son—John C. Lucy, Jr.—founded his own pallet business, the Abell Lumber Corporation, a decade later. By the mid-1990s, John C. Lucy, Jr.’s company had merged with other entities to become Pallet Management Systems, Inc., a multimillion-dollar publicly traded company led by John C. Lucy, Jr.’s son, John C. Lucy III. Though briefly successful, Pallet Management Systems experienced financial troubles during a market downturn several years later and filed for bankruptcy protection in 2003. Despite this loss, John C. Lucy III continues working as President of Clary Lumber, a hardwood lumber sawmill located in Gaston, North Carolina that his father first bought to supply lumber to the Abell Lumber Corporation. More than fifty years later, the Lucy family is still picking money off of trees.207

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206 Saxon, supra note 34 ("Mr. Harrison's time in office came as the state turned from a rural to an industrialized society, and he contributed significantly to that development with road construction and other economic programs.").

207 Perhaps because of this continued success, members of the Lucy family speak with pride about the business activities of John C. Lucy and Welford Ordway Lucy—even when discussing the specific case of Lucy v. Zehmer. They realize, for example, how difficult the task of cruising timberlands and predicting timber prices can be, and they are proud that John and Welford were able, despite their limited educations, to build a burgeoning business from their natural talent and skills. The Zehmers, by contrast, have been much more reticent to discuss the case on the record, with one family member acknowledging that the case continues to carry a stigma to this day for the family.
Welford Ordway Lucy took a slightly different path after *Lucy v. Zehmer*. As descendents of both Lucy brothers report, Welford left Dinwiddie for Warrenton, Virginia in 1954, where he purchased a farm to raise cattle and opened a Stuckies store along Highway 17 (Welford reportedly observed how profitable a Stuckies franchise was for his daughter and son-in-law, and he concluded he too should pursue the opportunity). Just over a decade later, and after making a significant profit selling his Warrenton farm, Welford moved to Richmond to apply his talents to investing in the real estate market.\(^{208}\) Though initially successful at flipping other properties for a profit, this new business slowed down after a bad investment in an office building. The investment loss was not enough to ruin Welford financially, but it was a painful shock to the ego of a man remembered by his descendents for his intense pride in his business talents.\(^{209}\) He later was sued by the buyer of another property for failing to disclose the existence of contaminated storage tanks that violated city safety requirements and required an expensive clean-up.\(^{210}\) Welford lost that dispute, but, when all was said and done, he still died a wealthy man. Family members report that John’s and Welford’s siblings all exhibited a canny business sense and enjoyed similar financial success, and that the five children that grew up on a struggling farm each left lucrative estates for their descendents.

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\(^{208}\) His descendents recall that the development of Interstate 66 near Welford’s farm dramatically raised the value of the property.

\(^{209}\) Interview with Meade Lucy, December 10, 2010.

The timber industry has changed as well. Regional prices for timber eventually stabilized, and large entities emerged to manage and harvest timberlands more efficiently than their family-owned predecessors. A majority of the Ferguson Farm remains controlled by these interests to this day, with neat rows of pine trees packed together across the expansive property and signs of a small harvest apparent on its periphery. It remains to be seen, however, what that timber will be used for. In 2009, International Paper—the then-owner of the Camp Manufacturing plant in Franklin—announced that the mill would be closed, ending the plant’s seventy-five year run making paper in Southside Virginia.²¹¹ Local residents were naturally devastated by the news, but many lumbermen (including John C.

Lucy III) are still looking forward. If lumber made lumbermen rich in the 1890s, paper made them rich in the 1950s, and pallets made them rich even later, enterprising lumbermen are still looking for the next industry to create local fortunes.\textsuperscript{212}

Perhaps one other thing to change will be the way law students will understand \textit{Lucy v. Zehmer}. Unlike the caricature portrayed in the contracts classroom, the case involves sophisticated businessmen, a tumultuous economic climate, and the persistent lesson that appellate courts—and generations of contracts scholars—should be hesitant before stridently claiming to understand the facts of the case before them.

\textsuperscript{212} One local paper reported with optimism on these efforts to find new uses for the region’s substantial timber resources around the time the Franklin Mill was closed. \textit{Plentiful wood basket gives area a leg up in economic recovery}, The Tidewater News, May 22, 2010, available at http://www.tidewaternews.com/2010/05/22/plentiful-wood-basket-gives-area-a-leg-up-in-economic-recovery/. More recent news suggests that this optimism may have been justified. See, e.g., Nicholas Langhorne, \textit{Options for IP mill}, The TIDEWATER NEWS, Oct. 22, 2010 (relaying a statement from International Paper that “the closed Franklin paper mill is being considered for the production of wood pellets, lumber, fluff pulp, ethanol, biomass power generation and bio-diesel”), http://www.tidewaternews.com/2010/10/22/options-for-ip-mill/.