TO ERR IS HUMAN, TO MOO BOVINE:
THE ROSE OF ABERLONE STORY

NORMAN OTTO STOCKMEYER *

INTRODUCTION

More than a century ago, T.C. Sherwood of Plymouth entered into a contract to purchase a cow from Hiram Walker of Detroit. Because it was thought that the cow was barren, it was sold for beef. The price amounted to eighty dollars. Later, when Walker tried to back out of the deal, Sherwood sued him.

The resulting opinion, Sherwood v. Walker, 66 Mich. 568, 33 N.W. 919 (1887), handed down by the Supreme Court of Michigan in 1887, became a legal classic and is still studied by law students across the country. Indeed, in 1985 American Heritage magazine picked Sherwood v. Walker, as one of its “Five Classic Cases” that every law student must know. Additionally, in Sherwood’s hometown, the State Bar of Michigan dedicated a Legal Milestone historical marker that, according to the Michigan Bar Journal for August 1993, recognizes the case as “one of the most celebrated contracts cases in American history.”

What could possibly be of such lasting importance about a dispute between two farmers over a barren cow?

For one thing, nothing about the case is quite as it appears. Neither the buyer nor the seller was a farmer; rather, they were prosperous business men who could afford to pursue their dispute throughout Michigan’s court system. More importantly, the cow turned out not to be barren after all, a mistake that formed the basis of the court’s decision. And although Walker won the appeal, Sherwood ended up with the cow.

Here is the curious story behind the “Case of the Barren Cow,” the parties to the lawsuit, its surprising aftermath, and its continuing importance.

THE LAWSUIT

The story begins in May of 1886 when Sherwood approached Walker about buying some of his stock of purebred Angus cattle. Sherwood did not find any to his liking on one farm, so Walker suggested that Sherwood look at a few head of cattle on another farm, Walker’s Greenfield farm, which

* Norman Otto Stockmeyer is an emeritus professor at Thomas M. Cooley Law School. He is a graduate of Oberlin College and the University of Michigan Law School. This is his fourth article for the Thomas M. Cooley Law Review. Readers seeking more complete source citations may email the author at stockmen@cooley.edu. The author thanks Texas Wesleyan University law professor Franklin G. Snyder for sharing his research into cattle registry records relating to Rose and her offspring.
was located some eight miles northwest of downtown Detroit in what was then Greenfield Township and now part of Detroit.

Walker told Sherwood that the cows on that farm were probably barren and, therefore, could not breed. Sherwood picked out a cow with the fancy name of “Rose 2d of Aberlone.” The parties agreed on a price of $12.5 cents a pound, and Walker confirmed the sale in writing.

When Sherwood later returned to the Greenfield farm to take delivery of the cow, Walker refused to take Sherwood’s money or to deliver the cow. By then, Walker suspected that Rose was expecting a calf, and if so, she was worth as much as $1,000.


Walker appealed to Wayne County Circuit Court. However, following a full jury trial that December, Sherwood won the case again. Meanwhile, Rose delivered a calf in October, therefore proving that she was on the way to motherhood when the contract was made. (The gestation period for a cow is nine months.)

Determined not to lose his cow, Walker appealed again, this time to the Michigan Supreme Court. His lawyers raised twenty-five assignments of error. Sherwood’s lawyer responded that because of the contract, title to the cow had passed to Sherwood, and it was Walker’s turn to deliver.

The Michigan Supreme Court overruled the lower courts. It held that if both parties believed that the cow was barren and useless for breeding purposes—when, in fact, she was capable of breeding—then the seller could avoid the contract. Why? Because the contract would have then been based on a mutual mistake.

The bronze letters on the Legal Milestone plaque summarize the decision this way: “Because a mutual mistake affecting the substance of the transaction had been made, Hiram Walker had a right to rescind the contract, and keep the cow.”

Central to the Supreme Court’s decision was its belief that the parties’ mistake went to the very essence of the contract, the “root of the matter.” To those nineteenth-century jurists, a barren cow was a substantially different creature than a breeding one; as different, the Court said, as “an ox and a cow.” Thus, the animal as contracted for, a barren cow, did not exist.

(One may assume that the litigation delighted the lawyers. The case could well have served as the inspiration for “The Lawsuit,” a lithograph from the 1800s that depicts a plaintiff and a defendant tugging at opposite ends of a cow while a lawyer milks it.)
The Parties

Theodore Clark Sherwood

Theodore Clark Sherwood (1839-1910) was age forty-seven at the time of the controversy. He owned an eighty-acre farm on Ann Arbor Road at Sheldon Road, just south of the village of Plymouth. There he raised the best breeds of livestock; his farm was one of the finest in the county. But Sherwood made his living as a banker. A refined individual and prominent member of the Plymouth community, it has been said that he always appeared in public wearing a tall silk hat.

Sherwood was born in Geneva, New York, in 1839, and he moved with his parents to the Detroit area in 1854. After stints as a schoolteacher in a district near Detroit and as a railroad cashier in Kalamazoo, he began his banking career working for the First National Bank of Battle Creek, thereafter the First National Bank of Plymouth, and the Grand Rapids National Bank. He returned to Plymouth in 1884 to become president of the newly organized Plymouth National Bank.

Two years after the Supreme Court's *Sherwood* decision, Governor Cyrus Luce appointed Sherwood to be Michigan's first State Commissioner of Banking, a position he held from 1889 to 1896. He had the task of organizing the new state banking department and drawing up rules and regulations for banking institutions. According to his first annual report, published in the *New York Times* for January 29, 1890, Commissioner Sherwood had oversight responsibility for 90 state-chartered banks with assets of $47 million.

As Banking Commissioner Sherwood was credited with helping Michigan's banks through the financial panic of 1893 and the business depression that followed. A contemporary account said, "he is considered by business men of Michigan as one of the ablest financiers and one of the best informed men on financial questions in the state."

After his service as Banking Commissioner, Sherwood was president of Peninsular Savings Bank of Detroit for two years before retiring in 1898. He died October 1, 1910, at the age of seventy-one. He is buried in Plymouth's Riverside Cemetery, located on Plymouth Road west of Haggerty Road. An obituary referred to him as "a man of fine culture and pleasant address" and "the father of the state banking laws."

Coincidently, the cemetery is directly behind the 35th District Courthouse. District Courts replaced the old Justice of the Peace court system, which Sherwood began his famous lawsuit. A former Contracts student of mine, 35th District Court Judge Ronald Lowe, has installed a display commemorating *Sherwood v. Walker*. It is located on the third floor of the court house and is open to the public.

Sherwood's Plymouth National Bank went through several consolidations before merging with the National Bank of Detroit. It subsequently became First Chicago NBD Corp, and then Bank One, which
in 2004 was acquired by JPMorgan Chase. A toy store is now located on the site the bank once occupied at the corner of Main Street and Penniman Street in downtown Plymouth. The State Bar of Michigan’s Legal Milestone marker stands across the street in Kellogg Park.

An indication of his banker’s frugality may be gleaned from Sherwood’s instruction not to water Rose on the morning she originally was to be weighed and handed over. Why pay 5½ cents a pound for water?

_Hiram Walker_

Hiram Walker (1816-1898), then age seventy, seemingly was of a more generous nature. Even though Rose was being sold for a small fraction of what he had paid for her, Walker instructed his farm manager to throw in a free halter. (Of course, that was before he discovered that Rose might be worth ten times the sale price.) Walker could well afford to be generous, as he was at the time one of Detroit’s most successful industrialists.

(Much of the information that follows comes from a collection of columns from the Walkerville Times, republished in 2006 in the second edition of Best of the Times.)

Walker was born on the 4th of July, 1816, in East Douglas, Massachusetts, near Boston. At age twenty-two, he headed west to Detroit to seek his fortune. His first ventures were not successful. His Detroit grocery store failed, and a tannery in which he was a partner burned down. But he had more luck as a grain merchant, buying and selling grain, and distilling some of it into whisky.

Attracted by lax liquor laws and cheap land across the Detroit River in Ontario, Canada, in 1856 Walker purchased 468 acres of land 1½ miles upstream from Windsor for $40,000, and he went into the liquor business in a big way. An innovative merchandiser, he was among the first distillers to brand his barrels, the first to sell whisky in individual glass bottles, the first to employ whisky “runners” to promote his product, and the first to advertise with billboards and electric signs.

Walker was an innovator in other ways. He built the town of Walkerville to house his workers. By 1895, it had a population of 600. He used leftover mash to feed herds of cows, which led to a large dairy operation. He constructed Canada’s first concrete road between his distillery and cattle barn. The first electric streetcar in Canada ran from Walkerville to Windsor, powered by current from Walker’s plant. His Walkerville Wagon Works later became Ford of Canada. Indeed, he has been called “the Henry Ford of Canada.”

Hiram Walker’s Canadian whiskey—“lighter than Scotch and smoother than bourbon”—achieved great success. By the time of his dispute with Sherwood, Walker’s “Club Whisky” was being marketed throughout Canada and the United States.

In 1891, a new U.S. law required that product labels identify the country of origin. Walker boldly added “Canadian” to his product’s name.
“Canadian Club” eventually became one of the most recognized brand names in the world.

The Canadian Club Brand Center in historic Walkerville (now part of Windsor) offers tours of Hiram Walker & Sons’ magnificent main office building, built in 1894. Located on the banks of the Detroit River, it is five minutes east of the Detroit-Windsor Tunnel on Riverside Drive. Yes, there is a tasting room. Legions of law students have made pilgrimages to the site.

The most imposing residence in Walkerville is Willistead Manor. Noted architect Albert Kahn designed it for Edward Chandler Walker, Hiram’s eldest son. Tours of the thirty-six-room mansion are available.

An article in the March 1995 Michigan Living magazine suggests that a day tour of Walkerville also might include the Town Hall, designed by Albert Kahn in 1904, and the Crown Inn on Devonshire, the town’s earliest hotel. Do not overlook Kildare House, on the corner of Kildare and Wyandotte, built in 1885 for a Walker employee, which, fittingly, has been turned into a neighborhood pub. A virtual tour of historic Walkerville can be accessed at www.walkervilletimes.com/virtual-tour/virtual_tour.htm.

Except for a few early years in Walkerville, Hiram Walker continued to live in Detroit. He commuted to work by horse and buggy from his home at the corner of Shelby and Fort Streets, on the site now occupied by the Federal Reserve Bank Building, to a dock off Atwater Street, then by ferry across the mile-wide Detroit River to a dock he built at Walkerville.

Walker never gave up his U.S. citizenship, but considered himself neither a Canadian nor an American, but rather (recalling his date of birth) a "Yankee."

Hiram Walker died in 1899 at his home in Detroit. He was 84. He is buried in Elmwood Cemetery on Detroit’s near east side. His three surviving sons inherited the business. Hiram Walker & Sons was sold in 1926 for $14 million, not a bad return on Hiram’s initial $40,000 investment.

A glimpse into why a man of such means would take a fight over a single cow all the way to Michigan’s highest court is provided by this reflection at his seventy-fifth birthday in 1890: “The young men of the present do not know the value of money. I had hardly the time, as a young man, to go fishing, for I was always working. My habit, in my younger days, of saving the pennies, has placed me where I am today.”

Walker could pinch pennies until they squealed—or in Rose’s case, mooed.

Rose

Rose (1881- ? ) was not what one would think from reading the opinion in Sherwood v. Walker. First, her name was not Rose 2d of Aberlone. There was little reason to think that she was barren. And despite the ruling in favor of Walker, she ended up in Sherwood’s possession. (All
of this has been uncovered by the careful detective work of Texas Wesleyan University law professor Franklin G. Snyder, who has poured over cattle registry records of the period.)

She is called Rose 2d of Aberlone in the contract and in court papers, but her name was Rose 2d of Aberlour, not Aberlone. She was foaled at the Mains of Aberlour, near the River Spey, in Scotland. The purity of the river’s water, and the proximity to grain, led the distilling industry to flourish in that region. More than half of Scotland’s whisky comes from within twenty miles of Aberlour.

Rose was born on January 8, 1881, and subsequently registered with the American Angus breeders as number 2782. Her sire was Souter Johnny, named for a character in Burns’s “Tam O’Shanter,” and her dam was Delilah of Burnside.

Although no photo of Rose is known to exist, an engraving was made of her sister, Elaine of Aberlour. Rose herself became a “cover girl,” being depicted on the cover of the Student Lawyer Journal for April 1965, wearing the halter.

We do not know when or where Hiram Walker purchased Rose, but given his interest in whisky distilling and breeding Angus cattle, it is entirely possible that he bought her while visiting Scotland. Records show that Walker paid $850 for Rose, so parting with her for $80 can only be explained by his belief that she was unable to breed.

But was that belief justified? Here is perhaps the biggest surprise: Rose had given birth to a calf in 1883, registered to Walker as the breeder. She did not calve in 1884 or 1885, but she had proven her breeding potential.

Moreover, the court record lists four other Angus cattle for sale at the Greenfield farm in the spring of 1886. One, Waterside Standard, was a bull. Clearly, Rose’s delicate condition that May was not wholly unexplainable.

**The Aftermath**

Here’s another surprising fact: after the appeal was decided, on remand a circuit court jury again sided with Sherwood. Rose’s subsequent offspring list “T.C. Sherwood” as breeder. So despite having prevailed on appeal, Walker ultimately lost possession of Rose.

At the unveiling of the Legal Milestone, one speaker was quoted in the Plymouth Observer as saying, “Plymouth never got to be the hometown of Rose of Aberlone, but (the city) got the plaque—What a perfect way to make amends.” As we now know, however, Rose did get to graze on Sherwood’s farm after all.

(Writing in the June 1998 Michigan Bar Journal, another former student, Michael Ellis, reported that the unveiling was accompanied by presentations pregnant with puns. “People were ‘udderly’ pleased, not ‘cowed’ by the experience, and ‘milked’ it for all it was worth.” But let us moove on before the editors start beefing and apply a cleaver to this paragraph.)
Being the most sympathetic character in the case, Rose has become much celebrated in verse. The most widely published poem is that of UCLA law professor Brainerd Currie, which first appeared in the *Harvard Law School Record* in 1954 and has been reprinted several times in other legal publications. The 350-line epic concludes with a scene that generations of law students can recall—perhaps more fondly now than at the time:

_Tis the middle of the night before the exam,
And there's nothing to eat but a cold bit of ham ...
Mark how the eager students cram.
A dismal specter haunts this wake —
The law of mutual mistake;
And even the reluctant drone
Must cope with Rose of Aberlone.
She rules the cases, she stalks the page
Even in this atomic age ...
In many a hypothetical
With characters alphabetical,
In many a subtle and sly disguise
There lurks the ghost of her sad brown eyes.
That she will turn up in some set of facts is
Almost as certain as death and taxes:
For students of law must still alone
For the shame of Rose of Aberlone.
*(Harvard Law School Record, Thursday, March 4, 1954)*

_Sherwood v. Walker_ became “the single most loved law case at Harvard” due to Currie’s poem and the delight that Professor John P. Dawson, a native Detroiter, took in teaching the case to generations of Harvard law students. But law students at the University of Iowa (who might know a thing or two about cows) were not impressed with Currie’s poem, according to this response:

*My Wild Iowa Rose*

(Anonymous)

Unlike another, my rhyme is terse:
Your name, Oh Rose is under curse.
I can think of nothing worse
Than to suffer through the Harvard verse . . . .
*(Journal of Legal Education, 1982)*

Other tributes to Rose’s fertility include these two limericks, the first by Indiana University law professor Douglass G. Boshkoff, the other by an unknown author:
We've all heard the story of Rose
Whose failure to bear was a pose.
   "For the stew pot, I'm not,"
   Said Rose, like a shot.
And she wasn't, as everyone knows.
(Northwestern University Law Review, 1996)

-- and --

For this beef-cow who carried a calf,
The 80-buck price was a gaffe.
   The injustice moves us
   And so, it behooves us
To say: Here's a cow-and-a-half.

Then there are these lyrics, by Professor Snyder, to the tune of Bob Dylan's Just Like a Woman:

   JUST LIKE A HEIFER
Now Sherwood needed a cow.
It's not clear if for breeding, or for chow.
He went to Walker's farm,
Thought there would be no harm --
But there he fell under Rose's fatal charm
And he knew --
She's the one.

   CHORUS
She moos, just like a heifer
(Yes she does)
And she chews grass just like a heifer
(Yes she does)
And she woos bulls just like a heifer --
But she's priced just like a side of beef.

(Contracts Prof Blog, May 15, 2006)

My favorite tribute to the case, which summarizes it fairly well in far fewer words, was handed to me after class one day by a student, James Marchant:

To err is human,
To moo, bovine.
CONTINUING IMPORTANCE

Sherwood v. Walker has been cited as legal authority in more than fifty court decisions, from New York to California. Judges have called it "celebrated," "classic," "leading," and "seminal," as well as a "paradigm case" "revered by teachers of contract law."

James J. White, a distinguished professor of Contracts at the University of Michigan, recalled recently in exquisite detail how his Contracts professor dealt with the "barren cow" case nearly fifty years earlier:

I can still remember the Monday morning when we took up the doctrine of mistake in Contracts class. After we had the normal Socratic discourse about the cases, Bob [U-M law professor Robert J. Harris] set out his theory about how the cases should be put together . . . . Being good obsessive, compulsive law students who yearn for certainty, we eagerly wrote down his interpretation of these cases . . . .

On Tuesday Bob commenced the class by saying . . . . "Yesterday I told you that the cow case was correctly decided; now I think it was not. Today I believe the buyer not the seller should have won." You could smell the hostility in the air that day. If any of us had had a gun, we would have killed him. Our learning—so carefully put down on Monday—was worthless and, worse, we feared Bob might disavow Tuesday's analysis on Wednesday. (Law Quadrangle Notes, Fall 2005.)

Eventually White and his classmates came to love and respect their Contracts professor for showing them "the uncertainly and ambiguity inherent in contract law." In that sense, Sherwood v. Walker, whether correctly decided or not, remains a great teaching vehicle.

Last fall I learned from a former Contracts student, Stephen M. Rice, that he had entered upon a career at Liberty University School of Law teaching Contracts. Perhaps his classroom discussion of Sherwood v. Walker will be influenced by recollections of our class back in 1992.

As suggested by Professor Harris's change of mind, respect for the decision in Rose's case has not been universal. First, there was a dissent in the case itself. Justice Thomas R. Sherwood (another coincidence?) agreed with the majority opinion on mutual mistake as a basis for rescission. But he doubted that the buyer shared the seller's belief in Rose's infertility. In the dissent's view, the buyer thought that Rose "could be made to breed" and that "there is no pretense that (Sherwood) bought the cow for beef."

University of Michigan law professor George Palmer in his 1962 book, Mistake and Unjust Enrichment, sided with the dissent: "I find it most difficult to accept the statement of the majority of the court that the buyer, Sherwood, shared the mistake . . . . The whole sense of the matter suggested that . . . he thought there was a chance that Rose 2d would breed."
Today's students often harbor the same suspicions. One Contracts student, Donna Shackelford, was so worked up over the decision that she wrote me a long note saying that the author of the majority opinion, Justice Allen B. Morse, must never have owned cattle. "All breeders know that there is always a chance that if a cow is left with a bull (as Rose was) it could produce a calf... Plaintiff could not have wanted the cow for meat... because you don't buy a cow for meat—you buy a steer. And you certainly don't spend your time shopping around in herds to pick one out—the first plump one will do."

(Ah, the "plumpness" factor. Did Sherwood pick Rose over the other cows on the Greenfield farm because she was showing a little something extra? And if so, was Sherwood thinking "beef on the hoof" or "baby on board"?)

According to the Michigan Supreme Court Historical Society's website, www.micourthistory.org/resources, Justice Morse attended Michigan Agricultural College, so he would have known something about cows. But Justice Sherwood was actually raised on a farm. In another of the case's coincidences, after his service on the court Justice Morse was named Ambassador to Scotland, Rose's birthplace.


**WHAT ABOUT THE LENAWEE CASE?**

At one point the Michigan Supreme Court, sharing Judge Kaufman's difficulty in applying Sherwood v. Walker, tried to disown Rose. The 1982 case was Lenawee County Board of Health v. Messerly, 417 Mich. 17, 331 N.W.2d 203 (1982). It involved the sale of a three-unit apartment building located on a 600-square-foot tract of land for $25,500. Unknown to either party, a previous owner had installed the septic tank without a permit.

Within a week of the purchase, the buyers (Mr. and Mrs. Pickles) discovered raw sewage seeping out of the ground. The lot size was too small to support a legal septic system, rendering the property uninhabitable and virtually without value. The buyers sought to rescind their purchase based on mutual mistake. The issue was whether the parties' mistake went to the essence of the property—in one sense it surely did—or merely its value.

The learned justice who wrote the Supreme Court's decision, the Honorable James L. Ryan, expressed the view that Sherwood v. Walker's essence/value distinction was "inexact and confusing" and "an impediment to a clear and helpful analysis." Its holding was therefore to be limited to its facts (and thus of no legal precedent in non-cow cases).
But wait! What tipped the scales in *Lenawee* was an “as is” clause in the contract. Legally, the court said, that placed the risk of any unknown defect on the buyers. So, despite the mutual mistake, the buyers could not back out.

When *Lenawee* came out, some scholars thought Rose’s days were numbered. Law professor Michelle Oberman at Santa Clara University, writing in the *Arizona Law Review* in 2005, pronounced *Sherwood* to be essentially “dead law.” And a limerick celebrating *Lenawee* by Valparaiso University law professor Jeremy Telman began making the rounds:

The sewage leak, that was no trickle.
Now the property ain’t worth a nickel.
When “as is” you take,
You eat your mistake,
So bon appetit, Mr. Pickles.
(Contracts Prof Blog, November 13, 2006)

Yet, in the twenty-five years since it was decided, *Lenawee* has failed to supplant *Sherwood v. Walker*. In the 2008 edition of Professor Dawson’s popular law school casebook (carried on by others since his death in 1985), *Sherwood* is still reprinted in full, replete with a photo of Hiram Walker and an unidentified Angus cow. A relatively brief comment on *Lenawee* follows it.

I have examined 28 Contracts casebooks currently available. Thirteen reprint *Sherwood* and another 10 mention it, for a total of 23 (82%). Eleven reprint *Lenawee* and seven more mention it, for a total of 18 (64%). So, Rose holds the lead in law-school casebook coverage. (Six casebooks reprint both cases. Only two ignore both.)

The monumental encyclopedia of contract law *Williston on Contracts* continues to pay tribute to Rose. Volume twenty-seven of the fourth edition, which was published in 2003, devotes fully five pages to a discussion of *Sherwood v. Walker*. *Lenawee* rates a single citation—under the heading “Septic and sewer” cases.

Perhaps most telling of all, in a 2006 mutual-mistake case, *Ford Motor Co. v. Woodhaven*, a unanimous Michigan Supreme Court discussed *Sherwood* at length, ignored *Lenawee* completely, and announced that Rose’s case was still viable: “Our review of our precedents involving the law of mistake indicates that the peculiar and appropriate meaning that the term ‘mutual mistake’ has acquired in our law has not changed since *Sherwood*.”

So it has come to pass that the septic-tank case, rather than the barren-cow case, has become limited to its facts. And thank goodness. What law professor would not prefer to spend class-time discussing a frolicsome cow, rather than a leaking sewage system?
In addition to Rose’s case, today’s Contracts professors have several other mistaken-animal cases to choose from. There is the 1951 New York case, *Backus v. MacLaury*, involving a bull costing $5,000 that turned out to be sterile. In a 1976 Kentucky case, *Keck v. Wacher*, a buyer who paid $117,000 for a horse, which turned out to be “slipped” and worth just $40,000, obtained rescission of the sale. A German court in 2006 ordered Viagra to be administered to a stallion after his new owner claimed he was impotent and refused to pay the full contract price. It worked, and the court ordered the buyer to pay up.

But those cases are merely variations on Rose’s theme of shame and redemption.

**CONCLUSION**

Several erroneous beliefs and eerie coincidences surround this historic case. Nevertheless, it remains one of the great contributions to contracts jurisprudence and law-school lore.

Michigan Governor John Engler, another former student, issued a proclamation of tribute to Rose’s case in 1993. In his proclamation, the Governor rightly asserted that the case’s significance transcends the misguided individuals involved in the dispute: “The details of this case are less important than the ruling, which remains as sound today as it was over a century ago. The principals are gone but the principle will never die.”