

Sherwood v Walker

Cows and Contracts

66 Mich 568 (1887)

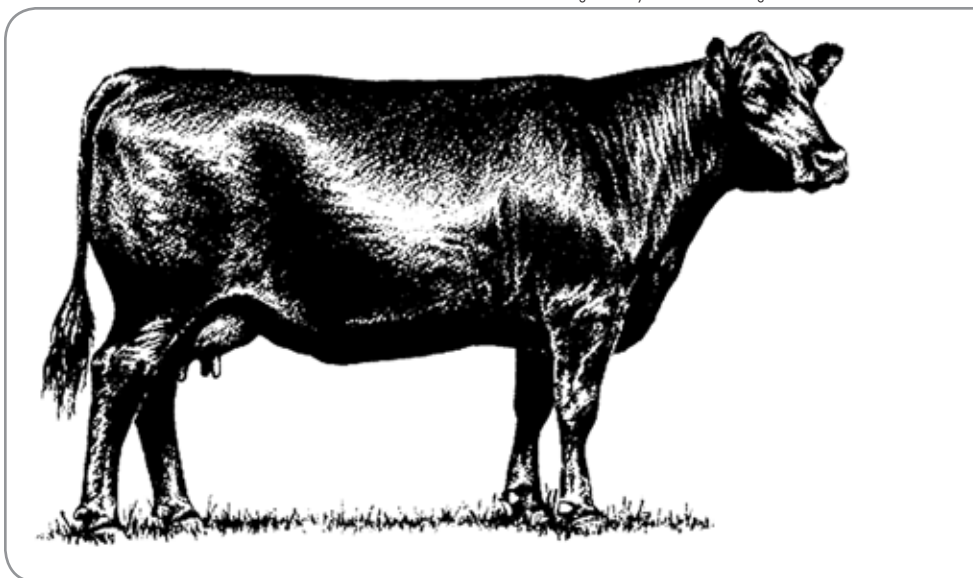
In 1887 the Michigan Supreme Court rendered what has come to be considered a seminal decision in the common law of contracts. Generations of American law students have studied *Sherwood v Walker*, more popularly known as the “cow case.” Here, Walker and Sherwood agreed to a price of about \$80 for an Angus cow (“Rose 2d of Aberlone” was her name) that both understood to be sterile. When the seller discovered that Rose was pregnant, and therefore worth about 10 times more than the agreed-upon price, he was allowed to cancel the contract. The decision defined the principle of “mutual mistake,” whereby a contract is voidable if both parties share a misunderstanding regarding a significant fact in the agreement. But there is more: *Sherwood* also revealed great changes in American society and law in the late nineteenth century.

On the centenary of the writing of the U.S. Constitution, Michigan and much of America was rapidly changing from a rural and small-town country to an urban and industrial one. The second half of the nineteenth century transformed the world. As Henry Adams noted, the world of an American born in 1850 was closer to the world of the year 1 than it was to the world that he would see in 1900.¹ This process of urbanization was well underway in the early nineteenth century; the triumph of the free-labor, commercial, and industrial North in the Civil War accelerated the movement. The nation enjoyed unprecedented material benefits, but also

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endured great social and cultural anguish over the swift and profound changes. Eighty-five percent of Michigan’s population earned its living on the farm when the Civil War began in 1861; by 1910, only about half did; by 1930, only a third. Detroit grew from 45,000 to 286,000 between the time of the war and the end of the century.²

Image courtesy of the American Angus Association®



Drawing of an Angus cow by renowned Angus artist Frank C. Murphy.

The law grew and changed with the country.

The parties in *Sherwood* provide a good example of the transformation from rural to industrial worlds. Part of the appeal of the story of the “cow case” lies in its simple, bucolic setting—what could provide a clearer example of contract than two farmers bargaining over the price of a cow?³ But the Walker of the case, whom the Supreme Court described simply as “in business at Walkerville, Ontario, and hav[ing] a farm at Greenfield,” was Hiram Walker, one of the giants of nineteenth-century enterprise—known as “captains of industry” to their admirers or “robber barons” to their detractors. Hiram Walker was a classic rags-to-riches story, born in poverty and building a fortune in distilling. His great innovation was in marketing, selling, and advertising his whiskey under a brand name, to distinguish it from rivals in a widening consumer market. He established himself in Canada, a safer manufacturing location due to potential American temperance or prohibition laws. (His American competitors forced him to call his product “Walker’s *Canadian* Club Whiskey.”) Like other industrialists, such as George Pullman, Walker built a model company town, Walkerville, which later became the site of another Michigan industrial giant, the Ford Automotive Plant. Walker purchased a farm in Wayne County

and took up the avocation of gentleman farmer and breeder of fine cattle. Still, one of the great commentators on American contract law referred to Walker as “a small farmer.”⁴ Theodore Sherwood was a successful banker who also took the part of a gentleman farmer and Angus cow breeder. Notably, some of their contract negotiations were made by telephone, a cutting-edge technological breakthrough in 1887.

The legal instrument of the contract was fundamental to the industrial-urban revolution in the American economy and society. The law of contract was virtually nonexistent in 1800. William Blackstone’s monumental, four-volume *Commentaries on the Law of England* (1765–69) devoted about four pages to contracts, a subset of real estate. But the economic explosion of the nineteenth century produced tremendous growth in this area of law, and thousands of cases were on the books by the time of the Civil War. In England, and even more so in the United States, lawmakers encouraged individuals to engage in economic enterprise, and the contract facilitated free-market, entrepreneurial freedom. The nineteenth century became “the golden age of contract law.” Indeed, the great English legal historian Sir Henry Maine described the whole transformation of modern society as a movement “from status to contract.” Individuals were no longer defined by birth, class, or race, but were equal persons before the law.⁵ And they were free to make mutually and socially beneficial exchanges by contract.

The nature of contract also changed. In the eighteenth century, judges would scrutinize contracts to make sure that they were “fair.” Still influenced by medieval ideas of “just prices,” courts would refuse to enforce “hard bargains” or contracts that gave one party more than an even exchange. As a result, few contracts were taken to court to enforce. Yet in the nineteenth century, legislators and courts began to leave the parties to contracts completely to their own devices. Provided they were adult males, in their right minds, and not using fraud or coercion, the contract depended completely on the subjective intent and will of the contractors. The government got out of the “paternal” position of supervising citizens. This was a change well suited to a liberal, egalitarian, democratic society such as the United States. People were assumed to be competent and trusted to take care of themselves, to succeed or fail on their own merits. The material benefits of this system—what the great legal historian J. Willard Hurst called the “release of energy” from encouraging individual enterprise—were tremendous. But the system gave more room to the shrewd and the sharp; the freedom to win also required a freedom to fail. In an 1844 South Carolina contract case, a judge referred to bargaining as a “contest of puffing and cheating” by both buyer and seller. But, once sealed, the bargain would be enforced.⁶ The new rules produced opportunity, economic growth, and higher living standards overall, but also vast inequality and startling, almost chaotic change. But on the whole, the American people believed that the benefits outweighed the disadvantages.⁷

In May 1886, Sherwood inspected some of Walker’s Angus cows, which Walker told him were infertile, at his Greenfield farm.⁸ Sherwood picked out Rose, and Walker confirmed the sale by

letter, at a price of five-and-a-half cents per pound—what she was worth as beef. When Sherwood sent a man to collect Rose, Walker, having found her pregnant, refused to deliver her. Sherwood secured a writ of replevin (a common-law writ, an order by a judge allowing a person to recover property wrongly taken), took possession of Rose, and won his claim to her in the Wayne County Circuit Court. Walker appealed to the Michigan Supreme Court.

Perhaps the entire case depended on the understanding that both Walker and Sherwood believed that Rose was infertile—as opposed to the possibility, elaborated in the Supreme Court’s dissenting opinion, that Sherwood was taking a chance that Rose might be fertile after all. (Courts seldom allow parties to void contracts based on unilateral, rather than mutual, mistake.) However, the original record of the case is incomplete and contradictory, and this record was all that the Supreme Court had to consider.⁹

The Court that heard the *Sherwood* appeal was full of new faces, Democrats who had recently taken over the bench. Only Justice Campbell, on the Court since 1858, remained of the renowned Republican “Big Four.” Three new judges joined the Court in the three years from 1883 to 1885. Thomas R. Sherwood (no relation to Rose’s putative owner) served as chief justice. Like most early Michigan justices, he was a New York native, moving to Kalamazoo in 1852. Sherwood was a Greenback-Democrat, elected to the Court when the Republicans were being turned out in 1882. John W. Champlin was also a New Yorker, moving to Kalamazoo two years after Sherwood and joining his brother’s law firm. He studied medicine and became an able surgeon, so that “a good doctor was spoiled to make a . . . justice.” Champlin, also a Democrat, was elected to the Court one year after Sherwood. Allen B. Morse was a Michigan native—the first to be chosen for the Court. He served in the Union Army, losing an arm in Sherman’s victory at Missionary Ridge, near Chattanooga, in November 1863. Morse took his place on the Court after defeating Thomas M. Cooley in the 1885 election. This Court “may almost be called a military tribunal,” one observer noted in 1890, “for the puisne judges have all smelled powder.”¹⁰

Justice Morse’s majority opinion reversed the circuit court’s decision in July 1887. Morse assumed that Sherwood and Walker were both mistaken about Rose’s barrenness. “It appears from the record that both parties supposed this cow was barren and would not breed, and she was sold by the pound for an insignificant sum as compared with her real value if a breeder,” Morse wrote. “She was evidently sold and purchased on the relation of her value for



Hiram Walker, from a painting that hangs in Willistead Manor, Windsor, Ontario.

Wikipedia contributors, “Hiram Walker,” *Wikipedia, The Free Encyclopedia*, http://en.wikipedia.org/w/index.php?title=Hiram_Walker&oldid=232161637 (accessed August 27, 2008)

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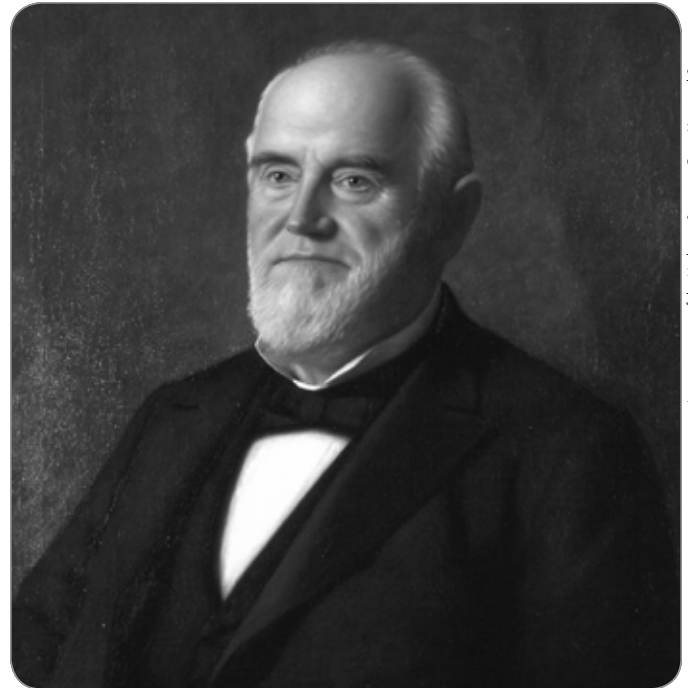
beef, unless [Sherwood] had learned of her true condition, and concealed such knowledge from [Walker].”¹¹ Thus, Morse indicated, it was a case of mutual mistake or fraud on Sherwood’s part, a void contract in either case.

While there were some common-law precedents for the decision, Morse ultimately relied on logic and natural law. In some sense, there was no contract because Walker and Sherwood had made an agreement to purchase something that did not exist—a *barren* cow named Rose. Morse used the terminology of Plato and Aristotle, distinguishing the nature or essence of a thing from its accidental features. “If there is a difference or misapprehension as to the substance of the thing bargained for, if the thing actually delivered or received is different in substance from the thing being bargained for and intended to be sold, then there is no contract; but if it be only a difference in some quantity or accident, even though the mistake may have been the actuating motive to the purchaser or seller, or both of them, yet the contract remains binding.” In simple terms, a breeding cow was fundamentally different from a beef cow.¹²

The Court thus took a position in an emerging battle over legal philosophy. The appeal to philosophic standards—to God, Nature, or Reason—was as old as Western civilization itself. It came under attack in the nineteenth century, challenged by legal philosophies derived from “positivism.” Positivists argued that judges did not simply “discover” the eternal and immutable principles of law. Rather, law was a human product, the command of the sovereign. Oliver Wendell Holmes, Jr., who wrote his classic *Common Law* a few years before *Sherwood*, gave expression to this idea. Holmes wanted the language of morals and metaphysics completely excised from the law. He, and more radical critics of natural law jurisprudence, believed that judges used natural law as a pretext to make law on the basis of their own class interests. In contrast to Justice Morse’s discussion of the essential or real nature of Rose, the positivists believed that these were just names, non-existent abstractions. Though often called “legal realists,” they were really “legal nominalists,” denying the reality of legal concepts.

Such law-school nostalgia was another sign of the modernizing forces at work in 1887: formal legal education was just getting underway. Rather than simply serving as an apprentice in a law office, “reading law” for a while and then hanging up a shingle, as lawyers like Abraham Lincoln did, the late nineteenth-century bar began to organize and professionalize. The American Bar Association, for example, was formed in 1878. Formal study, credentials, and organization took hold among lawyers, doctors, and even historians in the late nineteenth century. Only 11 out of 30 jurisdictions required any qualifications to practice law in 1840. After the Civil War, many more did. Teaching *Sherwood* became part of the progressive “search for order,” as middle-class professionals tried to control the often unruly effects of the unbridling of contract.¹

1. Wiebe, *The Search for Order, 1877–1920* (New York: Hill & Wang, 1967); Hockett, *New Deal Justice: The Constitutional Jurisprudence of Hugo L. Black, Felix Frankfurter, and Robert H. Jackson* (Lanham: Rowman & Littlefield, 1996), p. 32.



Official Court portrait of Justice Thomas R. Sherwood.

Image courtesy of the Michigan Supreme Court Historical Society

Thus, *Sherwood* is a profoundly ambivalent decision. On the one hand, it seemed to be stepping away from the anything-goes, devil-take-the-hindmost character of nineteenth-century contract doctrine, back toward a paternalistic judicial scrutiny of bargains, preventing Sherwood from reaping a windfall by pulling a fast one. Yet it did so by using natural law reasoning, which was revived in the late nineteenth century in defense of the doctrine of “liberty of contract.” Most critics of nineteenth-century contract law claim that it empowered the already powerful and better informed, usually sellers and employers, at the expense of the weak and ignorant, usually employees and buyers—hardly characteristic of this case between two men of wealth.¹³

Chief Justice Sherwood dissented. Quite simply, he disagreed that there had been a mutual mistake. “He believed she would breed,” Justice Sherwood said of plaintiff Sherwood. The purchaser turned out to be more correct about a quality of the cow “which could not by any possibility be positively known at the time by either party to exist.” Articulating the dominant theory of contract, he said, “It is not the duty of courts to destroy contracts when called upon to enforce them, after they have been legally made.” The law should leave individuals to their own devices. “As to the quality of the animal, subsequently developed, both parties were equally ignorant, and as to this each party took his chances.”¹⁴ But Justice Sherwood had to assume, apart from the record of the case on appeal, that Theodore Sherwood had been banking on Rose’s possible fertility.¹⁵

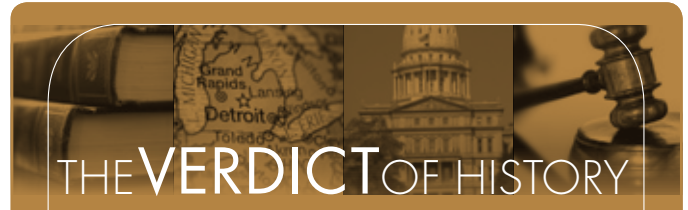
What did *Sherwood* actually settle? Hiram Walker got Rose back, but the doctrine of “mutual mistake” was far from settled.¹⁶ Mistake cases are rare enough, and mutual mistake cases even rarer.¹⁷ Courts and casebooks continue to be “puzzled” about the principle, and

“courts use [mistake] for *ex post* rationalizations of their holdings,” one recent study notes.¹⁸ *Sherwood* was seldom cited in its first century. Indeed, the Michigan Supreme Court seemed to overrule it in 1888, reaffirmed it three years later, and repudiated it in 1982.¹⁹ Nevertheless, *Sherwood* became a staple in the American legal education system. When a federal judge cited the decision in 1969, he called it “an ancient case revered by teachers of contract law,” one that brought on “a flood of nostalgia” for him.²⁰

Finally, perhaps *Sherwood*'s greatest claim to fame is that it inspired two humorous poems, one by Brainerd Currie in 1954, and another by Alan Garfield in 2004, which can be read on our website at www.micourthistory.org. ■

FOOTNOTES

1. Adams, *The Education of Henry Adams* (Boston, 1927), p 53.
2. Dunbar, *Michigan: A History of the Wolverine State*, 2d ed (Grand Rapids: Wm B Eerdmans Pub Co, 1970), pp 582–584, 619.
3. Roscoe Pound, one of the founders of twentieth century “sociological jurisprudence,” believed that judges were unable to deal with modern, urban, industrial problems because they analyzed them in light of outdated, premodern legal ideology. Courts should not treat complex, modern industrial labor relations “as if [corporation and worker] were farmers haggling over the sale of a horse.” Pound, *Liberty of contract*, 18 Yale L J 454 (1909).
4. Atiyah, *Promises, Morals, and Law* (New York: Oxford Univ Press, 1981), quoted in Birmingham, *A rose by any other word: Mutual mistake in Sherwood v Walker*, 21 U Cal–Davis L R 198 (1987–1988).
5. Friedman, *A History of American Law* (New York: Simon & Schuster, 1973), p 275; Maine, *Ancient Law* (New York: Dent, 1931 [1861]), ch 5.
6. Scheiber, *Economic Liberty and the Modern State*, in Scheiber, ed, *The State and Freedom of Contract* (Stanford Univ Press, 1998), p 151.
7. Hall, et al., eds, *American Legal History: Cases and Materials* (New York: Oxford Univ Press, 1991), p 171; Teevan, *A History of the Anglo-American Common Law of Contract* (Westport: Greenwood, 1990), pp 175–183; Hurst, *Law and the Conditions of Freedom in the Nineteenth Century United States* (Madison: Univ of Wis Press, 1956). For a contrary view, emphasizing the continuity of pre- and post-industrial contract doctrine, see Simpson, *The Horwitz thesis and the history of contracts*, U Chi L R 46 (1979), pp 533–601, and Karsten, *Heart versus Head: Judge-Made Law in Nineteenth Century America* (Chapel Hill: Univ of NC Press, 1997), pp 47–53.
8. It is possible that Rose had calved in 1884, according to research undertaken by Terrence Ayala into the records of the American Aberdeen Angus association.
9. Birmingham, *supra* at 200–201.
10. Chaney, *The Michigan Supreme Court*, Green Bag 2 (1980), p 394; *Michigan Supreme Court Historical Reference Guide* (Lansing: Mich Supreme Court Hist Society, 1998), pp 76–81; Baxter, *History of the City of Grand Rapids, Michigan* (New York: Munsell, 1891), pp 730–760.
11. *Sherwood v Walker*, 66 Mich 568, 576; 33 NW 919 (1887).
12. *Id.* at 576–577; Birmingham, *supra*. Discusses the philosophical and linguistic issues in considerable depth, as does Golanski, *Nascent modernity in the case of Sherwood v Walker: An intertextual proposition*, 35 Willamette L R 315 (1999).
13. Pound, *supra*. See especially Horwitz, *The Transformation of American Law, 1780–1860* (Cambridge: Harvard Univ Press, 1977).
14. *Sherwood*, *supra* at 580–582.
15. Birmingham, *supra* at 199; Fuller, *Mistake and Error in the Law of Contracts*, 33 Emory L J 61 (1984).
16. Terrence Ayala reports that *Sherwood* won possession of Rose in a second trial after the Supreme Court remanded the case. Moreover, Rose gave birth to five more calves.
17. This is not to deny that the doctrine often has significant results. When a deep-sea treasure-hunting company found out that its treasure was discovered in waters mistakenly believed to be Florida's, it saved millions of dollars that it would have had to share with the state. Birmingham, *supra* at 204.
18. Rasmusen & Ayres, *Mutual and unilateral mistake in contract law*, 22 J of Legal Studies 312 (1993).
19. *Nester v Michigan Land & Iron Co*, 69 Mich 290, 296; 37 NW 278 (1888); *McCay v Coleman*, 85 Mich 60, 61; 48 NW 203 (1891); *Lenawee County Bd of Health v Messerly*, 417 Mich 17, 29; 331 NW2d 203 (1982).
20. Birmingham, *supra* at 203.



The Verdict of History: The History of Michigan Jurisprudence Through Its Significant Supreme Court Cases is proudly sponsored by the Michigan Supreme Court Historical Society, with the generous assistance of an Administration of Justice Grant from the Michigan State Bar Foundation.* The project includes 19 essays about 20 significant Michigan Supreme Court cases written by Professor Paul Moreno.

Essays were edited by the Significant Cases Committee and Angela Bergman, Executive Director of the Historical Society.

Additional research to gather images and supporting materials was conducted by several Historical Society Coleman Interns and staff, including Laura Langolf, Brittany West, Jennifer Briggs, and John Albright.

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*The Michigan State Bar Foundation's funding for this publication does not constitute an endorsement of any content or opinion expressed in it.