

Basic Assumption: A Poem Based on *Sherwood v. Walker*

Alan E. Garfield, *Southern Methodist University Law Review* 57 (2004), 137

I'll tell you how a man with a cow had a cow
because his cow had a cow.

Here's how.

The man with a cow had a cow
because he sold his cow for just chow.

How now?

He sold his cow for just chow
because he didn't know his cow had a cow.

Had his cow had a cow it would have been worth a thou
and would not have sold for just chow.

What now?

Well, the buyer said "Wow!"

The seller said "Yeow!"

And the Court finally said "Come now!
How can a cow with a cow worth a thou
sell like a cow for just chow.

Not never, and not now!"

So now you know how a man with a cow had a cow
because his cow had a cow.

Aberlone, Rose of, Being an Entry for an Index
Brainerd Currie, *Harvard Law School Record* (1954)

I

'T is the middle of night on the Greenfield farm
And the creatures are huddled to keep them from harm.
Ah me!—Ah moo!
Respectively their quidsome balm
How mournfully they chew!
And one there is who stands apart
With hanging head and heavy heart.
Have pity on her sore distress,
This norm of bovine loveliness.
Her gentle limbs, her hornless brow
Proclaim no ordinary cow:
Fair as a pasture sweet with hay
Mown in the very month of May!
Nay, fairer yet! And yet more fair!
She stands alone, the short black hair
Heaving sometimes on her breast,
Shunned and despised by all the rest.
If one should ask her why she doth grieve
She would answer sadly, "I can't conceive."
Her shame is a weary weight like stone
For Rose the Second of Aberlone.
Her sire is of a noble line
Of most aristocratic kine:
Angus of Aberdeen, black and polled;
Their name is proud and their get pure gold.
Their procreation hath won renown,
But Rose the Second hath let them down.
Her forebears have labored for bitter meed,
For Rose is barren and will not breed.
Now the gate that is strait and the way that narrow
Call for a cow to forgo being farrow.
In a cow one condones a trifle of loose
Morality if she will just reproduce.
The stars in their courses deliver us
From the cow that is non-frugiferous!
If a heifer aspires to a niche on high
She must certainly plan to fructify,
And when she reaches puberty
Must concentrate on uberty.
No honor is there for the boss of that ilk

That produceth no young and giveth no milk;
And this is the reason her kith make moan
For Rose the Second of Aberlone.
Nor maid nor mother, she stands forlorn,
The tragic object of pity and scorn,
Her very beauty a mockery
Of all that a proper cow should be.
Rue and hemlock! Sorrow and shame!
She bears a noble and fertile name,
But her lot is woe, unleavened by weal:
She bears the name, but she bears no veal.
She is hardly worth the price of her feed,
For Rose is barren and will not breed.
In a world of logic she finds no room;
The curse of Verwekoe hath sealed her doom.
Hiram Walker (no kin, I'm sure,
To the proximate cause of the water cure)—
Hiram Walker, of Walkerville,
Hiram Walker, of Greenfield lord—
Here was a wight with an eye on the till!
Quoth he to himself, "I can't afford
To yield me to sentiments weak and rash;
The critter's no 'count, and I need the cash.
The rule is laid down from time immemorial
That a cow must have qualities more than pictorial."
And so he hath sold her to Banker Sherwood,
His eyes cast down, for a glance at her would
Have melted a heart of the hardest stone.
O weep for the Rose of Aberlone!
Sold like a carcass, as if for beef!
From the pain of that there is no relief.
Five and a half mean cents per pound
(What will it be when the meat is ground?).
Allow two score and ten for shrink!
What would her sainted fathers think?
The deal is closed, the parties bound;
Will her loins be lean, will her steaks be round?
Sold for a pittance, and sold incog—
Lot 56 in a catalogue!
Insult and injury! Humiliation!
This is no end for a cow of her station!
Said Walker to Sherwood, "I wait your pleasure.
Take her and welcome. And for good measure
I'll throw in a halter [What callous mirth!]
Just to insure you your money's worth!"

At this there escaped a hapless groan
From Rose the Second of Aberlone.

II

Go, lovely Rose, to your degradation!
Go, and go with you the tears of a nation!
Methinks there ought to have been some bard
To witness that scene in King's cattle-yard—
Some bard who could justly, in verse or in prose,
Make immortal the flowering of Aberlone's Rose.
They took her, that October morn,
Before the dew was off the corn,
To the cattle-yard with its sinister scale,
The better to finish the dreadful sale.
She was put in charge of good George Graham
(Were there cows to be weighed? Well, he would weigh 'em).
Never had coat such glossy sheen;
She was less a cow than an exiled queen.
She walked with dignity and pride,
And as good George Graham stroked her side
He descried a slight rotundity
Evincing, he fancied, fecundity!
And he read in her mute, appealing eyes
A message that caused him glad surprise;
He caught his breath, and must not be blamed
If his voice was broken as he exclaimed,
"Rose, you're about to become a mother!"
She blushed and replied, "*Ich kann nicht udder.*"
Then summoned he Walker of Walkerville,
Who galloped his hardest o'er dale and hill,
Who wanted to know what she did weigh,
And what the deuce? wherefore, and why the delay?
George touched his forelock and muttered an oath;
Then, controlling himself, as follows he quoth:
"Hold, Hiram! We wag on too fast by half,
For Rose is, unless I'm mistaken, with calf!"
Behold then Hiram, most contrite of men!
He apologized to her again and again;
He assured her that his heart was riven,
And she assured him that all was forgiven.
"But how did you do it, my Rose, my bloom?
And who is the father—or should I say whom?"
"I did it for you," she said, "my liege,
I did it for you—and noblesse oblige!"
A star had set, a star hath risen!
Her spirit, loosed from out its prison,

Free from danger, free from fear,
Soars and sings for all to hear,
Flush with the knowledge of strong fertility,
Free from the stigma of fell sterility!
Vindication! O come, rejoice!
Obbligato for Rose's voice!
Hers is the bliss for which she longed.
In her all womankind was wronged;
'T was not she who lacked testosterone—
Not Rose the Second of Aberlone!
Withal, her delicate condition,
Compassion for poor Hi's contrition,
And eke the burning sun at noon
Made Rose to fall down in a swoon.
O take her up tenderly, lift her with care!
For Rose the Third is *en ventre sa mere*.

III

But they reckoned without the banker, Sherwood.
Now, one would have thought that the gauchest cur would
Withdraw from this tender and moving scene,
But the banker's heart was little and mean.
He twirled his moustache and his bill of sale,
And the words he uttered turned Walker pale:
"I am come to claim such as is mine own—
To wit, Rose Second of Aberlone!"
Full long in speechless thought Hi stood,
Then made reply as best he could:
"I wot not what to wit may mean,
But thou wost who is right, I ween.
And if thou thinkest to seize my Rose
Thou has lost thy wit, and I'll punch thy nose.
I wist there was some mistake, iwis,
And now let there be an end of this.
I said I was selling, but now I ain't—
For Rose is, *mirabile dictu, enceinte*.
You bought but a leathern bag of bone,
Not Rose the Second of Aberlone."
Then Sherwood waxed exceeding wrath:
"Thy prating irks me, by my troth!
Such sophistries I must abhor;
I'll hie me to a man of law,
And though to litigate I'm loth,
Ere night befalls I'll hale you both
Before a justice of the peace,
And thou shalt answer for his fees.

I'll take this chit that thou hast written,
I'll take it to the highest witan;
I'll wage my law, I'll have my cow,
I'll gain my gree, and that's a vow!"
With that he went off withershins,
Leaving Hi's world in smithereens.
Bethink how Rose's heart was thrilled
And how her being was fulfilled,
How mad with ecstasy she went
When she was found parturient—
With what delirious elation
She heard the news of her foetation!
Ah! that were paradise enow
For any merely mortal cow;
But her penitent destiny has in store
For gentle Rose one triumph more:
'T is surely the animal seventh heaven
To be the *res* in a writ of replevin;
To be enshrined in a casebook—truly,
This is the *bovid ultima Thule*.
Prepare then the forensic lists,
And chief of the protagonists
Shall be that procreant paragon,
Rose the Second of Aberlone.
A constable took her in custody
On a writ that was issued by some J.P.,
Who decently weighed her privily
To see what the bill of costs should be,
And to make right sure that no legal fiction
Should interfere with his jurisdiction.
She weigheth full an hundred stone,
Augmented Rose of Aberlone.
The J.P. gave poor Hi short shrift.
"This chattel's title has passed," he sniffed.
"Judgment for plaintiff! A deal's a deal!"
Then Hiram straightway took appeal
To the Circuit Court for the County of Wayne,
Only to be rebuffed again.
But his lawyer was not a whit dismayed:
He asked that a modest refresher be paid,
And then he bade Hiram be of good cheer.
"In the circumstances our course is clear:
For the pearl of justice we'll fish again!
To the Supreme Court of Michigan
We'll take our honest and upright cause;
We'll confound old Reilly and give him pause.

What a bill of exceptions we'll contrive—
Assignments of error a score and five!
We'll file a brief that will knock his eye out!
We live under law, not Jennison's fiat!
We'll argue the rule and the policy too,
As any attorney is bound to do;
We'll rely on basic principle,
And perhaps be a wee bit technical;
We'll invoke both logic and history,
And, if need be, appeal to sympathy;
We'll quote full pages from Chancellor Kent,
And refer to many a precedent;
And should we be short on authority,
We'll construct a little analogy;
We'll lean on the wisdom of Joseph Story,
And pound the rostrum and wave Old Glory;
We'll balance the equities pro and con,
And when we are through the case will be won.”
Oh! What will be the judgment's tone?
What fate for Rose of Aberlone?

IV

The briefs are in, the case submitted.
The lawyers on both sides acquitted
Themselves with nice distinction, just
As earnest counsel ever must
In fealty to their sacred trust.
Their arguments had an intensity
Befitting the issue's immensity;
And now they linger with cooling zeal
To learn the upshot of Hi's appeal.
Now, one of the Bench's keenest students
Of animal law and jurisprudence
Was Michigan's Mr. Justice Morse.
If a case involved a hind or a horse
They would call on him—for that was his forte—
To delivery the judgment of the court.
He knew far better than any jury
The ways of *domitae naturae*;
And when it came to the genus *Bos*
There was no sounder man than Justice Morse.
And thus 't was fitting that he deliver
The opinion in this *cause celebre*.
“Now that this case has reached its end, I
Shall endeavor,” Judge Morse began,
“To recount the *ratio decidendi*,

Avoiding dicta as best I can.
The question that is really crucial
Is whether the mistake so mutual
Quoad this ruminant's condition
Is such as justifies rescission.
That there was mistake there is no moot,
But does it go to the matter's root?
Or was the supposed sterility
Mere matter of quality, i. e.,
An attribute or characteristic
Below the level of facts juristic?
Was it simply a trait or accident
Inducing and not impairing consent?
Did it go to the substance at all, at all,
Or was it merely collateral?
Did it hamper unduly the parties' wills,
Or the exercise of their dickering skills?
In short, did it have anything to do
With the requisite mental rendezvous?
"Now, there's a distinction, as I've been taught,
Twixt a cow that's pregnant and one that's not.
In fact, the fallacy is arrant
That places a potential parent
In even the same taxonomy
With that drain on our economy
That we deprecate by all that's holy—
The wretched beast that's sine prole.
In my submission, pullulation
Is the vital force of all creation—
A concept I shall not enlarge on
Except in an essay in the margin.
Why, a creature acarpous is incomplete,
Like to a verse that has no feet;
Like to an ocean without a breeze,
Like to a dog that has no fleas;
Like to the works without the watch,
Like to the soda without the Scotch;
Like a delusion without a snare,
Or a poker hand without a pair;
Like Louis XV without DuBarry,
Or like the White House without a Harry;
Like a ferry without a concertina,
A coloratura without Rosina;
Like to spaghetti without Chianti,
Or like Don Quixote sans Rosinante;
Like to a satrap without a minion,

A judgment without a dissenting opinion!
A cow in which that condition is regnant
Is what might be called a negative pregnant.
But what a significant difference
When a cow has secured her deliverance—
When she proves that she can become a mother!
If a man buy one, shall he have the other?
I have viewed the premise, and do discern
That here is no scrub but a going concern.
This is an operative boner—
As it were, an error in persona.
It's a case of mistaken identities—
Of udderly different entities!
(I fear I've been frightfully peripatetic,
But that is the way of the muse nomothetic.)
Thou, Jennison, Judge of the Circuit, errest!
The judgment for plaintiff must be reversed!"

V

'T is the middle of night before the exam,
And there's nothing to eat but a cold bit of ham.
Ah me!—Ah moo!
Mark how the eager students cram,
What coffee black they brew!
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 radioactive tracts of land,
In hardly collectible notes of hand,
In fiddles of dubious pedigree,
In releases of liability,
In zoning rules unknown to lessors,
In weird conceits of law professors,
In printers' bids and ailing kings,
In all mutations and sorts of things,
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 atone
For the shame of Rose of Aberlone.