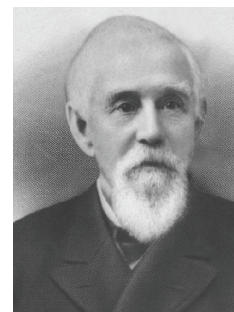


T. C. Sherwood

## ROAD TRIP! A LOOK AT THE PLACES AND PERSONALITIES MADE FAMOUS BY SHERWOOD V. WALKER

by Norman Otto Stockmeyer



Hiram Walker

*I want to begin by thanking Wallace Riley and the Michigan Supreme Court Historical Society for allowing me the privilege of speaking to you today. It is a great honor to follow in the footsteps of such luminaries who have delivered past Legal Vignettes such as former justices Dennis Archer, Thomas Brennan, and James Ryan, and several members of the profes-*

*soriate, including Professor Paul Moreno and the distinguished teacher and scholar Paul Carrington. My presentation, however, will be more in the mode of last year's luncheon entertainment. If you were here, you surely recall the delightfully wacky humor of A (Habeas) Chorus Line. For someone who aspires to offer a lighthearted presentation, that's indeed a very difficult act to follow.*

### INTRODUCTION

More than a century ago, Theodore 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 was 5½ cents a pound. Later, when Walker tried to back out of the deal, Sherwood sued him.

The resulting opinion, *Sherwood v. Walker*, 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. *Sherwood v. Walker* became “the single most loved law case at Harvard” due to the delight that Professor John P. Dawson, a native Detroit, took in teaching the case to generations of law students.

I share Professor Dawson’s delight. I’ve taught Contracts and Remedies for more than 30 years, and *Sherwood v Walker* shows up in both courses: As a mistake case in Contracts, and as a rescission case in Remedies. I’ve often thought how instructional it would be to lead a road trip to the sites involved in the litigation. Today, with the help of PowerPoint, I’m going to take you along on my virtual road trip.

While the students are piling on the bus, let me tell you a little more about the importance of the case.

In Sherwood’s hometown, the State Bar of Michigan dedicated a Legal Milestone historical marker

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recognizing the case as “one of the most celebrated contracts cases in American history.” And most recently, the case was the subject of a “Verdict of History” essay by Professor Moreno, sponsored by our Society.

What could possibly be of such lasting significance about a dispute between two nineteenth-century 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 true farmer. More importantly, the cow turned out not to be barren after all. And although Walker won the appeal, Sherwood ended up with the cow.

### THE LAWSUIT

Are we all aboard? Good. As we head for our first stop in Plymouth, let’s review the facts of *Sherwood v Walker*. The story begins in May of 1886 when Sherwood approached Walker about buying some of his stock of purebred Angus cattle. Walker suggested that Sherwood look at a few head of cattle on Walker’s Greenfield farm.

Walker told Sherwood that the cows on that farm were probably barren and could not breed. Sherwood picked out a cow with the fancy name of “Rose 2d of Aberlone.” The parties agreed on a price, amounting to about \$80, and Walker confirmed the sale in writing.

When Sherwood later returned to the Greenfield farm to accept 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.

Sherwood sued Walker in Justice of the Peace court seeking possession of Rose, and he won.

Walker appealed to Wayne County Circuit Court. Following a jury trial that December, Sherwood won 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. The Court overruled the lower courts. 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.”

(One may assume that the litigation delighted the lawyers. The case could well have served as the inspiration for “The Lawsuit.” It’s 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 C. Sherwood (1839–1910)

Theodore C. Sherwood 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. A Mobil gas station sits on the site today. Let’s stop there and gas up the bus. On his farm, Sherwood raised the best breeds of livestock; his farm was one of the finest in the county. But Sherwood made his living as president of the Plymouth National Bank. A refined individual, and prominent member of the Plymouth community, he always appeared in public wearing a tall silk hat.

Two years after the Supreme Court’s Sherwood decision, Governor Cyrus Luce appointed Sherwood to be Michigan’s first State Commissioner of Banking. He organized the new state banking department and drew up rules and regulations for banking institutions. Commissioner Sherwood had oversight responsibility for 90 state-chartered banks with combined assets of \$47 million.

Sherwood died October 1, 1910, at the age of seventy-

“For one thing, nothing about the case is quite as it appears. Neither the buyer nor the seller was a true farmer. More importantly, the cow turned out not to be barren after all. And although Walker won the appeal, Sherwood ended up with the cow.”

one. He is buried in Plymouth's Riverside Cemetery, located on Plymouth Road west of Haggerty Road. You can see his family grave marker out of the right-hand window. An obituary referred to him as "a man of fine culture and pleasant address" and "the father of the state banking laws."

The cemetery is located directly behind the 35th District Courthouse. District Courts replaced the old Justice of the Peace court system, in which Sherwood began his famous lawsuit. 35th District Court Judge Ronald Lowe has installed a display commemorating Sherwood v. Walker on the third floor of the courthouse. Let's go inside and take a look.

A toy store is now located on the site that Sherwood's bank once occupied, at the corner of Main Street and Penniman in downtown Plymouth. The State Bar of Michigan's Legal Milestone marker stands across the street in Kellogg Park. Gather around and I'll tell you about a more fascinating character: Hiram Walker.

### **Hiram Walker (1816-1899)**

Hiram Walker, then age seventy, was at the time one of the Detroit area's most successful industrialists.

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.

Attracted by lax liquor laws and cheap land across the Detroit River in Ontario, in 1856 Walker purchased 468 acres of land 1½ miles upstream from Windsor for \$40,000, and went into the liquor business. An innovative merchandiser, he was among the first distillers to brand his barrels, and the first to sell whisky in individual glass bottles with paper labels.

Walker was an innovator in other ways. He built the town of Walkerville to house his workers. We're on our way there now. By 1895, Walkerville had a population of 600.

By the time of his dispute with Sherwood, Walker's "Club Whisky" was being marketed throughout Canada and the United States. A few years later, in 1891, a new U.S. law required that liquor 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. Yes, there is a tasting room.

Legions of law students have made pilgrimages to the site. You can get out here, but be back on the bus in one hour.

Except for a few early years in Walkerville, Hiram Walker continued to live in Detroit. He commuted to work by horse and buggy, and then a ferry, from his home at the corner of Shelby and Fort Streets on the site now occupied by the Federal Reserve Bank Building.

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. There's his monument over there. Walker's three surviving sons inherited the business, which was sold in 1926 for \$14 million. That's not a bad return on Hiram's initial \$40,000 investment.

### **Rose (1881- ?)**

Rose was born on January 8, 1881. 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 in Scotland.

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.

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 a 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. We'd drive by Walker's Greenfield farm, but unfortunately nobody has been able to locate the site. That's why the Legal Milestone was placed in Sherwood's hometown, rather than on Walker's farm.

### **THE AFTERMATH**

Research has discovered another surprising fact. After the appeal was decided, on remand a circuit court jury sided with Sherwood. Her five 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 in 1993, one of the speakers 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 is now known, however, Rose did get to graze on Sherwood's farm afterall.

As we head toward home, imagine a world where courts stopped enforcing contracts. No one would lend money, or sell on credit. We would be reduced to a barter economy. And yet courts do not enforce all contracts. For example, contracts that are induced by fraud or duress are voidable by the victim.

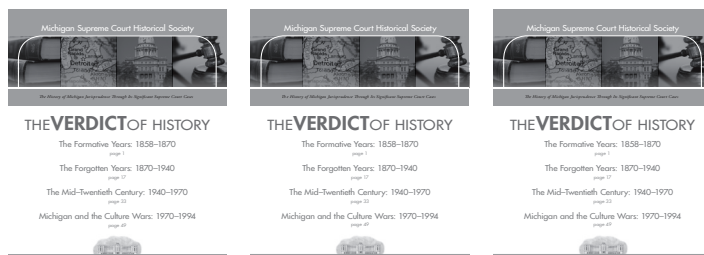
What if the contract was the product of a mutual mistake? No one was at fault, but the contract was not what the parties supposed. Should a court enforce it? That is where *Sherwood v. Walker* comes into the corpus of our jurisprudence. It "wrote the book" on the law of mistake.

As a result, *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," "famous," "leading," "re-versed," and, yes, "seminal." It was cited as authority by the Michigan Court of Appeals as recently as December of last year.

Several erroneous beliefs surround this historic case. Nevertheless, it remains one of the great contributions to contracts jurisprudence and law-school lore. The case is a part of Michigan history that is known to practically every living American lawyer and law student--and almost nobody else.

Our road trip has come to an end. Welcome back, and please--watch your step as you exit the bus.

**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 Legal Vignette is based on his article "To Err is Human, To Moo Bovine: The Rose of Aberlone Story," 24 Thomas M. Cooley Law Review 491 (2007). 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.



## The Verdict of History

The Verdict of History project was the star of the 2009 Annual Luncheon.

The author, Professor Paul Moreno, was a featured speaker at the Luncheon, and compiled copies of the case summaries were distributed to all luncheon attendees.

Your copy of the Verdict of History is enclosed with this newsletter. To order extra copies, please contact the Society at (517) 373-7589.

## 2009 Coleman Intern Stephanie Schnelz



Congratulations to 2009 Coleman intern Stephanie Schnelz. Ms. Schnelz graduated from Michigan State University this spring. She will be attending MSU College of Law in the fall.

While working as the Society's intern, Ms. Schnelz used her enthusiasm for the law and her combined creativity and organizational skills to research the lives of the Michigan Supreme Court's female justices.

The research will be used to put together a new exhibit in the Hall of Justice Learning Center celebrating the five women who have served as Chief Justice of the Michigan Supreme Court over the past 30 years as well as recognizing Michigan's unique status as a state with two female majority courts (both in 1997 and today).

The Society wishes Ms. Schnelz the best of luck!

## 2009 Board of Directors Michigan Supreme Court Historical Society



**Back row** (left to right): John P. Jacobs, John W. Reed, Hon. Alfred M. Butzbaugh, Hon. Avern L. Cohn, Hon. Michael G. Harrison, Christine D. Oldani, Hon. Denise Langford Morris, Janet K. Welch, Michael Murray, Hon. Patricia J. Boyle, Hon. James L. Ryan, Richard D. Reed, Matthew C. Herstein, Ronald D. Keefe, and Stephen K. Valentine, Jr.

**Front row** (seated left to right): Secretary Carl W. Herstein, Treasurer Lawrence P. Nolan, President Wallace D. Riley, Vice President Charles R. Rutherford, and Hon. Frank J. Kelley. Not pictured: Scott S. Brinkmeyer, Hon. Charles L. Levin, Eugene D. Mossner, and Mary Massaron Ross.

### Society Welcomes New Vice President, Directors to Board

**A**t the annual board meeting held in conjunction with the annual membership luncheon on April 30, the Board of Directors welcomed a new Vice President and two new directors to the Board.

Charles R. Rutherford, who has served on the Board since the Society was created in 1988, became Vice President taking over from Frederick Buesser, III, who recently stepped down from the Board. Formerly Mr. Rutherford had served as Secretary on the Board. Mr. Rutherford is Of Counsel in the Bloomfield Hills office of the law firm of Dykema Gossett where he practices intellectual property law.

Hon. Patricia J. Boyle was selected to serve the Board in place of Oakland County Circuit Court Chief Judge Wendy L. Potts. Justice Boyle served on the Michigan Supreme Court from her appointment in April 1983 until 1998. Currently Justice Boyle serves as Of Counsel to the law firm of Kienbaum, Oppenwall, Hardy & Pelton, in Birmingham.

John P. Jacobs of the Detroit firm Jacobs & Diemer P.C. also joined the Board at the April meeting. Mr. Jacobs has practiced appellate law for nearly forty years and is considered the “lawyer of last resort” by many. Mr. Jacobs is a long-time member of the Society and the Advocates Guild.

Board President Wallace D. Riley welcomed Mr. Rutherford back to the Executive Board and welcomed both Justice Boyle and Mr. Jacobs to the Board of Directors. Mr. Riley thanked Mr. Buesser and Judge Potts for their service to the Society over many years.



## Images from the 18th Annual Membership Luncheon



Chief Justice Marilyn Kelly, Professor Paul Moreno, Professor Otto Stockmeyer, John Van Bolt, Linda Rexer, Hon. Denise Langford Morris, Lawrence Nolan, and Wallace D. Riley were seated together.



From left: Eric Pelton, Hon. Gene Schnelz, Rob Romanelli, and new MSCHS Vice President Charles R. Rutherford are all smiles.



Justice Robert Young, Hon. Denise Langford Morris, Justice Diane Hathaway, and Justice Elizabeth Weaver join together for a photo.



The Verdict of History Committee poses for an official photo. From left: MSCHS Secretary Carl W. Herstein, Richard D. Reed, Professor Paul Moreno, Hon. Avern L. Cohn, Hon. James L. Ryan, and MSCHS Executive Director Angela Bergman (2000-2008).



Members of the law firm Dickinson Wright pose with Justice Robert P. Young, Jr. (center) and 3rd Circuit Judge Mary Beth Kelly.



State Bar Immediate Past President Ron Keefe and his wife Marilyn pose with SBM Executive Director Janet K. Welch and her husband Ben Hare.

## Thursday, April 30, 2009 — Detroit Athletic Club



Angela Bergman and President Wallace D. Riley.



Justice Maura Corrigan, Jack Cote, Roman S. Gribbs, and Chief Justice Marilyn J. Kelly smile for the camera.



Roman S. Gribbs and MSCHS Board Members Hon. Michael G. Harrison and Frank J. Kelley.



Board members John W. Reed, Hon. Charles L. Levin, and Richard D. Reed carrying his copy of the Verdict of History booklet.



MSCHS Executive Director Carrie Pickett poses with father and son board members Matthew and Carl Herstein.



Former Justice and new MSCHS Board member Patricia J. Boyle (center) poses with Justice Michael Cavanagh and other luncheon attendees.



### ***Have you paid your 2009 Dues?***

For your convenience, the Society accepts Visa, MasterCard, and American Express. Please call (517) 373-7589 to make your payment by phone, complete and mail or fax the following information to the Society, or pay on-line at <http://www.micourthistory.org/membership.php>

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### ***Mission Statement***

The Michigan Supreme Court Historical Society, a non-profit 501(c)(3) corporation, collects, preserves and displays documents, records, and memorabilia relating to the Michigan Supreme Court and the other Courts of Michigan, promotes the study of the history of Michigan's courts, and seeks to increase public awareness of Michigan's legal heritage. The Society sponsors and conducts historical research, provides speakers and educational materials for students, and sponsors and provides publications, portraits and memorials, special events and projects consistent with its mission.

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Dorothy Comstock Riley

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Janet K. Welch

#### ***Executive Director:***

Carrie Pickett

*Society Update* is published quarterly by the Michigan Supreme Court Historical Society. Writing submissions, article ideas, news and announcements are encouraged. Contact the Society at: 1st Floor Hall of Justice, 925 W. Ottawa Street, Lansing, MI 48915 Phone: 517-373-7589 Fax: 517-373-7592

E-mail [CPICKETT@MICOURTHISTORY.ORG](mailto:CPICKETT@MICOURTHISTORY.ORG); Website: [WWW.MICOURTHISTORY.ORG](http://WWW.MICOURTHISTORY.ORG)



1st Floor, Hall of Justice  
925 W. Ottawa Street  
Lansing, MI 48915