THEODORE C. SHERWOOD V. HIRAM WALKER ET AL.

SHERWOOD, J. *(dissenting).* I do not concur in the opinion given by my brethren in this case. I think the judgments before the justice and at the circuit were right.

I agree with my Brother MORSE that the contract made was not within the statute of frauds, and that payment for the property was not a condition precedent to the passing of the title from the defendants to the plaintiff. And I further agree with him that the plaintiff was entitled to a delivery of the property to him when the snit was brought, unless there was a mistake made which would invalidate the contract; and I can find no such mistake.

There is no pretense that there was any fraud or concealment in the case, and an intimation or insinuation that such a thing might have existed on the part of either of the parties would undoubtedly be a greater surprise to them than anything else that has occurred in their dealings or in the case.

As has already been stated by my brethren, the record shows that the plaintiff is a banker, and farmer as well, carrying on a farm, and raising the best breeds of stock, and lived in Plymouth, in the county of Wayne, 23 miles from Detroit; that the defendants lived in Detroit, and were also dealers in stock of the higher grades; that they had a farm at Walkerville, in Canada, and also one in Greenfield, in said county of Wayne, and upon these farms the defendants kept their stock. The Greenfield farm was about 15 miles from the plaintiff's.

In the spring of 1886 the plaintiff, learning that the defendants had some "polled Angus cattle" for sale, was desirous of purchasing some of that breed, and, meeting the defendants, or some of them, at Walkerville, inquired about them, and was informed that they had none at Walkerville, "but had a few head left on their farm in Greenfield, and they asked the plaintiff to go and see them, stating that in all probability they were sterile and would not breed." In accordance with said request, the plaintiff, on the fifth day of May, went out and looked at the defendants' cattle at Greenfield, and found one called "Rose 2d," which he wished to purchase, and the terms were finally agreed upon at five and one-half cents per pound, live weight, 50 pounds to be deducted for shrinkage. The sale was in writing, and the defendants gave an order to the plaintiff directing the man in charge of the Greenfield farm to deliver the cow to plaintiff. This was done on the fifteenth of May. On the twenty-first of May plaintiff went to get his cow, and the defendants refused to let him have her; claiming at the time that the man in charge at the farm thought the cow was with calf, and, if such was the case, they would not sell her for the price agreed upon.

The record further shows that the defendants, when they sold the cow, believed the cow was not with calf, and barren; that from what the plaintiff had been told by defendants (for it does not appear he had any other knowledge or facts from which he could form an opinion) he believed the cow was farrow, but still thought she could be made to breed.

The foregoing shows the entire interview and treaty between the parties as to the sterility and qualities of the cow sold to the plaintiff. The cow had a calf in the month of October.

There is no question but that the defendants sold the cow representing her of the breed and quality they believed the cow to be, and that the purchaser so understood it. And the buyer purchased her believing her to be of the breed represented by the sellers, and possessing all the qualities stated, and even more. He believed she would breed. There is no pretense that the plaintiff bought the cow for beef, and there is nothing in the record indicating that he would have bought her at all only that he thought she might be made to breed. Under the foregoing facts,—and these are all that are contained in the record material to the contract,—it is held that because it turned out that the plaintiff was more correct in his judgment as to one quality of the cow than the defendants, and a quality, too, which could not by any possibility be positively known at the time by either party to exist, the contract may be annulled by the defendants at their pleasure. I know of no law, and have not been referred to any, which will justify any such holding, and I think the circuit judge was right in his construction of the contract between the parties.

It is claimed that a mutual mistake of a material fact was made by the parties when the contract of sale was made. There was no warranty in the case of the quality of the animal. When a mistaken fact is relied upon as ground for rescinding, such fact must not only exist at the time the contract is made, but must have been known to one or both of the parties. Where there is no warranty, there can be no mistake of fact when no such fact exists, or, if in existence, neither party knew of it, or could know of it; and that is precisely this case. If the owner of a Hambletonian horse had speeded him, and was only able to make him go a mile in three minutes, and should sell him to another, believing that was his greatest speed, for $300, when the purchaser believed he could go much faster, and made the purchase for that sum, and a few days thereafter, under more favorable

circumstances, the horse was driven a mile in 2 min. 16 sec., and was found to be worth $20,000, I hardly think it would be held, either at law or in equity, by any one, that the seller in such case could rescind the contract. The same legal principles apply in each case.

In this case neither party knew the actual quality and condition of this cow at the time of the sale. The defendants say, or rather said, to the plaintiff, "they had a few head left on their farm in Greenfield, and asked plaintiff to go and see them, stating to plaintiff that in all probability they were sterile and would not breed." Plaintiff did go as requested, and found there three cows, including the one purchased, with a bull. The cow had been exposed, but neither knew she was with calf or whether she would breed. The defendants thought she would not, but the plaintiff says that he thought she could be made to breed, but believed she was not with calf. The defendants sold the cow for what they believed her to be, and the plaintiff bought her as he believed she was, after the statements made by the defendants. No conditions whatever were attached to the terms of sale by either party. It was in fact as absolute as it could well be made, and I know of no precedent as authority by which this Court can alter the contract thus made by these parties in writing, and interpolate in it a condition by which, if the *defendants should be mistaken in their belief that the cow was barren,* she should be returned to them, and their contract should be annulled.

It is not the duty of courts to destroy contracts when called upon to enforce them, after they have been legally made. There was no mistake of any such material fact by either of the parties in the case as would license the vendors to rescind. There was no difference between the parties, nor misapprehension, as to the substance of the thing bargained for, which was a cow supposed to be barren by one party, and believed not to be by the other. As to the quality of the animal, subsequently developed, both parties were equally ignorant, and as to this each party took his chances. If this were not the law, there would be no safety in purchasing this kind of stock.

I entirely agree with my brethren that the right to rescind occurs whenever "the thing actually delivered or received is different in substance from the thing bargained for, and intended to be sold; but if it be only a difference in some quality or accident, even though the misapprehension may have been the actuating motive" of the parties in making the contract, yet it will remain binding. In this case the cow sold was the one delivered. What might or might not happen to her after the sale formed no element in the contract.

The case of *Kennedy v. Panama, etc., Mail Co.,* L. R. 2 Q. B. 588, and the extract cited therefrom in the opinion of my brethren, clearly sustain the views I have taken. See, also, *Smith v. Hughes,* L. R. 6 Q. B. 597; *Carter v. Crick, 4* Hurl. & N. 416.

According to this record, whatever the mistake was, if any in this case, it was upon the part of the defendants, and while acting upon their own judgment. It is, however, elementary law, and very elementary, too, " that the mistaken party, acting entirely upon his own judgment, without any common understanding with the other party in the premises as to the quality of an animal, is remediless if he is injured through his own mistake." Leake, Cont. 338; *Torrance v. Bolton,* L *R.* 8 Ch. *A*pp. 118; *Smith v. Hughes,* L. R 6 Q. B. 597.

The case cited by my brethren from 37 Mich. *(Gibson v. Pelkie)* I do not think sustains the conclusion reached by them. In that case the subject-matter about which the contract was made had no existence, and in such case Mr. Justice GRAVES held there was no contract; and to the same effect are all the authorities cited in the opinion. That is certainly not this case. Here the defendants claim the subject-matter not only existed, but was worth about $800 more than the plaintiff paid for it.

The case of *Huthmacher v. Harris' Adm'rs,* 38 Penn. St. 491, is this: A party purchased at an administrator's sale a drill machine, which had hid away in it by the deceased a quantity of notes, to the amount of about $3,000, money to the amount of over $500, and two silver watches and a pocket compass of the value of $60.25. In an action of trover for the goods, it was held that nothing but the machine was sold or passed to the purchaser, neither party knowing that the machine contained any such articles,

In *Cutts v. Gulid,* 57 N. Y. 229, the defendant, as assignee, recovered a judgment against D. & H. He also recovered several judgments in his own name on behalf of the T. Co. The defendant made an assignment of and transferred the first judgment to an assignee of the plaintiff,—both parties supposing and intending to transfer one of the T. Co. judgments,—and it was held that such contract of assignment was void, because the subject-matter contained in the assignment was not contracted for.

In the case of *Byers v. Chapin,* 28 Ohio St. 300, the defendant sold the plaintiffs 5,000 oil barrels. The plaintiffs paid $5,000 upon their purchase, and took some of the barrels. The barrels proved to be unfit for use, and the contract was rescinded by consent of the parties. The defendant, instead of returning all the money paid to the purchasers, retained a portion and gave plaintiffs his note for the remainder. The plaintiffs brought suit upon this note. The defendant claimed that, under the contract of sale of the barrels, they were to be glued

by the plaintiffs, which the plaintiffs properly failed to do, and this fact was not known to defendant when he agreed to rescind and gave the note, and therefore the note was given upon a mistaken state of facts, falsely represented to the defendant, and which were known to the plaintiffs. On the proofs, the jury found for the defendant, and the verdict was affirmed.

In *Gardner v. Lane,* 9 Allen, 492, it is decided that if, upon a sale of No. 1 mackerel, the vendor delivers No. 3 mackerel, and some barrels of salt, no title to the articles thus delivered passes.

Allen v. Hammond, 11 Pet. 63, decides that if a life-estate in land is sold, and at the time of the sale the estate is terminated by the death of the person in whom the right vested, a court of equity will rescind the purchase.

In *Harvey v. Harris*, 112 Mass 32, at an auction two different grades of flour were sold, and a purchaser of the second claimed to have bought a quantity of the first grade, under a sale made of the second, and this he was not allowed to do, because of the mutual mistake; the purchaser had not in fact bought the flour he claimed. In this case, however, it is said it is true that, if there is a mutual agreement of the parties for the sale of particular articles of property, a mistake or misapprehension as to the quality of the articles will not enable the vendor to repudiate the sale.

The foregoing are all the authorities relied on as supporting the positions taken by my brethren in this case. I fail to discover any similarity between them and the present case; and I must say, further, in such examination as I have been able to make, I have found no adjudicated case going to the extent, either in law or equity, that has been held in this case. In this case, if either party had superior knowledge as to the qualities of this animal to the other, certainly the defendants had such advantage.

I understand the law to be well settled that "there is no breach of any implied confidence that one party will not profit by his superior knowledge as to facts and circumstances" equally within the knowledge of both, because neither party reposes in any such confidence unless it be specially tendered or required, and that a general sale does not imply warranty of any quality, or the absence of any; and if the seller represents to the purchaser what he himself believes as to the qualities of an animal, and the purchaser buys relying upon his own judgment as to such qualities, there is no warranty in the case, and neither has a cause of action against the other if he finds himself to have been mistaken in judgment.

The only pretense for avoiding this contract by the defendants is that they erred in judgment as to the qualities and value of the animal. I think the principles adopted by Chief Justice CHRISTIANCY in *Williams v. Spurr,* 24 Mich. 335, completely cover this case, and should have been allowed to control in its decision. See, also, Story, Sales, §§ 174, 175, 382, and Benj. Sales, § 430.

The judgment should be affirmed.