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LEGAL PIPELINE

Rose of Aberlone and the Doctrine of Mutual Mistake



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The year was 1886. The place — Wayne County, Michigan. This is the story of “Rose 2d of Aberlone,” perhaps the most famous cow in all of law school lore. Countless first-year law students learn about Rose in the case of *Sherwood v. Walker*, 33 N.W. 919 (Michigan 1887) during their first semester contracts class.

Although the story is 130 years old, it offers a clear, understandable glimpse into the doctrine of “mutual mistake” — an important principle for contractors and subcontractors to understand. More importantly, *Sherwood* is still good law today.

The deal

Let’s review the relevant facts. Plaintiff Theodore Sherwood, a banker, wanted to purchase a cow named “Rose 2d of Aberlone.” He was informed by the defendants, Hiram Walker & Sons, who were Angus cattle breeders, that the cows at the farm where Rose was located were probably barren and would not breed. This apparently was not an issue for Sherwood, who likely planned to use the cow for beef.

After some back and forth over the price, Sherwood agreed to pay five and one-half cents per pound (fifty pounds shrinkage) for Rose. He asked the defendants to confirm the sale in writing. The defendants sent

Sherwood the following letter.

Dear Sir:
We confirm sale to you of the cow Rose 2d of Aberlone, lot 56 of our catalogue, at five and a half cents per pound, less fifty pounds shrink. We inclose herewith order on Mr. Graham for the cow. You might leave check with him, or mail to us here, as you prefer.

Yours truly,
Hiram Walker & Sons

Six days later, Sherwood went to the farm to pick up Rose from Mr. Graham. However, Mr. Graham told Sherwood that the defendants instructed him not to deliver the cow. Sherwood tendered \$80 to Hiram Walker & Sons in full payment for Rose, but the defendants refused to take the money or deliver the cow. Sherwood subsequently brought suit. It turned out that Rose was pregnant and could possibly be worth as much as \$1,000. When Hiram Walker learned this, they understandably tried to back out of the deal with Sherwood.

The Michigan Supreme Court’s ruling

Sherwood prevailed in the case before a Justice of the Peace. Walker appealed to the Wayne County Circuit Court, which also found in favor of Sherwood. Undaunted,

Walker filed an appeal to the Supreme Court of Michigan, which overruled the lower courts and held in favor of Walker.

The Supreme Court explained, “[T]he mistake or misapprehension of the parties went to the whole substance of the agreement. If the cow was a breeder, she was worth at least \$ 750; if barren, she was worth not over \$80. The parties would not have made the contract of sale except upon the understanding and belief that she was incapable of breeding, and of no use as a cow. It is true she is now the identical animal that they thought her to be when the contract was made; there is no mistake as to the identity of the creature. Yet the mistake was not of the mere quality of the animal, but went to the very nature of the thing. A barren cow is substantially a different creature than a breeding one. There is as much difference between them for all purposes of use as there is between an ox and a cow that is capable of breeding and giving milk. If the mutual mistake had simply related to the fact whether she was with calf or not for one season, then it might have been a good sale; but the mistake affected the character of the animal for all time, and for her present and ultimate use. She was not in fact the animal, or the kind of animal, the defendants intended to sell or the plaintiff to buy. She was not a barren cow, and, if this fact had been known, there would have been no contract. The mistake affected the substance of the whole consideration, and it must be considered that there was no contract to sell or sale of the cow as she actually was. The thing sold and bought had in fact no existence. She was sold as a beef creature would be sold; she is in fact a breeding cow, and a valuable one.”

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In essence, because a mutual mistake affected the very substance of the transaction, Walker had a right to rescind the contract with Sherwood and keep the cow.

Mutual mistake today

Although the doctrine of mutual mistake has its genesis with *Rose the cow*, it remains a staunch rule of law in today's commercial marketplace. The subject matter of a supplier contract may not be a cow, but it may be a certain kind of pipe, plumbing fixture or faucet. The underlying principle is the same. Of course if this was a case of unilateral mistake, the outcome would be completely different.

Assume, for example, that Sherwood knew that the cow was pregnant when he made the deal and he did not disclose this fact to ignorant Hiram Walker. In this hypothetical, only one party, Hiram Walker, was mistaken. Absent any fraudulent conduct, in this example of unilateral mistake Sherwood would get to keep the cow (as the result of making a very good deal for himself!)

Thus, it is critically important to avoid mistakes by conducting due diligence in any commercial transaction. Furthermore, a court is not likely to reward a party for its own negligence – regardless of any mutual mistake.

In *ACA Galleries, Inc. v. Kinney*, 928 F. Supp. 2d 699 (S.D.N.Y. 2013), aff'd, 552 Fed. Appx. 24 (2d Cir. 2014), an art gallery sued an individual for selling it a forged Milton Avery painting for \$200,000. ACA sought rescission of its contract with the seller, Kinney, arguing that there was a mutual mistake (i.e., both parties were mistaken as to the authenticity of the painting).

While District Judge Miriam Goldman Cedarbaum agreed that there was a mutual mistake, she also noted that the doctrine of mutual mistake, "may not be invoked by a party to avoid the consequences of its own negligence." Here, Kinney gave ACA access to the painting at a storage facility before the purchase.

ACA had every opportunity to have the painting inspected and authenticated before it closed the deal with Kinney. However, ACA

waited until after the purchase to have the painting examined by the Avery Foundation. By failing to have this important examination before the transaction was consummated, ACA was precluded from invoking the doctrine of mutual mistake.

The Second Circuit Court of Appeals agreed with Judge Cedarbaum, finding that ACA knew that its "self-conducted pre-purchase inspection provided it with 'only limited knowledge with respect to the facts which the mistake relates but treat[ed its] limited knowledge as sufficient.'"

The appellate court also noted that ACA purposely avoided having the Avery Foundation authenticate the painting since that would have likely resulted in higher price for the artwork. As the appellate court concluded, "ACA could have accepted the higher price that accompanies certainty of authenticity, but chose instead to accept the risk that the painting was a forgery. The contract is not voidable merely because the consciously accepted risk came to pass."

Again, the key takeaway here is to perform due diligence so that you know precisely what you are getting in a commercial transaction, how much you should pay for it, and how much you are paying for it. While a court will protect an innocent party that "does its homework" from the consequences of mutual mistake, a court will not protect a negligent party who fails to conduct its own due diligence. The case of *ACA Galleries* builds upon *Sherwood v. Walker*, and both highlight important legal principles that are still valid in today's commercial contracting marketplace. ●

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