ESSAY

A Rose by Any Other Word: Mutual Mistake in *Sherwood v. Walker*

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The trouble with Sherwood v. Walker, *the famous contracts case, is in its concluding paragraphs. There the court implies sometimes that the parties contracted about Rose, sometimes that they contracted about another cow. This Essay explains the confusion by the court's equivocating between languages. The court wanted to write straightforwardly about existing cows. Yet a language that allows only this is insufficiently powerful to express the legal rule the court also wanted. The court used two other languages, each of which let the court express the rule. Each lan-*

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The title, from *Romeo and Juliet*, act II, scene ii, lines 43-44, is inescapable, because it couples the name of the cow with a promise of semantics. Juliet's entire thought is, "What's in a name? That which we call a rose / By any other word would smell as sweet." The language is from Q2, the good quarto of 1599; Q1, the bad quarto of 1597, has the more familiar 'name' for 'word'. Evans, *Note on the Text* and *Textual Notes* to *Romeo and Juliet*, in THE RIVERSIDE SHAKESPEARE 1093, 1093, 1095 (1974).

The title quotation and this Essay are connected a second way that this Essay does not pursue. The quotation is also the starting point of a philosophical theory of mistake, which distinguishes between what it calls 'Shakespearean' and 'non-Shakespearean' contexts. The Shakespearean context is that of '*x*' in '*x* smells sweet', such that if an object smells sweet, any name of this object substituted for '*x*' gives a true sentence. Besides being philosophical, the theory addresses Ingram v. Little, [1961] 1 Q.B. 31, hence is informed by or explains the law. *See* P. GEACH, *Quantification Theory and the Problem of Identifying Objects of Reference*, in LOGIC MATTERS 139, 146 (1972).

guage, however, was in its own way unsatisfactory. The court did not choose one language or the other. The lesson of Sherwood *is that some legal rules* cannot *be clearly expressed.*

INTRODUCTION

Sherwood v. Walker,[1] a century old in 1987, retains a significant role in legal education and as legal precedent, hence is worth rethinking on its anniversary. "Replevin for a cow,"[2] it begins, and superficially its story is as simple as that. Its characters — the parties and the cow — have taken on mythic proportions. Also, arguably they are more attractive than those of the other great contracts cases, Rose being more personable than a mill shaft, Walker's legacy more enduring than Wichelhaus'.

Walker is of course Hiram Walker,[3] although the case does not instruct its reader in his entrepreneurial role. "The Walkers are importers and breeders of polled Angus cattle," it says laconically, largely leaving it at that.[4] Doctrinally there is no reason for the reader to know more. Professor Atiyah for one is taken in by this. His discussion of the case orients the reader by calling Walker "a small farmer."[5] Indeed, Walker was that, or a middling farmer; however, calling him so is "a bit like describing T. S. Eliot as a banker from Missouri."[6] The gravitational force of the implicit reference outside the text makes it at least difficult to "reif[y]" the text "as an objective 'thing' " as Eliot and his school of criticism prescribe.[7] Anyway, Dawson, Harvey, and Henderson's photograph of Walker is as distant as a photograph of Andrew Carnegie from *American Gothic*.[8]

The replevied cow of the majority opinion's first sentence is, of course, Rose 2d of Aberlone, hereafter often called just 'Rose'. The reader knows a lot about Rose, including her weight: 1420 pounds.

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[1] 66 Mich. 568, 33 N.W. 919 (1887).

[2] *Id.* at 568, 33 N.W. at 919.

[3] The Walkers are Hiram and sons. Telephone interview with Michael Wooters, Assistant Counsel, Hiram Walker & Sons, Inc. (Feb. 6, 1985). This Essay will use 'Walker' and 'defendant' to refer to the Walkers collectively.

[4] 66 Mich. at 569, 33 N.W. at 919.

[5] P. ATIYAH, PROMISES, MORALS, AND LAW 90 (1981).

[6] Fox, *Admirable Urquhart* (Book Review), 6 London Rev. Books, Sept. 20-Oct. 3, at 13, col. 1, 14, col. 3 (1984).

[7] P. DEMAN, *The Rhetoric of Blindness: Jacques Derrida's Reading of Rousseau*, in BLINDNESS AND INSIGHT 102, 104 (2d ed. rev. 1983).

[8] J. DAWSON, W. HARVEY & S. HENDERSON, CASES AND COMMENTS ON CONTRACTS 602 (5th ed. 1987).

Rose's significance recedes, however, as one studies the case. "The main controversy depends upon the construction of a contract for the sale of the cow."[9] By one of two interpretations of the case, this cow, the contract cow, is not Rose.

What in the end has to be construed is the parties' — mostly Sherwood's — attitude toward Rose's imagined barrenness. Independently of the case, it is not clear what 'barren' means. The word commonly means *incapable* of breeding. But less uncompromising meanings have been authoritatively entertained. Under 'barrenness', Dr. Johnson couples "want of the power of procreation" with "[w]ant of offspring" *in the same subdefinition*.[10] And the *O.E.D.* offers "not pregnant at the usual season,"[11] which if it happened once probably was not enough to avoid the sale.[12] It is safe to maintain that Sherwood and Walker at least believed that Rose was not pregnant at the time of contracting. But this belief wasn't an occurrent belief. It probably was like the reader's belief that give or take only an ounce, there is a cow somewhere in Wisconsin right now that weighs 1420 pounds. The reader hasn't thought about it, but would be surprised if it were not true.

What the parties *said* and *did* is not disputed. Sherwood inspected some cows including Rose at Walker's farm on May 5, 1886. Thereafter the parties agreed by telephone that Sherwood would buy a particular cow that they called 'Rose' from Walker at 5.5 cents per pound, less fifty pounds shrinkage. On May 21 Walker sent Sherwood a confirming letter. But Walker later refused to give Rose up, because she was pregnant. Rose had been pregnant five months at the time the parties purported to contract, if that matters,[13] since she had a calf in October of 1886, and the gestation period of a cow is ten months.

Whatever else may be true, breeding cows aren't ordinarily sold by the pound. Still, the reader of the majority and dissenting opinions together isn't certain that the contracting event didn't go, Sherwood: 'I'll buy Rose for x a pound, including a small premium for the chance she is fertile', Walker: 'I accept'. Judge Posner would like it to have, 'pregnant' substituted for 'fertile'; he remarks that the price of the cow *might* have "included her value if pregnant, discounted (very drastically, of

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[9] 66 Mich. at 569, 33 N.W. at 919.

[10] S. JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (unpaginated 1755 & photo. reprint 1983).

[11] 1 OXFORD ENGLISH DICTIONARY 681 (1933).

[12] *See* 66 Mich. at 577, 33 N.W. at 923.

[13] Judge Posner thinks it does but that it shouldn't. R. POSNER, ECONOMIC ANALYSIS OF LAW 90-91 (3d ed. 1986).

course) by the probability of that happy eventuality."[14] This would be an easy case to decide against Walker. Nevertheless, it isn't *Sherwood*.

The case was tried to a jury in the circuit court of Wayne County, Michigan. Today one would say that the parties had contracted by phone, though under the Statute of Frauds the contract was unenforceable against Walker without Walker's confirming letter. Walker argued seemingly without great conviction that the confirming letter was only an offer, which he had withdrawn before Sherwood could accept it. Instead, the circuit court understood that a contract arose between the parties on the sending of the confirming letter. Lacking the instruction of the *Restatement of Contracts*,[15] the court interpreted the phone conversation taken by itself to yield not an unenforceable contract, but no contract or a void one, because of the Statute of Frauds, which at the time it decided the case applied to contracts for the sale of goods worth over fifty dollars.

There being a contract got the court only half way home. A replevin action, of course, litigates the plaintiff's right to the replevied thing against the defendant. Sherwood got possession of Rose at the beginning of the case, on posting a bond to give her back if he lost. To win, Sherwood had to show he owned her. By the formal reasoning of the day, the case in the circuit court turned on whether title to Rose had passed to Sherwood on the parties' contracting, that is, with the confirming letter, or was to remain in Walker until Sherwood took delivery of the cow. And whether title had passed in turn depended on when the parties or Walker had intended title to pass. Undoubtedly, Walker had no such intent as a specific psychological state, his mind not having addressed the issue. But the court left the question to the jury as a matter of fact, instructing them: "So, gentlemen, it comes down to this, from all the evidence in this case, do you believe that Mr. Walker intended that this title was to pass by this writing."[16] The jury decided he did.

The circuit court also told the jury that the pregnancy of Rose and the attitudes of the parties to Rose's imagined barrenness at the time of contracting were irrelevant to the case. The record, largely handwritten, sometimes on printed forms, also contains a typescript which is the bill of exceptions, including the charge to the jury. The typescript contains a summary of the evidence in the case that is incomplete and contradictory regarding the beliefs of the parties about Rose's barren-

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[14] *Id.* at 90.

[15] RESTATEMENT (SECOND) OF CONTRACTS § 1, illustration 1 (1981).

[16] Bill of Exceptions at 10.

ness. Here is all the Supreme Court of Michigan could, or the reader today can, know about these beliefs. First, Sherwood testified that Walker told him "that in all probability [the cattle Sherwood inspected, including Rose] were sterile and would not breed."[17] Second, Walker introduced

> evidence tending to show that at the time of the alleged sale it was believed by the plaintiff and defendant . . . that the cow was not with calf, was barren and would not breed; that she cost $850; that she was worth somewhere from $750 to $1,000 and was sold as a barren animal, and if she was not thought to be barren [defendant] would not have sold her for less than the above sum. That the plaintiff bought her at the price of beef and thought he could make her breed.[18]

The court's opinion identifies Sherwood as a banker. The dissent reports he also owned a farm near Walker's. A banker would buy a cow to eat, but a farmer would by a cow to breed.[19] The court's opinion has Walker telling Sherwood Rose was "probably barren, and would not breed."[20] The 'probably' suggests she might breed, and a case can be made that trying to breed her would be sound husbandry.[21] The court then slides over into saying that "[i]t appears from the record that both parties supposed this cow was barren and would not breed."[22] The 'probably' gets left out. As Professor Palmer observes with polite understatement, "it is debatable whether this last finding was justified by the evidence."[23]

In contrast, the dissent was sure Sherwood bought the cow to breed. It would have affirmed the circuit court's decision because a reasonable person could not find that Sherwood did not intend to breed Rose, so

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[17] *Id.* at 1.

[18] *Id.* at 4.

[19] For the theory that God gave cows life to keep their meat fresh, see K. THOMAS, MAN AND THE NATURAL WORLD 20 (1983). For the corresponding praxis, see C. HIBBERT, AFRICA EXPLORED 30-31 (1982); A MOOREHEAD, THE BLUE NILE 20 (1962). On the advantage of a breeding cow, see *infra* text accompanying note 37.

[20] 66 Mich. at 569, 33 N.W. at 920.

[21] Imagine as follows. It cost $20 to provide for Rose for a year. The time value of money for a year is 10%. The probability that if Rose is a breeding cow she will breed the next year is .8. Rose's value the next year if she doesn't breed is $75 and if she does is $800. Therefore, an attempt to breed Rose for a year is the right economic choice if, roughly, the probability of her being a breeding cow is at least .06. If 'probably' means having a probability above .5, there is a wide range of probabilities within which both 'Rose was probably barren' and 'Sherwood or Walker should have tried to breed her' are both true.

[22] 66 Mich. at 576, 33 N.W. at 923.

[23] 2 G. PALMER, THE LAW OF RESTITUTION § 12.1 (1978) [hereafter RESTITUTION].

that as a matter of law Walker was unilaterally mistaken, hence remediless. Instead, the majority remanded for retrial, the jury to be instructed that if they "found that the cow was sold, or contracted to be sold, upon the understanding of both parties that she was barren, and useless for the purpose of breeding, and that in fact she was not barren, but capable of breeding, then the defendant . . . had a right to rescind."[24] The dissent does not controvert, indeed it quotes and expressly ratifies, the majority's statement of the *law* pertaining to the case. The law and Walker's belief being undisputed, the opinions disagree only as to whether reasonable persons could differ about Sherwood's belief. This Essay addresses both sides' settled view of the law of mutual mistake, after setting *Sherwood* in its modern doctrinal and pedagogical context.

I. *SHERWOOD*'S REPUTATION

Of course, *Sherwood v. Walker* is famous pedagogically, and is worth analyzing for that reason alone. Professor Currie while a student wrote a poem celebrating the case, which one cannot resist quoting in small part:

> And one there is who stands apart
> With hanging head and heavy heart.
> Have pity on her sore distress,
> This norm of bovine loveliness.
> . . .
> If one should ask her why she doth grieve,
> She would answer sadly, "I can't conceive."
> Her shame is a weary weight of 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 forbears have labored for bitter mead,
> For Rose is barren and will not breed.
>
> . . . .
> . . .
>
> He descried a slight rotundity
> Bespeaking, he fancied, fecundity!
> And he read in her mute, appealing eyes

[24] 66 Mich. at 578, 33 N.W. at 924.

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."

. . . .

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 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.[25]

The reader should distinguish between how frequently and how affectionately a case is cited. *Sherwood* gets cited affectionately. For example, in *H. Kook & Co. v. Scheinman, Hochstin & Trotta, Inc.*, Judge Kaufman called *Sherwood* "an ancient case revered by teachers of contract law," the mention of which "brings a flood of nostalgia" to the judge.[26] Of course, nostalgia gets one only so far in the Second Circuit. The litigant who cited *Sherwood* lost, hence the case brought him no advantage. And perhaps disgracefully for Rose, Judge Kaufman got her name wrong, calling her 'Rose . . . of Abalone', as did the Maine court in *DiBiase v. Universal Design & Builders, Inc.* ('Rose 2d of Abalone').[27] Saying 'I love you *A*' to *B* displays not affection but indifference.

Despite the affection and the case's obvious pedagogical appeal, courts have not until recently cited *Sherwood* that often — only a couple dozen times in the course of a century. Nevertheless, *Sherwood* came into its own as authority in a modest way in 1980, when it was cited thrice, consistently on the winning side. The least interesting of the cases that cited *Sherwood* in 1980 no doubt would have delighted

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[25] Currie, *The Rose of Aberlone, reprinted in part in* J. DAWSON & G. PALMER, CASES ON RESTITUTION 600, 601-02 (2d ed. 1969).

[26] 414 F.2d 93, 98 (2d Cir. 1969).

[27] 473 A.2d 875, 879 (Me. 1984).

Hiram Walker: *White v. Mattox*,[28] where the Supreme Court of Arizona dispositively compared to Rose a liquor license that contracting parties mistakenly believed transferable.

Then in a striking case, *Aluminum Co. of America v. Essex Group, Inc.*,[29] brought in the District Court for the Western District of Pennsylvania, the parties to a long-term contract were faced with a price index that did not reflect a significant increase in the cost of processing aluminum. Processing aluminum requires a great deal of electricity, which rose in price in the 1970s as oil did. The court compared the price index to Rose. Thus at the time the contract was made, the price index was fertile for or pregnant with misspecification, and the consequences of adopting it, like Rose's coming calf, were concealed from the contracting parties. *Alcoa* is important and controversial. Having found mutual mistake, the court decided to set a new price itself, although the parties hastened to settle before it did so. The intervention was unprecedented, and characterizations of the case range from Professor Speidel's "trail-blaz[ing]"[30] to Professor Dawson's "bizarre."[31] These characterizations do not exclude — perhaps they imply — each other. But the one reflects a modern view of contract as process instead of transaction, and the other, its author's traditional, conservative scholarly values.

Third, in *Florida Department of State v. Treasure Salvors, Inc.*,[32] the Court of Appeals for the Fifth Circuit mentioned *Sherwood* in an in rem admiralty action disputing who owned treasure from a sunken Spanish ship. Treasure Salvors seemingly transferred to Florida one-quarter of what they had found in consideration for the right to operate in what they and Florida believed were Florida waters. The waters, however, weren't Florida's. The court decided that consequently Florida had not taken title to the property, just as Sherwood had not taken title to Rose. *Alcoa* and *Treasure Salvors* are striking in different ways. *Alcoa* offers innovative doctrine. *Treasure Salvors*, doctrinally routine, involved a large sum of money, the treasure allegedly being worth a quarter of a billion dollars. The law financially if not conceptually has come a long way from an eighty-dollar contract for a cow.

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[28] 127 Ariz. 181, 619 P.2d 9 (1980).

[29] 499 F. Supp. 53 (W.D. Pa. 1980).

[30] Speidel, *Court-Imposed Price Adjustments Under Long-Term Supply Contracts*, 76 NW. U.L. REV. 369, 416 (1981).

[31] Dawson, *Judicial Revision of Frustrated Contracts: The United States*, 64 B.U.L. REV. 1, 28 (1984).

[32] 621 F.2d 1340 (5th Cir.), *reh'g denied*, 629 F.2d 1350 (5th Cir. 1980), *aff'd in part and rev'd in part* 458 U.S. 670 (1982).

Consistently with Judge Kaufman's expressed nostalgia for *Sherwood*, the three 1980 cases don't just cite it but say respectful or caring things about it. *White* calls it "classic";[33] *Alcoa*, "celebrated";[34] *Treasure Salvors*, "seminal."[35] Of course, 'seminal' is exactly right given modern cattle breeding practices. The fact is that cows need not go for $80 or $800 anymore, although the prices of them are still not in *Treasure Salvors*'s league. The ceiling on the value of a cow was its restricted output. Today, embryo transplants let a cow genetically if not personally bear twenty calves a year, so that an exceptionally fine cow — the Platonic ideal of which is beyond the scope of this paper, although one may observe in passing that femininity is a part of it — sells for over a million dollars.[36]

II. A Dark Side of *Sherwood*

Sherwood v. Walker looks straightforward but it is not. To dispel a belief that it is, a reader might first inspect its history as precedent in Michigan, the jurisdiction that decided it. If the case has anomalies, they should induce anomalies in applying it, and these other anomalies should betray the first. In 1888, the year after it decided *Sherwood*, the Michigan court appeared to repudiate the case, saying in *Nestor v. Michigan Land & Iron Co.* that "the rule applied in" *Sherwood* "can never be resorted to except in a case where all the facts and circumstances are precisely the same."[37] That should have been that, if 'precisely' be taken even half seriously, since there are not that many pregnant cow cases, let alone pregnant Rose cases. Of course the history of the case as precedent didn't end there, it had barely begun. One should, however, remark the proximity of the court's reaffirming *Sherwood*, which occurred only three years later in *McKay v. Coleman*.[38] *McKay* was an action to rescind a sale of real property because the contracting parties believed that the property included an entire building, whereas it included only part of the building. Without citing *Nestor*, the Michigan court found that "this case is ruled by the principles laid down in" *Sherwood*.[39] Hence Michigan denied itself the jurisprudence of *Sher-*

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[33] 127 Ariz. at 183, 619 P.2d at 11.

[34] 499 F. Supp. at 65.

[35] 621 F.2d at 1349.

[36] Mydans, *Promoters Are Bullish over Cows*, N.Y. Times, Nov. 23, 1983, at B1, col. 1 (morning ed.); Hartford Courant, July 14, 1985, at A2, col. 2.

[37] 69 Mich. 290, 296, 37 N.W. 278, 280 (1888).

[38] 85 Mich. 60, 48 N.W. 203 (1891).

[39] *Id.* at 61, 48 N.W. at 203.

wood only from 1888 to 1891, then assimilated buildings to cows.

Thereafter, the Michigan court placidly cited *Sherwood* without reproach until 1982, when it turned around again, in *Lenawee County Board of Health v. Messerly.*[40] Here it again restricted *Sherwood* as precedent, declaring much as it had said in 1891 that *Sherwood*'s holding or part of it is "limited to its facts."[41] *Messerly* remains the Michigan law on mistake. In *Dingeman v. Reffitt*,[42] the state's intermediate appellate court respectfully applied *Messerly*, dismissing *Sherwood* as a "criticized . . . prior decision."[43] Also, in the space of only an object of a preposition, the court misread *Sherwood* as badly as any court could.[44] The law is unchanged by that court's routine, anniversary citing of *Sherwood*.[45]

So much may be passed off as just bad craftsmanship on the part of the otherwise often illustrious Michigan court, which should make up its mind about the scope of a precedent. As evidence that the trouble is deeper, and with *Sherwood* instead of the deciding court, the reader may compare how courts treat *Sherwood* as precedent with how they treat a still more famous case, *Hadley v. Baxendale.*[46] In *Hadley*, the defendant's firm, a carrier, breached its contract with plaintiff shipper by delaying delivery of the latter's broken mill shaft, so that it lost profits.

Victoria Laundry (Windsor), Ltd. v. Newman Industries, Ltd.[47] is representative of cases that apply *Hadley*. The defendant in *Victoria Laundry* delayed delivering and installing plaintiff's boiler, likewise causing lost profits. *Victoria Laundry*'s argument might have proceeded either of two ways. The court might have asked, 'Is a delayed boiler like a delayed mill shaft?', and decided the case depending on its answer. Or it might have asked, 'Do the facts of late delivery of a boiler fall under the rule of *Hadley*?', and gone on from there. It chose to ask whether the facts fit the rule, mentioning the facts of *Hadley*, but just to give the reader a context. In the dispositive part of its opinion the court quoted and interpreted what it identified as "the memorable sen-

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[40] 417 Mich. 17, 331 N.W.2d 203 (1982).

[41] *Id.* at 29, 331 N.W.2d at 209.

[42] 152 Mich. App. 350, 393 N.W.2d 632 (1986).

[43] *Id.* at 356, 393 N.W.2d at 635.

[44] By treating 'quality' and 'nature' as synonymous instead of as polar opposites. *See infra* text accompanying notes 60-71.

[45] Shell Oil Co. v. Estate of Kert, 161 Mich. App. 409, 421 n.8, 411 N.W.2d 770, 775 n.8 (1987).

[46] 9 Ex. 341, 156 Eng. Rep. 145 (1854).

[47] [1949] 2 K.B. 528.

tence in which the main principles laid down in [*Hadley*] are enshrined."[48] Observe that what gets enshrined here is not the mill shaft but a sentence. The text is about another text.

In contrast, courts go to *Sherwood* for its facts, disregarding or worse any language about the rule in the case, if there is a rule. *Sherwood* has no memorable sentence, or none about a rule as opposed to about a cow. Symptomatically, Professor Currie's poem has *Rose* "turn[ing] up in some set of facts," not the case's rule being suggested by these facts. The Michigan court's language in *Messerly* is equally representative of that of courts more favorably disposed to *Sherwood*, and stands in contrast to that of *Victoria Laundry*. The *Messerly* court, rejecting *Victoria Laundry*'s rule-oriented resolution, said, "we think the better-reasoned approach is a case-by-case analysis."[49] Courts that cite *Sherwood* argue, 'The situation we address is/isn't like a pregnant cow believed barren'. That is, the courts move between fact patterns according to the similarity relation without interposing a rule.

Also, academics are inattentive to *Sherwood*'s rule or outright reject it. Professors Williston[50] and Corbin[51] spoke concretely about a pregnant cow. Professor Farnsworth quotes language from *Sherwood* stating its rule, then attacks it. He says, "some basis" for mistake doctrine "other than this specious and artificial reasoning must be found."[52] Farnsworth's 'specious' and 'artificial' are hard words indeed by which to address a beloved case.

Professor Chafee's elegant *Some Problems of Equity*[53] also deploys *Sherwood*'s facts unencumbered by doctrine. Professor Chafee discussed the "frequent situation," as it was then, of a "man" who marries a

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[48] *Id.* at 537. The sentence, hard to remember, is, the reader will to some degree recall,

> Now we think that the proper rule in such a case as the present is this: — Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.

9 Ex. at 354, 156 Eng. Rep. at 151.

[49] 417 Mich. at 29, 331 N.W. at 209.

[50] 13 S. WILLISTON, TREATISE ON THE LAW OF CONTRACTS §§ 1570-1570A (3d ed. 1970).

[51] 3 A. CORBIN, CONTRACTS §§ 598, 605 (1960).

[52] E. FARNSWORTH, CONTRACTS § 9.3, at 653 (1982).

[53] Z. CHAFEE, SOME PROBLEMS OF EQUITY (1950).

"girl" who falsely claims to be pregnant.[54] The "situation," interpreted charitably, is that the contracting parties have made a mutual mistake of fact. Professor Chafee instructed the reader: "Compare Sherwood . . . ."[55] The reference is elliptical; however, a more elaborate reference would be indelicate. The point to be made is that Professor Chafee would direct the reader to the mistake concerning conception in the case — the facts — not to its rule. Indeed, against the teaching of *Sherwood*, he would have dismissed the husband's action to rescind, on the refreshing or quaint ground that a man must be self-reliant:

> Seduction is not a straightforward process, so why should the negotiations leading from seduction to marriage be subjected to the high standard of *uberrima fides*? Mariana in the Moted Grange is not the only betrayed girl who had to use wiles, a woman's best weapon, to bring down her man. Who wants to be the Lady of Shalot? . . . King Solomon disclaimed knowledge of the ways of a man and a maid, perhaps using "maid" in a Pickwickian sense . . . . There are some things a man has to decide for himself, and one of them is whom he is going to marry. He ought to stand on his own feet and use his own experience of life, and not rush around to some judge for comfort if he gets hurt. He has made his own bed and must lie in it.[56]

The reader should pause to reflect on where she has been and anticipate where she is going. *Sherwood*, despite being an indisputably classic case and well-loved, has these incongruous aspects. Michigan equivocates about its precedential force. Scholars ignore or impatiently reject its rule. Nevertheless, courts and scholars agree that the facts of *Sherwood* constitute a paradigm for relief. This Essay will use the philosophy of language to explain the incongruities, starting with a closer look at the kinds of language in *Sherwood*'s opinion. The "Ich kann nicht udder" in Currie's poem is a play on 'Ich kann nicht anders', Luther's famous and possibly apocryphal explanation, if it be that, of his refusal to recant, that is, to stop being a Lutheran.[57] As Luther did, this Essay goes straight to the text.

III. The Language of *Sherwood v. Walker*

A judicial opinion's ordinary linguistic progression is instructively telescoped by the sentence: "The enemy sawed the Commandant and his wife in halves, and committed other grave breaches of international

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[54] *Id.* at 77.

[55] *Id.* at 77 n.8.

[56] *Id.* at 78-79.

[57] At the Diet of Worms in 1521. 2 J. MacKinnon, Luther and the Reformation 301-02 (1928).

law."[58] The quoted sentence describes one event two ways. First, it describes the event in ordinary language — or largely in ordinary language, because 'Commandant', perhaps 'enemy', and most plainly 'wife' presuppose legal relations. The picture the reader gets is of some people standing around with a saw and so forth. This picture is independent of the legal relations. Second, the quoted sentence describes the event by classifying it as a legal result. As do 'Tully' and 'Cicero', the pieces of language 'the enemy's sawing the Commandant and his wife in halves' and 'the enemy's committing a grave breach of international law' refer to the same thing, in this instance an event, although they do so from different points of view or conscious of different concerns.

Sherwood v. Walker proceeds in this usual way until its concluding few paragraphs, using ordinary language then legal language. The two kinds of language are juxtaposed in the case's first sentence, previously quoted: "*Replevin* for a *cow*."[59] The first emphasized word, 'replevin', is a legal word, the second, 'cow', is an ordinary language word. The reader of *Sherwood* expects the opinion to speak initially in ordinary language, and indeed it does so. After orienting the reader, that is, indicating that what is to be interpreted is a contract, the opinion summarizes what the parties did in almost one thousand words containing hardly a legal term other than 'plaintiff' and 'defendant'. In this context these expressions don't characterize the parties but simply refer to them. Hence they don't do anything 'Sherwood' and 'Walker' wouldn't do.

The reader then expects the opinion to shift to legal language to state the legal effect of what the parties did. The opinion does this too, giving the procedural posture of the case and then talking about title passing, the topic that preoccupied the circuit court. The reader is ready for the opinion to conclude, using legal language until its judgment, which should again be ordinary language. Because the law affects the world, besides obtaining its raw material there, a case typically has a legal-language exit phase as well as a legal-language entry phase. In summary, the opinion should start with something like 'Sherwood said, 'I'll buy . . .' ', and finish with something like 'The parties did/didn't contract, hence . . .'. The court's introducing a third kind of language, neither ordinary nor legal, would discommode the reader, and signal a change from the expected.

And this is exactly what happens. Toward the end of the opinion,

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[58] M. GRANT, THE ANCIENT HISTORIANS xv-xvi (1970) (quoting an unnamed ancient historian; offered as an instance of detached historical writing).

[59] 66 Mich. at 568, 33 N.W. at 919 (emphasis added).

when there are just a few paragraphs remaining the reader abruptly encounters this passage:

> 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 bargained for and intended to be sold, — then there is no contract; but if it be only a difference in some *quality* 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.[60]

The emphasized words in the quoted passage belong neither to ordinary nor to legal language. The immediately following paragraph, the last paragraph before the judgment, contains more of this third kind of language:

> 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 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.[61]

As before, the emphasized words are neither lay nor legal.

It is perhaps evident where these terms come from; however, the reader may let Professor Leff disclose this to her. Unfortunately, Professor Leff died before he could complete the *Leff Dictionary*.[62] Nevertheless, the dictionary has been published through the first part of the letter 'c'. Hence it includes 'accident', a word stressed in the first quoted passage. Professor Leff's definition of 'accident' starts conventionally enough, "1. A state of affairs or incident brought about by accidental means. Though the connotation is not necessary, perhaps because of the ubiquitous term 'automobile accident,' there is frequently

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[60] *Id.* at 576-77, 33 N.W. at 923 (emphasis added).

[61] *Id.* at 577-78, 33 N.W. at 923-24 (emphasis added).

[62] Leff, *The Leff Dictionary: A Fragment*, 94 YALE L.J. 1855 (1985).

some implication of violence or injury also connected to the term."[63] This is roughly what *Black's* or any other ordinary legal dictionary would say, although one might have wished that 'accidental' had not adorned the definiens.

Professor Leff's second meaning of 'accident', the last, is less common. It begins, "2. In Aristotelian terminology, a property of a thing or concept which it has but need not have, *i.e.*, a property not necessary to make it what it is."[64] Immediately the definition refers the reader to "Logical Terms, Glossary of" in *The Encyclopedia of Philosophy*, a respected standard source, which further instructs her, "Aristotle . . . also recognized that a thing might not have a property that it need not have. He called such a property an *accident.*"[65] This by itself is a little puzzling, as verging on the tautological, because not needing to have something is arguably the same thing as possibly being without it. The point must be that Aristotle thought some accidental properties instantiated. Meanwhile, Professor Leff's reader is pondering what this second meaning of 'accident', far removed from that meaning familiar from tort law, is doing in a *legal* dictionary. Professor Leff acknowledges the apparent incongruity: "This meaning of the term is not particularly important in law (or, for that matter, in logic either these days)."[66] It will turn out that the meaning, although not the word, *is* important in logic.[67] The definition's concluding sentence explains all: "[This meaning] does occasionally show up, however, in 19th century and earlier opinions by judges wrestling with questions about 'essences,' including the legendary *mutual mistake* case involving the famous cow, 'Rose 2d of Aberlone,' *Sherwood v. Walker*, 66 Mich. 568, 33 N.W. 919 (1887)."[68]

The reader lacks Professor Leff's definition of 'substance', Leff's instruction, as noted, having been curtailed at "c." Briefly, however, the *Sherwood* court uses 'substance' and 'accident' as Aristotle used them. Here more directly is how Aristotle defines these concepts. *Substance*: "that which is neither said of a subject nor in a subject, e.g. the individ-

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[63] *Id.* at 1889.

[64] *Id.*

[65] Brody, *Logical Terms, Glossary of*, in 5 THE ENCYCLOPEDIA OF PHILOSOPHY 57, 71 (P. Edwards ed. 1967).

[66] Leff, *supra* note 62, at 1889.

[67] To use Leff's language quoted in the next sentence of the text, a lot of wrestling with essences still goes on. *See generally* STUDIES IN ESSENTIALISM (Midwest Studies in Philosophy vol. 11, 1986).

[68] Leff, *supra* note 62, at 1889.

ual man or the individual horse."[69] *Accident*: "something which may either belong or not belong to any one and the self-same thing."[70] The reader may identify the substances in *Sherwood* from what in Aristotle's definition succeeds the 'e.g.'. These are, using this Essay's abbreviated and simplified statement of the facts, Sherwood, Walker, and Rose: two people and a cow. Accidents are predicated of these individuals. Thus Sherwood was a banker, Rose was black — insofar as black angus cows are black. Not all the properties of substances are accidents, however. According to Aristotle's theory, substances may have properties necessarily. The reader may, without committing herself to what is or is not a substance, imagine that Rose *must* be a cow, that Sherwood *can't* be a turnip. Also, Rose might have been white instead of black. Or so Aristotle's usual example of an accident goes.[71]

This Essay's way into *Sherwood* is through asking what this Aristotelian language, or the technical philosophical language in general, is doing in the opinion. The reader must first understand that this philosophical language is vastly different from the ordinary language that she observed at the beginning of *Sherwood*. Philosophers were probably most conscious of this difference in the 1930s. It was then that Rudolph Carnap and others, including Hempel, who appears later, isolated and gave a special place to ordinary discourse, which they called the "basic language, *i.e.*, the observation language."[72] This is the "language which we use in every-day life in speaking about the perceptible things surrounding us."[73] We use it "either on the basis of direct observation or with the help of an experiment for which we know the conditions and the possible result determining the application of the term in question."[74] It is in ordinary language that the law states facts; this language is preeminently transparent.

None of the emphasized words belongs to the observation language. By way of further illustration, the reader may investigate 'substance'. The philosopher David Hume's idea here was that if one looks for substance, one sees only properties. Hume argued from rhetorical ques-

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[69] ARISTOTLE, *Categories* $2^{a}14$-15, in 1 THE COMPLETE WORKS OF ARISTOTLE 3, 4 (rev. Oxford trans. 1984).

[70] ARISTOTLE, *Topics* $102^{b}6$-7, in 1 THE COMPLETE WORKS OF ARISTOTLE 167, 170 (rev. Oxford trans. 1984).

[71] *Id.* at $102^{b}9$-10.

[72] Carnap, *Intellectual Autobiography*, in THE PHILOSOPHY OF RUDOLPH CARNAP 1, 79 (P. Schlipp ed. 1963).

[73] Carnap, *Testability and Meaning*, 3 PHIL. SCI. 419, 466 (1936).

[74] Carnap, *Logical Foundations of the Unity of Science*, 1 INTERNATIONAL ENCYCLOPEDIA OF UNIFIED SCIENCE, pt. 1, at 42, 53 (1938).

tions: "If [substance is] convey'd to us by our senses, I ask, which of them; and after what manner? If it be perceiv'd by the eyes, it must be a colour; if by the ears, a sound; if by the palate, a taste and so of other senses."[75] Since according to Hume substance is manifestly not "a colour, or a sound, or a taste," and so forth — these typically being accidental properties — the idea of substance is "not empirical."[76]

All the reader knows at this point is that the philosophical language at the end of *Sherwood* differs from the ordinary, observation language at its beginning. By putting up with some slight formality, through supplying a semantics[77] for the observation language, the reader may see what is good about this language. Let her inspect the sentence 'Rose is a cow', which belongs to the observation language. To the logician or philosopher, the sentence has these two parts: a name, 'Rose', and a predicate, 'is a cow'. Here the word 'predicate' is understood in the philosophical sense, as picking out a linguistic function from names to sentences. So the function 'is a cow' at the argument 'Rose' supplies the value 'Rose is a cow'.[78]

There is going to be a set of individuals, D, which are what exist.[79] 'Rose' names, that is, refers to or denotes, an individual in D. Also, 'is a cow' denotes a set of individuals, a subset of D. 'Rose is a cow' is true, or denotes T instead of F, if what 'Rose' denotes is in the set 'is a cow' denotes. Otherwise it is false, denotes F. A logical consequence of 'Rose is a cow' is 'There is a cow'. This sentence may be written more perspicuously as 'There is something, that is a cow', that is, '$\mathrm{E}x(x$ is a cow)'. In this sentence 'x' is a variable taking individuals, elements in D, as values. The sentence denotes T if and only if in D *something* is a cow, so the set of cows is not empty. If the set is empty, the sentence is false. The set D is called the 'domain'.[80]

The observation language has two good qualities. First, it is a *first-order* language. This means that the language's variables, such as 'x', denote only individuals. Also, the individuals are ordinary things, like

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[75] D. HUME, A TREATISE OF HUMAN NATURE 16 (2d L. Selby-Bigge ed. 1978).

[76] *Id.*

[77] For background about philosophical semantics, see generally S. HAACK, PHILOSOPHY OF LOGICS (1978).

[78] The grammar here follows A. ANDERSON & N. BELNAP, ENTAILMENT 473-92 (1975).

[79] Intuitively and by a popular theory, for which see W. QUINE, *On What There Is*, in FROM A LOGICAL POINT OF VIEW 1, 13 (2d ed. rev. 1961).

[80] A. TARSKI, *The Concept of Truth in Formalized Languages*, in LOGIC, SEMANTICS, METAMATHEMATICS 156 (1956).

cows. For mathematical languages, things are different.[81] Of course, a language having variables that range over individuals that are angels or elementary particles wouldn't be an observation language. Second, the observation language is an *extensional* language. Extensionality has two earmarks. First, a language is extensional, hence not intensional, if what its sentences denote depend only on what their parts denote. 'Rose is a cow' is true, denotes T, since what 'Rose' denotes belongs to the set that 'is a cow' denotes. Second, a language is extensional if its semantics doesn't refer to other possible worlds.[82] 'Rose is a cow' denotes T because she is one in *this* world. This Essay argues the *Sherwood* court couldn't express its rule in a first-order, extensional language. Needing to give up either first-orderness or extensionality, it equivocated. The court's inability to speak in its best language created the case's anomalies.

IV. PALMER'S VIEW

Quod licet Jovi, non licet bovi.
Anon.[83]

Professor Palmer, *Sherwood v. Walker*'s leading interpreter, appears in this Essay as a hostile witness.[84] He says:

> There is not much question that, according to ordinary ways of thinking, the parties reached agreement for sale of a particular animal at a specified price, although the animal possessed a quality they supposed it lacked which made it worth some ten times the agreed price. . . .
>
> . . . .
>
> . . . The controlling circumstance . . . was that the assumed attribute played a vital part in shaping the terms of the bargain . . . .[85]

A student of this passage should parse it by dividing it at the first break, between 'price' and 'the controlling', then subdividing the parts

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[81] "[V]ariables should not range over objects like cows and pigs." K. KUNEN, SET THEORY 2 (1980).

[82] Possible worlds are ways the world might be or might have been. *See generally* D. LEWIS, ON THE PLURALITY OF WORLDS (1986).

[83] 'What is permitted to God is not permitted to a cow'. The adage, which has no recognized source, is quoted in N. GEORGESCU-ROEGEN, *Energy and Economic Myths*, in ENERGY AND ECONOMIC MYTHS 1, 21 (1976).

[84] Mostly because he refuses out of hand to entertain a second reading introduced in Part V. But he also says of himself and his reader, "Ours is not a search for philosophic truth . . . ." G. PALMER, MISTAKE AND UNJUST ENRICHMENT 35 (1962) [hereafter MISTAKE].

[85] *Id.* at 16, 44; 2 RESTITUTION, *supra* note 23, §§ 12.1-.2.

into pairs of sentences and prefixed connectives.[86] The connectives are 'there is not much question that, according to ordinary ways of thinking' and 'the controlling circumstance was that'. The sentences are 'the parties . . . agreed price' and 'the assumed attribute . . . the bargain'.

The reader should ascertain the force of the first connective, 'There is not much question that, according to ordinary ways of thinking', by contemplating what might have been. Following 'the parties . . . agreed price', the sentence that is the connective's argument, Professor Palmer might have continued, 'But the ordinary ways of thinking are wrong', and introduced an unexpectedly subtle reading. He didn't, but immediately advanced to the legal consequences of these facts. Hence the first connective has the force of 'the following, orthodox interpretation is sufficiently obvious to forestall debate'.

The first sentence used as an argument, 'the parties . . . agreed price' is a highly interpreted statement of the facts of *Sherwood*. It is important to identify the source of this interpretation in the opinion. The interpretation tracks a sentence from the opinion's final paragraph before the judgment: "*She* was sold as a beef creature would be sold; *She* is in fact a breeding cow, and a valuable one."[87] In fact, this sentence offers the strongest support for Professor Palmer's view. In the text of *Sherwood*, it is as a straight syntactical matter hard to make out the antecedent of the two tokens of 'she' — it can't be 'the thing'. Still, they *must* refer to Rose, since she is the only local fertile cow. The sentence says that a single cow both was sold and is fertile. The neighboring sentences don't make the same commitment.

Professor Palmer provides the reader this picture of the parties contracting. Sherwood and Walker are standing in Walker's field — it is now suburban Detroit, but let that go. Rose, lost in thoughts of incipient motherhood, is affectionately nuzzling Sherwood. The only visible barren cow is Lucy 8th, but she is distant and inattentive. Sherwood says to Walker, pointing at Rose: 'I offer to buy from you this cow, which we believe barren'. Walker replies, 'I accept'.

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[86] Connectives are linguistic functions that take sentences as inputs or arguments and return sentences as outputs or values. They are to be compared with predicates, already introduced. The two most familiar connectives are 'it is not the case that' and 'and', the former taking one sentence as argument, the latter taking two. So 'it is not the case that' takes 'Rose is a cow' into 'It is not the case that Rose is a cow'. *See* A. ANDERSON & N. BELNAP, *supra* note 78, at 477. These connectives are extensional. Professor Palmer's, however, are intensional, because the sentences they form may be true or false whether the sentences they take as arguments are true or false.

[87] 66 Mich. at 578, 33 N.W. at 924 (emphasis added). The sentence concludes the passage quoted *supra* text accompanying note 61.

Professor Palmer's connective 'the controlling circumstance was that' signals that the upcoming sentence is for him the key to the case. It is a yet more highly abstracted statement of *Sherwood*'s facts. It is fair then to restate what is taken by him to be significant as:

> (1) *Facts*: The cow Sherwood bought from Walker lacked a vital property.

(1) speaks directly of barrenness, the property the cow actually lacked, instead of its opposite, fertility, as Professor Palmer does. But there's no difference.

Now the reader should see that (1) is second order, that it cannot belong to a first-order language. The reason it cannot is that talk about properties, qualities, or attributes occurs essentially in it. Properties are not individuals. (1) may be written '$\mathrm{E}F$(Rose is not F & F is vital)', which reads, 'there is a property such that Rose doesn't have it, and this property is vital'. The variable 'F' is a predicate variable, and should be contrasted with 'x', an individual variable, already introduced.[88]

The first conjunct of (1) is harmless, since one may interpret it as just another way to say, a typographical variant of, 'Rose is barren'. The second conjunct, which asserts that Rose's barrenness is vital, is the problem. The reader might imagine paraphrasing this conjunct to make it first order. Two approaches commend themselves. First, vitalness might have to do with price, 'Rose's barrenness is vital' being a misleading, unspecific way to say the equivalent of 'Barren cows are being sold for $80, fertile cows for $800'. This is close to the sentence from *Sherwood* that Professor Palmer tracks. But in *Wood v. Boynton*,[89] the buyers kept a stone bought for $1 despite its being worth $700, its diamondness not being vital enough. Second, vitalness might have to do with being stressed, the troublesome conjunct coming down to something like 'Sherwood and Walker, while negotiating, said 'barren' seven times'. But the parties might have said almost anything seven times. The surrogate sentences are first order but they don't do the job.

This Essay gives two answers to why a second-order language is bad: it is bad because highly regarded people say so, and it is bad no matter what. First the appeal to authority, largely anecdotal. *The Philosopher's Lexicon* contains this entry: "*hempel*, adj. (only in the idiom *hempel-minded*) Said of one who insists on recasting the problem in

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[88] *See supra* text accompanying note 80.

[89] 64 Wis. 265, 25 N.W. 42 (1885).

first-order logic."[90] Hempel thought (still thinks) like Carnap.[91] They are logical positivists or empiricists but these are dying out.[92] In the 1930s, an influential part of the philosophical community *required* that a language be first order.

Individual variables (x) denote individuals, while predicate variables (F) denote sets of individuals, or subsets of the domain D.[93] For example, 'barrenness' denotes the set of barren things. The reader might have been able to see this coming, because the predicates of a first-order language are interpreted by sets. 'Rose is a cow' is true if and only if what 'Rose' denotes is in the *set* that 'is a cow' denotes. A first-order language, though, doesn't quantify over these sets. It doesn't say 'There is a set such that', hence the sets are interpretive devices, instead of things that exist.[94] The trouble with a second-order language, then, continuing the appeal to authority, is that it is "set theory in sheep's clothing."[95] Sets are problematic things, so that "[a]s a matter of conscience, many philosophers resort to sets only in desperation. Their maxim is to avoid commitment to sets whenever and so long as possible."[96] Independently of authority, two things, one theoretical, the other more practical, are wrong with sets. First, naive set theory is paradoxical or inconsistent, while sophisticated set theory is unintuitive.[97] Second, sets as such are not, like cows, observable. They don't enter causal relations.[98]

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[90] THE PHILOSOPHICAL LEXICON 6 (D. Dennett & K. Lambert eds. 1978).

[91] *See supra* text accompanying notes 72-74.

[92] There's a picture of Hempel and another (Feigl) captioned 'The last two empiricists'. H. FEIGL, INQUIRIES AND PROVOCATIONS at iv (1981).

[93] If the language stays extensional.

[94] W. QUINE, *supra* note 79, at 13.

[95] W. QUINE, PHILOSOPHY OF LOGIC 66, 67 (1970).

[96] Massey, *Tom, Dick, and Harry, and All the King's Men*, 13 AM. PHIL. Q. 89, 105 (1976).

[97] A famous paradox demoralized the great logician Gotlob Frege. He had been reducing arithmetic to logic, including set theory, so that mathematics would be grounded in what is unquestionable. Bertrand Russell asked him whether the set of sets that are not members of themselves is a member of itself, thus disclosing a contradiction, since it is if and only if it is not. To get around the paradox Frege in effect assumed the universe contained only one thing, which if nothing else restricted the applicability of his theory. Letter from Bertrand Russell to Gotlob Frege (June 16, 1902) and Letter from Gotlob Frege to Bertrand Russell (June 22, 1902), *reprinted in* FROM FREGE TO GOEDEL 122, 124, 125 (J. van Heijenoort ed. 1967); B. RUSSELL, MY PHILOSOPHICAL DEVELOPMENT 76-77 (1959).

[98] Recently, God has been interpreted as a set, whose elements are virtue and so forth, also sets. Post, *New Foundations for Philosophical Theology: Quine with God*, 71 J. PHIL. 736 (1974). There's been some trouble with the idea of praying to a set.

V. THE THIRD COW[99]

An illustration in the original *Restatement of Contracts* goes, "A bargains with B to sell him a specific horse. Though the fact is not known to the parties, the horse has already died. No duty arises."[100] The reader should reflect that she is not troubled by the *result.* The issue is how to reach it. One may do so by adapting (1): the horse B bought from A lacked a vital property. This use of 'vital', unlike Professor Palmer's, is not figurative, since being alive is literally vital. But the reader may think this reasoning not entirely faithful to her own insight, which may build on there being, at the time of the transaction, no horse that could be its subject, on the implicated horse's not then existing.[101] In the context, this insight isn't radical. Indeed, the *Restatement* makes it, the cited illustration's section beginning, "When the existence of a specific thing . . . ."[102]

The bulk of the language in the concluding paragraphs of *Sherwood* supports this view, and supports it better on successive readings. It must be said, however, that Professor Palmer, the case's leading scholar, disagrees. He acknowledges that "the court made some attempt to describe the mistake as one of identity or existence."[103] The contract cow wasn't Rose, and didn't exist. The "some attempt" is somewhat contemptuous. Professor Palmer thinks that "the solution of legal problems ought not depend on the answer to metaphysical questions of this sort."[104]

Sherwood doesn't consistently develop either Professor Palmer's one-cow theory or this new two-cow theory to which Professor Palmer is opposed. But the two-cow theory makes a better fit. The reader conscious of Aristotle's use of 'substance' and 'accident' sees this use in the

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Caton, *God, for Quine's Sake*, 71 J. PHIL. 748 (1974).

[99] This study counts as the second cow Lucy 8th, whom Sherwood thought he might have bought. *Sherwood*, 66 Mich. at 571, 33 N.W. at 920.

[100] RESTATEMENT OF CONTRACTS § 460, illustration 1 (1932). The *Second Restatement* insensitively substitutes an illustration involving a machine destroyed by fire to identical legal effect. RESTATEMENT (SECOND) OF CONTRACTS § 263, illustration 5 (1981).

[101] The result may be seen to depend on one's answer to the vexed question of whether a dead horse is a horse. *Compare* M. DUMMETT, FREGE 572 (1973) *with* Ayers, *Locke Versus Aristotle on Natural Kinds*, 78 J. PHIL. 247, 270 (1981). Dummett says 'no', Ayers says 'yes'. Ayers also decides that a daughter of horses that grows up otherwise to be a cow is still a horse, although a deformed horse.

[102] RESTATEMENT OF CONTRACTS § 460(1) (1932).

[103] 2 RESTITUTION, *supra* note 23, § 12.2.

[104] MISTAKE, *supra* note 84, at 46.

court's language "if the thing actually delivered or received is different in substance from the thing bargained for and intended to be sold — then there is no contract."[105] Things different in substance are different things. Starting here, the court says successively that "a barren cow is substantially a different creature than a breeding one"; that Rose "was not in fact the animal . . . the defendant . . . intended to sell or the plaintiff to buy"; and finally that "[t]he thing sold and bought had no existence."[106] This sequence is almost an argument. That it is helps validate the two-cow theory.

The two-cow theory may be written to parallel Professor Palmer's (1) as:

(2) *Facts*: The cow Sherwood bought from Walker didn't exist.

According to (2), the contract cow didn't exist, hence Sherwood can't replevy her from Walker, who doesn't have her. In fact, Sherwood replevied the wrong cow, as much as if he had replevied Lucy.

As does Professor Palmer, the reader gets edgy thinking about things that don't exist. Much has been said by philosophers to relieve this anxiety, for example, that "existence is something like breathing, only quieter," which assimilates a nonexistent cow to the perhaps more familiar phenomenon of a cow holding its breath.[107] Nor, for that matter, is existence entirely a positive thing. The reader should keep in mind that philosophers and theologians have often situated God above existence,[108] and that "[i]t is the final proof of God's omnipotence that he need not exist in order to save us."[109]

The problem for this study lies elsewhere: in how to represent semantically a nonexistent cow. The reader may get a start toward the semantics by recognizing that 'the contract cow' will have to refer to *something*, and this thing has to be different from what 'Rose' refers to. That is, the sentence 'The contract cow $\neq$ Rose', which asserts the two cows aren't identical, has to come out true. As previously explained, in

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[105] 66 Mich. at 576, 33 N.W. at 923.

[106] *Id.* at 577-78, 33 N.W. at 923-24.

[107] Raphael, *To Be and Not To Be*, 61 PROC. ARISTOTELIAN SOC'Y 57, 58 (1961). *See* J. AUSTIN, SENSE AND SENSIBILIA 68 n.1 (1962).

[108] G. HEGEL, LOGIC 49 (W. Wallace trans. 3d ed. 1975) (3d ed. Heidelberg 1830); P. TILLICH, SYSTEMATIC THEOLOGY 237 (1951). Hegelians sometimes have trouble with existing cows. *See* Sass, *A Hegelian in South Wisconsin*, THE OWL OF MINERVA, June 1981, at 1.

[109] P. DE VRIES, THE MACKEREL PLAZA 8 (1970). *See also* N. MALCOLM, LUDWIG WITTGENSTEIN 71 (1958); Frankfurt, *Descartes on the Creation of the Eternal Truths*, 86 PHIL. REV. 36, 53 (1977).

a preferred, extensional language[110] a name refers to an individual, which is an element of the domain, D. For example, 'Rose' refers to say r, an element of D. Of course, 'the contract cow' cannot refer to r because the contract cow isn't Rose and anyway doesn't exist. Adding u — the nonexisting individual — to D doesn't work by itself. Letting the contract cow's description refer to u is merely a mathematically convenient way to say that this cow doesn't exist. Second, and almost consequently, 'the contract horse' inspired by the first *Restatement*'s illustration must, if dead horses don't exist, refer to u too. So then the cows are distinct, but not the cow and the horse.

The reader will do well to consult a study that coincidentally illustrates its semantic message by addressing the problem that two classes, that of offices and that of persons, "seem to have an equal claim to the title 'the Supreme Court'."[111] 'The Chief Justice wrote *Marbury v. Madison*' and 'The Chief Justice didn't exist in 1804' are both true right now, although they appear inconsistent on the easy added premise that a Chief Justice must exist to write. Besides the set of individuals, D, the study posits a set of possible worlds, W, interpreted as times. Then at least definite descriptions refer to individual concepts, functions from possible worlds to individuals. So 'wrote *Marbury v. Madison*' is true of the individual concept 'the Chief Justice' refers to, which successively takes as values the individuals Jay, Marshall, Story, . . . , Warren, Burger, Rehnquist. Or if these are understood as individual concepts, it takes time-slices of them. And 'didn't exist in 1804' is true of Rehnquist, also an individual concept, since he is the Chief Justice in 1987 and u in 1804.

If the Chief Justice can be an individual concept, a cow can too. Also, the reader initially should take possible worlds to be times, so that cows are functions from times to individuals. When Rose and the contract cow are young cows, heifers, and until Rose is pregnant, the cows may be identical, so that the individual concepts give the same value, r; subsequently, 'Rose' still gives r, but 'the contract cow' gives u.

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[110] *See supra* text accompanying note 80.

[111] Parks, *Classes and Change*, 1 J. PHIL. LOGIC 162 (1972). Parks uses a fragment of a Bressan language, from A. BRESSAN, A GENERAL INTERPRETED MODAL CALCULUS (1972). Bressan intended his language to axiomatize physics, so there may be some overkill in using it to count cows.

	contract cow	Rose
t_0 birth	u	u
t_1 pregnancy	r	r
t_2 contract	u	r
t_3 death	u	r
t_4	u	u

This table gets the test sentence right. 'The contract cow ≠ Rose' comes out true, since <u, r, u, u, u> isn't <u, r, r, r, u>. 'The contract cow at t_1 ≠ Rose at t_1' is false, however, since at t_1 both cows give the value r. The cows are distinct, and distinct also from the *Restatement* illustration's horse, <u, h, h, h, u>.

The reader will do better, however, to think of W as containing possible worlds as such.[112] She might then test her intuitions against Dr. Johnson's conflated meanings of 'barren'.[113] A cow wants offspring, is childless, if she lacks offspring in the actual world. A cow wants the power of procreation if she is childless in every possible world, is *necessarily* childless. The contract cow was necessarily childless. But she was more than that. Necessarily, she was a barren cow. The parties just contracted that way. Substituting 'necessarily childless' for its definiendum 'barren' in 'The contract cow was necessarily barren' gives 'The contract cow was necessarily necessarily childless'. That she was restricts the logic underlying *Sherwood*, since the reiterated necessity operator is *not* redundant.[114] Or, more probably, the occurrences of 'necessary' name different operators. The inner operator, closest to 'childless', imports physical, the outer operator logical necessity.

(2)'s language is intensional, because one must investigate other possible worlds to find out the truth values of its sentences in this world. The parties contracted about Rose or did not depending on the cow they did contract about's necessary barrenness, barrenness in every possible world. Again, Carnap in the 1930s disliked intensional as well as

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[112] On possible worlds, see D. LEWIS, *supra* note 82.

[113] *See supra* text accompanying note 10.

[114] If the operators are interpreted as connectives, the language cannot be S4 or S5, which contain $Lp \supset LLp$. G. HUGHES & M. CRESSWELL, AN INTRODUCTION TO MODAL LOGIC 43-60 (1968).

second-order languages.[115] Intensional languages contain sentences not observational. One can't go out in the actual world and determine if they are true.[116] It is a fact Rose was fertile, and at some level of expertise or of dissection her fertility could be observed. There was no way to observe that the contract cow was necessarily barren, for two reasons. First, there was no existing, visible cow to inspect. Second, had there been, there would still have been no way to inspect this cow in other possible worlds to see that she was necessarily barren. She had to be stipulated to be necessarily barren.

VI. The Underlying Equivocation

The reader leaves this Essay's Part II having a second, inconsistent picture of the contracting process in *Sherwood v. Walker* to put beside Professor Palmer's. The parties are again standing in Walker's field, Sherwood pointing to Rose. But Sherwood says to Walker, not 'I offer to buy from you this cow, which we believe barren', as before, but 'I offer to buy from you a barren cow, which we believe is this cow'. Only it is not, because Rose isn't barren. So Walker's 'I accept' can only complete a contract about another, barren cow.[117] What is tricky about the juxtaposed pictures is that the evidence, that is, what is *actually* observed, doesn't determine one's choice between them.

This Essay has by (1) and (2) described the facts of *Sherwood* two ways, in terms of properties that exist and cows that don't. Of course, a court wants to state a rule. What is characteristic of a rule is that a judge applies it to the facts of a case to decide it, to obtain a result or outcome. Thus the reader should think of a rule as a function from facts to results. If facts and results are not themselves linguistic things, a rule isn't either, although it may be named or described. In fact, two separate descriptions of the same rule in *Sherwood v. Walker* derive from (1) and (2), as follows:

(1') *Rule*: If anything the parties contract about

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[115] He and other positivists had "a methodological commitment to extensional languages." Fetzer, *Reduction Sentence "Meaning Postulates"*, in The Heritage of Logical Positivism 55 (N. Rescher ed. 1985).

[116] B. van Fraassen, The Scientific Image 118 (1980); F. Waismann, Wittgenstein and the Vienna Circle 214 (B. McGuinness ed. 1979); *see also* W. Quine, *supra* note 95, at 72.

[117] In terms of an example by Kripke, either the parties are contracting about a particular table, which they believe is made of molecules, or they are contracting about a table that is made of molecules, which they believe is this table. S. Kripke, Naming and Necessity 47 (1980); *see also* Kripke, *Identity and Necessity*, in Identity and Individuation 135, 151-52 (M. Munitz ed. 1971).

lacks a vital property,
one of them may rescind.

(2') *Rule*: If anything the parties contract about doesn't exist,
one of them may rescind.

In these descriptions of rules nothing significant to this study changes if the last clause, 'one of them may rescind', is replaced by the *Restatement*'s 'no duty arises'.[118]

The reader may ascertain that the descriptions are or may be interpreted to be equivalent, that is, to name or describe the same function. To do so, she should distinguish two levels of discourse: the object language, which is the language being studied, and the metalanguage, in which the object language is discussed. In a metalanguage in which one may talk about the languages of both (1') and (2'), one may say that the thing the parties contracted about lacks a vital property, speaking in one language, if and only if the thing the parties contracted about doesn't exist, speaking in the other. This is by no means a strange result in other fields of inquiry, for instance mathematics.[119]

The descriptions have equal authority. The reader may take either the language used in (1) and (1') or that used in (2) and (2') as her object language, and talk about it in the other language as her metalanguage. *The second-order language as metalanguage.* A claim that the contract cow doesn't exist, made in the object language, is true if and only if, in the metalanguage, the contract cow lacks a vital property. How many cows there are depends on what properties are vital. *The intensional language as metalanguage.* A claim that the contract cow lacks a vital property, made in the object language, is true if and only if, in the metalanguage, the contract cow doesn't exist. What properties are vital depends on how many cows there are. Across the languages, the description 'the contract cow' does not refer to the same thing, or even the same sort of thing. In the second-order language, the contract cow is an individual, while in the intensional language, it is an individual concept, a function.

The link between the languages is that a property that the contract cow lacks in one of them is vital if and only if in the other the contract cow has this property necessarily. That is, for the cow not to have this property is not consistent with what the parties take this cow to be. For

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[118] Also, although the 'contract about's carry a part of the analytic burden, this Essay ignores them.

[119] H. PUTNAM, *Mathematics Without Foundations*, in 1 PHILOSOPHICAL PAPERS 43, 45 (1975).

a cow to have a property necessarily, however, is just for it to have this property in all possible worlds. The reader may look at the legal result differently: if the parties to a contract get the possible world they are in wrong, that is too bad, but both are bound. But if there is no possible world for them to be in, one of them can rescind the contract. As the majority of the Michigan court understood the facts of *Sherwood*, since fertility or its lack was a necessary property, there was no possible world in which Rose and the contract cow were the same animal. Interpreting 'necessary' as 'nonaccidental' brings the court's two analyses together, or would bring them together except that the court is using two languages.

If the reader reflects back on the desirability of using a first-order, extensional language,[120] she will appreciate the source of the opaqueness of the concluding paragraphs of *Sherwood*. The court wished to express its rule in this language, but could not. The reader should imagine an infinitely long sequence of the sets of facts of possible cases, ordered by their descriptions in a defining language that is first-order extensional. The rule maker's problem is to describe a function from these sets of facts to the results the rule maker wants in each case. Following Judge Posner, one may most simply represent the results by '1' or '0', in this instance depending on whether the plaintiff or the defendant should win.[121] The rule maker can *always* name or otherwise refer to her rule, calling it, for example, 'the rule in *Hadley v. Baxendale*', or, Judge Morse having written the opinion in *Sherwood*, 'Judge Morse's favorite rule'. But just naming a rule does not tell a rule follower, be it the originating court the next time around or another court, what to do. This is patent from the injunction, 'Decide according to Judge Morse's favorite rule'. That one would not know what to do is an insight of Professor Fuller's, stated as an illustration: "[T]he 'rule' that one should do unto others as one would be done by [them] could hardly serve as [an] injunction to be applied by courts."[122]

The problem Fuller identifies is exactly that which confronted the *Sherwood* court. It *wanted* to express its rule in a first-order, extensional language, but could not. In Part IV, this Essay supplied examples of attempts to do so, that incompletely reduce 'vital' to talk of respective prices of fertile and barren cows or to talk of the frequency of

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[120] *See supra* text accompanying notes 81-82, 90-98, 115-16.

[121] R. POSNER, *The Ethical and Political Basis of Wealth Maximization*, in THE ECONOMICS OF JUSTICE 88, 114 (1981).

[122] L. FULLER, *Mediation — Its Forms and Functions*, in THE PRINCIPLES OF SOCIAL ORDER 125, 148 (1981).

a linguistic type, 'barren', in the parties' negotiations.[123] Indeed, simply as a mathematical fact, almost all the sequences of 1s and 0s, by which this study represents legal rules, cannot be expressed in *any* language.[124] The court could, however, express its rule in a second-order, extensional language by (1'), or in a first-order, intensional language by (2'). Neither language is as bad as it might be, that is, simultaneously second-order and intensional. Also, neither language was wholly acceptable to the court, for reasons already expressed. The observation language alone lets one state clearly how to decide a case. Hence the court was stuck with properties that exist or cows that don't. Then Kant got it right when he said: legal theory [*Rechtslehre*] "based on pure reason accepts the maxim 'Entities are not to be multiplied beyond necessity' even more than do the other branches of philosophy."[125] The court equivocated in the concluding paragraphs of its opinion between the languages of (1') and (2'), adopting neither, abandoning neither. The only other thing it could have done was change its rule, trading the right rule for one easier to communicate. But it did not want to do that either.

This impasse of language in some degree[126] explains *Sherwood*'s experience as a precedent. The case doesn't describe its rule helpfully. Hence the precedential value of the case is ostensive. Its language *points* to its facts, and directs other courts, 'Decide thus'. Then these other courts weigh the relevance of *Sherwood* to later cases by the similarity of *Sherwood*'s facts to those of the later cases. But similarity here at once becomes a technical term, so one should write: 'legal similarity'. The law often works this way, and a rule follower who reads a set of related cases may learn the underlying rule, recognize how to go on to decide other cases with it, despite her not being able to articulate what she knows, any better than her sources could.[127]

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[123] *See supra* text accompanying note 89.

[124] *See generally* S. KLEENE, INTRODUCTION TO METAMATHEMATICS (1952); R. SOARE, RECURSIVELY ENUMERABLE SETS AND DEGREES (1987); RECURSION THEORY (1985).

[125] Letter from Immanuel Kant to Christian Gottfried Schutz (July 10, 1797), *reprinted in* KANT: PHILOSOPHICAL CORRESPONDENCE, 1759-99, at 234, 235 (A. Zweig ed. 1969).

[126] That it doesn't explain all is clear from the difficulty of putting the rule of *Hadley v. Baxendale*, often cited as such, into the observation language. *See supra* note 48.

[127] For this sort of learning in another profession, having epistemological parallels to the law, see D. ARMSTRONG, BELIEF, TRUTH AND KNOWLEDGE 127-28 (1973); E. GIBSON, PRINCIPLES OF PERCEPTUAL LEARNING AND DEVELOPMENT 6-7 & fig. 1-1 (1969).

CONCLUSION

In *Sherwood v. Walker*, as this Essay has reconstructed the case, the court wanted to speak in a first-order, extensional language. The cash value of its wanting to speak thus is that it wanted to speak simply, about existing cows. But the court couldn't express the appropriate rule in this language. It wanted to partition the set of facts in cases in a way its best language doesn't permit. Hence it equivocated between giving up good things: the first-orderness of the language, or its extensionality. The court couldn't have both, but in the end it did not choose between them. That it didn't is why at the end of the court's opinion the student of the case isn't sure how many cows there are.