

SHERLOCK HOLMES AND LAW 2019

*Ira Brad Matetsky**

January 1, 2019: At the stroke of midnight, the copyright on Arthur Conan Doyle's "The Adventure of the Creeping Man," first published in 1923, expires in the United States. Due to a series of congressional enactments extending the duration of copyright terms, this is the first canonical Sherlock Holmes story to enter the public domain in the U.S. in more than two decades. (See also December 31, 2019 entry.)

March 4, 2019: The Massachusetts Land Court resolves a dispute over the boundary line between two neighboring properties. In doing so, Justice Keith C. Long rejects an argument concerning the doctrine of "adverse possession," partly on the ground that the argument has rarely been presented in other similar cases and has never been accepted by a court. The court states in a footnote that the novel argument "fails the *Silver Blaze* test. If it [were] correct, it would surely have been raised and applied in a legion of other adverse possession cases."¹ The Court then cites "Silver Blaze," which is the most commonly quoted of all Sherlock Holmes stories in a legal context,² and quotes at length from Holmes's famous exchange with Inspector Gregory about "the curious incident" of the dog that "did nothing in the night-time."

March 19, 2019: "Silver Blaze" again, in another footnote. The Washington (State) Court of Appeals finds that there was sufficient evidence to find a criminal defendant guilty of drug possession. The court distinguishes two other cases cited by the defendant in which convictions were reversed, because in those cases but unlike this one, no drug paraphernalia was found. In a footnote, Judge Kevin Korsmo observes, "The absence of evidence sometimes can constitute evidence. See Sir Arthur Conan Doyle, "The Adventure of Silver Blaze" in *The Memoirs of Sherlock Holmes* (1894) (silence of guard dog allowed inference that thief was known to the dog)."³

March 20, 2019: A federal court in Indiana finds that there are disputed issues of fact in a lawsuit by an employee who claims that his employer wrongfully denied him time off under the Family and Medical Leave Act

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¹ *Nannucci v. Hynds*, 27 L.C.R. 89, 93 n.19 (Mass. Land Court Mar. 4, 2019).

² See Ira Brad Matetsky, "The Law of Dogs That Do Nothing in the Night-Time: Judges and the Sherlock Holmes Canon," in Candace Lewis, Ira Brad Matetsky & Roger Donway, eds., *Upon the Turf: Horse Racing and the Sherlockian Canon*, at 149-57 (BSI Press 2020).

³ *State v. Alatorre*, 2019 Wash. App. LEXIS 652, at *8 n.3 (Mar. 19, 2019).

(FMLA). The employee had told the employer he was injured, but had not provided much detail about the injuries. Judge Robert L. Miller, Jr. quotes precedent holding that “[t]he FMLA does not require employers to play Sherlock Holmes, scanning . . . for clues to the undisclosed, true reasons for an employee’s absence.”⁴

March 27, 2019: Professor Stephen R. Alton, of the Texas A&M University School of Law, posts an online preprint of his forthcoming law review article, “Dr. Jekyll and Mr. Holmes: A Tale of Two Testaments.”⁵ Alton’s paper addresses a series of legal issues created by the reported testamentary dispositions of Dr. Henry Jekyll in Robert Louis Stevenson’s *The Strange Case of Dr. Jekyll and Mr. Hyde* and Jonas Oldacre in Arthur Conan Doyle’s “The Adventure of the Norwood Builder.” As summarized in the abstract of Alton’s article, “[t]aken together, these two testaments raise the issues of the testator’s capacity and intent to make the will, undue influence and bequests to attorneys (notably to the drafting attorney), due execution of the will, and the effect of the beneficiary’s possible murder of the testator.”⁶

June 12, 2019: The U.S. Court of Appeals for the Ninth Circuit overturns a lower court’s dismissal of some customers’ claim that bank employees stole valuables from their safe deposit boxes. The plaintiffs argued that the only way anyone could have gained access to the boxes was either to pick the lock, to drill through the lock, or to use the bank’s keys. Plaintiffs presented evidence that lock-picking and lock-drilling had not occurred and therefore the remaining possibility — that bank employees must have gained unauthorized access using the keys — must be correct. In holding that plaintiffs’ case was strong enough to go to trial, the court in a footnote quotes Sherlock Holmes in “The Adventure of the Blanched Soldier”: “[W]hen you have eliminated all which is impossible, then whatever remains, however improbable, must be the truth.”⁷

⁴ *Lutes v. United Trailer, Inc.*, 2019 U.S. Dist. LEXIS 45772, at *11 (N.D. Ind. Mar. 20, 2019) (quoting *de la Rama v. Illinois Dep’t of Human Servs.*, 541 F.3d 681, 687 (7th Cir. 2008)).

⁵ Texas A&M University School of Law Legal Studies Research Paper 19-13, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3360516 and forthcoming in the *University of South Carolina Law Review*.

⁶ For related discussion, see Andrew Jay Peck *et al.*, “The Adventure of the Norwood Builder: A Lawyerly Annotated Edition,” 2015 Green Bag Almanac & Reader 116-162, 5 *Journal of Law* 235-278 (2015), available at <http://journaloflaw.us/8%20Almanac%20Excerpts/2015/JoL5-1,%20AE-2015,%206Doyle-et-al.pdf>, and the articles cited there.

⁷ *Nalbandyan v. Citibank, N.A.*, 777 Fed. Appx. 189, 192 n.2 (9th Cir. June 12, 2019) (per curiam).

June 27, 2019: It is the U.S. Supreme Court’s last scheduled session before the Court recesses for the summer, and legally attentive Sherlockians are eagerly awaiting the Court’s decision in *Carpenter v. Murphy*, one of the last remaining cases of the Court’s 2018–2019 Term that has not yet been resolved. When the case was argued in 2018, Justice Samuel A. Alito, Jr. invoked “a fundamental principle of law that derives from Sherlock Holmes, which is the dog that didn’t bark,”⁸ raising the question whether this “Sherlock Holmes Canon”⁹ would be cited in the Court’s written opinion. But in an unusual development, the Court is unable to resolve the case by the end of the Term and issues no decision; instead, Chief Justice John Roberts announces that the case “is restored to the calendar for reargument” at a later date.¹⁰ A decision in the case, or another presenting the same legal issue, is now expected sometime in 2020.

October 1, 2019: Another citation of “Silver Blaze,” in another footnote. The California Court of Appeal finds that a citizen ballot initiative raised the age at which youthful offenders can be tried in adult rather than juvenile court. Dissenting, Judge Art W. McKinster argues that the ballot initiative did not make this change, in part because no one suggested that the initiative would have this effect while it being considered. In a footnote, McKinster declares: “This lack of comment, like Sherlock Holmes’ ‘dog in the night-time’ which tellingly failed to bark . . . was in itself evidence.”¹¹

November 4, 2019: Yet another quotation from “Silver Blaze,” in another footnote — and this time in a case *literally* about dogs “that did nothing in the night-time.” The Texas Court of Appeals affirms a defendant’s conviction for murdering his wife, rejecting the defendant’s contention that the murder was committed by a burglar. Among other evidence supporting the conviction, Judge Elizabeth Kerr observes: “Additionally, other evidence belied a burglary. If a burglar had entered the house, the dogs would have barked. They did not.”¹² In a footnote, Kerr continues: “Sherlock Holmes fans will immediately call to mind ‘The Adventure of Silver Blaze,’ a story in *The Memoirs of Sherlock Holmes*, in which Holmes deduces that the presumed

⁸ Transcript of oral argument at 53, *Carpenter v. Murphy*, No. 17-1107 (argued Nov. 27, 2018).

⁹ See Matetsky, note 2 above, at 156 & n.33 (discussing Anita S. Krishnakumar, “The Sherlock Holmes Canon,” 84 *Geo. Wash. L. Rev.* 1 (2016)).

¹⁰ *Journal of the Supreme Court of the United States*, October Term 2018, at 904.

¹¹ *B.M. v. Superior Court*, 40 Cal. App. 5th 742, 767 n.3, 243 Cal. Rptr. 3d 426 (4th Dist. Oct. 1, 2019) (McKinster, J., dissenting).

¹² *Andrews v. State*, 2019 Tex. App. LEXIS 9750, at *22-23 (2d Dist. Nov. 7, 2019).

murderer was someone well-known to the stable dog past which a famous race horse had been led in the night with no fuss from the dog.”¹³ The footnote continues by quoting the dialog between Holmes and Inspector Gregory as well as Holmes’s later explanation that he “had grasped the significance of the silence of the dog” as an inference that helped solved the case.

December 18, 2019: The year’s last “Silver Blaze” footnote. The Supreme Court of Michigan declines to issue an advisory opinion on the constitutionality of an amendment to the Michigan Constitution. In a dissenting opinion, Justice David Viviano observes that “it appears no delegate at the constitutional convention ever mentioned that he or she understood” a constitutional provision adopted at the convention in the fashion being advocated in another justice’s opinion.¹⁴ In a footnote citing “Silver Blaze,” Viviano observes: “In this sense, it was like the watchdog that did not bark in the famous Sherlock Holmes novel [*sic*], i.e., the absence of a fact that one would expect to see.”¹⁵

December 20, 2019: The U.S. Court of Appeals for the Ninth Circuit, based in California, holds that users of Huuuge Inc.’s video slots game app are not bound by an arbitration clause contained in Huuuge’s terms of use, because the clause was concealed and a reasonable user would not have been on notice of it. Judge M. Margaret McKeown finds that far from being clearly displayed, the clause was positioned so that users would “need Sherlock Holmes’ instincts to discover the terms.”¹⁶

December 31, 2019: At the end of the year, three more canonical stories, all first published in 1924, enter the public domain in the United States: “The Adventure of the Sussex Vampire,” “The Adventure of the Three Garridebs,” and “The Adventure of the Illustrious Client.” The last six stories from *The Case-Book of Sherlock Holmes* remain under copyright in the U.S. — but not for much longer: four will enter the public domain in 2022, and the final two in 2023.

¹³ *Id.* at n.6.

¹⁴ *In re House of Representatives Request for Advisory Opinion Regarding Constitutionality of 2018 PA 368 & 369*, 936 N.W.2d 241, 274 (Mich. 2019) (Viviano, J., dissenting).

¹⁵ *Id.* at n. 65 (Viviano, J., dissenting).

¹⁶ *Wilson v. Huuuge, Inc.*, 944 F.3d 1212, 1214 (9th Cir. 2019).