

NERO WOLFE, REX STOUT, THE LANGUAGE, AND THE LAW

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More than one person has noted a seeming irony of devoting a themed issue of *The Green Bag Almanac and Reader*, a compilation of the year's best legal writing, to the Nero Wolfe novels and stories of Rex Stout. After all, one of Mr. Wolfe's most strongly held views is his oft-expressed disdain for almost all lawyers and the work that they do. In reality, however, both Mr. Wolfe and Mr. Stout share with many lawyers, law teachers, and judges an admiration for fine use of the English language — the celebration of which is the reason *The Green Bag Almanac and Reader* was created. And both Wolfe and Stout were ready to use the law when it suited their purposes.

An attentive reader of the Nero Wolfe novels would correctly conclude that Stout and his creation had at least a general familiarity with the law and lawyers. One Wolfe novel, *Murder by the Book*, and one novella, "Eeny Meeny Murder Moe," have plots centered on the affairs of law firms; another novella, "The Next Witness,"¹ contains two memorable courtroom scenes. Throughout the Corpus, Wolfe displays a knowledge of basic legal precepts, or at least knows how to obtain information about the law when he needs it; for example, in *The Rubber Band*, Wolfe advises clients that a legal claim they might wish to assert has "expired by time" under the statute of limitations, while in "Immune to Murder" he accurately quotes federal and New York State statutes governing diplomatic immunity, and in "Before I Die," he tests a law student's knowledge of the law by deliberately misusing a legal term to test whether the student will notice. Wolfe also is not shy about using the legal system or threatening to do so, either on his own behalf to collect fees, or on behalf of a client to assert a claim or to force a suspect to provide information.

Occasionally, of course, either Stout or Wolfe misapprehends a legal point. For example, in *The Golden Spiders*, a lawyer-suspect threatens to "replevy" money that was paid to Wolfe as a fee that he had not yet earned by the time of the payor's death; this usage of the term "replevy" is technically incorrect, as replevin deals primarily with tangible personal property and is generally not the

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¹ Reprinted in this *Almanac*, *infra*, pp. 99-144.

proper cause of action in New York to recover a cash payment.² More seriously, the stories are replete with instances in which Wolfe, Archie Goodwin, and numerous others are arrested or threatened with arrest as material witnesses; in reality, while valuable as plot devices, material witness warrants are much less common than the Wolfe Corpus would suggest. They are reserved for witnesses who are at risk of fleeing the jurisdiction or who refuse to attend court, not those who simply have relevant information or somehow annoy the police or the District Attorney's office.³

That Rex Stout was able to depict the law and lawyers in his stories with at least general accuracy is not surprising, because Stout interacted with the law and lawyers on numerous occasions. Needless to say, he had to deal with legal issues surrounding publication rights to his work throughout his writing career; Stout's files, archived at the Burns Library of Boston College, contain several folders of correspondence between Stout and his lawyers, and contain no evidence that Stout disdained the legal profession. Stout also dealt with lawyers who represented him or organizations with which he was affiliated in at least two litigations,⁴ although he was a defendant in both actions and thus was not the person who chose to resolve the disputes by legal means. Stout interacted regularly with the lawyers for organizations with which he was affiliated, such as Freedom House and the Authors' Guild. Stout testified before Congress, primarily on copyright law and other legal issues affecting writers, at least six times.⁵ Most notably, Stout's non-fictional writings included articles and book reviews discussing several well-known criminal cases, including the Rosenberg case, the Hall/Mills murder case in New York, the Boston Strangler case, and the Brinks robbery.⁶

² See, e.g., *Equitable Life Assur. Soc. v. Branch*, 32 A.D.2d 959, 302 N.Y.S.2d 958 (2d Dep't 1969).

³ The current statutory provision for material witness orders in New York provides that "[a] material witness order may be issued upon the ground that there is reasonable cause to believe that a person whom the people or the defendant desire to call as a witness in a pending criminal action: (a) [p]ossesses information material to the determination of such action; and (b) [w]ill not be amenable or responsive to a subpoena at a time when his attendance will be sought." N.Y. Crim. Proc. Law § 620.20(1). See also Jeanne E. Thelwell, "The Legal Wolfe," *infra* p. 424.

⁴ See *Hart v. Friends of Democracy, Inc.* 266 A.D. 203, 42 N.Y.S.2d 554 (4th Dep't 1943) (libel action in which Stout was a defendant); *Walmor, Inc. v. Shapiro*, 240 A.D. 969, 268 N.Y.S. 904 (1st Dep't 1933) (possibly a collection action in which Stout was impleaded). There are no published opinions in these cases, but the author is seeking to obtain copies of the records in these cases from the courts or the State Library.

⁵ See Ira Brad Matetsky, "Mr. Stout Goes to Washington" (forthcoming in *The Gazette* in 2012).

⁶ For a list of Stout's principal articles and book review pieces on legal topics, see the Appendix on pp. 97-98 below.

Some of the nation's jurists have reciprocated Stout's attention. The Nero Wolfe novels have been read and praised by United States Supreme Court Justices, reportedly beginning with Oliver Wendell Holmes, Jr. According to Stout's biographer, John McAleer:

Justice Oliver Wendell Holmes died on 6 March 1935, at ninety-four. During the last year of his life he read *Fer-de-Lance*. After his death, a marginal note he had made was found. Carl Van Doren got hold of it and showed it to Rex. It read, "This fellow is the best of them all."⁷

More than half a century later, Justice Harry A. Blackmun recorded that he had read several of the Wolfe novels and enjoyed them.⁸

Other Justices, though they may not have realized that they shared a viewpoint with Mr. Wolfe and his creator, took a stance aligned with theirs on at least one point of diction.⁹ It is well known, for example, that neither Wolfe nor Stout would accept the use of the word "contact" as a verb: Wolfe denounces this usage as early as *Black Orchids* (1941), in which he tells Johnny Keems that "'contact' is not a verb under this roof," and the real-life Stout felt equally strongly about the matter. It is less well-remembered that another voice opposing the use of "contact" as a verb belonged to Justice Felix Frankfurter. *Remmer v. United States*¹⁰ was a criminal case involving an allegedly improper communication with a juror, in which Justice Sherman Minton wrote the opinion of the Court. In his first draft of the opinion, Minton wrote that "a person unnamed had contacted a certain juror." While otherwise approving of the draft opinion, Frankfurter returned it to Minton with a marginal note stating that "I made a vow never to agree to an opinion that uses 'contact' as a verb." Minton responded to Frankfurter:

⁷ John McAleer, *Rex Stout: A Majesty's Life* 244 (1977). McAleer notes that "[t]his phrase was printed on the program prepared for the surprise dinner given Rex by more than a hundred friends, at Sardi's on his seventy-fifth birthday." *Id.* at 543 n.2. The Wolfe Pack's attempts to locate earlier references to Holmes' marginal comment, and ideally Holmes's copy of *Fer-de-Lance* containing his marginal note, are ongoing.

⁸ See Harry Blackmun, *Meet Nero Wolfe*, *infra* p. 408.

⁹ Most people would describe it as a "grammatical" point, and most people would be wrong, as Wolfe and Stout would be aware. In the story "Method Three for Murder," a suspect accuses Wolfe of "alienating the affection of my wife" and Wolfe corrects him by substituting "affections" for "affection," observing that "in that context the plural is used." When the suspect objects that he didn't visit Wolfe's office to discuss grammar, Wolfe points out that his correction dealt not with a matter of grammar but one of diction (that is, the best usage of an individual word rather than the relationship of the words within a sentence to each other). Given that Wolfe correctly observes this distinction, so should we.

¹⁰ *Remmer v. United States*, 347 U.S. 227 (1954).

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My dear Felix:

I have your comments on my circulation of No. 304, *Remmer v. U.S.*

I have made the following addition, at the end of the opinion:

MR. JUSTICE FRANKFURTER concurs in the judgment of the Court and in the opinion, except that he disagrees with the use of the word "contact" as a verb.

But on second thought, to save the printing of this concurrence, I'll change the verb "contact."¹¹

As a result, in the published *Remmer* opinion in the *United States Reports*, the words "contacted a certain juror" are replaced with "communicated with a certain juror."¹² Mr. Wolfe and Mr. Stout would heartily have approved. Whether substituting "communicated with" for "contacted" is actually an improvement to the sentence is probably beside the point.¹³

Wolfe's high standards for English usage, and condemnation of those who do not live up to his standards, are memorialized in an opinion of the U.S. Court of Appeals for the First Circuit. In a memorable scene that opens the novel *Gambit*, Mr. Wolfe burns a copy of the new and controversial *Webster's Third New International Dictionary* in the presence of Archie Goodwin and of a would-be client. (The scene was recalled in press coverage generated by this year's 50th anniversary of the publication of *Webster's Third*.¹⁴) In

¹¹ Letter from Justice Sherman Minton to Justice Felix Frankfurter, Feb. 15, 1954, *Remmer v. United States* file, Sherman Minton Papers, Harry S. Truman Presidential Library, Independence, Mo., quoted in William Franklin Radcliff, *Sherman Minton: Indiana's Supreme Court Justice* 164 (1996). Frankfurter returned Minton's letter with a handwritten note: stating "Shay: That's a good illustration of your sense of teamwork!! FF". *Id.*

¹² *Remmer*, 347 U.S. at 228.

¹³ See Bryan A. Garner, *A Dictionary of Modern American Usage* 161 (1998):

Though vehemently objected to in the 1950s, *contact* is now firmly ensconced as a verb. Brevity recommends it over *get in touch with* or *communicate with*; it should not be stylistically infelicitous even in formal contexts.

See also Saul Panzer (channeled by Ira Brad Matetsky), "Wolfe Pack Member Survey Corner," *The Gazette*, vol. XVI, no. 4, Fall 2005, at 28-29.

¹⁴ See Geoffrey Nunberg, "Not Another Word: When a Dictionary Could Outrage," *New York Times Book Review*, Sept. 23, 2011, at 35, discussing the controversy that surrounded *Webster's Third* and observing that

[t]he uproar spilled over beyond the culture pages. In his novel *Gambit* Rex Stout had his detective Nero Wolfe feed his *Third* to the fire a page at a time while declaring it "subversive and intolerably offensive."

1998, the First Circuit decided *Empire Company v. OSHA*,¹⁵ in which one of the issues was the meaning of the word “contiguous” as used in an OSHA regulation. The OSHA decision under review relied on a definition of “contiguous” contained in *Webster’s Third*, which equated “contiguous” with “nearby.” In his opinion for the court, Judge Woodlock¹⁶ found that OSHA’s definition and its citation to *Webster’s Third* were acceptable, in this footnote:

Webster’s Third New International Dictionary 492 (1986) (“1 . . . c: NEARBY, CLOSE: not distant . . .”). While purists have been skeptical about the latitudinarian tendencies of *Webster’s Third*, see generally Herbert C. Morton, *The Story of Webster’s Third: Philip Goves’ Controversial Dictionary and its Critics* (1994); see also Rex Stout, *Gambit* 2 (1964) (Nero Wolfe reported to view *Webster’s Third* as “subversive because it threatens the integrity of the English language”), this meaning of “contiguous” is found in the primary definition of its more prescriptive predecessor, I *Webster’s New International Dictionary* 576 (2d ed. 1950) (“1. In actual contact; touching; also, near, though not in contact . . .”) (emphasis supplied). This meaning is reflected as well as the secondary definition of the current edition of the Random House Dictionary. *Random House Unabridged Dictionary* 439 (2d ed. 1993) (“2. in close proximity without actually touching; near.”). The current edition of the principal legal dictionary also treats the definition employed by the Commission and the ALJ as the most common. *Black’s Law Dictionary* 320 (6th ed. 1990) (“In close proximity; neighboring . . .”). In short, there is nothing unreasonable about defining “contiguous” to mean “nearby.”¹⁷

Another court decision recollecting Mr. Wolfe’s and Mr. Stout’s views of proper usage is *Bachowski v. Brennan*.¹⁸ Discussing a prior order in the case, Judge Dumbauld observes that “[t]he terms of the order were intended to ‘track’ (to use a locution which Nero Wolfe would not tolerate) the opinion of the Court of Appeals.”¹⁹

In another recent opinion, Judge O’Toole of the District of Massachusetts recalled one of Nero Wolfe’s favorite words. The issue

¹⁵ 136 F.3d 873 (1st Cir. 1998).

¹⁶ Of the District of Massachusetts, sitting by designation.

¹⁷ 136 F.3d at 878 n.2. The date cited by the court for *Gambit* is not the date of the novel’s first publication, which was in 1962, but is the date of the first Bantam paperback edition. The fact that the First Circuit’s citation and discussion of *Gambit* is contained in a footnote rather than the body of the opinion does not, of course, derogate from their authority and importance. See generally Ira Brad Matetsky, *The Footnote Argument – Sustained at Last?*, 6 Green Bag 2d 33 (2002).

¹⁸ 405 F. Supp. 1227 (W.D. Pa. 1975), appeal dismissed sub nom. *Bachowski v. Usery*, 545 F.3d 363 (3d Cir. 1976).

¹⁹ 405 F. Supp. at 1231 n.21.

in *United States v. Criswell*²⁰ was whether a Massachusetts trooper had probable cause to pull over the defendant's vehicle because one of its headlights was out. In denying the defendant's motion to suppress evidence seized as the fruit of the stop, the court observed:

After the cars passed each other, [the officer] made a U-turn and followed [defendant's] Pontiac in order to initiate a traffic stop based on his observation of the malfunctioning headlight. Pictures of the vehicle taken shortly after the stop show that the car's left front headlight was indeed malfunctioning, and Criswell's counsel's attempt to quarrel about whether an adjacent auxiliary light that was working was a "headlight" was, as Nero Wolfe would put it, flummery.²¹

Finally, an accurate recollection concerning Rex Stout is contained in an opinion of the Connecticut Superior Court in the 1996 decision *Lagana v. Reiss*,²² which addressed whether a landlord's notice to quit was served on the tenant at the correct address. The property was regarded for some purposes as being located in the Town of Southington but for others in the contiguous²³ Town of Meriden. Judge Beach's opinion for the court observes that "[n]o explanation was immediately offered for the discrepancy, but one supposes that the scenario is not unique."²⁴ The opinion continues in a footnote:

It is the court's understanding that the house of mystery writer Rex Stout, creator of Nero Wolfe and the indefatigable Archie Goodwin, was bisected by the New York-Connecticut state line.²⁵

These reported references to Nero Wolfe and Rex Stout in published judicial opinions, and another two dozen or so citations in the law reviews,²⁶ do not yet rival the hundreds of decisions citing

²⁰ Crim No. 08-10025-GAO, 2009 WL 3340160 (D. Mass. Oct. 15, 2009).

²¹ *Id.* at *1.

²² No. SPN 24463 SO, 1996 WL 727329 (Conn. Super. Sept. 25, 1996).

²³ That word again.

²⁴ 1996 WL 727329, at *1.

²⁵ *Id.* at n.2.

²⁶ See, e.g., Peter Linzer, "Implied," "Inferred" and "Imposed": Default Rules and Adhesion Contracts: The Need for Radical Surgery, 28 Pace L. Rev. 195, 195 (2008) (quoting the dictionary-burning scene from *Gambit* and criticizing the interchangeable use of "infer" and "imply"); John F. Wirenius, *Brigaded with Action: Undirected Advocacy and the First Amendment*, 32 Seton Hall L. Rev. 299, 347 n.208 (2002) (also recalling the *Gambit* scene as well as Wolfe's views on Richard III's guilt in *Death of a Doxy*); Kurt M. Saunders, *The Regulation of Internet Encryption Technologies: Separating the Wheat from the Chaff*, 17 J. Marshall J. Computer & Info. L. 945, 956 (1999) (quoting an article by Ronald Rivest that cites communication between Wolfe and Archie in *The Doorbell Rang* as an "example of using authentication to achieve confidentiali-

Arthur Conan Doyle's Sherlock Holmes stories; though Nero Wolfe and Archie Goodwin uttered many quotable statements over more than forty years, they coined no aphorisms as frequently cited as Holmes's dog that did nothing in the night-time.²⁷ Nonetheless, those of us who are simultaneously Wolfeans, lawyers, and proponents of good writing must say of the continued references to Wolfe and Stout in the legal literature: Satisfactory. May there be many more.²⁸

APPENDIX

Selected writings of Rex Stout on law-related themes:²⁹

"Nero Wolfe's Creator Looks at \$1,500,000 Robbery," published in various newspapers, February 1950 (discussing the Brinks Robbery that had occurred in Boston the previous month).

"At Last We Belong," *The American Writer*, Oct.-Dec. 1954, 3-5 (approving the United States' accession to the Universal Copyright Convention).

"He Got His Man," *The New York Times Book Review*, Mar. 24, 1957 (reviewing Henry Goddard, *Memoirs of a Bow Street Runner*, a book about the precursors of Scotland Yard).

"Authors League Backs J.F.K., Asking Fairer Tax Treatment for Writers," *Publishers Weekly*, Mar. 15, 1963, pp. 27-29 (reprinting Stout's testimony before the House Ways and Means Committee).

"Was the Murderer in the Jury Box?," *The New York Times Book Review*, Feb. 2, 1964 (reviewing William M. Kunstler, *The Minister and the Choir Singer*, a book about the Hall-Mills murder case).

ty"); Francis M. Nevins, *Copyright + Character = Catastrophe*, 39 J. Copyright Soc'y USA 33 (1992) (discussing various attributes of Nero Wolfe's fictional persona and how many of them could be adopted by another author before infringing on Rex Stout's copyrights); Malla Pollack, Note, *Intellectual Property Protection for the Creative Chef, or How To Copyright a Cake: A Modest Proposal*, 12 Cardozo L. Rev. 1477, 1489 n.17 (1991) (quoting the scene from *Too Many Cooks* in which Wolfe demands the recipe for saucisse minuit as a fee). In addition, memorial tributes to several legal academics have noted their appreciation for the Nero Wolfe books.

²⁷ See Arthur Conan Doyle, "Silver Blaze," reprinted in *The Green Bag Almanac and Reader 2008*.

²⁸ The author is continuously on the lookout for additional sightings of references to Nero Wolfe or Rex Stout in a legal context. Please forward information about any recent citations via e-mail to werowance@nerowolfe.org or imatetsky@ganfershore.com. Appropriate credit will be provided in future issues of *The Gazette*, *The Green Bag*, or both.

²⁹ Listing prepared with the assistance of Guy M. Townsend, John J. McAleer, Judson C. Sapp & Arriean Schemer, eds., *Rex Stout: An Annotated Primary and Secondary Bibliography* (New York: Garland Publishing, Inc. 1980).

"The Case of the Spies Who Weren't," *Ramparts*, Jan. 1966, pp. 30-34 (written in Archie Goodwin's voice, inspired by Walter & Miriam Schneir, *Invitation to an Inquest*; discusses the evidence against Julius and Ethel Rosenberg and concludes that they were not guilty).

"A Murderer's Milieu," *Saturday Review*, Oct. 29, 1966, 29-30 (reviewing Gerald Frank, *The Boston Strangler*).

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Judge Learned Hand said he had faith in "the eventual supremacy of reason." Do you?

No, and I certainly wouldn't wish such a fate on posterity.

John McAleer interviewing Rex Stout, in John McAleer, Rex Stout: A Majesty's Life 502 (1977)