



THE ROAD TO HELL IS PAVED WITH “PARTICULAR INTENTIONS”

Randy D. Gordon

Reviewing

MARIANNE WESSON, *A DEATH AT CROOKED CREEK:
THE CASE OF THE COWBOY, THE CIGARMAKER, AND THE LOVE LETTER*
(NYU Press 2013)

IF WE NEED CURRENT, collateral proof that Professor Maitland was spot-on in his observation that all law is history, then Marianne Wesson’s *A Death at Crooked Creek* provides a copious dose.¹ And it is a worthy successor to that other great investigation of death on the Great Plains, Truman Capote’s *In Cold Blood*. Like Capote, Wesson skilfully weaves narrative fabric out of a legal record, historical context, and imagined scenes and dialogue (alt-

Randy Gordon is a partner at and chair of the antitrust and trade regulation practice of Gardere Wynne Sewell LLP, and an adjunct faculty member in law and English at Southern Methodist University. The views expressed in this article are the author’s alone and do not necessarily represent those of the firm or its clients.

¹ Marianne Wesson, *A Death at Crooked Creek: The Case of the Cowboy, the Cigar Maker, and the Love Letter* (2013).

though she's much more forthright than Capote on this latter point!). Unlike Capote, though, who had access to the principal actors and fresh records, Wesson had to contend with a cast that had long disappeared from the earth and documents that crumbled to dust at her touch.

The book is principally an investigation of a standard textbook evidence case, *Mutual Life Ins. Co. of New York v. Hillmon*,² but it pauses to consider a range of larger cultural narratives that came to define and describe life on the frontier. I have written about the case myself on a couple of occasions – it has a particular resonance for me, I suppose, because I grew up in western Kansas and it begins just a few years before my grandfather (who lived until the late 1980s) arrived in Kansas in a covered wagon with his parents and siblings.³

The *reported* story (i.e., the one set forth by the Supreme Court) is fairly easy to capsule, and it's worth brief examination here. Towards the end of 1878, John W. Hillmon purchased \$25,000 of life insurance (a considerable sum in those days) before setting out from Lawrence, Kansas for points west. The ostensible purpose of his trip was to meet up with a friend, John H. Brown, who would accompany him on an expedition to find and purchase land for a ranching operation. Brown and Hillmon connected in Wichita sometime in February, 1879 and around March 5 headed southwest towards Medicine Lodge, where they stayed for a few days before decamping for a relatively unpopulated area called Crooked Creek. There, tragedy befell Hillmon: Brown's rifle discharged as he was unloading it from a wagon and a bullet struck Hillmon in the head. The verdict after two coroner's inquests was "accidental death." That probably would have been that had not Hillmon's wife of six months, Sallie, made a claim on the insurance policies, setting in motion litigation of *Bleak-Housian* proportions – spawning a third

² 145 U.S. 285 (1892).

³ Randy D. Gordon, *Rehumanizing Law: A Theory of Law and Democracy* 54-58 (2011); Randy D. Gordon, *Truth in Context: Sketching a (New) Historicist Pedagogy*, in *The Moral Imagination and the Legal Life* 189, 195-200 (Zenon Bankowski & Maksymilian Del Mar eds., 2013).

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coroner's inquest, six trials (and two trips to the Supreme Court) and lasting into the next century. The third trial gave rise to the first trip to the Supreme Court.

Sallie Hillmon's claim bore facial indicia of fraud: Hillmon was of relatively modest means (compared to the amount of insurance), a relative had paid part of the insurance premiums, the couple had been married only a short time, and Hillmon's "death" came right on the heels of the multi-policy purchase. Unsurprisingly, given these circumstances and a general proliferation of insurance fraud in the late nineteenth century, the insurance companies refused to pay voluntarily and litigation ensued. In 1888, after two trials had already resulted in hung juries, the third trial was held as a consolidation of three separate actions (one against each insurance company).

At the trial, Sallie's case rested on evidence supporting the gun-fell-out-of-the-wagon story that I just described. Defendants, however, "introduced evidence tending to show that the body found in the camp at Crooked Creek on the night of March 18th was not the body of Hillmon, but the body of one Frederick Adolph Walters."⁴ There was "much conflicting evidence" on the point, but in the defendants' telling "Walters left his home at Ft. Madison, in the State of Iowa in March, 1878, and was afterwards in Kansas in 1878, and in January and February, 1879; that during that time his family frequently received letters from him, the last of which was written from Wichita; and that he had not been heard from since March, 1879."⁵ To tie Walters to the corpse at Crooked Creek, the defendants tried to introduce two letters from Walters, one written to his sister, one to his fiancée. The sister's letter had been lost, but the fiancée's letter was available. The trial court refused to allow the sister to testify as to the contents of her letter or to allow the contents of the fiancée's letter to be read to the jury. For the Supreme Court's purposes, the two letters contained evidence of the same operative fact, so the focus both for the Court then and for Wesson now is on the letter that was physically available.

⁴ *Id.*, 287.

⁵ *Id.*

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The fiancée, Alvina D. Kasten, testified (by deposition) that she was 21 years of age, a resident of Ft. Madison, and engaged to Walters, whom she last saw in March of 1878. After Walters left, she corresponded regularly with him, receiving a letter from him about every two weeks until March 3, 1879, when she received his final letter. That letter was dated at Wichita, March 1, 1879, and signed by Walters; the envelope was postmarked “Wichita, Kansas, March 2, 1879.” Here’s what it said:

Dearest Alvina: Your kind and ever welcome letter was received yesterday afternoon about an hour before I left Emporia. I will stay here until the fore part of next week, and then will leave here to see a part of the country that I never expected to see when I left home, as I am going with a man by the name of Hillmon, who intends to start a sheep ranch, and as he promised me more wages than I could make at anything else I concluded to take it, for a while at least, until I strike something better. There is so many folks in this country that have got the Leadville fever, and if I could not of got the situation that I have now I would have went there myself; but as it is at present I get to see the best part of Kansas, Indian Territory, Colorado, and Mexico. The route that we intend to take would cost a man to travel from \$150 to \$200, but it will not cost me a cent; besides, I get good wages. I will drop you a letter occasionally until I get settled down; then I want you to answer it.⁶

The trial court ruled that this letter, and the one to Walters’ sister, were inadmissible hearsay. So when Sallie prevailed at trial, the defendants included this evidentiary ruling as a point of error on appeal.

In the Court’s view, “[t]he matter chiefly contested at the trial was the death of John W. Hillmon” – i.e., “whether the body found at Crooked Creek on the night of March 18, 1879, was his body, or the body of one Walters.” The defendants introduced evidence tending to show that Walters was at Wichita in early March, that he had not been heard from since, that his body had been found at

⁶ *Id.*, 288-89.

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Crooked Creek, and that he went to Crooked Creek between early March and March 18. Thus, “[e]vidence that just before March 5th he had the intention of leaving Wichita with Hillmon would tend to corroborate the evidence already admitted, and to show that he went from Wichita to Crooked Creek with Hillmon. Letters from him to his family and to his betrothed were the natural, if not the only attainable, evidence of his intention.” And “whenever the intention is of itself a distinct and material fact in a chain of circumstances, it may be proved by contemporaneous oral or written declarations of the party.”⁷

Thus is born the modern “statement of intention” exception to the hearsay rule. This exception has been much criticized, and it does seem overbroad. (Could a statement that “I’m going to do my homework” be used later as collateral proof that the dog did eat it?) So why did the Court (largely) invent this exception? In earlier writings on the subject, Wesson made a good structuralist argument that “narrative exigencies” rather than “policy views” drove the Court’s decision.⁸ Specifically, she argued that the Court was compelled to read the story before it as a “romance” into which the “Dearest Alvin” letter (in its very artlessness) fits perfectly as a signifier of truth. Now, in *A Death at Crooked Creek*, she also demonstrates that the Supreme Court was convinced that the case was easily characterized as an example of fraudulent “graveyard insurance.” In this respect, she draws close to my own view that the Supreme Court was constrained to read the letter in light of the then-dominant view of the frontier as a seething cauldron of lawlessness. In other words, the Court created a rule of evidence that would allow the construction of a better, more truthful story – one in which John Hillmon was a murdering, thieving desperado who preyed on a hapless young adventurer out to “strike something better” on the frontier. In any event, this letter animates Wesson’s foray into the past, which turns out to be far more equivocal than the Court has led us to believe.

⁷ *Id.*, 294-95.

⁸ Marianne Wesson, *Particular Intentions: The Hillmon Case and the Supreme Court*, 18 *L. & Lit.* 343, 350 (2006).

Legal narratives – viz., the stories presented at trial and constructed in case opinions – are, as Neil MacCormick notes, “partial in every sense.”⁹ No judge or jury can ever determine “what really happened” down to the minutest detail: the legal system trades in approximations. The task that Wesson sets for herself in her new book is to construct a closer approximation. And she does this through an effective and engaging narrative structure that is one part case history, one part social reconstruction, and one part present-day memorial of the twists and turns of her own investigation (which includes the exhumation of Hillmon’s grave and a search for DNA evidence). Along the way, she introduces us to an array of familiar (and not-so-familiar) characters, ranging from “Uncle Jimmy” Green, the first Dean of the Law School at the University of Kansas, who appeared at one of the inquests and conducted all six trials; Mary Elizabeth Lease, a feminist icon; populist political figures like Governor Lorenzo Lewelling and Congressman “Sockless Jerry” Simpson; and Ezra Ripley Thayer, a one-time Supreme Court clerk and future Dean of Harvard Law School. These characters converge in an imaginative way that ably demonstrates the Janus-faced nature of Kansas: one side peering towards a mythical past of agrarian simplicity, the other cast in the direction of Wall Street investment and its industrial fruits.

At the end of the day, Wesson is left (and leaves us) in a state of suspense that is nonetheless satisfying. Probably everybody was lying in one respect or another. Probably a skewed view of the West animated the Supreme Court. Probably Hillmon died at Crooked Creek and is buried in Lawrence. Probably Walters was alive and well at the time of the trials. And probably the “Dearest Alvina” letter is either an outright fake or at best full of lies. (In either case, it’s probably an invention of the insurance companies.) These ‘probables’ are not hollow, however. They serve to remind us that law is a historical product, which is to say that it is a product of a multiplicity of discourses – of narratives. Thus, although the creators of the *Hillmon* hearsay exception could not stand outside the narrative

⁹ Neil MacCormick, *Rhetoric and the Rule of Law* 221 (2005).

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stream that surrounded them and be “objective” observers of the evidence, we – from the privileged perspective of the present – can see that particular legal rule “grow[ing] out of a particular place and time.”¹⁰

Thus conceived, the *Hillmon* opinion is, as Hippolyte Taine suggested with respect to all documents, “simply a mold like a fossil shell, an imprint similar to one of those forms embedded in a stone by an animal which once lived and perished.”¹¹ So just as we can study a fossil to form some idea of the animal that formed it, so may we study a document to comprehend its author. Under this way of thinking, a document can be described as a momentary fix and snapshot of then-extant cultural crosscurrents. Thus, contra strict textual constructionists, “[i]t is a mistake to study [a] document as if it existed alone by itself. That is treating things merely as a pedant, and you subject yourself to the illusions of a book-worm.” The teaching points here are two-fold. First, a historicist point of view can help us discover why a flimsy rule like the statement-of-intention exception to hearsay was adopted in the first place. (As Wesson wryly points out, history is replete with instances of men lying to women about where they were going or what they intended to do.) Second, it puts us on guard as to our own law-making, which just as inevitably takes place within a causal stream, the influences of which are easily overlooked (or perhaps impossible to see) in a moment of decision undertaken in haste or with particular results in mind.

Ultimately, we can only make of Wesson’s investigation what we will. But the true value of the book is in the telling, not the tale.



¹⁰ Brook Thomas, *Reflections on the Law and Literature Revival*, 17 *Critical Inquiry* 510, 535 (1991).

¹¹ Hippolyte Taine, *History of English Literature* – (1864) trans. Henry Von Laun, rev. ed. (1864; Colonial 1900), excerpted in *The Modern Tradition* 254, eds. Richard Ellman & Charles Feidelson, Jr (1965).