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Every lawsuit begins and ends as a story, and sometimes it's even a really ripping tale, teeming with plot, character, and suspense. But the law's insistence on distillation and abstraction ensures that ordinarily a casual student of the lawsuit, reading an appellate opinion, can catch only fleeting and sometimes misleading glimpses of the story. The narrative movement in legal scholarship has attempted, among its other projects, to excavate some of the stories thus concealed.[1] This article gives an account of one such undertaking, and its unexpected discovery that the narrative urge and an inauthentic document—a fake— may have made a significant and ironic contribution to the evolution of the law of evidence.

In the spring of 1879, a young Kansas woman named Sallie Hillmon[2] filed claims against the policies that three insurance companies had issued on the life of John Hillmon, her husband of six months. John had died, she said, in a firearms accident at a campsite in rural southwest Kansas. Life insurance fraud was common, if not rife, in late nineteenth century America[3], and the companies refused to pay the claims, maintaining that her husband was not dead. In July of 1880, negotiations broke down and she commenced lawsuits against them. The case[4] was tried six times, and twice received

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1 *See, e.g.*, TORTS STORIES (Robert L. Rabin & Stephen D. Sugarman eds., 2003); CONSTITUTIONAL LAW STORIES (Michael C. Dorf ed., 2004). A more venerable example is QUARRELS THAT HAVE SHAPED THE CONSTITUTION (John. A. Garraty ed., 1987).

2 The lady's first name is variously reported, sometimes as Sarah or Sadie, and her last name is sometimes rendered Hillman, but almost all of the original court documents say "Sallie E. Hillmon."

3 See discussion *infra* notes __-__ & accompanying text.

4 The three suits were *Hillmon v. Mutual Life Insurance Co. of New York*, *Hillmon v. The New York Life Insurance Co.*, and *Hillmon v. Connecticut Mutual Life Insurance Co.*, Nos. 3147, 3148, and 3149 in the Circuit Court of the United States in and for the District of Kansas, First Division. Many of the original documents pertaining to this litigation, including Mrs. Hillmon's hand-written Complaints, are archived at the National Archives and Records Administration, Central Plains Region, in Kansas City, Missouri. The three cases were eventually consolidated for trial, and for later argument on appeal to the United States Supreme Court, which decided the appeals in *Mutual Life Insurance Co. of New York v. Hillmon*, 145 U.S. 285 (1892).

plenary consideration on appeal by the United States Supreme Court. The narrative aspects of the Hillmon case have not been altogether neglected: because Mrs. Hillmon was a young woman, innocent of apparent influence or connections, and because the insurers were powerful eastern corporations, it is preserved in the national imagination as a sliver of history, a small but colorful nugget of western Americana. In its time the Hillmon case was also regarded, in a way we can recognize, as an entertaining David-and-Goliath struggle and a contest between teams of celebrity lawyers. But among litigators and law students the case is chiefly remembered today because in the course of considering the trial court's exclusion of certain epistolary evidence, the Supreme Court created the important "state of mind" exception to the hearsay rule for expressions of the intentions of the speaker or writer. In practice this rule has, like all persisting legal doctrines, become somewhat abstracted from the case that gave it birth. Yet in many ways it remains profoundly wedded to its origins in a dispute about the identity of the corpse found at the campground, and thus embedded in a classic mystery narrative.

The Hillmon decision has proven one of the most durable examples of nineteenth century case law. Many decisions of that era concerning the rules of evidence enjoy little continuing vitality, in part because they often have a vague or *ipse dixit* quality to them[5], but *Hillmon* is different: cited as the basis of one of the hearsay exceptions codified in 1975 by the Federal Rules of Evidence, its facts parsed and studied by lawyers bent on persuading judges that its precedent should be viewed in one way or the other, it is a case that every student of evidence, every trial lawyer, and every judge knows and remembers. The state of mind exception, at least as it pertains to expressions of intention, rests on very little ground other than the authority of *Hillmon*; more than nearly any other rule of evidence, it owes its existence to a single decision.

The subject of the Court's opinion was the admissibility, over a hearsay objection, of a certain letter. Ostensibly written by a young man to his sweetheart back home, the letter is an object that a student of film theory might call the McGuffin.[6] *Mutual Life*

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[5] For example, many purport to consider the *res gestae* exception to the hearsay rule, a doctrine notorious for its vacuity. See cases collected in Morgan, *The Law of Evidence, 1941-45*, 59 HARV. L. REV. 481 (1946).

[6] A McGuffin, in a film or narrative, is a "thing . . . which appears to the characters and the audience to be of great significance but is actually only an excuse for the plot," or "a thing . . . which misleads the characters and the audience." THE NEW SHORTER OXFORD ENGLISH DICTIONARY (Lesley Brown, ed., 4th ed. 1993). Some credit Alfred Hitchcock with the invention of the term, and the use of the concept in many of his films. In a 1966 interview with Francois Truffaut, Hitchcock explained the origins of the idea with a story: Two Scots men are traveling on a train, and one asks the other "What's that package up there on the baggage rack? "O," says the other, 'that's a McGuffin." "What's a McGuffin?" "It's an apparatus for

Insurance Co. v. Hillmon held that this particular McGuffin was admissible, happily for the story that could not satisfactorily be told without it, and there is no denying that it is an altogether shapely and rewarding tale. But it will be my claim here that the story as conventionally understood is not true, and its McGuffin was not an authentic document at all, but a fake. I will argue that the narrative exigencies of the story it felt compelled to tell led the Court to create an ill-considered but remarkably resilient legal doctrine, and that the venerability and importance of this doctrine have led us to remember the events—the story— of the Hillmon case in a way that validates the Court's enterprise of rule invention, but cannot survive a closer inquiry into the historical record. Altogether, the Hillmon matter serves as a beautiful illustration of the influence that certain narrative imperatives may bring to bear on the creation of legal rules.

THE CORPSE AT THE CAMPGROUND

The Hillmon case was tried twice, in 1882 and 1885, to juries that were unable to decide on a unanimous verdict. It was a verdict for Sallie Hillmon in the third trial, in 1888, that eventuated in the famous Supreme Court decision of 1892.[7] The ultimate contested factual issue in all of the trials was the identity of a man who died at a campsite on Crooked Creek, near Medicine Lodge, Kansas, leaving behind a body whose demise far predated the availability of twentieth-century methods for the identification of biological material. Sallie Hillmon and her attorneys insisted that the corpse was her husband's, and there was evidence that this was the case, including identifications of the body (when it was fresher) by Sallie Hillmon and many of those who knew Hillmon when he was alive[8], and statements made on some occasions by Hillmon's traveling companion at the time, John H. Brown. In Brown's original account, as well as in his later pretrial deposition, he said he had shot Hillmon accidentally while unloading a firearm from a wagon while the two men were camped near the place called Crooked Creek.[9]

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trapping lions in the Scottish Highlands." "But there are no lions in the British Highlands." "Well, then, that's no McGuffin." *See* WIKIPEDIA: THE FREE ENCYCLOPEDIA, *at* http://en.wikipedia.org/wiki/Main_Page (last visited (date)).

[7] The case was also retried three times after the 1892 decision, resulting in two more hung juries, one more verdict for Mrs. Hillmon, and one more reversal of that victory by the Court, in 1903.

[8] *See* TOPEKA CAPITAL, Mar. 6, 1888, at 2 (John Eldridge, Sallie Hillmon); TOPEKA CAPITAL, Mar. 22, 1888, at 4 (Judge's summing up refers to several other witnesses).

[9] Brown's original account, given at an inquest, is reported in the LAWRENCE STANDARD, Apr. 10, 1879, at 1-2. For portions of Brown's pretrial deposition, which was taken over a period of weeks in

The insurance companies argued that the deceased was not Hillmon, whom they accused of absconding in the service of an insurance swindle, but an innocent victim, a man whom they claimed Hillmon and John H. Brown had lured to Crooked Creek for the precise purpose of killing him and leaving his body behind to be passed off as Hillmon's. There was some evidence that *this* was the case, including witnesses who swore the body (or a photograph of it) could not have been Hillmon,[10] and a written statement sworn to by John H. Brown on another occasion, in which he affirmed the companies' version, saying that the victim was an individual named "Joe" whom he and Hillmon had picked up in Wichita and persuaded to accompany them west.[11]

Other evidence adduced by the defendants in the various trials included testimony from several persons who identified the dead man as Frederick Adolph Walters, once a citizen of Ft. Madison, Iowa, and the betrothed of a Miss Alvina Kasten, also of Ft. Madison.[12] It was not disputed that Mr. Walters had left Ft. Madison in March of 1878 for the purpose of bettering his condition, and had traveled widely in the Midwest for a year or so. The defendant insurance companies claimed that Walters found himself in Wichita in March of 1879[13], and it is here that the McGuffin, or letter, comes into the story.

December of 1881 and January and February of 1882, see Transcript of Record, Supreme Court of the United States, The Mutual Life Insurance Co. of New York, The New York Life Insurance Company, and the Connecticut Mutual Life Insurance Company of Hartford, Connecticut (Consolidated), Plaintiffs in Error, vs. Sallie E. Hillmon, at 162, filed Oct. 8, 1888 [hereinafter 1888 Transcript]. A transcript of the entire deposition may be found in the record of the second appeal. Transcript of Record, Supreme Court of the United States, Conn. Mutual Life Insurance Co. v. S.H. Hillmon, No. 94 (1903), filed Oct. x, 1899, at 342 [hereinafter 1899 Transcript].

[10] TOPEKA DAILY COMMONWEALTH, Mar. 7, 1888, at 8; TOPEKA DAILY COMMONWEALTH, Mar. 8, 1888, at 8; TOPEKA DAILY COMMONWEALTH, Mar. 9, 1888, at 8; TOPEKA DAILY COMMONWEALTH, Mar. 13, 1888, at 8.

[11] Brown appeared as a witness only in the first trial, and thereafter became unavailable, so in the 1888 proceeding his statements in support of the plaintiff took the form of a transcript of his pretrial deposition, which he had given after returning to his original story about the accidental death of Hillmon. Those offered by the defendant companies, containing the "Joe" version of his account, appeared in the written affidavit Brown had signed at the urging of the companies' agents. *See* Aff., John H. Brown, 1888 transcript, *supra* note 9, at 163 [hereinafter Brown Affidavit].

[12] TOPEKA DAILY COMMONWEALTH, Mar. 14, 1888, at 3. These identifications were made from photographs taken of the corpse about a month after its demise.-- probably it was somewhat the worse for wear, having been exhumed, autopsied, displayed to the public, buried, and exhumed again during those weeks.

[13] TOPEKA CAPITAL, Mar. 22, 1888, at 4 (judge's summing-up).

Indeed it was claimed in the third trial that there had been two letters from Mr. Walters posted from Wichita to Ft. Madison in early March of 1879, one to Miss Kasten and the other to Mr. Walters' sister Elizabeth Rieffenach, although the Rieffenach letter was, in fact, never produced.[14] In the first two trials (as well as in the last three) the Kasten letter was received as an exhibit, supported by the pretrial deposition testimony of Miss Kasten about her receipt of it.[15] Mrs. Rieffenach, the sister of the missing man, claimed that the letter she had received from her brother could not be found, and in some of the trials her rather remarkably detailed testimony concerning its contents was allowed.[16] The contents of the two missives varied in a fashion one might expect considering the writer's relationships to the addressees, but according to the testimony and evidence each letter informed the recipient that the author was in Wichita but planned to leave that city soon with a "man by the name of Hillmon" (in the sister's account of her letter, "a certain Mr. Hillmon"). The letters described Hillmon as a sheep trader, and the fiancee's letter explained the writer's decision to accompany this stranger, rather than follow many other young men of the time west to the Colorado mines in search of gold, with the revelation that Hillmon had "promised me more wages than I could make at anything else." Each of the women described her respective letter as the last communication she had ever enjoyed from Mr. Walters.[17]

These letters were obviously useful to the defense, both in suggesting an alternate identity for the corpse and in corroborating Brown's statement that he and Hillmon had lured a victim to accompany them on their journey. It's difficult for any reader of the Court's 1892 decision to resist the conviction aroused by Mr. Justice Gray's description of the letters-- that the Crooked Creek corpse belonged to Frederick Adolph Walters. John Brown's conflicting accounts might cancel one another out and leave one in doubt, as might various witnesses' identifications of the corpse as Hillmon or Walters, but the letters are a decisive tiebreaker. It's nearly impossible to regard as coincidence that Frederick Adolph Walters, shortly before the death at the campground, encountered a man named Hillmon in Wichita, left that town with him, and was never heard from again; murder is the obvious explanation.

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14 1888 Transcript, *supra* note 9, at 189 (Rieffenach deposition), 190-91 (Kasten deposition).

15 LEAVENWORTH TIMES, June 28, 1882, at 1 (she is identified as Elvira D. Caston)

16 *See, e.g.*, LEAVENWORTH TIMES, June 19, 1885, at 1 (second trial), in which it is reported that "Mrs. Elizabeth Reivnoeck," sister of the missing man, "repeated this letter almost verbatim." The Supreme Court's 1992 opinion reproduces Mrs. Rieffenach's recitation of the letter. Mut. Life Ins. Co. of New York v. Hillmon, 145 U.S. 285, 288 (1892).

17 1888 Transcript, *supra* note 9, at 190.

Still, the first two juries were unconvinced, at least enough of the jurors to produce two mistrials. The third jury, however, pondered a different mix of evidence: in that trial Judge Shiras of the Circuit Court in Topeka excluded the Kasten letter and the testimony of Elizabeth Rieffenach about the one she said she had received, accepting the arguments of Mrs. Hillmon's lawyers that they were inadmissible hearsay.[18] The jury returned a verdict for Mrs. Hillmon, and the insurance companies appealed. The Supreme Court's decision overturning that verdict contains its famous language about what has become known as the "state of mind" exception to the hearsay rule.

THE BIRTH OF THE STATE OF MIND EXCEPTION

The language from the Court's opinion that has been remembered (and codified) is this:

> A man's state of mind or feeling can only be manifested to others by countenance, attitude, or gesture, or by sounds or words, spoken or written. The nature of the fact to be proved is the same, and evidence of its proper tokens is equally competent to prove it, whether expressed by aspect or conduct, by voice or pen. When the intention to be proved is important only as qualifying an act, its connection with that act must be shown, in order to warrant the admission of declarations of the intention. But 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.
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> The existence of a particular intention in a certain person at a certain time being a material fact to be proved, evidence that he expressed that intention at that time is as direct evidence of the fact as his own testimony that he then had that intention would be. After his death these can hardly be any other way of proving it, and while he is still alive his own memory of his state of mind at a former time is no more likely to be clear and true than a bystander's recollection of what he then said, and is less trustworthy than letters written by him at the very time and under circumstances precluding a suspicion of misrepresentation.

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[18] 1888 Transcript, *supra* note 9, at 190 (Kasten letter), 189-90 (Rieffenach testimony).

> The letters in question were competent not as narratives of facts communicated to the writer by others, nor yet as proof that he actually went away from Wichita, but as evidence that, shortly before the time when other evidence tended to show that he went away, he had the intention of going, and of going with Hillmon, which made it more probable both that he did go and that he went with Hillmon than if there had been no proof of such intention. In view of the mass of conflicting testimony introduced upon the question whether it was the body of Walters that was found in Hillmon's camp, this evidence might properly influence the jury in determining that question.
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> The rule applicable to this case has been thus stated by this court: 'Wherever the bodily or mental feelings of an individual are material to be proved, the usual expressions of such feelings are original and competent evidence. Those expressions are the natural reflexes of what it might be impossible to show by other testimony. If there be such other testimony, this may be necessary to set the facts thus developed in their true light, and to give them their proper effect. As independent, explanatory, or corroborative evidence it is often indispensable to the due administration of justice. Such declarations are regarded as verbal acts, and are as competent as any other testimony, when relevant to the issue. Their truth or falsity is an inquiry for the jury."[19]

With this reasoning the Court reversed the trial judge and sent the case back to be tried anew, directing that the evidence of the two letters be allowed. The Court's language is scarcely transparent, however, especially to the eye of a reader a century later. What does the Court intend when it instructs that the letters were not competent "as proof that he actually went away from Wichita" but were admissible as evidence that "he had the intention of going, and of going with Hillmon, which made it more probable both that he did go and that he went with Hillmon than if there had been no proof of such intention"? What is the difference between the disclaimed purpose and the approved

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[19] *Mut. Life Ins. Co. of New York*, 145 U.S, at 295-96, *quoting* Ins. Co. v. Mosley, 8 Wall. 397, 404-05 (1869).

one?[20]

And what does the Court mean when it suggests that expressions of intention are (at least sometimes) "verbal acts"? Today we reserve that description for utterances the saying of which *per se* transforms the legal situation of the speaker and/or another-- for example words of gift, of contract, or of consent.[21] It is characteristic of such locutions that they effect this transformation whether or not they are "true"; they are not actually hearsay at all, because not offered to prove the truth of some matter asserted.[22] Descriptions of one's intention to go to a certain place are not, ordinarily, in that category—certainly not when offered solely as proof that the person did go to that place. Such declarations would be probative only if true—would be, that is, hearsay. The Court spreads this confusion around a bit by borrowing from an earlier case the proposition that the "truth or falsity" of statements like those in the letters is "an inquiry for the jury."[23] But the rule excluding hearsay, which the Court does not purport to repeal in this case or any other, rests precisely on the notion that the truth or falsity of some extrajudicial utterances is too challenging for the determination of a jury that has been deprived of a chance to observe the declarant and hear him cross-examined under oath.

There is yet another difficulty of the Court's opinion, which has proved to be consequential in many later cases.[24] If, as the Court holds, the letters were properly admissible to prove that Walters intended to leave Wichita with Hillmon (and apparently as well for their tendency to prove that he *did* leave Wichita with Hillmon), surely if admitted the letters' effect on the jury could not be confined to proving those propositions. If accepted as evidence of the truth of the propositions put forward by the letter-writer, they argued just as surely that Hillmon had approached Walters in Wichita, had promised him extraordinarily (perhaps suspiciously) good wages if he would accompany Hillmon, and had intended to take Walters along when he and Brown decamped. None of these latter propositions concerns Walters' intentions; instead they describe either past events that the writer is recalling as he writes ("I met Hillmon and he

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[20] Perhaps what is intended is a distinction between rebuttable evidence and incontrovertible proof. If so, this differential usage is not one that the Court pursued consistently in other opinions.

[21] There is a hint of this notion in the Court's observation about intentions "important only as qualifying an act." Words of gift, for example, must be accompanied by delivery to effectuate the gift.

[22] *See* CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE § 8.16 (3d ed. 2004).

[23] *Mut. Life Ins. Co. of New York*, 145 U.S. at 296, *quoting* Ins. Co. v. Mosley, 8 Wall. 397, 404-05 (1869).

[24] *See, e.g.*, United States v. Pheaster, 544 F.2d 353 (9th Cir. 1976); United States v. Annunziato, 293 F.2d 373 (2d Cir. 1961).

promised me good wages"), or the perceived intentions of another not the writer ("Hillmon intends to take me with him when he leaves Wichita").

The Court, although it does not address this criticism explicitly, does seem to anticipate it by citing at length the precedent *Hunter v. State*, a fourteen-year-old New Jersey decision on an appeal from a murder conviction. In *Hunter*, the disputed evidence was a pair of declarations by one Armstrong that he was "going with Hunter to Camden on business." He was found dead a day later, and Hunter was charged with murder. The New Jersey Supreme Court defended the admissibility of Armstrong's statements with following argument:

> In the ordinary course of things, it was the usual information that a man about leaving home would communicate, for the convenience of his family, the information of his friends, or the regulation of his business. At the time it was given, such declarations could, in the nature of things, mean harm to no one. He who uttered them was bent on no expedition of mischief or wrong, and the attitude of affairs at the time entirely explodes the idea that such utterances were intended to serve any purpose but that for which they were obviously designed. If it be said that such notice of an intention of leaving home could have been given without introducing in it the name of Mr. Hunter, the obvious answer to the suggestion, I think, is that a reference to the companion who is to accompany the person leaving is as natural a part of the transaction as is any other incident or quality of it. If it is legitimate to show by a man's own declarations that he left his home to be gone a week, or for a certain destination, which seems incontestable, why may it not be proved in the same way that a designated person was to bear him company?[25]

As a precedent, *Hunter* does justify the broad use of a declaration of intention, but it is an odd choice for the Court, which was under no compulsion to promote this New Jersey decision into a determinant of federal common law. Its reasoning is at best unpersuasive: it gives no authority for its "incontestable" premise that a man's declarations "that he left his home to be gone a week, or for a certain destination" qualify for a hearsay exception, and apart from a state of mind exception, none would seem to apply. Its genial air of nineteenth century doubt that a respectable gentleman would utter

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[25] Hunter v. State, 11 Vroom 495, 538 (N.J. 1878).

a falsehood about his own affairs has a charm to it, but not much force. Nevertheless the *Hillmon* decision silently endorsed *Hunter*'s holding and stamped it with the Court's powerful imprimatur. The expansive version of the state of mind exception —that is, an exception that encompasses statements about whom one's assignation was with, or who one's companion would be— has persisted remarkably well through the ensuing one hundred twelve years, and it has done so because of *Hillmon*.[26]

What could account for the Court's unconvincing reasoning and doubtful rulemaking in the Hillmon case? Even a modest version of the hearsay exception for the

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[26] A case in which these competing interpretations of the rule of Hillmon are most consequentially put to the test is *United States v. Pheaster*, 544 F.2d 353 (9th Cir. 1976), *cert. denied*, 429 U.S. 1099 (1977). After the disappearance of sixteen-year-old Larry Adell, both Hugh MacLeod Pheaster and Angelo Inciso were convicted of kidnapping, conspiracy to kidnap, and the mailing of ransom demands and extortionate threats. Of Pheaster's involvement in Adell's disappearance there seems to be little doubt, although there was some evidence that Adell, a young man with a drug problem and a wealthy father, may either have participated in his own disappearance or decided to stay away from home even after he was free to return. There was much less evidence, however, against Angelo Inciso; the main item was a statement made by Adell to a group of his friends in a restaurant moments before he vanished, to the effect that he was going out into the parking lot to obtain some drugs from "Angelo"—a statement admitted under the "state of mind" exception. The court affirms Inciso's conviction, noting that the Walters letters crucial to the *Hillmon* holding had the same tendency to prove not only the speaker's intentions, but those of someone else and the nature of a past conversation between the two.

For other federal cases taking essentially this view of *Hillmon*, see United States v. Sayetsitty, 107 F.3d 1045 (9th Cir. 1997); United States v. Donley, 878 F.2d 735 (3d Cir. 1989); Terrovona v. Kincheloe, 852 F.2d 424 (9th Cir. 1988); United States v. Washington Water Power Co., 793 F.2d 1079 (9th Cir. 1986); United States v. Moore, 571 F.2d 76 (2d Cir. 1978); United States v. Houlinhan, 871 F. Supp. 1495 (D. Mass. 1994); Int'l Wood Processors v. Power Dry, Inc., 593 F. Supp. 710 (D.S.C. 1984). Still other federal cases accept the broader view of *Hillmon* but recommend the use of a limiting instruction to confine the hearsay's probative value to the speaker's intentions and their likely realization. *See* United States v. Astorga–Torres, 682 F.2d 1331 (9th Cir. 1982); Brown v. Tard, 552 F. Supp. 1341 (D.N.J. 1982); Baughman v. Cooper-Jarrett, Inc, 530 F.2d 529 (3d Cir. 1976); United States v. Day, 591 F.2d 861 (D.C. Cir. 1978). The Fourth and Second Circuits have trod the middle ground of allowing statement of a declarant's intention to prove the intentions or acts of another only if there is independent corroborating evidence of the latter. *See* United States v. Nersesian, 824 F.2d 1294 (2d Cir. 1987); United States v. Jenkins, 579 F.2d 840 (4th Cir. 1978). In a small number of cases, courts have declined to admit a statement of intention that might be taken by the jury as proof of the acts or intentions of a non-declarant. *See* United States v. Hernandez, 176 F.3d 719 (3d Cir. 1999); Johnson v. Chrans, 844 F.2d 482 (7th Cir. 1988) (applying Illinois law); United States v. York, 1987 WL 5938 (N.D. Ill. 1987). New York state courts interpreting that jurisdiction's state of mind exception have imposed four limitations, including corroboration and declarant unavailability, on the admissibility of a *Hillmon*-type statement. *See* People v. James, 717 N.E.2d 1052 (N.Y. 1999).

expressed intentions of a hearsay declarant, that is a version allowing expressions of intention to prove only the genuineness of the intention, does not rest on any plausible theory of reliability; it lacks any justification in the sort of armchair psychology that prompted the invention of, say, the exceptions for dying declarations[27] or statements against interest.[28] On the contrary, it would seem to be easier to lie about one's intentions than about nearly anything else, since the likelihood of being caught out in a lie is small—any discovery of later acts incompatible with the expressed intention can always be explained by the simple phrase "I changed my mind." The more robust version of the exception endorsed by the *Hillmon* court is even less grounded in reliability, since allowing an expression of intention as evidence that the intention was accomplished disregards the folk wisdom that there is "many a slip 'twixt cup and lip."[29]

One could ascribe the Court's curious misstep here to generalized hostility toward Sallie Hillmon and her suit, and there is some evidence that at least one member of the Court entertained this sentiment.[30] But the Court did not need to reach out to invent the state of mind exception to send Mrs. Hillmon's case back for retrial; it had already decided, before addressing the matter of the Walters letters, that Judge Shiras erred reversibly by granting the insurance company defendants too few peremptory challenges.[31] Indeed, the dispute about the letters seems to have been a secondary consideration in the minds of the defendants' lawyers. The companies' principal argument before the Court concerned the peremptory challenge question, and they placed the matter of the letters far down their list of assigned errors.[32] Nevertheless, after disposing rather briskly of the challenge issue, the Court observed that "[t]here is . . . one question of evidence so important, so fully argued at the bar, and so likely to arise upon another trial, that it is proper to express an opinion on it,"[33] and then proceeded to

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27 *See* FED. R. EVID. 804(b)(2) advisory committee's note.

28 *See* FED. R. EVID. 804(b)(3) advisory committee's note.

29 Bartlett's Familiar Quotations describes this admonition as "an ancient proverb, sometimes attributed to Homer." JOHN BARTLETT, BARTLETT'S FAMILIAR QUOTATIONS 235 n.1 (16th ed. 1992).

30 See *infra* note __.

31 Since the three cases had been consolidated for trial, Judge Shiras had allocated the statutory three challenges to the defendants jointly, and had denied them any further strikes after each had excused one juror. The statute authorized this method of allocating peremptory challenges in cases "where there are several defendants," but the Court held that it was improper to employ it when separate cases against different defendants had been consolidated. Mut. Life Ins. Co. of New York v. Hillmon, 145 U.S. 285, 294 (1892).

32 *See* Petition in Error, 1888 Transcript, *supra* note 9, at 90-101.

33 *Mut. Life Ins. Co. of New York*, 145 U.S. at 294.

consider the trial court's decision to exclude evidence of the Walters letters. There were many other points of error assigned by the insurance companies in their appeal, not a few of which were equally likely to "arise upon another trial," but it was the hearsay question that the Court chose to address.

The Court's general pro-business orientation during the 1880's and 1890's might be suspected of playing a role in the Hillmon decision. During those years, a series of decisions favoring the railroads had the general effect of insulating those powerful businesses from state regulation, and thus perpetuating the advantages they enjoyed in the political struggle arising from the contrast between Midwestern farmers' debt loads and the profitability of the railroads.[34] Railroads were not the only beneficiaries of the Court's predilections; in 1895 it invalidated the income tax[35] and absolved the American Sugar Refining Company of any antitrust liability despite that corporation's success in gaining complete control of ninety-eight percent of the sugar output of the United States.[36] Even so, it does not seem likely that the Hillmon decision arose entirely from the Court's pro-capitalist impulse. The creation of a new exception to the hearsay rule was not *ex ante* a victory for business, except in this one case; in the future, this novel doctrine was as likely to be employed by an individual litigant, or the government, as by a business organization.

If puzzled, we may be enlightened a bit by one available source of direct information about the Court's thinking in the Hillmon matter. Justice Horace Gray, who wrote the opinion of the Court, had at the time a remarkably competent secretary (today we would say law clerk): Ezra Ripley Thayer, later to become Dean of the Harvard Law School and a noted evidence teacher and scholar. In Dean Thayer's teaching notes he recounts that, contrary to the Court's description of the matter as "fully argued at the bar," the case for admitting the hearsay letters was "miserably argued."[37] The companies' counsel, he reports, put forward "practically no ground" except course of business—that is, the business records exception. Justice Gray's opinion also notes that the insurance companies' counsel had rested their argument for the admissibility of the letters chiefly on this exception, one he dismisses immediately as profoundly unsuited to the Walters correspondence. According to Thayer, the Court in conference nevertheless voted to

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[34] Missouri Pac. Ry. Co. v. Nebraska, 164 U.S. 403 (1896); Chicago, Milwaukee, & St. Paul Ry. Co. v. Minnesota, 134 U.S. 418 (1890); Texas & Pac. Ry. Co. v. Kirk, 115 U.S. 1 (1885).

[35] Pollock v. Farmer's Loan Co., 158 U.S. 601 (1895).

[36] United States v. E.C. Knight Co., 156 U.S. 1 (1895).

[37] Thayer's notes are quoted in John MacArthur Maguire, *The Hillmon Case—Thirty Three Years After*, 38 HARV. L. REV. 709 (1925). Professor Maguire does not explain how he happened to have access to Thayer's teaching notes.

overturn the trial court's ruling on "general principles."[38] In any event, Thayer noted that Justice Gray, assigned to write the opinion, was in "dense darkness" until he (Thayer) "fed him with matter obtained with J.B.T."[39]—that is, from James Bradley Thayer, the young secretary's father, himself a Harvard law professor and scholar of the law of evidence.

What an imbroglio! At the time the Hillmon case was argued, it seems the Supreme Court building housed a Court that would object to the exclusion of the letters on principles too general to be articulated but too powerful to be omitted from its holding, a Justice assigned to author an opinion but more than willing to leave the fine points to his clerk, and a young scholar so eager to leave his mark on the law of evidence that he would seek guidance in *ex parte* correspondence with his famous father, incorporate their invention into the Court's opinion, and later boast that it was his idea, and not the clueless Justice Gray's, to cobble together this new exception to the hearsay rule.

And yet these converging antagonists to Sallie Hillmon's victory, who suffered from no apparent motives more nefarious than ordinary ambition or professional fatigue, cannot altogether account for the invention of the state of mind exception. There is something more powerful at work: the urge to complete a just and intelligible narrative. One proponent of narrative legal theory proposes the maxim *Da mihi facta, abo tibi jus* ("give me the facts, then I will give you the law"),[40] and several scholars have remarked the inseparable character of the activities of law-making and fact-finding (or storytelling).[41] Persuaded by these accounts, I believe that narrative exigencies, rather

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[38] It is obscure what these general principles may have been, but a cryptic comment in Thayer's notes here suggests that in conference one member, possibly Justice Henry B. Brown, remarked that the case seemed to be one of "graveyard insurance." *Id*. at 711, n. 11. The meaning of this dismissive characterization is murky, but at about the time of the *Hillmon* decision it seems to have found popular use to describe various insurance frauds. Investigators of the time employed the term to characterize a common scheme in which an individual or syndicate purchased insurance on the life of an ill or doddering soul, then encouraged the insured to indulge his unhealthy habits or take risks with his life; sometimes the scheme went so far as to encompass murder. *See* J.B. LEWIS AND C.C. BOMBAUGH, STRATAGEMS AND CONSPIRACIES TO DEFRAUD LIFE INSURANCE COMPANIES: AN AUTHENTIC RECORD OF REMARKABLE CASES 53 (1896) (describing the practice as a "graveyard epidemic") [hereinafter REMARKABLE STRATAGEMS]. For more about this unusual book, see infra note ___ & accompanying text.

[39] Maguire, *supra* note __, at 711-712.

[40] Jan M. van Dunné, *Normative and Narrative Coherence in Legal Decision Making*, in LAW AND LEGAL INTERPRETATION 409 (Fernando Atria & D. Neil MacCormick eds., 2003).

[41] *See, e.g.*, *id*.; Neil MacCormick, *Coherence in Legal Justification*, in THEORIE DER NORMAN (Werner Krawietz ed., 1984). *See also* Robin West, *Jurisprudence as Narrative: An Aesthetic Analysis of Modern Legal Theory*, 60 N.Y.U. L. REV. 145, 159 (1985); RICHARD WEISBERG, POETHICS AND OTHER

than any policy views regarding the advisability of a hearsay exception for statements of intention, drove the Court's 1892 decision in the Hillmon case.

It is impossible to come away from an encounter with the Supreme Court's opinion without the conviction that the Court believed—indeed any reader must believe—that exclusion of the evidence concerning Walters' letters would have disserved the cause of truth. The letters, although barred from the jurors' notice, were part of the appellate record, and minutely described in the Court's opinion. Once a reader of the opinion knows of the letters, it seems offensive to the idea of justice that the law would countenance a retrial in which the verdict would rest on the jurors' ignorance of evidence that seemed to prove, with near certainty, that the corpse belonged to Frederick Adolph Walters. The story, the true story, had to be the one that Brown told in his affidavit: Hillmon persuaded the credulous "Joe" (obviously, from the evidence of the letters, Frederick Adolph Walters) to accompany them on their journey, and killed him at Crooked Creek, leaving his body to be taken for Hillmon's. If the reader is left with this narrative anxiety about the availability of the indispensable McGuffin, can the Court have been unmoved by the corresponding need to participate in the creation of an acceptable story—a story in which truth and justice are served rather than one in which they are mocked?

There is even a narrative tradition in which the story as it was understood by the Court—that is, the story of Hillmon's criminality and Walters' victimization— would fall: that of the romance. The appeal of this variety of narrative has been persuasively identified by Robin West with natural law jurisprudence,[42] a system of thought that would have informed the jurisprudential inclinations of many members of the Supreme Court in 1892.[43] West relies on the analytic categories explicated by Northrop Frye, who instructs that in romance, "subtlety and complexity are not much favored. Characters tend to be either for or against the quest. If they assist it they are idealized as gallant or pure; if they obstruct it they are characterized as villainous or cowardly."[44] Frye also suggests that in romance, "[t]he enemy is associated with winter, darkness, confusion,

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STRATEGIES OF LAW AND LITERATURE (1992); Jonathan Yovell, *Invisible Precedents: On the Many Lives of Legal Stories Through Law and Popular Culture*, 50 EMORY L.J. 1265 (2001).

42 *See* West, *supra* note__, at 159.

43 *See* BRENDAN F. BROWN, THE NATURAL LAW READER 113 (1960).

44 NORTHROP FRYE, ANATOMY OF CRITICISM 195 (1957), *quoted in* West, *supra* note __, at n. 48.

sterility, moribund life, and old age, and the hero with spring, dawn, order, fertility, vigor, and youth."[45]

On the dimension of comedy and tragedy, the Court's implicit narrative tends toward the comic, which according to Frye "celebrates the virtue of the dominant social group" and "protects the group against assault from outsiders."[46] Of course, insurance companies are not very plausible romantic heroes, which may explain why the defendants put so much stock in the Walters theory: a young adventurer seeking his fortune away from home while trying to maintain ties to his betrothed and family can be portrayed as a perfect gentle knight. The resulting narrative is nearly irresistible, especially to a Court already inclined toward natural law.

The Court that decided *Hillmon* was not interpreting a statute or a Constitution; it was unconstrained by any text whatsoever. The rules of evidence were commonly invented by judges, case by case, and at the time there were no critics suggesting that this enterprise partook of "judicial activism" or any other questionable philosophy. Inattentive though they may have been to the details of their decision, the Justices must have believed they were doing justice by inventing a hearsay exception for statements describing the intentions of the speaker. For truth to prevail (and for Hillmon's swindle to be thwarted), the letters had to be part of the story; for the letters to be part of the story, they had to be admissible; for the letters (unquestionably hearsay) to be admissible, some exception to the hearsay rule had to be found; if one could not be found, it must be invented. *Da mihi facta, abo tibi jus.*

HILLMON'S ICONIC PERSISTENCE

More than judicial narrative anxiety is required, however, to explain the veneration that the Hillmon doctrine has encountered over the ensuing years, for not all nineteenth century decisions concerning the law of evidence have so impressively endured, nor been so generously interpreted. Yet here as well, narrative theory has a contribution to make. The Hillmon story, with its familiar motifs (populism, corporate

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[45] FRYE, *supra* note __, at 187-88 (1957), *quoted in* West, supra note __, at 48. These tropes recur continually in the narratives urged by the defendants on the serial juries that heard the Hillmon case—the youth and purity of their surrogate Walters as contrasted with the age, experience, and corruption of Hillmon. This was so especially concerning teeth and scars: Hillmon's teeth were often described (by defendants' witnesses) as rotten, his body as scarred.

[46] West, *supra* note__, at 159.

greed, wily frontier drifters, hardscrabble lives made bearable by the possibility of windfall wealth, the sudden production of a document to end disputes among contesting eyewitnesses), is a candidate for the status Jonathan Yovell has called "invisible precedent."[47] As with Yovell's example, the murder of a fellow gambler by the brutal Englishman Thurtell, the narrative itself is so engaging and so resonant that the mere invocation of it enhances the prestige of subsequent productions. In literature or other cultural environments, this process represents the ordinary progress of culture. But if the later artifacts are legal productions—that is, decisions or rules—the citation of the original may succeed in substituting the narrative virtues of the source for reasoned analysis. Thus do good stories become law, or pieces of law—although the features that make the stories good ones may not necessarily survive the transformation, and excellent narratives may metamorphize into bad law.

The role the Hillmon case played in the formation of one of the Federal Rules of Evidence exemplifies this process beautifully. Although later commentators raised doubts about the rule of *Hillmon*, especially the expansive version,[48] its holding was incorporated eighty-three years after its announcement into Rule 803(3). That rule, demarking an exception to the hearsay rule, reads (in pertinent part): "*The following are not excluded by the hearsay rule, even though the declarant is available as a witness: . . . . A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed . . . .*" By itself (especially in light of the qualification of the last phrase) this rule might be read to exclude such materials as the Walters letters, or at least to require strict confinement of their use to proving the intentions of the declarant, and prohibit their employment to prove any past acts, or anyone else's intentions. But it has not been on the whole been read that way, in part because the influential Advisory Committee's Note to that rule states: "The rule of *Mutual Life Insurance Co. v. Hillmon*, . . ., allowing evidence of intention as tending to prove the doing of the act intended is, *of course*, left undisturbed."[49]

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47 Yovell, *supra* note __.

48 *See* Maguire, *supra* note __; Eustace Seligman, *An Exception to the Hearsay Rule*, 26 HARV L. REV. 146 (1913); James W. Payne, Jr., *The Hillmon Case—An Old Problem Revisited*, 41 VA. L. REV. 1011 (1955).

49 FED. R. EVID. 803(3) advisory committee's note (emphasis added). By contrast, the House Judiciary Committee states in its report on this exception that although it approves the text of the rule, it "intends that the Rule be construed to limit the doctrine of Mutual Life Insurance Co. v. Hillmon . . . so as to render

Note the emphatic *of course* deployed in the midst of the comment. Although other Advisory Committee Notes are thoughtful, analytical, occasionally critical—even of Supreme Court precedents[50]-- in this Note the mere mention, the invocation, of *Hillmon* begins and ends the discussion. The case has become iconic, and thus unquestionable. Moreover, the cause of narrative coherence requires that its rule must be construed to sustain the story of deception and conspiracy that the case is understood to tell. The letters must, in this cause, be admissible in all of their aspects and implications—they must illuminate not only what Walters intended and did, but also what Hillmon intended and did. Unless the letters are allowed this explanatory force, the story is missing essential ingredients that are required to satisfy our curiosity and our hunger for a just narrative.

Since the Hillmon decision itself seemed to permit all uses of the Walters letters, it is with some justification that most judges[51] have accepted the *Hillmon* decision to mean that a declaration of the speaker's intentions is admissible over a hearsay objection, even if it includes assertions about past conduct of the speaker or another, and even if it contains a claim about the intentions of someone else. This doctrinal result grows largely out of reverence for the rule of *Hillmon*-- and the circumstance that the disputed evidence in *Hillmon* itself described not only the intentions of the declarant Walters, but that declarant's claims about the past acts and intentions of another, Hillmon.

But suppose a case were to be made for the truth of quite a different narrative, one in which the corpse belongs to Hillmon after all? In particular, suppose that the story's McGuffins, the famous letters, were fakes, or (in the case of the Rieffenach letter) never existed? The possibility of any such plausible narrative may seem small given all of the foregoing discussion, but that is in part because the authenticity of the Walters letters is taken for granted; the quarrel over their admissibility as hearsay seems to have exhausted any skepticism about their provenance on the part of Mrs. Hillmon's lawyers.

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statements of intent by a declarant admissible only to prove his future conduct, not the future conduct of another person." FED. R. EVID. 803(3) Report of the House Committee on the Judiciary. Whether because this limiting intention was not echoed by the other chamber, or because it is unclear how it might be made operational, this paragraph of the Report has not had much influence on the courts. *See supra* note ___.

[50] In the advisory committee's note after FED. R. EVID. 804(4), the Committee rejected the rule of *Donnelly v. United States*, 228 U.S. 243 (1913) (statement against penal interest is not an exception to the hearsay rule, even if declarant is unavailable). See also the nuanced consideration of *Palmer v. Hoffman*, 318 U.S. 109 (1943) in the advisory committee's note to FED. R. EVID. 803(6), and of *United States v. Dumas*, 149 U.S. 278 (1893) in the note to FED. R. EVID. 803(8).

[51] *See supra* note __.

It is also in part because partisans of the defendants have played a suspiciously large role in constructing the Hillmon story in historical memory.

THE SOURCES OF OUR UNDERSTANDING

Most persons familiar with the Hillmon case take their understanding of it from a few sources: the Supreme Court's opinion, a noted and erudite 1925 Harvard Law Review article by John MacArthur Maguire entitled *The Hillmon Case: Thirty-Three Years After*[52]; and a lengthy account of the case found in the 1913 edition of Dean Wigmore's famous treatise on the law of evidence, *The Principles of Judicial Proof*.[53] Those more historically inclined might search out an article by historian Brooks W. Maccracken, published in *American Heritage* magazine in 1968.[54] Although the Maguire article is somewhat critical of the apparent breadth of the Hillmon doctrine, in none of these accounts would the reader find much to disturb her impression that the exclusion of the Walters letters would have been a hindrance to discovering the true identity of the corpse at Crooked Creek. Lovers of truth, and those attached to the idea that the rules of evidence on the whole promote its realization, will find little to disturb them in their consideration of the *Hillmon* case if it rests on these sources.

But these accounts, especially the Wigmore excerpt, are subject to a certain amount of impeachment when examined critically and compared with other, more contemporaneous, documents. Maccracken, author of the engaging *American Heritage* article, confesses that his "principal authority" was a report prepared by the Kansas State Superintendent of Insurance, which is the same account republished in the Wigmore treatise.[55] This confession is corroborated by observing a number of instances where, despite conflicts in the evidence, the historian adopts the report's language or conclusions, sometimes nearly verbatim.[56] Although Maccracken acknowledges that the superintendent who authored the report was "of counsel for the insurance companies in the second trial," he does not seem to consider that this circumstance might have affected

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52 *See* Maguire, *supra* note __.

53 Annual Report of the Kansas State Superintendent of Insurance, *reproduced in* JOHN H. WIGMORE, THE PRINCIPLES OF JUDICIAL PROOF 856-896 (1913) [hereinafter Annual Report].

54 Brooks W. Maccracken, *The Case of the Anonymous Corpse*, XIX AMERICAN HERITAGE 50 (June 1968).

55 *Id*. at 75.

56 For two striking instances of concordance see notes __-__ *infra* & accompanying text.

the reliability of the account[57], which was written after the third trial had resulted in a verdict for Mrs. Hillmon but before the Supreme Court had rendered its decision.[58]

In fact the Superintendent of Insurance, a lawyer and businessman named Charles Gleed, discloses without apparent embarrassment in his Report that he was attorney of record for the defendant insurance companies in both the second and third trials of the *Hillmon* case.[59] Newspaper accounts and court records confirm that he and his firm continued to represent one of the insurance companies for the next decade, through the last trial. Gleed was also a journalist who claims to have written many of the contemporaneous newspaper accounts of the inquest and the first trial.[60] He practically made a career of debunking Mrs. Hillmon's claim, and yet his account has become the principal authority for what we now remember of, and how we think about, the Hillmon case.

This report that casts such a long shadow, the "Annual Report of the Kansas State Superintendent of Insurance," is a remarkable document. It was published about a month after the third trial produced a verdict for Mrs. Hillmon, so its preparation must have begun much earlier, during or even before that trial. On the occasion of the report's release, the Superintendent still represented the defendants, whose motion for new trial was pending. (In it he predicts, or threatens, that in the event the motion should be unsuccessful, the United States Supreme Court will be petitioned for review.) The circumstance that a man engaged in the public job of Superintendent of Insurance was free, during his term of office, to represent at a month-long trial three of the insurance companies that he was charged with regulating makes a rather stunning instance of what we would today call "regulatory capture."

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[57] Maccracken is not alone in harboring little skepticism of this report or its source. A British scholar who investigated the case opines that "no impartial reader can fail to be persuaded by the account of the facts retailed by Wigmore that the body presented was not that of Hillmon, but that of one Walters." Colin Tapper, *Hillmon Rediscovered and Lord St. Leonards Resurrected*, 106 L.Q.REV. 441, 459-60 (1990). Professor Tapper concedes that Wigmore's account was "taken from a report by a Kansas State Insurance Commissioner who . . . admittedly [represented] the defendants," but credits the author as "meticulous in separating fact from opinion." *Id.* at n. 72. Wigmore's account is in fact nothing but a verbatim replication of the Superintendent's Report.

[58] Wigmore gives the date of the report as 1887, but this cannot be correct, as the report says on its first page, "The cases are now (April 1888) in the Circuit Court pending the argument of a motion for new trial. If this motion is overruled, an appeal will probably be taken to the United States Supreme Court." (parenthetical material in original). Annual Report, *supra* note __, at 856-896.

[59] *Id*. at 856 (Gleed lists himself as attorney for defendants on both second and third trials); *see also id.* at 884-87 (Gleed quotes at length from his own closing argument).

[60] See *infra* text accompanying note__.

Thus the canonical sources of our understanding of this influential and durable decision, and the narrative it encloses, are unacceptably touched by the partisanship of a man who, despite his lengthy paid advocacy for one of the litigants, managed to make himself the chief authority on how the case should be remembered.[61] This considered, a bit of retrospective investigation is in order, and the most instructive information about the Hillmon case is to be found in contemporaneous newspaper accounts.

THE NEWSPAPERS AND THE HILLMON CASE

Any appreciation of the circumstances prevailing during the six trials of Mrs. Hillmon's lawsuit must take account of the part played by the newspapers that reported on them. The Hillmon case was a sensation, and the Kansas press of that time was neither restrained nor what we would today call "objective" in its coverage.[62] But this is not to say that newspaper accounts about trials were indifferent to facts. Indeed, the daily stories in many papers resembled transcripts, with minute, almost question-and-answer, reportage of the testimony. Almost all of the newspaper stories employed this near-transcription method, and these close accounts of testimony comprised the bulk of any paper's coverage of a trial. Comparison of accounts of a day at trial as reported by two different newspapers often reveal verbatim correspondence between their accounts of the witness testimony, suggesting that a gift for stenographic recording was part of the newspaper reporter's arsenal.

Stories often began with recapitulations of earlier days' testimony, and these introductions offered the reporter an opportunity for summary, analysis, and opinion. Although newspapers published in the city where a trial was taking place sometimes used surprising circumspection in the expression of opinion from the time the jury was empanelled until it retired to deliberate, for most papers most of time partisanship was the order of the day. Some of the papers that reported the Hillmon trials were obvious

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[61] Wigmore acknowledges the "courtesy" of Mr. Gleed in supplying a typewritten copy of the Superintendent's Report, seemingly to facilitate its inclusion in the Dean's great treatise.

[62] See KENNETH S. DAVIS, KANSAS: A BICENTENNIAL HISTORY 130-31 (1976)(" . . . in [no other state] has the press played so active, so decisive a historical role; and in none other has the press been as intensely partisan, violently controversial, and ruthlessly competitive. In this respect the early Kansas press resembled somewhat that of France: a Kansas newspaper was almost invariably the organ of a strictly defined political party or (more often) party faction, or was the crusading spokesman of a cause (this sometimes provided its sole *raison d'etre*), or was the propagandist for some special economic interest, or was a combination of these; and its stand or point of view on these matters was as clearly evident in its news columns, which were shamelessly "slanted" or "colored," as in its frankly labeled editorials.")

Hillmon partisans, and some (especially the *Leavenworth Times*) obvious allies of the insurance companies. None of a newspaper's readers would have found this shocking or even unusual.

But it is not only as illustrations of the community and political sentiment that surrounded the trials that the newspapers are useful; in some cases they are the only available accounts of the testimony of certain witnesses. Although portions of the transcripts of the third and sixth trials have been preserved in the records prepared for appeal, these records did not include transcriptions of every witness's testimony. As for the four inconclusive trials, no official transcripts are available.[63] Moreover, the first three judicial inquiries into the death at Crooked Creek were coroner's inquests, and transcripts of their proceedings have not been preserved,[64] but the third, and most consequential, inquest is reported in extraordinary detail by the *Lawrence Standard*. Many of the witnesses who testified at the six later trials gave testimony at the Lawrence inquest, and some of the jurors later became witnesses in the various trials. In addition, the circumstance that an inquest was held in Lawrence at all, after one had been concluded in the county where the body was found, is not without interest. To begin to understand the Hillmon case, it is necessary to begin with the inquests.

THE INQUESTS AND THE "CALCIUM LIGHT OF TRUTH"

After Brown reported the shooting death at Crooked Creek, two inquests were conducted under the auspices of the coroner at nearby Medicine Lodge, seat of rural Barbour County. The first jury failed to agree whether the death was accident or

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[63] There is reason to believe that the defendants may have employed private stenographers to record and transcribe the evidence for their benefit; in a skirmish in one of the later trials, they objected to the use of "their" transcript as an exhibit to prove the prior testimony of two dead witnesses, arguing that "it was the private property of the defendants having been obtained at their expense and being in constant use by them for reference, and that if placed in evidence as an exhibit it would be in a sense public property from which they would get no benefit as owners." TOPEKA DAILY CAPITAL, Jan. 22, 1895, at 3. This position was not altogether unreasonable: it must be remembered that the making of copies was arduous manual labor, and that a transcript represented a considerable investment that could not easily be amortized by the quick production of a number of photographic copies. In any event, my researches did not turn up any of the transcripts commissioned by the defendants.

[64] *See* LEAVENWORTH TIMES, June 27, 1882, at 1 (first trial) (George Baldridge testifies that he took a stenographic record of the inquest at the request of Maj. Wiseman, but "never furnished either the coroner or county clerk a copy of the testimony.")

otherwise (one account says the jury "did not know how to render a verdict,"[65] an odd circumstance suggesting that homicide, or at least investigations into it, were not common in Barbour County); the second concluded that the shooting was accidental.[66] The body was then buried at Medicine Lodge, and Brown wrote a letter to Sallie Hillmon explaining what had happened and conveying his regret and condolences.[67]

When the insurance companies that had issued policies on Hillmon's life learned of the reported death, however, they lost no time moving into action. Agents of two of the companies, Theodore Wiseman (sometimes known by the title of "Major")[68] and a C. Tillinghast, traveled to Medicine Lodge and demanded that the body be exhumed for their examination. They were accompanied by one Colonel Walker, apparently a figure of some renown in Kansas.[69] The first two gentlemen told the Medicine Lodge coroner that they knew Hillmon and wanted to assure themselves that the deceased was he. According to a contemporaneous report in The Medicine Lodge paper, the *Cresset*, "the identification was satisfactory" and the body, presumptively Hillmon's, was dispatched "to be returned to his relatives near Lawrence."[70] When the body reached Lawrence, however, far from being returned to Sallie Hillmon or any other relative, it was delivered to two physicians, Doctors Stuart and Walker. Described by the *Lawrence Standard* as "representing the insurance companies," these physicians were reported to be in doubt about whether the body, by then nearly a month dead and partially decomposed, was that of Hillmon. Three other persons who knew Hillmon were asked to look at the exhumed body, and all said they could not be certain whether or not it was he. Mrs. Hillmon declined at first to examine the body, saying she preferred to remember her husband as he

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65 LAWRENCE STANDARD, Apr. 10, 1879, at 1 (testimony of Levi Baldwin).

66 *Id*. at 2; *see also* LEAVENWORTH TIMES, June 16, 1882, at 1.

67 LEAVENWORTH TIMES, June 17, 1882, at 1.

68 Major Wiseman continued to be a useful agent for the companies throughout the next two decades of the Hillmon litigation. He described his commission as "looking up evidence to prove that the body was not Hillmon." TOPEKA DAILY CAPITAL, Mar. 18, 1896, at 2. He had to confess with some rue, at the fifth trial, that he had gone unpaid and had been required to sue his employers for the $2500 they owed him for his services. *Id.* But he may have had his revenge for this mistreatment. See *infra* note ___ & accompanying text.

69 MEDICINE LODGE CRESSET, Apr. 3, 1879, at 2. This story remarks, of Colonel Walker, "The Col.'s fame in early Kansas history is too well known to need any comment."

70 *Id*. At later proceedings, Major Wiseman and Mr. Tillingast would testify that they knew and said, immediately on seeing the body, that it was not Hillmon's. *See* TOPEKA DAILY CAPITAL, Mar. 18, 1895, at 1 (testimony of Major Wiseman), but this was not the *Cresset* reporter's impression.

was in life, but later she did look at it.[71] The body was then sent to a funeral home to be embalmed, although it was apparently taken out and shown to various persons over the ensuing days.

The next day the coroner of Leavenworth County summoned a coroner's jury and commenced a third inquest, Douglas County Attorney J.W. Green and his assistant George Barker performing the office of examining the witnesses. The inquest proceedings were reported for the *Standard* in great particularity. In one of the articles that the *Standard*'s reporter authored during the inquest, he took time out from reporting the testimony to castigate some cynical observers of the proceedings: "The mistake is made by some, of supposing that the inquest now being held is managed by the representatives of the insurance companies. The inquest is, of course, by the State to determine whether the body brought here is that of Hillmon, and the manner of that death. County Attorney Green and Geo. J. Barker represent the State and not the insurance companies in the examination now being held."[72]

This rather impatient admonition takes on some significance in light of later events. Mr. Charles Gleed's role in representing the insurance companies at the later trials of Mrs. Hilllmon's suit against them has been earlier remarked, but the reader will perhaps be surprised to learn that his co-counsel in those trials were J.W. Green and George J. Barker. Barker and Green also represented the companies at the first trial, as well as in both appeals, serving these clients altogether for nearly a quarter of a century. Green, the County Attorney, later became Dean of the University of Kansas School of Law, although he continued to represent the companies in the Hillmon litigation. Whatever their titles and job descriptions at the time of the inquest, these gentlemen certainly ascended later to precisely the roles here disclaimed for them. But it is likely that they were actually employed by the companies even at the time of the inquest. At the fourth trial of the case, in 1895, the Coroner (called as witness by the defendants) testified that he had received his pay for conducting the inquest from the insurance companies, that he believed the witnesses and jurors had been compensated from the same source, and that "as far as he knew the coroner's inquest had not cost the county of Douglas a single dollar."[73] He also recalled "the fact of the examination of witnesses being conducted by George J. Barker in behalf of the insurance companies and that to

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71 She later said that the insurance company's men discouraged her from viewing the corpse; they denied that they had, but another witness who had been with her on the occasion confirmed her account. *See* LEAVENWORTH TIMES, June 30, 1882, at 4 (testimony of Mrs. Judson).

72 LAWRENCE STANDARD, Apr. 10, 1879, at 1.

73 TOPEKA DAILY CAPITAL, Feb. 16, 1895, at 6.

this, [the Coroner] offered no objections."[74] Testifying in the same trial, Major Wiseman corroborated this account: he said that he had "employed Mr. Barker at the time of the inquest to assist him in establishing the fact that the body was not Hillmon's."[75]

Despite citizen grumbling about its justification the inquest went forward, an arduous affair of several days. Many witnesses testified, including John Brown, who gave the same account of an accidental shooting that he had given at Medicine Lodge.[76] Mrs. Hillmon testified that she had looked at the corpse after it was brought to Lawrence and knew it for her husband's.[77] Similar testimony about the corpse's resemblance to Hillmon was given by Levi Baldwin, a cousin of Sallie and erstwhile employer of John Hillmon who had gone to Medicine Lodge and accompanied the body back to Lawrence.[78] The proprietor of the rooming house where Sallie and John maintained their household also said he had seen the corpse and it was Hillmon.[79] The chief controversies seemed to concern the questions of Hillmon's height, the condition of his teeth, and the age of a smallpox vaccination scar. (Controversies over these matters—teeth, height, scars—would mark each of the later trials as well.) The corpse was five-eleven, and

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74 *Id*.

75 TOPEKA DAILY CAPITAL, Jan. 31, 1895, at 4. Moreover, there is reason to believe that the reporter so bent on chastising those citizens of Lawrence who suspected that their public officials might be partisans of the insurance companies was none other than Charles Gleed himself. The articles are not signed, but Gleed's biographer relates that as a youthful journalist Gleed had written for "highly partisan Republican newspapers" in Lawrence. TERRY R. HARMON, CHARLES SUMNER GLEED: A WESTERN BUSINESS LEADER, 1856-1920 148 (Unpublished Ph.D. dissertation, University of Kansas, 1973) (on file with the University of Kansas Library). After several undistinguished years as a student of the general curriculum at the University of Kansas in Lawrence (and a stint as the editor of the student paper), in 1878 Gleed became one of the first students of the newly created law department, which was headed by none other than Lawrence lawyer James W. Green. *Id.* at 17-19. The Hillmon trial no doubt would have engaged the feelings of gratitude and ambition that Gleed attached to his law professor and dean. In February of 1879, Gleed also became the Lawrence correspondent for the Kansas City Daily Journal, a position that lasted for only three months, but accustomed him to reporting on newsworthy Lawrence events. *Id.* at 27-29. Thus the Hillmon inquest in May of 1879 would have coincided with the end of Gleed's employment with the Kansas City paper, and with the end of his (only) year of law study in Lawrence. Gleed did not qualify for the Bar until 1884, after serving an apprenticeship in the law department of the Santa Fe Railroad.

Whoever the reporter may have been, his reporting of Green's conduct was most flattering. He says, for example, that County Attorney Green "has the faculty if asking a question in a way that one cannot but consider it a privilege to answer." LAWRENCE STANDARD, Apr. 10, 1879, at 1.

76 *Id.* at 2.

77 *Id*.

78 *Id*.

79 *Id*.

Hillmon had reported exactly that height when he first applied for the insurance, but the doctor who examined him at the time testified that Hillmon had come back a few days later to say that he was really only five-nine, and that the doctor had then proceeded to measure him and found that the shorter height was correct.[80] Hillmon had been vaccinated for smallpox just before leaving on his journey, about three and a half weeks before the shooting, and the corpse had a scar from a recent vaccination, but various doctors testified that the scar was too fresh for the body to be Hillmon's; one said Hillmon's scar would have hardened and dropped off by the time of the Crooked Creek shooting.[81] The physicians who had performed the post-mortem of the corpse noted its excellent teeth and one of them, who had examined Hillmon in connection with his policy application, said that by contrast "one or two" of Hillmon's front teeth were "broken or out."[82] Levi Baldwin and the Hillmons' landlord Arthur Judson, however, said that John Hillmon's teeth were not defective, and one of the other physicians said he had noticed nothing unusual about Hillmon's teeth when he examined him.[83] Two of the physicians also disputed an aspect of John Brown's account of the shooting: a man shot as the dead man had been would not have staggered before falling, as Brown said Hillmon had, but would, as one of them opined, fall "like a dead weight," or "quick as sight."[84]

The reaction from afar to this medical testimony by the writers and editors of the Medicine Lodge *Cresset* (which had earlier reported on the finding of the corpse and the less elaborate coroner's proceedings in that city) was swift and venomous. Reminding their readers of the earlier events, they wrote:

> And now come forward divers and sundry medical experts, versed in the intricacies of insurance swindling, and propose to choke down our throat the monstrous falsehood, that Mrs. Sadie E. Hillman and the man J.H. Brown are accomplices in a matter of selling human life and human blood for money. The legal and medical twisting shows an evident strain on the part of the Insurance departments to establish, by quack doctors, old women and hack drivers, that Hillman was not Hillman, but that some

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80 *Id*.
81 *Id*.
82 *Id*.
83 *Id*.
84 *Id*.

> poor unfortunate soul has been sent to eternity, and his body made to do duty as dead man in Hillman's boots.[85]

The *Cresset*'s writers speculated that suspicions had attached to the Hillmon death in part because it took place in their rural neighborhood, which they claimed city folk had always regarded as an uncouth wilderness "where the Lion roareth and the Whangdoodle mourneth for its first born."[86]

But back in Lawrence the reporting continued for a time to be less obviously opinionated. When the reporter departed from mere transcription, in the early stages of the trial his analysis was notably evenhanded. He characterized Brown's testimony as "a seeming consistent, fair, and honest story."[87] He noted the oddity of a man like Hillmon purchasing a large amount of life insurance (apparently the same circumstance that aroused the insurance companies' suspicions), but then conceded that "a man in such circumstances, if he was going into a wild, frontier country, and leaving behind a loved wife, might take that amount and carry it, for a time, at least."[88] And though he noted the discrepancy between the corpse's length and the five feet nine inches of Hillmon height measured the preceding winter (by the doctor's testimony), asking "does lying in the grave three weeks lengthen a man out in that way?", he also observed that "in many cases death and decomposition work wonderful changes in a human body, so that it cannot be recognized even by longtime friends who have known and loved the form when it was animated with life."[89]

To this point the inquest seems to have been a puzzling but reasonably professional affair. There was controversy over teeth and scars and height but no mention was made of any other person who might have been the real victim of the shooting. John Brown had, in his testimony, mentioned that a third man had traveled with him and Hillmon from a spot "a few miles" out of Wichita to a creek "seven or eight miles" from that city, where the man, whose name they did not learn, camped with them two or three days before joining another party.[90] He also mentioned that a different stranger had camped with them for one night near (but not at) the fatal Crooked Creek campsite.[91] But nobody

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85 MEDICINE LODGE CRESSET, Apr. 17, 1879, at 2.
86 *Id*.
87 LAWRENCE STANDARD, Apr. 10, 1879, at 1.
88 *Id*.
89 *Id*.
90 *Id*.
91 *Id*.

to this point sought to put a name other than Hillmon's on the corpse, nor was it suggested that either of the traveling companions Brown mentioned might have ended up dead at Crooked Creek.

Apparently some citizens who were following the affair continued to complain that the coroner in Douglas County had no business reopening the question of manner of death after it had been disposed of in Barbour County.[92] The *Standard*'s reporter had no sympathy at all for this opinion:

> The attempt to belittle the case is, of course, a failure. A human life was sacrificed under such circumstances that it becomes the duty of the proper authorities to thoroughly investigate the matter. It is know that the Coroner's inquest in Barbour County was a harried and ignorantly-managed affair.
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> According to Levi Baldwin's own testimony, the first coroner's jury summoned in Barbour County did not know how to render a verdict, and another was summoned, and after a brief and hasty consideration of the matter, based entirely on Brown's testimony, gave a verdict of accidental killing. Subsequent facts that came to light, rendering it absolutely imperative that the strange and unaccountable performance that caused the death of a citizen of Douglas county (or a purported citizen) should be thoroughly looked into, and every fact connected with it brought to the surface, so that the calcium light of truth may shine in upon what seems to be a cowardly and murderous transaction. If all parties are innocent, no

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[92] Another Lawrence newspaper had reported that, although not opposed to the inquiry "the people—very many of them—do object to having the EXPENSE foisted off upon DOUGLAS COUNTY. The proceedings here are instituted, we understand, by the Insurance companies who have $25,000 at stake, and it is claimed to be simply a matter of justice that they should foot the bills, instead of our overburthened taxpayers." LAWRENCE DAILY TRIBUNE, April 7, 1879, at 4. The taxpayers needn't have worried; as it turned out the companies were willing to pay everyone, including the witnesses and jurors. See note __ *supra* & accompanying text. And this gesture seemed to quell the objections of the Tribune's editors, as they suggested a few days later that citizen curiosity about the verdict of the coroner's jury was "unseemly" as "[i]t is a private matter and hence we have no right to be too inquisitive; we do not pay the bills; we do not encourage or justify the official action; we have no right to ask any questions." LAWRENCE DAILY TRIBUNE, Apr. 10, 1879, at 4.

> one should object to an investigation, and those who do object to it may find themselves upon the side of thieves and murderers.[93]

Despite the mildness of his earlier reporting, one may mark here the moment where the Standard's journalist, as if stung by the sentiments of those who questioned the propriety of the proceedings, changes his tone from curiosity to active hostility toward Sallie Hillmon's claim.

Moreover, at just about this time, this reporter undertook some investigation of his own. He wrote

> Before proceeding to a synopsis of today's testimony in the Brown-Hillmon case, which is now attracting very general attention, we desire to say that this reporter called on a lady who had seen Hillmon and particularly noticed his features, and the following conversation took place:
> "When did you see Hillmon?"
> "Shortly after his marriage, at a social gathering. He played with my baby, and I noticed him particularly, as the man made an unfavorable impression upon me."
> "Did you notice any peculiarity of feature about him?"
> "I did. His upper lip ran up in the center and displayed his front teeth, and one or two of the teeth were partly broken off or gone. I always notice a person's teeth."[94]

Having delivered this bombshell, the reporter then returned to transcription, reporting the testimony of the rooming house owner (who testified that there was nothing peculiar about Hillmon's mouth or his lips and that he recognized the corpse as Hillmon

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[93] LAWRENCE STANDARD, Apr. 10, 1879, at 2. The colorful juxtaposition of calcium and truth appears also in the otherwise very different coverage of the Medicine Lodge newspaper, which proposes that the "light of calcium truth be permitted to shine through the dark and infamous swindle which the Insurance companies propose to so coolly carry out." MEDICINE LODGE CRESSET, Apr. 17, 1879, at 2. The calcium light, invented by Thomas Drummond in 1816 and also known as a Drummond light or "limelight," was in general use as theatrical lighting in the 1870s and 1880s. It provided a sharp, highly controlled, shaft of illumination. *See A Brief Outline of the History of Stage Lighting, at* http://lupus.northern.edu/wild/th241/ldhist.htm (last visited (date)).

[94] LAWRENCE STANDARD, Apr. 10, 1879, at 2.

the minute he saw it).[95] It does not appear that the lady described in the revelation ever became a witness, although the newspaper's readers could not have failed to note her uncanny prescience about Hillmon's villainy.

There then followed synopses of a number of witnesses who said, in more or less equal number, that Hillmon did or did not have a defective tooth, and then this:

> STARTLING DEVELOPMENTS!
>
> Mrs. Lowell, wife of M.L.Lowell of this city, has a brother who left here on the 5th of last March, for Wichita, and to go from there southwest, and return to Independence and Humboldt.
>
> She has not heard of him since he went away, although it was customary for him to write her often. From the description of the dead body brought here she thinks it is her brother, and as we go to press parties are on the way to the cemetery to take up the remains and let her see them.[96]

When word of this report reached Medicine Lodge, the journalists of the *Cresset* remarked: "We would kindly suggest to the lady in question, that she search the Penitentiary, as these silent brothers are more likely to turn up there or on a cottonwood tree, than in the grave of a respectable citizen."[97] But it seems to have been taken seriously in Lawrence, and represents the first suggestion found in any account of the case concerning a possible alternate identity for the deceased man.

The *Standard's* reporter followed the Lowell revelation with one more before signing off for the week: "Brown has not yet been found or heard of."[98] This is a rather portentous account of an unremarkable absence, as Brown had given his testimony and there is no apparent reason why he should have been compelled to remain in attendance on the coroner's court. Still, apparently the reporter had not seen him for a day or two, and this fact is reported in a manner that attributes the circumstance to Brown's evasion and links it to the missing brother of Mrs. Lowell. Later arguments by the companies linked Brown's elopement to his fear of implication in what they claimed was a growing body of evidence suggesting murder, but this reported "startling development" appears to be the first occasion when this suggestion was made, and it was made by a representative of the press. As for Mrs. Lowell, apparently she proved a disappointment to the murder

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95 *Id*.

96 *Id*. Has any corpse outside of horror fiction ever suffered more difficulty remaining in its grave?

97 MEDICINE LODGE CRESSET, April 17, 1879, at 2.

98 LAWRENCE STANDARD, Apr. 10, 1879, at 2.

theorists; once the body was dug up again and shown to her she was unable to recognize it as anyone she knew.[99]

The missing brother of Mrs. Lowell was only the first of many persons mooted as the dead man, just as Frederick Adolph Walters was only the last. The same article that reported Mrs. Lowell's anticlimactic discovery informed the reader that "[I]t was reported yesterday that a young man from Indiana saw the body brought here and recognized it as that of a friend who left Indiana some time ago, for Wichita, and has not since been heard of. Many wild rumors are afloat, but as yet there has been nothing definite learned concerning him."[100] This young man of Indiana, the second proposed victim of Hillmon and Brown, was never again mentioned. Brown's absence, however, continued to be the subject of comment.

> WHERE IS BROWN?
>
> Brown has not been heard from since he left so mysteriously yesterday morning, nor is his whereabouts known. It was supposed that he went to Wyandotte to visit his family, but such was not the case. Brown should not have been allowed to leave the city until the inquest was closed, especially as such damaging testimony against him had been brought out.[101]

Again the reporting suggests a link between Brown's failure to present himself at the inquest every day and the implications of the testimony, although to this point it is difficult to identify anything "damaging" to Brown that has been adduced. Later testimony at the inquest focused on the question of Brown's whereabouts, but it revealed nothing sinister: it seemed he had checked out of the place where he had been staying in Lawrence, saying that he was going home to his family in Wyandotte,[102] a place less than forty miles away, which later was shown to have been exactly what he did.[103]

The report of the next day's proceedings began with the proposition that "public opinion is somewhat divided, yet the very general opinion is that the body is not that of Hillmon," and went on the recount the testimony of a Mrs. McCoy, who said that she was John Hillmon's sister, and that she had written a letter to Sallie Hillmon asking for

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99 LAWRENCE STANDARD, Apr. 17, 1879, at 4.

100 *Id*.

101 *Id*.

102 *Id.* (Testimony of G.A. Stevens, Mrs. Turner Sampson, and Kitty C. Howe).

103 LAWRENCE STANDARD, June 26, 1879, at 4.

an opportunity to see her brother's body one last time, but had received no reply. Moreover, she said that her brother was less than five feet nine inches tall, had a missing tooth, and a scar (not large, she said) on his left hand caused by a firearms accident. When dug up again[104] the corpse was found to have no manual scars "with the exception of a slight mark on the middle finger."[105]

The reporter closed this day's account by noting that "[t]he inquiry 'Where is Mr. Brown?' has not been answered," and then conveying a hint sure to keep his readers' suspense level high for the next day's edition:

> A small circle of persons interested in the case have been very much agitated all day, and the appearance of things indicate that there are coming developments that will astonish a great many persons. Though a Standard reporter got an inkling of the matter, he was bound over to keep the secret, and nothing can at present be made known. Suffice it to say there is something now planned to let a flood of light in upon this dark and fearful mystery.[106]

Whatever this coming development may have been, it apparently was not made known to the jury, which rendered its verdict before any other evidence was taken, finding that the deceased was a person "unknown to the jury" who came upon his death "in a felonious manner at the hands of one J.H. Brown."[107]

The Medicine Lodge journalists did not have much to say about this outcome, but they were scornful of the efforts of their Lawrence rivals to stir the pot with hints of revelations to come. "We are still waiting," they wrote, "the startling developments promised in the Hillman case, but they come not by these promises. The Insurance company has gained time to poisen [sic] the public mind against Mrs. Hillman and horrify public sentiment." [108]

The *Lawrence Standard* was unimpressed with the carping of its rival, however. Two months after the coroner's verdict, having reviewed all of the earlier developments for the reader, that paper then related: "It is stated that Brown sent word from Missouri that he himself did not do the killing as he claimed in his testimony before the coroner's

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104 *See supra* note __.

105 LAWRENCE STANDARD, Apr. 17, 1879, at 4.

106 *Id.*

107 *Id*.

108 MEDICINE LODGE CRESSET, May 8, 1879, at 2.

jury, and that if assured protection he is ready to turn State's evidence."[109] This brief report presaged what became the most helpful turn of events of all for the insurance companies who had insured John Hillmon's life—the defection (albeit temporary) of Brown from the Hillmon camp to their own. But before returning to Mr. Brown and his behavior after the verdict of the coroner's jury, we must consider the "something" alluded to by the Standard's reporter toward the end of the inquest, the development that promised to "let a flood of light in upon this dark and fearful mystery."

THE MAN WHO LEFT WICHITA WITH HILLMON AND BROWN

The day after forecasting this spectacular revelation, the *Standard*'s reporter made another, possibly related, prediction:

> It is probable that before too many days some man will be missing whose appearance will correspond to that of the dead body. Or, possibly, the man came from down in the southwest, where men lead a rambling life, and one would not be missed.[110]

The jury returned its verdict on the Monday after this suggestion was printed, but public interest in the case did not abate. Two months later the *Standard* printed not only a recapitulation and analysis of the case, but an account of further discoveries made on behalf of the insurance companies by their trusted agent Major Wiseman, under the headline WHOSE BODY WAS IT?:

> Armed with the photographs of Hillmon, Brown, and the dead man, the major went to Wichita and found a number of persons who knew Hillmon and Brown, and who recognized the photograph of the dead man as that of Frank Nichols, sometimes called "Arkansaw." . . . At Wichita the Major found the baggage of Frank Nichols in pawn for $18 board bill . . . for the past three years he had lived in the vicinity of Wichita, [where] he boarded

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109 LAWRENCE STANDARD, June 26, 1879, at 4.

110 LAWRENCE STANDARD, Apr. 17, 1879, at 4. On April 11, the other Lawrence newspaper reported a "rumor" that "the body of the supposed Hillman may prove to that of a man named Willey, who had been with Hillman and Brown a great deal. His home is in Illinois and he was last heard of some sixty miles southwest of Wichita, about six weeks ago." LAWRENCE DAILY TRIBUNE, Apr. 11, 1879, at 4. Willey's name does not seem to come up again, however.

> at the same hotel that Hillmon and Brown stopped at, and became quite intimate with them. He left Wichita on March 2d and went to Oxford, 35 miles south, to collect some money due for work, stating to some of his friends that he intended to
>
> HERD CATTLE FOR HILLMAN AND BROWN[111]
>
> at $20 a month and found, and asked his friends' advice in regard to this matter. He stated further that Hillman had plenty of money, having showed him a bank book containing records of deposits in a bank in Lawrence of some five thousand dollars. His friends advised him to accept the situation offered, and he told them afterwards that he had, and before leaving Wichita, promised to write them, but up to date, they have never received any letter from him. . . . .Certain things that transpired after the three men met near Wellington cannot be related here. Suffice it to say that one of the party left and the other two traveled together. In a lovely place fourteen miles north of Medicine Lodge, the shooting took place. The three men, Brown, Hillman, and Nichols were strangers in Barbour county. The spot where the shooting occurred being about one hundred miles southwest of Wichita.[112]

The mystery would seem thus to have been solved, except that as the reader knows, this solution leaves no room for the proposition that the dead man was the Iowan Frederick Adolph Walters, author of the McGuffinesque letters. Nichols was the third, but still not the last, of the men proposed by advocates of the murder theory as the victim of Brown and Hillmon. Note, too, the similarity between the claims made about Nichols and those later made about Walters — that he had encountered Hillmon and Brown and been promised excellent wages to travel with them, had communicated these matters to his friends about the first or second of May, had later accepted Hillmon's offer, then never been seen or heard from again. Major Wiseman, Colonel Walker, and the insurance companies' other agents were apparently tireless in their efforts to locate a convincing actor to cast in this role, and the details of their story were already becoming clear, even though they had not by this time ever heard of the cigarmaker from Iowa. In the journalist from Lawrence (Mr. Gleed as I believe[113]) they had a useful ally.

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111 This phrase is displayed in the newspaper column in the manner shown.

112 LAWRENCE STANDARD, June 26, 1879, at 4.

113 *See supra* note ___.

THE TWO ACCOUNTS OF MR. BROWN

It was mid-May when the coroner's jury returned its verdict of murder "at the hands of John Brown." Curiously, there is no mention of Hillmon in this accusation. Brown must have been feeling alarmed, but the coroner's verdict had no automatic legal consequences and he was not immediately accused, arrested, or charged.[114] Instead, he was approached not long afterward by a lawyer named W.J. Buchan. Buchan had offices at Wyandotte, near the Brown family home to which John Brown had repaired after testifying in the proceedings at Lawrence. The lawyer had several conversations with Brown over the summer, beginning in May, and eventually spoke as well to Brown's brother. In September, Brown signed a lengthy statement in the presence of Buchan and a notary public, and in it he repudiated the story he had told about Hillmon's death and gave quite a different account. The statement averred that John Hillmon and his wife's cousin Levi Baldwin had entered into a conspiracy to commit insurance fraud, Baldwin's part being to pay the premiums and Hillmon's (and Brown's) being to journey to the southwest with the object to "find a subject to pass off as the body of John W. Hillmon, for the purpose of obtaining the insurance money." He said that the first trip the two had taken, in late December, was hoped to produce a discovery of someone who had frozen to death and whose corpse could be passed off as Hillmon's, but when none was found the men went back to Wichita and Hillmon thence to Lawrence. Hillmon came back to Wichita in early March and on their second venture, according to the statement, the two had encountered a stranger "the first day out of Wichita, about two or two and one half miles from town." The stranger "said his name was either Berkley or Burgess, or something that sounded like that," but Brown and Hillmon "always called him Joe." Hillmon told Brown that Joe "would do for a subject to pass off for him," but Brown objected that murder was "something that I had never before thought of, and was beyond my grit entirely." Nevertheless, by the statement's account, Hillmon proceeded with his plan, most foresightedly by persuading "Joe" to allow Hillmon to vaccinate him for smallpox. Hillmon accomplished this rather remarkable feat by taking the virus from his own arm, which was according to Brown "quite bad," and using a pocket knife to insert

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[114] Much later the coroner testified that he had issued a warrant for Brown's arrest after the jury returned its verdict, and that Mr. Green had assisted in its preparation. *See* TOPEKA DAILY CAPITAL, Feb. 16, 1895, at 6. But none of the contemporaneous reporting mentions this fact, and Green himself, called as a witness twenty years later at the sixth trial, denied that he had ever issued a warrant for Brown. LEAVENWORTH TIMES, Oct. 24, 1899, at 4.

it into the other man's. Hillmon also persuaded the other man to trade clothing with him, and measures were taken to avoid any passersby seeing three men, rather than two, in the wagon: "sometimes one and then the other would be kept out of sight." Apparently as a hedge against any impression of implausibility a reader might form of these events, the statement explains that the stranger was "a sort of an easy-go-long fellow, not suspicious or very attentive to anything."

The statement then relates that Hillmon shot and killed the stranger at the Crooked Creek campground, put his own day book in the dead man's coat,[115] told Brown to ride for assistance, and then vanished north with "Joe's" valise. Later, back in Lawrence, Brown (according to the statement) had a conversation with Sallie Hillmon in which she assured him that "she knew where Hillmon was, and that he was all right."[116]

A more useful document than this affidavit, from the insurance companies' point of view, can scarcely be imagined. It accounts for all the facts then known, including the inconvenient vaccination scar, discredits not only Brown's earlier testimony but two of the most important witnesses (Baldwin and Sallie Hillmon) who identified the corpse as Hillmon,[117] and makes excellent use of what had before been the most suggestive

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[115] Hillmon's daybook or journal, a surprisingly literate document that says nothing about any plans to kill a man (of course it wouldn't, no matter whom you believe) was found on the body at Crooked Creek. *See* Annual Report, *supra* note __, at 857-59.

[116] Brown affidavit, *supra* note__, at 165.

[117] Even the formerly pro-Hillmon newspaper in Medicine Lodge, which had been so scornful of what it described as the companies' manipulation of the Lawrence inquest, reported Brown's confession with an air of sober belief: "Griffith, of the Merchant's Bank, of Lawrence, writes in regard to the Hillman case, that Brown has turned State's evidence, and now testifies that Hillman was not killed in Barbour County last spring, but another man was foully murdered and his corpse was made to do duty as that of Hillman. Griffith further states that Mrs. Hillman has given up all her insurance policies and in all probability has left the country entirely." MEDICINE LODGE CRESSET, Dec. 19, 1879, at 3.

Much later, one of the Medicine Lodge journalists would declare in a book of reminiscences that despite all evidence to the contrary, he believed that it was Hillmon who died at Crooked Creek because so many good and honest men from Medicine Lodge had identified the corpse as the man they had met by that name as he passed through the town. But this memoirist's rehearsal of all the contrary evidence is an excellent tribute to the insurance companies' management of public belief, for he recounts several items that are false, disputed, or partial: that the premiums had all been paid by Levi Baldwin in the form of promissory notes, that the death was met with "remarkable indifference" by Sallie Hillmon, and that Brown had confessed to the plot (with no discussion of the circumstances or his recantation). *See* THOMAS.A. MCNEAL, WHEN KANSAS WAS YOUNG 89-92 (1939). So is another local memoir, which recounts that Brown's confession of participation in fraud was made in the course of his trial testimony, *see* XVII COLLECTIONS OF THE KANSAS STATE HISTORICAL SOCIETY 609-610 (William Connelley ed., 1928). This

circumstance in favor of the company's position: the suspiciously large amount of life insurance carried by a poor man like Hillmon.

Brown also wrote (not just signed, as with the affidavit) another highly helpful document: a letter to Sallie Hillmon. Brown later would say that the letter was dictated to him by Buchan.[118] In it he wrote, "I would like to know where John is, and how that business is, and what I should do, if anything. Let me know through my father. Yours truly, John H. Brown."[119]

Sallie Hillmon had not yet filed suit on the policies (although she did by then have a lawyer). When Buchan confronted her with the Brown affidavit, in Brown's presence, she turned to Brown and asked him how he could make such a statement; she also asked Buchan if he thought she did not know her own husband's body when she saw it. Brown said to her only that he had made the statement and would stand by it.[120]

By the time of the first trial of the Hillmon case in 1882, Brown had returned to his original account, testifying for Sallie Hillmon and claiming that Buchan and the insurance companies had pressured him into swearing to the affidavit. But most readers of the Supreme Court opinion, learning of Brown's inconstancies, will likely have the same reaction that this writer did on first reading: Brown was a weasel and a turncoat, but his affidavit was probably true. For (I reasoned) there could have been many motivations for Brown to lie when he said he had killed Hillmon accidentally, chiefly an expectation that he would share in the insurance proceeds when they were paid. But it seemed unlikely that he had lied in confessing to the plot as he did in the affidavit. Pressure from the insurance companies seemed inadequate to account for that narrative or his willingness to give it, as it would have exposed him to prosecution as an accomplice to murder.

Maccracken's account does hint at a certain complexity that arises from the role of Buchan, the lawyer who persuaded Brown to sign the affidavit. He notes that although the insurance companies always referred to Buchan as Brown's "own attorney," he was

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is of course mistaken: all of Brown's spoken testimony, in his deposition and in the first trial, consistently maintained that he had killed Hillmon accidentally at Crooked Creek.

118 LEAVENWORTH TIMES, June 20, 1882, at 1 (testimony of John Brown).

119 This is the form in which the letter is reported in some newspaper accounts. *See, e.g.*, LEAVENWORTH TIMES, June 18, 1882, at 5. But Gleed's quotation of the letter in the "Report," which purports to be verbatim, contains a number of comical misspellings and other errors: "Mirs" for "Mrs.", and "Let me now threw my Father."

120 This was Brown's testimony at the first trial (the only one at which he appeared in person). *See* LEAVENWORTH TIMES, June 18, 1882, at 5. In addition, it was Mrs. Hillmon's consistent account. *See* LEAVENWORTH TIMES, June 20, 1882, at 1.

paid for his labors by the insurance companies, and that one of the courts involved called his conduct "unprofessional."[121] Maccracken, however, explains Buchan's behavior with the suggestion that "he seems to have thought of himself as an arbitrator."[122] In this sympathetic characterization Maccracken follows Gleed, whose "Annual Report" asserts that "[t]he transaction, as far as Buchan was concerned, became an arbitration, with himself as arbitrator."[123] Gleed also maintains (and Maccracken repeats) that Buchan became involved in the matter only after Brown begged his own father for assistance and the father retained Buchan to represent his son.[124] Buchan's actions as described by Maccracken seemed questionable; nevertheless, as a naïve reader I was prepared to accept the historian's forgiving explanation and ascribe my reaction to a (perhaps excessively) nuanced sense of the boundaries of acceptable professional conduct, instilled in me a century later in a far different legal environment. But further reading led me back to Buchan's behavior, and caused me to re-examine my tolerant first conclusion.

The only documents evincing legal representation were signed after Brown agreed to the affidavit Buchan had composed for his signature. There were two such documents, both also prepared by Buchan. The one executed by Brown, dated the same day he signed the affidavit, authorized Buchan to "make arrangements, if he can, with the insurance companies for a settlement of the Hillmon case, by them stopping all pursuit and prosecution of myself and John H. Hillmon, if suit for money is stopped and policies surrendered to the companies."[125] The second, dated the next day, was executed by an agent of the insurance companies; it "authorized and employed" Buchan to procure and surrender the policies of insurance on the life of John Hillmon.[126] Buchan himself would testify later that the only pay he received in the matter came from the insurance companies. He bridled at the suggestion that there was anything improper about this, saying that he "was in the habit of taking fees for his work."[127]

The testimony of the Browns, both John and his brother Reuben, at the first and (in Reuben's case) subsequent trials was altogether different from Buchan's. John Brown testified that Buchan showed up, unbidden, at a farm in Missouri where Brown was

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121 Maccracken, *supra* note__, at 53.

122 *Id*. at 53, 73.

123 Annual Report, *supra* note __, at 873.

124 *Id*. at 870; Maccracken, *supra* note __, at 53. Certainly this was Buchan's claim, but the elder Brown was never called to testify, by either side. The brothers Brown maintained that Buchan had approached John Brown without invitation or authority.

125 LEAVENWORTH TIMES, June 22, 1882, at 1 (first trial).

126 *Id.*

127 LEAVENWORTH TIMES, June 14, 1885, at 4 (second trial)

working; he came back at least twice more, approaching Brown at places where he was employed and finally at his brother Reuben's house. On the last occasion, at Reuben's, Buchan brought with him a man named Ward, whom he said was a deputy sheriff.[128] On each occasion Buchan pressed Brown to sign a statement saying that the dead man was not Hillmon but another; according to later testimony from Brown, Buchan told Brown he could "make it appear it was a man who came out from Wichita ; the man called himself Joe; . . . {and} was killed by Hillmon and me; and was passed off as Hillmon; . . . he asked me what I was doing here, and said they are after you." Brown testified that at Reuben's house, with the deputy sheriff Ward in tow, Buchan told Brown that "he only asked me to do something to benefit myself, and end the matter . . . said there was a warrant for my arrest, and I must do something soon." Buchan also informed Brown "that he was employed to protect me; am well acquainted with the insurance men; they care nothing for you, and want to keep from paying the money . . . ."[129]

Reuben, in his testimony at the first trial, seconded his brother's account. Buchan, he said, had recruited him to go along when the lawyer first went calling on John, saying that the brothers' father had retained him to look after John's interests. On that occasion Reuben heard Buchan attempt to persuade Brown to say that the dead man was not Hillmon, and heard his brother refuse. He remembered also Buchan coming to his house some time later with the deputy sheriff, and telling Reuben that his brother was about to be arrested if he did not cooperate and sign a statement that it was not Hillmon who died at Crooked Creek, but that all would be well if John were to sign the statement and then keep out of sight. Reuben explained in his testimony that he had no money to defend John with, and added that Buchan had offered to pay John $15 for his board (to defray the cost of boarding with Reuben), and in addition to "see the insurance agents and not have the warrant served." So Reuben undertook to convince his brother that it would be better for him to do as Buchan said, in order to avoid further difficulties, and Brown gave in to these arguments and signed a paper that Buchan had prepared.[130]

After this capitulation there followed John Brown's preparation (pursuant to Buchan's dictation) and signing of the letter to Sallie Hillmon saying that he would "like

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128 LEAVENWORTH TIMES, June 17, 1882, at 1. Buchan acknowledged that the deputy accompanied him on the drive over to Reuben Brown's place, but testified that his companion's law enforcement credentials were mere coincidence; the sheriff's office just happened to have the best team of horses around, and "little use for it." LEAVENWORTH TIMES, June 22, 1882, at 1.

129 LEAVENWORTH TIMES, June 17, 1882, at 1.

130 LEAVENWORTH TIMES, June 20, 1882.

to know where John is."[131] But Mrs. Hillmon testified that she did not receive this letter,[132] and Buchan admitted that he did not send it on to Mrs. Hillmon; instead he gave it to the insurance companies' representatives.[133] Apparently it was never intended as an actual communication; it was a piece of evidence manufactured by Buchan, at a time he purported to be representing Brown, in favor of the insurance companies' theory that Brown and Sallie Hillmon were united in a continuing conspiracy.

A couple of days later, in the presence of a notary, Brown signed the lengthy affidavit prepared by Buchan. The notary testified in the second trial that Buchan told Brown not to read the prepared document before he signed it.[134] The document's history then became even more bizarre: after it was shown to Mrs. Hillmon and did not immediately produce the desired effect of prompting her to make a similar confession, it was torn to pieces and thrust into a stove in Buchan's office. Brown (backed up by Sallie Hillmon) claimed that it was he who treated the paper thus[135]; Buchan said he had done it.[136] In Brown's account, the reason for this destructive act was an agreement between the two men that the document was to be used only to be shown to the insurance companies' men.[137] Buchan maintained that the statement was prepared "as a guarantee that Brown would testify in case suit was brought that the statement was true,"[138] a description that implies the possibility of use in court to impeach a discrepant statement (and of course that is the very use to which the affidavit eventually was put). But Buchan's account is not compatible with his claim that he tore up the statement and thrust it into the stove; on this point Brown's story is far more credible.

Whether or not it was not intended for use in a lawsuit, after the stove incident Brown must have believed that the statement had been destroyed. Buchan, however, acknowledged that between the time Brown signed it and the stove incident, he had given a copy of the affidavit to the insurance companies' attorneys for the purpose of having it

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131 LEAVENWORTH TIMES, June 18, 1882, at 5.

132 LEAVENWORTH TIMES, June 11, 1885, at 4 (second trial).

133 LEAVENWORTH TIMES, June 22, 1882, at 1 (first trial)

134 LEAVENWORTH TIMES, June 12, 1885, at 4 (second trial). In the 1988 trial Buchan agreed that "Brown did not read [the affidavit] over." LAWRENCE TRIBUNE, Mar. 16, 1888, at 2.

135 LEAVENWORTH TIMES, June 17, 1882, at 1 (John Brown); LEAVENWORTH TIMES, June 20, 1879, at 1 (Sallie Hillmon).

136 LEAVENWORTH TIMES, June 22, 1882, at 1.

137 LEAVENWORTH TIMES, June 17, 1882, at 1 (first trial). He seemed willing by his account, however, to have it shown to Sallie Hillmon as an inducement to abandon her claims.

138 LEAVENWORTH TIMES, June 22, 1882, at 1.

copied.[139] (Copies were made by hand at the time, so the preparation of a copy was not a casual act.) He could then destroy the original affidavit or permit its destruction to reassure Brown of his good faith, secure in the knowledge that his colleagues representing the companies had access to a copy. But he seems even to have anticipated the possibility that a handmade and unsigned copy might not be admissible to the same extent as an original: later he rescued the torn statement from the (evidently unlit) stove, and placed the pieces in an envelope.[140] Judge Shiras, presiding in the third trial, ruled that the copy made at Buchan's direction could not be admitted or described, and that the matters therein could not be proved unless the original, torn, document were produced.[141] Thanks to Buchan's rescue it was produced (apparently restored or at least pieced back together), and admitted into evidence for the impeachment of the man he had claimed was his client.[142]

Although Buchan denied or contradicted many aspects of the Brown brothers' testimony, his own account of the course of his representation is scarcely less damning. He acknowledged that the only pay he received or expected for his work on the Brown matter came from the insurance companies.[143] In addition to preserving Brown's affidavit after it had been disposed of into a stove, he admitted passing the letter that Brown wrote to Sallie Hillmon (implying that "John" was still alive) on to the insurance companies' lawyers rather than posting it.[144] He agreed that on one occasion when he had learned of John Brown's whereabouts (from Brown's father, apparently), he took Colonel Walker along when he went to speak with Brown, even though he believed that Walker had a warrant for his "client's" arrest.[145] It was undisputed that he prepared a document that, in exchange for Brown's affidavit, promised immunity from prosecution for both Brown

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139 *Id.*

140 LEAVENWORTH TIMES, June 23, 1882, at 1 (testimony of J.R. Buchan).

141 1899 Transcript, *supra* note 9, at 166-67. *See also* TOPEKA DAILY CAPITAL, Mar. 2, 1888, at 4. This enforcement of what we would today call the Best Evidence Rule prompts the question: why was not the testimony of Elizabeth Rieffenach—who said she could not produce the letter from her brother but proceeded to describe its contents in detail-- subject to the same objection? Possibly the objection was not made, or possibly Judge Shiras thought the testimony fell within an accepted exemption from the Best Evidence Rule for documents that have been lost or destroyed.

142 *Id*.

143 LEAVENWORTH TIMES, June 22, 1882, at 1.

144 TOPEKA DAILY CAPITAL, Mar. 10, 1888, at 4 (second trial).

145 *Id*.

and Hillmon.[146] But these negotiations were held only between Brown and representatives of the insurance companies; no public officials signed any of the documents, nor is there any discernible evidence of their involvement. Either Buchan arranged for his "client" to confess to a crime in exchange for a promise that he knew was worthless, or the insurance companies really did dictate the administration of criminal justice in Kansas, and Buchan knew it and was willing to participate in the appropriation of the criminal justice system for their private purposes. Even allowing for the possibility of a less rigorous set of professional expectations in 1880 Kansas than we might entertain today, the behavior of the lawyer Buchan cannot be extenuated as the work of an "arbitrator." If the testimony of the Brown brothers is to be believed, his perfidy was shocking; but even if his own account is credited, his persistent persuasions might easily have caused a poor young man to sign a statement that he knew was not true in exchange for assurances that he would face no further trouble if he did so.[147]

If you are not yet persuaded, consider testimony much later by one of the companies' own faithful agents. The central claim of the affidavit drafted by Buchan for Brown's signature was that a man who called himself "Joe Berkley" or "Joe Burgess" camped and traveled briefly with Brown and Hillmon, and was later killed at Crooked Creek. In this particular the affidavit capitalized on Brown's earlier testimony at the inquest that a stranger had been their road companion one leg of the trip (although there Brown said that the stranger had left them before they struck out for Crooked Creek).[148] But testifying at the last trial, in 1899, Major Wiseman admitted that he had found "Joe Burgess," the same one mentioned in Brown's affidavit, quite alive not long after the

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146 *Id.* Buchan testified that Brown's insistence on immunity not only for himself but for his partner as well complicated the negotiations, and of course if true this would suggest that Brown knew Hillmon was still alive; but Brown's testimony was different.

147 Brown's deposition describes Buchan's importunings thus: "[B]y me consenting to do this would insure me that I would never have any trouble about it from that time on, and if I didn't the insurance men would hunt me down and penitentiary me for murder, and that they had plenty of money, and never calculated to paying the woman her money, and it would enable him to get big pay for this paper, and that if I needed any money or anything he would give me all I wanted." Brown Deposition, *supra* note __, at 401.

148 Brown's deposition testimony claimed that "After I told him [Buchan] of this man that camped with us at Cow Skin, then he said he could make it appear that this man was killed instead of Hillmon, and stated in his paper [the affidavit] to this effect." Brown Deposition, *supra* note ____, at 401.

Lawrence inquest.[149] There was a Joe Burgess, but he was not the same man as Frederick Adoplh Walters, and he was not dead. The affidavit was false.

These reflections are important not only to the judgment of history as it pertains to Mr. Buchan, but also to the credibility of Brown and, ultimately, to the significance of the two hearsay letters purporting to be from Frederick Adolph Walters. Without Brown's affidavit, the defendants had little to rest their case on but claimed variations between Hillmon's and the dead man's bodies, the oddness of a man like Hillmon having purchased so much life insurance, and the Walters letters. The letters and the affidavit (despite certain discrepancies between them)[150] seem to reinforce one another: each tends to quell doubts about the reliability of the other. But if the Brown affidavit is dismissed as the product of the interactions of an unscrupulous lawyer, a relentless set of adversaries, and a frightened and unlettered young man, the Walters evidence justly falls under new scrutiny, together with the famous decision that legitimized it.

THE LETTERS IN THE TRIALS

There was no evidence produced of the letters at the Lawrence inquest, of course, because at that time the insurance companies had not yet learned of Mr. Walters' disappearance or even of his existence. Instead, it will be remembered, the defendants proposed various other possible identities for the corpse: the missing brother of Mrs. M.L. Lowell, the "young man of Indiana," and (after the proceeding was over, in the newspapers) Frank Nichols, also known as "Arkansaw." But by the time of the first trial the insurance companies had settled on Walters as their main candidate; some of his family members were summoned as witnesses, and some evidence about the letters was admitted.

Judge Foster, presiding in the first trial, admitted the fiancee Alvina Kasten's letter, together with the deposition in which she identified it; Kasten herself did not testify live at this trial (or any of the others).[151] Elizabeth Rieffenach, Walters' sister, did

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149 LEAVENWORTH TIMES, Nov. 11, 1899, at 6. Apparently by the last trial the defendants had more or less given up the claim that Frederick Adolph Walters was the "Joe Burgess" of Browns' affidavit. One of their own attorneys elicited from Major Wiseman that he had "found" both Francis (Frank) Nichols and Joe Burgess in 1879. *Id*. But perhaps they knew they if they did not bring out this fact, plaintiff's counsel would have. Wiseman's belated willingness to help Sallie Hillmon may have been connected to his testimony in the fifth trial that the companies had not paid him for his services and he had been required to sue them. *See supra* note ___.

150 *See infra* note ___ & accompanying text.

151 LEAVENWORTH TIMES, June 29, 1882, at 4.

testify, but she did not mention the letter about which she later displayed such an astonishing and particular memory; she was asked only to examine some exhibit (very likely the Alvina Kasten letter) and affirm that the handwriting on it was her brother's.[152] A second sister, Fanny Walters, testified that the family had received a letter from Frederick Adolph postmarked Wichita in early March of 1879, but she said nothing about its contents; and a brother who lived in Missouri, C.R. Walters, said that his last letter from Frederick Adolph was sent from Wichita, and mentioned going southwest with a stock man named Hillmon.[153]

The attorneys on both sides seemed far more interested during the first trial in other evidence about the corpse's identity, especially the matter of the teeth, an issue whose significance had become clear as early as the inquest and would persist through each of the six trials. The corpse had a splendid set of teeth, and Sallie Hillmon insisted that her husband's mouth had been perfect.[154] Levi Baldwin and Mr. Judson, at whose table Hillmon had eaten three meals a day for some years, agreed that Hillmon's teeth were whole,[155] but the defendants produced many witnesses who remembered that Hillmon had a noticeable dental imperfection, although they differed on the location of the offending tooth in his mouth and whether it was stained, blackened, or missing altogether, and one said that Hillmon had not one but two missing teeth.[156] Colonel Wiseman, though in the employ of the defendants, would say only that John Hillmon had one tooth that was shorter than the others around it.[157]

Judge Foster's summing-up was rather severe about John Brown and his two conflicting accounts, instructing the jury that unless his affidavit was not "voluntarily made," then Brown must be either a "conspirator to cheat and defraud the insurance companies and in furtherance thereof an accessory to shedding the blood of an innocent man," or "one who sought to rob the woman whom he had made a widow of her just dues and blacken and traduce the name of her dead husband and his own friend."[158] The newspaper's man lost no time, once the jury had retired to deliberate, in declaring to his readers that the "policies were obtained by fraud," that "murder and perjury were resorted

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152 *Id*.
153 *Id*.
154 LEAVENWORTH TIMES, June 20, 1882, at 1.
155 LEAVENWORTH TIMES, June 16, 1882, at 1.
156 LEAVENWORTH TIMES, June 21, 1882, at 1; LEAVENWORTH TIMES, June 22, 1882, at 1.
157 *Id*.
158 LEAVENWORTH TIMES, July 2, 1882, at 5.

to."[159] The judge kept the jurors in session overnight on a Saturday, but after seven ballots the jury remained divided seven to five in favor of Mrs. Hillmon, and a mistrial was declared.[160]

In the second trial the Kasten deposition was again received in evidence, together with the letter.[161] The letter to Elizabeth Rieffenach was at this trial mentioned for the first time, but it was not offered as an exhibit because Mrs. Rieffenach maintained that she could no longer find it. She was permitted to testify to the letter's contents, and did so in such remarkable detail, as though quoting verbatim,[162] that most students of the case take away the impression that this letter was produced; but it was not. Again the jury hung, this time six to six.[163]

We know the evidence of the letters was important to the second jury because after their inability to reach a unanimous verdict brought the trial to an end, an enterprising reporter interviewed some of the jurors; two of them were willing to disclose what had been the chief points of discussion in the jury room. One juror (who had voted for the plaintiff) suggested to the reporter that if Walters had been in Wichita

> he would certainly have been seen and remembered by somebody. He would have had a boarding house; he became a cigarmaker, he would certainly have been remembered by someone of that craft. The fact that there was no attempt to bring anyone forward, who could say they had seen him in Wichita at that time, caused us to believe THAT THERE WAS SOMETHING CROOKED about that letter.[164]

Concerning Brown's two accounts, this juror said that they "had considerable influence, although it was hard to tell which of his stories was true," and also that "it will be hard to make me believe but what Buchan worked him pretty hard, to get his evidence for the companies."[165]

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159 LEAVENWORTH TIMES, July 4, 1882, at 2.
160 LEAVENWORTH TIMES, July 4, 1882, at 4.
161 LEAVENWORTH TIMES, June 18, 1885, at 1.
162 LEAVENWORTH TIMES, June 19, 1885, at 1. The press account spells her surname "Reivnoeck."
163 LEAVENWORTH TIMES, June 25, 1885, at 4.
164 *Id.* (capitalization in original).
165 *Id.*

It appears that if Brown's dueling statements are seen to cancel one another out, the letters become important to the jury's deliberations. Yet they must have failed to convince some, possibly because their authenticity was doubted, especially in the absence of any corroboration of the events recited in the letters. The Walters letters thus seem to have operated as tiemakers in the first two Hillmon trials: aware of their contents, the juries divided and could not decide.

Apparently in response to the reported doubts of the interviewed juror, the defendants called, at the third trial in 1888, several witnesses to testify that they had seen Walters, or someone who resembled him, in Wichita in early March, 1879.[166] And again they offered the Kasten deposition, together with its attached copy of the letter she said Walters had sent her, as well as portions of Mrs. Rieffenach's deposition describing her letter.[167] But this new and revived evidence availed the defendants little because Judge Shiras forbade any mention of the contents of the letters, reasoning that their assertions were hearsay (as no doubt they were).[168] The jury found unanimously for Mrs. Hillmon.[169] The letters, it seems, had been essential to the insurance companies' earlier modest success in staving off a loss; without them they could not prevent a Hillmon victory. Of course it was this outcome that gave rise to review of the case by the Supreme Court, where the Court (per Justice Gray), after delivering its famous opinion, remanded the matter to be tried yet again before a jury fully apprised of the existence and content of the Walters letters.[170]

The three trials that ensued after the Supreme Court's 1892 decision produced outcomes that eerily replicated the first three trials': two more hung juries, followed by a verdict for Mrs. Hillmon destined to be overturned by the United States Supreme Court when the litigation reached it for the second time. But the letters, having by then enjoyed the Supreme Court's attention, sustained a more focused and searching scrutiny in the last three trials than in the first two.

The fourth trial, which took place in Topeka in 1895, was the longest of any, occupying nearly three months of the court's time. The Topeka newspaper, recounting the case's previous history with some awe, prematurely called the proceeding "this final

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166 TOPEKA DAILY CAPITAL, Mar. 14, 1888, at 4.

167 TOPEKA DAILY CAPITAL, Mar. 14, 1888, at 4; 1888 Transcript, *supra* note 9, at 190-91. Rieffenach did not appear in person at this trial. Her deposition was taken in 1880. *See* 1899 Transcript, *supra* note 9, at 1778.

168 See 1888 Transcript, *supra* note 9, at 189-90.

169 TOPEKA DAILY CAPITAL, Mar. 22, 1888, at 4.

170 *See supra* note __ & accompanying text.

Titanic contest."[171] On this occasion the insurance companies produced some evidence that no previous jury had heard. Major Wiseman testified for the first time that when the body was exhumed at Medicine Lodge, Levi Baldwin's brother Alva exclaimed, "Hell! That ain't Hillmon."[172] Wiseman also testified that he had received a letter (not produced) from the patriarch of the Walters family asking him for help in locating a "lost son who wrote home last that he was going west with a man by the name of Hillmon to herd sheep for him."[173] In addition, the defendants called three citizens of Lawrence who had served as jurors at the inquest there; they testified, with remarkable unanimity, that during the inquest Mrs. Hillmon had testified that she could not remember or did not know the color of her husband's hair and eyes, nor his height.[174] As no official transcript was preserved of these proceedings, Mrs. Hillmon's lawyers were not in position to impeach this testimony, but this author is: contemporaneous newspaper accounts report that she described the color of his hair and eyes (eyes dark brown, hair brown, whiskers lighter than hair) in addition to many other features of his appearance (dark complexion, sometimes wore chin whiskers and sometimes only a moustache, hair quite straight and tolerably long, cheek bones quite prominent at times, depending on his weight).[175] (It is true that she said she could not certainly state his height, never having measured him.) Two of these jurors also testified that Mrs. Hillmon did not appear affected by the grief one would expect if her husband were dead; one said she was "frivolously good-natured and jovial."[176] But the Lawrence *Standard's* otherwise unsympathetic chronicler of the inquest had reported, to the contrary, that as Sallie Hillmon recounted for the inquest the

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171 TOPEKA DAILY CAPITAL, Feb.5, 1895, at 4.

172 TOPEKA DAILY CAPITAL, Feb.1, 1895, at 8. The blow-by-blow accounts of the inquest and accompanying events in Lawrence by a reporter who obviously favored the insurance companies made no mention of this event in 1879, although it seems that it would have been well-remarked at the time had it happened. And it is curious that this evidence was not also excluded as hearsay. The newspaper account suggests that it was objected to, but that Judge Thomas overruled the objection. *Id.* The hearsay rules of the time did recognize an exception for "excited utterances" caused by startling stimuli. *See* Ins. Co. v. Mosley, 75 U.S. 397 (1869)., and the judge at the sixth trial apparently admitted Alva Baldwin's statement as such a "sudden ejaculation." LEAVENWORTH TIMES, Oct. 28, 1899, at 4. But this utterance was (allegedly) made by the loyal brother and traveling companion of one of the conspirators. On the defendants' theory of what happened, how surprised could Alva Baldwin have been if the corpse did not appear to be Hillmon? When Alva Baldwin finally appeared as a live witness, at the sixth trial, he firmly denied having made the exclamation. LEAVENWORTH TIMES, Oct. 26, 1899, at 4.

173 TOPEKA DAILY CAPITAL, Feb. 1, 1879, at 8.

174 TOPEKA DAILY CAPITAL, Feb. 2, 1895, at 5; TOPEKA DAILY CAPITAL, Feb. 6, 1895, at 4.

175 LEAVENWORTH STANDARD, Apr. 10, 1879 at 1.

176 TOPEKA DAILY CAPITAL, Feb. 2, 1895, at 5; TOPEKA DAILY CAPITAL, Feb. 6, 1895, at 4.

last letter she had received from her husband, she "appeared considerably affected," and that "her grief, because of his death, has all the appearance of being genuine and heart-felt."[177]

As for the letters, neither Alvina Kasten nor Elizabeth Reiffenach appeared in person at the fourth trial, but their depositions were admitted. Another sibling, Miss Fannie Walters, testified at length about her brother's appearance and his resemblance to photographs of the corpse taken when it was exhumed at Lawrence, and she did aver that the family had received a final letter from him postmarked Wichita in early March of 1879, but she did not testify to its contents.[178] There was another deposition witness who claimed to have been the recipient of correspondence from Walters: one H.S. Spreen of Ft. Madison, who deposed that he had gotten a letter from Walters dated Wichita, about the 5th or 6th of March, informing Mr. Spreen that the writer "was going west to herd sheep for a man." According to Mr. Spreen the business purpose of the letter, which was not produced, was to request a statement of Walters' account with "the lodge" (apparently the Odd Fellows Lodge, of which Walters was a member).[179] Although Spreen had testified at the first trial, merely to say that Walters had a mole on his back and that a picture (apparently of the corpse) "look[ed] a good deal like Walters,"[180] this was the first mention of any letter Spreen had received from him. And the brother C.R. Walters, who lived at the time of Frederick Adolph's disappearance not with the sisters and father in Ft. Madison, but in Missouri, remembered (as he did in the first trial) a letter he said he had received during February of 1879, postmarked Wichita. His memory of this missing letter had grown a bit more particular with time: he said it related that his brother "had made arrangements to drive cattle for a man by the name of Hillmon" in Colorado, and wished to postpone plans the two brothers had made to meet and go to Leadville for the gold mining until after his engagement with Hillmon.[181]

This brotherly letter (like the one Mrs. Reiffenach claimed) was not produced, but another one was, by Mrs. Hillmon's lawyers: a letter that C.R. Walters had written to the sheriff of Leavenworth in 1880, after the inquest but before any of the trials, stating that his brother Frederick Adolph had a gold filling in his teeth.[182] This letter was inconvenient to the defendants, as their proof had been as adamant on the untouched

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177 LAWRENCE STANDARD, Apr. 10, 1879 at 1.

178 TOPEKA DAILY CAPITAL, Feb. 24, 1895, at 2.

179 TOPEKA DAILY CAPITAL, Feb. 20, 1895, at 3.

180 LEAVENWORTH TIMES, June 29, 1882, at 4. The man's name is reported there as "H.C. Sprehn."

181 TOPEKA DAILY CAPITAL, Feb. 23, 1895, at 5.

182 *Id*.

perfection of the corpse's teeth as on any point in the litigation. C.R. Walters' firm recollection that it was cattle, not sheep, that were the subject of Hillmon's intentions as described in the letter was also a bit of an embarrassment, as the Kasten letter mentioned the woollier species. The jury in this trial hung eleven to one in favor of Mrs. Hillmon.[183]

The fifth trial followed the fourth by a year; it began and ended in March of 1896. There were the familiar disagreements about resemblances and disparities between the living Hillmon and the corpse, and evidence of the contradictory accounts given by John Brown. Once again the epistolary productions of Mr. Walters, addressed to Kasten, Rieffenach, and C.R. Walters, became the subject of proof. There was also a rather spectacular witness who was heard in this trial for the first time, a Patrick Heely of St. Louis. Mr. Heeley testified that seventeen years earlier, in the winter of 1879, he had known Frederick Adolph Walters in Wichita—for about two months prior to March 1st, he said. Walters worked for him in Wichita, said Heeley, helping him sell railroad excursion tickets, and the two men had seen each other at least once a day. On about March 1st he said he saw Walters with another man whom Walters introduced as John Hillmon; on a later occasion, he saw Walters alone and Walters said he was going with Hillmon to start a cattle ranch.[184] This testimony must have been very impressive at the time, and seems not to have been much impeached, but in retrospect it seems altogether dubious. Heeley was quite certain that his acquaintance with, and employment of, Walters had lasted for at least the two months prior to March 1st, and that he had seen him at least once every day in Wichita during that time; at the sixth trial, however, Elizabeth Rieffenach produced a letter postmarked February 9, 1879 at Emporia (about eighty wintry miles from Wichita) in which her brother writes that he is staying in that city and has not had much employment recently.[185] But this letter was not known to the jurors of the fifth trial. They also hung, a majority of the jurors apparently in favor of the defendants.[186]

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183 TOPEKA DAILY CAPITAL, Mar. 21, 1895, at 1.

184 *Id.* at 5.

185 1899 Transcript, *supra* note 9, at 1794.

186 TOPEKA DAILY CAPITAL, Apr. 4, 1896, at 1. The *Capital* reported that the last poll taken of the jurors was seven to five, although one juror later claimed they had been evenly divided. It also reported that the jurors had thereafter agreed to some sort of numerical system to calculate the weight of evidence on each side by assigning a value from zero to five for each witness. On this system, the Capital's source said, the insurance companies were far ahead until one holdout juror refused to vote according to this system, and this defection caused the foreman to inform the judge that they were at an impasse. The paper also reported that the insurance companies had proposed to the Hillmon side, after this outcome, to "try the case

The sixth trial began in a manner that resembled the others, but offered several significant new revelations. Alvina Kasten did not testify, but her deposition and the letter performed the same office they had in most of the earlier trials. For the first time, Elizabeth Rieffenach produced a cache of letters that she said had been written home by her brother during the year between his departure from Ft. Madison and the missing Wichita letter.[187] Their purpose was to show that he often signed his letters "FA Walter" (not Walters, the family name); by then Mrs. Hillmon's lawyers had noticed and pointed out that the Kasten letter was signed in this fashion.[188] It was also claimed to be obvious that the handwriting on these letters matched that of the "Dearest Alvina" letter, a proposition that Mrs. Hillmon's lawyers did not dispute.[189] But this collection is interesting for another reason as well: although the missives suggest that Walters visited Council Bluffs, Kansas City, Warrensburg , Paola, Aladdin, Lawrence, and Emporia, Kansas, as well as Holden, Missouri, during this year,[190] there is no evidence in them that Walters ever stayed or worked in Fort Scott, Wellington, or Arkansas City-- the places that the "Joe" of John Brown's affidavit said he had been working. The tendency of this evidence to disprove that "Joe Burgess" and Frederick Adolph Walters were the same man was reinforced when Major Wiseman confessed that he had found Joe Burgess— the same Joe "of whom there was some talk of [his] having been the body which was shipped back for that of Hillmon" — alive more than twenty years before.[191]

There was a surprise rebuttal witness for the plaintiff, a man named Simmons-- his testimony is discussed below. But before that, about midway through the trial, a controversy arose about whether it could continue, occasioned by an attempt to corrupt one of the jurors. One of the jurors communicated to Judge Hook that he had been approached with a "communication . . . which he interpreted as preliminary to an offer to bribe." The judge disclosed this matter in open court but declined to say which juror had received this communication, or the name of the party who made it. This latter

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before the five federal judges who have tried the case and abide by the decision of the majority." *Id*. This proposal did not, it seems, meet with agreement.

187 1899 Transcript, *supra* note 9, at 1790-94.

188 LEAVENWORTH TIMES, Nov. 11, 1899, at 6.

189 J.W. Green explicitly noted the plaintiff's failure to contest the identity of the handwriting in his summation. LEAVENWORTH TIMES, Nov. 17, 1899, at 4.

190 This itinerary is remarkably similar to the list of cities given by Miss Alvina Kasten when she was asked in her deposition from whence she had received letters from Walters. *See* 1899 Transcript, *supra* note 9, at 1693. These letters were never produced because (Kasten said) she had destroyed all of Walters' letters except for the crucial one. *See infra* note ___ & accompanying text.

191 *See supra* note ___.

information was known, however, to the juror and to the judge (who announced to the courtroom, including the jurors, that it was "no lawyer connected with this case").[192] The juror had apparently rejected this overture outright, and Judge Hook seemed content to proceed with the trial after disclosing the event to all counsel and emphasizing a prohibition against any further efforts of that nature; he later acknowledged that the person identified as the briber had been in the courtroom at the time he issued this admonition.[193] Plaintiff's counsel pronounced that they were pleased to proceed as well, but defense counsel immediately moved for a mistrial, and for dismissal of the jurors, insisting that in light of the respective financial positions of the parties, "an impression would go out: it would make an impression upon the jury that if anyone had done that, it was the defendants in this case, because the defendants have the money."[194] The judge declined to interrupt the trial or dismiss the jury. In the end, the jurors deliberated for less than a day before returning a unanimous verdict for Mrs. Hillmon.[195]

THE AUTHENTICITY OF THE MCGUFFIN

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192 LEAVENWORTH TIMES, Oct. 27, 1899, at 4.

193 *Id*.

194 Typewritten partial transcript of 1899 trial, page marked 668 (NARA Archive).

195 LEAVENWORTH TIMES, Nov. 19, 1899, at 4. The New York Life Insurance Company had paid Sallie Hillmon Smith's claim before the sixth trial commenced. *See* LAWRENCE EVENING STANDARD, Oct. 15, 1899, at 4. Mutual of New York paid the judgment against it from the sixth trial. *See* Satisfaction in Full of Judgment, August 8, 1900 (NARA Archive). But the Connecticut Mutual Life Insurance Company again appealed. A Circuit Court of Appeals having been created since the previous appeal, the appeal was first argued and decided there, in favor of affirmance. Conn. Mut. Life Ins. Co. v. Hillmon, 107 F. 834 (1901). Certiorari review was granted by the United States Supreme Court, with the same result as a decade earlier: the Court overturned Mrs. Hillmon's victory and remanded the matter for a new trial. On this occasion the bases for reversal were again issues pertaining to the law of evidence. The Court held that John Brown's affidavit, introduced by Mrs. Hillmon for the limited purpose of showing why she had at one time said she would release the defendants from her claims, should have been received as the truth of the matters it recited and the jury so instructed. It also held that certain statements that witnesses claimed Levi Baldwin had made about a scheme he and John Hillmon had conceived, a scheme that Baldwin said would make him rich, were admissible against Mrs. Hillmon as co-conspirator's statements. Conn. Mut. Life Ins. Co. v. Hillmon, 188 U.S. 208 (1903). To the twenty-first century litigator these seem very dubious propositions, and they never achieved the prominence of the rule created in the first decision. (Two Justices dissented without opinion; one of them was Justice David Brewer, who eighteen years earlier had presided over the second Hillmon trial.) Before the case could be tried for a seventh time, the Connecticut Mutual Life Insurance Company settled Mrs. Hillmon's claim.

There is more than enough reason to doubt the authenticity of the famous Walters letters, indeed to doubt whether the Rieffenach letter ever existed at all. Apparently at least some of the jurors thought so as well: the companies never managed to persuade a unanimous jury of their case, although it would seem that any juror who credited the authenticity and truth of the letters would be nearly compelled to conclude that the dead man was not Hillmon but Walters. Curiously, Mrs. Hillmon's lawyers do not seem to have pursued the possibility that the letters were fakes; there is no doubt of their zealous advocacy but this particular point is not one that appears to have occurred to them. Nevertheless, reasons for doubting the letters' genuineness are numerous.

There are significant incompatibilities between the account in John Brown's affidavit, which was the defendants' most important evidence, and the Kasten letter. In the latter, which was postmarked Wichita on March 2nd, 1879, and begins with the inscription "Wichita, Kansas, Mar 1st 79" the writer states "I will stay here until the fore part of next week & then will leave here to see 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 range . . . ."[196] In the affidavit prepared and urged on him by Buchan, John Brown swore that he and Hillmon "overtook a stranger on this trip the first day out from Wichita, about two and one-half miles from town. Who Hillmon invited to get in and ride." According to the affidavit, the stranger said he was named "Berkly, Burgis, or something sounding like that, we always called him Joe," and claimed that he "had been around Fort Scott awhile, and had worked about Wellington and Arkansas City."[197] This portion of the affidavit is perfectly consistent with the testimony Brown gave at the inquest saying that he and Hillmon had been joined by a stranger during some of their travels.

But in the affidavit "Joe" has become the man who, according to the remainder of the affidavit and the companies' claims, was killed at Crooked Creek and left behind to masquerade as Hillmon's cadaver. If there were such a man, however, it would not have been the man who wrote the "Dearest Alvina" letter. If Frederick Adolph Walters were the "stranger" referred to in Brown's affidavit, perhaps he might have employed an alias, and possibly he might even have claimed that he worked in places that he had not. But another discrepancy cannot be explained away: if the letter writer were F.A. Walters, how could he have met up with Hillmon in Wichita, and posted a letter from Wichita thereafter describing this encounter? According to Brown, he and Hillmon encountered

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196 Or possibly "ranch." See Transcript 1899, *supra* note 9, at 1689. Concerning originals and copies of this letter, see *infra* n. ___ & accompanying text.

197 Brown Affidavit, *supra* note 11, at 165.

the stranger two or two and half miles outside of Wichita, on their way west. If Walters met Hillmon in Wichita, then he was not the man Brown describes in his affidavit, and thus not the man who, according to the affidavit, was murdered at Crooked Creek.[198]

The insurance companies did not know of Walters' existence or disappearance at the time the attorney Buchan persuaded Brown to sign the affidavit. Eventually the insurance companies' men, who were alert to any news of missing young men, learned that the family of Frederick Adolph Walters was looking for their vanished relative. By then it was too late to go back and change the name—Joe Berkley or Burgess—that Buchan had written into the affidavit.

But Walters' disappearance was too suggestive for the defendants not to make use of it, especially after their earlier candidates for the identity of the corpse proved so disappointing. All that was needed to transform it into strong proof that Hillmon had not died at Crooked Creek was a document to tie the vanished man to the Crooked Creek corpse, and a witness to authenticate it. The Kasten letter and Miss Alvina Kasten satisfied this need almost perfectly. (Almost, because of the small discrepancy between the letter and Brown's affidavit concerning the occasion of the letter-writer's making the acquaintance of John Hillmon.) If Frederick Adolph Walters really did meet John Hillmon, he would not have been mistaken about when and where. But if a member of the insurance companies' team composed the Kasten letter for the purpose of deceiving a jury, the composer might have overlooked the discrepancy between its contents and the Brown affidavit.

Still, the mind resists this last possibility, because it requires us to conclude that Alvina Kasten lied when she testified, in her deposition, that she had received the letter on March 3, 1879. We must also conclude that Elizabeth Rieffenach never received the lost letter that she testified contained nearly the same information (as did her brother C.R. Walters), and must credit the insurance companies' agents and lawyers with sufficient dishonesty to create a brazenly inauthentic document and suborn the perjury of these witnesses. Can this rather extravagant hypothesis be supported? I believe that it is not

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[198] It may be speculated that Walters actually wrote the letter on the trail after meeting Hillmon and Brown, then handed it off to a traveler going the opposite direction, back toward Wichita, asking him to post it from there. But in such a case why would he not say so, instead of heading the letter "Wichita"? Moreover, immediately after inscribing this heading the letter writer states that he "will stay here until the fore part of next week & then will leave here" (with Hillmon). The letter was dated March 1, 1879, and postmarked March 2nd, a Sunday. If the writer had kept with his intentions (that's the idea of the hearsay exception, isn't it?) he could not have left Wichita until at least the day after the letter mentioning Hillmon's name was posted from there, and so could not have met Hillmon for the first time on the trail.

only supportable but nearly irresistible, and that a narrative that accounts for all of the known facts must lead us to the conclusion that the Kasten letter was a fake (and that the Rieffenach letter never existed).

We know that the lawyer Buchan, an attorney who conceded that he worked for and was paid by the insurance companies, employed shocking coercion to persuade John Brown to sign the affidavit, a document shown to be false by the later testimony of Major Wiseman.[199] We also know that not long before Alvina Kasten gave her deposition (the only occasion when she ever swore to her receipt of the letter) Buchan dictated to Brown the language of a letter addressed to Sallie Hillmon, suggesting that the writer and the addressee were conspirators in a plot and that John Hillmon was still alive. The circumstance that there was never even any pretense of actually mailing the letter to Mrs. Hillmon—that Buchan sent it directly to the insurance company lawyers[200]— suggests both the nakedness of Buchan's motive for having Brown write it, and the clumsiness of his methods. Mr. Buchan was no stranger to the fabrication of evidence—epistolary evidence— nor was he too scrupulous to pressure an individual into swearing to propositions that were not true.

Neither was Buchan the only attorney in the employ of the companies who participated on the presentation of false evidence. At least three witnesses who testified at the second and fourth trials—the three jurors from the Lawrence inquest—testified falsely about what Mrs. Hillmon had said at the inquest.[201] The witnesses were examined in these trials by attorneys Green and Barker, both of whom were present at the inquest—indeed conducted it—and surely knew that these witnesses' testimony was untrue. Other testimony presented by the defendants—such as that of the doctor who said that John Hillmon reported his height to be 5'11" (the length of the dead body) when examined for his insurance policy, but came back unbidden a few days later to say he was in fact only 5'9" — is far enough beyond implausible to arouse a serious suspicion of subornation.[202]

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199 See *supra* note __& accompanying text.

200 See *supra* note __ & accompanying text.

201 See *supra* note ___ & accompanying text.

202 *See* LAWRENCE STANDARD, Apr. 10, 1879, at 2 (testimony of Dr. Miller). This testimony was offered again at each of the trials to explain why the doctor's form had 5'9" written over an erased earlier entry (other forms said 5'11"). *See, e.g.*, LEAVENWORTH TIMES, Nov. 3, 1899, at 6. But why would Hillmon have done such a thing, even if he were planning the scheme the defendants attributed to him? Surely he knew his own height, and he could not have known, before leaving home, what height his victim would be.

It also seems nearly certain that the testimony of Seeley in the fifth trial was perjured, but it is less clear that the attorneys knew that this was the case, as the letter that proved him false was not discovered

And it surely reflects on the ethics of the companies' lawyers that they continued to maintain for years after their agent had located "Joe Burgess" alive that he and Frederick Adolph Walters were the same (dead) man.[203]

Then there is that troubling attempt at juror corruption in the course of the last trial. It was the defendants who insisted (unsuccessfully) that the jury should be discharged after the attempt was disclosed in open court. Although the *Leavenworth Times* sought to cast the defendants as scrupulous in their objection to proceeding in a tainted trial (and the plaintiff as suspiciously willing to go forward after the attempt was exposed),[204] the companies' swift move to terminate a proceeding in which at least one juror may have known which side had attempted to corrupt him was at least self-interested, and at worst evidence of guilty knowledge.[205]

But if the defendants' lawyers were capable of such chicanery as document fakery and subornation, what would have induced such respectable women as Alvina Kasten and Elizabeth Reiffenach to perjure themselves? Of Kasten more later, but as to Reiffenach, a possible explanation appears in a newspaper account of the second trial. The reporter concludes an account of the day's testimony with the following:

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until some time shortly before the sixth and last trial. Defense counsel wisely did not call Seeley in the sixth trial.

[203] See *supra* note ____ & accompanying text. J.W. Green was still arguing this proposition in his opening statement in the last trial, twenty years after he certainly had learned that it could not be true. LEAVENWORTH TIMES, Oct. 18, 1899, at 4 ("The man who was buried at Lawrence was Walters. He was the man who accompanied Hillmon and Brown west from Wichita with the promise of a position on a sheep ranch.").

[204] *Id*.

[205] What follows here is a resort to character evidence that would be forbidden in most courtrooms. *See* FED. R. EVID. 404(b). Charles Gleed was, on an earlier occasion in his life, accused of participation in bribery. The circumstances were quite different from those of the Hillmon litigation. In 1887 the Kansas Legislature had passed a law appropriating money to compensate victims of the notorious Quantrell Raid on Lawrence in 1863. There was widespread dissatisfaction about the amount and method of compensation, and several sources complained that (in the words of one) "a Topeka lobbyist serving as a member of the University of Kansas Board of Regents" (this could only have been Gleed) had taken $50,000 raised by the claimants to purchase votes in the Legislature, and was now refusing to pay the bribes or return the money. Gleed did not deny that he had lobbied for the legislation, but disputed that he had offered any bribes. He excoriated his accusers by deeming it a pity that they had not been "gathered in by Mr. Quantrell." A number of citizens and newspapers apparently believed the accusation. HARMON, *supra* note __, at 81-85.

> It is not generally known that there was an insurance on the life of young Walters, who is said to have been the dead body taken to Lawrence and passed for the body of Hillman. A reporter for THE TIMES was informed yesterday afternoon that Walters' life was insured and that the insurance money was paid, on the evidence elicited in the Hillman trial, of his death.[206]

The *Leavenworth Times* was not a sympathetic admirer of Sallie Hillmon.[207] Probably the report of insurance on Walters' life found its way into print as a way of suggesting that some insurance agent was so convinced that the dead man was Walters that he paid out his company's money on the strength of this conviction. But to this writer the reported circumstance suggests another possibility altogether. The defendants repeatedly argued the unlikelihood that such a man as John Hillmon would purchase insurance on his worthless life; could Frederick Adolph Walters, an unmarried man and a cigarmaker by trade, have been any likelier to invest in such a cause? Hillmon had a wife to provide for, but F.A. Walters had no dependents, and no more prospects than the older man. But if the defendants wished to induce not only his sister Mrs. Rieffenach but other members of the Walters family to testify (as they did) about correspondence from Frederick Adolph that mentioned the name Hillmon, what better method of compensating them for their trouble than retrospectively issuing a policy of insurance on his life, then paying the proceeds to his bereaved family-- a gesture splendidly synchronous with their insistence that he had died at Crooked Creek?

Beyond pecuniary motives, however, I believe that the Walters family, or some of its members, did truly come to believe that the photographs of the dead man were those of their lost son and brother Frederick Walter. A little suggestion and an adroit presentation of the photos would go a long way toward persuading a baffled and worried family whose loved one had suddenly ceased writing that his death by murder was the explanation.[208] Their evident belief that Frederick Adolph had died at Crooked Creek may

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206 LEAVENWORTH TIMES, June 14, 1885, at 4.

207 Toward the end of this trial it printed a story expressing the sentiment that "where there is such a well-grounded suspicion as there is in this case, the quicker such cases are thrown out of court the better, and the sooner the attempts to defraud insurance companies will be stopped." LEAVENWORTH TIMES, June 26, 1885, at 2.

208 A curious piece of evidence offered by the defendants at the last trial, but excluded by the judge (perhaps on hearsay grounds), showed that the Walters family had erected a gravestone in the family

have nudged the family toward participation in perjury, if they thought it would produce justice for their missing member. C.R.Walters even admitted to this motivation on cross-examination during the last trial, while trying to explain a piece of inconvenient evidence. He had written to the Sheriff Clarke of Douglas County about his missing brother, and mentioned that he thought his brother had fillings in his teeth.[209] This evidence was of course at odds with the insurance companies' persistent claim that the corpse had had perfect, unblemished, unaltered teeth. C.R.'s explanation, elicited on redirect by J.W. Green, was revealing. He said he had been told that Clarke was working for the Hillmon side, and that:

> . . . I had a feeling of vengeance in the matter and was naturally suspicious on all sides, and while I had no sympathy for the insurance companies . . . still I had the fear that the murderer would not be brought to terms unless he was brought there by the insurance companies, and that prompted me to make some statements to Mr. Clarke that may not be altogether true.[210]

It is obscure why his belief that Clarke was working for Sallie Hillmon would prompt C.R. Walters to misrepresent the perfection of his brother's teeth. But his confession of his desire to see the "murderers" brought to justice, and his belief that it was only the insurance companies that could accomplish this goal, is telling. If he harbored this belief, other members of his family may have done so as well.

Elizabeth Rieffenach's testimony about the lost letter mentioning Hillmon, together with the cache of other letters she produced for the last trial, contributes to another puzzle: what was her brother's name? The family name was Walters, or so all of the family witnesses are identified. In her original deposition, given in 1881, Rieffenach testified that the lost letter was signed "Fred Adolph Walters,"[211] but the "Dearest Alvina" letter was signed "F.A. Walter." Various family members sought to explain the discrepancy in the last name by saying that some family members used Walter and some Walters. Frederick Adolph, his brother C.R. claimed, used both forms alternately[212] (and

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cemetery plot inscribed "Frederick Adolph Walters, born January 25th, 1855, died February 17, 1879. Interred at Lawrence, Kansas." 1899 Transcript, *supra* note 9, at 1799.

209 See *supra* note __ & accompanying text.

210 LEAVENWORTH TIMES, Nov. 11, 1899, at 6.

211 *See* 1899 Transcript, *supra* note 9, at 1780.

212 *Id*. at 1752.

had signed the letter to him with the signature "F.A. Walters")[213] By the last trial in 1899, Elizabeth Rieffenach was testifying, contrary to her deposition, that her brother never signed his name in any way but "F.A.", and usually "Walter."[214] In support of this claim she produced numerous letters from him, never before offered in evidence, purportedly written between his departure from home and February of 1879; most were signed "F.A. Walter" but one was signed "Fred A.W." one "F.A.W." and one "Fred. A. Walter."[215] (Alvina Kasten, when asked how her fiancee was commonly known among his companions, replied, "Adolph" [216]) None of these letters had ever been produced before the sixth trial. Perhaps these discrepancies do not prove very much, except that Elizabeth Rieffenach was caught in a number of inconsistencies in her eagerness to authenticate the "Dearest Alvina" letter, and that Frederick Adolph, if indeed he was author of the late-produced letters, used a number of different names (although none of them "Joe").

It was also claimed in this last trial, without much contest from Mrs. Hillmon's lawyers, that the handwriting on these late-discovered missives matched that of the "Dearest Alvina" letter.[217] This claim cannot be examined retrospectively because of the unavailability of both these letters and the original "Dear Alvina" letter, but the latter's compromised chain of custody takes away considerably from the probative value of this claimed circumstance. The original letter, it seems, spent much of its life in the custody of Mr. James W. Green, counsel for the defendants.[218]

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213 *Id*. at 1751.

214 *Id*. at 1781.

215 *Id*. at 1788-94.

216 *Id*. at 1690.

217 See *supra* note ___ & accompanying text.

218 It would be an excellent exercise to compare the handwriting on the Kasten letter to that of other letters written by young Walters, but the original of the Kasten letter is not to be found; in its stead, in the archives of the National Archives and Records Administration, is a copy (marked "Copy")—handwritten, for facsimile copies were unknown in those days. The original (also handwritten) deposition transcript is there; but the copied letter appears to have been substituted for the original "Exhibit C," which would in the ordinary course have been appended to the deposition. The handwritten copy is rather obviously not written in the distinctive elegant copperplate of the notary who recorded the deposition, one Sabert M. Casey of Ft. Madison. But at the end of the copy appears this notation: "Received June 24, 1881 a letter of which the above is a true copy," and below this is a signature: J.W. Green, Atty. For Deft." The handwriting of the Green signature bears a remarkable resemblance to the handwriting of the copy; for example, the "D" of "Deft." is identical to that of "Dearest." It appears that J.W. Green, County Attorney, attorney for the defendants, probably hand-wrote the only copy that survives of the famous Dearest Alvina letter, and was allowed—before the first trial of the case-- to substitute his handwritten copy for the original. It does not appear that Alvina Kasten was ever again asked to identify this letter, as she never

Alvina Kasten's deposition was taken in June of 1881, a year before the first trial, in her home town of Ft. Madison, Iowa, and it is this deposition that served thereafter as the defendant's evidence concerning the famous letter. In this deposition she identifies an exhibit (Exhibit "C") as a letter beginning "Dearest Alvina" received by her on the 3rd of March, 1879; she says she recognizes the handwriting as that of her fiance[219] F.A. Walters, from whom she testified she had received a letter every two weeks, or week and a half, since his departure from Ft. Madison nearly a year earlier. The letter contains the familiar description of his encounter with "a man by the name of Hillmon who intends to start a sheep range" and his intention to accept the man's offer of employment at "more wages than I could make at anything else."

Kasten testified that she had given this letter to Mr. Tillinghast, representing the New York Life Insurance Company, in January of 1880. She said that Tillinghast had come to see her, on the occasion when she gave him the letter, with Daniel Walter, one of Frederick Adolph's brothers, and with a Mr. Spreen (probably H.S. Spreen, a friend of the Walters family and a frequent witness for the insurance companies; by the time of the fourth trial Mr. Spreen was also testifying that he had had a letter from Walters, unfortunately destroyed, that affirmed his plan to go west with a man to start a sheep ranch). The Walters brother had been there earlier in the month, she said, to show her some pictures of the dead man. She identified only one of them, the side view, as her sweetheart; about the other she said she could not tell.[220]

What might have been Miss Alvina Kasten's motives for lying under oath? If threats or inducements prompted her deposition testimony identifying the letter, they are not evident from the record. Still, her account of her relationship with Adolph, as she said she called him, suggests some modest pride in her betrothed status. Perhaps it would have been hard for her to acknowledge that her fiance had simply chosen not to come home to her, and to stop writing; his death at the hands of Hillmon may have been a less painful explanation for his disappearance. And once recruited to this explanation, perhaps she (like C.R. Walters) was not difficult to enlist in the enterprise of denying the

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again testified in the Hillmon case. In other words, the original "Dearest Alvina" letter was in the possession of defense counsel after the deposition of Alvina Kasten, who never had another occasion to examine it.

[219] 1899 Transcript, *supra* note 9, at 1687. She balked at specifying whether they were engaged, saying it was nobody's concern but theirs, but did agree that the two had exchanged rings around December of 1877. *Id*. at 1691.

[220] *Id*. at 1696. The deposition, like this paragraph, alternates between "Walter" and "Walters" as the family name.

wicked Hillmons the proceeds of their crime, by agreeing that a letter she was shown had actually been received by her shortly after it was dated. She may have been persuaded that the letter was intended for her and had somehow gone astray, but that it would benefit the Hillmons were she to say truthfully that she had not received it by post. She may also have been promised that she needed only to testify at a deposition and would never have to appear before a judge, for as a resident of Iowa she was not susceptible to the subpoena of a Kansas federal court.

We know Alvina Kasten never did appear in court, which prompts the question, why not? Would it not have behooved the defendants (who brought in many witnesses from much further away than Iowa) to persuade the bereaved fiancée to travel to the trial? Yet they did not do so.[221] The suggestion that wounded romantic pride might account for a respectable young woman's small bout of perjury may seem fanciful, but consider her testimony that she destroyed all of her correspondence from Adolph --except of course for the letter she had turned over to the insurance companies' men-- in 1881.[222] Why? She "was sick at the time and did not expect to get over my sickness and destroyed all my letters."[223] Apparently she did not want her letters read in case she died, but this modesty does not comport with her earlier eagerness to surrender the "Dearest Alvina" letter for use in litigation. The destruction of the letters is, however, compatible with some belated doubts about the martyrdom of her swain, although hard evidence of his perfidy would not appear for many years after the young lady gave her deposition.

THE MAN WHO OWNED A CIGAR FACTORY

Consider testimony from the sixth and last trial, in 1899, by one Arthur Simmons. It appears that the defendants may actually have located Mr. Simmons originally, for a pro-defendant newspaper's coverage of the last trial mentions toward the end of the plaintiff's case that it expects testimony from the defendants that "Walters was in Leavenworth in the year 1878 and that while here worked for the tobacco house of

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221 Nor did Mrs. Hillmon's attorneys, of course, but unlike defense counsel they had few resources available to assist in any such persuasion. In any event, it does not seem to have occurred to Mrs. Hillmon's lawyers that the Kasten letter was not authentic.

222 *Id*. at 1694.

223 *Id*. At first she said she had destroyed the letters shortly after giving the Wichita letter to Tillinghast; on further questioning she said it had been a year later than that, which would have been only shortly before giving the deposition. She appears, from the transcript, to have been flustered by the questioning, explaining her lapses by saying she was "bothered" (worried, presumably) about her sister, who was ill.

Staiger & Simmons."[224] But when given, the testimony of Simmons differed from this prediction by a highly significant year, and he was in the end called by the plaintiff as a rebuttal witness. He testified that for three weeks in May of 1879—that is, two months *after* the death at Crooked Creek-- he employed Frederick Adolph Walters in his factory as a cigarmaker. Nor was his testimony the only proof of these events; Simmons produced records of employment corroborating this claim. He knew the young man as F. Walters, and he identified a photograph of the young Frederick Adolph as one of the man who had made cigars for him. He testified that even after the intervening years he had a good recollection of the young cigarmaker because

> [h]e was a man who was all the time talking to the men about him and telling of his many travels. He had been in a large number of towns in different places and he also talked a great deal of his love scrapes and how he had gotten out of them.[225]

Now perhaps this Arthur Simmons was lying through his teeth and had counterfeited the employment records bearing Walters' name,[226] but short of outright bribery there is no apparent reason why he should have done these things for Mrs. Hillmon or her attorneys.[227] And if Simmons was truthful, his testimony not only

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224 LEAVENWORTH TIMES, Oct. 25, 1899, at 4.

225 LEAVENWORTH TIMES, Nov, 14, 1899, at 4.

226 After the evidence had closed at the last trial, but before the jury was instructed, the Hillmon attorneys asked leave to reopen the case for the testimony of a newly-discovered witness, T.S. Cookson, who was said to be a co-employee who remembered F.A. Walters working at the Simmons cigar factory during the dates testified to by Simmons. The court denied the motion to reopen. LEAVENWORTH TIMES, Nov. 15, 1899, at 4.

No aspersion was ever cast on the character of Simmons, at least not in the courtroom. The last-minute timing of his testimony may have made a search for impeachment material hopeless, but years later, reporting retrospectively on the case, the Topeka Capital characterized Simmons as "one of the oldest and most substantial cigar manufacturers in Leavenworth." TOPEKA DAILY CAPITAL, July 5, 1903, at 5.

227 It is true that there was also evidence, in various of the Hillmon trials, of sightings of Hillmon after his claimed death at Crooked Creek. But none of these identifications was supported by any documentary or corroborative evidence, and most if not all were highly implausible on their face. In the fifth trial, for example, one John H. Mathias, described (even by the pro-defendant Topeka Daily Capital) as "an old soldier who is just recovering from the effects of a railroad wreck," testified that he knew Hillmon from buffalo hunts in Texas in the early 1870s, and had seen him again in May 1881 in jail in Tombstone, Arizona, having been sent there by the insurance companies to identify the prisoner. The man was released from jail, Mathias said, in June of 1881. The witness also believed that all the prisoner was charged with

directly disproves the insurance companies' claims about the corpse, but also suggests something of Alvina Kasten's place in Mr. Walters' life. It may cast some light on her coyness about whether they were engaged, point to the reasons why he may have left his home and family in Iowa for a more uncertain but freer life, make some sense of her decision to destroy his correspondence, and explain why Walters did not make himself known when the publicity about the Hillmon case reached him.

The *Leavenworth Times* was scornful of the Simmons evidence when it was first presented. The newspaper's trial reporter argued that it would have been impossible, so soon after the notorious death at Crooked Creek, for Walters or his employer Simmons to have been unaware that information about a young man named Walters was being sought in nearby Lawrence in connection with an inquest and the possibility that he might have been a victim of homicide.[228] But this argument represents pure revisionism, because in May of 1879 the name of Walters had not been publicly associated with speculation

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was "being John Hillmon" (presumably, that is, being the murderer of Walters). TOPEKA DAILY CAPITAL, March 25, 1896, at 5. Mrs. Hillmon's attorneys argued that it was not believable that the defendants, having taken the measures they did to find Hillmon (including the offer of large rewards), would have allowed him to slip away after he had been located by their agent. Another reported sighting of Hillmon in July 1879, at a mining site near Leadville, Colorado, was vague: Carl R. Hayes, a former resident of Lawrence, said he had notified Wiseman as soon as he saw Hillmon, who was working the mines there. Deposition of Carl R. Hayes, on file at NARA archive – need more detail for cite. *See* LEAVENWORTH TIMES, June 19, 1885, at 1. But Wiseman, for all his eagerness to apprehend Hillmon, apparently was not able to translate this tip into a genuine encounter with him, for he never testified about one. Moreover, Frank Brooks and John L. Jones, who knew Hillmon, worked the Leadville mines during the same month and never saw Hillmon there. Depositions of John L. Jones and Frank Brooks, on file at NARA archive; *see also* LEAVENWORTH STANDARD, June 30, 1882, at 4. Another two witnesses testified, in the second trial, that they lived in Albuquerque and had known a man named "Coleman" there about a year earlier; shown a photograph of Hillmon, he said it looked like Coleman. LEAVENWORTH TIMES, June 19, 1885, at 1. None of this testimony has the force of the Simmons' evidence. Gleed's Annual Report maintains that the defendants made little effort to try to locate Hillmon, given the impossibility of finding a determined man hiding in the wilds of the American west, see Annual Report, *supra* note 9, at 677, but this parade of witnesses from afar belies his disclaimer. What is undoubted is that the defendants, with all of the resources they devoted over a quarter century to the Hillmon case, were never able to produce John Hillmon. Even the success of James W. Green in persuading the Governor of Kansas to issue arrest and extradition warrants for Hillmon in 1894 did not result in his appearance. Green swore somewhat mendaciously in his affidavit that the purpose of his application was "in good faith for the punishment of crime, and not for the purpose of collecting a debt, or pecuniary mulct.". Aff. of James W. Green (on file with Kansas State Historical Society); Application of James W. Green, *id.*; Arrest and Extradition Warrant for John W. Hillman (sic), *id.* (In Misc. Collections, John W. Hillman.)

[228] LEAVENWORTH TIMES, Nov. 14, 1899, at 4.

about the identity of the corpse in the Hillmon case. Indeed, in June of 1879 the Lawrence papers were still speculating that the dead man was Frank Nichols, also known as "Arkansaw." By that time F. Walters had left the employ of Mr. Simmons and moved on. (Simmons said that he employed about twenty-five men at a time and that they "changed often."[229]). Certainly the name of Walters came up at the first trial, in 1882, but Simmons testified that although he remembered the trial he did not attend it.[230]

But would not the news that he was thought to be dead have reached Walters himself at some point, especially if he remained nearby? And would not Walters then have made himself known, and by this act relieved the sorrow of those who loved him and mourned his supposed demise? If he was the young man described by Arthur Simmons, an adventurer and traveler and a bit of a rake, maybe not. Perhaps he would have preferred to remain lost, especially if the insurance companies that had placed so much stock in his death were eager to subsidize his adventures away from home. And if this deal were struck, what would have been more sensible than for one of the companies' agents (my money would be on Mr. Buchan) to require Walters for his part to pen a letter, its contents partly dictated, to someone back home? The letter could then serve as evidence for the companies' propositions about the corpse at Crooked Creek. (The dictation technique was precisely the method employed by Buchan to obtain a letter from John Brown addressed to Sallie Hillmon, a document that was then employed to suggest the existence of a Hillmon/Brown conspiracy.[231]) In such a case, the handwriting similarity between the Dearest Alvina letter and the letters later produced by Elizabeth Rieffenach would be no coincidence or forgery; they would indeed have been written by the same hand. And the mystery of why F.A. Walters, if he were still alive, had not in so many years turned up would be solved.

Can one suspect the defendants' lawyers of such chicanery? It is useful to remember that Charles Gleed was trained in the law department of the Santa Fe Railroad, where he was no doubt exposed to many claims of personal injury filed against his employer. One observer, writing late in the century, noted that the railroads, in pursuing the defense of personal injury litigation, would

> send their runners, in the shape of claims agents, local lawyers, doctors, surgeons, and nurses, to take 'statements' that are, to say the least, if not perverted to suit their interests, with great justice made to speak more

229 *Id*.

230 *Id*.

231 *See supra* note __ & accompanying text.

> favorably for the company, and these are sometimes used as impeaching testimony under circumstances that shock the commonest sense of humanity."[232]

This description would fit not only the conduct I am attributing to the defense here, but also the pressures to which Buchan subjected John Brown to secure his affidavit.

Of course, the letter to Alvina Kasten, having been created some time after the inquest, would have to be supplied with a Wichita postmark of a much earlier date. Although the original cannot be examined[233], the handwritten copy that remains available for inspection represents that the original was postmarked "Wichita—Mar 2, 1879." (The original envelope, containing the mark, spent many of the years between Alvina Kasten's 1880 deposition and the later trials in the safekeeping of Mr. J.W. Green.[234]) But nineteenth century American postmarks, or cancellations, were neither distinctive nor uniform.[235] Forging one would not have been much of a challenge, and there is no suggestion that any of Mrs. Hillmon's lawyers scrutinized the cancellation or the letter with any suspicion.

But if the matter of the postal cancellation is not that much of a difficulty for us, two questions remain to trouble the convictions of those who would believe that John Hillmon died at Crooked Creek. Why would a ranch hand purchase such an extraordinary amount of life insurance (the premiums, it was claimed, were more than his yearly income[236])? And why did the insurance companies fight this case so bitterly, at such great length and expense, if not because they refused to capitulate to fraud? The answers cannot be known, but here are some that I think not unlikely.

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232 Eli Shelby Hammond, *Personal Injury Litigation*, 7 YALE L.J. 328 (1897). Some critics of the insurance companies thought their practices were similar. At least one of the newspapers reporting on the Hillmon matter during the Lawrence inquest claimed that the companies "have availed themselves of some cheap testimony to disprove the identity of J.W. Hillman", and predicted darkly that "hundreds who have examined the body, can be found willing to make the necessary identification" in the course of "the dark and infamous swindle which the Insurance companies propose to so coolly carry out." MEDICINE LODGE CRESSET, Apr. 17, 1879, at 2.

233 *See supra* note ___.

234 *See supra* note _____ & accompanying text.

235 See the examples in THE NEW HERST-SAMPSON CATALOG: A GUIDE TO 19TH CENTURY UNITED STATES POSTMARKS AND CANCELLATIONS (Kenneth L. Gilman ed., 1989) (copy available from author).

236 *E.g.*, TOPEKA DAILY CAPITAL, Apr. 1, 1896, at 2 (summation of defendants' attorney Isham).

The Brown affidavit, which was written by Buchan, says that Levi Baldwin's part in the conspiracy was to supply the money for the premiums,[237] and the companies always insisted that Baldwin had invested money in the criminal scheme. Indeed part of their case consisted of the testimony of one of Baldwin's creditors, who claimed that Baldwin had attempted to put off a payment of a debt by saying that he would soon have $10,000 from the Hillmon insurance proceeds.[238] Sallie Hillmon never contradicted the claim that Baldwin had supplied some of the premium money. But these circumstances need not suggest that Baldwin and Hillmon had conspired to defraud the companies; it might instead mean that Baldwin, a venturesome fellow by all accounts, thought that a bet against his friend Hillmon's return from a winter sojourn into wild territory, where blinding blizzards or Indian attacks could strike at any time, was a sensible investment. Very possibly Levi Baldwin and John Hillmon had an unwritten side agreement about the disposition of the proceeds in the event John met with a fatal misfortune during his travels: Baldwin would recover a generous return on his investment, but make sure that Sallie was taken care of. Sallie may even have been aware of the agreement. If so, it's not surprising that Baldwin and Sallie Hillmon would not have wanted to acknowledge the side agreement once the matter was in litigation,[239] as it would have been portrayed as (and perhaps was) a devious and ghoulish scheme, and might have given rise to an

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[237] Brown Affidavit, *supra* note 11, at 460. It seems indisputable that John Hillmon paid some of the premium himself, as in the third trial one of the companies' agents produced a promissory note signed by John Hillmon, saying it was for the second premium due to New York Life Insurance Company. TOPEKA COMMONWEALTH, Mar. 16, 1888 at 8 (testimony of A.L. Selig). And, another testified at the Lawrence inquest that at the time Hillmon took out the insurance he "paid semi-annual premiums in New York Life and Connecticut, in cash." LAWRENCE STANDARD, Apr. 17, 1879, at 4. Of course, he may have borrowed the cash from Baldwin. During the fifth trial it was reported that "arguments were heard for and against the introduction of testimony to show that Levi Baldwin had furnished money to pay premiums on the policies on Hillmon's life, and that he was to receive a portion of the life insurance money." TOPEKA DAILY CAPITAL, Mar. 21, 1896, at __.

[238] TOPEKA DAILY CAPITAL, Mar. 10, 1888, at 4 (testimony of J.S. Crew). Another version of the Crew testimony, however, merely has it that Baldwin sought some mercy toward his indebtedness by saying he had borrowed the money in part to pay the premium on Hillmon's life insurance policy. TOPEKA DAILY CAPITAL, Feb. 22, 1895, at 3; Deposition of James S. Crew, August 1892 (NARA Archive) . Another witness, a physician, testified that Baldwin had asked him in the fall of 1878 whether it wouldn't be a "good scheme to get your life insured for all you can and have someone represent you as dead and then skip out for Africa or some other d__n place?" TOPEKA DAILY CAPITAL, Mar. 11, 1888, at 4 (testimony of Dr. Phillips). My own reaction to this claim is that the degree of indiscretion it attributes to Baldwin is at variance with the defendants' determined portrayal of him, on other occasions, as a crafty criminal.

[239] In the fourth trial, in 1895, Baldwin denied that "he was to get $10,000 from Mrs. Hillmon." TOPEKA DAILY CAPITAL, Jan. 20, 1895, at 5.

attempt by the companies to evade payment on the ground that the real party in interest, Baldwin, had no insurable interest in Hillmon's life.[240] But such an agreement would not suggest that John Hillmon intended to commit murder or insurance fraud.

The motivations of the defendants are more difficult to explain— indeed it would be hard to rationalize them no matter who died at Crooked Creek, because the insurance companies must have spent more defending the Hillmon case than they would have had to pay out had they honored Mrs. Hillmon's claim. They eventually settled her claims for nearly forty thousand dollars, all of their investigative and legal expenses constituting losses beyond this amount. Their reasons, or those of the men who were making decisions for them, could not have been strictly rational in an immediate sense; but that does not mean that they consisted of merely the principled determination to resist fraud, although suspicion of fraud very likely did account for the companies' initial refusal to pay the claim.

Fraud was understood by all insurance company executives to be a serious problem for their industry in the second half of the nineteenth century, and many notorious swindles were reportedly accomplished by means that bore a certain resemblance to aspects of the Hillmon affair. The underworld of life insurance fraud had become so colorful and so worrying by the 1870s that it merited extended treatment in a book called *Remarkable Stratagems and Conspiracies: An Authentic Record of Surprising Attempts to Defraud Life Insurance Companies*, by J.B. Lewis and C.C. Bombaugh.[241] Among the cases there recounted is one that arose in Wichita, Kansas, where in 1873 a house contractor named A.N. Winner is said to have schemed to insure a friend of his named McNutt for $5000, and then collect the proceeds after faking

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[240] It is very difficult to ascertain whether, in 1870s Kansas, the law required that the beneficiary enjoy an "insurable interest" in the life of a deceased for a policy of life insurance to be valid. One authority quotes Kent's Commentaries to the effect that "The necessity of an interest in the life insured, in order to support the policy, prevails generally in this country, because wager contracts are almost universally held to be unlawful, either in consequence of some statute provision, or upon principles of the common law." REMARKABLE STRATAGEMS, *supra* note 38, at x. Lewis and Bombaugh also record an instance of a would-be insurance swindler in Kansas taking care to marry his female companion before making her the named beneficiary of insurance on his life, "in order to legalize the policy." *See infra* note __. But it does not appear that the Hillmon defendants ever attempted to convert their suspicions about the real beneficiary of the policy into a defense against payment.

[241] REMARKABLE STRATAGEMS, *supra* note __. This compulsively readable true crime book is not an altogether nonpartisan document, having been written by two men very much embedded in the insurance industry. Lewis identifies himself as "Consulting Surgeon and Adjuster, Travelers Insurance Co." and Bombaugh as "Editor, *Baltimore Underwriter*."

McNutt's death by fire. But a body was needed for the scheme to succeed, and McNutt apparently confessed to luring a victim from Kansas City to Wichita by promising him a job, and then murdering him in gruesome fashion.[242]

One of the decade's most notorious attempts at life insurance fraud was undertaken in Baltimore in 1872 by two confederates, William Udderzook and Winfield Scott Goss. After insuring Goss's life for $25,000 altogether, through three different companies, the men obtained a corpse from a medical supplier and staged a kerosene lamp explosion after placing the cadaver in Goss's rented house. The burned corpse was claimed to be Goss but the insurance companies refused to pay. One of their main points of suspicion was a claimed disparity between the teeth of the corpse and those of the living Goss. In a reversal of the later dental dispute in Hillmon, the insurers claimed that Goss had strikingly good teeth but that the corpse (whom they arranged to be exhumed a year after burial) had a severely decayed set. Udderzook apparently became alarmed by the vigor of the companies' investigations, which included the widespread circulation of photographs of Goss inquiring whether anyone had seen the living man. He decided that Goss, who was in hiding in New Jersey and had a weakness for liquor, could not be trusted to remain out of sight; so he lured him to some nearby woods and murdered him. Udderzook was hanged for the murder of Goss in 1874.[243]

One thus can scarcely blame insurance company executives for their suspicions, once the Hillmon death was reported to them. The similarities between its features and certain details of spectacular frauds in their very recent memories were striking: the three insurance policies totaling $25,000 in Goss-Udderzook, and the Wichita connection and

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[242] REMARKABLE STRATAGEMS, *supra* note __, at 346-351. This account also records that the nominal beneficiary of the policy was a young woman with whom McNutt had been living, and whom he married shortly before embarking on the scheme "in order to legalize the policy." *See infra* notes _____ & accompanying text.

Possibly the similar brief interval between John Hillmon's marriage to Sallie and the death at Crooked Creek contributed to the companies' suspicions. Certainly they tried to make it seem suspicious, as in several of the trials one of their agents testified that Sallie Hillmon had told him that she could not say much about her husband's appearance because she "was not sufficiently well-acquainted with him to give a description." *See, e.g.,* TOPEKA DAILY CAPITAL, Mar. 18, 1896, at 1 (testimony of A.L. Selig). Sallie Hillmon consistently denied having ever made this statement.

[243] *Id*. at 126-282. In a slightly later and even more spectacular series of insurance frauds, the serial killer Herman Webster Mudgett, who called himself H.H. Holmes, murdered at least twenty-seven people, many for the purpose of collecting insurance on their lives. Much of Holmes' colorful and gruesome career coincided with the planning and execution of the Chicago World's Fair of 1893; the story of this jarring juxtaposition is told in ERIK LARSON, THE DEVIL IN THE WHITE CITY: MURDER, MAGIC, AND MADNEESS AT THE FAIR THAT CHANGED AMERICA (2003).

the recent marriage of the alleged deceased and the policy beneficiary in Winner-McNutt.[244] One of the Hillmon defendants, the Mutual Life Insurance Company of New York, had even been a party to the Goss-Undderzook litigation, which had resulted in a verdict for the purported widow of Goss that was only overturned after Udderzook's murder of Goss led to his conviction.[245] Neither is it surprising that the companies' agents used the techniques of demanding exhumation, comparing teeth, and blanketing the countryside with photographic flyers in the Hillmon investigation, as those measures had worked so well in earlier, successful, fraud investigations.[246]

But although these environmental circumstances might explain the companies' initial suspicions, they cannot readily account for their adamantine resistance to settling Mrs. Hillmon's claim over the course of nearly a half century of expensive litigation. For these reasons, I believe we must look to the professional lives of the local lawyers who represented them, whose advice must surely have guided their clients' decisions.

These lawyers were prominent leaders of the Kansas legal and business community. There was of course James W. Green, the county attorney who became the first Dean of the state's law school, whose interests required the cultivation of the business community. And there was Charles Gleed, author of the report on the case that Wigmore made famous. Gleed was called to the Bar in 1884; the second Hillmon trial was his first important legal engagement.[247] The reputation he earned by assisting in this litigation led to his retention by the State of Kansas, in 1885, to represent it in litigation before the United States Supreme Court concerning the constitutionality of state law prohibiting alcoholic beverage production, a remarkable assignment for a young man barely admitted to the practice of law.[248] A year later he and his firm (which included Gleed's brother as well as his Hillmon co-counsel and erstwhile state senator George Barker) acquired two railroads as clients; later in the decade they represented the telephone company as well as land mortgage companies and eastern interests who invested in western real estate mortgages. During this time many Kansas farmers lost their farms because of crop losses, disastrous weather, and low farm product prices; the

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244 In his summation in the last Hillmon trial, James Green even sought to appeal to the jury by reminding them of the Winner-McNutt case (although there had been nothing in evidence about it). LEAVENWORTH TIMES, Nov. 17, 1899, at 4.

245 REMARKABLE STRATAGEMS, *supra* note__, at 173.

246 Nor, if I am right and the company lawyers composed the Dearest Alvina letter, must one look beyond the Winner-McNutt case to see what might have inspired the portion of the letter in which the writer claims that John Hillmon "promised me more wages than I could get at anything else."

247 HARMON, *supra* note __, at 62, 66.

248 *Id*. at 71.

law firm prospered by prosecuting foreclosure suits, and advertised itself widely in the eastern states as the best firm to protect eastern investors in Kansas farm property.[249] Gleed's biographer observes that "lawyers like the Gleeds were the most fortunate of all the parties who participated in the land mortgage business in Kansas during the 1880s and 1890s. They were able to collect their legal fees in spite of the financial losses being experienced by others."[250] The Gleed brothers often opposed actions under consideration by the Kansas Legislature that would have protected farmers against foreclosure, arguing that such legislation would alarm and drive away eastern investors.[251]

Gleed, of course, was also the State Insurance Commissioner during the late 1880s, a position that he used to encourage eastern insurance firms to do more business in Kansas. He also served as a Regent of the University of Kansas and several times he toyed with the idea of running for political office. The uniting theme of all of his business and political activity was his conviction that "[m]any of the business enterprises with which he was connected and the prosperity of the state as a whole were dependent upon a continued flow of eastern and European capital unto the West."[252] In one of his many public speaking engagements, he sought to alert his fellow citizens to the danger that powerful eastern interests would withdraw their participation in the state's economy if Kansas could not overcome its reputation as an unsafe and uncivilized outpost.

> We are compared to the people of Mexico, and the suggestion is freely offered that we be annexed to that turbulent republic. We are done up in satire, stung all over with barbed wit, and blistered with abuse. We are described as cranks, fad chasers, and political unaccountables generally.
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> Ours is called the home of the hobby and the land of the ism. It is wondered if we are never to quit "bleeding"—and if our hemorrhage is uncurable. It is remembered against us that every social or political opinion ever known since Kansas has been a state has been noisily played with by its disciples, whether few or many. It is flung at us that we have

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249 *Id*. at 70-79.
250 *Id.* at 79.
251 *Id*.
252 *Id*. at 189.

> always been puritanical in our opinions, intemperate in our enthusiasms, and violent in our methods.[253]

Gleed eventually became the owner of the Kansas City Journal, but his journalistic ethics were assailed over the years by the accusation that he used the newspaper's editorial policy to promote the interests of the Santa Fe Railroad, an organization that had employed him between his law studies and the establishment of his law firm and later became his client; it was a business whose fortunes he saw as central to the aspirations of Kansas.[254] Gleed was unrepentant about his journalistic biases; his biographer attributes to him the sentiment that "[t[he economic well-being of the nation depended on the ability of capitalists to receive an adequate return on their investments, and it seemed necessary for business leaders to seek to influence public opinion in an era when their interests were being threatened . . ."[255] Although nearly all of his business ventures failed, Gleed spent most of his middle and later years as a promoter of various enterprises. He is said to have died without leaving much of an estate, "an ambitious man who was disappointed by his failure to become a member of the nation's business elite."[256]

Other lawyers came and went for the Hillmon defendants. In the last two trials Green, Barker, and Eugene Ware,a younger member of the Gleed firm, were joined by Edward Isham of the Chicago law firm Isham, Lincoln, and Beale. Isham, one of whose partners was the son of Abraham Lincoln, was held in such apparent awe that the newspapers referred to him as "Judge" Isham[257] and reported that he enjoyed "the distinction of having argued more cases in the United States Supreme court than any other attorney in America."[258] But it is Green and Gleed whose fingerprints are on decisions both tactical and strategic for the defendants. The Hillmon case was, for each of them, the beginning of a career in law and public affairs marked by a commitment to making Kansas safe for industrial and mercantile interests.

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253 C.S. Gleed, *As Others See Us, in* THE KANSAS DAY CLUB: ADDRESSES DELIVERED AT ANNUAL BANQUETS DURING THE FIRST TEN YEARS OF THE CLUB'S EXISTENCE, 1892-1900, 57-63 (1901) *quoted id*..at 190-191.

254 HARMON, *supra* note__, at 450-51.

255 *Id*. at 451.

256 *Id*. at 477.

257 *See, e.g.*, LEAVENWORTH TIMES, Oct. 19, 1899, at 4.

258 *See* TOPEKA DAILY CAPITAL, Mar. 10, 1895, at 11.

In Gleed's case, his enthusiasm for debunking Sallie Hillmon's claim was of a piece with his expressed concern that the eccentricities and antics of his fellow citizens would alienate the powerful interests on whose investments the state's economic growth must depend. Gleed would have fought with every resource he could command to stem any belief in the community of eastern businessmen that their investments in Kansas would be susceptible to loss by fraud. And his defiant stance toward Sallie Hillmon's claim would also have found reinforcement in the culture of railroad accident litigation in the late nineteenth century, to which he would have been introduced as a young man in the law department of the Santa Fe Railroad and throughout the 1880s, while his law firm represented the railroad. One writer described this culture in 1870 as follows:

> The policy of railroad companies is generally to discourage . . . suits and make them as expensive and unproductive as possible, in order that other people, in a similar condition, may be deterred from prosecuting them. . . . The company is sure to find some dark question as to the character of negligence of which they are accused, some doubtful instruction of the court, or some error of the jury, on which to found an "appeal," and to keep him paying costs and fees, perhaps for years longer before – if ever—he receives his money.[259]

By 1897, when another observer surveyed the scene, not much had changed:

> [they] almost without exception everywhere . . . adopt the policy of 'fighting' every claimant for damages, no matter how clear their liability, unless it may be they will 'compromise' when they can pay a nominal and wholly inadequate sum.[260]

I think it fair to suggest that the Hillmon case occupied a place of symbolic and emotional significance, and professional pride, for some of the defense lawyers that may have disabled them from giving dispassionate advice to their clients.

As for Sallie Hillmon, by the time the case was over she retained none of the settlement proceeds; before the last trial she had assigned her interest in them to other

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[259] *The Measure of Damages for Personal Injuries on Railways*, HUNT'S MERCHANT'S MAGAZINE 357 (1870).

[260] Hammond, *supra* note __, at 328.

parties.[261] Perhaps the decision whether to continue her exhausting quest for affirmation that her husband was no murderer was by then not hers at all.[262] But of her we do know this one thing: years earlier, before the time when the Supreme Court first heard the Hillmon case and while there was still some prospect that she would collect the judgment she had won, Sallie Hillmon had remarried.[263] It is possible that an unschooled waitress in her twenties[264] pulled off a devastating double-cross of her first husband, knowing that he would be compelled to remain hidden while she and her second husband enjoyed their bigamy and his life insurance proceeds. But isn't it far more likely that she always knew the truth of what she had claimed from the first moment she viewed the body that had been brought to Lawrence from Crooked Creek-- that John Hillmon was dead?

THE HILLMON CASE ONE HUNDRED TWELVE YEARS AFTER[265]

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[261] On the question of who owned what interest in the eventual proceeds, there is a great deal of conflicting evidence. In 1882 Sallie Hillmon swore that she had not parted with her interest in any of the cases. See Affidavit of Sallie Hillmon, June 1882 (NARA Archive). In 1888 William Sinclair, the individual who had provided the bond securing any costs Mrs. Hillmon might be required to pay in connection with the litigation, had prayed to be released from his obligation, averring in part that "Sallie E. Hillman has assigned and parted with all of her interest in said several suits," naming her attorneys and H.S. Clark as the purchasers. Affidavit of Wm. T. Sinclair, January 6, 1888 (NARA Archive). (An H.S. Clark was in 1879 the Sheriff of Douglas County, where Lawrence is located., *see* TOPEKA DAILY CAPITAL, Mar. 12, 1895, at 6). *See* TOPEKA DAILY CAPITAL, Feb. 19, 1895, at 4, where reference is made to a document (excluded from evidence) conferring a certain interest in the litigation on the plaintiff's attorneys. But see Appearance of Attorneys Representing James T. Lord, January 22, 1898, (NARA Archive), in which it is averred that Sallie has sold her interest in the litigation against the New York Life Insurance Company to Mr. Lord.

[262] She seems to have been too ill to attend the final trial on the date when it was originally scheduled. *See* Motion for Continuance, Feb. 14, 1898 (containing affidavits from Mrs. Hillmon and her doctor saying she has been very ill with "la grippe" and cannot bear the strain of a trial at that time)(NARA Archive).

[263] Newspaper accounts of the third trial, in 1888, report that "Mrs Hillman was married some time ago and her name is now Smith," and that her husband attended the trial with her. LAWRENCE TRIBUNE, Mar. 16, 1888, at 4. The same story says that the jury is unaware of her remarriage because "the attorneys on each side fear to introduce" evidence of it. *Id*.

[264] The Topeka Daily Capital reported that Sallie Hillmon Quinn was eighteen when the suit was commenced, which would have made her at most twenty-six at the time of her remarriage, see *supra* note ___. TOPEKA DAILY CAPITAL, July 5, 1903, at 5.

[265] Maguire's famous article purported to re-examine the case thirty-three years after its original decision. *See* Maguire, *supra* note__. To the best of my knowledge, no other legal scholar has looked at the original documents of the litigation since that time. I encourage others to take this step; perhaps

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I have suggested that the legal rule propounded by the Court in the Hillmon case was created because the only story the Court could bring itself to endorse demanded it.[266] And I have undertaken to persuade my readers that this story was untrue. Only the reader knows whether she has been persuaded.

But suppose I have succeeded; what if I am right? What if the letter from Frederick Adolph Walters to Alvina Kasten was written not when it was dated and postmarked but later, and not because the writer really wished to inform Miss Kasten of his whereabouts and plans, but because some agent of the three insurance companies manufactured this evidence with the assistance of Mr. Walters, who was paid for his contribution? At the very least, if we are persuaded of these propositions, we might be able to look at the exception to the hearsay rule for statements of intention with an eye less deceived by the McGuffin that has always bound this fragment of legal doctrine to a charming but mendacious story. Others have debated the pros and cons of the rule and its variations,[267] and this article is long enough without joining the quarrel, but no participant in the debate has questioned the narrative premise that prompted the Court's invention. Surely the discussion would be served by this clearer vision of the origins of and necessity for a hearsay exception admitting statements of the declarant's intentions.

Recent Supreme Court consideration of other hearsay exceptions has cast a severely critical eye on proponents' easy claims about the inherent credibility of certain categories of extrajudicial statement.[268] If the justification for the *Hillmon* hearsay exception is the inherent reliability of statements describing the declarant's intentions, those I have persuaded about the Walters letter must look soberly at the statements of Frederick Adolph Walters in the letter to his dearest Alvina, for if I am correct it is full of falsehoods from the implicit assertion contained in the date at the top ("Today is March 1, 1879"), to its assurance to Miss Kasten that "I am about as Anxious to see you as you are to see me," to its recitation of the writer's intentions to look for a place to start a sheep

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someone will notice in this vast repository of paper something I overlooked. The documents in the NARA archive are very fragile and brittle now, and I doubt they will survive even another half century of storage.

266 *See supra* notes ___ & accompanying text.

267 *See supra* note __. For a most unusual narrative describing the debate, see *Glen Weissberger, Judge Wirk Confronts Mr. Hillmon: A Narrative Having Something to Do With the Law of Evidence*, 81 BOSTON U. L. REV. 707 (2001).

268 *See* Crawford v. Washington, 541 U.S. 36 (2004); Williamson v. United States, 512 U.S. 594 (1994); Idaho v. Wright, 497 U.S. 805 (1990).

ranch with John Hillmon, who had promised him "more wages than I could make at anything else." One might respond that a single counterexample does not unmake the wisdom of a general rule, but at least the wisdom of the rule must be defended without reference to that particular example. This enterprise is one that the law of evidence, in the one hundred twelve years post-*Hillmon*, has not seriously undertaken.

But even if they do not prompt revision of the law of evidence, these investigations may serve to illustrate the powerful and often unacknowledged contribution of the narrative imperative—the need to construct an acceptable story—to the creation of decisional law. Judges may not think of themselves as storytellers, but this role is not easily abandoned even when disclaimed. Perhaps the maxim *da mihi facta, abo tibi jus*[269] undervalues the other determinants of common-law decisionmaking, but it is a rare narrator who is willing to throw the McGuffin overboard

Of course, I cannot claim to be immune myself from the seductions of narrative. I have here only told another story, albeit one that I believe to be better justified by the evidence than the understood version. (And of course, my story has the same McGuffin as the Court's—the Dearest Alvina letter— although it plays a different role in the two narratives.) I have tried in telling my version to lash myself to the mast of truth, but I confess I've enjoyed telling what I believe to be an excellent story, and possibly its siren call has deceived me as well. Other investigators may prove me wrong; I hope some will try to do so.

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[269] *See supra* note ____.