"Remarkable Stratagems and Conspiracies": How Unscrupulous Lawyers and Credulous Judges Created an Exception to the Hearsay Rule

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“REMARKABLE STRATAGEMS AND CONSPIRACIES”: HOW UNSCRUPULOUS LAWYERS AND CREDULOUS JUDGES CREATED AN EXCEPTION TO THE HEARSAY RULE

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This essay has a somewhat different goal than the other contributions to this Symposium: rather than considering present-day ethical predicaments, it aims to inspire reflection on an episode in which improper and unprofessional conduct by attorneys contributed to the creation of the law of evidence. In particular, it considers the events that led to the formulation and enactment of a rule that persistently affects the conduct of trials even by the most responsible and ethical lawyers: the hearsay exception codified as Federal Rule of Evidence 803(3).1

The bare bones of the narrative are well-known to nearly every lawyer, as it has formed a staple of the study of the law of evidence since the date of the U.S. Supreme Court’s first decision on the matter in 1892, in Mutual Life Insurance Company of New York v. Hillmon.2 Even the lay public was transfixed by the story in its time; the tale of John Hillmon was the subject

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1. The rule provides an exception to the general rule excluding hearsay for 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 unless it relates to the execution, revocation, identification, or terms of declarant’s will.

The rule of Mutual Life Insurance Co. of New York v. Hillmon, 145 U.S. 285 (1892), is embedded in this capacious exception; as discussed here, it pertains only to statements describing the declarant’s intention or plan. Fed. R. Evid. 803(3).

2. There were originally three lawsuits: Hillmon v. Mutual Life Insurance Co. of New York, No. 3147 (Dec. 10, 1878); Hillmon v. The New York Life Insurance Co., No. 3148 (Dec. 10, 1878); and Hillmon v. Connecticut Mutual Life Insurance Co., No. 3149 (Dec. 10, 1878), in the Circuit Court of the United States for the District of Kansas. The cases were eventually consolidated for trial. After the first two trials resulted in hung juries, the third produced a verdict for Sallie Hillmon. Mut. Life Ins. Co., 145 U.S. at 286. The companies took appeals to the U.S. Supreme Court, which decided them in Mutual Life Insurance Co., the most famous and consequential of the Hillmon decisions. Eleven years, two more hung juries, and one more verdict for Sallie Hillmon later, the Court considered a second appeal by the companies in Connecticut Mutual Life Insurance Co. v. Hillmon, 188 U.S. 208 (1903). Many of the original documents pertaining to this litigation, including Sallie Hillmon’s handwritten complaints, are preserved at the National Archives and Records Administration, Central Plains Region, in Kansas City, Missouri (NARA Archive), where I have been able to examine them.
of six trials, and a cause célèbre for a quarter of a century, despite its unpretentious origins. In 1879, a Civil War veteran and occasional cattle dealer named John Hillmon (frequently misspelled “Hillman” in later accounts) took leave of his wife, Sallie, at their home in Lawrence, Kansas, telling her that he intended to travel west in the company of a frequent sidekick of his, John H. Brown. The purpose of their trip, Hillmon explained, was to look for a place where he might acquire some property to start a ranch. Nobody today would remember or care about this journey but for an unusual (and, to some, suspicious) circumstance: before leaving home, Hillmon purchased $25,000 in life insurance, naming Sallie as the beneficiary. This sum represented such an extraordinary amount of insurance at the time (at least for a man of Hillmon’s modest resources and prospects), that no single insurer would issue it. Three different companies wrote policies for Hillmon, one for $5000 and two for $10,000 each.

There is no evidence to suggest that the three companies had any objections—other than the unusual amount of coverage—to selling their insurance to him, and for his part, Hillmon readily agreed to be examined by the physicians they employed for the purpose of ascertaining that his health was sound.

After satisfying the physicians (one of whom insisted that Hillmon be vaccinated for smallpox, a request to which he agreed), the would-be rancher left home in February 1879 and met up with Brown in Wichita, Kansas. The two men departed that city during the first week of March, traveling by horse and wagon southwest toward the town of Medicine Lodge, Kansas. They stayed in that small hamlet for a brief interval before striking out roughly northwest toward a place called, when it was called anything, Crooked Creek—a plausible enough vicinity to survey for uncultivated land that might be available for homesteading. On the evening of March 17, however, Brown appeared at the door of a nearby dwelling with a tragic story to tell. He reported to the householder, one Philip Briley, that he had accidentally shot his companion Hillmon in the head as he, Brown, was unloading their weapon from the wagon at their campsite. By Brown’s account, the trigger of the Sharp rifle caught on a blanket and the

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3. This, at least, was the account given when John Brown first reported John Hillmon’s death to the authorities in Barbour County, Kansas. Accidental Death, Lawrence Standard (Kan.), Mar. 27, 1879, at 1; see also Cresset (Medicine Lodge, Kan.), Apr. 3, 1879, at 1.


5. The Hillmon Trial, Topeka Daily Capital (Kan.), Feb. 12, 1895, at 6.

6. Brown’s original account, given at an inquest, is reported in The Hillman Horror, Lawrence Standard (Kan.), Apr. 10, 1879, at 1. For portions of Brown’s pretrial deposition, which was taken over a period of weeks between December 1881 and February 1882, see Transcript of Record at 162, Mut. Life Ins. Co. v. Hillmon, Nos. 858, 859, 860, 861 (U.S. 1888) [hereinafter 1888 Transcript]. A transcript of the entire deposition may be found in the record of the second appeal. See Transcript of Record at 342, Conn. Mut. Life Ins. Co., 188 U.S. 208 (No. 94) [hereinafter 1899 Transcript] (deposition of John Brown).
gun discharged its projectile into the head of Hillmon, who was kneeling to tend the fire. Hillmon, said Brown, was dead.\textsuperscript{7}

Briley immediately sent for the coroner at Medicine Lodge, George Paddock, who traveled to the campsite and observed the scene; Paddock then arranged for the body to be taken back to Medicine Lodge, and convened an inquest. Some of the witnesses at this inquest had been in the company of Brown and Hillmon when the two men had passed through that town on an earlier trip that was aborted by bad weather; they said they recognized the corpse as that of the man they knew as John Hillmon.\textsuperscript{8}

Apart from the mourning of Sallie Hillmon and Hillmon's friends, this verdict would likely have been the end of the matter—but for the insurance policies. For if Hillmon were dead, the companies owed Sallie Hillmon a small fortune, and the corporations that had been willing to take John Hillmon's premiums were not quite so eager to pay out the policy proceeds. Fraud had become an obsessive concern for insurance companies in the late nineteenth century, as insurers traded stories about criminals who would arrange for the purchase of life insurance, and shortly thereafter present a corpse that they claimed to belong to the insured, although it did not.\textsuperscript{9} In some of these notorious cases, a cadaver had been obtained somehow and disfigured to prevent detection of the fraud;\textsuperscript{10} in others, the body belonged to a victim who had been freshly killed for the occasion.\textsuperscript{11} The companies suspected that in the case of Hillmon a similar attempt to defraud them was in progress. Several factors apart from the industry's customary vigilance contributed to their suspicions: the unusually large cumulative value of Hillmon's policies, their discovery that some of the initial premiums on the policies had been paid not by Hillmon but by his friend (and Sallie's cousin) Levi Baldwin,\textsuperscript{12} the circumstance that Hillmon's death was reported

\textsuperscript{7} 1899 Transcript, supra note 6, at 342 (deposition of John Brown).
\textsuperscript{8} T.A. McNeal, When Kansas Was Young 91–92 (1922). McNeal was a newspaper editor in Medicine Lodge at the time of these events, and knew the witnesses, of whom he said, "I can not doubt their honesty, and it is hard to believe that they were mistaken." Brown later testified in a deposition that he and Hillmon had passed through Medicine Lodge shortly before Christmas 1878, and other witnesses confirmed his account. See 1899 Transcript, supra note 6, at 343 (deposition of John Brown); The Hillmon Cases, Leavenworth Times (Kan.), June 16, 1882, at 1.
\textsuperscript{9} See generally J.B. Lewis & C.C. Bombaugh, Remarkable Stratagems and Conspiracies: An Authentic Record of Surprising Attempts to Defraud Life Insurance Companies (1878). Lewis was a consulting surgeon for the Travelers Insurance Company, and Bombaugh the editor of the Baltimore Underwriter, a trade publication.
\textsuperscript{10} One notorious fraud of this type was attempted by criminals named William Udderzook and Winfield Scott Goss. For a detailed account, see id. at 126–282.
\textsuperscript{11} See id. at 346–51.
\textsuperscript{12} At least this was the companies' frequent claim. During the fifth trial of Sallie Hillmon's lawsuit against the companies, 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." Buchan Testifies, Topeka Daily Capital (Kan.), Mar. 21, 1896, at 5. But it seems indisputable that Hillmon paid some of the premium himself, as in the third trial one of the companies' agents produced a promissory note signed by Hillmon, saying it was for
such a brief time after the policy’s issuance, and their discovery that John and Sallie Hillmon had been married for a very short period (two months or so) before he sought out the insurance coverage.13 Armed with these doubts, the companies and their representatives rather swiftly arrived at a counternarrative about the events at Crooked Creek—an account they then invoked to refuse to pay the insurance proceeds to Sallie.

According to the companies’ version, Hillmon, Brown, Baldwin, and possibly Sallie Hillmon had conspired to defraud them in the familiar fashion: Baldwin induced his cousin Sallie to marry John Hillmon and paid for the insurance policies naming her as beneficiary, while Brown and Hillmon’s part was to contrive the appearance of the “accident” and the feigned death of Hillmon. The corpse, according to this theory, belonged to some passerby or fellow traveler whom Brown and Hillmon had encountered on the early stages of their travels. They persuaded this victim to travel with them (and to stay out of sight on the occasions when Hillmon and Brown so instructed him) until he could be murdered at Crooked Creek, his body to be dressed up in Hillmon’s clothes and boots, to be passed off as Hillmon. The companies at first had no proof of this theory, however, so they immediately set out to find some.14

The three insurance companies were all Wall Street corporations, chartered in New York or Connecticut but doing business throughout the country, including in such frontier locales as Kansas. The purchase of life insurance, once seen as an immoral mechanism for gambling on such sacred and mysterious matters as the timing of death,15 had become in the post–Civil War years an eminently respectable practice, marketed to men as a manner of satisfying their obligation to provide for their families in the event of premature death.16 The insurance companies nevertheless found it

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13. The couple was married on October 3, 1878. How It Happened, Leavenworth Times (Kan.), June 20, 1882, at 1. The insurance applications were dated December 5, 1878; January 14, 1879; and February 24, 1879. See 1899 Transcript, supra note 6, at 160–63. Certainly the companies tried to make the couple’s newlywed status seem suspicious; in several later 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.” Story of Two M.D.’s, Topeka Daily Capital (Kan.), Mar. 19, 1896, at 2 (providing the testimony of A.L. Selig). Sallie Hillmon denied having ever made the statement.

14. Major Theodore Wiseman, a useful agent for the companies throughout the two decades of the Hillmon litigation, described his commission as “looking up evidence to prove that the body was not Hillmon.” How Tall Was He?, Topeka Daily Capital (Kan.), Mar. 18, 1896, at 2.


16. Id. at 55–57.
necessary to promote their unfamiliar products aggressively, through the efforts of agents who were said nearly to "force[] their product upon an unwilling clientele."\(^\text{17}\) The sale of life insurance was thus a face-to-face affair, and the companies depended on loosely supervised local representatives to conduct this part of their business. Moreover, they relied on members of the local bar to represent them when litigation arose (as inevitably it did), and it is here in our tale that the conduct of lawyers becomes important.

Sallie Hillmon filed suits against all three companies in 1880, after negotiations over their nonpayment of the proceeds fell apart. After the three cases were consolidated for trial, the companies mounted a common defense: the dead man was not John Hillmon, but another. For all that appears in the records of the matter, the defense lawyers did not generally regard themselves as advocating for a single defendant, but acted as though they represented the united interests of the three companies; they divided opening and closing statements without regard to which lawyer represented which client, and their strategies were identical (at least until the last years of the litigation, when one and then a second settled with Sallie Hillmon, leaving only the Connecticut Mutual Life Insurance Company to litigate the matter to the bitter end).\(^\text{18}\) Among the defense lawyers were three up-and-coming members of the Kansas bar, and one seasoned veteran. James W. Green is now remembered as the founding dean of the University of Kansas Law School, but at the time the Hillmon litigation arose, the Law School was in its infancy and the youthful Green was its only faculty member.\(^\text{19}\) This position would seem weighty, but the young professor's academic responsibilities apparently did not altogether consume his energies, as he served at the same time as county attorney for Douglas County.\(^\text{20}\) George Barker, another young lawyer, served as Green’s assistant county...
attorney.21 One of Green’s pupils during the Law School’s first year, 1878–79, was a young journalist named Charles Gleed, who aspired to add a second profession to his first.22 During the summer of 1879, after the death at the Crooked Creek campground, the insurance companies procured the services of W.J. Buchan, a slightly older gentleman who had served as city attorney for Wyandotte, Kansas, and been elected to the Kansas Senate the year before; he continued to serve as a lawmaker for another thirteen years thereafter.23

When news of Hillmon’s death reached Lawrence, it aroused the companies’ suspicions immediately. They swiftly dispatched representatives to Medicine Lodge: a Major Theodore Wiseman, one C. Tillinghast, and a Colonel Walker, who was a Civil War veteran described as a figure of great fame in Kansas.24 None of these men was a lawyer, but they were successful in insisting that the campground corpse, which the Medicine Lodge authorities had buried, be exhumed and transported back to Lawrence.25 It is not known what persuasions they employed to accomplish this result, but they did not have the consent of Sallie Hillmon, who was apparently content for her husband to keep his rest where first laid. Nor is it altogether clear what jurisdiction the Lawrence authorities would have to conduct an inquest over the body. The death did not occur within Douglas County, and although John Hillmon was a resident of Lawrence, it was precisely the theory of the companies that the body did not belong to Hillmon. But insistence seemingly accomplished what legal nicety perhaps could not have: the Medicine Lodge authorities gave up the corpse. Sallie Hillmon’s cousin Levi Baldwin and his brother Alva, having arrived at Medicine Lodge in the interim, arranged for transport of the body via wagon and rail back to Lawrence.26

The Medicine Lodge newspaper, The Cresset, reported that Wiseman and Tillinghast had known Hillmon in life, and insisted on viewing the body as it was taken from its first grave to ascertain whether it was him. According to The Cresset, “The identification was satisfactory.”27 But Wiseman would later testify that he knew upon first seeing the body that it did not

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24. Cresset (Medicine Lodge, Kan.), supra note 3. This story remarks, describing Colonel Walker, “The Col’s. fame in early Kansas history is too well known to need any comment.” Id.
25. Id.
27. Id. This bit of reportage marks the beginning of a long journalistic war between that paper and others, especially the Lawrence Standard. The Standard very soon became a reliable advocate of the theory that Hillmon, his wife, her cousin, and Brown were united in a conspiracy to pass off the body of some innocent victim as Hillmon’s in order to defraud the insurance companies. The Cresset was scornful of this theory.
belong to the man he knew as John Hillmon;\textsuperscript{28} he could not explain why the local newspaper had taken away a different impression.

When the body first arrived in Lawrence, it was not delivered to Sallie Hillmon nor to any place she designated, but conveyed to an undertaking establishment to enable a postmortem investigation by the companies' physicians; these were doctors in private practice who regularly did work for the insurers, including the examination of customers seeking to be insured.\textsuperscript{29} Moreover, the corpse was kept available at Bailey and Smith's to enable residents who had known John Hillmon to view the corpse (by then about three weeks dead). Many came to look; some said the body was Hillmon's, others declared that it was not. Quite a few of these citizens, of both opinions, were called to testify to their opinions at the inquest that was convened by Dr. Richard Morris, the Douglas County coroner.\textsuperscript{30}

Douglas County was represented at the inquest by James W. Green, the county attorney. His assistant George Barker participated as well, interrogating some of the witnesses. As it was not formally an adversarial proceeding, Sallie Hillmon was not represented, but she attended, and seems to have enjoyed the advice of a Lawrence attorney named E.B. Borgalthaus.\textsuperscript{31} The matter quickly became notorious, and local citizens and newspapers soon committed themselves to passionate opinions about whether the dead man was Hillmon or his victim. Sallie and others who had seen the corpse testified that it was Hillmon;\textsuperscript{32} various other acquaintances of Hillmon averred that the corpse did not resemble him.\textsuperscript{33} The companies' physicians, called as witnesses by Green and Barker, testified that the corpse could not be Hillmon's for a variety of reasons: because it was too tall,\textsuperscript{34} because it had perfect teeth in contrast to Hillmon's allegedly rotted dentition,\textsuperscript{35} and because the corpse could not have staggered and fallen as Brown described the accident, but would rather have collapsed instantly to the ground.\textsuperscript{36} They acknowledged that the corpse carried a smallpox vaccination scar at the site where Hillmon had

\textsuperscript{28} See, e.g., \textit{How Tall Was He?}, supra note 14.
\textsuperscript{29} Dr. G.G. Miller, one of the postmortem physicians, had examined Hillmon for the Mutual Life Insurance Company of New York prior to the issuance of their policy; by the time of the first trial in 1882, he was describing himself as the examining physician for that company. \textit{Hillmon's Hair}, Leavenworth Times (Kan.), June 24, 1882, at 1. Another postmortem physician, Dr. J.H. Stewart, had examined Hillmon for the policies issued by the New York Life Insurance Company and the Connecticut Mutual Life Insurance Company. \textit{Vaccine Virus}, Leavenworth Times (Kan.), June 23, 1882, at 1.
\textsuperscript{30} \textit{The Hillman Horror}, supra note 6.
\textsuperscript{31} \textit{U.S. Circuit Court: Hillmon Cases Reached}, Leavenworth Times (Kan.), June 15, 1882, at 1 (reporting that E.B. Borgalthaus testified that he was Sallie Hillmon's attorney).
\textsuperscript{32} \textit{Hillman Examination}, Lawrence Daily Tribune (Kan.), Apr. 7, 1879, at 4.
\textsuperscript{33} \textit{The Hillman Case}, Lawrence Daily Tribune (Kan.), Apr. 8, 1879, at 4; \textit{The Hillman Inquest}, Lawrence Daily Tribune (Kan.), Apr. 9, 1879, at 4.
\textsuperscript{34} \textit{Murder Will Out!}, supra note 12.
\textsuperscript{35} Id.
\textsuperscript{36} Id.
one, but opined that the corpse’s scar was too fresh to have originated on
the date when Hillmon took the vaccination.  

Some citizens were dubious about the propriety of the inquest—not
necessarily because they sided with Sallie, but because they thought the
proceeding was a burdensome expense for the County. The dispute would
seem, after all, to be between Sallie Hillmon and the insurers; Douglas
County did not have much stake in the outcome. Some suggested that the
insurance companies were manipulating the County’s officers for their own
purposes. But the reporter for the Lawrence Standard would have none of
this criticism. In one of the articles that he authored during the inquest, he
took time out from reporting the testimony to castigate these critics:

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.

Except that they did not. When Sallie Hillmon finally sued the insurance
companies for nonpayment of the proceeds in 1880, Green and Barker
entered appearances for the companies, and remained their lawyers of
record for most of the next twenty-three years, until the matter was finally
settled. Green’s former student, Charles Gleed, entered his appearance in
1882 and remained nearly to the bitter end as well. It was in the fourth of
the six trials that Dr. Morris finally acknowledged (in an effort to ward off
the accusation that the county’s funds had been wasted on the inquest) 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.” He also recalled “the fact
of the examination of witnesses being conducted by George J. Barker in

37. The Hillman Horror, supra note 6.  
38. Id.  
39. Id. at 1.  
40. James W. Green appeared on the brief filed with the Supreme Court in 1902, in the
(1903) (showing Green on the brief). Green and George Barker gave closing arguments at
the last trial, in 1899. See Isham and Barker Close for Defense, Leavenworth Times (Kan.),
Nov. 18, 1899, at 4; Simmons’ Testimony a Footless Fancy, Leavenworth Times (Kan.),
Nov. 17, 1899, at 4.  
Annual Report of the Kansas Superintendent of Insurance 49, 49–78 (1887), reprinted in
John H. Wigmore, The Principles of Judicial Proof 856, 856–896 (1913) [hereinafter Annual
Report] (listing himself as attorney for defendants on both the second and third trials); see
also id. at 884 (quoting at length from his own closing argument). Gleed’s law firm was
reported to be “on the side of the insurance companies” in the fifth trial, in 1896, although he
is not reported to have carried out many courtroom duties. Will Try It Again, Topeka Daily
Capital (Kan.), Mar. 11, 1896, at 1.  
42. The Hillmon Trial, Topeka Daily Capital (Kan.), Feb. 16, 1895, at 6.
behalf of the insurance companies and that to this [Morris] offered no objections.43 Testifying in the same trial, Wiseman, agent for the companies, 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."44 In other words, the County's attorneys were working for the insurance companies from the start, and deploying the powers of their office to serve those clients.

But the inquest was notable not only for the undisclosed interests of the public's lawyers, but also for its outcome, which would prove most useful to the companies' litigation strategy. Since we know who sponsored the proceedings, it is not surprising that the jury's conclusion was that the body belonged to a person unknown who had been the victim of a felonious "gunshot wound through the head." More puzzling at first is the portion of the verdict declaring that the gun was "held in the hands of John H. Brown."45 If, as now seems inescapable, the Lawrence inquest was controlled from start to finish by the insurance companies, why would they not have arranged for the verdict to name Hillmon as the villain?

Their plan becomes more transparent when the next developments in the case are examined. Brown, after testifying about the accidental death of Hillmon and his own role in it, left the town of Lawrence before the conclusion of the inquest. The Lawrence Standard suggested that he had fled the state and that his behavior was suspicious,46 but in fact Brown lived on the Missouri side of the river.47 There is some dispute about whether the inquest's verdict resulted in the issuance of any warrant for his arrest,48 but in any event he was neither arrested nor charged during the year after the death of Hillmon. What he did experience was hounding, by the lawyer and State Senator W.J. Buchan.

In one of the later trials of the Hillmon case, Buchan admitted that he had never received pay for his work on the Hillmon matter from any client but the insurance companies, and that they had retained him to defeat Sallie Hillmon's claim.49 But this is not how he presented himself to Brown during several meetings with him in Missouri over the summer and fall months of 1879. Instead, the lawyer told the worried young man that he had been sent by Brown's father and his brother Reuben, who were

43. Id.
46. The Hillman Tragedy, Lawrence Standard (Kan.), June 26, 1879, at 4; Murder Will Out!, supra note 12.
47. 1899 Transcript, supra note 6, at 347–48 (deposition of John Brown).
48. The coroner testified that he had issued a warrant for Brown's arrest after the jury returned its verdict, and that Green had assisted in its preparation. See The Hillmon Trial, supra note 42. But none of the contemporaneous reporting mentions this fact, and County Attorney Green himself, called as a witness twenty years later at the sixth trial, denied that he had ever issued a warrant for Brown. Advised His Brother to Swear to a Lie, Leavenworth Times (Kan.), Oct. 24, 1899, at 4.
49. The Hillmon Case, Leavenworth Times (Kan.), June 14, 1885, at 4.
concerned about Brown’s legal situation after the inquest verdict had named him as the killer.\textsuperscript{50} The insurance companies, Buchan advised Brown, knew that Hillmon was still alive and was the killer; they were determined that the matter would end with the defeat of Sallie Hillmon’s claims and they were prepared to do anything to reach their goal. If it were necessary for Brown to be sacrificed to their anger, he would be, and there was nothing Buchan could do for him. On the occasion of one visit, Buchan even brought with him a man he introduced as a deputy sheriff from Lawrence, telling Brown that the deputy had a warrant to arrest Brown and would do so unless Buchan were able to dissuade him.\textsuperscript{51} But if Brown were to tell the “truth”—that is, the truth that the dead man was not Hillmon but someone else, whom the murderer Hillmon had killed for the insurance money—why then, said Buchan, Brown would have no worries. The companies could easily arrange that any acts of complicity on Brown’s part would be forgotten, all charges foregone or dismissed.\textsuperscript{52} Eventually Buchan even persuaded Reuben, with whom Brown had been staying, of the wisdom of this course, and Reuben importuned his brother to accept the lawyer’s offer.\textsuperscript{53}

By September, Brown was worn down, and finally agreed to supply an account of the death at Crooked Creek more helpful to the insurance companies than the version to which he had testified at the inquest.\textsuperscript{54} This second account was embodied in an affidavit, which Buchan prepared. The lawyer brought the document to Reuben Brown’s house for John Brown to sign, and then insisted that John Brown accompany him to a nearby office for the statement to be notarized.\textsuperscript{55} This affidavit, which was one of the insurance companies’ most important pieces of evidence, narrates in vivid terms a murder committed by Hillmon.

The statement avers that John and Sallie Hillmon and Sallie’s cousin Levi Baldwin had entered into a conspiracy to commit insurance fraud, Baldwin’s part being to pay the premiums. Hillmon and Brown were to journey to the Southwest with the goal of finding a “subject to pass off as the body of John W. Hillmon, for the purpose of obtaining the insurance

\textsuperscript{50} That Tooth, Leavenworth Times (Kan.), June 22, 1882, at 1 (discussing the first trial). This was W.J. Buchan’s claim about how he had acquired an interest in John Brown, but the elder Brown was never called to testify by either side. The Brown brothers maintained that Buchan had approached John Brown without invitation or authority.

\textsuperscript{51} See 1899 Transcript, supra note 6, at 401 (deposition of John Brown); see also A Long Story, Leavenworth Times (Kan.), 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.” That Tooth, supra note 50.

\textsuperscript{52} 1899 Transcript, supra note 6, at 401 (deposition of John Brown) (testifying that Brown related that Buchan promised that he would “never have any trouble about it from that time on.”).

\textsuperscript{53} How It Happened, supra note 13.

\textsuperscript{54} Id.

\textsuperscript{55} That Tooth, supra note 50.
money." On the first trip the two had taken, in late December, they had hoped to encounter a corpse that had frozen to death and could be passed off as Hillmon’s, but when none was found the men went back to Wichita and Hillmon returned to Lawrence. Hillmon then traveled to Wichita again in early March and the pair set out again in a southwest direction; then, according to the statement, the two encountered a stranger “the first day out from Wichita, about two or two and one-half miles from town,” and invited him to travel with them. The man “said his name was either Berkley or Burgis, or something sounding like that,” but Brown and Hillmon “always called him Joe.”

Hillmon took Brown aside and told him that Joe “would do for a subject to pass off for him,” and over Brown’s objections (for according to the affidavit Brown was unwilling to participate in murder) Hillmon proceeded with his plan. Hillmon’s most foresighted measure was persuading Joe to allow Hillmon to vaccinate him for smallpox by taking the virus from his own arm and using a pocket knife to insert it into the other man’s. Hillmon also persuaded Joe 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 back out of sight.”

Apparently as a hedge against any impression of implausibility a reader might form of these events, the affidavit 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 and put his own daybook in the dead man’s coat (Hillmon’s daybook or journal, a surprisingly literate document that says nothing about any plans to kill a man—of course it would not, no matter whom you believe—was found on the body at Crooked Creek). Hillmon then told Brown to ride for assistance, according to the affidavit, and vanished north with Joe’s valise. Later, back in Lawrence, Brown had a conversation with Sallie Hillmon in which she assured him that “she knew where Hillmon was, and that he was all right.”

A more useful document than this affidavit, from the insurance companies’ point of view, can scarcely be imagined. It was consistent with all the facts then known, accounted for the inconvenient vaccination scar, nullified Brown’s earlier testimony, discredited the character of two of the most important witnesses who identified the corpse as Hillmon (Baldwin and Sallie Hillmon), and highlighted the most suggestive circumstance in favor of the company’s position: the suspiciously large amount of life insurance carried by a poor man like Hillmon.

56. 1888 Transcript, supra note 6, at 164.
57. Id.
58. Id. at 165.
59. Id. at 164.
60. Id. at 165.
61. Id.
At Buchan’s further insistence, Brown also wrote (not just signed, as with the affidavit) another highly helpful document: a letter to Sallie Hillmon. He later would testify that it was dictated to him by Buchan. The brief missive read, "I would like to know where John is, and how that business is, and what I shall do, if anything. Let me know through my father. (Signed) John H. Brown." But later Sallie Hillmon would testify that she did not receive this letter, and Buchan would admit that he had not posted it to her; instead, he gave it to the insurance companies’ representatives. 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.

Buchan acted swiftly to consolidate these victories, for he and the companies apparently believed that Sallie Hillmon would surrender her claims once she learned of Brown’s betrayal. During those weeks of the late summer of 1879, in the early months of her (disputed) widowhood, Sallie Hillmon apparently took several rail journeys to visit relatives; her travel was financed by the insurance companies, who made this investment in hopes of keeping her away from the advice of her attorneys in Lawrence. She allowed them to wonder whether she would surrender her claims to the insurance proceeds, and by September she had several times raised their hopes only to dash them. But with Brown’s defection, Buchan felt they had her cornered. Brown was the only available witness to the death at Crooked Creek, and if his account were one of murder and fraud, surely Sallie would see that her only salvation lay in renouncing her claims, acknowledging her husband’s crime, and hoping to portray herself as an innocent spouse who had no role in his wicked schemes.

Buchan arranged for Sallie to meet him and Brown at the Planter’s Hotel in Leavenworth, Kansas, one September afternoon, and there in a parlor he signaled Brown to tell Sallie the words the lawyer had rehearsed with him: that he had signed a statement confessing that the dead man was not John Hillmon, but a stranger who had been killed for the insurance proceeds. Sallie’s reaction was not precisely what Buchan had hoped: she addressed

63. 1899 Transcript, supra note 6, at 482 (deposition of John Brown).
64. The Hillmon Case, Leavenworth Times (Kan.), June 11, 1885, at 4.
65. That Tooth, supra note 50.
66. Sallie Hillmon seemed quite ready to play along in this game. In one letter she wrote to Buchan in September 1879, headed “Ottawa,” she said, “When I left Lawrence I had but little money, and will have to ask you to send me enough to buy a ticket to your city.” In another, dated January 1880, she wrote from Tonganoxie (where her cousin’s property was located), “I am ready to go to Colorado as soon as you send the tickets and money. Can’t stay here much longer as parties in Lawrence are making inquiries . . . .” Vaccine Virus, supra note 29.
67. This was Brown’s testimony at the first trial (the only one at which he appeared in person). Brown’s Letter, Leavenworth Times (Kan.), June 18, 1882, at 5. In addition, it was Sallie Hillmon’s consistent account. See How it Happened, supra note 13.
herself not to Brown but to Buchan, asking him if he really thought she would not know her own husband's body if she saw it.\(^{6}\) She then pleaded fatigue and asked for a few hours alone. But later in the evening she altered course again, telling Buchan that she would sign the release form he had prepared.\(^{69}\)

When, however, Buchan asked her for the policies themselves (for their surrender would have been the clearest and most incontestable evidence that she had renounced her claims), Sallie pleaded inability to produce them; they were with her lawyer L.B. Wheat back in Lawrence.\(^{70}\) Buchan was compelled to pay for more rail tickets to transport himself and Sallie back to Lawrence, but when they arrived at Wheat's office, that attorney refused to give up the documents, saying that he had a lien on the policy proceeds because of the work he had done on the case.\(^{71}\) The exasperated Buchan had to spend the night in a hotel while Sallie went home.\(^{72}\)

Buchan was no quitter, though, and the next day he persuaded Sallie to come with him to Wyandotte, where he kept his office, for the purpose of inspecting the affidavit that Brown had signed.\(^{73}\) Perhaps Buchan thought the sight of this damning and circumstantial document would frighten her enough to insist that Wheat produce the policies and hand them over. But Sallie, whether cool and manipulative or safe in her innocence, this time ignored Buchan and turned to Brown, who was in the room, asking him why he would make such a statement. Her composure must have unnerved Brown, for at this juncture he took the affidavit from Buchan, crumpled it, and thrust it into the stove that was used for heating the office.\(^{74}\) Brown and Sallie then departed together, leaving Buchan with his strategy in ruins.

Or perhaps not quite. For Buchan had taken the precaution of showing the affidavit to his real clients—the insurance companies—and having a copy made of the document before allowing Sallie to examine it.\(^{75}\) Copies were made by hand at the time, laboriously lettered by scrivener, so the preparation of a copy was not a casual act. His happy foresight in securing a copy must have consoled Buchan quite a bit for the damage to the original, but even the latter was not destroyed altogether—the fire must not have been very hot. Buchan was able to extract it from the stove and patch it somewhat back together. It was lucky for his clients that he did so, for there would come a time in the ensuing litigation, after Brown had returned

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69. A Demurrer Filed, Leavenworth Times (Kan.), Oct. 27, 1899, at 4.
71. A Demurrer Filed, supra note 69.
72. Vaccine Virus, supra note 29.
73. What She Says, Topeka Daily Capital (Kan.), Mar. 6, 1888, at 4.
74. How It Happened, supra note 13 (providing the testimony of Sallie Hillmon); see also 1899 Transcript, supra note 6, at 457 (deposition of John Brown). Buchan would later claim that it was he who had thrown the paper into the stove. See That Tooth, supra note 50; Vaccine Virus, supra note 29. This claim, however, is completely inconsistent with his later acts; Brown's and Sallie Hillmon's accounts are far more credible.
75. That Tooth, supra note 50; Vaccine Virus, supra note 29.
to his original story, when the affidavit was offered into evidence and the trial judge ruled that a copy was not admissible. The scorched and creased original, however, could be produced, and was admitted into evidence to impeach the testimony of Brown—the man Buchan had claimed to represent.

The Brown affidavit and Sallie Hillmon’s release represented small turns of good fortune for the insurance companies, but not decisive victories. After destroying the affidavit (or so he thought) in the stove, Brown never again embraced the story the companies wished him to tell, but returned to his earliest narrative—the two men at the campsite, Hillmon building the fire, Brown’s removal of the firearm from the wagon, and its accidental discharge. In 1881, after Sallie had filed her lawsuits against the companies, Brown was compelled by the companies’ lawyers to sit for a deposition that literally lasted for weeks, beginning in December 1881 and lasting through February 1882. The insurance attorneys cross-examined him for twenty days and taxed him mercilessly with his affidavit, but he never again wavered from his original story, and always insisted that it was only Buchan’s threats that had pressured him into signing the document accusing Hillmon. (Although the defendants’ attorneys made good use of the affidavit to impeach Brown when he later testified in Sallie Hillmon’s favor, his explanation for his inconsistent statements seems to have been credible to at least some of the many jurors who sat on the case. The first two trials ended in hung juries, and after the second some of the jurors were interviewed by a local journalist. Concerning Brown, one juror said that he “had considerable influence, though it was hard to tell which of his stories were true,” but also that “it will be hard to make me believe but what Buchan worked him pretty hard, to get his evidence for the companies.”)

As for Sallie’s capitulation and signing of the releases, the companies attempted to plead this transaction as a defense to her suits against them, but without success; the first trial judge, Cassius G. Foster, ruled that the releases were not given in exchange for any consideration and hence were void; each of the later judges seems to have regarded this ruling as the law of the case, and none ever took a different view. Wheat continued to represent Sallie throughout the decades of litigation, so it is safe to presume

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76. See 1888 Transcript, supra note 6, at 166–67; see also The Hillmon Case, Topeka Daily Capital (Kan.), Mar. 2, 1888, at 4.
77. 1888 Transcript, supra note 6, at 167–68.
78. See 1899 Transcript, supra note 6, at 401 (deposition of John Brown).
79. The Hillman Trial, Leavenworth Times (Kan.), June 25, 1885, at 4.
80. The NARA Archive contains the answers of the Connecticut Mutual Life Insurance Company and the Mutual Life Insurance Company of New York, in which Sallie Hillmon’s signed release were pleaded in defense. But Judge Cassius G. Foster said, in instructing that first jury, “In my view of the law, these releases cut no figure in these cases and do not estop the plaintiff maintaining her suits on the policies and therefore I shall say no more about them.” Foster’s Finding, Leavenworth Times (Kan.), July 2, 1882, at 5. In the last trial, Judge William Hook refused to instruct the jury that the releases were admissible as “evidence . . . that no lawful claim could be made under said policies.” 1899 Transcript, supra note 6, at 1906.
that he had not offended her when he refused to turn the policy documents over to Buchan at her direction. Perhaps Sallie's entire course of dealings with Buchan was intended to bamboozle and mislead him, although it seems unlikely she could have been certain that the signing of the release would do no harm to her interests.

Buchan's usefulness to the insurance companies seems to have come to an end with these episodes, but the attorneys who remained on the defense team also engaged in many acts of questionable professional propriety. After their efforts failed to intimidate Brown into confessing to complicity in murder and fraud, and their hopes were disappointed that Sallie would give up her lawsuit, they turned to a strategy that they pursued relentlessly for the next two decades: attaching an identity other than Hillmon's to the dead man. Remember that the Brown affidavit said that the stranger who joined the Hillmon/Brown traveling party, and ended up dead at Crooked Creek, was named "Berkeley" or "Burgis," but that he was usually just called "Joe." Brown later testified that he did not come up with this name: it was supplied, just like all of the other contents of the statement, by Buchan. But even while Buchan was still embarked on his campaign to obtain Brown's signature, the companies' other lawyers were at work trying to locate someone who could identify the stranger who (by their account) lost his life in the company of Brown and Hillmon.

During the Lawrence inquest, one proinsurance company newspaper, the Lawrence Standard, had suggested that the dead man was sure to be a fellow named "Frank Nichols," known to his friends as "Arkansaw." Nichols, the paper informed, had gone missing after telling some friends that he agreed to travel with a man named Hillmon; this report stirred up a great deal of indignation against the Hillmons in Lawrence, but only until "Arkansaw" turned up quite alive, putting an end to these particular speculations. There were other names floated as well in the Lawrence press, including the missing brother of a Mrs. M.L. Lowell, and a young man of Indiana. None of them proved to be the dead man.

But there was no shortage of anxious frontier families whose young men had left home and neglected to correspond, and it was here the companies' hopes lay. They hoped to learn of some fellow about the right age who might have been footloose enough to fall in with Hillmon and Brown and agree to accompany them on the trail, and inexperienced and trusting enough to have met his death at the campground near Crooked Creek. Or they needed to find Hillmon—alive. To these ends, their agents and scouts made inquiries through the channels of communication that they thought

81. See supra note 58 and accompanying text.
82. 1899 Transcript, supra note 6, at 401 (deposition of John Brown).
83. The Hillman Tragedy, supra note 46.
84. Wiseman testified at the sixth trial that he located Frank Nichols alive, apparently not long after the inquest. Damaging Evidence by John Hillmon's Sister, Leavenworth Times (Kan.), Nov. 1, 1899, at 6.
85. Murder Will Out!, supra note 12.
likely to produce leads. Eventually these efforts yielded a return: the coroner, Morris, came into possession of a letter from Fort Madison, Iowa, seeking information about a young cigar maker from Fort Madison who had traveled recently in Kansas. The young man’s family had stopped receiving correspondence from him in early March and was worried. Morris forwarded the letter to Wiseman, who would later testify that it said, in substance, “I am inquiring for 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.” He could not produce the letter.) The missing cigar maker’s name was Frederick Adolph Walters.

Daniel Walters, a Swiss immigrant to Iowa and the patriarch of a family of five children, would testify in an 1881 deposition that his worries about his son’s whereabouts had led him to ask the secretary of his local Masonic lodge to correspond with other lodges in neighboring states, especially Kansas, from where Frederick Adolph had written a number of letters back home before his correspondence ceased. It was this correspondence that had led Wiseman to the Walters family. (The elder Walters did not, however, say anything under oath about the contents of his son’s last letter, and he did not employ the name Hillmon.)

Whatever the letter from Daniel Walters may have said, when Wiseman received it, he traveled to Fort Madison with his fellow agent Tillinghast and asked to meet with as many members of the Walters family as could be assembled. This group included Daniel Walters and his wife, and the three daughters who still lived at home: Annie, Fannie, and Elizabeth. Fannie Walters would later testify that she, her parents, and her sisters examined the photos of the corpse at the Walters home in January 1880. Fannie said that she was sure the pictures were of her brother, as did Elizabeth. Their mother never testified, but in the fifth trial, the presiding judge allowed Fannie to swear that when shown the photographs, her mother had exclaimed, “That’s my boy,” and then fainted dead away.

The companies came away from that first meeting with the Walters family committed to the proposition that Hillmon and Brown had lured Frederick Adolph Walters, the young cigar maker, to his death. This theory required that Walters (despite the difference in name) be the “Joe Berkley” or “Joe Burgis” described in Brown’s affidavit, which he had signed the previous September, for they would always maintain that this statement embodied the truth even though Brown had by then recanted it. As the months passed, and the lawyers on both sides began to prepare for the first trial of Sallie Hillmon’s case in June 1882, the companies’ lawyers and

86. The Hillmon Case, Topeka Daily Capital (Kan.), Feb. 1, 1895, at 8.
87. Id.
90. The Hillman Case, Leavenworth Times (Kan.), June 19, 1885, at 1. This press account spells her surname “Reivnoeck.”
91. 1899 Transcript, supra note 6, at 1778 (deposition of Elizabeth Rieffenach).
their agents sought more and more evidence to support their theory that the
dead man was Walters. They showed the corpse photographs to many of
Walters’s acquaintances, some of whom were willing to swear that the
photograph depicted their friend. They lined up various acquaintances of
Hillmon who were willing to say that the corpse (if they had seen it) or the
photographs of it (if they had not), did not resemble Hillmon. And the
lawyers exerted themselves to emphasize another point of significance: a
discrepancy between the height of the corpse (agreed to have been about
five feet eleven inches) and that of Hillmon. Sallie and others in her camp
said that Hillmon was that tall or nearly so, but the insurance companies
were bent on portraying Hillmon as a shorter man—at least two inches
shorter. They found various witnesses who were prepared to testify that
Hillmon was five feet eight or nine inches at most. But inconveniently for
them, Hillmon had described himself in writing as having a height of five
feet eleven (along with various other physical characteristics) on three
separate occasions when he applied for the insurance policies.

Their attempt to rob these damaging documents of their likely effect on
the height issue was delivered in the testimony of Dr. G.G. Miller at the
first trial (and repeated in several of the later ones). Miller was the
physician who had examined Hillmon for general good health before the
Mutual Life Insurance Company of New York would issue its policy. The
doctor testified that Hillmon filled out the application form with such
statistics as chest and abdominal girth and height, and that Miller measured
the applicant’s chest and abdomen, but not his height. Hillmon came
back in to visit the physician a few days or a week later, testified Miller,
and “said he had made a mistake in his height: that he was five feet nine
inches instead of five feet eleven inches.” Miller testified that he then
measured Hillmon’s height for the first time, saw that the shorter height was
correct, and made an entry to that effect in his “ledger book,” an item that
was thereupon offered and received as an exhibit. There were no other
entries of this sort in the book, which apparently consisted of records of
patient accounts paid and due, and of course no nineteenth-century forensic
techniques were capable of ascertaining when the entry in Miller’s ledger
book was written. But his account is highly implausible even putting

92. See Was It Walters?, supra note 88.
93. See, e.g., Photograph Palaver, Leavenworth Times (Kan.), June 27, 1882, at 1.
94. See 1899 Transcript, supra note 6, at 178, 184, 192.
95. Hillmon’s Hair, supra note 29.
96. Id.
97. Id. Dr. Miller acknowledged that there are no other such entries, and also that he had
placed his signature by this entry, unlike the others; he said that “Hillmon’s name ought to
have been signed,” presumably to demonstrate his acquiescence in the shorter height
measurement. This particular entry could not have been a business record if it were not the
regular practice of the doctor to record such things in the book, although the objection seems
not to have occurred to Sallie’s attorneys during the first trial. As we shall see, their
appreciation of the virtues of the hearsay rule seems to have come to them rather late in the
litigation. In the third trial, they did make this objection to Dr. Miller’s ledger, and it was
sustained. See 1888 Transcript, supra note 6, at 185.
aside these circumstances: What could have motivated Hillmon, whether villain or innocent, to misreport his height the first time he filled out the insurance form, and then return to correct the number at a later date? Surely he knew his own height, and unless he already knew the identity and height of the victim whose body he hoped to pass off as his own (a claim utterly inconsistent with the account that he and Brown met Joe while leaving Wichita some weeks later, not to mention inconsistent with Walters having been as tall—five feet eleven inches—as the defendants claimed), what purpose could he have had in misreporting it on either the first or the second occasion? Miller’s testimony appears to be the baldest perjury, supported by the creation of a false document.

Other obviously perjured defense testimony peppered the six trials. Many of the inquest jurors testified at various times that at the Lawrence inquest, Sallie Hillmon said she could not describe her husband, and that her demeanor during that proceeding was frivolously good-natured and jovial. But otherwise unsympathetic newspaper accounts of the inquest recount her particular description of Hillmon, and say of her demeanor that “her grief, because of his death, has all the appearance of being genuine and heartfelt.” In the fifth trial, Patrick Heeley of St. Louis testified that seventeen years earlier, in the winter of 1879, he had known Walters in Wichita—for about two months prior to March 1, he said. Walters had 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 1, Heeley testified, he saw Walters with another man whom Walters introduced as Hillmon; on a later occasion, Heeley again saw Walters, who said he was going with Hillmon to start a cattle ranch. This testimony must have been very impressive at the time, and seems not to have been much impeached, but in retrospect it is clear it could not have been true. Heeley was quite certain that his acquaintance with, and employment of, Walters had lasted for at least the two months prior to March 1, 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 wrote that he was staying in that city and had not had much employment recently.

But the subornation and fabrication of the evidence of Miller and other witnesses, the affidavit of Brown, and the “letter” Brown was persuaded to write to Sallie Hillmon cannot compare in boldness to the companies’ most ambitious efforts to shore up their case that the corpse belonged to Walters. It was those efforts that created the piece of evidence for which the Hillmon

98. Hillmon Trial Again Resumed, Topeka Daily Capital (Kan.), Feb. 6, 1895, at 4.
100. Id.
102. 1899 Transcript, supra note 6, at 1794.
case is remembered: a letter that transformed the law of hearsay for longer than a century.

When Tillinghast and Wiseman visited the Walters family and showed them the corpse photographs that had such a dramatic effect on Mrs. Walters, they left the photographs behind. The Walters family showed them in turn to a young woman who had been close to Fredrick Adolph before he left home, and apparently she, too, thought they resembled the missing cigar maker. This young woman, Alvina Kasten, received a visit herself from Tillinghast later in the month of January 1880, and she would later testify in a deposition that on that occasion she gave the agent a letter—a letter beginning “Dearest Alvina,” and written, unquestionably, in the hand of her betrothed, Frederick Adolph Walters.

The deposition represents the only sworn statement Kasten ever gave over the quarter century of litigation; she never appeared to testify at any of the six trials. In the deposition, she testified that she received this letter in early March 1879, just as she had received letters from her suitor Frederick Adolph about every two weeks since his departure from Fort Madison. But the letter she gave to Tillinghast was special: it was the last communication she ever received from the man she called “Dolph,” with whom she said she had exchanged betrothal rings a year before. Its contents, however, were the real bombshell, for among its pleasantries and teasing courtship language the following passage appeared: “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.... as he promised me more wages than I could make at anything else....” The letter was dated March 1, 1879, and postmarked Wichita, Kansas, March 2, 1879. It was uncontroverted that Hillmon and Brown had been in Wichita on the weekend of March 1–2, 1879, before setting off toward Medicine Lodge.

This letter, then, was the undisputed prize of all of the insurance companies’ and their lawyers’ efforts to prove their theory of the death at Crooked Creek. For if the letter were authentic, a proposition that Sallie Hillmon’s lawyers never disputed, it seemed to prove beyond peradventure that the dead man was not Hillmon but Walters. The only other conceivable explanation was coincidence: it was only happenstance that Walters met Hillmon in Wichita, made arrangements to travel with him, and was never heard from again—and that Hillmon met his death on the very journey that Walters was to take with him. But surely fate could not be so fickle. Murder and fraud were the obvious, the only plausible, explanation.

103. See 1899 Transcript, supra note 6, at 1696–97 (deposition of Alvina D. Kasten).
104. Id. at 1687–89.
105. Id. at 1687.
106. Id. at 1687–88.
107. 1888 Transcript, supra note 6, at 100.
The "Dearest Alvina" letter is the central focus of Mutual Life Insurance Company v. Hillmon, the case in which the Supreme Court overturned the victory Sallie Hillmon had finally achieved over the insurance companies in the third trial of her case against them. Sallie's lawyers, the estimable Wheat and others, had never suggested that the letter was a forgery, probably because they had seen other exemplars of the cigar maker's handwriting and could see a resemblance with that on the companies' prize exhibit. It is perhaps remarkable that they managed to stave off defeat in the first two trials, given the persuasive power of the letter.

But during the third trial, Wheat and his cocounsel seem to have experienced an epiphany: the letter was hearsay! This proposition, once grasped, could not really be refuted, for unquestionably it was a writing made outside of court offered to prove (at least some of) the propositions it asserted: that the writer had met a man named Hillmon who had offered him high wages to accompany him west where the man planned to start a sheep ranch, and that the writer had accepted the offer and intended to carry out his part of the agreement. Nor did any of the commonly recognized exceptions to the hearsay rule seem to militate in favor of the letter's admissibility.

The hearsay exception, made in the course of the third trial, seems to have caught the defendants' lawyers rather flat-footed; possibly they too had failed to consider the hearsay angle. Judge O.P. Shiras sustained the objection, and the letter, thus ruled inadmissible, was kept away from the jury. Unaware of the letter's existence, the jury returned a verdict for the plaintiff, implicitly finding that the dead man was Hillmon. The defendants appealed, as was possible at the time, directly to the Supreme Court.

Although the case is remembered today for what it held about the letter's admissibility, this issue was not the companies' first line of argument on appeal. They were more exercised about the consolidation of the three matters for trial, and Judge Shiras's ruling during jury selection that the defendants must share three peremptory challenges, rather than enjoying three apiece (or perhaps they just thought this argument more promising). They designated a number of other errors as well; the admissibility of the letter was far down the list. And indeed, the Court began its opinion by

109. In his summation after the sixth and last trial, Green claimed that Sallie Hillmon's lawyers had called the letter a forgery, Simmons’ Testimony a Footless Fancy, supra note 40, but in fact their arguments against its probative value were not that, but different, Isham and Barker Close for Defense, supra note 40 (reporting that John H. Atwood claimed that the Hillmon referred to was a different Hillmon). By that time Frederick Adolph Walters's sister had produced a cache of other letters undisputedly from him, see 1899 Transcript, supra note 6, at 1790–94, but very likely Sallie Hillmon's lawyers had obtained other exemplars much earlier.
110. Nearing the End, Topeka Daily Capital (Kan.), Mar. 16, 1888, at 5; see also 1888 Transcript, supra note 6, at 190.
111. Their petition for writ of certiorari listed consolidation issues as errors one and two, and the peremptory challenge issue as three. The exclusion of the Kasten letter was
agreeing with the defendants about the peremptory challenge issue; the companies would have enjoyed a new trial had the Court gone no further. But the Justices were unwilling to leave the matter of the letter unaddressed, saying 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.”

The Court’s unanimous opinion, by Justice Horace Gray, proceeds to rule the letter admissible because it expressed the intentions of the writer, concluding that such declarations ought to form an exception to the usual rule excluding hearsay. It is this aspect of the Court’s decision that is not only remembered but honored, and codified in Federal Rule of Evidence 803(3) as well as many matching provisions of state law. I will venture that today, more than a century later, it is the rare trial that does not feature at least one invocation of this venerable exception to the hearsay rule.

Some jurists and scholars have doubted the wisdom of this hearsay exception, and others have defended it. More subtly, some have noted that it would not seem to accommodate all of the assertions in the “Dearest Alvina” letter, for some of them (for example, that the writer has met a man named Hillmon, and that he has offered generous wages) describe not the future but the past. Debates about the proper reach of the exception continue among scholars and judges. But there is no doubt that the rule of Hillmon has become deeply embedded in the law of evidence in this country, and adopted elsewhere as well. My intention here is not to revisit this debate, although it is important, but to suggest that the policy premises of this rule are sufficiently doubtful that the Court would not have invented the hearsay exception but for the pressure of a nearly irresistible desire to ensure that Hillmon did not succeed in his criminal schemes.

I have elsewhere written at greater length about reasons to believe that this desire animated the Court’s unforced choice to rule that the letter was admissible before remanding the case for retrial. In brief, I believe that the Court, convinced (as who would not be?) that the “Dearest Alvina” letter made Hillmon’s guilt unmistakable, designed the only measure it could fashion to deprive Sallie Hillmon of the benefit of the hearsay rule on remand, since otherwise that rule would keep later jurors in the dark about the letter. But more to the point for our present purposes is historical

designated error number eighty-six. 1888 Transcript, supra note 6, at 90–101 (petition for writ of certiorari).


113. Id. at 295–96.


115. See, e.g., United States v. Annunziato, 293 F.2d 373 (2d Cir. 1961).


evidence I have discovered about the *Hillmon* case: evidence that has persuaded me that the “Dearest Alvina” letter was, although authentic in the sense that it was written by Walters, inauthentic in other aspects, and full of lies both implicit and explicit. Some of this evidence is summarized below.\(^{118}\)

1. **Discrepancies between the “Dearest Alvina” letter and the Brown affidavit:** These two documents formed the core of the defendants’ case, and in many ways they are mutually reinforcing. But recall that the Brown affidavit describes having met the stranger Joe, who later became the corpse at Crooked Creek, “the first day out of Wichita, about two or two and one-half miles from town.”\(^{119}\) The letter, however, is postmarked Wichita, and in it the writer says that he is still in the town, has met a man named Hillmon, and plans to leave with him “the fore part of next week.”\(^{120}\) If (as the letter says) the letter writer had already met Hillmon before he posted the letter, then he could not (as the affidavit says) have encountered him and Brown for the first time on the trail after Brown and Hillmon had left Wichita.

2. **The real “Joe Burgess”:** In the sixth trial of the *Hillmon* case, the useful Major Theodore Wiseman confessed that more than twenty years before he had located “Joe Burgess,” the fellow who (as “Burgis”) was named as Hillmon’s victim in the affidavit that Buchan prepared and induced Brown to sign; the young man was quite alive.\(^{121}\) Apparently, Joe Burgess was missing at the time the affidavit was written by Buchan, who hoped to be able to attach his identity to the corpse. Burgess’s continued existence did not prevent Green, Barker, and the other defense lawyers (who surely knew what their faithful agent had discovered) from arguing at every trial that the “Joe” of the affidavit and Walters were the same (dead) man.\(^{122}\) (Wiseman’s admission also removes all doubt about whether the affidavit represented the truth—Brown could not really have witnessed the death of “Joe Burgis” if the fellow was still alive months

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\(^{118}\) It is described at greater length in Wesson, *supra* note 117, and in Marianne Wesson, *The Hillmon Case, the Supreme Court, and the McGuffin, in Evidence Stories* 277 (Richard Lempert ed., 2006).

\(^{119}\) 1888 Transcript, *supra* note 6, at 164.


\(^{121}\) *Damaging Evidence by John Hillmon’s Sister*, Leavenworth Times (Kan.), Nov. 1, 1899, at 6. Apparently, by the end of the last trial the defendants had more or less given up the claim that Walters was the “Joe Burgess” of Brown’s affidavit. One of their own attorneys elicited from Wiseman that he had “found” both Francis (Frank) Nichols and Joe Burgess in 1879. Id.

\(^{122}\) 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. *By Conspiracy*, Leavenworth Times (Kan.), 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.”).
later. Brown’s later explanation for why he signed the document is lent new plausibility by these reflections.)

(3) Walters alive and kicking two months after the death at Crooked Creek: During the last Hillmon trial, in 1899, a witness appeared who had never before testified in the matter. Apparently located by the defendants, who at first thought he would be useful to them, Arthur Simmons proved instead to be a devastating witness for the plaintiff’s case: he testified that he had employed Walters at a cigar factory that he owned in Leavenworth in May 1879, two months after the fatal shooting at Crooked Creek. Not only did he identify his former employee from photographs of Walters, he produced written records of employment showing that “F. Walters” had worked at the tobacco house for a month. The defense lawyers disparaged Simmons’s memory, saying that no man could speak with confidence twenty years later about such a casual relationship, but Simmons said he had his reasons: by his account, Walters was a memorably boastful character, always talking of his frequent relocations and the romantic adventures that necessitated them. And no reason was ever suggested why Simmons, a person of apparently unimpeachable respectability, should lie for Sallie Hillmon, or fabricate documents on her behalf. No doubt the testimony of Arthur Simmons was a major factor in the sixth jury’s decision, despite the evidence of the “Dearest Alvina” letter, to return a verdict for Sallie Hillmon.

(4) Forensic examination: With a colleague from the University of Colorado, in May 2006, I undertook exhumation of the body buried in Hillmon’s grave in the Oak Hill Cemetery of Lawrence, Kansas. We had located a descendant in the direct male line of descent from Hillmon’s father; if DNA could be extracted from the remains, we hoped to be able to ascertain with some confidence whether the deceased was related to the descendant, Leray Hillmon. Unfortunately, deterioration related to the remains’ long immersion in an underground stream has so far prevented the extraction of any human DNA from the bone fragment that we were permitted to retain from the exhumation.

After this disappointing outcome, my colleague, Dennis Van Gerven, professor of anthropology, University of Colorado, undertook a forensic examination of the facial features of the

123. The *Leavenworth Times*, a reliable journalistic ally of the insurance companies, reported on October 25, 1899, that the defendants would call Arthur Simmons to testify that Walters had worked at Simmons’s tobacco house in 1878; this prediction was wrong by a year. *Mrs. Hillmon’s Evidence to Be Finished Today*, Leavenworth Times (Kan.), Oct. 25, 1899, at 4.
125. Id.
126. Id.
corpse and the two men, as displayed in photographs. The corpse was photographed in its coffin during the inquest in Lawrence, and photographs of the two men were also among the exhibits used in the trials. I was able to make digital copies of these photographs from the originals, located at the National Archives and Records Administration. Professor Van Gerven's full report is accessible at our web site, but his conclusion can be briefly summarized: the dead man was not Walters, but there is a high likelihood that he was Hillmon.

It is not my claim that the insurance companies' lawyers knew from the start that the man who died at Crooked Creek really was John Hillmon. I believe their initial skepticism was genuinely provoked by the facts as they understood them at the outset of the matter and some recent vivid instances of insurance fraud. But I also believe that in their pursuit of victory for their clients, the lawyers—perhaps obsessed, perhaps self-interested—left behind professional ethics, not only as those are understood today, but as they existed at the time. In doing so they damaged not only Sallie Hillmon, but also their own clients, who financed their unsuccessful resistance to Sallie's claim for a quarter century and certainly spent more in the process than the amount at stake. Moreover, they inflicted a considerable wound on the law of evidence, one that remains.

These men were in many ways paragons of respectability and merit. Buchan was not only an attorney and a lawmaker for many years; he is remembered respectfully in Kansas history for an occasion when he intervened to disperse a hostile crowd that was attempting to prevent the landing of a boatload of "Exodusters," freed slaves fleeing the harshness of the Jim Crow South, at the river docks near Kansas City. Green, remembered as "Uncle Jimmy," is a colorful figure in the history of the University of Kansas as the founding dean of its Law School; today his statue adorns the campus in Lawrence. Gleed, although an indifferent student, went on to form a successful law firm with his more scholarly brother Willis. Charles Gleed argued on behalf of the State of Kansas in

129. Not everyone who knew him was an admirer, however. His sister-in-law Kate Stephens, a classics scholar, always maintained that he stole credit for founding the Law School from her father, to whom it properly belonged. See generally Kate Stephens, Truths Back of the Uncle Jimmy Myth in a State University of the Middle West (1924).
130. Harmon, supra note 22, at 18.
131. Gleed never finished a law (or any other) degree, although his brother Willis, more of a scholar, graduated from Columbia Law School. Id. at 19, 63. In 1884, the two brothers formed a law firm, Gleed and Gleed, and the next year took in Barker, by then a "leading attorney" of Lawrence. Id. at 64. Another partner who later joined the firm, Eugene Ware, who had also served as a state senator and who, under the pen name "Ironquill," is remembered as one of Kansas's leading poets. Id. at 65. Ware appeared on the firm's briefs before the Supreme Court in the second appeal of the Hillmon case.
important litigation before the Supreme Court in 1885, represented the Santa Fe Railroad and other eminent clients, became a regent of the University of Kansas, and eventually became owner of the *Kansas City Journal*. Barker was briefly a partner in the Gleeds' law firm and shared in its prominence and success; he later served as state senator from Douglas County and mayor of Lawrence. Yet, in the course of their work on the *Hillmon* matter, individually and collectively these men violated a staggering number of the ethical rules that govern the conduct of attorneys.

In their disingenuous claim to represent the “people of Douglas County” at the Lawrence inquest rather than the insurance companies’ interests (a claim belied by the later admission of Wiseman that the insurance companies had paid Barker for his services during the inquest, not to mention the coroner and all of the jurors), Green and Barker violated the obligation to avoid conflicts of interest and lied about the interests that they did represent.

Concerning his advice to Brown that he had been hired by Brown’s father to represent the son’s interest, two explanations are possible. Possibly it was true that the elder Brown had hired Buchan, in which case Buchan engaged in a gross conflict of interest because he was simultaneously engaged to represent the interests of the insurance companies. More likely (for the companies never produced Brown’s father as a witness, even when it would have helped them refute Brown’s complaints about Buchan’s mendacity), Buchan was never retained to represent Brown and lied about this fact in order to gain (and then betray) Brown’s confidence and pursue his campaign to persuade Brown to sign the affidavit.

Whatever the origins of his “representation” of Brown, Buchan was grossly disloyal to Brown’s interests, obtaining his signature on a document that exposed him to prosecution and then turning it over to his adversaries, arranging for a copy of the document to be made and then pretending that it

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132. *Id.* at 70–71.
133. *Id.* at 457.
134. *Id.* at 230–35. I suspect, but cannot prove, that as a young journalist Gleed was the author of the *Lawrence Standard’s* very prodefense coverage of the *Hillmon* case during the inquest of 1879. Born in 1856, Gleed would have been twenty-three during the inquest in 1879. 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* matter no doubt would have engaged the feelings of gratitude and ambition that Gleed attached to his law professor and dean. In February 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 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 never returned to law school and did not qualify for the bar until 1884 after serving an apprenticeship in the law department of the Santa Fe Railroad. *Id.* at 63.
135. *Id.* at 54–65; see also *Hillmon Trial Nearly Done*, Topeka Daily Capital (Kan.), Mar. 10, 1895, at 11.
had been destroyed when Brown thrust it into the stove, and testifying in court many times in an effort to discredit his ostensible client's account of the events at Crooked Creek.

Concerning that affidavit, and the letter to Sallie Hillmon that he dictated to Brown, Buchan created false evidence intended for presentation in a judicial proceeding.

By the time of the first trial, Green and Barker knew that "Joe Burgis" (Burgess), named in the affidavit as the dead man, was in fact alive. They certainly knew that he was not identical to Walters, and yet they maintained in their arguments until the last trial (after Wiseman had confessed in his testimony that he discovered Burgess alive in 1879 or 1880) that Joe and Walters were the same. In this persistent lie, they violated their obligation of candor to the courts.

In presenting the testimony of Dr. Miller, who testified to an utterly unbelievable pair of transactions with Hillmon, I believe it fair to conclude that the lawyers knowingly presented perjured testimony and participated in the fabrication of a false document (the ledger book). Miller was an ongoing employee of the insurance companies, and no reason appears for him to have perjured himself except at their behest. Similarly, no reason appears that Heeley should have given his obviously false account of his conversation with Walters about Hillmon other than inducements by the defendants. But even if we cannot be certain that the trial attorneys—Green, Barker, and Gleed—participated in the subornation of these lies under oath, Green and Barker surely knew that the inquest jurors' later accounts of Sallie Hillmon's testimony and behavior at the inquest were not true; they had conducted the inquest and elicited from her the very descriptions the witnesses claimed she had not given, and could have observed her demeanor as closely as anyone.

I have so far not mentioned other highly plausible suspicions of misconduct by these lawyers because, in my judgment, it cannot be ascertained with sufficient historical confidence that the lawyers were complicit in them. For example, during the last trial, one juror communicated to Judge William C. Hook that he had been approached with a "communication . . . which he interpreted as preliminary to an offer to bribe."136 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 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").137 The juror apparently had 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

137. A Demurrer Filed, supra note 69.
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). Plaintiff’s counsel pronounced that they were pleased to proceed as well, but defense counsel immediately moved for a mistrial and dismissal of the jurors, insisting that, in light of the respective financial positions of the parties, “the impression would go out; it would make an impression upon the jury that if anybody had done that, it was the defendants in this case, because the defendants have the money.” The judge declined to interrupt the trial or dismiss the jury. (The jurors deliberated for less than a day thereafter before returning a unanimous verdict for Sallie Hillmon.)

Similarly, there were many witnesses other than those already mentioned whose testimony we can now see to have been false. Several claimed to have seen Hillmon alive years after his death at Crooked Creek, for example. But failures of perception (encouraged by the reward the

138. Id.
139. Typewritten Partial Transcript, supra note 136, at page marked 668.
140. Gives Her $33,102: Jury in Hillmon Case Finds for Plaintiff, Leavenworth Times (Kan.), Nov. 19, 1899, at 4. For a discussion concerning the later history of this matter, see supra note 18.
141. Later in his life, Gleed would be accused of bribery in a very different matter. In 1887, the Kansas legislature 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.” According to Gleed’s biographer, a number of citizens and newspapers believed the accusation. Harmon, supra note 22, at 81–85.
142. In the fifth trial, for example, one John H. Mathias, described (even by the prodefendant 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 1881. The witness also believed that all the prisoner was charged with was being John Hillmon (presumably, that is, being the murderer of Walters). Wanted: The Truth, Topeka Daily Capital (Kan.), Mar. 25, 1896, at 8. Sallie 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. See The Hillman Case, supra note 86. But Wiseman, for all his eagerness to apprehend Hillmon, apparently was not able to translate this tip into a genuine
insurance companies offered for information leading to Hillmon's live capture) may account for this testimony, and the lawyers may have been agnostic about its candor. If we believe that the corpse was that of John Hillmon, then either the doctors who autopsied it were untruthful in saying that the cadaver's teeth were perfect, or the many witnesses who testified that some of John Hillmon's teeth were defective or missing were lying. All of these witnesses were called by the defendants, but perhaps this testimony was, if not believed by the defense lawyers, at least not actively known to be false.

A more curious episode is Charles Gleed's composition of a document that would become the chief source of information for many later scholars of the Hillmon case. Gleed had been counsel for the companies during the second and third trials, but had not been admitted to the Bar at the time of the first. Shortly after the third trial, while the appeal was pending, he wrote a "Report" called "The Hillmon Cases," which he managed to have included in an otherwise dry official Kansas publication, a compendium of statistics and data called the Eighteenth Annual Report of the Superintendent of Insurance. Dean John Wigmore, when assembling Principles of Judicial Proof, his magisterial 1913 volume on the law of evidence, included this document as the basis for an understanding of the Hillmon case. The great Dean helpfully explained in a footnote that he had obtained a typewritten copy of this report from Mr. Gleed, and he titled it "HILLMON V. INSURANCE CO. (Charles S. Gleed. 18th Annual Report of the Kansas State Superintendent of Insurance. 1887, p. 49)." Later scholars of course discovered this helpful account in Wigmore's treatise and relied on it in coming to their conclusions, the Dean's title having convinced them that the account was the work of the Superintendent of

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; see Coming to a Close, Leavenworth Times (Kan.), 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, they said it looked like Coleman. The Hillman Case, supra note 86. Gleed's account in the "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 41, at 877, 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 Hillmon. Even the success of 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." Application of James W. Green (1894) (on file with Kansas State Historical Society in Misc. Collections, John W. Hillman); see also Affidavit of James W. Green (1894) (on file with Kansas State Historical Society in Misc. Collections, John W. Hillman); Arrest and Extradition Warrant for John W. Hillman (1894) (on file with Kansas State Historical Society in Misc. Collections, John W. Hillman).

143. Annual Report, supra note 41, at 856.
Insurance. It was not: The Superintendent at the time, one Daniel W. Wilder, had no apparent role whatsoever in its preparation. Moreover, Gleed's account is so highly partisan, so argumentative, so indifferent to every piece of evidence in favor of Sallie Hillmon, that I doubt any careful scholar would rely on it without this false appearance of official endorsement. Gleed thus had a substantial role in carrying forward a false version of the real facts of Hillmon for many generations. Nevertheless, I do not lay this at his feet as an act of misconduct because I am not sure how much of this result he intended or foresaw.

The most consequential misconduct of the insurance companies' lawyers was what I believe to have been their participation in the creation of the "Dearest Alvina" letter. For, as I have argued, it was almost certainly this letter and its apparent implications for the identity of the dead man that prompted the Justices of the Supreme Court to adopt the rule that out-of-court statements embodying the declarant's intentions are admissible as an exception to the hearsay rule. This hearsay exception is lacking in empirical or policy justification, yet has displayed remarkable durability, finding its way into the Federal Rules of Evidence and the evidence codes of nearly all American jurisdictions, as well as into British law, chiefly because of the prestige of the Hillmon decision. Yet the letter was, if not quite a fake, full of lies, and its provenance was misrepresented by witnesses who must have been solicited to lie by the companies' lawyers.

How do we know that the letter contains untruthful statements? The letter was presented as persuasive evidence of Walters's death at the hands of Hillmon by way of an argument against coincidence, an induction so intuitive that it needed little articulation. The argument goes like this: it could not have been mere coincidence that this young man wrote from Wichita on March 1 (a date that we know Brown and Hillmon were in that city) and spoke of meeting Hillmon (even spelled correctly!) and of being offered suspiciously high wages to travel west with him to assist in starting a ranch (the same reason that Hillmon had given Sallie for his journey), and

144. See, e.g., Brooks W. Maccracken, The Case of the Anonymous Corpse, XIX Am. Heritage 50, 75 (1968) (believing the report was written by the Kansas state superintendent of insurance). A British scholar who investigated the case opines that "[n]o 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 F.H. 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 represent[ed] the defendants," but credits the author as "meticulous in separating fact from opinion." Id. at 460 n.72. But Wigmore's presentation is in fact nothing but a verbatim replication of the account authored by Gleed.

I confess that I was myself taken in by this canard, chiefly because of Maccracken's representation, until I finally found a copy of the original superintendent's report (which is not easy to come by). See Wesson, supra note 118, at 285–86.

then vanished, never to be heard from again—and that on this same journey
Hillmon was shot dead by accident! No, it is not allowable—the only
possible conclusion is that Walters was the victim of Hillmon’s murderous
plot to defraud the insurance companies.

But if we are persuaded that the dead man was Hillmon after all (or even
if we are only persuaded that he was not Walters) then the same argument
against coincidence must prove something quite different: that the letter
was not an authentic document, or at least not a truthful one, for otherwise
the coincidence would again be too great. At one time other evidence
against the Walters theory had left me, during many months of archival
research, persuaded that the letter must have been forged. But when I
learned that at the last trial Walters’s sister, Elizabeth Rieffenach, had
produced a cache of her brother’s other letters, which had not previously
been examined, to prove that the handwriting on them was identical to that
on the letter to Kasten, this explanation became less tenable. It is not
possible to conduct a comparison of these documents now, for neither the
collection produced by Walters’s sister nor the original of the “Dearest
Alvina” letter is preserved in the official archives of the case. But I
doubt that Sallie Hillmon’s lawyers, for whom the suspicion of forgery
must have been attractive, would have failed to argue for this possibility
had there been any doubt in their minds about the writing; yet they did not
do so. It seems, therefore, likely that the famous letter was after all written
by Walters—only not when and where the heading indicates. Moreover,
the letter’s deployment of the Hillmon name and information about the
transaction between the two men—if, as argued above, it did not happen—
could only have been by design, fashioned to refute Sallie Hillmon’s claim
by any means necessary.

We have seen that the insurance lawyers were not strangers to the
fabrication of epistolary evidence, as shown by the episode in which
Buchan persuaded Brown to write an incriminating letter to Sallie Hillmon
that was never intended for delivery to her. Nor was Kasten the first
person to come forward and claim that a missing friend had said, shortly
before his disappearance, that he had contracted to travel with “a man
named Hillmon.” Recall that during the Lawrence inquest, a newspaper
journalist friendly to the insurance companies reported that a young man
named Frank Nichols, known as “Arkansaw,” was missing, and that he had
“left Wichita on March 2nd” after telling some friends that he intended to
“herd cattle for Hillman and Brown” (this last phrase appearing in all caps

146. Kasten claimed that she had destroyed all of her swain’s letters apart from the one
mentioning his encounter with Hillmon. 1899 Transcript, supra note 6, at 1694.
147. The original letter to Kasten was removed from the official court file by James W.
Green, with the court’s permission, and a (handwritten) copy substituted. The substitute
copy appears to be written in Green’s own hand. For more discussion of this letter, see
Wesson, supra note 117, at 383 n.192.
148. See supra notes 62–65 and accompanying text.
149. See supra note 83 and accompanying text.
in the newspaper). Unhappily for the companies, Frank Nichols turned up not long afterward quite alive. The company narrative—a young man persuaded to travel with the criminals Hillmon and Brown, his later disappearance, his fortuitous disclosure to a friend (or sweetheart) that he had been solicited to travel with Hillmon—was developing for quite some time before the "Dearest Alvina" letter ever saw the light.

I cannot prove this to a certainty, but I am persuaded that the companies' representatives located Walters some time after his family met with Wiseman and Tillinghast, and discovered that the young cigar maker had not written home or to Kasten since the preceding spring because he had decided not to return to Fort Madison to make good on his betrothal. (Simmons recollected Walters as a man "who was all the time talking to the men about him and telling of his many travels. [H]e also talked a great deal of his love scrapes and how he had gotten out of them.") What better bargain could be struck than for the companies to pay Walters to write the letter, and then to disappear for good?

This theory requires a belief that some members of the Walters family committed perjury, for both Rieffenach and her brother Charles R. Walters testified to having received correspondence from Frederick Adolph similar to the Kasten letter, mentioning the name "Hillmon" (although they could not produce these letters). But some reasons may be imagined, if not demonstrated, as their motivations to tell these falsehoods. More difficult is explaining Kasten's motivation to lie (under oath, for she gave her account in a deposition) that the letter had been delivered to her by post, and that she received it on about March 3. I have elsewhere suggested that the humiliation inherent in the truth may have disposed her to believe that nothing but murder would have prevented her fiancé from carrying out his intentions toward her, and that once recruited to this solution to the mystery and shown the letter (which may have been presented to her as a missive that had been intended for her but gone astray in the mail) she was willing to shade the truth about the circumstances of its receipt in order to deny the Hillmons the fruits of their great and unforgivable crime. Kasten was not susceptible to subpoena

151. See supra note 84.
152. In addition to Frank Nichols, the company friendly Lawrence Standard also floated the possibilities that the corpse belonged to the missing brother of a Mrs. M.L. Lowell, *The Hillman Horror*, supra note 6, and "a young man from Indiana," *Murder Will Out!, supra* note 12. Lowell, on being shown the corpse, said that it was no one she knew, and the young man of Indiana was never mentioned again.
153. *Claims Walters Was in Leavenworth in May 1879*, supra note 124.
156. See Wesson, supra note 117, at 378–79.
157. See id. at 380–81.
and never testified in person at any of the trials; she may have been promised that the deposition would be the only occasion when she would ever have to give the false account. It is painful to attribute the crime of perjury to such a sympathetic character, but if we are persuaded that the dead man was Hillmon (or merely not Walters), I do not think the conclusion that she lied about when and how she received the letter can be avoided. And if she did so, it was at the behest of the insurance companies’ lawyers.

It is thus sobering to reflect that this iconic item of evidence, which prompted the creation of a powerful and enduring emblem of evidentiary admissibility, was full of lies—for, if I am right about the identity of the dead man, the letter is rife with deceit, from the implicit assertions about when and where it was written to the explicit falsehoods about the transactions between the writer and Hillmon. Sobering, because of course the purpose of the Federal Rules of Evidence, on the whole, is to promote the discovery of truth. Any rule that makes admissible a false out-of-court statement when there is no possibility of a cross-examination that might expose its mendacity damages this project.

It is even more dispiriting to acknowledge that this persistent distortion of the law’s mission, while to some extent accidental, was the product of grave misconduct by a group of men, including some highly respected attorneys who are even now remembered as honorable members of our profession and (in one case) a teacher of its apprentice members. In my opinion, the repeal of the rule that exempts statements of intention from the prohibition against hearsay evidence—a rule that is justified, when it is, only by invocation of the case that bears his name—would be fitting tribute to Hillmon, and a suitable apology for the insults the law and its actors have leveled at his reputation and his memory.