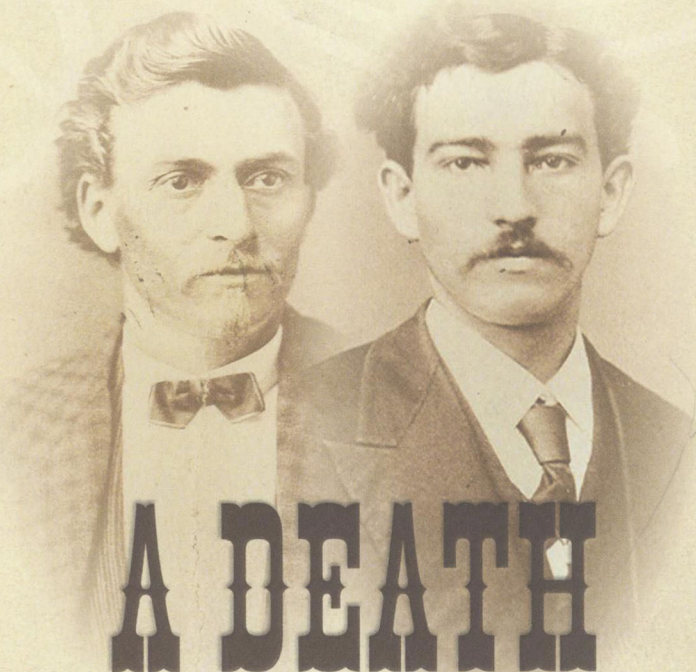


★ MARIANNE WESSON ★



A DEATH AT CROOKED CREEK

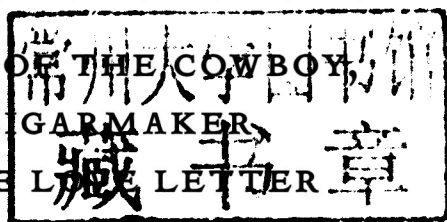


THE CASE OF THE COWBOY, THE CIGARMAKER,
AND THE LOVE LETTER

A DEATH AT CROOKED CREEK



THE CASE OF THE COWBOY,
THE CIGARMAKER,
AND THE LETTER



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**A DEATH
AT CROOKED
CREEK**

If [the dead] should speak, what revelations there would be!

MARK TWAIN, "THE PRIVILEGE OF THE GRAVE" (1905)



Some circumstantial evidence is very strong, as when you find a trout in the milk.

HENRY DAVID THOREAU

AUTHOR'S NOTES

The volume that follows is a work of both history and imagination. Portions of the narrative, those told from the point of view of one or another of the characters in the Hillmon story, necessarily contain some invention; nobody memorialized the sorts of conversations that surely took place in parlors and courthouse vestibules, nor did Sallie Hillmon or any of the other actors, apart from John Hillmon, leave behind for us a journal or diary that recorded her or his thoughts. Notes at the end of each of these scenes inform the reader which aspects represent documented history, and which parts are invented.

Imagination is hardly a steady beacon, of course, and at times as I researched and wrote, mine led me off the straight path. New information and reconsideration many times compelled me to revise my theories, and these moments came to form their own narrative.

The remaining portions of the book are as accurate historically as I could make them. All newspaper stories in the text are rendered verbatim as in the originals. Other sources are documented in the endnotes. When inventing, I did my best to hew to the historical record as I discovered it. Nothing herein is contradicted by the evidence to which I had access, and I have made an effort to treat the case evenhandedly. The reader must judge whether I have succeeded.

IMPORTANT CHARACTERS IN THE STORY OF THE HILLMON CASE

THE HILLMONS AND FAMILY OF LAWRENCE, KANSAS, AND ENVIRONS:

Sallie Quinn Hillmon, the plaintiff. Waitress and seamstress.

John Wesley Hillmon, her first husband. Civil War veteran and cowboy.

Levi Baldwin, her cousin. Rancher.

James Smith, her second husband. Traveling salesman.

THE WALTERS FAMILY OF FORT MADISON, IOWA, AND ELSEWHERE:

Frederick Adolph Walters, itinerant cigarmaker.

Mr. and Mrs. Daniel Walters, his parents.

Fannie and Anna Walters and Elizabeth Walters Rieffenach, his sisters.

C.R. Walters of Missouri, his brother.

Alvina Kasten of Fort Madison, Frederick Adolph's fiancée.

FRIENDS AND ACQUAINTANCES OF THE HILLMONS:

Mr. and Mrs. Arthur Judson, the Hillmons' landlords.

John Brown, John Hillmon's former employee and occasional traveling companion.

THE INSURANCE COMPANIES' AGENTS AND INVESTIGATORS:

A.L. Selig, agent. Later Mayor of Lawrence.

Important Characters in the Story of the Hillmon Case

G.W.E. Griffith, agent.

H.B. Munn, agent.

C.E. Tillinghast, investigator.

Samuel ("Colonel") Walker, investigator.

Theodore ("Major") Wiseman, investigator.

CORONERS:

George Paddock, *Medicine Lodge*, Kansas.

Richard Morris, *Lawrence*, Kansas.

EXAMINING PHYSICIANS:

Dr. J.H. Stewart.

Dr. G.G. Miller.

Dr. Charles V. Mottram.

LAWYERS FOR SALLIE HILLMON:

E.O. Borgalthaus (the Lawrence inquest).

Lysander Wheat (all six trials).

Samuel Riggs (all six trials).

John Hutchings (second and third trials).

Charles Hutchings, brother of John (fourth through sixth trials)

John Atwood (sixth trial).

LAWYERS FOR THE INSURANCE COMPANIES:

James Woods Green (all six trials). Also at one time County Attorney of Douglas County, and at all pertinent times Dean of the University of Kansas Law School.

George Barker (all six trials). Also at one time Assistant County Attorney for Douglas County.

W.H. Buchan, Kansas State Senator. No trial appearances, except as witness. Also claimed to represent John Brown.

Charles Gleed (second through sixth trials). Also businessman, occasional journalist, and eventual owner of the *Kansas City Journal*.

Eugene Ware (fourth through sixth trials). Also known as the poet "Ironquill."

Edward Isham (fifth and sixth trials). From Chicago law firm of Isham, Lincoln, and Beale; law partner to Abraham Lincoln's son Robert.

ASSORTED WITNESSES:

W.H. Lamon, photographer.

Reuben Brown, John's brother.

James Crew, banker.

W.W. Nichols, buffalo hunter and brother-in-law to John Hillmon.

William Hillmon and Mrs. George Nichols, brother and sister to John Hillmon.

Dr. Patterson, dentist.

Patrick Heely, agent for railroad excursion tickets.

Alva Baldwin, Levi's brother.

Arthur Simmons, cigar factory owner.

Various citizens of Lawrence and Fort Madison.

Many others.

KANSAS OFFICIALS:

S.H. Snider, Superintendent of Insurance (1893–1894).

Webb McNall, Superintendent of Insurance (1897–1899).

FEDERAL TRIAL JUDGES:

Judge Cassius Foster (first trial).

Judge David Brewer (second trial).

Judge Oliver P. Shiras (third trial) (visiting from Iowa).

Judge Alfred D. Thomas (fourth trial) (visiting from North Dakota).

Judge John A. Williams (fifth trial) (visiting from Arkansas).

Judge William C. Hook (sixth trial).

IN THE UNITED STATES SUPREME COURT:

Justice Horace Gray, author of the Court's 1892 Hillmon opinion.

Ezra Ripley Thayer, law secretary to Justice Gray, later Dean of the Harvard Law School.

Justice Henry Brown, author of the Court's 1903 Hillmon opinion.

Justice David Brewer, presiding judge in second trial, later elevated to the Supreme Court. Dissented from the Court's ruling in the 1903 Hillmon decision.

TIMELINE OF EVENTS IMPORTANT TO THE HILLMON LITIGATION

- OCTOBER 3, 1878: John Hillmon and Sallie Quinn marry in Lawrence, Kansas.
- DECEMBER 1878: John Hillmon leaves Lawrence, meets John Brown in Wichita, and the two travel west.
- FEBRUARY 1879: After being driven back home to Lawrence by cold weather, Hillmon leaves home again to reunite with Brown and recommence the journey west.
- MARCH 17, 1879: John Brown knocks on door of a rural resident near Crooked Creek, Kansas, and reports that his traveling companion, John Hillmon, has been killed in a firearm accident.
- MARCH 1879: Coroner's jury at Medicine Lodge, Kansas, concludes that the death at Crooked Creek was accidental.
- APRIL 1879: Coroner's jury in Lawrence, Kansas, returns verdict that death was felonious and victim was not John Hillmon.
- SEPTEMBER 1879: John Brown signs affidavit at urging of attorney and State Senator W.J. Buchan.
- JANUARY 1880: Insurance company attorneys contact Walters family of Fort Madison, Iowa, who identify the corpse from photographs as Frederick Adolph Walters.
- JULY 1880: Sallie Hillmon files lawsuits against the Mutual Life Insurance Company of New York, the New York Life Insurance Company, and the Connecticut Mutual Life Insurance Company.
- JUNE 1881: Alvina Kasten sits for a deposition taken by the insurance companies' attorneys.

Timeline of Events Important to the Hillmon Litigation

DECEMBER 1881–FEBRUARY 1882: John Brown sits for a deposition taken by the insurance companies' attorneys.

JUNE 1882: First trial of *Hillmon v. Mutual Life Insurance Company et al.*

JULY 4, 1882: First jury reports itself unable to decide; mistrial declared.

JUNE 1885: Second trial of *Hillmon v. Mutual Life Insurance Company et al.*

JUNE 24, 1885: Second jury reports itself unable to decide; mistrial declared

FEBRUARY–MARCH 1888: Third trial of *Hillmon v. Mutual Life Insurance Company et al.*

MARCH 22, 1888: Third jury returns a verdict for Sallie Hillmon.

MAY 16, 1892: United States Supreme Court overturns verdict, remands Hillmon case for retrial.

JANUARY–MARCH 1895: Fourth trial of *Hillmon v. Mutual Life Insurance Company et al.*

MARCH 23, 1895: Fourth jury reports itself unable to decide; mistrial declared.

MARCH–APRIL 1896: Fifth trial of *Hillmon v. Mutual Life Insurance Company et al.*

APRIL 3, 1896: Fifth jury reports itself unable to decide; mistrial declared.

MARCH 1897: Kansas Insurance Commissioner Webb McNall declines to renew business licenses of all three insurance companies.

SEPTEMBER 1897: Judge Williams enjoins McNall from interfering with insurance companies' business in the state.

JANUARY 12, 1898: Kansas Supreme Court affirms McNall's authority to ban the companies.

JANUARY 20 (APPROX.), 1898: New York Life Insurance Company settles with Sallie Hillmon.

OCTOBER–NOVEMBER 1899: Sixth trial of *Hillmon v. Mutual Life Insurance Company et al.*

NOVEMBER 18, 1899: Sixth jury returns a verdict in favor of Sallie Hillmon against the two remaining life insurance companies.

AUGUST 1900: Mutual Life Insurance Company of New York settles with Sallie Hillmon.

APRIL 3, 1901: Court of Appeals for the Eight Circuit affirms the verdict in favor of Sallie Hillmon.

JANUARY 2, 1903: United States Supreme Court reverses the verdict in favor of Sallie Hillmon and remands the case for another trial.

JULY 1903: Settlement is reported between Sallie Hillmon and the Connecticut Mutual Life Insurance Company.

PROLOGUE

OAK HILL CEMETERY | LAWRENCE, KANSAS | MAY 19, 2006

It's not yet eight in the morning, but even so heat rises in shimmering waves from the grass-carpeted floor of the graveyard. The earlier months of this spring brought drenching rains to eastern Kansas, and the saturated green of the cemetery hurts my drought-accustomed Colorado eyes.

The neon color scheme extends to a coffin-sized rectangular outline of Day-Glo orange that glistens on the grass amid a jumble of old headstones. The grave that interests us has no stone or monument, but Mitch Young, the cemetery supervisor, has marked its boundaries with spray paint. Even after all these years, he is confident that their records allow him to identify its location with precision. I have seen the entry: *John W. Hillman, 04/05/1879, grave number 555, lot ID 0000421*. The spelling is wrong—it's Hillmon—but the rest of the name and the date are correct. This is the place, all right.

Mitch sits in the cab of his backhoe, and everyone else stands gathered a few yards away, expectant—anthropologist Dennis Van Gerven and his graduate student Paul Sandberg, my husband, Ben Herr, Ernesto Acevedo-Muñoz and his documentary film crew, a small crowd of journalists kept mercilessly at bay by the city's communication

officer. They're waiting for me to give the signal to begin, and any further delay would be pointless: it has taken us more than a year and considerable trouble to achieve permission to disinter the body below the ground, and we're not going home until we do. I know, moreover, that we are not the first to disturb the dead man's repose. Even so, the ancient prohibition against violating a final resting place pushes back with surprising force against my determined intentions. I mumble a few awkward words in the direction of the ground—something about apologizing to the man below for the intrusion, and thanking him for what he will allow us to learn—but they do not vanquish the dread, which will remain with me all day.

I nod to Mitch and he fires up the backhoe's engine, maneuvers its corrugated iron teeth into the ground, and begins to strip off the top layer of earth between the orange boundaries. The raw turned soil beneath the blade sends up a bracing scent of minerals mingled with decay.

Dennis, my partner in this venture, is a colleague at the University, a physical anthropologist—an unlikely Indiana Jones, short and bald, but dashing and unflappable nevertheless. He consorts habitually with dead people; I do not. I believe in cremation and memorial services and avoid funerals.

Dennis, on the other hand, has made a name for himself with his research on mummies. As a matter of professional necessity, he regards the dead as reasonably good company. I am of course familiar with the rumors about curses and the like, so I imagine he's had to develop a matter-of-fact attitude toward his work. I recruited him to this investigation even before I realized it would entail digging a body out of the ground, but as matters have turned out I am very grateful for the participation of someone who has done this sort of thing before. I appreciate his calm and his experience, because as far as I am concerned this situation, despite the brightness of the day and the clutch of onlookers and crew, invites the presence of irrational anxieties and the occasional apparition.

Sallie Hillmon, for example, John's wife—she's haunted my thinking for many months now, and it would not be at all difficult for me to believe that I've caught a glimpse of her, wearing a long calico dress, over there in the shade beneath a stand of oak trees. I know she stood

near here once, in 1879, the first time they put the body into this grave that Mitch is now busy uncovering. I've learned quite a bit about her, actually, and as for the rest, I find it dangerously easy to imagine. Sometimes the things I've discovered and those I imagine collude to persuade me that I know her, that I understand her as well as I do my friends and colleagues. I appreciate that this is an illusion, but it is at certain moments an irresistible one.

There is of course one thing that I don't know about Sallie: What was she thinking when she looked on the body that we will disinter today? "Oh my dear, I will miss you so very much"? Or perhaps more like "Dear God, I hope we get away with this"? That is, did she recognize her husband immediately, as she would claim in every public forum? Or did she gaze on a corpse that she knew was not John Hillmon's but another's, as the insurance companies would later maintain? Or was she perhaps in doubt, confounded by the changes the corpse had gone through during the month since life had left it? I cannot be sure; I can only hope that what we learn from Dennis's examination will bring us closer to knowing. This uncertainty, however, does not seem greatly to impede my imagination.

I press my back against the trunk of a massive oak and watch the backhoe tear up the thick grass, trying to calm my unruly pulse by reflecting on the events that have brought me here. Some of them happened quite a long time ago.



On May 16, 1892, the United States Supreme Court announced its decision in the case of *Mutual Life Insurance Company v. Hillmon*. More than a century later the case remains one of the most influential decisions in the American law of evidence. This corner of the law comprises a set of rules designed to answer one question: what information is allowed as proof in a court of law? One of the most important of those rules originated in the Hillmon case.¹

The Hillmon lawsuit arose out of a dispute concerning the identity of a corpse, and its macabre subject matter had brought the case a great deal of attention even before the nation's highest court agreed to hear it. The suit was one for enforcement of a contract of life insurance: Sallie

Hillmon, a young woman of Lawrence, Kansas, claimed that her husband, John, had been killed, in the late winter of 1879, by a firearm accident at a desolate campsite in western Kansas called Crooked Creek. The three insurance companies that had issued policies on John Hillmon's life disputed the claim, maintaining that Hillmon was still alive, so in 1880 Sallie sued the companies for the policy proceeds. The case had been tried three times before reaching the Supreme Court; the first two trials ended in hung juries, but the third had produced a verdict for Sallie Hillmon.

Just as today, getting a case on the Supreme Court's docket required a certain procedural diligence. To prosecute their appeal before the Supreme Court, and there to argue for a new trial, the insurance companies were required to identify the errors that they claimed the trial court had committed (in the third trial, the one they lost). To this end they had filed a compendium, or "assignment," of errors they alleged, a lengthy list of eighty-eight items. The eighty-sixth error on the companies' list was the trial court's refusal to allow the jury to see a certain exhibit offered as evidence by the insurance companies: a letter. It was a document in some ways as common as a Kansas windstorm, a love letter from a young man who had been traveling about the country addressed to his sweetheart back home.²

The placement of the letter's exclusion from evidence so far down the insurance companies' designated error list suggests that the lawyers did not put much stock in this particular claim, for every appellate advocate knows to put your best arguments in the front of your papers and leave the less convincing for the end. The letter is charming, however: a handwritten epistle postmarked Wichita, Kansas, March 2, 1879. Its author, a young cigarmaker originally of Fort Madison, Iowa, who on this date has been away from his birthplace plying his trade for nearly a year, has written it to his fiancée back home, a Miss Alvina Kasten. His letter contains both some awkward endearments and some news. The trifling endearments provide most of the missive's charm, but the news is less whimsical. Indeed, the information the letter supplies is very significant, or at least the insurance companies would so later claim: the young man reports that he has met "a man named Hillmon." Moreover, he writes, this Hillmon has promised him higher wages than he can make in any other pursuit if only the cigarmaker will come along as

hired help on Hillmon's travels out west, where (as the letter says) "he hopes to start a sheep ranch." (Or sheep *range*, perhaps—the handwriting is a bit spidery.) The letter writer reports to his sweetheart that he has decided to accept Hillmon's offer.³

Alvina Kasten and the young man's family would later swear that this was the last letter any of them ever had from the cigarmaker, whose name was Frederick Adolph Walters. Indeed, they would testify that they never saw him again. It was this letter that was offered by the companies as proof that Hillmon was not dead at all, but quite alive. The body belonged instead, they insisted, to the young itinerant Walters, whom Hillmon and an accomplice had inveigled along on their journey, and then killed and dressed up in Hillmon's clothes and boots in a diabolical effort to use his corpse to commit life insurance fraud.⁴

The cigarmaker's love letter, almost a footnote to the insurance companies' case on appeal, would become the unexpected centerpiece of the Supreme Court's opinion. The Justices ruled unanimously that Frederick Adolph Walters' letter to Miss Alvina Kasten should have been admitted in evidence. In order to arrive at this conclusion the Court would create an entirely new piece of the law of evidence, and the insurance companies thus would win the new trial they desired. But these events constitute only the beginning of a story marked by complexity and persistent mystery, as well as great legal importance. For the Court's opinion in the Hillmon case was to become not only a famous decision but also a highly consequential one: the rule it announced is now written into the law of evidence in nearly every jurisdiction in the United States.⁵

The trial judge whom the Supreme Court implicitly rebuked in its Hillmon opinion was a distinguished jurist named O.P. Shiras. Judge Shiras had kept the letter away from the jury by sustaining an objection from Sallie Hillmon's lawyers, who argued that the letter was hearsay. The hearsay variety of evidence was generally forbidden in American courts from colonial times, although the rule was always subject to a number of exceptions. Hearsay is a showing of what someone said or wrote outside the trial, put forward to prove the proposition said or written. The out-of-court speaker or writer is known to the law as the *declarant*. Since the hearsay declarant ordinarily does not come to court, hearsay evidence lacks the protections against falsehood and

mistake that sworn testimony by an in-court witness enjoys: the oath, an opportunity for the jury to size up the person making the statement, and the rigors of cross-examination by the opposing party. Accordingly, the law of evidence forbids the use of hearsay as evidence, except in certain limited circumstances known as the *exceptions* to the hearsay rule.⁶

Frederick Adolph Walters's letter, in which he said more or less "I plan to travel out west with John Hillmon," was undeniably hearsay, as it was offered in evidence to prove that the cigarmaker had this intention (and hence that he carried it out, which in turn would contribute to the likelihood that it was he rather than John Hillmon who died at the Crooked Creek campground). Judge Shiras's ruling excluding the letter thus seems in retrospect clearly correct, indeed unavoidable. The more surprising circumstance is that Sallie Hillmon's lawyers did not make the hearsay objection at either of the first two trials, the ones that ended in hung juries; it seems not to have occurred to them until the third.

The law did recognize various exceptions to the hearsay rule at the time the Hillmon case was tried. These exceptions could operate to make an out-of-court statement admissible even if it was put forward, as lawyers say, "to prove the truth of the matter asserted." Most of the hearsay exceptions were designed to accommodate evidence of statements made outside of court when there were reasons to believe they were true and reliable. Dying declarations, for example—statements made by a person on his deathbed, knowing that he was about to die—were deemed admissible on the premise that "no man would meet his Maker with a lie upon his lips." Statements against the speaker's interest—for example, a confession to an act of wrongdoing, or the acknowledgment of a debt—were generally regarded as an exception, because it was understood that only a desire to tell the truth would account for a human being's open presentation of a statement that could not advance, but only harm, her interests. Written business records, if kept and maintained in a regular and reliable fashion, were deemed admissible despite their hearsay nature: this exception rested on a recognition that the exigencies of business would require a merchant or banker to keep accurate records or fail. Startled utterances describing some exciting or alarming event that had just happened were admitted on account of the excited state of the declarant and the immediacy of the outburst,