H. L. Gordon Recalls Trials in the 1860s and 1870s

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Foreword

By

Douglas A. Hedin
Editor, MLHP

Hanford Lennox Gordon—usually ideintified by his initials "H. L." or at other times by his nickname "Thundering Gordon" — was one of the more colorful lawyers in post-bellum Minnesota. Admitted to the New York bar in 1857 at age twenty, he moved to Wright County, Minnesota, and was admitted to the Minnesota bar in September 1860. After service in the Civil War, he returned to Wright County, was elected county attorney and to a term in the state senate. In 1867 he moved to St. Cloud and formed a brief partnership with Loren W. Collins, who later served on the state Supreme Court.

Throughout his life, Gordon was plagued with illness, some that brought him to the verge of death. For a more hospitable climate, he moved to Florida then to California, where he died in 1920 at age eighty-three. All the time, he was practicing law, engaging in business pursuits and writing. He wrote many letters-to-the-editor, political speeches and poetry, publishing several volumes of verse. In 1890, his long, flattering self-portrait was published in the *Biographical History of the Northwest* edited by Alonzo Phelps.[1] In it he told tales of his life as a lawyer on the Minnesota frontier

[1] Alonzo Phelps, 4 *Biographical History of the Northwest* 139-152 (1890). The etching on page 4 is from this book.

In 1915 he donated his papers to the Minnesota Historical Society. They include copies of correspondence, the 4th edition of his book *Laconics* (1914), two copies of his memoirs and a large, fragile scrapbook of newspaper articles. He wrote with an eye on history—that is, he believed that someday his writings would be read by others and so he continued to polish them, even after they were published or sent. Most every page of the first quarter of *Laconics* has his penciled additions, corrections and marginalia. Another example is a fourteen-page letter he wrote in September 1911 in reply to a family friend, Byron Sutherland, who had sent him reminiscences of lawyers and politicians they knew in the old days (for some reason there are two faint carbon copies of this reply in his papers). It is evident that even after it was mailed, he touched up the copies by inserting or deleting words and phrases.

This is a very entertaining letter. And through it we get a glimpse of Gordon's combustible personality and how trials were fought in rural towns in the 1860s and 1870s. While writing this letter, he did not search his papers to check for accuracy. He writes that in 1860 as Wright County Attorney he charged James Shippey with murder, and to his irritation, the presiding judge, Charles Vanderburgh, pestered him to seek assistance in drafting the indictment. He brags that his indictment was never "attacked" and he won a conviction. He does not mention the fact that Shippey appealed his conviction on several grounds, one being that the indictment was deficient because the foreman of the grand jury did not sign it. The Supreme Court rejected this argument in an opinion in 1865.[2]

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[2] ***State v. Shippey***, **10 Minn. R. (Gil. 178) 223 (1865). The complete opinion is posted in the Appendix, at 21-27. In his self-portrait in Phelps's *Biographical History of the Northwest*, he writes the following about this case:**

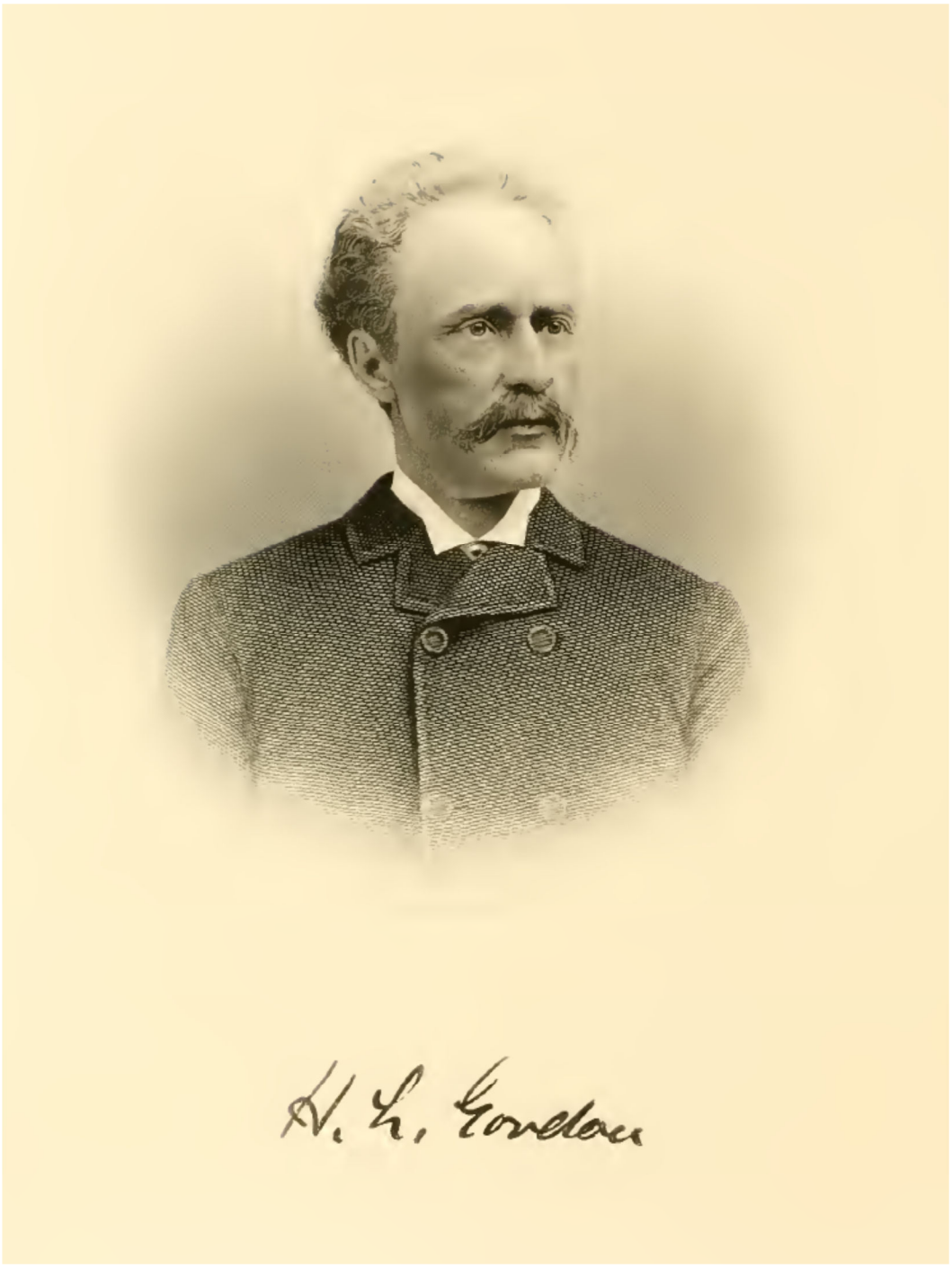
> **At the next term of the district court, he was engaged on one side of every case, and won every case he tried. His first important case was the State against Shippey, indicted for murder. Shippey was ably defended by Eugene Wilson of the Minneapolis bar, but he was convicted and sentenced to be hanged. Gordon believed him guilty of manslaughter, but not of murder. He therefore used his best efforts to secure a commutation of his sentence, and succeeded. Gordon's practice grew rapidly, and soon extended to half the counties in the State.**

In contrast, in his letter to Sutherland, he mocks Wilson's blundering, histrionic defense. For Wilson's biographical sketches and obituary, see "Eugene M. Wilson (1833-1890)" (MLHP, 2008-2016).

In another anecdote, he reveals that he had mastered a rule essential for success in the courtroom: Know your judge. The trial judge in this case was, again, Charles Vanderburgh, who, Gordon knew, was a disciple of New York law, which he had studied before migrating to Minnesota. The issue in the litigation was whether a railroad was responsible for the loss of a shipment of whiskey that had been ordered and bought by Gordon's client. The judge, relying on what he considered settled New York law, was about to rule for the defendant when Gordon suddenly flourished a copy of a recent decision of the New York Court of Appeals that he had received a week before trial. After reading it, "Van" reversed course and ruled in favor of Gordon. This was a time when surprise was a feature of trials, when lawyers had to be quick on their feet, argued points of law orally and did not file memoranda with the court.

In the most dramatic story, Gordon challenges Judge James M. McKelvy for meeting with the prosecution in a criminal case in his hotel room at night and then changing his ruling on the admissability of a confession of Gordon's client the next morning. Cornered and exposed, McKelvy lashes back, orders Gordon arrested and jailed for contempt of court but spectators block the sheriff from taking custody of the defiant lawyer. After a recess, the trial, which has already lasted three weeks, resumes but popular sentiment has changed. In the end the jury is "out about twenty minutes" and returns a verdict of not guilty.

A copy of H. L. Gordon's letter to Byron Sutherland dated September 18, 1911, follows. Etchings of F. R. E. Cornell, Eugene M. Wilson and Judge Charles Edwin Vanderburgh, three men who appear in his trial tales, are posted in the Appendix, at 18-20. The Supreme Court's decision in *State v. Shippey*, 10 Minn. Reports 223 (1865), concudes this article.



• 1890 •

208 South Broadway.

Los Angeles, Cal., Sept.18,1911.

Byron Sutherland,
Hicks Wharf, Va.

Dear friend:-

Your appreciated letter of August 27th came duly to hand. I was glad to hear from you. I intended to have run down to see you when I was in Washington two years ago this Autumn; but at the time in September that I could have gone, you had a house full of company, and about October 1st, I got a severe cold and was quite ill. My daughter May (Mrs Rene A. Brassey of Los Angeles), came on to Washington to look after me, and brought me back to Los Angeles about the last of October. I was in bad condition and did not get much better till January. The fact is, I have been a semi-invalid for many years and have had to take very good care of myself to dodge the undertaker. My invalidism drove me out of the practice of my profession in 1877,--and finally out of Minnesota. I was in Minnesota last year from July 4, to the last of September, and while in Minneapolis I was laid up for two weeks with a severe attack of catarrhal fever and acute rheumatism. I got no real relief until I got back to Los Angeles. The climate of Minnesota does not agree with me--winter or summer. I am better in Southern California than in any other region I have visited. I regret that I did not come here to live forty years ago.

The first time I was in Los Angeles was in August 1870. It was then a town of about 3000 inhabitants, mostly Mexicans, with

a sprinkling of Germans, French, Italians, pure Spanish and "Yankees". Land on our principal business streets, now worth from $3000 to $5000 per front foot— 130 to 150 ft. deep— could then have been bought for from $300 to $500 per acre. The country all about Los Angeles was sheep and cattle ranges, and practically a desert, except during the winter (rainy season) from November to June. Irrigation, the "Almighty dollar" and Yankee ingenuity have turned it into a paradise, full of Adams and Eves,--the devil and his imps are not lacking. Los Angeles, according to the census of 1910 had over 319,000 inhabitants; she has now probably 350,000 and is still booming.

Your remarks about myself are flattering, but I know you do not intend to flatter—and express only what you honestly think. Most men suck in flattery as a calf sucks milk. I flatter myself that I do not. As to Frank Cornell and myself, Judge Vanderburgh made similar remarks, and even much stronger in my favor on several occasions at Monticello, Buffalo, Litchfield and St.Cloud. I was his personal and political friend, but I got suspicious that he flattered me to my friends that it might come to my ears. Van was quite a politician, but an honest and able judge. I made the fight for him for Judge of the Supreme Court (and won), not because he flattered me, but because I thought his twenty years' service on the District Court Bench, his integrity and ability, entitled him to promotion.

When I first began the practice of law in Wright County in 1859, I was elected County Attorney. The first term of the District Court held in Wright County after my election as County Attorney was held by Judge Vanderburgh in the fall of 1860--(I think). There was a murder case to be tried, and as I was "young and green", Judge Vanderburgh wrote me a kindly letter advising me to call on

the Attorney General to assist me in drawing the indictment, and at the trial I thanked the judge for his advice, but "forgot" to call on the Attorney General for assistance. The indictment I drew was not even attacked. Van, however, during the trial seemed to fear that I wouldn't draw out all the facts from the witnesses, and on several occasions suggested points to me, until I got "riled" and got up and begged to inform the Court that I was the prosecuting attorney, and as such, responsible for the conduct of the case for the State and didn't desire any assistance from the bench. The fact was I had carefully laid out my lines, and Van's suggestions broke in where I didn't want any breaks. Van took my remarks kindly. I won the case and got a verdict of murder in the first degree. Eugene Wilson was for the prisoner and made a serious blunder by pleading insanity of the defendant and attempting to prove it by two "backwoods" doctors. Under my cross-examination, "them doctors" became the laughing stock of the crowded court room, and even the jurors, and Van himself smiled broadly on the bench. The defendant, in fact either shot in self defense, or at the utmost was guilty of manslaughter only. The poor fellow was sentenced to be hanged. Then I began to realize that I might become a murderer myself. I got nervous and "hustled" for a commutation of the sentence to imprisonment for life, which I secured from the Governor with the assistance of Vanderburgh. Afterwards I would have got him pardoned, but he was a "trusty" at the prison, old and without means or friends and didn't want to be pardoned. He told me the prison was home to him and he preferred to remain.

After the trial and the court adjourned for the day, Van came up to me and before the crowd spoke very flatteringly of my

conduct of the case. You can easily conceive that gave me a big boost among my "frontier constituents".

In "summing up", "Gene" Wilson, a good advocate & a fine gentleman, shed tears copiously and wiped his eyes vigorously with his bandanna. In my reply, after carefully summing up the evidence and ridiculing the doctors till they got red in the face, and the jurors laughed, I said to the jury with my voice full of tears: "Gentlemen of the jury, I feel like crying too. I feel like crying for our poor dear innocent state of Minnesota;" and turning to Wilson, I said: "Mr Wilson, if you will kindly lend me that onion you had in your handkerchief I'll blubber like a baby too." The crowded court-room snickered out loud, and Van had to rap for order.

Van never afterward attempted to put a bit in my mouth when I was conducting a case before him; but once in a while his judicial gun would go off half-cocked. I remember one such occasion---Payson vs The First Division of the St Paul & Pacific R.R. Co. The "First Division" was running trains to Elk River some twelve miles below Monticello where Payson kept a hotel. He bought and had shipped to him directed to Monticello, several barrels of whiskey. A common carrier (teamster) hauled freight from Elk River station to Monticello. It was the custom of the R.R.agent at Elk River to deliver Monticello freight to this teamster. The barrels of whiskey were received by the R.R.agent at Elk River and placed on the near platform of the station for delivery to the teamster, but before the freight charges were paid and before delivery to the said succeeding common carrier, the whiskey was destroyed. Payson sued the R.R.Co. for the value of the whiskey. I was Payson's attorney; Bigelow of St Paul, was the

attorney for the Company. He claimed that the R.R.Co. was not responsible as common-carriers, but only as warehouse-men, having carried the goods to the end of their line and stored them at their warehouse. No negligence or carelessness could be shown. The trial came on before Vanderburgh at Monticello. After the evidence was all in, Mr Bigelow made an argument for the Co., citing some antiquated authorities,—that the company having carried the goods to the end of their line and stored them at their warehouse, were no longer insurers of the goods, but were only liable as warehousemen for lack of common care. I attempted to argue in reply that the R.R.Co. in that case were liable as common carriers until they had actually delivered the goods to the succeeding common carrier. Judge Vanderburgh stopped me and said he should instruct the jury that the R.R. Co. were not responsible as common carriers for the loss of the goods Van was born in New York and studied law in Maygatt's office in Norwich, Chenango county, New York. The decisions of the Court of Appeals of New York were his "Gospel", and I knew it.

I said to the judge: "I am sorry, your Honor, that you have decided this case before I have finished my argument. You may be right; but if so, the Court of Appeals of the state of New York is clearly wrong. In a recent case decided by that court, the Court of Appeals holds squarely that in a case like this where the goods are consigned to a point beyond the terminus of the first common carrier, the first common carrier is liable as such till the goods are actually delivered to the succeeding common carrier". I further said: "That decision will soon be in the hands of your Honor, I think, and in the hands of the leading members of the bar". This was a trap for Bigelow. I sat down. Mr Bigelow arose with a

broad grin and remarked that he had frequently heard of the tact and assurance of his young friend, and while in a degree he admired the "cheek" of the yound "backwoods" attorney, he begged leave to question his statement and attribute it to his well-known imaginative temperament; that in fact, no such decision had ever been made by the Court of Appeals of New York, and he feared his young friend had eaten cold pancakes for breakfast.

Judge Vanderburgh however had begun to understand at least one side of me---that I wouldn't mislead the court or make a statement that I could not verify, and he asked me what authority I had for my statement. In reply, I said: "If your Honor had not cut me short in my argument I would have produced my authority in Vol. (I forget the number) N.Y.Court of Appeals Reports. Here it is;---- and pulled it out of my little "grip" and handed it to the judge. Then I remarked to Mr Bigelow that I was sorry that the head of the St Paul bar was so far vehind his imaginative backwoods friend of Wright county in his knowledge of the decisions of the courts, and hoped my "cold pancakes" wouldn't seriously affect his stomach. I had received the volume of reports less than a week before the trial. Vanderburgh read the decision carefully. He reversed himself and I won the case.

So, you see how garrulous I have gotten because of your statement of what Vanderburgh said about me.

Frank Cornell---dear, dead Frank Cornell! I liked him and admired him. He was an opponent worthy of the best steel. He was a sharp lawyer and a "square" man. When I was in Minneapolis last year I went out to the cemetery, and --pardon my infirmity---I dropped a tear or two at his grave. He got to like me and I got to like him.

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We had met as opponents in many cases. I knew what I had to meet when Frank Cornell was on the other side, and you bet I sat up nights and studied my case. When Cornell was a candidate for nomination for Attorney General of Minnesota, my friends were pushing me for the position at the Republican state convention. I really didn't want, and could not afford to take the nomination, but fool that I was, I consented to let my friends (in a combination) use me. I could and would have been nominated, but Frank Cornell came to me at the Merchants Hotel in St Paul just before the convention assembled, and begged me as a friend--and because he needed it-- to help him to the nomination. Right then and there I told Frank that I didnt want the nomination and that I would turn all my friends that I could to him--which I did. He was nominated and elected, and the Republican convention could not have made a better selection. Understand me--I was never a politician for myself. I hated personal politics; but I was ever loyal to my friends.

Frank Cornell! Oh, I remember the many hot contests we had at the bar, and chief among them, all, the murder cases at Alexandria. Four Scandinavians, Olsen, Nace, Thorud and Holverson, had been lynched and strangled at the end of a rope to force confession, and were afterwards indicted at Alexandria, Douglas County, for murder of one Paulson. Defendants were all poor. They were sent down to the Stearns County jail at St Cloud for safe keeping. They sent for me to come and see them. This was in 1871. I went to the jail and questioned them one by one separately. I said to myself, they are either sharper than I am, or they are innocant men. I took their defense--not a dollar in sight for me----and never was. I went up to Alexandria, 88 miles away from my home at St Cloud, and

spent two weeks looking over the field and mapping the ground,etc. In this and some other matters out of court, Knute Nelson, a bright young Norwegian who had recently come from Wisconsin and opened a law office in Alexandria, assisted me.

The trial came on about the first of December 1871. Frank Cornell was there as Attorney General, Mower County attorney, and there were two other assistant prosecuting attorneys. I was alone for the defense. Judge McKelvey was on the bench. He was often full of whiskey, and always had an ear cocked to the popular breeze---and popular sentiment ran strong against the prisoners. Cornell was in fact my fighting opponent. We "fit an' fit" for twenty-three days, and until Frank Cornell and the rest of them were worn out, and I was holding the fort on strong tea and "milk punch", till I fell in utter exhaustion in closing the case to the jury and was carried out of the court room. I won the case, and Frank Cornell told me he was glad of it. The defendants were in fact innocent, but there was a strong popular feeling before the trial that they were guilty. All the evidence against them was circumstantial except a confession forced from Nagle to save his life from the lynchers. This confession was written by County Attorney Mower and was finally signed by Nagle after being strung up and strangled almost to death, as the evidence showed. Mower himself confessed it on the stand. The judge at first ruled the confession out, but after a conference with the attorneys for the prosecution at his rooms in the hotel at night, he came into court the next morning, reversed himself and admitted the "confession" in evidence. I learning of this private conference (through Lorenzo W. Collins, a friend who was an

9 Collins was too honorable to appreciate the profound action of the judge, and promptly gave me the "fish-eye"

assistant prosecutor) was prepared for the action of the court. When the judge announced that he had reconsidered the matter and would allow the confession to go to the jury, I calmly arose and said: "Your Honor, I expected this; but hereafter when any legal point in this case is to be argued by the attorneys for the prosecution before your Honor out of court, and at your honor's private rooms in the hotel, on behalf of my clients I ask that I may be invited to be present and participate in the discussion and the "beverage".

McKelvey turned white. He ordered me to sit down. I didnt sit down. He pounded his desk with his fist and ordered me to sit down or he would put me under arrest. I stood with my arms folded, said nothing, but didnt sit down. He then ordered the sheriff to arrest me for contempt. The sheriff was a warm personal friend of mine, but of course had to obey the order if he could. He couldnt. A score or more of stalwart frontiersmen, among whom was Knute Nelson, surrounded him and blocked his way. He couldnt break through the sturdy phalanx. He told me afterward that he didnt want to. At any rate, he couldnt if he would. There was great hubbub and commotion. The court adjourned for two hours.

By this time the sentiment had changed in favor of the defendants. I hadnt been given a fair deal by the court and was alone fighting four attorneys for the prosecution. The judge had been running the court right along from 9 o'clock in the morning till 10 and 11 o'clock at night, with brief recesses for meals. This was near the end of the trial and you can conceive that I was worn down and getting ugly. Personally I had the sympathy of the crowd. They knew the court was crowding me and treating me unfairly, and they were ready to show their resentment.

The case went on. The jury was out about twenty minutes and brought in a verdict of "not guilty". Most or all of the jurors came in to see me soon after, where I lay in bed a wreck and under the care of two physicians. Three of the jurors said if it had come to a fight over my arrest, they would have taken a hand. I did not recover from that breakdown during the winter--- in fact, I have never fully recovered from it.

So you see, I have given you a little "frontier history" known now to but few living men. Knute Nelson is one of them. Can you wonder that I have ever since been his personal friend. His sturdy courage won my admiration then, and I have many times since been confirmed in my estimate of his honesty and courageous conduct as Member of Congress, Governor and United States Senator. I "backed" him the first time he was nominated and elected to Congress against Kindred and his "bar'l" of money. Although not then a resident of the district, I was active in his interest at the Detroit Republican convention. The convention split, a minority of the honestly elected delegates and a lot of "bogus" delegates nominated Kindred; a majority of the fairly elected delegates having adjourned from the hall to a tent, to avoid bloodshed, nominated Nelson. Nelson was a poor man, and after the split he was afraid to take the nomination against Kindred's "bar'l" and the Democratic nominee, not yet named. I made a speech to the convention in the tent and urged his nomination, pledging my active support and money to make a successful fight. I predicted that he would beat Kindred two to one, and he did; and he beat Barnum, his Democratic opponent, much worse.

I fulfilled my promises. I wrote the little pamphlet, that in English, Swedish, Danish (Norwegian), German and French,

flooded the district. I spent money, and took the stump for him, and have never asked him for any favor of importance for myself. In fact, I laid out and engineered the programme for him and the anti-Kindred forces at the Detroit convention from start to finish, and the programme was right de facto et de jure.

"General" Johnson, one of Ben Butler's old Boston strikers and a shrewd rascal, was chairman of the Congressional Committee, and as such, by custom would have called the convention to order and named the temporary chairman, a very important matter. He was playing "pig and puppy", pretending to be friendly to Nelson, while we had abundant reason to believe that he was in the interest and pay of Kindred---as events proved. The other members of the committee were anti-Kindred. I got Governor Charles A. Gilman, Knute Nelson and Col._____ of Duluth (his name eludes me), all candidates for the nomination, together in my rooms at the hotel; and at my suggestion they all agreed that whichever of them had the most votes in the ~~committee~~ convention, should have the active and open support of the others. I then insisted that the anti-Kindred members of the Congressional Committee be called into conference, that Johnson be deposed from the chairmanship, and that one of the other members of the committee be elected in his stead. All of the committee but Johnson were called in and two or three outside friends, among whom was Hon. H.C.Waite of St Cloud. I told them that they had a perfect right to depose Johnson and name a chairman in his stead, as he, Johnson was

elected chairman by the committee and held the position only at their will and sufferance. Some of the committee were in doubt, but my argument, supported by Knute Nelson and Hon.S.G.Comstock of Moorhead, prevailed. By resolution, Johnson was deposed and Comstock selected as chairman of the committee in his stead. A duplicate of the resolution was signed by all the other members of the committee, and handed to "General" Johnson (I think by Gov. Barto) only a few minutes before the convention was to be called to order. Johnson was in a rage and refused to "abdicate". He and Comstock mounted the platform together and both began to read the call and call the ~~committee~~ convention to order. The Kindred men had packed the hall with his friends, bogus delegates and armed cowboys from his ranch in Dakota. Hell broke loose immediately. The Kindred following yelled to put Comstock off the platform. Kendall, a bogus Kindred delegate from Duluth, began to shove cowboys with revolvers in their belts onto the platform which was about four feet above the floor. I got there before the second cowboy and stood between them and Comstock. Kendall sprang onto the platform and ordered me off. He said: "Get off this platform or you'll get killed." I said, "Kendall, send your cowboys off this platform and get off yourself, and I will get off; but if you or one of your cowboys pull a gun, you will die with your boots on and die daxxxxd d----d quick". He flunked. But at that point (as by pre-arrangement in case of riot) Comstock who was as cool as a cucumber ~~in an ice-box~~, announced that the convention was adjourned to meet immediately in a large tent already provided for in case of emergency. Comstock and the anti Kindred men all withdrew from the hall. Happily no blood was shed

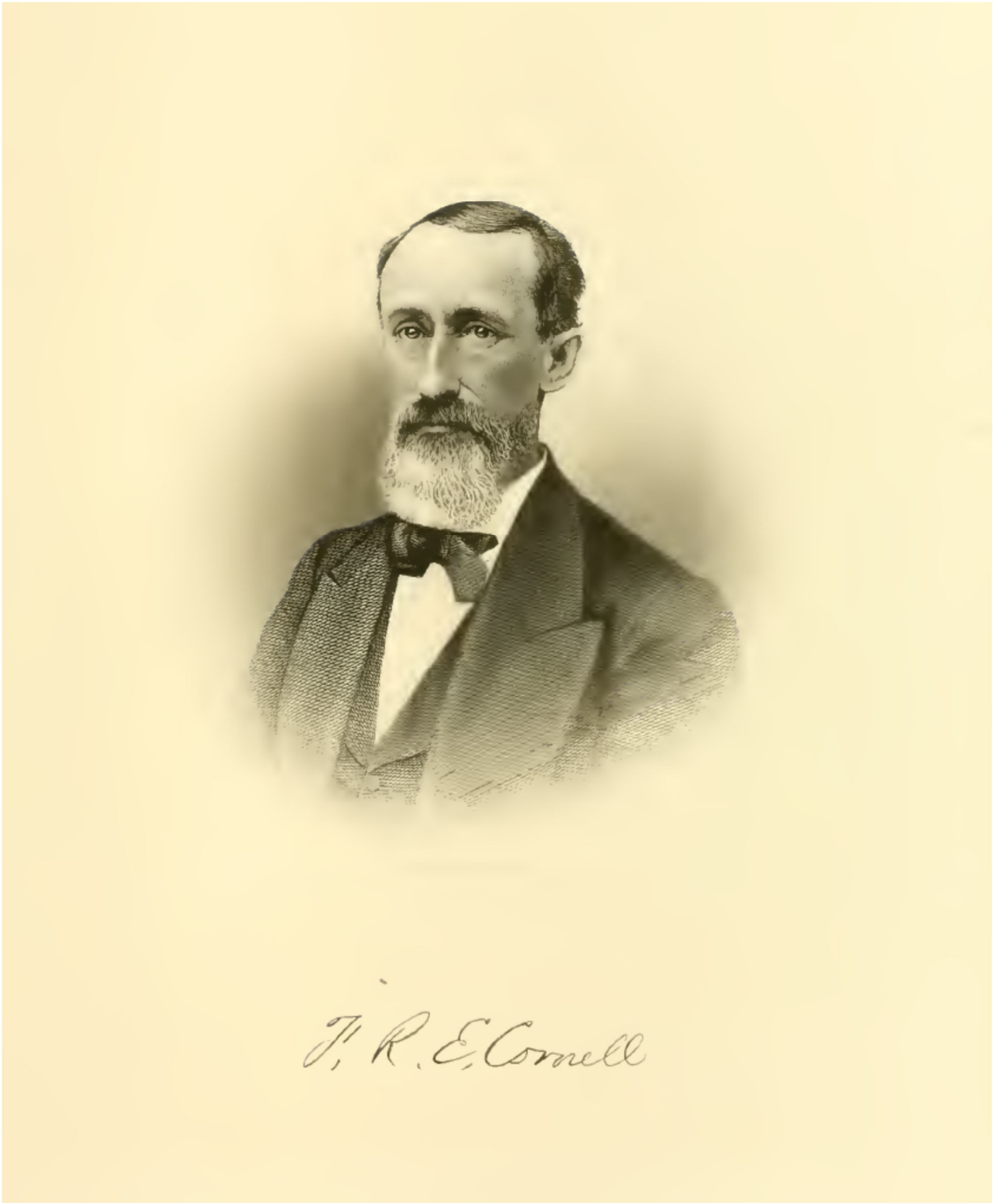
This was perhaps bravado on my part: I thought he would flunk.

except by Kendall. His excitement or an overdose of "hot stuff" gave him the nose-bleed. Kendall and his boys all had Colts in their belts. I showed no gun, but had two good ones in the outside pockets of the light overcoat I had on.

Well, I guess I was a fool, but "I allus wuz", and this long, garrulous letter is proof that I havent got over it yet.

Very truly yours,

Hanford L. Gordon



Alonzo Phelps, 4 Biographical History of the Northwest (1890)

Eugene M Wilson

8 Magazine of Western History (August 1888)

Charles Edwin Vanderburgh (1829-1898) served on the Fourth Judicial District Court
from 1860 to 1881, when he was elected to the Supreme Court,
where he served from January 1882 to January 1894.
Source: 8 Magazine of Western History (June 1888).

STATE OF MINNESOTA

vs.

THOMAS J. SHIPPEY

10 Minn. R. (Gil. 178) 223
(1865)

Murder, Presumption from Killing.—Where it appears that the defendant deliberately and intentionally shot the deceased, the presumption is that it was an act of murder.
State *vs.* Brown, vol. 12, 538.

Insanity, Degree Necessary to Acquit.—A party indicted, is not entitled to be acquitted on the ground of insanity, if at the time of the alleged offense he had capacity sufficient to enable him to distinguish between right and wrong, and understood the nature and consequences of his act, and had mental power sufficient to apply that knowledge to his own case.
State *vs.* Gut, vol. 13, 341.

Provocation to Reduce Offense.—A mere trespass upon land is not such a provocation as the law will recognize as sufficient to reduce a killing below murder.
State *vs.* Hoyt, vol. 13, 132.

Same, Proportion between, and Instrument.—The instrument employed in killing must bear reasonable proportion to the provocation, to reduce the offense to manslaughter.

Self Defense, Pacts to Justify.—To justify a killing as in self defense, it is not enough that the defendant believed in a state of facts, which, if true, would have justified the act in self defense, but he must have had reasonable grounds for such belief.
Gallagher *vs.* State, vol. 3, 185.

Indictment, Signing by Foreman, Waiver.—By not moving to set aside the indictment, or demurring, the defendant waives the objection that the indictment is not signed by the foreman of the grand jury.

Application for new trial, to supreme court.

Points and authorities for defendant:-

1. That the verdict should be set aside under §6, p. 778, Comp. Stat., on the ground that it was not warranted by the evidence. In that it appears therefrom—*First*, that the mind of defendant was in such state of partial insanity, as rendered him incapable of committing murder in the first degree. *Second*, that the circumstances of provocation were such as should have convinced the jury, that defendant either imagined he was necessarily acting in self-defense, or his blood was so heated as to take the case out of the degree of crime found in the verdict.

2. That new trial should be granted on account of error in the charge of the court below—in that the counsel for defendant requested the court to charge the jury, "that if the jury believe that the prisoner at the time of the killing believed in the existence of a state of facts, which if true would have constituted self-defense, they must find a verdict of acquittal," which the court refused to so charge, and thus erroneously prevented the jury from considering one ground of defense. Case of *Commonwealth v. Rogers*, 7 Met. 500; Russell on Crimes, 8, note; and Roscoe on Criminal Evidence, 593.

3. That the indictment in the case was not signed by the foreman of the grand jury finding it; for though the statutes provide that most defects in an indictment must be taken advantage of by demurrer, yet can it be considered an indictment at all unless signed by the foreman? The indictment from its form would not be good at common law, and when it must rely for being good upon following a statutory form, can it vary in so important a particular and be valid?

Points and authorities for the State:-

1. The indictment is, so far as the signature of the foreman of the grand jury is concerned, strictly in accordance with the statute. Comp. Stat. 754-5, §60. The signature of the foreman under the words "a true bill," without regard to the part of the indictment in which it appears, is always sufficient. Whart. Am. Cr, Law, 497-8.

2. No objection being made upon the trial to the indictment, all such objections are waived, and cannot avail the defendant at this stage of the cause. Comp. Stat. 764, §§108, 109.

3. There being evidence in support of the verdict, it requires no citation of authorities to show that this court will not disturb it.

4. The evidence in this case is so entirely conclusive and there being absolutely no evidence tending to absolve the defendant from the guilt of the crime for which he was convicted, it is difficult to discover any other objection than delay in the present motion.

5. *(a.)* The charge of the judge excepted to was strictly correct as given, even when tested by the doctrine of Selfridge's case—a case which has been severely criticised, —was decided not upon legal but political grounds, and which sought to engraft the principles of the code of honor upon the maxims of criminal jurisprudence. Whart. Cr. Law, 1026. *(b.)* The charge as requested, even if abstractly correct, was utterly inapplicable to the case at bar, there being no evidence tending to show any belief of danger to life or limb in the mind of the defendant. *Derby v. Gallup*, 5 Minn. [138].

***Wilson & McNair*, for defendant.**
***G. E. Cole* [Attorney General], for State.**

WILSON, C. J. The defendant applies to this court for a new trial under § 6, P. 777, of the Comp. Stat.

The grounds of the motion are: *First*, that the verdict is not warranted by the evidence; *Second*, error in the charge of the court; *Third* that the indictment was not signed by the foreman of the grand jury. I cannot say that the evidence did not warrant the verdict.

It clearly appears that defendant deliberately and intentionally shot the deceased, and from this the presumption is that it was an act of murder. *Commonwealth v. York*, 9 Met. 93. This presumption it was for the defendant to rebut. I think it very clear that the evidence would not have justified the jury in acquitting the defendant on the ground of insanity. His suspicion of strangers, apparent melancholy, and peculiarity of deportment generally, are not proof of insanity, as that term is popularly understood. Perhaps by theorists these peculiarities may be considered evidences of insanity. It is indeed very difficult to define that invisible line that divides insanity from sanity, but such speculation is not here necessary; for a party indicted is not entitled to an acquittal on the ground of insanity, if at the time of the alleged offense he had capacity sufficient to enable him to distinguish between right and wrong, and understood the nature and consequences of his act and had mental power sufficient to apply that knowledge to his own case. *Commonwealth v. Rogers*, 7 Met. 500. I think the evidence does not show insanity of any grade; certainly it falls far short of showing such insanity as would be a proper ground of defense according to this rule

But the defendant's counsel insist that though insanity was not proven, "that the circumstances of provocation were such as should have convinced the jury that the defendant either imagined he was necessarily acting in self-defense, or that his blood was so heated as to take the case out of the degree of crime found in the verdict." Under our statute the killing of a human being in the heat of passion upon sudden provocation, or in sudden combat intentionally, is manslaughter, not murder. It was for the jury to say whether the homicide in this case was committed under such circumstances, and by their verdict they have negatived that hypothesis; and in this respect, too I think their verdict is justified by the evidence. The designed killing of another without provocation and not in sudden combat, is none the less murder, because the perpetrator of the crime is in a state of passion. *People v. Sullivan*, 7 N. Y. 399; *Penn v. Bell,* Addis. 156; *Penn v. Honeyman*, id. 147; *State v. Johnson*, 1 Ired. 354; *Preston v. State*, 25 Miss. 383; *Campbell v. State*, 23 Ala. 44. And where there are both provocation and passion, the provocation must be sufficient. See cases last cited.

The circumstances of provocation proven in this case were not sufficient to extenuate the guilt of the homicide, or reduce the crime to the grade of manslaughter. The provocation given by the deceased in trespassing on defendant's land, is not such as would provoke any person not wholly regardless of human life to use a deadly weapon. Nor is it such as the law will recognize as sufficient to reduce the killing below murder. *Commonwealth v. Drew*, 4 Mass, 396; *State v. Beauchamp*, 6 Blackf. 299; *State v. Horgan*, 3 Ired. 186; *Monroe v. State*, 5 Geo. 85; 1 Arch. Cr. Pr. and Pl. (7th ed.) 808, 809, 810. Without farther provocation than this, so far as the evidence shows, the defendant took his gun and followed deceased, with the apparent purpose of shooting him or his companion. It is true that before the prisoner shot deceased, the deceased threw at him (but did not hit him with) a stick or club; but I think that this could not be considered such provocation as the law looks upon, as an alleviation of the homicide from murder to manslaughter. There is a wanton disregard of human life and social duty in taking or, endeavoring to take the life of a fellow being, in order to save ourself from a comparatively slight wrong, which the law abhors. To determine on the sufficiency of the provocation to mitigate the killing from murder to manslaughter, the instrument or weapon with which the homicide was effected must be taken into consideration; for if it was effected with a deadly weapon, the provocation must be great indeed to lower the grade of the crime from murder; if with a weapon or other means not likely or intended to produce death, a less degree of provocation will be sufficient; in fact, "the instrument employed must bear a reasonable proportion to the provocation to reduce the offense to manslaughter." Wharton Cr. Law (2d ed.), 368-9, and cases cited in notes; see also 7 Arch. Cr. Pr. and Pl. (7th ed.) 803-4, 808-9-10, 816, 821, and cases cited in the notes; *Com. v. Mosler*, 4 Penn. St. 264; *Regina v. Smith*, 8 Car. & P. 160.

The revenge in this case was disproportionate to the injury, and outrageous and barbarous in its nature, and therefore cannot in any legal sense be said to have been provoked by the acts of the deceased. The facts in this case incontrovertibly show that the prisoner did not act and could not have supposed it necessary to act in self-defense. He was the pursuer not the pursued. Self-dense can only be resorted to in case of necessity. The right to defend himself

would not arise until defendant had least attempted to avoid the necessity of such defense. *People v. Sullivan*, 7 N. Y. 399; Wharton Cr. Law, 386; *Regina v. George Smith*, 8 Car. & P. 160.

The defendant's counsel asked the court to charge the jury, "That if the jury believe that the prisoner at the time of the killing believed in the existence of a state of facts, which if true would have constituted self-defense, they must find a verdict of acquittal," which the court refused, but charged the jury that "the facts must be such as reasonably to have raised such belief or apprehension on part of the defendant." The court was correct in refusing to charge as thus requested. The mere fact that defendant *believed* it necessary for him to act in self-defense would not warrant a "*verdict of acquittal*."

It is not enough that the party believed himself in danger, unless the facts and circumstances were such that the jury can say he had reasonable grounds for his belief. Comp. Stat. 703, §5; *Shorter v. People*, 2 N.Y. 193; Whart. Cr. Law, 386; Arch. Cr. Pr. and Pl. 798; *U. S. v. Vigol*, 2 Dallas, 346. In Tennessee, I believe, it has been held otherwise (*Grainger v. The State*, 5 Yerg. 459) but I think this decision stands alone, unsupported by either principle or authority. Such belief would perhaps reduce the crime to manslaughter, but whether it would or not, it is not necessary to decide in this case.

The only exception taken to the charge of the court is above given, and we must therefore presume that in every other respect it was full and correct. But even if the charge in this respect had been erroneous, it would not be a good ground for reversal of the judgment. Self-defense *ex vi termini* is a defensive not an offensive act, and must not exceed the bounds of mere defense and prevention. To justify such act there must be at least an apparent *necessity* to ward off by force some bodily harm.

Where the party has not retreated from or attempted to shun the combat, but has as in this case unnecessarily entered into it, his act is not one of self-defense. The plaintiff, by taking his gun and following after the deceased, without any previous provocation (such as the law will recognize as provocation for the use of a deadly weapon), showed conclusively that the homicide was committed in

self-defense, real or imaginary. The evidence, therefore, did not make a case for laying down law of self-defense, and an error of the court concerning an abstract proposition having nothing to do with the matter in hand is not sufficient ground for reversing a judgment. *Shorter v. People*, 2 N. Y. 202.

The other ground on which defendant's counsel ask a new trial is, that the indictment was not signed by the foreman of the grand jury. Whether the signature of the foreman on the back of the indictment was sufficient, it is not necessary for us now to decide. This objection, not having been taken by motion to set aside the indictment or by demurrer, was waived. §2, p. 764, and §11, p. 766, Comp. Stat. I have felt in the examination of this case a great anxiety to discover some legal ground on which to grant the defendant a new trial, but governed as the court is and ought to be strictly by the rules of law, I have failed to see any ground for such action. It is for us to declare the law, and if this is a case in which it should not be rigorously enforced, the state executive only can apply the remedy. New trial denied. •

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