"William Mitchell"*

by

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and Have Developed the Jurisprudence of the United States.

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WILLIAM MITCHELL
1832—1900.

BY

EDWIN AMES JAGGARD.

Associate-Justice of the Supreme Court of Minnesota.

WILLIAM MITCHELL was born on a farm at Stamford, Welland County, Ontario, near the Falls on the old Niagara Peninsula, November 18th, 1832. His father, John Mitchell, and his mother, Mary Henderson, were both born in Scotland. Having received a preliminary education at public schools in Canada, he matriculated as a sophomore at Jefferson College, now Washington and Jefferson College, at Cannonsburg, Pennsylvania, in the fall of 1850, shortly after the graduation of James G. Blaine. He thus came within Dr. Johnston's aphorism for the intellectual salvation of a Scotchman. According to Boswell, that epigrammatic dogmatist, in refusing to allow Scotland to derive any credit from Lord Mansfield, observed, "Much may be made of a Scotsman if he be caught young."

The simple and sturdy habits of life and thought initiated in his boyhood were there confirmed by his associations with a small number of boys—about 258 [**388**] —substantially all of whom were of Scotch or of Scotch-Irish extraction, and of the Presbyterian religion. These students were conspicuous for strength, industry, earnestness and frugality.[1] His mental processes and acquirements and his personality were under the constant supervision of able and learned professors, not tutors. The members of the faculty, eight in number, and the college president, Doctor A. B. Brown, were of that middle zone of educators, now rapidly being depleted, which lies between the one pole at which teachers are sacrificed to the attainments

[1] One of his classmates, William K. Hunt, D.D., Coshocton, Ohio, who is still living, describes Mitchell at College as a ruddy, smooth-faced, modest and friendly "Britisher;" a hard student, rather taciturn, not very sociable or sportive; profoundly deferential toward the faculty; quietly determined on college honors and ambitious along the line of life he subsequently followed. "While in college, he deservedly held the place of *primus inter pares."* He was a member of the Alpha Chapter of the Phi Gamma Delta Fraternity.

of students, and the opposed pole at which the students are sacrificed to the personal progress of the man of research. The college facilities were limited. Its curriculum was narrow; its atmosphere surcharged with the Calvinism of the "unspeakable Scot;" but the mental drill was exacting and thorough; the moral discipline severe and exalting. Invertebrate logic was as effectively excluded as was molluscous morality. In his later years, Judge Mitchell dwelt with affection and gratitude upon this training and upon his daily intercourse with the faculty and with practically the whole body of his fellow students. He found in [**389**] these advantages of the small college enough to offset the wider life and greater opportunities of large universities, and he noted with pride the distinction and general usefulness of the lives of the men he had known at college.[2]

In addition to the other good and obvious things, he there acquired the best of them all—a friend. His intimacy with a Scotch-Irish lad, Eugene M. Wilson, utterly lacking in hysteria, was simple, faithful and serene. Unbroken and unmarred, it endured during the long lives of both. Wilson seems to have graduated in 1852, Mitchell in 1853 with highest honors. He went immediately to his friend's home in Morgantown, then in Virginia, and now in West Virginia. There he studied law in the office of his friend's father, Edgar C. Wilson. For two years he taught in the Morgantown Academy. The slender youth, sensitive in feeling, sympathetic by nature, enjoyed and profited by the hospitality of the south, more gracious and more graceful than the plain living and rigid mannerisms with which he was familiar in the north. He came to understand the [**390**] southern people and southern problems. In 1857 he was admitted to the bar, and with his friend left for the west.

When the side-wheels of their Mississippi steamboat stopped at Winona,

[2] Among his other college friends who did not enter the ministry were Silas M. Clark, elected to the Supreme Bench of Pennsylvania in the same year in which Judge Mitchell was first elected to the Supreme Bench of Minnesota; Thomas Ewing, for many years President Judge of the Court of Common Pleas at Pittsburgh; Judge Ebenezer Haft, of California; Augustus Landis, Judge of Court of Common Pleas, Blair County, Hollidaysburg, Pa., and Rush Clark, who was a member of Congress from 1876, until his death in 1878. Of his classmates, forty-two in all, thirty-six graduated, ten practiced law, thirteen entered the ministry, four practiced medicine; many served with distinction, and some died in the Civil War.

Minnesota, on the 6th day of April, 1857, the venturesome tyros walked up from the landing through the scattered wooden houses of its main street, and were received in a buoyant spirit of hope, helpfulness and happiness by the pioneer villagers. The local Indians based their assumption of superiority to all others upon the belief that the center of the earth was at the mouth of the Minnesota river, directly beneath the center of the heavens; in evidence of which with Milesian simplicity they adduced the fact that one standing there would find the horizon equally distant at all points. To this conviction of the unapproached excellence of their environment, the early settlers succeeded. Nor was this disturbed, at the time the Virginia lawyers arrived, because that most fragile of financial bubbles, known as the "Town site Boom," [3] which was blown in the flush years of 1855 and 1866, had exploded in 1857. That frontier was no place for the faint-hearted or weak-kneed. It was the "idiotic optimism of the west" which held together the coon-capped and buckskin-clad sharpshooters of [**391**] the First Minnesota at Gettysburg when they broke the charge of Pickett's Brigade, while their kinsmen were keeping the red men separated from the white men's scalps. It kept their families going while wild beasts devoured their flocks, and grasshoppers their fields. It helped them when they all came back home, to whistle and work after a cyclone had carried away what fire and famine and flood and drought had left. It justified them in their faith, until they attained their present heritage, greater than the dreams of the seer whom Proctor Knott made famous. This hopeful self-reliance and courage of conviction, but not this optimism, became parts of young Mitchell's character and mind.

Anomalous as it may seem, the conditions were most favorable to his highest intellectual development. The crudities of his surroundings were objective, not subjective. He was one of a typical group of frontiersmen, not as they are caricatured, but as they really were, strong, scholarly men, worthy to be Empire Builders. "As iron sharpeneth iron, so a man sharpeneth the countenance of his friends." The friends of William Mitchell conduced directly to his greatness. His first partner, his college chum, Eugene M. Wilson, appointed United States District Attorney in 1857, was elected in 1868 to the National Congress in which his father and grandfather had served; and in 1888 failed of election as governor of his state, because he

[3] Judge Mitchell had no connection with any town-site boom; but in 1858 he and his friend Eugene Wilson took government claims in what they called Monongalia country, after the Monongahela river, which is now part of Kandiyohi county. The town, Irving, the name of a dead sweetheart of Mr. Wilson in Virginia, is still on the map.

was nominated by the Democratic party. A later partner, [**392**] W. H. Yale, was, however, elected lieutenant governor, and is now marshall of the Supreme Court of Minnesota. Another partner, Daniel S. Norton, graduated from Kenyon College, Ohio, served with distinction in the Mexican War, and died while in the United States Senate. Of his intimate friends, Earl S. Youmans, a brother of Professor Youmans of the Popular Science Monthly, although a rich and extensive lumberman, thundered against the protective tariff on lumber with a wisdom which attracted general and surviving interest, and with a prescience which foretold the disaster now written on the pine barrens of the northwest. Another, Thomas Wilson, for some time Chief-Justice of Minnesota, a representative in Congress from 1887 to 1889, and now a distinguished railroad counsel, was defeated by a very small margin for governor on the Democratic ticket. Another, William Windom, of Quaker descent, a graduate of Kenyon College, and a college chum of Senator Norton, served in the House from 1859 to 1869, and the best part of four terms in the United States Senate, accepted the Treasury Portfolio in the Cabinet of President Garfield, and died while he was secretary of treasury under President Harrison. In more states than one, it has happened that "the great men came first."

The young Scotchman found immediate professional success and personal happiness. The understanding and affection between him and the new community was instantaneous; and continued during [**393**] his whole life. The local city council witnessed his first entry into public life. He was within the territory at the birth of the state of his adoption. As a member of the judiciary committee of the Second Legislature, 1859—1860, he stood in loco parentis to part of the framework of its system of laws. For one term he administered those laws as county attorney. For many years he was engaged in active practice.

Social relations in the community to which young Mitchell came had their bases in answer to the question, "What can I do to help you?" Judge Mitchell all through life practiced that spirit of helpfulness. He assisted the infant industries of the ambitious town. He helped friend or stranger according to his needs. To one young boy, for example, who enjoyed the advantageous combination of a heritage of poverty, with an endowment of ability and character, he extended tactful, material and sustained assistance. Admitted to the bar, elected to Congress, and now Chairman of the Ways and Means Committee, that boy, James A. Tawney, loves the great man who is gone as a grateful son loves his father.

William Mitchell came to his own because of that same spirit of helpfulness in this embryonic community. An opposing counsel in those days, Judge Severance, who still survives, says that literally and not in any extravagance of undeserved eulogy, "he was the paragon of courtesy as a practitioner." In practice he was recognized as self-reliant, but not as [**394**] self-confident; as honest and brave, but not as aggressive; as wise in the law, and strong before courts; as convincing before juries, but not notable as an advocate. He was respected for his learning, loved as a man, but he was not dreaded as an opponent. Indeed, his gentle and kindly nature inclined him to shrink from combat with his more bellicose brethren at the bar. His friends recognized, perhaps, more clearly than he himself, his peculiar fitness for the bench. In 1874, they elected him judge of the District Court of the third judicial district, corresponding to the common law court of Common Pleas. This was done without effort or assistance on his part; he was "elevated by natural gravitation."

In 1877, the Supreme Court, then consisting of three members, two of whom had been of counsel in the case, was called upon to decide the case reported as State of Minnesota vs. Young.[4] Accordingly the governor appointed two district judges, William Mitchell and Samuel Lord, to sit with Justice Berry, as Justices of the Supreme Court, pro hac vice. The case was heard and determined by the Court, as thus constituted. Judge Mitchell, writing the opinion, held, inter alia, the advanced doctrine, that parol authority is sufficient to authorize the filling of a blank in a sealed instrument, and that such authority may be given in any way which it might be given in case of an unsealed instrument. The decision, excellent in itself, met with general approval and served [**395**] to call him to general attention of the legal profession, which had none too much reverence for medieval survivals.

At the expiration of his full term, in 1880, he was reelected, again by public sentiment, and without any seeking on his own behalf. All members of the bar practicing before him agree that he was an almost perfect nisi prius judge. What Burnet says of Sir Mathew Hale, applies to him: "He did not affect the reputation of quickness and dispatch by a hasty and captious hearing of counsel. He would bear with the meanest and gave every man his full scope, thinking it was much better to lose time than patience." [5] His

[4] 23 Minnesota Reports, 551.
[5] Life of Mathew Hale, by Gilbert Burnett, p. 177, ed. of 1681.

official duties were not oppressive but stimulating. Simple in manner, unpretentious in life, he had the natural gravity of mind and character which increased the regard of the community. Humor, culture and a geniality, which had supplanted his immature taciturnity endeared him to his numerous intimate friends. This esteem universally extended to him the Anglo-Saxon respect for the bench and the reverence of foreign settlers for the highest personal representative of the power of the state, gave him the dignity without the cares of an "uncrowned king," as the district judges of that locality are referred to, without satire.

The church of his forefathers he steadfastly attended and supported. In it he reared his family. His Scotch loyalty preserved his association with the [**396**] Presbyterians, but without actual membership in their organization; for his private religious convictions never disputatiously exhibited, but frankly expressed on appropriate occasions, had undergone more radical changes than had been affected by the progress of thought and knowledge in that denomination.

His domestic life was as serene and happy as it was unsullied.[6] At this time he was making and saving money enough to conform to his modest necessities and tastes; but not enough to cause a waste of any considerable time or energy. While he was always of opinion, that in the classical dispute between Venator and Piscator, his revered brother of the angle clearly prevailed, he enjoyed the abundant and varied hunting all about him. But his greatest relaxation was in the fisherman's paradise at his very door. Even his beloved Nepigon was not far away. The cultivation of native trees, shrubs, plants and flowers, and of the rarer ones, which he imported, filled full the cup of his simple pleasures. And I think we can say, that after the troubles of the Vicar of Wakefield had ended he was no more contented, [**397**] and shed no more happiness about him than did William Mitchell.

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[6] Shortly after Judge Mitchell had definitely "located" in Minnesota, he married, in Morgantown, Va., a widow with one child, Mrs. Jane Hanway Smith. She died in 1867, leaving three daughters, who still survive, Mrs. J. K. Ewing Jr., of Pittsburgh, Pa.; Mrs. Frank A. Hancock of Evanston, Ill., and Mrs. H. L. Staples of Minneapolis, Minn. In 1872, he married Mrs. Frances M. Smith, of Chicago, Ill., a daughter of Jacob D. Meritt of Dubuque, a widow with one child. She died in 1891, leaving their son, William D. Mitchell, born in 1874, and now practicing law in St. Paul, Minn.

In 1881 by act of the Legislature, Chapter 141, the Justices of the Supreme Court of Minnesota, were increased from their former number, three, to their present number, five. Governor John S. Pillsbury, with an eye single to their fitness and with no reference to political affiliation or service, appointed the two extra judges, namely: Greenleaf Clark of St. Paul, and William Mitchell of Winona. Judge Mitchell had been a Republican; be had gone to a Pennsylvania College. But his southern associations and marriage made the reconstruction measures of President Johnson's time so odious that for this reason and for other reasons, he became a Democrat; and a Democrat he remained the rest of his life. He and Judge Clark served out the term beginning March 4th, 1881. In accordance with the state constitutional provision, their successors were to be elected at the next general election which occurred in 1882. Justice Mitchell was reelected; Justice Vanderburg succeeded Justice Clark. In 1888 and in 1894, Justice Mitchell was renominated by both parties, and was reelected. In 1891 President Harrison signed his appointment to the Eighth Circuit Court of Appeals, and sent that appointment to the Senate. At the last moment it was recalled for a number of reasons, none of which concerned him personally.

Having served on the State Supreme Court for a [**398**] period of nineteen years he accepted the nomination for reelection tendered by the Populist and Democratic conventions, in 1900. In the Republican convention subsequently held, 300 delegates, of whom the writer was one, strove to secure the indorsement of that nomination. In this they had assistance from judges, lawyers and teachers in all parts of the country. Professor Thayer, of Harvard, wrote to a prominent Minnesota lawyer: "I have long recognized Judge Mitchell as one of the best judges in this country, and know also the opinion held of him by lawyers competent to pass opinion on such questions. There is no occasion for making an exception of the Supreme Court of the United States. On no court in the country to-day is there a judge who would not find his peer in Judge Mitchell. That he has been considered in the highest circles for the bench of the Supreme Court of the United States is, I dare say, known to you as it is to me . . . To keep him on the bench is a service not merely to Minnesota, but to the whole country and to the law." Many adverse influences were arrayed against his renomination. The failure of the opposing parties to follow the lead of the Republican party in previous elections to nominate a non-partisan bench, the trading in the convention due to a close struggle for the nomination for governor, the force given to considerations of locality, the mania for vituperation of the bench which temporarily possessed the bar, the inconsistent opposition of great vested

interests, because of sup[**399**]posed populistic rulings, and of radicals, because of imaginary corporation leanings, all these and other influences frustrated the effort to secure his indorsement. It is to the honor of the gentlemen who were nominated that none of them directly opposed Judge Mitchell; none of them sought to prevent his renomination or personally advance his own candidacy. The election resulted in his defeat by a narrow margin. Without bitterness, and without lamentation, but saddened, Judge Mitchell left the bench an old and a poor man, literally worn out by service as unparalleled in his state in its extent as it was unappreciated in merit. He retired to private practice with his son, refused to consider an appointment as Chief-Justice of Porto Rico, and died on August 21st, 1900, at Lake Alexandria, Minnesota.

After he had been raised to the Supreme Bench, he retained his residence in Winona, and returned to it, from the sessions of the court, which were all held in St. Paul, every Saturday until the death of his wife, in 1891; subsequently he lived in St. Paul. The great mass of court work demanded all his time and energy. His life became largely impersonal. This machine-like existence, while it diminished his pleasures, detracted not in the least from what is, after all, perhaps, the best thing in life, interest in work.

Among the conspicuous cases of general interest, in which he wrote opinions, one of the first was the Minnesota Railroad Bond case. By the constitutional amendment of March 9th, 1858, bonds in aid [**400**] of railways were authorized to be issued upon satisfactory evidence of the completion of ten miles of way. Not a mile of way was in fact constructed, but bonds to the extent of $2,275,000 were issued. A constitutional amendment of 1860 provided that no law making any provision for any payment on such bonds should take effect until adopted by a majority of the state electors. As the result of Governor John S. Pillsbury's phillipic, against what he regarded as infamous repudiation,—and, the rumor is, of judicious gilding of local statesmen—in 1881, a legislative act referred the determination of the constitutional questions concerning the payment of the bonds to a number of judges. Before that tribunal sat, the issues were taken to the Supreme Court by writ of prohibition. That court held that the constitutional amendment requiring the submission of all liquidating legislation to the vote of the people violated the provision of the Federal Constitution prohibiting the impairment by the act of a state legislature of the obligation of a contract.[7]

[7] State of Minnesota vs. Young, 29 Minnesota Reports, 474.

The bonds were thereupon adjusted to the satisfaction of the bondholders. In Secomb vs. Kittleson [8] (in which Judge Mitchell wrote the opinion), it was held that under the act of the special session of the Legislature in 1881, confirming the adjustment, an injunction would not lie to restrain the state treasurer from executing that satisfaction so agreed upon. In his later years he ex[**401**]pressed regret at this decision, especially because he had concluded that the bond issue was a fraud from beginning to end, and that the claimants under the bonds were not bona fide holders.

In the "Railroad Land Grant Cases" his opinions settled controversies on important points in many western states, which had received that form of government aid, and were generally recognized as of great merit. One opinion, held that a state could tax such lands after they had been conveyed to a railroad company by the state, pursuant to the Act of Congress, and after such railroad company, paying a tax of three per cent on its gross earnings, in lieu of all other public charges, had transferred all its property used for operative purposes to another corporation. [9] This conclusion was confirmed by the Supreme Court of the United States. [10]

The earliest stage, one of Russell Sage's eccentric lawsuits, was brought up before Calvin L. Brown, then on the District Court, now on the Supreme Court of Minnesota, upon stipulated facts. In Sage vs. Swenson, [11] Judge Mitchell affirmed the ruling of Judge Brown, and applied to the facts in that case the rule, that while a railroad company after a grant of land has no vested right by a mere executive with [**402**] drawal from entry and settlement of lands within either its "place" or "indemnity limits," yet so long as the withdrawal continues in force, the lands are not subject to entry and settlement and no lawful settlement on them can be acquired. An appeal from this decision was immediately taken to the Supreme Court of the United States. Meanwhile the multitude of settlers whose interests it injuriously affected began to inquire into the facts of the case. As a result when it came before the Supreme Court at Washington, the attorney-general was directed by that court to investigate the good faith of the litigation; and

[8] 29 Minnesota Reports, 555.

[9] County of Redwood vs. Simons & St. Peter Land Co., 40 Minnesota Reports, 512; 42 Minnesota Reports, 181.

[10] 159 United States Reports, 526. Part of Judge Mitchell's opinion therein quoted was subsequently set out in full and approved in Weyerhauser vs. Minnesota, 176 United States Reports, 550.

[11] 64 Minnesota Reports, 517.

on his report the cause was stricken from the calendar and was never argued. The facts were that Swenson had no knowledge of ever having been sued, and that he had never employed an attorney to defend the action. Its sole purpose was to establish a rule of law favorable to Russell Sage in a case in which his counsel appeared for both sides, on a distorted state of facts. The attempted "rape on the Court" did not succeed.

Judge Mitchell's decision in State vs. Corbett,[12] holding that a Minnesota law, which legislated ticket scalpers out of business, was constitutional, has been the occasion of much discussion, in and out of court, favorable and unfavorable, but stood unquestioned until 1905, when in State vs. Manford,[13] the question was reargued and the Corbett case affirmed. [**403**] One interesting point on reargument concerned Burdick vs. People,[14] which the Corbett case in part rested. In re Burdick,[15] sets forth that subsequently a number of ticket brokers, as amici curiae, petitioned the court to expunge the opinion in 149 volume of Illinois Reports,[16] from the records and reports of the court for the reason that said cause was fictitious and collusive, and that the opinion and judgment had been obtained by collusion and fraud practiced on the court. Affidavits affirming and denying the charge were filed, but the court refusing to determine the merits of the controversy, did not disturb its previous holdings.

Judge Mitchell's progressive liberality of thought is well illustrated in the Sunday cases. In Brimhall vs. Van Campen,[17] Judge Flandrau had based the legal observance of that day upon religious dogma. "This Sunday act can have no other object than the enforcement of the fourth of God's Commandments, which are a recognized and excellent standard of both public and private morals." In State vs. Petit,[18] Judge Mitchell rested it upon a police regulation of the state for the promotion of the physical, mental and moral welfare of the citizens, established, as a civil and political institution; and, as some particular day must be fixed, the one most naturally [**404**] selected is that which is regarded as sacred by the greatest number of citizens, and which by custom is generally devoted to religious worship, or

[12] 57 Minnesota Reports, 345.
[13] 79 Minnesota Reports, 173.
[14] 147 Illinois Reports, 600.
[15] 162 Illinois Reports, 48.
[16] Page 600.
[17] 8 Minnesota Reports, 13.
[18] 74 Minnesota Reports, 376.

rest or recreation, as this causes the least interference with business or existing custom. That reasoning and his conclusion were approved by the Federal Supreme Court, in Petit vs. State of Minnesota.[19]

When general commercial disaster gave new life to questions concerning the theory and practice in proceedings by creditors to compel stockholders in insolvent corporations to contribute for the benefit of such creditors, to the full extent of their stockholders' liability, he rendered an important and far-reaching decision, to the effect that the constitutional provision imposing such liability was self-executory.[20] In Whitman vs. Oxford National Bank,[21] the same question came for the first time before the Federal Supreme Court, under the constitution of another state. That court accepted Judge Mitchell's decision alone as sufficient authority for the general proposition, and cited no other case on that point. In Hospes vs. Northwestern Manufacturing Co.,[22] Judge Mitchell abandoned the old notion of the trust doctrine and implied contracts, and placed the rule on which the equitable right of creditors against corporate stockholders was based, squarely on the doctrine of fraud. This doctrine has been generally [**405**] accepted. The decision has been cited in other states, times without number, and stands to-day as one of the leading expositions of the law it enunciated. An essential part of his language in this case, is substantially that of Mr. Charles W. Bunn, of counsel.[23] In so using the expression, which best fitted the occasion, Judge Mitchell followed approved precedent. Mr. Horace Binney has pointed out that in Gibbons vs. Ogden, Chief-Justice Marshall incorporated large extracts from the briefs and writings of Alexander Hamilton. So he also used bodily passages and continually phrases which it is schoolboys' knowledge were also used by Daniel Webster. Other investigators insist that Daniel Webster, in his turn, used the words as well as the ideas of Jeremiah S. Black, which merely proves that, "A good Bar makes a good Bench."

The decisions of Judge Mitchell were marked by an absence of provincialism. The current jest about the Mississippi justice, who, after the war, punished for contempt a young lawyer who cited Massachusetts authorities, is being constantly paralleled in the north, as by the experience—literally true—of a western publisher who pronounced

[19] 177 United States Reports, 164**.**
[20] Willis vs. Mabon, 48 Minnesota Reports, 140**.**
[21] 176 United States, 559.
[22] 48 Minnesota Reports, 176.
[23] 48 Minnesota Reports, 180, 192, 193.

excellent the manuscript of a Massachusetts professor for a book of real estate law, save that it quoted only the decisions of the English Courts, of the Federal Supreme Court and of the Massachusetts courts. To which that pundit replied, "that is all the law there is in [**406**] America." Judge Mitchell was conspicuously free from gaucheries in style and judgment. His state was at the beginning of its history. Of its legal problems, most were unsolved, many were untouched. The whole field of jurisprudence lay open for his gleaning. Born in Canada, educated in Pennsylvania, admitted to the bar in Virginia, and developed in Minnesota, he was free from the inertia of accepted theories; he was subject to neither bucolic nor metropolitan predisposition. His mind was scientific. It was a wide-open door to truth. In consequence, his decisions were the result of the most thorough investigation of the law of all states and countries, and owe no little of their recognized eminence to the almost unerring certainty with which he selected the wisest of current opinions and formulated the rule of law most nearly true in itself and best adapted to his environment. They register a deliberate and conscious effort to bring about, as far as could be, a uniformity of decisions between the various states so that the country might stand as the antithesis of the abomination of the foolishly diverse and local regulations of the petty German states. For example, with respect to whether or not a bill of lading is negotiable, in the sense in which a bill of exchange or a promissory note is negotiable, where the purchasers need not look beyond the instrument itself, or whether it is a receipt for goods, which is susceptible of explanation or contradiction, the same as any other receipt, the decisions of the various states [**407**] were directly opposed to each other. After a review of them, Judge Mitchell said:

> On questions of commercial law, it is eminently desirable that there be uniformity. It is even more important that the rule be uniform and certain than that it be the best one which might be adopted. Moreover, on the questions of general commercial law, the Federal Courts refuse to follow the decisions of the State Courts, and determine the law according to their own views of what it is. It is therefore very desirable that on such questions the State Courts should conform to the doctrine of the Federal Courts. The inconvenience and confusion that would follow from having conflicting rules on the same question in the same state, one in the Federal Courts and another in the State Courts, is of itself almost a sufficient reason why we should adopt the doctrine of the Federal Courts on this question.

> To do otherwise so long as the jurisdiction of those courts so largely depends on the citizenship of suitors, would really result in discrimination against our own citizens.

He accordingly held that a bill of lading, issued by a station or shipping agent of a railroad company or other common carrier, without receiving the goods named in it for transportation, imposes no liability upon the carrier, even to an innocent consignee or endorsee, for value, and that the rule is the same whether the act of the agent was fraudulent and collusive, or merely the result of mistake.[24]

The value of his common law training in ridding his mind of the erroneous preconceptions of a law[**408**]yer brought up under the code merely, is evident in his view of the jurisdiction of the probate court over real estate. In the common law states, speaking generally, lands upon the death of the owner, descending to and vesting in the heirs, have no concern with probate proceedings, unless there is occasion to resort to them when the personal estate is not sufficient to pay debts. There is no necessity, and often no provision for decreeing the title in the heirs. A trust in executors as to lands, lasts, accordingly, only so long as the administration proper exists, although under the terms of the trust, it might continue; for example, until all real estate is converted into personalty and distributed according to the terms of the trust. On the other hand, in the so-called code states, the current impression, and sometimes the decisions, are that when the ordinary notices for the probate of a will, or appointment of a representative of the estate, have been served, the court has the same jurisdiction as to the realty which it has as to the personalty. For example, under the common law theory, an administrator can not maintain an action for trespass upon real property, committed after the death of an intestate, unless he has first asserted his right under the statute, by taking possession of such real property, or by otherwise bringing it within the powers and jurisdiction of the probate court. Under the erroneous and confused code theory, the administrator could maintain such an action. In Noon vs. [**409**] Finnegan,[25] Judge Mitchell announced the common law rule, while Judge Gilfillan, in his dissenting opinion, held to the misconception, natural to a code lawyer. So also, in his dissenting

[24] National Bank of Commerce vs. Chicago, Burlington & Northern Railway Co., 44 Minnesota, 224, affirmed in Swedish American National Bank of Minneapolis vs. Chicago, Burlington & Quincy Railway Co., 105 Northwestern Reports, 469.
[25] 29 Minnesota Reports, 418.

opinion, in Hungerford vs. O'Brien, [26] Judge Mitchell endeavored to keep his state in line of the common law as to the liability of guarantors. He insisted that the guarantor was entitled to notice of the maker's default, and did not necessarily become absolutely liable, on default of the maker. In the same way he manifested his sympathy with the preservation of the convenient forms of old common law pleading, on the common counts, as for money had and received, notwithstanding the attempted abolition of all forms of action by the code. [27]

That sound common-sense, which is a necessary part of the endowment of every great judge, he possessed in abundance. Of a metaphysical lawyer he once said: "He puts the fodder up so high that I can't reach it." But his judgments evidence a profounder faculty and reflect a power of logic suggestive of John Stuart Mill.

The precision of his analysis is well illustrated in the rule for determining what is approximate, and what is a remote consequence, of the wrongful act. The English courts, at one extreme, held that the rule is the same with respect to the remoteness of [**410**] damages, whether the damages are claimed in contract or in tort, and substantially followed Hadley vs. Baxendale.[28] The Supreme Court of the United States, in language used in a large number of cases, announced the confused test, that it must appear that the injury was the natural and probable consequence of the negligence, or wrongful act, and that it ought to have been foreseen, in the light of attending circumstances.[29] In Christianson vs. Railroad Company,[30] Judge Mitchell gives the true rule, not it is true, for the first time in the history of the law, but with certainty and with clearness. He pointed out that the other statements of the law confounded the definition of negligence with that of proximate cause, and held that where an act is negligent, the person committing it is liable for any injury proximately resulting from it, although he could not have reasonably anticipated that injury would result in the form or way in which it did, in fact, happen.

Of his decisions, the one which has occasioned the most reasonable and

[26] 37 Minnesota Reports, 306.
[27] See Brand vs. Williams, 29 Minnesota, 238.
[28] Sharp vs. Powell, Law Reports, 7 Common Pleas, 253.
[29] Milwaukee, etc., Railway Co. vs. Kellogg, 94 United States Reports, 469.
[30] 67 Minnesota Reports, 94.

pertinacious criticism, is his concurring opinion in Sheehan vs. Flynn.[31] In substance he there held that a land-owner may drain his land of surface water by artificial ditches, although the effect is to cause the water to pass more rapidly [**411**] and with increased volume on to adjacent land of his neighbor if the same water would not naturally flow in some other direction, and he acts with proper regard to his neighbor's welfare. The underlying theory, more clearly set forth in Mr. Justice Canty's opinion of "comparative injury" done by the "common enemy" surface water, is persistently debated. It is difficult to see how the standard of one man's right can be determined by the extent of another man's advantage. On the other hand, his opinion with regard to navigable waters and riparian rights, have received general approbation and satisfactorily determined the law on that subject.[32]

A discriminating critic having a large familiarity with Judge Mitchell's opinions, has attributed their excellence to his power of illumination. In point of fact Judge Mitchell had no peculiar style and indulged in few idiosyncrasies of utterance. He affected no judicial eloquence. He did his work without friction. His language was simple, not labored, and had a smoothness and grace that was purely natural. Like most men who think clearly, he wrote clearly. His phrases were always lucid, rarely picturesque; never bizarre. He once referred however to an imperfect brief as containing "scrambled facts." His single intent was fully and accu[**412**]rately to formulate the law; to that end he used the best expressions of his views which he could find or invent, indifferently and with little regard to quotation marks. As a result the wayfaring man, though a lawyer, could not err in understanding what he had written. A good illustration of his faculty for good expression is to be found in Morss vs. Minneapolis & St. Louis Railway Co.[33] After referring to the rule previously laid down in Minnesota, permitting evidence of repairs after an accident which resulted in personal injuries as an admission of previous unsafe condition, he said:

> But, on mature reflection, we have concluded that evidence of this kind ought not to be admitted under any circumstances, and that the rule heretofore adopted by this court is on principle wrong; not for the reason given by some Courts, that the acts of

[31] 59 Minnesota Reports, 449.
[32] Bradshaw vs. Duluth Imperial Mill Company, 52 Minnesota Reports, 59; and especially Lamprey vs. State, 52 Minnesota Reports, 181. City of St. Paul vs. C., M. & St. P. Railway Co., 63 Minnesota Reports, 330.
[33] 30 Minnesota Reports, 465, 468.

> the employes in the making of such repairs are not admissible against their principals, but upon the broader ground that such acts afford no legitimate basis for construing such an act as an admission of previous neglect of duty. A person may have exercised all the care which the law required, and yet, in the light of his new experience, after an unexpected accident has occurred, and as a measure of extreme caution, he may adopt additional safeguards. The more careful a person is, the more regard he has for the lives of others, the more likely he would be to do so, and it would seem unjust that he could not do so without being liable to have such acts construed as an admission of prior negligence. We think such a rule puts an unfair interpretation upon human conduct, and virtually holds out an inducement for continued negligence. [34]

[**413**] By party affiliation a Democrat, Judge Mitchell has been charged with having carried his Jacksonian theories of government into his opinions. That imputation often made, during the heat of political campaigns, has been regarded by the disinterested men in the profession as unjust and by his friends as shameful. It was unfounded in fact but unfortunate in effect. None of his opinions evidence any partisanship. Most of his expressed a priori theories of government would have appeared equally obvious to a Federalist as to a Jeffersonian; some of his conclusions would have been rejected by both.

There was, for example, no preconception for or against paternalistic government in his restriction of the state to its natural functions. In Rippe vs. Becker,[35] an action was brought to restrain the state board of railroad and warehouse commissioners from building a state elevator at Duluth. Writing the opinion of the court, Judge Mitchell held the act authorizing that construction to be unconstitutional, because the work was not in the exercise of the police power, but was a work of internal improvement, and prohibited by the Constitution. After a characteristically able examination of the law itself, of the [**414**] authorities applicable to it and of the relevant general principles, he said:

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[34] In 1 Shearman & Redfield on Negligence (5th edition), section 60c, page 84, note 3, we find this comment, "The best statement of this rule, and the reasons for it, is in Morss vs. Minneapolis, etc., Railway Co., 30 Minnesota, 465; 16 Northwestern Report, 358. The rule has been repeatedly enforced in New York, although never with a statement of reasons approaching to the clearness of Judge Mitchell's opinion in the Minnesota case."

[35] 56 Minnesota Reports, 100.

> The time was when the policy was to confine the functions of the government to the limits strictly necessary to secure the enjoyment of life, liberty, and property. The old Jeffersonian maxim was that the country is governed the best that is governed the least. At present the tendency is all the other way, and towards socialism and paternalism in government. This tendency is, perhaps, to some extent, natural as well as inevitable, as population becomes more dense, and society older, and more complex in its relations. The wisdom of such policy is not for the courts. The people are supreme, and, if they wish to adopt such a change in the theory of government it is their right to do so, but in order to do it they must amend the constitution of the state. The present Constitution was not framed on any such lines.

His position as to the defense of individual liberty in trade combinations, which appears in Bohn Manufacturing Co. vs. Hollis, [36] has been generally commended and followed. Whether sound or not, it was clearly the result of independent judgment. There a large number of retail dealers formed a voluntary association by which they mutually agreed that they would not deal with any manufacturer or wholesale dealer who should sell lumber directly to consumers, not dealers, at any point where a member of the association was carrying on a retail yard, and provided in their by-law, that whenever any wholesale dealer or manufacturer made any such sale their secretary should notify all members of the fact. The result according to the complaint, would have been [**415**] a substantial loss of custom by such wholesale dealer or manufacturer. The plaintiff having made such a sale, the secretary threatened to send notice of the fact, as provided by the by-laws, to all members of the association. Plaintiff brought an action for a perpetual injunction. Judge Mitchell refused to grant that injunction, and held that any man, unless under contract obligation, or unless his employment charges him with some public duty, has a right to refuse to work for or deal with any man or class of men, as he sees fit; and that this right, which one man may exercise singly, any number may agree to exercise jointly.[37]

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[36] 54 Minnesota Reports, 223**.**

[37] This opinion has been universally cited and almost universally approved. Of it a distinguished academician wrote: "If Judge Mitchell had never rendered his state and its jurisprudence any other service than the writing of this opinion, it would have entitled him to remain on the Supreme Bench during his life." As to clearness, succinctness and

Encroachments by the judiciary upon the function of coordinate branches of the government, he avoided upon indisputable principles. In Moede vs. County of Stearns,[38] held that the action of a county board in forming a school district, is legislative and not judicial and is therefore not reviewable on certiorari. Judge Mitchell said:

> There is no country in which the distinction between the functions of the three departments of government is more definitely [**416**] marked out on paper than in the United States, and yet there is none in which the courts have assumed so often to review, in advance of actual litigation involving the question, the acts of coördinate branches of the government. It has become the fashion to invoke the court by direct action, or through some remedial writ to review almost every conceivable act, legislative, executive or ministerial, of other departments; and courts have been so often inclined to amplify their jurisdiction in that respect that they have not infrequently converted themselves into a sort of appellate and supervisory legislative, or executive body. Such a practice is calculated to interfere with the proper exercise of the functions of executive and legislative officers or bodies; to obliterate the distinction between the powers and duties of the different departments of government and, above all, to bring the courts themselves into disrepute, and to destroy popular respect for their decisions. It may be very convenient to have in advance a judicial determination upon the validity of a legislative or executive act. It would often be equally so in the case of acts of a legislature. But we think the courts will best subserve the purposes for which they are organized by confining themselves strictly to their own proper sphere of action, and not assuming to pass upon the purely legislative or executive acts of other officers or bodies until the question properly arises in actual litigation between parties.

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usefulness, this opinion contained in five and one-half pages, is in conspicuous contrast with the leading English case, Allen vs. Flood, Law Reports Appeal Cases 1 (1898), contained in 180½ pages.

[38] 43 Minnesota Reports, 312.

In Lomen vs. Minneapolis Gas Light Co.,[39] the constitutionality of a law providing for struck juries involved an investigation into the nature of a jury trial and the extent of the constitutional rights therein involved. In sustaining the constitutionality of the law, Judge Mitchell said:

> Inasmuch as the legislature is a coordinate branch of the government, the courts do not sit to review or revise their legislative [**417**] action; and hence, if they hold an act invalid, it must be because the legislature has failed to keep within its constitutional limits. A court has no right to declare an act invalid solely on the ground of unjust and oppressive provisions, or because it is supposed to violate the natural, social, or political rights of the citizen, unless it can be shown that such injustice is prohibited or such rights guaranteed or protected by the constitution. Except where the constitution has imposed limits upon the legislative power, it must be considered as practically absolute. The Courts are not the guardians of the rights of the people, except as these rights are secured by some constitutional provision which comes within the judicial cognizance. The protection against, and the remedy for, unwise or oppressive legislation, within constitutional bounds, is by appeal to the justice and patriotism of the people themselves, or their legislative representatives. Neither are courts at liberty to declare an act void merely because, in their judgment, it is opposed to the spirit of the Constitution. They must be able to point out the specific provision of the Constitution, either expressed or clearly implied from what is expressed, which the act violates. Moreover, courts will never declare a statute invalid unless its invalidity is, in their judgment, placed beyond reasonable doubt.

The power of the state to regulate railway rates, he sustained without a trace of attachment to the conviction that "the best government is the least government." The "Steenerson Wheat Rate Case,"[40] was a proceeding commenced before the state railroad and warehouse commission. It was claimed that the Great Northern charged an unreasonable rate for the transportation of grain and the mill products thereof between certain points.

[39] 65 Minnesota Reports, 207.
[40] 60 Minnesota Reports, 461.

The commission reduced the rate, and the Great Northern appealed [**418**] to the district court. Thereupon the Northern Pacific, and two other railroad companies made an application to the court to file complaints in intervention. The appeal to the Supreme Court raised the question of the right of a competing line of road to file a complaint in intervention, and of the commission or the court, on appeal to allow intervention, at its discretion, and thus to put such road in position to take part in the trial, and perhaps, control proceedings brought against another carrier to compel a reduction of rates for the carriage of passengers or freight or to remedy some other matter within the purview of the law establishing the railroad and warehouse commission.

The opinion of the court held that the other railroad companies which were not parties to the original proceedings were not entitled to intervene, as a matter of right.

Judge Mitchell in a concurring opinion agreed with the conclusions of a majority of the court, although for a different reason; that such intervention was not a matter of right. In connection with the current agitation on the general subject, it would seem to be of interest to quote this part of his opinion:

> The practice adopted in these proceedings only confirms me in the opinion that, both by professional training as well as because of the nature of their modes of procedure, the courts are not appropriate tribunals for the consideration of a question of this character. The tendency of the lawyer as well as the judge is to [**419**] liken such proceedings to an action between parties, and to make them conform to the rules as to parties, pleading, and practice which obtain in such actions.

Subsequently the court permitted the Northern Pacific Company to intervene and to introduce testimony in support of the allegations of its complaint in intervention. Upon this appeal by the state,[41] it was held, among other things that the fixing of rates is a legislative or administrative act, not a judicial one, and under the constitution the court can not place itself in the shoes of

[41] 69 Minnesota Reports, 353.

the commission, and try *de novo* the question what are reasonable rates; and on appeal, under said statutes, the court can review the acts of the commission only so far as to determine whether the rates fixed by it are unreasonable and confiscatory, and to what extent, in much the same manner as an appellate court determines whether or not the verdict of a jury is excessive, and to what extent. That the burden is on the railroad company to show that the rates fixed by the commission are unreasonable. The opinion of Justice Canty was an elaborate one, going into the powers of the commission in reducing rates and the territory to be covered by such reduction; the reasonableness of the same and the test; the burden of proof as to reasonableness and the power of the court on appeal from the commission, in fact the entire question of "fixing railway rates" was discussed in all its details. Judge Mitchell concurred in the result arrived at and in most of [**420**] the grounds upon which it was based, but on account of the importance of the case emphasized some principles which he thought should govern cases of this class. *Inter alia,* he said:

> Courts should be very slow to interfere with the deliberate judgment of the legislature or a legislative commission in the exercise of what is confessedly a legislative or administrative function. To warrant such interference, it should clearly appear that the rates fixed are so grossly inadequate as to be confiscatory, and hence in violation of the constitution. It is not enough to justify a court in holding a rate "unreasonable," and hence unconstitutional, that, if it was its province to fix rates, it would, in its judgment have fixed them somewhat higher. Any such doctrine would result, in effect, in transferring the power of fixing rates from the legislature to the courts, and making it a judicial, and not a legislative function. When there is room for a reasonable difference of opinion, in an exercise of an honest and intelligent judgment, as to the reasonableness of a rate, the courts have no right to set up their judgment against that of the legislature or of a legislative commission. In my opinion, it is only when a rate is manifestly so grossly inadequate that it could not have been fixed in the exercise of an honest and intelligent judgment that the courts have any right to declare it to be confiscatory.

Judicial conservatism came to him by nature, training and association. His large knowledge of decided cases was accompanied by a reverential attitude

to what had been held to be the law. His decisions incorporate the spirit of Coke's reply to the King: "True it is that every precedent hath a commencement; but where authority and precedent is wanting there is need of great consideration before that anything of novelty be established, and to pro[**421**]vide that this be not against the law of the land." Courage and self-reliance, however, were also inbred and developed. His legal convictions were strong and positive. He freely and sometimes boldly exercised the *vis major* of judicial power. The result was that principle prevailed over precedent. In Little vs. Railroad Company,[42] the owner of lands in Wisconsin, brought suit in Minnesota against the railway company for negligently setting fire to his property in Wisconsin. The Legislature of Wisconsin had, prior to the time at which the alleged damage arose, enacted that all actions for injuries to real property should be tried within the county in which the subject of the action is situated. A long and essentially unbroken line of decisions, including Livingston vs. Jefferson,[43] in which Chief-Justice Marshall wrote the opinion, established the rule that actions for injuries to lands are local. In considering the evils incident to this rule, most likely to occur in a new country, Judge Mitchell pointed out that "if the rule be adhered to, all that the one that commits an injury to land, whether negligently or wilfully, has to do in order to escape liability, is to depart from the state where the tort was committed and refrain from returning. In such case the owner of the land is absolutely remediless. . . We recognize the respect due to judicial precedents and the authority of the doctrine of stare decisis; but inas[**422**]much as this rule is in no sense a rule of property, and as it is purely technical, wrong in principle and in practice often results in a total denial of justice, and has been so generally criticised by eminent jurists, we do not feel bound to adhere to it, notwithstanding the great array of judicial decisions in its favor."

In State vs. Thomas,[44] it had been held that an indictment for perjury in a form carried forward from territorial days, was good although it failed to specify by assignments of perjury, or their equivalent, wherein the testimony was false. This anomaly occurred in no other state or country. Accordingly, in State vs. Nelson,[45] Judge Mitchell overruled the earlier case because such an indictment did not inform the accused of the nature and cause of the

[42] 65 Minnesota Reports, 48; 67 Northwestern Reports, 846.
[43] 1 Brockenbrough's Reports, 203; 15 Federal cases, 8411.
[44] 19 Minnesota Reports, 484.
[45] 74 Minnesota Reports, 409.

accusation against him. In referring to the doctrine of stare decisis, he says:

> While the doctrine of stare decisis should, within proper limits be adhered to, yet inasmuch as a constitutional right of the citizen is involved, if the decision in State vs. Thomas was erroneous, it ought not to be followed, although it may have stood unchallenged for nearly twenty-five years.

It has appeared in what has been previously written that the prevailing element in Judge Mitchell's life was a passion for justice. That feeling dominated his mind, modeled his character, inspired his labors and ruled his life. Careful not to substitute [**423**] impracticable idealism for the settled rules of law, his sense of the eternal right never consciously veered. Candor was as natural to him as breathing. He was literally without pride of opinion and never allowed inconsistencies in his own rulings to interfere with the final announcement of the nearest approximation to ultimate law. In Pamperin vs. Scanlon,[46] writing the opinion of the court, he said that a creditor redeeming need not pay liens held by the purchaser at an execution or mortgage sale subsequent to that on which the sale was had and prior to that under which he redeemed, if such purchaser has not, with respect to such subsequent lien placed himself in the line of redemption by complying with the statute. A year later he refused to follow the rule therein laid down and dissented from the conclusion of the court sustaining that opinion, although he recognized that the former case had become a rule of property and therefore, ordinarily, even if erroneous should stand. He pointed out that his opinion could have worked no hardship to the defendant in the later case; that the former decision had probably not been followed to any great extent; and that at all events the evils to result from allowing it to stand would probably be greater than those which would follow from its being overruled.[47] So in Rosse vs. Duluth,[48] he wrote an opinion overruling Fitzgerald vs. Railroad Com [**424**] pany[49] which held that statutes requiring railroads to fence their right of way applied to cattle only and not to children, and that a child injured on a railroad track could not recover for injuries there received because of the failure to fence. Inter alia he said:

> The writer, who is the only member of this court who was on

[46] 28 Minnesota Reports, 345.
[47] Parke vs. Hush, 29 Minnesota Reports, 434.
[48] 68 Minnesota Reports, 216.
[49] 29 Minnesota Reports, 336.

> the bench when the Fitzgerald case was decided, assumes his full share of responsibility for that decision, but subsequent reflection has convinced him that the court placed too narrow a construction upon the statute; that the views expressed in the dissent of the late Chief-Justice Gilfillan were correct. . . It is suggested that as the decision in the Fitzgerald case has stood unchallenged for fifteen years, during which the legislature has not, by amending the statute, expressed any dissatisfaction with the construction which this court had placed upon it, therefore it ought not now to be overruled, even although erroneous. The decision is not a rule of property. Neither can railway companies claim to have acquired any right either legal or moral, under it, for it did not repeal the statute, nor relieve them of the duty of fencing their road.

The consistency of Judge Mitchell's mental processes is well illustrated by referring to what is called the fellow-servant cases. At an early stage of the discussion of the later phases of that vexed rule he accepted the doctrine of vice-principal; namely, that he to whom the master delegated one or more of the duties absolutely imposed by law upon the master was a vice-principal and not a fellow-servant; and that the servant, therefore, did not assume [**425**] the risk of the negligence of such a vice-principal.[50]

To this rule, he adhered despite the virile struggles of his associates for a more satisfactory test; as for the "substantial disparity of knowledge."[51] Meanwhile the Federal Supreme Court with a commendable lack of consistency receded from its original criterion of the superior servant or of the servant having control and passed through various stages of uncertainty concerning the doctrine of vice-principal and of servants in charge of separate departments.[52]

To a just estimate of William Mitchell, as an appellate judge, it is essential to consider the variety and extent of his judicial labors. When be went upon the bench in 1881, 203 cases were set for argument; in 1890, 590; in 1895, 695 and in 1899 they dropped to 450; the average during his nineteen years of service was 470. The total number on the calendar during his service was

[50] Hess vs. Adamant Manufacturing Co., 66 Minnesota Reports, 79.
[51] Blomquist vs. Chicago, Milwaukee and St. Paul Railway Co., 60 Minnesota Reports, 426; Carlson vs. Northwestern Telephone Exchange Co., 63 Minnesota Reports, 428.
[52] Northern Pacific Co. v. Dixon, 194 United States, 338.

8,930. There were five judges on the bench; Judge Mitchell's aggregate share of the calendar was 1,786. To this number is to be added innumerable concurring and dissenting opinions.[53] Judge Mitchell wrote more than 1,600 opinions; how many more than this is not determinable. Much of his work cannot be certainly [**426**] identified. Apart from per curiam opinions, he prepared in whole or in part many decisions for other members of the bench who were unequal in point of capacity for labor to do their allotted share of the work. No one ever knew this from him, who all his life did kindness so that his left hand knew not what his right hand had wrought. But the grateful testimony of his confrères, and especially of one who has recently died, advises us of the existence, but not of the extent of these unrecorded labors. A current estimate, not far from the truth, is that excluding Sundays, and allowing a month in each year for vacation, Judge Mitchell wrote one opinion in every three days for nineteen years. He composed the syllabus, as required by statute, a statement of facts which is rendered desirable, if not necessary by the current method of advanced reporting, and the decision itself. All this was done without the aid of an amanuensis or stenographer The time consumed in argument, during this period, averaged about four hours a day and the time in consultation about three hours a court day In chambers, especially in Judge Mitchell's case, a large portion of the remaining day was consumed in consultation between the different members of the court. He examined the decisions of the other judges with a thoroughness to which his many concurring and dissenting opinions bear witness. Proof was read and re-read for two systems of reporting. All this, together with the incessant interruption inevitable in public life, left little day [**427**] time for the writing of opinions. If he had been subject to an eight-hour day of law, few opinions would have been written.

Nor could he have done his full work if he had been subject to the tax on time imposed by the requirements of travel in cities of great distances.

In fact he worked night and day, week day and Sunday. Only one who labored as Chief-Justice Hale said he had labored, sixteen hours a day, or the like, could have accomplished the colossal work which Mitchell did. In point of numbers, his opinions exceed those of any other justice of the Supreme Court of his state, or of the nation. His fundamental conception of the duty

[53] His first decision was Fenno vs. Chapin, 27 Minnesota Reports, 519**;** his last, State vs. Matter, 78 Minnesota Reports, 377.

of the court, lay in Gladstone's maxim, "Justice delayed is justice denied." For many years, the Supreme Court of Minnesota, twice a year, has cleaned up its calendar and decided all cases ready for hearing: so that in all parts of the state, a suitor could, and now can, initiate litigation and receive final adjudication within the period of six months.

The merits of Judge Mitchell's decisions are to be determined in view of these considerations. These conditions imposed a burden and afforded an opportunity. His industry easily bore the burden and his natural ability utilized the opportunity to the uttermost. It may not be justly said that any of his decisions were epochal. Perhaps none of them were momentous. This was inevitable because of the nature of the questions submitted. The constitutional [**428**] restrictions upon the jurisdiction of state courts prevent their consideration of the monumental issues, which, usually involving some political controversies, influence the destiny of the nation. When any considerable occasion came, however, he rose to the greatest height it permitted. Some of his opinions were preeminent; an exceptionally large percentage of them were excellent. Their high quality was uniform. In view of the extraordinary rapidity of their production, it is surprising that none of them after the scrutiny of years and the crucial test of continual debate have been found to be inaccurate, immature, or unjustified by sound, although not necessarily conclusive reason and authority. The formulae of the law stated in general terms he sustained by sufficient, but rarely by superabundant authorities. His opinions were not encyclopaedic. He was the logical opposite of these commentators whom Voltaire found in his journey to the Temple of Taste:

> What others have with care expressed
> With accuracy we digest;
> On others' thoughts we spend our ink
> But for our part we never think.

Judge Mitchell was a voice and not an echo He took what other men had thought and decided, made it his own, added the force of his own conception and expression and gave a product to the world which is little by little coming to be recognized as the work of a great master and as an advancement [**429**] in the philosophy and administration of our jurisprudence.

His mind was statesmanlike and his work was constructive in an unusual

degree. When he arrived in Minnesota, it was an uninhabited wilderness. When he retired from the Supreme bench, it had become a rich and populous commonwealth. In I857 its population was 150,000; in 1872, when he went upon the district bench, approximately half a million; in 1881 when he went on the Supreme bench 800,000; in 1900 when he retired, approximately 1,800,000. When he entered practice, its system of laws was embryonic; when he completed his judicial service, it possessed a complete, elastic and satisfactory code of municipal law. In the creation of that code he had been a large and most important part. The history, topography, natural resources and environment of the state involved the widest range of intellectual effort and of legal investigation for the selection and determination of the best rules of law and for the correct construction of an exceptionally large quantity and variety of legislation involving as it did many and novel sociological experiments. In consequence, there are few titles in the law appearing before any state courts which are not illuminated by his wisdom.

Mr. Tawney has justly observed: "From the foot-hills of obscurity, Judge Mitchell arose among the mountain-peaks of fame. Exquisite yet tremendous he moved unobstrusively among men, seeking [**430**] everywhere with singleness of purpose that noble realm, where across the ages, the friends of justice and of God hold silent converse with each other and their Great Original."

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