

“ WILLIAM MITCHELL ”

By

Edward Lees

Commissioner, Minnesota Supreme Court

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Foreword

By

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Editor, MLHP

The May 1920 issue of the *Minnesota Law Review* carried a 24 page article by Edward Lees on William Mitchell, always ranked as Minnesota's greatest jurist. Lees was a Commissioner of the Supreme Court at the time.

This was not the first study of Mitchell. John Stryker wrote a short but incisive chapter on him for *The History of the Bench and Bar of Minnesota*, published in 1904.¹ Edwin Jaggard contributed a chapter for the eighth and last volume of Dean William Draper Lewis's famous series, *Great American Lawyers*, published in 1909.² Lees's article is different. He had read hundreds of Mitchell's opinions and his article reflects the depth of his reading. It has footnotes—each to a Mitchell opinion; it quotes appraisals of his rulings by prominent law school professors (but does not cite the sources of those comments). It is, in short, more scholarly than the others. It is posted here.³

But before we turn away, a question remains: why did he write it? He was admitted to the Minnesota bar in 1886, at age twenty-one, and began practicing law in Winona. From 1895 to 1918, he was in partnership with

¹ John E. Stryker, "William Mitchell" (MLHP, 2013) (published first in Hiram Fairchild Stevens, ed., 1 *History of the Minnesota Bench and Bar* 65-71 (1904)).

² Edwin Ames Jaggard, "William Mitchell, 1832-1900" (MLHP, 2008) (published first in William Draper Lewis, ed., 8 *Great American Lawyers* 387-430 (1909)).

³ The etching of Mitchell on page 7, below, was in the first volume of Stevens' *History of the Bench and Bar of Minnesota* (1904), and copied for the *Law Review* article.

Marshall B. Webber, and they built up a large clientele. He was appointed commissioner in 1918. That office was created in 1913 to help the supreme court cope with a huge volume of cases, without having to increase the number of justices via constitutional amendment.⁴ While hearing, deciding and writing opinions in many appeals, he somehow found time to write his article. For sure it had been on his mind for years.

William Mitchell was appointed to the Supreme Court in March 1881 and served until January 1900. Though his judicial duties required him to spend most of his time in St. Paul, he endeavored to travel by rail to his home in Winona on weekends.⁵ It was during these visits that he became acquainted with Lees, an impressionable young lawyer in his twenties and early thirties. When Lees writes about Mitchell's habits and personality, he writes from fond memory:

His figure was erect and slender, his features clear cut, his face bearded, his eyes dark and penetrating, his cast of countenance sober and thoughtful and apt to give an impression of austerity until his face lit up with a smile, as it usually did when he was, engaged in conversation. He was a man of reserve and native dignity, not apt to make advances in forming acquaintances, but a firm and loyal friend when once he bestowed his friendship upon any one.

He not only knew Mitchell but appeared before him in appeals to the Supreme Court. His article begins:

On December 15, 1899, Judge Mitchell filed his last judicial opinion, and on August 21, 1900, his life came to an end.

⁴ 1913 Laws, c. 62, at 53-54 (effective March 12, 1913).

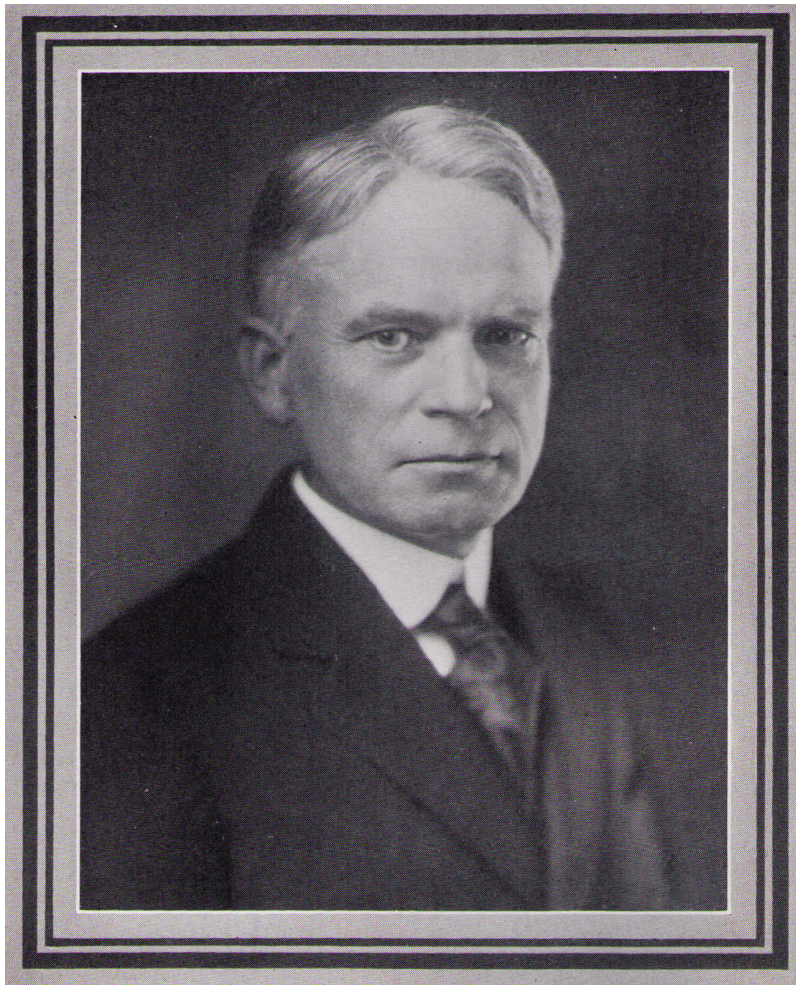
⁵ Lees recalls:

Those who entered his home were met with the hospitality characteristic of earlier days and with an innate courtesy and cordiality which were peculiarly his own. He prized his home life and his Winona friends so highly that for many years after he became a justice of the Minnesota supreme court, it was his weekly practice to make the trip from St. Paul to Winona to spend Sunday at home, returning in time for the opening of court on Monday.

A photograph of the Justice's home in Winona can be found on page 3 of "Photographs of William DeWitt Mitchell (1925-1935)" (MLHP, 2015). It was furnished to the MLHP by the Winona County Historical Society.

He might have added that on November 22, 1899, just three weeks before his last opinion, Mitchell filed a dissent in *Palmer v. Winona Railroad & Light Company*, where Webber & Lees represented the defendant.⁶ But modesty forbade personal references.

As a Commissioner Lees worked within the Court, and that experience may have enhanced his understanding of Mitchell's relations with other justices during his two decades of service. And he likely was encouraged to pursue his project by his colleagues, some of whom had also argued cases before Mitchell. Chief Justice Calvin Brown was appointed to the Court in November 1899, a few weeks before Mitchell left.



Commissioner Lees

⁶ *Palmer v. Winona Railroad & Light Co.*, 78 Minn. 138, 80 N.W. 869 (1899) (remand for new trial), on appeal after retrial, 83 Minn. 85, 85 N. W. 941 (1901).

Lees's study, it seems, has its origins in his friendship with Mitchell, his admiration for his opinions and a belief that he could improve on previous writings about him. But before turning to his article, there remains another question: why did he write it *at this particular time*? Mitchell, after all, had been dead twenty years. To this there is a ready answer: the *Minnesota Law Review*, founded only four years earlier, welcomed submissions from the local bench and bar. Lees took advantage of this opportunity.

Articles in the first volume of the *Law Review*, published in 1917, have been analyzed by Professor Daniel Farber for the one hundredth volume.⁷ He noted that of the four articles in the first issue, two were written by University faculty members, the others by Supreme Court Justice Oscar Hallam and Edward F. Waite, Judge of the Hennepin County Juvenile Court. Volume 2 (1917-1918) carried "Constitutional and Practical Objections to the Exclusive Regulation of Interstate Railroad Rates" by Henry C. Flannery, an Assistant Minnesota Attorney General. It was a rejoinder to D. C. lawyer Charles W. Needham's article "Exclusive Federal Regulation of Railroad Rates by the Federal Government" in the February 1918 issue. Volume 3 (1918-1919) had "Minnesota Legislation 1919" by Elias J. Lien, the state law librarian, and "The Minnesota 'Blue Sky' Law" by Montreville J. Brown, a St. Paul lawyer.⁸ It also had Ambrose Tighe's "The Legal Theory of the 'Safety Commission' Act," a defense of a controversial state law intended to harness opponents of the recent war. Volume 4 (1919-1920) carried Minneapolis lawyer Ernest C. Carman's "Is a Motor Vehicle Accident Compensation Act Advisable?" and Lees's study of Justice Mitchell. Volume 5 (1920-1921) had William Anderson's "The Minnesota Constitution," a condensation of his history of the framing of the state constitution in 1857,⁹ and two articles on declaratory judgments by James Schoonmaker, a St. Paul practitioner. This is a sample of the articles and book reviews contributed by local lawyers and faculty of the University of Minnesota to the *Law Review* in its first years (if many were published, it is probable that far more were rejected). In addition, a summary of the annual meeting of the Minnesota State Bar Association appeared in each volume.

⁷ Daniel A. Farber, "Back to the Future? Legal Scholarship in the Progressive Era and Today," 100 Minn. L. Rev. 1 (2015).

<http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=3575&context=facpubs>

⁸ For Lien's obituary, see "Elias J. Lien (1868-1932)" (MLHP, 2013-2016). For Brown's bar memorial see, "Ramsey County Bar Memorials-1972" 16-19 (MLHP, 2016).

⁹ The text of Anderson's history is posted in the "Constitution" category in the archives of the MLHP.

This is a far more hospitable publishing environment than that faced by early lawyers who wished to publish their reflections on legal developments in the state, including its legal history. In 1888 Charles E. Flandrau published "The Bench and Bar of Ramsey County, Minnesota" in two installments in *Magazine of Western History*, a pseudo-scholarly journal in decline.¹⁰ He published a revision of that article under the title, "Lawyers and Courts of Minnesota Prior to and During Its Territorial Period" in the March 1897 issue of *The Minnesota Law Journal*, which went defunct later that year.¹¹ And George F. Longsdorf, a St. Paul lawyer, published a "history" of the Minnesota Supreme Court in *Case and Comment* in 1912.¹²

The opportunity for local law writers offered by the *Law Review* is evident in the record of a few publications of Charles B. Elliott, lawyer, judge, part-time academic and prolific author of treatises, textbooks and articles. His books were published by Goodyear Book Co., Callaghan and Co., Bobbs-Merrill Co., and West Publishing Company.¹³ But until the *Law Review* opened for business there was no local outlet for his articles. He published a history of the state supreme court in *The Green Bag* in 1892.¹⁴ In 1903 his long tribute to Chancellor Kent appeared in the *American Law Review*.¹⁵ In 1921 the *Law Review* became the home of his essay "The Proposed League of Nations."

¹⁰ Charles E. Flandrau, "The Bench and Bar of Ramsey County, Minnesota" (MLHP, 2008-2009) (published first in 7 *Magazine of Western History* (January & May 1888)). A few months later, that journal carried his tribute to Isaac Atwater his friend and former colleague on the Supreme Court. Charles E. Flandrau, "Judge Isaac Atwater," (MLHJP, 2008) (published first in 8 *Magazine of Western History* 254-260 (July 1888)).

¹¹ Charles E. Flandrau, "Lawyers and Courts of Minnesota Prior to and During Its Territorial Period" (MLHP, 2009) (published first in 5 *The Minnesota Law Journal* 41-48 (March 1895)). All five volumes of *The Minnesota Law Journal*, published from 1893 to 1897, are posted in the "Journals" category in the archives of the MLHP.

¹² George F. Longsdorf, "The Supreme Court of Minnesota" (MLHP, 2015) (published first in 19 *Case and Comment* 39-46 (June 1912)). Much earlier New York lawyer Clark Bell published the second "history" of the court in the *Medico-Legal Journal*, which he edited. Clark Bell, "The Supreme Court of Minnesota: (MLHP, 2010-2016) (published first in 17 *Medico-Legal Journal* (1899)).

¹³ Most of Elliott's treatises and textbooks are posted in the "Treatises/textbooks" category in the archives of the MLHP.

¹⁴ Charles B. Elliott, "The Supreme Court of Minnesota" (MLHP, 2016) (published first in 4 *The Green Bag* (March & April 1892)).

¹⁵ Charles B. Elliott, "An American Chancellor," 37 *American Law Review* 321 (May-June 1903). It was originally delivered as a speech to the Yale Law School on March 25, 1903.

The contribution of the *Law Review* to the legal profession in Minnesota—by helping practitioners keep up with new laws, court decisions and controversies and, especially, for welcoming articles on a wide range of subjects by Minnesota lawyers, judges and academics—for a half century or more after its inception in 1917 cannot be underestimated.¹⁶ And to it we are indebted for publishing Lees’s study of Justice Mitchell — the best so far.

Lees resigned from the Court because of declining health on October 1, 1927. He died on March 25, 1928, at age sixty-three.¹⁷ On May 18, 1928, services were held in his memory at the Minnesota Supreme Court.¹⁸ No eulogist mentioned his law review article but Federal District Court Judge John B. Sanborn likened his opinions to William Mitchell’s: “His opinions ranked with those of Judge Gilfillan, Judge Mitchell, Judge Bunn, and other great judges of this Court.” George W. Peterson added, “Judges Mitchell, Start, and Lees were peers. Each was the equal of the other.”

Edward Lees would have known that these comparisons were foolish, but he would have been pleased at the mention of his old friend, who long ago, at the beginning of his career, had welcomed him into his home, where they discussed books, exchanged fishing tales and talked law.

¹⁶ Its importance to the bar declined as the century came to a close. In the last four decades or so it rarely published articles by local lawyers and judges. The void was filled by the *William Mitchell Law Review*, launched in 1974, and bar association journals. The task of educating lawyers on new laws and regulations, court procedures and rulings was taken up by the continuing legal education movement, which operated for the most part outside the law schools

¹⁷ The photograph of Lees on page 3 is the front piece of the 1929 *Minnesota Legislative Manual*.

¹⁸ See “Edward Lees” in *Testimony: Remembering Minnesota’s Supreme Court Justices* 258-264 (Minn. Sup. Ct. Hist. Soc., 2008).



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MINNESOTA LAW REVIEW

VOL. IV

MAY, 1920

NO. 6

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ON December 15, 1899, Judge Mitchell filed his last judicial opinion, and on August 21, 1900, his life came to an end.

The lapse of twenty years has not dimmed, but increased his reputation as a judge. Today, he is generally accorded a place in the group of great American judges whom all lawyers delight to honor. It is a source of pardonable pride to the bar of Minnesota to know that he began his career in their ranks. Of those who encountered him when he was in practice, all are gone, so far as the writer has been able to ascertain, except Honorable Charles C. Willson of Rochester. Only a few are left who appeared before him when he was a district judge. Many members of the bar of today never saw him. The time has already come when he is known to most lawyers solely through his published opinions. In the belief that they, and those preparing for the bar, will be interested in knowing more about him, this sketch of his life and work has been written. A more extended account, prepared by the late Judge Jaggard, is contained in Volume VIII of Lewis' Great American Lawyers.

William Mitchell was born November 18, 1832, the son of John Mitchell and Mary (Henderson) Mitchell, who were both natives of Scotland. His boyhood was spent on his father's farm near Niagara Falls in Welland County, Ontario. After attending the public schools in Canada, he entered Jefferson College at Cannonsburg, Pennsylvania, graduating with the class of 1853. It was here that he met Eugene M. Wilson, who became one of his intimate friends. The latter lived at Morgan-

town, then in Virginia but now in West Virginia, where his father was a lawyer. On leaving college, he went to Morgantown and read law in the office of his friend's father. He was thus occupied until 1857, with an interval of about two years when he taught in an academy at Morgantown. He was admitted to the bar in that year and, accompanied by young Wilson, left Virginia to seek his fortune in the West. In April the two young men landed at Winona, Minnesota, having journeyed up the Mississippi River on a steamboat, with many others, also on their way to Minnesota. Winona was just emerging from a boom period and, as a consequence, nearly every one found himself the owner of town lots, bought at extravagant prices in the expectation of speedily reselling them at a profit. These expectations had been disappointed, the boom had collapsed, every one was in debt, money was scarce, and the time was not a propitious one for the arrival of two young lawyers in search of their fortunes. Nevertheless they both stayed—one for nearly all the remaining years of his life, the other for a few years. The impression made by the conditions found at Winona was lasting. Years after, in one of his opinions, Judge Mitchell drew upon his early recollections, when he said:¹

"Nothing would be more unjust than to test a man's acts in 1889, while the real estate boom still continued, by the conditions existing in 1897. No one who has not passed through one of these booms can realize how extravagant men become in their opinions as to the values of property, and how largely the judgment of even ordinarily prudent and conservative business men is influenced by the atmosphere surrounding them. After the boom has subsided, men can hardly believe that persons of ordinary business capacity and intelligence could ever have entertained such extravagant ideas of value; and hence, even when we honestly attempt to judge of their actions in the light of the conditions then existing, our judgment is liable to be unconsciously influenced by the changed conditions now existing."

The two young men engaged in practice as partners, under the firm name of Wilson & Mitchell, but the firm was soon dissolved by the former's removal to Minneapolis. Judge Mitchell continued to practice at Winona until 1874. In later years he would refer to this period as being, on the whole, the most enjoyable of his life.

He married in 1857, and established the home where he reared his family. His domestic life was happy. He lived comfortably,

¹ *Wheadon v. Mead*, (1898) 72 Minn. 372, 376, 75 N. W. 598.

but simply. Those who entered his home were met with the hospitality characteristic of earlier days and with an innate courtesy and cordiality which were peculiarly his own. He prized his home life and his Winona friends so highly that for many years after he became a justice of the Minnesota supreme court, it was his weekly practice to make the trip from St. Paul to Winona to spend Sunday at home, returning in time for the opening of court on Monday.

His professional life was fortunate. He soon gained an enviable standing at the bar and acquired an excellent practice. He always had a partner in business. Daniel S. Norton, afterwards United States Senator from Minnesota, succeeded Wilson, and, when Norton went to Washington, William H. Yale, at one time Lieutenant Governor of the state, became his partner under the firm name of Mitchell & Yale. His name, or that of his firm, appears frequently in the early Minnesota Reports, beginning with the case of *Bingham v. Board of Supervisors of Winona*² and ending with *Sherwood v. St. Paul & Chicago Railway Co.*³

The Winona bar, during his time, numbered among its members several men of superior ability and attainments. In addition to those already mentioned, there was Thomas Wilson, first, judge of the third judicial district, then, chief justice of the supreme court and finally engaged in private practice, where he became one of the most skillful trial lawyers the state has ever had. With him, he contracted a friendship which continued for life, although the two men were of wholly different temperaments. Another Winona lawyer who was his contemporary was William Windom, who was sent to Congress, first as a Representative, and later as Senator from Minnesota, and who died while holding the office of Secretary of the Treasury. Another was Charles H. Berry, first Attorney General of Minnesota and for a time a United States District Judge in the territory of Idaho. Contact with these men and with others of, perhaps, equal ability though less widely known, was, of itself, an education. A contest with them was a test of one's ability to survive. The years in which he was engaged in practice were those in which his habits of work were formed. It was a troubled period in our history, including the dark years of the Civil War when the country

² (1863) 8 Minn. 441, 443.

³ (1875) 21 Minn. 127, 128.

was aflame with passion, the bitter ones of reconstruction after the war was over, and those of reckless speculation which came later and were followed by the great financial panic of 1873. During all of them he was occupied with his profession, though not to the exclusion of everything else. He gave freely of his time and ability to advance the interests of the community where he lived. He served one term in the State Legislature at the session of 1859-1860; one as County Attorney in 1863-1864; represented his ward in the City Council for four years; was a director of the Public Library; trustee of the Cemetery Association; a director of the LaCrosse, Trempealeau & Prescott Railroad Co., a railroad which linked Winona with the roads from the east, which then terminated at LaCrosse, Wisconsin; the first president of the Winona & Southwestern Railroad Co., when it was organized in 1872 under a special act of the legislature; and an incorporator and the first president of the Winona Savings Bank, organized in 1874. He was not fond of office, public or private, but, when pressed into service, was thorough and attentive in the performance of his duties.

He was a diligent student and keen observer and was blessed with an excellent memory. His mind was stored with solid information covering a wide field. No one who knew him well can fail to recall his extensive fund of knowledge, his shrewd wisdom, and his independence of judgment. The last characteristic is illustrated by his political connections. Originally a republican and an adherent of that party during the war, he left it owing to his disapproval of the course of its leaders during the reconstruction period, and was thereafter identified with the democratic party. In 1896, he was unable to subscribe to his party's policy with reference to the coinage of silver, and did not allow his long association with it to influence him in casting his ballot or in giving expression to his views.

By nature, he was peace-loving, and shunned conflicts, although he bore himself manfully when attacked. His coolness and self-control, his great knowledge of legal principles, his sure application of them, his ready comprehension of the vital facts in a case, his fairness in stating them, and his transparent honesty combined to make him a formidable adversary in the court room, although he never enjoyed the trial of jury cases. As a counsellor, he was of transcendent merit. After seventeen years of practice, he had an established clientage with unbounded con-

fidence in him, a solid reputation for intelligence and ability, a wide acquaintance, and no enemies except those that every good man makes if he acquits himself as he should on every occasion. His friends had long recognized in him the qualities that go to the making of a good judge, and in 1874 he was elected judge of the district court of the third district and began a judicial career which was destined to continue until only a few months before his death. For over seven years he held the office of district judge, conducting it to the entire satisfaction of every one. He was an ideal trial judge. He heard counsel attentively and patiently, made no display of his own learning, earnestly desired to get at the vital facts of the case, readily detected shams and fallacies, was singularly free from prejudices, and bent wholly on doing justice to the parties to a controversy. It has been said of him by one who knew, that no defeated litigant ever left his court room who did not go away satisfied that he had been given a fair trial or who was not convinced that his case had received the most attentive and careful consideration. He was prompt, as well as painstaking, in the dispatch of business and, hence, the work of the court was not burdensome to him. He found time to enjoy the simple wholesome pleasures that in later years want of leisure compelled him to forego. He was an out-of-door man and a confirmed fisherman. The Mississippi Valley, in the vicinity of Winona, afforded numerous opportunities for the outings he enjoyed. There were many small streams which abounded with trout. He used to relate with zest how he had enjoyed to the full many a summer's day along one of these streams until nightfall found him with a basket filled with trout and a drive homeward before him, with a keen appetite for the late supper that awaited him. The river was famous for its bass fishing and he often said there was no better test of a fisherman's skill than his ability to hook and land a three pound bass in the swift water where that fish is usually found. Years after, when his fishing trips had become less frequent, he was drawing on his own experience when he said:

"It is a matter of common knowledge that different species of fish, good and bad, those that take the hook readily, and those that do not, inhabit the same waters."⁴

He was fond of gardening, and the grounds about his home abounded with flowers and shrubbery. Books were among his

⁴ State v. Mrozinski, (1894) 59 Minn. 465, 467, 61 N. W. 560, 27 L. R. A. 76.

best friends, and he is said to have had one of the habits of the true book-lover—reading in bed. He was abstemious, but charitable in his judgment of men who were not. He often remarked, that a man who had no small vices was not equipped with a safety valve for the escape of surplus energy that might become explosive if not provided with an outlet. He was reared in the Presbyterian faith and gave his life-long support to that church, although not a member. He respected churches and the clergy, among whom he numbered several special friends.

His figure was erect and slender, his features clear cut, his face bearded, his eyes dark and penetrating, his cast of countenance sober and thoughtful and apt to give an impression of austerity until his face lit up with a smile, as it usually did when he was engaged in conversation. He was a man of reserve and native dignity, not apt to make advances in forming acquaintances, but a firm and loyal friend when once he bestowed his friendship upon any one.

Possessed of these traits and with these experiences, in his forty-ninth year he was appointed by Governor Pillsbury as one of the Associate Justices of the state supreme court immediately after the legislature increased their number from two to four. He took his seat at the opening of the April Term in 1881.

His opinions while a member of that court are the principal source of his great reputation. His life theretofore was an unconscious preparation for the performance of the tasks that he was now called upon to do. The work of lawyers and trial judges is of an ephemeral nature and soon forgotten, but the opinions of judges of appellate courts are preserved in the reports. From time to time they are referred to by text writers and critics of legal literature, and are cited in the briefs prepared in other cases. This insures a sort of permanency to the reputation of a judge of a court of last resort, if he is fortunate enough to earn any reputation at all. Doubtless there have been a good many American supreme court judges who have done excellent work, worthy of the respect of those who came after them, but how few are the names that are familiar to the bench and bar of a later generation. A distinguished writer for the *Harvard Law Review* mentions the names of twenty judges of state supreme courts who have achieved eminence. Among them occurs the name of Judge Mitchell. Of the others, it is doubtful whether more than five are known in Minnesota, though all were

men whose reputations in their several states survive, as his has survived not only here but in other states as well.

It is proper to inquire what it is that gives him his standing as one of the great American judges. An attempt to point out some of the characteristics of his opinions may help to answer the inquiry. One of the first things that arrests the attention as these opinions are read and studied is his habit of going back to the origin of legal principles. He followed what is known as the historical method, tracing the development of a doctrine from the time when it first appeared down to the time when his opinion was written. Almost none of his notable opinions are without references to the early English authorities. There are occasional allusions to the Year Books; and Coke, Blackstone, Mansfield, Eldon, Hale, Holt, and other eminent English judges, are frequently quoted. Even during the last years of his life, when he was incessantly pressed for time by reason of the increasing volume of business the court was required to dispatch, he did not abandon the practice of approaching the study of a principle from the historical standpoint. This method of approach leads to regard for the continuity of the law and reluctance to override precedents. With him, it did not do so to the extent that he hesitated to test legal formulas for himself, although they had been generally accepted and were stamped with the approval of eminent judges and writers. Though he greatly respected, he was never bound by the learning of the past. He regarded precedents as the guides, not the masters of the courts. He wanted to know what men in the seventeenth century thought the law should be, because their conception of it lies at the root of what men think in our own time and helps to an understanding of the present.

His attitude towards the common law is best illustrated by quotations from his opinions. The following are fairly typical:

"Courts have no more right to abrogate the common law than they have to repeal the statutory law. Lord Coke said: 'The wisdom of the judges and sages of the law has always suppressed new and subtle inventions in derogation of the common law.' The wise remark of another, peculiarly applicable to the present time, was that 'the variety of judgments and novelties of opinions are the two plagues of a commonwealth.' The great lights of the law may take some liberties with the law in the way of new applications of old principles that modesty would forbid to ordinary men; and while we are not disposed to look upon everything ancient with slavish reverence merely because it is

ancient, it would certainly be presumptuous in us to lightly discard a doctrine which has been so long approved, and which is so firmly established by authority. The principles of the common law were founded upon practical reasons, and not upon a theoretical logical system; and usually, when these principles have been departed from, the evil consequences of the departure have developed what these reasons were. The Pandora box that has been opened by the 'Texas doctrine' proves more forcibly than argument the wisdom of the common-law rule that damages of this kind cannot be recovered in actions on contract."⁶

"It is one of the great excellencies of the common law that it does not consist of inflexible statutory rules adapted to particular circumstances, which might become obsolete, but of certain comprehensive principles, founded on reason and natural justice, and adapted to the circumstances of all cases which fall within them. When new modes of doing business and new combinations of facts arise, these same principles will apply; but they must be adapted to the new situation by considerations of fitness and reason which grow out of the circumstances."⁶

"It is undoubtedly true that many of the doctrines of the common law had their origin in social or political conditions which have in whole or in part ceased to exist. But this fact alone will not usually justify courts in holding that these doctrines, when once thoroughly established, have been abrogated, any more than it would justify them in holding that a statute had been abrogated because the reason for its enactment had ceased. Any such rule would leave the body of the common law very much emasculated. . . . While, undoubtedly, the common law consists of a body of principles applicable to new instances as they arise, and not of inflexible cast-iron rules, yet where the rules of the common law have become unsuited to changed conditions, political, social, or economic, it is the province of the legislature, and not of the courts, to modify them."⁷

He sometimes took pleasure in discussing curious doctrines of the common law, apparently to disclose the arbitrary or unreal basis of some ancient rule, as witness the following:

"The doctrine that a corpse is not property seems to have had its origin in the dictum of Lord Coke, (3 Inst. 203) where, in asserting the authority of the church, he says: 'It is to be observed that in every sepulchre that hath a monument two things are to be considered, viz., the monument, and the sepulture or burial of the dead. The burial of the cadaver that is caro

⁶ *Francis v. Western Union Telegraph Co.*, (1894) 58 Minn. 252, 265, 59 N. W. 1078, 25 L. R. A. 406, 49 A. S. R. 507.

⁶ *Arthur v. St. Paul & Duluth R. Co.*, (1887) 38 Minn. 95, 101, 35 N. W. 718.

⁷ *Hulett v. Carey*, (1896) 66 Minn. 327, 341, 69 N. W. 31, 34 L. R. A. 384, 61 A. S. R. 419.

data vermibus (flesh given to worms) is nullius in bonis, and belongs to ecclesiastical cognizance; but as to the monument action is given (as hath been said) at the common law, for defacing thereof.' If the proposition that a dead body is not property rests on no better foundation than this etymology of the word 'cadaver,' its correctness would be more than doubtful. But while a portion of this dictum, severed from its context, has been repeatedly quoted as authority for the proposition; yet it will be observed that it is not asserted that no individual can have any legal interest in a corpse, but merely that the burial is nullius in bonis, which was legally true at common law at that time, as the whole matter of sepulture and custody of the body after burial was within the exclusive cognizance of the church and the ecclesiastical courts."⁸

He never tired of tracing the expansion of the common law to meet the new conditions that human progress brings about. To him the common law was a living, growing organism, and he nowhere better shows this to be true than in the following discussion of the law relating to the proper public use of highways.

"The question, then, is, what is the nature and extent of the public easement in a highway? If there is any one fact established in the history of society and of the law itself, it is that the mode of exercising this easement is expansive, developing and growing as civilization advances. In the most primitive state of society the conception of a highway was merely a footpath; in a slightly more advanced state it included the idea of a way for pack animals; and, next, a way for vehicles drawn by animals,—constituting, respectively, the 'iter,' the 'actus,' and the 'via' of the Romans. And thus the methods of using public highways expanded with the growth of civilization, until today our urban highways are devoted to a variety of uses not known in former times, and never dreamed of by the owners of the soil when the public easement was acquired. . . .

"Another proposition, which we believe to be sound, is that the public easement in a highway is not limited to travel or transportation of persons or property in movable vehicles. This is, doubtless, the principal and most necessary use of highways, and in a less advanced state of society was the only known use, as the etymology of the word 'way' indicates. And the courts, which, as a rule, are exceedingly conservative in following old definitions, have often seemed inclined to adhere to this original conception of the purpose of a highway, and to exclude every form of use that does not strictly come within it."⁹

⁸ *Larson v. Chase*, (1891) 47 Minn. 307, 309, 50 N. W. 238, 14 L. R. A. 85, 28 A. S. R. 370.

⁹ *Cater v. N. W. Tel. Ex. Co.*, (1895) 60 Minn. 539, 543, 63 N. W. 111.

His humorous reference to the wilderness of American case law in *Tierney v. Minneapolis and St. Louis Ry. Co.*,¹⁰ is entertaining. He said:

"Of course, in the multitude of cases on this subject with which the reports abound, often conflicting, and frequently not well considered, some authority can be found for almost any proposition. . . .

"The supreme court of Massachusetts is one of the few whose decisions on this question are anything like consistent, or seem to be governed by some uniform principle. . . .

"In New York the decisions are so often conflicting that the value of any particular one largely depends upon the composition of the court at the time, or the ability of the judge who wrote the opinion."

And note his biting reference to the modern text-writers:

"The 'Texas doctrine' has been favorably referred to in many of the more recent text-books, but the bench and bar will understand of how little weight as authority most of these books are, written as they very frequently are, by hired professional book-makers of no special legal ability, and who are usually inclined to take up with the latest legal novelty for the same reasons that newspaper men are anxious for the latest news."¹¹

He had the ability to extract the pith from the opinions of other judges and to set forth their conclusions comprehensively and clearly. Having done so, he would proceed to state the true principle as he conceived it to be, the foundation upon which it rested and, finally, its application to the facts of the case in hand. This was his usual method and he employed it with telling effect. Few judges were his equal in power to illuminate the subject under consideration, and none was his superior. He not only saw the decisive points in a case himself, but was able to make others see and understand them also. In a recent letter to the writer, Dean Woodruff of Cornell University College of Law dwells on this quality of Judge Mitchell's mind, saying:

"It has seemed to me, as I have read Judge Mitchell's opinions, that he belongs in the group with Chief Justice Shaw of Massachusetts, Chief Justice Gibson of Pennsylvania, and the few others who mark the highest achievement of our state courts. His mind was a quick solvent for the most refractory and opaque material of legal contention. Take, as typical, his opinion in *Johnson v. Northwestern Life Insurance Company*, 56 Minn. 365. The question there involved is one which, although not of

¹⁰ (1885) 33 Minn. 311, 320, 23 N. W. 229.

¹¹ *Francis v. N. W. Tel. Ex. Co.*, (1894) 58 Minn. 252, 263, 59 N. W. 1078, 25 L. R. A. 406, 49 A. S. R. 507.

major importance, has given rise to conflict and confusion amounting to something like chaos. He saw directly the human element that caused the conflict; he reviewed, not at too great length, the diverse common law precedents and brought them into workable adjustment by the formulation of a rule which is at once equitable and pliant; and it is all accomplished with a lucidity and force of expression that reflect the working of a clear and powerful mind."

The case to which Dean Woodruff refers is one in which the plaintiff sued to rescind a contract for life insurance he had made while an infant, and the opinion contains a statement of the principles applicable to the different situations which may be presented when an infant seeks to avoid his contract.

Other men prominent in the leading law schools agree in ranking Judge Mitchell among the great judges of his time.

In a recent letter written by Dean Wigmore of Northwestern University School of Law, he says:

"My attention was originally called to the late Judge Mitchell's opinions by Professor James Bradley Thayer of the Harvard Law School, who used to speak with the highest admiration of Judge Mitchell's opinions. Afterwards I perused a great many of them in the course of my studies in the law of evidence and learned to admire them myself. I think that Judge Mitchell's opinions stand out among those of his generation as marked by accurate scholarship, lucid expression and shrewd good sense. They attain a uniform high level of clarity which is seldom found. I should count Judge Mitchell as one of the three or four outstanding judges of the American supreme courts of his generation."

Professor Thayer's opinion of Judge Mitchell was expressed in a letter, part of which appears in the report of the memorial proceedings had soon after the death of the latter.¹² Among other things, he said:

"I have long recognized Judge Mitchell as one of the best judges in this country. There is no occasion for making an exception of the Supreme Court of the United States. On no court in the country today is there a judge who would not find a peer in Judge Mitchell."

Professor Samuel Williston of the Harvard Law School recently wrote of him with equal commendation, saying that "Judge Mitchell has been regarded in this school as one of the best judges of his generation."

Professor Edmund M. Morgan of the Yale School of Law writes that:

¹² See 79 Minn. xxix.

"Every teacher of law with whom I have talked regards Judge Mitchell as one of the greatest of American jurists. His ability to analyze a case and to reduce a legal issue to its lowest terms, his power of clear statement of legal principles, and his remarkable facility in the use of concise and expressive English, make his opinions especially valuable for those teachers who attempt to give the student training in legal analysis and sound legal reasoning."

Judge Mitchell cared little for the opinions of others or for legal doctrines, no matter how orthodox they might be, if they did not square with the facts of life, were not workable when applied to business affairs, or were more concerned with form or sentiment than with substance or experience. A few quotations will serve to illustrate the point:

"We are aware that there are some eminent authorities to the contrary, but, with all due deference to them, we cannot avoid thinking that they base their conclusion upon a fallacious and somewhat sentimental line of argument as to the inviolability and sacredness of a man's own person, and his right to its possession and control free from all restraint or interference of others. This, rightly understood, is all true, but his right to the possession and control of his person is no more sacred than the cause of justice."¹³

"We recognize the respect due to judicial precedents and the authority of the doctrine of stare decisis; but, . . . do not feel bound to adhere to it (the rule that an action for damages for an injury to land must be brought where the land is situated) notwithstanding the great array of judicial decisions in its favor. If the courts of England, generations ago, were at liberty to invent a fiction in order to change the ancient rule that all actions were local, and then fix their own limitations to the application of the fiction, we cannot see why the courts of the present day should deem themselves slavishly bound by those limitations."¹⁴

In speaking of the presumption indulged in by the common law as to alterations in written instruments, he said:

"All disputable presumptions of law are based upon the experienced course of human conduct and affairs, and are but the result of the general experience of a connection between certain facts; the one being usually found to be the companion or effect of the other. Hence such presumptions ought to be conformable to the experience of mankind, and the inferences which, in the light of that experience, men would naturally draw from a given state of facts. . . . Whatever might have been the fact for-

¹³ *Wanek v. City of Winona*, (1899) 78 Minn. 98, 100, 80 N. W. 851, 46 L. R. A. 448, 79 A. S. R. 354.

¹⁴ *Little v. Chicago, etc., Ry. Co.*, (1896) 65 Minn. 48, 53, 67 N. W. 846, 33 L. R. A. 423, 60 A. S. R. 421.

merly, when but few men could write, and when contracts were usually drawn by skilled conveyancers or scriveners, with great care and wholly in their own proper handwriting, the rule under consideration is wholly unsuited to the business habits or usages of this country at the present day."¹⁵

We find him speaking of the doctrine that an action will not lie to remove a cloud from title where the instrument creating the cloud is void on its face, as follows:

"I am aware that it is supported by a long line of venerable authorities which this court has followed in several cases. . . . The rule is based wholly on what Mr. Pomeroy calls verbal logic, and not upon any principle of justice or common sense. . . . The doctrine is seriously criticised by some of the best text-writers, and has been repudiated by some respectable authorities. It serves no good purpose, but, on the contrary, often results in a denial of justice. Under these circumstances, it not being a rule of property, but merely one of practice, I think the sooner we emancipate ourselves from it the better it will be for the credit of the court, and for the proper administration of justice."¹⁶

Vigorous common sense was one of his marked traits. He refused to be confused by misleading phrases, in these words:

"There is no magic in mere words to change the real into the unreal. A device of words cannot be imposed upon a court in place of an actuality of facts."¹⁷

Again and again we find him expressing the practical view of things, which is too often lost sight of by men of the highest intelligence. For example, note his opinion of the paid expert witness, written in connection with a consideration of the weight to be given to expert evidence:

"Experts are nowadays often the mere paid advocates or partisans of those who employ and pay them, as much so as the attorneys who conduct the suit. There is hardly anything, not palpably absurd on its face, that cannot now be proved by some so-called 'experts.' And, in these personal injury cases, so-called 'medical experts' can be found who will testify that almost any disease or ailment to which human flesh is heir was, in their opinion, caused by the injury. This evil has become so great in the administration of justice as to attract the serious consideration of courts and legislatures."¹⁸

¹⁵ *Wilson v. Hayes*, (1889) 40 Minn. 531, 536, 42 N. W. 467, 12 A. S. R. 754.

¹⁶ *Maloney v. Finnegan*, (1887) 38 Minn. 70, 73, 35 N. W. 723.

¹⁷ *Kausal v. Minn. Farmer's Mut. Fire Ins. Ass'n*, (1883) 31 Minn. 17, 21, 16 N. W. 430, 47 A. S. R. 776.

¹⁸ *Keegan v. Minneapolis, etc., R. Co.*, (1899) 76 Minn. 90, 95, 78 N. W. 965.

His impatience with insurance that does not insure, and his practical observations, evidently made for the benefit of the legislature, are characteristic, for he never hesitated to suggest to the law-making body any changes or improvements in the law which his experience on the bench led him to believe desirable.

"We have no patience with the prolix, obscure, and involved provisions and conditions which so many so-called co-operative, life, endowment, casualty insurance, and other similar associations usually incorporate into their policies and by-laws. The patrons of such associations are largely composed of people of limited means, neither astute lawyers nor experienced business men, whose object is to make moderate provision for their families in case of death. Whether intended to have such result or not, such provisions and conditions are calculated to mislead the insured, and entrap him into some act of omission or commission that will work a forfeiture of his insurance. It would certainly be a great boon to the public if there could be devised legislative forms of contracts and rules for all such associations, couched in clear, concise, and intelligible language, and to or from which the associations could neither add nor subtract."¹⁹

He occasionally indulged in sarcasm, as witness this, also written of doubtful insurance:

"We supposed that in the course of our professional and judicial experience we had met with about all the forms of contract which have been devised by the ingenuity of modern associations of this and similar kinds, but this one is entirely novel to us. It is certainly unique, and after a careful study of all its provisions it seems clear to us that it must have been contrived for the purpose of evading either the insurance laws or the usury laws, or both, of this state."²⁰

Of padded records and briefs, he remarked:²¹

"A record of over 1,000 folios, and briefs with 60 assignments of error, appear formidable, but, when carefully sifted, it will be found that they contain a vast amount of chaff, and very little grain."

He was of the opinion that most records and briefs suffered from the lack of condensation and frequently said that the force of an argument was too often spent before it reached the vital issue in the case. Prolivity of statement and the indiscriminate citation of authorities tended, in his opinion, to obscure rather

¹⁹ *Schultz v. Citizens' Mut. Life Ins. Co.*, (1894) 59 Minn. 308, 315, 61 N. W. 331.

²⁰ *Missouri, Kansas & Texas Trust Co., v. McLachlan*, (1894) 59 Minn. 468, 473, 61 N. W. 560.

²¹ *Oswald v. Minneapolis Times Co.*, (1896) 65 Minn. 249, 250, 68 N. W. 15.

than to illuminate issues. He had been trained in appellate practice before the days of stenographers and typewriters when lawyers wrote their bills of exceptions and briefs instead of printing the transcript of the testimony and dictating their arguments.

He thoroughly believed that the law, as laid down by the courts, should conform to business usages and the understanding of men generally, and said so in the following emphatic language:²²

"We may suggest that this entire question is one which should be determined more upon consideration of business usages and business policy than of mere theoretical logic."

"The law merchant, including the law of negotiable paper, is founded upon, and is the creature of, commercial usage and custom. Custom and usage have really made the law, and courts, in their decisions, merely declare it. The law of negotiable paper is not only founded on commercial usage, but is designed to be in aid of trade and commerce. Its rules should, therefore, be construed with reference to and in harmony with general business usages, and, as far as possible, with the common understanding in commercial circles."²³

In the field of commercial law he advocated uniformity before the movement for statutory uniformity had fairly begun. He justly observed that:²⁴

"It requires some temerity to attack either the policy or the soundness of a rule which seems to have stood the test of experience, which has been approved by so many eminent courts, and under which the most successful commercial nation in the world has developed and conducted her vast commerce ever since the inception of carriers' bills of lading. But on questions of commercial law it is eminently desirable that there should be uniformity. It is even more important that the rule be uniform and certain than that it be the best one that might be adopted."

He was more concerned with the practical than with the strictly logical application of legal principles. Thus we find him saying:²⁵

"In strict logic and morally it may be said that he who commits a wrongful act should be answerable for all the losses which flow from that act, however remote. But, as has been said, it were infinite for the law to attempt to do this, and any such rule

²² *Northern Trust Co. v. Rogers*, (1895) 60 Minn. 208, 210, 62 N. W. 273.

²³ *Hastings v. Thompson*, (1893) 54 Minn. 184, 189, 55 N. W. 968; 21 L. R. A. 178, 40 A. S. R. 315.

²⁴ *Nat'l Bank of Commerce v. Chicago, etc., R. Co.*, (1890) 44 Minn. 224, 235, 46 N. W. 324, 560, 9 L. R. A. 263, 20 A. S. R. 566.

²⁵ *North v. Johnson*, (1894) 58 Minn. 242, 245, 59 N. W. 1012.

would set society on edge, and fill the courts with endless litigation. Hence the law has been compelled to adopt the practical rule of looking only to the proximate cause, and to the natural and proximate or immediate and direct result."

"On this state of the authorities, we feel at liberty to adopt whichever rule (permissible on principle) we think the safest, most convenient and equitable in practice; keeping in mind that it is more important to work practical justice than to preserve the logical symmetry of a rule, provided this can be done without destroying all rules, and leaving the law on the subject all at sea."²⁶

He distrusted novelties in the law. One or two quotations show his attitude:

"It is true that this court has never before been called on to decide the question, and that mere assumption on the part of either bench or bar does not make a thing law; but, on the other hand, it is also true that a construction which has for a third of a century been accepted by every one as so obviously correct as never to have been questioned or doubted is much more likely to be right than a newly-discovered one, suggested at this late day by the emergencies of present litigation."²⁷

"Aside from its being a novelty in the law, which is always dangerous, I do not think it rests on any sound principle."²⁸

His views on the proper functions of the state, a question now agitating the minds of many men, are worth recalling. They were the views of a man of wisdom—forward looking, liberal but not radical, and conscious of the value of today's inheritance from yesterday. They were those of one who was anxious that political institutions should afford men free scope for individual growth while restraining reckless fanatics who are ever ready to destroy what society has painfully acquired through self-control learned in the hard school of experience.

Equally interesting is his conception of the functions of the different departments of government as defined in the constitution. It is what one would expect it to be in a man of his school of thought. It is worth while to compare the reasoned convictions of a man of wisdom and sound judgment whose mind had been formed during the middle years of the nineteenth century with the popular notions of today. Such a comparison makes

²⁶ *Jordahl v. Berry*, (1898) 72 Minn. 119, 122, 75 N. W. 10, 45 L. R. A. 541, 71 A. S. R. 469.

²⁷ *Willis v. Mabon*, (1892) 48 Minn. 140, 149, 50 N. W. 1110, 16 L. R. A. 281, 31 A. S. R. 626.

²⁸ *Carlson v. N. W. Tel. Ex. Co.*, (1896) 63 Minn. 428, 442, 65 N. W. 914.

one aware of how far we have drifted from the moorings of less restless and unsettled days. By collecting some of the things he wrote, we get his point of view. That of the man on the street today is so familiar as to need no comment.

"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 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."²⁹

Of special interest is his discussion of the police power and of changes in the forms of government which were already advocated in his day, though not with the insistence of today. He held that only by direct amendments of the constitution could the powers of the state be enlarged beyond the limits fixed by its framers. He was opposed to the doctrine that anything which a passing majority of the people believe to be for the public good may be enacted in a statute which must be held valid as an exercise of the police power, although it offends a plain mandate of the constitution.

"The police power of the state to regulate a business does not include the power to engage in carrying it on. Police regulation is to be effected by restraints upon a business, and the adoption of rules and regulations as to the manner in which it shall be conducted.

"While the jurists of continental Europe sometimes include under the term 'police power' all governmental institutions which are established with public funds for the promotion of the public good, yet, as understood in American constitutional law, the term means simply the power of the state to impose those restraints upon private rights which are necessary for the general welfare of all.

"The time was when the policy was to confine the functions of 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 ten-

²⁹ *Lommen v. Minneapolis Gas Light Co.*, (1896) 65 Minn. 196, 208, 68 N. W. 53.

dency 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 a 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."³⁰

He saw the selfish interests standing behind laws enacted ostensibly to promote the public welfare, saying:³¹

"A law enacted in the exercise of the police power must in fact be a police law. . . . In this day, when so many selfish and private schemes in the way of securing monopolies and excluding competition in trade are attempted under the mask of sanitary legislation, it may be an important question whether the judiciary are concluded by the mask, or whether they may tear it aside in order to ascertain who is in it."

He did not look upon the constitution as the only source of guarantees of those inalienable rights to which reference was made in the high sounding phrases of the Declaration of Independence, for he declared that:³²

"The guaranty of a certain remedy in the laws for all injuries to persons, property, or character, and other analogous provisions . . . are but declaratory of general fundamental principles, founded in natural right and justice, and which would be equally the law of the land if not incorporated in the constitution."

He justified governmental regulation of railroads, apparently upon the ground that it was the only alternative to governmental ownership. In his time, the latter alternative was generally considered to be quite impossible. It was then a conclusive demonstration of the propriety of regulation to show that without it public ownership would be inevitable. In the light of recent events, this statement made some thirty years ago is of more than historical interest:³³

"In fact, it was settled in the only way that any such question can be permanently settled, viz., in accordance with public policy and public necessity, for no modern civilized community could long endure that their public highway system should be in the uncontrolled, exclusive use of private owners. The only

³⁰ *Rippe v. Becker*, (1894) 56 Minn. 100, 57 N. W. 331, 22 L. R. A. 857.

³¹ *State v. Donaldson*, (1889) 41 Minn. 74, 82, 42 N. W. 781.

³² *Allen v. Pioneer Press Co.*, (1889) 40 Minn. 117, 41 N. W. 936, 3 L. R. A. 532, 12 A. S. R. 707.

³³ *State v. Chicago, etc., Ry. Co.*, (1888) 38 Minn. 281, 37 N. W. 782.

alternative was either governmental regulation or governmental ownership of the roads.

"In fact, this must be so, if the legislature is to be permitted effectually to exercise its constitutional powers. If this was not permissible, the wheels of government would often be blocked, and the sovereign state find itself helplessly entangled in the meshes of its own constitution."

He comprehended the problems involved in the relations of capital and labor. His views were enlightened and free from prepossessions in favor of either. A few selections bring out his point of view.

"It is sometimes said that mankind will seek cessation of labor at proper times by the natural influences of the law of self-preservation; also that, if a man desires to engage on Sunday in any kind of work or business which does not interfere with the rights of others, he has an absolute right to do so, and to choose his own time of rest, as he sees fit. The answer to this is that all men are not in fact independent and at liberty to work when they choose. Labor is in a great degree dependent upon capital, and, unless the exercise of power which capital affords is restrained, those who are obliged to labor will not possess the freedom for rest which they would otherwise exercise."²⁴

"The case presents one phase of a subject which is likely to be one of the most important and difficult which will confront the courts during the next quarter of a century. This is the age of associations and unions, in all departments of labor and business, for purposes of mutual benefit and protection. Confined to proper limits, both as to end and means, they are not only lawful, but laudable. Carried beyond those limits, they are liable to become dangerous agencies for wrong and oppression. Beyond what limits these associations or combinations cannot go, without interfering with the legal rights of others, is the problem which, in various phases, the courts will doubtless be frequently called to pass upon. There is, perhaps, danger that, influenced by such terms of illusive meaning as 'monopolies,' 'trusts,' 'boycotts,' 'strikes,' and the like, they may be led to transcend the limits of their jurisdiction, and, like the court of king's bench in *Bagg's Case*, 11 Coke, 98a, assume that, on general principles, they have authority to correct or reform everything which they may deem wrong, or, as Lord Ellsmere puts it, 'to manage the state.' . . . It is perfectly lawful for any man (unless under contract obligation, or unless his employment charges him with some public duty) to refuse to work for or to deal with any man or class of men, as he sees fit. This doctrine is founded upon the fundamental right of every man to conduct

²⁴ State v. Petit, (1898) 74 Minn. 376, 379, 77 N. W. 225.

his own business in his own way, subject only to the condition that he does not interfere with the legal rights of others. And, as has been already said, the right which one man may exercise singly, many, after consultation, may agree to exercise jointly, and make simultaneous declaration of their choice."³⁵

"Modern investigations have much modified the views of courts as well as political economists as to the effect of contracts tending to reduce the number of competitors in any particular line of business. Excessive competition is not now accepted as necessarily conducive to the public good. The fact is that the early common law doctrine in regard to contracts in restraint of trade largely grew out of a state of society and of business which has ceased to exist."³⁶

There was a time in the history of Minnesota when numerous corporations were organized which were not successful. The state constitution provides that a stockholder in any corporation except one organized to carry on a manufacturing or mechanical business shall be liable to creditors to the amount of stock held or owned by him. The legislature had made some provision for the enforcement of this liability and for the sequestration of the property of an insolvent corporation, but the nature and extent of a stockholder's liability had not been clearly defined and the procedure in working it out had not been settled. In a series of cases in which the opinions were written by Judge Mitchell, the whole subject was exhaustively considered and the field it occupied thoroughly explored. This series of cases begins with *State v. Minnesota Thresher Co.*,³⁷ and ends with *Hospes v. N. W. Mfg. & Car Co.*³⁸ On reading the ten or more opinions which make up the series, one is impressed with the great amount of labor that was required to master the facts and with the clearness of statement that makes them comprehensible to the reader. He grasps the intricate methods of "high finance," perceives the ends that promoters had in view, and his sturdy common sense and innate honesty are revealed as he marshals and analyzes the facts. He formulates and demonstrates legal principles with the sureness and lucidity characteristic of a trained and logical mind and follows with a statement of the conclusions which seem to be as inevitable as those in geometry. His treatment

³⁵ *Bohn Mfg. Co. v. Hollis*, (1893) 54 Minn. 223, 231, 55 N. W. 1119, 21 L. R. A. 337, 40 A. S. R. 319.

³⁶ *National Benefit Co. v. Union Hospital Co.*, (1891) 45 Minn. 272, 275, 47 N. W. 806.

³⁷ (1889) 40 Minn. 213, 41 N. W. 1020, 3 L. R. A. 510.

³⁸ (1892) 48 Minn. 174, 50 N. W. 1117, 15 L. R. A. 470, 31, A. S. R. 637.

of the "trust fund" doctrine in the *Hospes* case reveals his methods as well as anything he wrote while on the bench. There are many who assert that he never wrote a better opinion and its quality is attested by the fact that it is accepted everywhere today as the best exposition of the subject in existence.

His standard of legal ethics was high. He belonged to the old school of lawyers who believed that theirs was an honorable profession and not a commercial calling. He had scant patience with those who would forget the distinction, or with those who stir up litigation. A few quotations suffice to show his standards:

"The old common-law rules on the subject of champerty have doubtless been much modified, but the essential principle upon which those rules rested, and the evils and abuses at which they were aimed, still exist. The general purpose of the law . . . was to prevent vexatious or speculative litigation, which would disturb the peace of society, lead to corrupt practices, and prevent the remedial process of the law. All contracts or practices which necessarily and manifestly tend to produce these results ought still to be held void on grounds of public policy."³⁹

"Blackstone speaks of men who are perpetually endeavoring to disturb the repose of their neighbors, and officiously interfering with other men's quarrels, as 'the pests of civil society.' This view was not peculiar to the common law. The Roman law animadverted with equal severity on this class of men and their practices. This class of men in the form of 'prowling assignees' and intermeddling speculators are unfortunately just as numerous, and their practices just as pernicious, as they ever were."⁴⁰

"This sort of petty foraging upon the poor and ignorant is, in our opinion, one of the most reprehensible forms of professional misconduct."⁴¹

It is a common belief that to be a good judge a man must live a cloistered life and have a mind wholly absorbed in the study of cases and briefs to the neglect of everything else. Like many popular notions, it is largely fanciful. Judge Mitchell lived in this world and not in a world of abstractions. His study of cases and briefs did not exclude him from sharing in the common interests of ordinary men. His mind was stored with the fruits of his observations, as witness his portrayal of boyish traits in

³⁹ *Gammons v. Johnson*, (1899) 76 Minn. 76, 81, 78 N. W. 1035.

⁴⁰ *Huber v. Johnson*, (1897) 68 Minn. 74, 78, 70 N. W. 806.

⁴¹ *In re Temple*, (1885) 33 Minn. 343, 345, 23 N. W. 463.

Twist v. Winona & St. Peter R. Co.,⁴² and of the habits of Indians in *State v. Cooney*.⁴³

In the first case, he said:⁴⁴

"To the irrepressible spirit of curiosity and intermeddling of the average boy there is no limit to the objects which can be made attractive playthings. In the exercise of his youthful ingenuity, he can make a plaything out of almost anything, and then so use it as to expose himself to danger. If all this is to be charged to natural childish instincts, and the owners of property are to be required to anticipate and guard against it, the result would be that it would be unsafe for a man to own property, and the duty of the protection of children would be charged upon every member of the community except the parents or the children themselves."

And in the second, that:⁴⁵

"The idea of these Indians buying game from those who keep it for sale will cause a smile of incredulity on the part of those who know them best; but, even if they do sometimes buy it, it is the Indian who kills and sells the game, or the trader who keeps it for sale, and not the Indian who buys it for food, who is benefited. If an Indian has the money with which to buy venison, he is able to buy beef or some other article of food with his money. I know of no more effectual method of depleting game, in both Indian reservations and the adjacent country, than to hold that Indians may kill it for purposes of barter and sale, or that traders may buy and keep it for sale, during the closed season."

Overworked judges have little opportunity for investigation. As a rule they have not the time to trace the streams of law to their fountain-head or to write elaborate and exhaustive opinions. During Judge Mitchell's time the business of the court increased rapidly. The flood of personal injury litigation had begun to come and there were no stenographers, typewriters or copyists to assist the judges in the preparation of their opinions. Evidences of the high pressure under which the court worked crop out every now and then in his opinions, and yet to the very last, in all the more important cases in which he wrote, he adhered to the same painstaking method of ascertaining and stating the law and giving it application to the case in hand that characterized his early opinions when the work of the court was far less

⁴² (1888) 39 Minn. 164, 39 N. W. 402, 12 A. S. R. 626.

⁴³ (1899) 77 Minn. 518, 80 N. W. 696.

⁴⁴ *Twist v. Winona & St. Peter R. Co.*, (1888) 39 Minn. 164, 167, 39 Minn. 402, 12 A. S. R. 626.

⁴⁵ *State v. Cooney*, (1899) 77 Minn. 518, 522, 80 N. W. 696.

burdensome. We find him referring to lack of time for further investigation or discussion in opinions which to us seem wholly adequate. When he left the bench the court was disposing of upwards of four hundred cases per year. When he went upon it, less than two hundred cases per year were on the calendars. It would be natural to assume that his earlier opinions dealt more exhaustively with the cases decided than his later ones when he was writing them more than twice as rapidly. Such is not the case however. There are no evidences of haste in the later series. Neither are there any marks of "brain fag" such as sometimes appears in the work of a man who has been employed for many years in arduous mental labor. To the very last, whenever a case out of the ordinary was assigned to him, he writes with buoyancy and evident interest. His style is as refreshing and his manner of treatment as alert and individual as ever. His opinions dealt almost wholly with cases involving private controversies. Few of great public importance came before the court while he was one of its members. There were many involving important questions of substantive law. Their decision has had a permanent influence on the jurisprudence of the state. Its framework was erected during his time. The fundamental principles of our jurisprudence having been framed, there remained the application of those principles to the ever varying facts presented by individual cases. The court had already entered upon this period in its work when he left the bench. In a way, he had completed the task he was so well qualified to do—that of giving shape to the body of the common law as it exists in this commonwealth today. In the decision of individual cases between private parties, principles of human conduct were approved or disapproved, business usages sanctioned, personal rights recognized, and a system of laws for the government of men in their relations with one another gradually built up on the solid foundation of Anglo Saxon common law. Judge Mitchell was one of the chief artificers, and how well he built is now a matter of common knowledge among lawyers, while laymen who never heard of him unconsciously enjoy the benefits of the enlightened jurisprudence he had so large a part in shaping.

Quotations from Judge Mitchell's opinions have been freely made for the reason that it has seemed that they best reveal his mind and character to those who did not know him. From them, one gets glimpses of his philosophy and his sympathies, and a

clear perception of his mental processes. However great one's admiration for him may be, it cannot but be deepened by the consecutive reading of a considerable number of his opinions. The methods of one man cannot be unconditionally recommended for the imitation of another, but young lawyers may well be guided, in dealing with legal problems, by a study of his methods. Though few men are gifted with the great natural abilities he possessed, the ordinary man may become a good lawyer or capable judge by following his practice of patient and thorough investigation of the facts and the law in each case to be dealt with, and by keeping in mind, as he did, the fact that in the pursuit of truth it is necessary to draw freely upon the learning and experience of others because of the narrowness of individual knowledge and experience.

The final factor in his successful career as a judge was the character of his associates on the bench. In this respect he was singularly fortunate. One able judge alone cannot make a great court, but when he is one of a group of able men, his and their work inevitably gains in quality, and the decisions of the court acquire a standing and authority they would not otherwise enjoy. Minnesota has produced a number of judges who ranked with the best in other states. Judge Mitchell was aware of the ability of his associates. In speaking of them at the memorial exercises for Chief Justice Gilfillan, he said:

"One of the chief inducements to my acceptance of a place on this bench, was the rare combination of talents possessed by the three judges then composing this court. There was Justice Cornell, with his remarkably clear, acute intellect, Justice Berry, with his sound judgment and great fund of practical common sense, and Chief Justice Gilfillan, with his great mental vigor and remarkable power of analysis."

His estimate, on that occasion, of Judge Gilfillan is in large measure applicable to himself. Equally applicable are the words of Chief Justice Start on the same occasion. With them, this sketch may well be concluded, for of Judge Mitchell, as well as of Judge Gilfillan, it may be truly said that:

"The special work, to which he gave long and laborious years of useful service, was the molding of the jurisprudence of our young state. To this work he brought natural abilities of a high order, the ripe experience of a learned lawyer, a keen sense of justice, an extraordinary command of the resources of reason, perfect integrity and great moral courage. His judicial opinions

are the rich fruit of that work. . . . These opinions are a monument to his fame as a jurist. That fame will widen as the years advance."

EDWARD LEES.*

*Commissioner of the Supreme Court of Minnesota.

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