THE HENNEPIN LAWYER*
JUNE 2006 4

WHEN JUSTICE MITCHELL CHANGED HIS MIND—TWICE

BY

DOUGLAS A. HEDIN

"A foolish consistency," Emerson once wrote, "is the hobgoblin of little minds."

William Mitchell, who served on Minnesota's highest court from 1881 to 1900, thought widely and deeply about the law and the place of a judge among the people. His rulings reflect a jurist who possessed considerable self-confidence. They also suggest that he had an inquisitive, even restless mind, certainly not a small one. Daniel Dickinson, who served on the court with Mitchell from 1881 to 1893, recalled somewhat ponderously this facet of his colleague's mindset in a memorial service to him in late 1900: "No well-sounding legal proposition, though familiar and current as true coin, was Justice William Mitchell accepted by him without test, whether expressed in the decisions of this or other courts, or in argument at this bar, if wanting in the true ring of reason and right. We can all recall

* This article appeared first on pages 4-5 of the June 2006 issue of *The Hennepin Lawyer*. Though reformatted, it is complete. It is posted on the MLHP with the permission of the Hennepin County Bar Association.

how often he challenged some widely current declaration of the law, and after painstaking examination demonstrated its fallacy."

In 1882, Justice Mitchell changed his mind about a mundane issue of real estate law. He announced it in dissent in a case where the majority followed an opinion he had written in another case just the year before.

In *Pamperin v. Scanlan*, 28 Minn. 345 (October 4, 1881), the Supreme Court, in an opinion written by Mitchell, held that a notice provision in a recently-enacted statute "regulating the redemption of mortgaged premises after foreclosure sale" had to be strictly followed.

This litigation appears to have arisen in part because the ambiguity of the legislation gave each side some hope of success. "The provisions of this statute are so very imperfect, and in some respects so very obscure," Mitchell complained, "that the task of construing them is one of great difficulty." He may have expected more from the legislative branch, having served in the House of Representatives in the second legislature, from 1859 to 1860. This was not the last time he objected to the poor quality of the legislature's draftsmanship. Throughout his judicial career, when an appeal required the construction of sloppily drafted statute, Mitchell made his displeasure known, sometimes so bluntly that lawyer-legislators must have winced.

One year later, the issue raised in *Pamperin* returned to the court in the case of *Parke v. Hush*, 29 Minn. 434 (October 17, 1882). Speaking for the majority, Chief Justice James Gilfillan quickly disposed of the appeal on the authority of *Pamperin*. But Mitchell dissented and openly admitted, "I never felt

entirely confident that the decision in that case was correct. Subsequent reflection only increased my doubts, and my investigation of the present case has convinced me that it was erroneous." What partially triggered his "reflection" was a recent decision of the California Supreme Court on the same topic. But he did not rest on that authority. He returned to the language of the redemption statute, which he now called "exceedingly defective," and noted that "law-makers" must have acted in awareness of certain rules of equity that predated the legislation, rules supporting his construction, And he observed that *Parke* was pending when *Pamperin* was decided and so there could not have been any reliance in the real estate market on his earlier ruling.

At the very time Mitchell was reconsidering *Pamperin*, he was having second thoughts about an evidentiary issue that recurred during this formative era of tort law—whether evidence of subsequent repairs to the site or cause of a personal injury is admissible to prove negligence. In *Kelly v. Southern Minnesota Railroad Co*., 28 Minn. 98 (July 2, 1881), Mitchell held that evidence that the defendant replaced a plank in a bridge after a horse was injured while crossing it was admissible. "Such evidence has been repeatedly held competent," he wrote. But two years later he authored *Morse v. Minneapolis & St. Louis Railroad Co*., 30 Minn. 465 (July 14, 1883), which overruled *Kelly* on this point. Other courts had reached the same conclusion on formalistic grounds, namely that "the acts of employes in making such repairs are not admissible against their principals." For his part, Mitchell turned to public policy:

> 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.

Mitchell acknowledged error in these cases under somewhat unusual circumstances. He was appointed to the court by Governor Pillsbury in mid-1881, when its membership increased from three to five. In the general election on November 8, 1881, he received the highest number of votes of the four candidates on the ballot (Daniel Dickinson, appointed by Governor Pillsbury to fill a vacancy caused by the death of Justice F. R. E. Cornell, was elected, as was Charles Vanderburgh, while Greenleaf Clark, another Pillsbury appointee, received the fewest votes). It is sometimes said, even by justices themselves, that it takes a new member of a supreme court a few terms to become comfortable deciding the complex and sometimes highly charged social, economic and quasi-political questions that come before the highest tribunal of any state. If William Mitchell went through such a period of adjustment, his decisions do not show it. His dissent in *Parke*, and his discussion of public policy in *Morse* were issued in only his second year on the court.

Other justices have commented on Mitchell's willingness to re-examine his own rulings. Following a tradition of paying tribute to its deceased members—a tradition the Supreme Court, sadly, has abandoned—Thomas Canty, who served with Mitchell from 1894 to the end of 1899, remarked in a memorial service to him October 1900, "If he came to the conclusion that a decision in which he had participated was wrong, he was always ready to overrule it or grant a re-argument." Decades later, in a study of Mitchell in the May 1920, issue of the

Minnesota Law Review, Edward Lees, a supreme court commissioner, succinctly described his approach to stare decisis: "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."

But it is something Justice Frankfurter once wrote about Robert H. Jackson that comes to mind when we consider Justice Mitchell's changes of mind so soon after being appointed to the supreme court: "To confess error was for him a show of strength, not of weakness." ■

=┼=

Posted MLHP: August 2009.