

JUSTICE WILLIAM MITCHELL

Two Addresses

BY

GUNNAR H. NORDBYE

Judge, United States District Court

FOREWORD

BY

DOUGLAS A. HEDIN

Editor, MLHP

Gunnar H. Nordbye received a recess appointment by President Herbert Hoover to a newly created federal judgeship on the district court of Minnesota on March 18, 1931. In making this selection, the President relied upon the recommendation of Attorney General William DeWitt Mitchell. Nordbye expressed his gratitude to General Mitchell at the close of an address at a ceremony dedicating a bronze statue of Justice William Mitchell, the General's father, at the William Mitchell College of Law in St. Paul on May 6, 1959. Two years later, he addressed the Winona County Historical Society on Justice Mitchell.

After Nordbye's death on November 5, 1977, at age eighty-nine, some of his official papers were donated to the Minnesota Historical Society. Though Nordbye served on the federal bench forty-six years, those papers occupy only one box, and include a file on his nom-

ination and Senate confirmation, speeches on court procedures at judicial conferences, a tribute to Judge John Sanborn, published in 44 *Minnesota Law review* 200–204 (1959), and several files of memoranda and orders on what he evidently considered one of his most important cases—litigation over ownership of the papers of William Clark, some of which pertain to the Lewis & Clark expedition.¹

One slender file contains his speeches on Justice Mitchell and “copies” of the materials he used to research and write them. These sources include an article on Mitchell by Supreme Court Commissioner Edward Lees in 4 *Minnesota Law Review* 377–401 (1920), and biographical portraits in 1 *Encyclopedia of Biography of Minnesota* 147–49 (1900) edited by Charles Flandrau, and by John E. Stryker in 1 *Bench and Bar of Minnesota* 65–71 (1904) edited by Hiram F. Stevens. When Nordbye wrote his speeches, copy machines were not readily available. Because he could not photocopy these articles, he had a member of his staff—his secretary most likely—make a typewritten copy of each one. As he composed his speeches, he could consult, for example, a typewritten copy of Lees’s complete law review article, with footnotes. This is a highly unusual way of conducting research, and is understandable only when it is recalled that at this time Nordbye had a full docket of cases, with little free time for historical research. As a result, his tributes to Justice Mitchell are unoriginal and derivative. Of course, those in the audience at the law school’s dedication ceremony in 1959 and at the meeting of the county historical society in 1961 were unaware of this.

Judge Nordbye’s two speeches on Justice Mitchell follow. They are complete. The names of court cases are underlined because that was his style in the draft of his speech in Winona.

¹ For three articles on the history of this litigation see “The Case of the Clark Papers,” 36 *Minnesota History* 216–229 (June 1959).

<http://collections.mnhs.org/mnhistorymagazine/articles/36/v36i06p216-229.pdf>

Address by Hon. Gunnar H. Nordbye, Chief Judge of the
United States District Court for the District of Minnesota, at
William Mitchell College of Law on May 6, 1959, at the
ceremony for the dedication of a bronze bust of
Justice William Mitchell

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Some years ago when I held court in New York City, I had the pleasure of having a visit with the late Augustus N. Hand, Judge of the United States Court of Appeals for the Second Circuit. When he learned that I was from Minnesota, he mentioned that I came from the State which had produced several outstanding jurists, but that the outstanding Judge, and one of the great Judges of our country, was the late Justice William Mitchell of the Minnesota Supreme Court. You will remember that in discussing the two Hands, Augustus and Learned, someone said that one should quote Augustus, but that it would be better to follow Learned. However, I am sure that Learned would share the view of Augustus as to Judge Mitchell.

Another Easterner, the late Professor Thayer of the Harvard Law School, also shared the view of Augustus Hand. In 1899 he wrote to a friend in Minnesota, and with respect to Justice Mitchell stated,

“I never met him and have no personal acquaintance with him. I know him only as a Judge whose opinions, like those of all the Judges in the country, reach me through the excellent law reports published in your State. In the course of my work at the Harvard Law School, I have long had to search carefully through these reports for cases relating to my special subject. In that way I have long recognized Judge Mitchell as one of the best Judges in this country, and have come to know also the opinion held of him by lawyers competent to pass an opinion on such a question. 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 his peer in Judge Mitchell.”

In Shearman and Redfield on Negligence, published at the turn of the century, and which was one of the standby textbooks on negligence when I began the practice of law, the authors in referring to a question on which the highest courts of the country were irreconcilable, said,

“The best statement of this rule and the reasons for it is in *Morse v. Minneapolis and St. Louis Railway Company*, 30 Minn. 465. 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.”

It is interesting to delve into the report of this railway case handed down some 76 years ago, a question of evidence arose in the trial of the case as to the admissibility of testimony regarding the repairs subsequently made by the defendant of the switch involved in the accident which was alleged to have been defective. The Minnesota Supreme Court in O’Leary v. City of Mankato, 21 Minn. 65, held that under similar circumstances such evidence was competent. The O’Leary case had been followed by other decisions handed down by the Minnesota Supreme Court. The language to which Shearman and Redfield referred was with reference to the decision of the Minnesota Supreme Court, through Judge Mitchell, overruling the O’Leary case, when in that regard 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 the employes in making 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.”

To those of us who have practiced law, taught law, or presided on the Bench in Minnesota, we need no support from other jurisdictions to confirm our opinion regarding the stature of Judge Mitchell as one of the great Judges of America, but we do take pardonable pride in the universal recognition that was bestowed upon him as one of the Nation’s great Judges.

Judge Mitchell was born in the town of Stamford, County of Welland, Province of Ontario, Canada, on November 19, 1832. His parents, John Mitchell and Nary Henderson, were natives of Scotland. John Mitchell was a farmer. Young Mitchell lived on the farm until he was about 16 years of age, when he came to the United States and entered Jefferson College, Cannonsburg, Pennsylvania, and was graduated from that institution in the Class of 1853. He taught two years in an Academy at Morganstown, Virginia, now West Virginia. He read law for two years in the office of Edgar Wilson of Morgantown and was admitted to the Bar of Virginia in the Spring of 1857. In April, 1857, he came to Minnesota and located at Winona, where he began the practice of law. He served in the Second Minnesota Legislature in the sessions of 1859 and 1860. Subsequently, he was elected County Attorney of Winona County for one term. It was in the Fall of 1873 that he was elected Judge of the then Third Judicial District and took his seat in January, 18th, for a term of seven years. He was re-elected

in the Fall of 1880 and was on the District Bench until March, 1881, when he, a Democrat, was appointed by Governor Pillsbury, a Republican, as one of the Judges of the Minnesota Supreme Court. Judge Mitchell was originally a Republican, but became dissatisfied with some of the reconstruction measures and policies of the Party during the administration of President Johnson. In 1867 he became a self-styled Independent Democrat. However, his career thereafter would indicate that he was never an active Democrat in the political sense.

It has been said that Judge Mitchell as a lawyer was not too happy in his career. He was not an advocate or a man gifted with the oratorical powers which seemed so necessary in order to make one a trial lawyer in those early days. But with his superiority in the knowledge of the law, his innate honesty and high character, he was a successful practitioner. However, it was as a trial Judge that his real worth became apparent. His patience with the Bar and the litigant, his fairness, his humbleness, the clarity of his rulings and decisions, brought to him the profound respect and esteem of the Bar and the public of the District which he served. But it is Judge Mitchell's career on the Supreme Court of Minnesota, where for 19 years he was an Associate Justice of that Court, that will be remembered forever by the Bar of this State and the Nation.

The late Newton D. Baker, an eminent lawyer and Secretary of War in World War I, once gave his understanding of a great Judge. He said,

“He must be a man of learning who spends tirelessly the weary hours after midnight acquainting himself with the great body of traditions and the learning of the law. ...

“A man who bears himself in his community with friends but without familiars; almost lonely, devoting himself exclusively to the most exacting mistress that man ever had, the law as a profession in its highest reaches, where he not only interprets the law but applies it, fearing neither friend nor foe, fearing

only one thing in the world — that in a moment of abstraction, or due to human weakness he may in fact commit some error arid, fail to do justice.”

But merely to recite these qualifications which a man on the Bench must have in order to be a good Judge, all of which attributes were so fully demonstrated in Judge Mitchell’s life, does not give us a true picture of this great jurist. He possessed the quality of mercy and understanding. He had a deep sympathy for those who earn their living by the sweat of their brow and was ever zealous that their rights should be guarded and defended. To protect the poor, the defenseless, and the weak, was in his mind the first duty of the State. And although he was a man of great learning and erudition, he exhibited the utmost humbleness and self-abnegation in his relations with those with whom he associated. Emerson said, “Nothing is more simple than greatness. Indeed, to be simple is to be great.”

It is said that he was not a forceful man in the sense that he could be a leader in any crusade or conflict. Rather, he would avoid a clash if he could and was always ready to forgive and forget. These characteristics of humbleness, his thoughtfulness for his fellow men, coupled with a keen and discerning understanding of human frailties, motivations and ambitions, rendered him peculiarly able to reflect in his opinions an unusual insight and understanding of the many facets which make up the lives of men. He was indefatigable in his search after truth. It has been said of him that “no well-sounding legal proposition, though familiar and current as true coin, was accepted by him without test, whether expressed in a decision of the Minnesota Supreme Court or other courts * * if wanting in true ring of reason and right.”

He was utterly devoid of pride of opinion, and if he ever came to the conclusion that any decision which he had rendered or in which he had participated was wrong, he was quick to vote for reargument and to over-ride that which had been done by the Court. He was a man of

profound scholarship in the law and gifted with the knowledge and meaning of the value of words with which he could set forth his legal views in a manner and quality of expression which rendered his opinions models for conciseness and lucidity.

Judge Mitchell's opinions are to be found from Volume 27 of the Minnesota Reports to and including Volume 78. During his tenure on the Court, he wrote some 1,500 opinions. No greater or more enduring monument can a man have than the great contribution he made to American jurisprudence in these 52 volumes of the Minnesota reports.

It is now nearly 59 years since Judge Mitchell passed away. It has been said that a Judge's career should not be appraised until the end of his life's work, and then only by the norm of his generation and his country. When he passed away on August 21, 1900, his colleagues on the Bench and Bar, and the State at large, universally mourned the loss of one of their most distinguished citizens, and now over a half century later, we revere him not only as one of Minnesota's greatest and most distinguished citizens but also as one of the great Judges of this State and Nation.

During the years he served on the Supreme Court Bench, this State went through its formative years when the basic decision law was being declared. Contracts, boundary line disputes, chattel and real estate mortgage litigation, negotiable instruments, eminent domain, landlord and tenant, principal and agent, vendor and purchaser, pleadings, practice and evidence, consumed the Court's attention. Negligence cases were relatively few. The State was evolving from a pioneer agricultural society into the industrial era which became more pronounced at the turn of the century. It was with reference to these basic principles in our jurisprudence that Judge Mitchell made such a marked contribution to the law.

His contemporaries always mentioned his simple, unaffected ways, his fairness, his modesty, and the crystal clearness of his legal reasoning. He led a quiet and unassuming life in his beloved city of Winona. He was not the type of man who was attracted by traveling, or to vacation in distant parts of our Nation. Rather, his interest was in the civic affairs of Winona, his family and his books. But with respect to his reading, other than the law, it is quite probable that he at times followed the pattern referred to by an Italian lawyer, Piero Calamandrei, who wrote a book entitled "Eulogy of Judges" and with respect to the diversion of Judges, stated,

"Just as to divert themselves with exciting adventures, far removed from the monotonous routine of daily existence, the middle classes like to read detective stories or to see lurid melodramas, so the judge seeks in the theater or in novels happenings which contrast sharply with his daily existence. He likes pictures of loving spouses superimposed on pink and blue backgrounds, brothers who amicably divide their inheritances, merchants who do not go bankrupt, and landowners who meet on their common boundary to express with tears in their eyes their mutual joy at being neighbors."

His love for flowers and trees was one of his main hobbies. He imported rare plants and bulbs, the cultivation and growth of which greatly intrigued him and from which he obtained great enjoyment. And what a wonderland of nature he had at his door step in the charming hills surrounding the City of Winona where he lived for almost half a century,

At the memorial exercises in memory of Associate Justice Mitchell held by the Supreme Court on October 2, 1900, Chief Justice Start concluded, in part, with these words, which so aptly summarized the qualities of the man whose departure the State mourned.

"Gentlemen of the Bar: Your memorial is a just and merited tribute to the learning and worth of Justice Mitchell, and aptly

expresses our own estimate of his character and public services. He was a great lawyer and a great judge, but he was more, he was a great man. His life was an open book with no sealed or impure pages, He was a modest man. His sail was never bigger than his boat. His manner was direct, simple and unaffected. He was a man of the best abilities and of the weightiest character. His mental grasp was clear and incisive, his impulses honorable, his aims lofty, and his love of justice and truth supreme. * * * He never prated of duty and conscience, but he was absolutely loyal to both, and fearlessly did that which he believed to be right regardless of consequences to himself. He achieved success without elation, and accepted defeat with equanimity. His simplicity of character, his practical and sturdy common sense, his profound knowledge, his genial humor, and his tactful kindness made him a delightful companion and a most valued friend.”

And in closing, may I be pardoned if I do so with a personal note. Obviously, I was too young to have known Judge Mitchell. He finished his tenure on the Supreme Court Bench when I was a lad of some 12 years. But some thirty years ago it was due to the unswerving, steadfast loyalty of Judge Mitchell’s only son, a great lawyer and a great statesman, the late William D. Mitchell, Attorney General under President Hoover, that I am permitted tonight to be designated on this program as a Judge of the United States District Court of the District of Minnesota, It is therefore with sincere pleasure and pride that I have the opportunity to be with you and participate in this memorable occasion when the bust of Judge Mitchell is presented to the William Mitchell College of Law by his grandson, William Mitchell.

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Address by Hon. Gunnar H. Nordbye, Chief Judge
of the United States District Court for the District of
Minnesota, to the Winona County Historical Society
on January 17, 1961, on Justice William Mitchell

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Nearly one hundred and four years ago, two young lawyers from Virginia came up the Mississippi River on a steamboat to a small settlement which two years before had been known as Montezuma, but in April of 1857 was known as Winona. When our two young adventurous Easterners disembarked at Winona, the population was possibly some three thousand inhabitants. Spring, with its Minnesota freshness and beauty, was undoubtedly evident everywhere as the steamboat loaded with passengers laboriously churned the swift and murky waters of the Mississippi. The stately virgin hills clothed in the budding colors of Spring must have been an inspiring sight to those who crowded forward on the boat for an early view of their future home. Particularly must this have been true as to the two young lawyers from the East destined to hang out their shingle in this newly built town on the spacious plateau, not far from the site of Maiden's Rock steeped in the legend of the Indian maiden "Winona".

On the editorial page of the *Winona Republican* of July 7, 1857, three months after their arrival, appeared this auspicious item:

"Attention is invited to the card of Messrs. Wilson and Mitchell, attorneys at law. Mr. Wilson enjoys a high reputation professionally and socially, and we presume his associate is equally worthy."

The Mr. Wilson referred to in this item was Eugene M. Wilson, of Morgantown, Virginia, the son of Edgar C. Wilson, a lawyer of that city

in whose office William Mitchell read law for two years and thereafter was admitted to the Bar of Virginia in the Spring of 1857.

Although Winona had just gone through a boom during which city lots were sold at extravagant prices, with the expectation that re-sales could be made immediately for handsome profits, the result was that most local people had a great deal of real estate but no money. The two young lawyers, however, weathered the adversities of the boom's collapse, and surprisingly, young Mitchell apparently had not lost faith in the future of his new home in that in September of that same year of 1857, he married Miss Jane Hanway Smith, of Morgantown, Virginia, and she became a Winonan in the Fall of that year.

The young man whom the Winona Republican presumed to be equally worthy with the better known Virginian, Eugene L Wilson, was born in Stamford, County of Welland, Ontario, not far from Niagara Falls, on November 19, 1832. His parents, John Mitchell and Mary Henderson Mitchell, were natives of Scotland. John Mitchell was a farmer, and young Mitchell lived on the farm until he was about sixteen years of age. When he came to the United States, he entered Jefferson College, at Canonsburg, Pennsylvania. He was graduated from that institution in the class of 1853. He taught school at an academy at Morgantown, Virginia, now West Virginia, for two years. After being admitted to the bar in 1857, he and young Wilson set forth from Morgantown to seek their fortune in the West.

As we attempt to look back and visualize the early beginnings of these two young lawyers, it must be evident that the time was not a propitious one for their arrival. Not only had the Winona boom collapsed, but the year 1857 was a dismal one for the entire State. And in 1862,

Winona was visited by a fire that swept clean its entire business section, and many presaged the death of the young city which nestled

so attractively along the stately bluffs of the Mississippi. Although young Wilson left for Minneapolis a few years thereafter, Mitchell stayed and prospered in a modest way. He served in the second State Legislature in the sessions of 1859 and 1860. He served one term as County Attorney. In 1863 and 1864 he represented his ward on the City Council. He was director of the Public Library, Trustee of the Cemetery Association, and 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. He was the first President of the Winona & Southwestern Railroad Co., when it was organized in 1872. Likewise, he was the first President of the Winona Savings Bank organized in 1874. After some four years of existence, an unusual incident in early banking history took place. The depositors were notified by the bank officials to withdraw their deposits, and by July 1, 1879, they were paid in full, principal and interest.

Three daughters were born to the Mitchells. In September of 1867, Mrs. Mitchell died, and in July of 1872, the widower married again, another Smith, a Mrs. Frances H. Smith, of Chicago, formerly of Dubuque, Iowa. There were born to the second marriage two children, the surviving son being William DeWitt Mitchell, a long time attorney of St. Paul, and who became Attorney General of the United States under President Hoover.

It was in the Fall of 1873 that William Mitchell was elected Judge of the then Third Judicial District and took seat in January, 1874, for a term of seven years. He was re-elected in the Fall of 1880 and was on the District Bench until 1881, when he, a Democrat, was appointed by Governor Pillsbury, a Republican, as one of the Judges of the Supreme Court. Judge Mitchell was originally a Republican, but he became dissatisfied with some of the reconstruction measures and policies of the party during the administration of President Johnson. It was in 1867 that he became a self-styled independent Democrat. However,

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His contemporaries always mentioned his simple, unaffected ways, his fairness, his modesty, and the crystal clearness of his legal reasoning. He led a quiet and unassuming life in his beloved city of Winona. Physically, Judge Mitchell was tall and slight in stature. His face was bearded. In demeanor he was quiet and dignified and may at times have given the impression of austerity, but he had a delightful,

sweet smile which illuminated his face and his deep-set eyes whenever he was engaged in conversation. He was not the type of man who was attracted by traveling or vacationing in distant parts of our Nation. Rather, his interest was in the civic affairs of Winona, his family and his books. But with respect to his reading, other than the law, it is quite probable that at times he followed the pattern referred to by an Italian lawyer, Piero Calamandrei, who wrote a book entitled "Eulogy of Judges" and with respect to the diversion of Judges, stated,

"Just as to divert themselves with exciting adventures, far removed from the monotonous routine of daily existence, the middle classes like to read detective stories or to see lurid melodramas, so the judge seeks in the theater or in novels happenings which contrast sharply with his daily existence. He likes pictures of loving spouses superimposed on pink and blue backgrounds, brothers who amicably divide their inheritances, merchants who do not go bankrupt, and landowners who meet on their common boundary to express with tears in their eyes their mutual joy at being neighbors."

His love for flowers, trees and outdoor life was his main hobby. He imported rare plants and bulbs, the cultivation of which greatly intrigued him and from which he obtained a great deal of enjoyment. And what a wonderland of nature he had at his doorstep among the charming hills surrounding Winona, where he lived for almost a half century. During those years he lived comfortably but simply. It is said that those who visited his home were met with the genuine hospitality characteristic of the early days and with the innate courtesy and cordiality which were peculiarly his own. His home life meant so much to him that when he was on the Supreme Court sitting in St. Paul, it was his weekly practice to make trips home for every weekend. When the demands of his gardening duties permitted, he would hike away to the many small streams around Winona which then teemed with brook trout, and on many a spring and summer day he would faithfully trudge the banks of the trout streams, and proud he was

when his creel was filled. And the Mississippi River, with its swift waters and the fighting small-mouth bass likewise afforded him great relaxation and enjoyment.

After he became an Associate Justice of the Supreme Court, he was re-elected to that office at succeeding elections as nominee of both political parties. Unfortunately for the State, however, in the election of 1898, judicial offices were dragged into politics. Judge Mitchell was nominated at the Convention of the Democratic Party and even received some 300 votes at the Republican Convention, but failing to receive the Republican nomination, his opponent nominated by that party became the successful nominee.

It is interesting to note that when Professor Thayer, of the Harvard Law School, learned of the failure of the Republican Party to nominate him, he wrote to a prominent attorney in Minneapolis on September 2, 1898, as follows:

“I am astonished to hear that there is doubt of the re-election of Judge Mitchell to your Supreme Court. I wish the people of Minnesota knew the estimate that is put upon him in other parts of the country, and there could be no doubt about it then.

“I never saw him and have no personal acquaintance with him. I know him only as a judge whose opinions, like those of all the judges in the country, reach me through the excellent law reports published in your State. In the course of my work at the Harvard Law School I have long had to search carefully through these reports for oases relating to my special subjects. In that way I have long recognized Judge Mitchell as one of the best judges in this country, and have come to know also the opinion held of him by lawyers competent to pass an opinion on such a question.

“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 his peer in Judge Mitchell. * * * Pray do not allow your State to lose the services of such a man. To keep him on the bench is a service not merely to Minnesota, but to the whole country and to the law. Your State it is that is on trial now before the country. The question is: Can Minnesota appreciate such a man? Is it worthy to have him? I am not going to believe that a State which can command the services of one of the few judges in the country that stand out among their fellows as pre-eminent, that give it distinction, will refuse to accept those services. You lawyers of Minnesota must not let party politics work any such result. Surely the bar can prevent it if they will.”

And on November 2, 1898, the Republican “Pioneer Press” in St. Paul published the following editorial:

“Judge Mitchell was the one man on the Supreme Bench that could least be spared. He was put there originally by appointment of Governor Pillsbury seventeen years ago, both because of the high reputation he had gained as a District Judge, and also because he was a Democrat, it being the strong desire of Governor Pillsbury to satisfy the prevailing public sentiment in favor of a non-partisan judiciary. * * * Appointed originally by a Republican Governor, he has been three times nominated by the concurrent action of the state conventions of both parties and elected by the unanimous vote of the electors of all parties. And this not only because he has represented the principle of non-partisanship in the judiciary, but because of his exceptionally high standing and reputation as a judge; because he united the intellectual and moral qualities — the ability, learning and acuteness of a great jurist with the purity and unbending integrity of an honest man which constitute the ideal judge. Without disparagement to other judges on the

bench, it is safe to say that, in the general opinion of the Bar, there is none of Judge Mitchell's associates on the bench, and none who have been nominated on either ticket, who could not be far better spared than he. * * * ”

But the strong majority of Republican voters in Minnesota, following the strict party line, voted out of office this great jurist regarding whom it is said that “he received success without elation and accepted defeat with equanimity.” After his defeat, he retired to his home in Winona on January 1, 1900, and passed away less than a year thereafter.

In the retrospect, as we view the many contributions Judge Mitchell made to the stability and progress of the law in our State, one is impressed with the foresight and sagacity with which he viewed the many problems which confronted the people of our State. The encroaching power of the State to regulate and regiment our lives and businesses under the guise of the police power of the State gave him concern. In Rippe v. Becker, 56 Minn. 100, the question involved the constitutionality of a legislative act which authorized the erection of a state elevator or warehouse at Duluth for public storage of grain. Without discussing here the particular constitutional question involved in that decision, which was handed down in 1894, the views of Judge Mitchell as to the police power of the State were provocative and timely. In determining that the statute was invalid, he stated, in part,

“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 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 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.”

And his views as to the relationship of capital and labor are particularly illuminating in that these questions are now continuously before the courts, but of course great changes have appeared in legislation and in the decisions of our courts regarding these questions since the days of Judge Mitchell. In Bohn Mfg. Co. v. Hollis, 54 Minn. 223, the question before the court involved the legality of an agreement and the actions thereunder of a voluntary association of retail lumber dealers who mutually agreed that they would not deal with any manufacturer or wholesaler who would sell lumber directly to consumers at any point where any member of the association was carrying on the business of a retail yard. An injunction was sought to prevent the secretary of the retail association from sending a notice of a violation to the members of the retail association with the intent that such retailer should refrain from doing business with the

offending wholesaler. Some of Judge Mitchell's views in that case in denying the injunction appear in the following excerpt:

“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 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 consideration, may agree to exercise jointly, and make simultaneous declaration of their choice.”

An interesting sidelight regarding Judge Mitchell's views of the Sunday laws is found in State v. Petit, 74 Minn. 376. It appears that the Minnesota legislature had passed a statute which provided:

“All labor on Sunday is prohibited, excepting the works of necessity or charity. In works of necessity or charity is included whatever is needful during the day for good order, health or comfort of the community; provided, however, that keeping open a barber shop on Sunday for the purpose of cutting hair and shaving beards shall not be deemed a work of necessity or charity.”

The constitutionality of the Act was questioned on two grounds: (1) That the whole act was invalid in that it was not within the police power of the State to prohibit any kind of labor or business on Sunday which did not interfere with the peace and good order of the community; and (2) it was contended that the Act was invalid as being class legislation. The following are some of the excerpts of the decision written by Judge Mitchell in concluding that the Act was valid:

“So-called Sunday legislation has, with many persons, and occasionally even with courts, been the subject of adverse criticism, as an unwarranted interference with that freedom of religious belief and practice which is guaranteed to every man by the constitution. These criticisms proceed upon an entirely erroneous theory as to the object of such legislation.

“In some states it has been held that Christianity is part of the common law of this country, and Sunday legislation is upheld, in whole or in part, upon that ground. Even if permissible, it is not necessary to resort to any such reason to sustain such legislation. The ground upon which such legislation is generally upheld is that it is a sanitary measure, and as such a legitimate exercise of the police power. It proceeds upon the theory,

entertained by most of those who have investigated the subject, that the physical, intellectual and moral welfare of mankind requires a periodical day of rest from labor, and, as some particular day must be fixed, the one most naturally 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 rest and recreation, as this causes the least interference with business or existing customs.

“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.”

One could continue on and on with quotations from Judge Mitchell’s decisions which reflect his keen insight and, his sound understanding of the many problems which confronted our State in its formative years. But I know of no better way of summarizing the contributions to our State and posterity than to quote from the eulogy of Chief Justice Start at the memorial exercises held in memory of Judge Mitchell in October 1900. He said,

“Gentlemen of the Bar: Your memorial is a just and merited tribute to the learning and worth of Justice Mitchell, and aptly expresses our own estimate of his character and public services. He was a great lawyer and a great judge, but he was more, he was a great man. His life was an open book with no sealed or impure pages. He was a modest man. His sail was

never bigger than his boat. His manner was direct, simple and unaffected. He was a man of the best abilities and of the weightiest character. His mental grasp was clear and incisive, his impulses honorable, his aims lofty, and his love of justice and truth supreme. * * * He never prated of duty and conscience, but he was absolutely loyal to both, and fearlessly did that which he believed to be right regardless of consequences to himself. He achieved success without elation, and accepted defeat with equanimity. His simplicity of character, his practical and sturdy common sense, his profound knowledge, his genial humor, and his tactful kindness made him a delightful companion and most valued friend.”

In closing, may I be pardoned if I do so with a personal note. Obviously, I was too young to have known Judge Mitchell. He finished his tenure on the Supreme Court bench when I was a lad of some twelve years. But some thirty years ago, it was due to the unswerving, steadfast loyalty to me of Judge Mitchell’s only son, the late William DeWitt Mitchell, a great lawyer and a great statesman and Attorney General of the United States, that President Hoover appointed me a Judge of the United States District Court of the District of Minnesota. And singularly, I was in Winona when I first received word of my assured confirmation by the Senate. It is therefore with sincere pleasure that I have the opportunity to be with you and participate in this occasion which has been set aside by the Winona Historical Society as an evening dedicated to the memory of one of your great sons. ■

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