

Memorial on William DeWitt Mitchell

Prepared for the
Association of the Bar of the City of New York
by Edward Everett Watts, Esq.

William DeWitt Mitchell, former Attorney General of the United States and for a long time one of the leaders of the American Bar, died at his home at Upper Brookville, Long Island, on August 24, 1955, after an illness of several months. He was in his eighty-first year. At the time of his death, Mr. Mitchell was senior member of the New York City law firm known as Mitchell, Capron, Marsh, Angulo & Cooney.

Mr. Mitchell became a member of this Association in 1933 and served as its President from 1941 to 1943. During the course of his membership he also was a member of numerous Association committees, including the Executive Committee from 1935 to 1939 and again from 1941 to 1943.

Mr. Mitchell was born in Winona, Minnesota, on September 9, 1874. He was the son of Judge William Mitchell of the Minnesota Supreme Court and Frances Merritt Mitchell. His father has been referred to by the Harvard Law Review as one of the twenty state supreme court justices who have achieved all-time eminence.

Mr. Mitchell attended Minnesota public schools, Lawrenceville school, Sheffield Scientific School at Yale and the University of Minnesota, where he received his A.B. in 1895 and his LL.B. in 1896. Before turning to the law he seriously considered an engineering career. As a boy he thought he would like to be a telegraph lineman. Later he told a friend: "The subject of electricity shocked most of my thoughts. I

built telegraph keys and most of the time my pockets were filled with screws and wire.”

Before completing his legal studies Mr. Mitchell lost his mother. Thereafter he and his father lived in particularly close companionship, having “absorbing common interests, not the least of which were fishing and the law”. Justice Mitchell was a great angler and together they fished in every part of the country.

Mr. Mitchell was admitted to the Minnesota bar in 1896 and took a law clerkship in St. Paul with Stringer & Seymour. During the Spanish–American War he served as line officer of the 15th Minnesota Volunteer Infantry, later acting as judge advocate for the United States Second Army Corps. Upon his return to civilian life he went back to the law and soon entered into partnership with his father, who had retired from the court. After his father’s death and several changes in his partnership arrangements, Mr. Mitchell became a partner of the late Carl Taylor in the St. Paul firm of How, Taylor & Mitchell. (In 1905 Mr. Taylor left Minnesota, thereafter becoming a member of the New York firm of Byrne, Cutcheon & Taylor. In 1927 after a “merger”, Mr. Taylor became senior partner in Taylor, Blanc, Capron & Marsh, to which firm Mr. Mitchell came in 1933 after his service in Washington).

Mr. Mitchell was, in 1900, secretary of the First Charter Commission of St. Paul. In 1901, he married Gertrude Bancroft, of Boston and St. Paul, who was an organizer of the St. Paul Community Chest and served on the national board of the YWCA and, as a Colonial Dame, on the Board of Regents for Gunston Hall. Mrs. Mitchell died in 1952. They are survived by two sons, William and Bancroft, and by three grandchildren.

In 1914 and 1915, Mr. Mitchell was president of the Ramsey County (Minnesota) Bar Association. In World War I, he was colonel for the Sixth Infantry of the Minnesota National Guard and later served at

Camp Taylor, Kentucky. In 1919, President Wilson appointed him Regional Counsel for the United States Railroad Administration. In 1922, he was chairman of the Citizens Charter Commission of St. Paul. During this "St. Paul period" he served many important clients. When he left that city in 1925, his firm was known as Mitchell, Doherty, Rumble, Bunn & Butler.

One of his St. Paul partners, for seventeen years, was the late Pierce Butler, who in 1923 became a Justice of the Supreme Court. When it was suggested at about that time that Mr. Mitchell's name be proposed for a vacancy on the United States Circuit Court of Appeals, he replied that the only federal post that really interested him was that of Solicitor General. He had no thought that the position would ever be offered to him but merely, as usual, spoke his mind.

Although he sometimes described himself as a "congenial old-line Democrat", Mr. Mitchell in 1925 was appointed Solicitor General of the United States by President Coolidge. Before accepting, he stipulated that his representation of the Government in court should be limited to those cases in which he was satisfied that the Government's position was just. After his appointment, Solicitor General Mitchell, or subordinates acting under his direction, on thirty-four occasions advised the Supreme Court that in their opinion the lower courts had erred in rendering decisions in favor of the Government; in all but one of these cases the Supreme Court thereupon reversed.

Mr. Mitchell conducted the litigation of the United States Government with such outstanding ability, fairness and success that the justices of the Supreme Court did the somewhat unusual thing of urging upon President-elect Hoover his appointment to the office of Attorney General.

As Attorney General, he served with distinction from 1929 to 1933 in the Cabinet of President Hoover. In 1930, administration of the unpopular prohibition act was transferred from the Treasury to the

Justice Department and that heavy burden was added to the customary duties of the Attorney General. It was conceded by the Eighteenth Amendment's friends and foes alike that he handled this difficult assignment with outstanding integrity and ability. His administration of the Justice Department was also marked by firm but fair enforcement of the anti-trust laws.

During Mr. Mitchell's administration as Attorney General, there were chiseled into the wood paneling outside the Attorney General's offices the following words, well stating the principle he followed in government service:

"THE UNITED STATES WINS ITS POINT WHENEVER
JUSTICE IS DONE ITS CITIZENS IN THE COURTS"

As Attorney General Mr. Mitchell had as one of his duties the task of selecting and recommending to the President from time to time candidates for appointment to the federal judiciary. In 1932, following the retirement from the Supreme Court of Oliver Wendell Holmes, President Hoover, acting with the full approval of the other officials or the Department of Justice, asked Mr. Mitchell to take the vacant post on that Court. Although he considered appointment to the Supreme Court the highest honor that could come to any lawyer, Mr. Mitchell replied that he felt that the bar generally hoped for the appointment of the Chief Judge of the New York Court of Appeals, Benjamin N. Cardozo, and that he himself felt that Judge Cardozo was the man who should be appointed. As usual in such matters, President Hoover followed Mr. Mitchell's advice.

As already mentioned, in 1933 Mr. Mitchell rejoined in New York his former St. Paul partner, Carl Taylor, their firm then becoming Mitchell, Taylor, Capron & Marsh. Previous "seniors" of the firm (and its chain of "predecessor firms") include a number of others who served this Association: Charles B. Hunt, Secretary of the Association in 1872, who headed a predecessor partnership in 1851; Judge Charles

Pinckney Kirkland, whose Memorial in the 1884 Year Book is one of the earliest in the Association's records; Herbert B. Turner, one of the founders of this Association in 1869 (senior partner for over thirty years); and Frederick Geller, who was Chairman of the Association's Executive Committee in 1919.

In 1934 the United States Supreme Court designated Mr. Mitchell chairman of its Advisory Committee which formulated the Federal Rules of Civil Procedure, adopted in 1938. It has been said that the adoption of these rules constituted the greatest single improvement in federal practice and procedure since the creation of the federal courts. Mr. Mitchell served as chairman of that committee from the date of its formation until his death.

Among the many important clients that Mr. Mitchell served as a private lawyer were the British and American governments and The United Nations.

In 1933, he successfully represented the British government in the re-argument in the United States Supreme Court of Factor v. Laubheimer, 290 U. S. 276, involving the construction of certain treaties and the right to secure extradition. Later he served the British government as expert witness on United States law in litigation in London involving the gold clause. An episode from that case perhaps may be mentioned. After Mr. Mitchell had testified, one of Britain's leading barristers took over the cross-examination. At his request, Mr. Mitchell identified a book as one containing official U. S. Supreme Court reports. The barrister thereupon read from it several legal propositions directly contrary to the statement of law just announced by Mr. Mitchell. The witness, taken by surprise, asked to see the book, and immediately saw the trouble. He proceeded deliberately, however. As he slowly turned the pages, he sensed in the quiet courtroom a growing undercurrent of sympathy for the "expert" who had been caught insufficiently prepared. At last, quietly and tactfully, he explained that the learned barrister had made a mistake, natural

enough for one not familiar with American reports; he had been reading the syllabus of the argument advanced on behalf of the unsuccessful litigant not the Court's decision! The cross-examiner, thoroughly embarrassed, had no further questions.

Mr. Mitchell achieved substantial success as a retriever of lost causes. He was successful in having the Black Tom case reopened by the Mixed Claims Commission and in securing a substantial award for the American claimants. He argued the case both before the international commission and in the U. S. courts (see Z. & F. Assets Corp. v. Hull, 311 U.S. 470). The late Robert T. Swaine wrote that the "successful conclusion of the case after so many reverses and discouragements, its colorful character and wide range of evidence and points of law mark it as the most spectacular of all international claim litigations. Swaine also observed that "in size of recovery" (about \$25,000,000) and "in duration of litigation" (about 24 years) it "far exceeded the Alabama claims after the Civil War" (Swaine: "The Cravath Firm", II p. 693-4).

In the celebrated patent litigation between Swan Soap and Ivory Soap, Lever Brothers Co. v. Procter & Gamble. et al., 139 F. 2d 633, Mr. Mitchell was enlisted by Lever Brothers when all appeared lost, but he turned the threatened rout into an important victory. Many considered his similar "Sheridan's Ride" in the case of Paramount Publix v. American Tri-Ergon (1935), 294 U. S. 464, even more noteworthy. When Mr. Mitchell was retained, the Supreme Court had already denied his client's certiorari petition. Upon Mr. Mitchell's somewhat unusual application for rehearing, the Supreme Court concluded to take another look. The other side thereupon retained George Wharton Pepper, who mentions the case in "Philadelphia Lawyer". Senator Pepper and his colleagues satisfied themselves "that the decision appealed from was sound" but he reports "We never had a chance; the case had been in effect decided when the petition for rehearing was granted."

Mr. Mitchell's last Supreme Court argument was in the Florida East Coast case, a railroad reorganization, decided April 5, 1954, 347 U. S. 298, in which Mr. Mitchell secured a 4 to 3 reversal.

During World War II, President Roosevelt designated Mr. Mitchell to represent the Government in an investigation involving a possible leak to certain newspapers of Navy Department confidential information on matters of high strategic importance affecting the national security.

Later in September 1945, the Joint Congressional Committee investigating the Pearl Harbor disaster unanimously selected Mr. Mitchell as its chief counsel. The New York Times reported that the procedure agreed upon by the interested government agencies gave Mr. Mitchell full access to all departmental records, to those of the Joint Chiefs of Staff and to President Roosevelt's papers at Hyde Park. On December 14, 1945 Mr. Mitchell resigned because of the delaying tactics of members of the committee and also because he had not been permitted to present evidence he thought pertinent.

In 1951 the Law School of the University of Minnesota conferred on Mr. Mitchell its first award for outstanding achievement. The certificate of commendation referred to him as a "practitioner and public servant of rare modesty, integrity, and scrupulous regard for high ethical standards". It said that he was acclaimed by many as "our country's leading appellate lawyer" and that his "incisive intelligence and searching clarity have brought honor to his profession and to himself". He also received honorary LL.D. degrees from Yale (1929), Williams (1930) and Michigan (1931). The Yale citation is typical:

"He is an ornament to the legal profession,
a barrister wise in counsel, skillful as
an advocate, and upright in character".

In December 1952, Mr. Mitchell was a member of what the New York

Times described as “a panel of three jurists of international repute” employed by The United Nations to pass upon problems raised by the refusal of some members of its staff to testify on the subject of their Communist affiliations,

For many years he served as trustee of the Mutual Life Insurance Company of New York. He was a member of the executive committee of The Pilgrims. From 1925 to 1929 he was a member of the Central Committee of the American Red Cross and also was its counselor.

Mr. Mitchell was an ardent amateur golfer. For a time he played in the low 70's, and he was a member of a team of senior golfers which represented the United States in a series of international matches.

His clubs included the University Club, Century Association and Down Town Association, of New York; the Piping Rock Club and the Garden City Golf Club, of Long Island; the Metropolitan Club and the Burning Tree, of Washington; also the Somerset Club, University Club and White Bear Yacht Club, of St. Paul.

He was for many years a member of the Council of the American Law Institute. He also was a member of the American and New York State Bar Associations, the New York County Lawyers Association, the American Judicature Society, the Spanish War Veterans and the American Legion.

When Mr. Mitchell's portrait was presented to the Minnesota Historical Society several years ago, the speaker of the day said, among other things:

“The qualities of successful advocates vary * * Mr. Mitchell * * is not of the type to move juries, nor does he rise to great heights of eloquence. Rather he is the intellectual type, the perfectionist, appealing to reason and at his best before appellate tribunals where his manner is

calm and self-possessed, his exposition temperate, and his arguments possess the power which moderation and balance give. His special quality is his searching, accurate and lucid intelligence and clarity of thought which penetrate to the ultimate and exact truth of the matter in hand and discern everything which may make it intelligible and probable to the general mind of the court.”

The New York Herald Tribune, in reporting Mr. Mitchell’s death, stated that he had been called “one of the half-dozen best legal minds in the nation.” Whether that is an understatement, it is clear (using the language of the Yale citation) that the bar of this city has lost a major ornament. □

A carbon copy of this address is filed in Box One of the William D. Mitchell Papers at the Minnesota Historical Society. A date —10/7/55— is typed in the upper left hand corner of the first page, and that probably is the date it was delivered by Mr. Watts at a meeting of the New York Bar Association. His spelling, punctuation and citation style are not changed.

For a related article, see the Address of Attorney General Mitchell on December 20, 1932, in “Dedication of the St. Paul City Hall-Ramsey County Courthouse” 35-44 (MLHP, 2012). ■

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