

THE
PENNSYLVANIA MAGAZINE
OF
HISTORY AND BIOGRAPHY.

VOL. XL.

1916.

No. 1.

HON. JAMES TYNDALE MITCHELL, LL.D.,

SENIOR VICE PRESIDENT OF THE HISTORICAL SOCIETY OF PENNSYLVANIA;
LATE CHIEF JUSTICE OF THE SUPREME COURT OF PENNSYLVANIA.

BY HON. HAMPTON L. CARSON.

Mr. President, Fellow Members of the Historical Society, and Distinguished Guests of the Bench and Bar:

We have met tonight to do honor to the memory of one who for nineteen years was our Senior Vice President—from November 12, 1896, to July 4, 1915—and who for fifty-five years was in close personal and official relationship to our active work. Beginning with a life membership in 1859, when he was but twenty-five years of age, he was elected a member of the Council in 1881, becoming President of the Council in 1883, and holding that office until his death; filling acceptably, as manifested by successive re-elections, one of the Vice Presidencies of the Society until, through the deaths of Judge Craig Biddle and Dr. Henry Charles Lea, he attained seniority in 1896, becoming at the same time a Trustee of the Gilpin Library. During all these years he was in hearty sympathy with our purposes, and by generous gifts added substantially to our treasures.

VOL. XL.—1

A profound student of the history of Pennsylvania, particularly in the department of biography, he was one of the few who brought to the illumination of his work the taste and the knowledge of a collector of prints, manuscripts, autograph letters and pamphlets, and that accurate familiarity with the details of our development as a Commonwealth which such an amiable mania is sure to bestow. He exploited no theories, he defended no vagaries, he chased no rainbows, but reached his historical conclusions after cautious examination of the facts and a skilful and critical comparison of the most approved authorities. His views rested upon a basis which the majority of scholars would accept as sound and sane.

James Tyndale Mitchell, born at Belleville, Illinois, on November 9, 1834, was the son of Edward P. Mitchell and Elizabeth Tyndale who had been married in Philadelphia, the home of the bride, by Bishop White in 1833. His paternal grandfather, James Mitchell, had gone many years before from Roanoke, Virginia, to what was then a far distant western state, and there established himself in business with his son Edward as an associate. Some years later, the climate proving unsuited to Mrs. Edward P. Mitchell, the young couple with their infant son came to Philadelphia, where Robinson Tyndale, the maternal grandfather of the future Chief Justice, was extensively engaged as a wholesale and retail dealer in china and glass, importing Canton and Nankin wares as a specialty. After the death of Robinson Tyndale, Edward P. Mitchell entered into co-partnership with his brother-in-law, the gallant Pennsylvania soldier, Hector Tyndale, under the firm name of Tyndale & Mitchell. The maternal stock was sprung from that sturdy strain which marked William Tyndale, the martyr, who after translating the Bible was burned at the stake for heresy, and which in later years produced Professor John Tyndall, the scientist.

The stock of the maternal grandmother was descended from Samuel Jennings, pro-proprietary Governor of New Jersey, and was related to the families of Biles and Langhorne, in Bucks County, Pennsylvania, so well known among the early colonists, as well as to Thomas Stevenson and William Thorne, among the early patentees of Flushing and Hempstead on Long Island.

Edward P. Mitchell, besides business capacity, possessed literary tastes which were manifested by contributions to the *Knickerbocker Magazine* under the pen name of Ralph of Roanoke. His intimate friend was Joseph C. Neal, of *Neal's Gazette*, and their circle was enlarged by William C. Graham of *Graham's Magazine* and Louis A. Godey, so long known as the editor of *Godey's Lady Book*. The commingling of these ancestral traits produced an interesting result; the subject of this sketch all through his life wielded "the pen of a ready writer," illustrating his own remark "that books were written by men who had a call to write and who sought in that way to pay their debt to their profession." From his father he also inherited his geniality, his sense of humor, and his imperturbable good nature. From his mother, whom I am told he greatly resembled in his open-handed generosity to those in need, he inherited his quiet manners and self-repression. His grandfather Tyndale used to call him the "little judge," when as a fair-haired child he sat silently attentive beside him in front of the fireplace.

Judge Mitchell's early education was received at the Zane Street Grammar School, Philadelphia, under the mastership of Dr. Samuel Jones, a brother of the Hon. Joel Jones, who had been a judge of the District Court and Mayor of Philadelphia. In February, 1848, he was admitted into the Central High School, and four years later graduated with the degree of Bachelor of Arts. He then entered the Sophomore Class at Harvard University and graduated in July 1855. Among

his classmates were Alexander Agassiz, Francis C. Barlow, Phillips Brooks, Theodore Lyman, Robert Treat Paine, and Charles Francis Adams. Mitchell stood five in the class, which graduated sixty-nine members. At that time C. C. Felton was professor of Greek; Longfellow was professor of French and Spanish Languages and Literature; Benjamin Pierce was the professor of Mathematics, and the greatest mathematician of his day; Asa Gray taught Botany; Francis J. Childs, afterwards eminent in Anglo-Saxon studies, was professor of Rhetoric; Oliver Wendell Holmes was professor of Anatomy, and Bishop Huntingdon was preacher to the University and professor of Christian Morals. Chief Justice Lemuel Shaw was a member of the Governing Board, Benjamin Robbins Curtis having resigned but a short time before to become an Associate Justice of the Supreme Court of the United States. Besides Longfellow and Dr. Holmes, Judge Mitchell doubtless constantly saw Ralph Waldo Emerson and James Russell Lowell.

Judge Mitchell served as an Overseer of Harvard University from 1905 to 1912, and in 1901, June 4th, received the degree of LL.D. from his Alma Mater.

In October, 1855, he was registered as a law student in the office of George W. Biddle, Esq., a courtly and accomplished gentleman, who succeeded Mr. Wm. M. Meredith in professional leadership, and on November 10, 1857, was admitted to the Bar of Philadelphia—his fellow students of that year being thirty-eight in number, of whom William B. Hanna and William N. Ashman reached the highest judicial station in our Orphans' Court, John K. Valentine the office of United States District Attorney, James Parsons a professorship of Law in the University of Pennsylvania and a registership in Bankruptcy, and Joshua T. Owen a seat in Congress.

Mr. Mitchell's course of study was, as he himself

calls it, "old-fashioned." He began with Blackstone, and accustomed as he was to a daily lesson of fifty pages of Hume's History of England, he found the first book a task "far from hard." With the second book he "stepped into a new world." He read it "six times consecutively and practically learned it by heart" before he was allowed to go to the third book. After that he "spent four solid months on Coke upon Littleton." "But it was not time ill spent," as he once earnestly asserted, "A good deal of it was antiquated, but it laid the foundation of knowledge of the system upon which the English Common Law is built." Then Blackstone again, after which Kent, Smith on Contracts, Adams on Equity, Hale's Pleas of the Crown, Foster's Crown Law, Greenleaf's Evidence, and "the most perfect law book that was ever written," Stephen on Pleading. "How antiquated," he exclaims, "that curriculum sounds now!" But the rule then was *multum non multa*, words which Judge Sharswood had emphasized as the cardinal maxim for law students in his famous lectures at the Law School, and repeated at the head of his Course of Legal Study in Appendix II to his classic essay on Professional Ethics. In short, the school of lawyers to which Mr. Mitchell belonged was the school of Sharswood, the school of Gibson, the school of Tilghman, the school of Binney. Their devotion to the maxim of *stare decisis* was not based upon a blind adherence to the past, nor upon an unquestioning Toryism, but upon an abhorrence of judicial legislation, which Tilghman, as Mr. Binney tells, us, "dreaded as an implication of his conscience," a reverence for the sacredness of the boundary lines between the judiciary and the legislature, and a horror of the acts of positive injustice as well as violations of law resulting from a usurpation by one branch of the government upon the powers of another. This is the keynote to the most impressive and important of Mr. Mitchell's judicial utter-

ances, and his ear became attuned to it in his early student days.

In 1860 he received the degree of Bachelor of Laws from the University of Pennsylvania, where he had enjoyed the teachings of Sharswood, of E. Spencer Miller and Peter McCall. In the same year he became a clerk or an assistant to the City Solicitor of Philadelphia, the well-known Charles E. Lex, and held the place for three years, relinquishing it to become the editor-in-chief of *The Law Register*, a post which he held for twenty-five years. How deeply he was indebted to this experience, as well as to his position as one of the editors of *The Weekly Notes of Cases* from 1875 to 1899, in the practical mastery of legal principles, he has frequently admitted in familiar conversations with those interested in the development of his career. In 1865, as the successor of the late Samuel Dickson, and for the eight years following, he was the Librarian of The Law Association of Philadelphia and here found the opportunity of touching, tasting, and digesting those ancient sages of the law which were the delight of the learned John William Wallace and upon which was based the latter's extraordinary book, *The Reporters*, so honorable to American legal scholarship, "a classic," as Mr. Mitchell himself called it, "more interesting to a lawyer than an ordinary novel."

Under such surroundings, "with a very moderate experience in the active litigation of the Court Room," but where he had the opportunity of observing the conduct and manner of Messrs. George M. Wharton, Henry M. Phillips, St. George Tucker Campbell and William L. Hirst—the "Big Four," as he humorously called them, "who were in every case"—and with what he modestly called "a fair degree of book knowledge," Mr. Mitchell confided to an intimate but politically influential friend at the bar his ambition to go upon the bench. Fortunately, owing to this friend's loyal in-

sistence, with the aid of another friend equally powerful politically, that ambition was realized; and in 1871 he ascended the bench through election to the District Court of Philadelphia, then presided over by that truly profound jurist, the Hon. J. I. Clark Hare, and with Judges George M. Stroud and M. Russell Thayer as associates. A strong court indeed as thus constituted, and when, in accordance with the "New Constitution" adopted in 1873, the District Court was abolished and the judges were transferred to the new courts of Common Pleas, it fell to the lot of Mr. Mitchell, the junior judge, to deliver an address at the final adjournment of the District Court, January 4, 1875, which sketched the history of the tribunal from its establishment in 1811 in a manner which, if nothing else had proceeded from his pen, would have fully established his fitness for historical legal work. His labors in this line reached their fitting climax in two notable addresses—twin peaks of achievement—in the Eulogium upon John Marshall, delivered February 4, 1901, in which he unhesitatingly claimed for Marshall "the foremost place in the list of eminent judges," and the Historical Address at the centennial celebration of The Law Association of Philadelphia, in which with the strokes of a master's brush he delineated the characters and the acts of many remarkable men who during one hundred years had united in corporate efforts in the best interests of the bar and the profession of the law.

In the shifting of the judges from the old courts to the new Judge Mitchell became a member of Court of Common Pleas No. 2 of Philadelphia County, with Judge Hare as its President, and with a new colleague, Joseph T. Pratt, who, dying three years afterwards, was succeeded by D. Newlin Fell. Here for thirteen years—from 1875 to 1888—he sat as a member of a court of original jurisdiction, acquiring that special kind of experience which, while not indispensable, has

proved so frequently to be the best preparation for the tasks of an appellate judge. There, in the closest contact with life and with men that comes from the daily exhibition in flesh, blood and speech, of human nature in all its varieties of good and evil, he learned a lesson, "a lesson to be learned, a lesson of wisdom," as he himself once told us, "for a judge, old or young, to keep his hands off; to let each man fight his fight in his own way, and the judge not to interfere unless he is called upon to do so." Of his qualities as a *Nisi Prius* judge it would be impossible to speak too highly. I refer not simply to his learning and ability, his patience and courtesy, his dignity and tact, his disposition of motions promptly and properly, his methodical ways and diligent performance, his happy mingling of conciliation with control—this rare blend of qualities he possessed—but I refer more particularly to his power to expedite business without grappling with counsel, his power of self-repression, believing with Bacon that "it is no credit to a judge to anticipate that which, if he be patient, he will in due time hear from the Bar," his unwavering attention to the evidence, his avoidance of the risks of injustice from a failure to listen and to hear, his respect for the rights of counsel to develop their points as they had prepared them, knowing well that no two minds ever approached a subject in the same way any more than that two men walked alike or saw alike; his realization that a trial in court was a civilized substitute for physical strife, that litigants would more cheerfully acquiesce in an adverse verdict if given a full chance to be heard and that a trial judge's time for action, apart from the necessary rulings upon points of evidence when raised by the Bar, was when, after the advocate's hour had passed, the time for the intervention of the magistrate had arrived, thus avoiding prolonged preliminary discussions, the confusion, mental and physical, which results from derailing an

argument even though it be circuitous or timid, and, above all, avoiding those burnings of the heart and those bitter and at times ill-repressed feelings which spring from a conviction, whether right or wrong, that the judge had lost his balance and had leaped to a conclusion. "It is better, far better," said Joseph Allison, an eminent judge now gone, "that the defeated suitor should leave my court room satisfied that he had been fully heard, than that I should save an hour or even a day of the public time. That phrase 'the public time' is a misnomer, the time belongs to the litigants who have paid for their writs and their subpoenas. It is to satisfy them with the result that courts are open."

Judge Mitchell's charges to juries were models of their kind. His voice was clear, his language simple, his arrangement orderly, his reduction of broken masses of matter complete, his summing-up of conflicting evidence fairly balanced, his statements of the law free from subtle distinctions, his affirmation or refusal of points precise and intelligible—a strain of clear, unbroken fluency presenting alike, in most luminous order, all the essential phases of the contention.

Aside from Judge Mitchell's work at Nisi Prius, mention should be made of the value of his work *in banc*. This was enhanced by his well-known brochure upon Motions and Rules, a handbook of practice for Pennsylvania judges in every county of the state, and an indispensable aid to practitioners old and young. Just as in chemistry a solvent will clarify a turbid liquid, so that book performed the inestimable service of settling practice at a time when four separate courts were struggling to establish rules.

Judge Mitchell had the assistance of two remarkable colleagues—Judges Hare and Fell. The former, who was the President of the Court, was a man whom Justice Mitchell years afterwards in *Forepaugh vs. The Delaware, Lackawanna and Western Railroad*

Company, 128 Pa. 217 (A. D. 1889), called "the most learned living jurist," a man whose intellectual interest in the questions discussed in the Motion lists, and whose legal omniscience were such as to result in displays which recalled Buller's description of Lord Mansfield in the King's Bench, "where propositions were stated, discussed, and reasoned upon until the hearers were lost in admiration of the strength and stretch of the human understanding," or, as Thurlow used to say, "Lord Mansfield was a surprising man; ninety-nine times out of a hundred he was right in his opinions and decisions and, when once in a hundred times he was wrong, ninety-nine men out of a hundred would not discover it." Of Judge Fell it is only necessary to say that at Nisi Prius he had Mitchell's best qualities; *in banc* his strong sense and close attention to the facts were relied on by Judge Hare, and on his recent retirement as Chief Justice the Bar paid fitting tribute to his exalted worth as a judge and his lovable qualities as a man.

At the general election on November 6, 1888, Judge Mitchell was chosen an Associate Justice of the Supreme Court, and in the following January he took his seat, his commission being dated January 7, 1889. At the same time the Hon. Edward M. Paxson became Chief Justice, and the associates were James P. Sterrett, Henry Green, Silas M. Clark, Henry W. Williams, and J. Brewster McCollum, the last named having been chosen at the same time as Justice Mitchell, but drawing precedence of place by lot.

I now propose to classify the most important of Justice Mitchell's opinions under several leading heads designed to indicate their scope and character. They are to be found scattered through 104 volumes of reports, from 124 Pa. to 228 Pa. inclusive, covering the full period of twenty-one years. I have ascertained by an actual count that he participated in the decision

of 11,580 cases, delivered opinions in 981, of which thirty-four were written dissents, and dissented in 108 cases without opinions; this was at the average of forty-eight written opinions a year. Of course his colleagues, except one or two of them who were deterred by illness, an affliction unknown by Mitchell, maintained an equal average. It is an impressive proof of the way in which the business of our great tribunal has grown with the expansion of the Commonwealth when we recall the facts that Chief Justice Tilghman with two and later with three associates, during twenty-one years of joint services, from 1806 to 1827, had their labors reported in twenty-one volumes; that Chief Justice Gibson and his three and later four associates, serving for a period of twenty-four years, from 1827 to 1851, filled fifty volumes of reports; that Chief Justice Black and his four associates during three years, from 1851 to 1854, filled ten volumes, and that Chief Justice Mitchell and his six associates in twenty-one years filled 104 volumes.

It is proper to say to those of this audience who are not lawyers that it must not be understood that the opinions of Justice Mitchell were peculiar to himself. They were the statements of the conclusions reached by his colleagues, or a majority of them, and himself, in the cases presented. No judge is at liberty to indulge in the fancies of a poet, the metaphysics of a philosopher, the theories of a social reformer, or the efforts of a legislator. He is the servant as well as the oracle of the law, which, while not an exact science like mathematics or physics, is none the less a science which aims to secure human happiness, and safety for life, limb, and property by the enforcement of stable rules and not by whim, caprice, or individual opinions. The decision of a case is the determination by a court, after argument and consultation, of the rights of the parties as measured and controlled by law, and the judge who

delivers the opinion is but the mouthpiece of the court and is sustained by its authority. That which is personal and individual to a judge is his method of statement, his selection of illustrations, the spirit which pervades his style, and all those intangible but persistent characteristics which make him what he is as distinguished from his brethren. With this caution against the impression that a judicial opinion is ever written with the freedom of an Essay by Macaulay, or a Constitutional History by Hallam, or a criticism by Andrew Lang, I turn now to the opinions of the Supreme Court of Pennsylvania as written by Justice Mitchell, selecting but a few specimens from a veritable mine of wealth.

I. CONTROL OF COURTS AND THEIR CONSTITUENT PARTS.

A. *As to Judges.* In *Stedman vs. Poterie*, 139 Pa. 100 (A. D. 1890), he fully recognized the power of courts to establish rules for the conduct of their proceedings, and argued that elastic rather than rigid construction should prevail in their application, but he did not favor strained constructions to reach an end. Thus, in *Comm. vs. Eckerd*, 174 Pa. 137 (1896), he declared: "When the law of England punished even petty larcenies with death, the humanity of judges sought to mitigate its Draconian severity, in advance of legislative reform, by extreme technicality in favor of life, but the necessity for that has gone by. The law is and always will be careful of prisoners' rights and tender of human life, but in the present day of mild punishments and scrupulous if not cowardly juries, who shrink from the performance of plain but disagreeable duties, there is no occasion for courts to strain unsubstantial technicalities in favor of criminals whose guilt is clear, and whose defences will not stand the test of common sense and credibility." But when a judge, even though actuated by the most laudable

motives, of his own motion initiated an investigation for the correction of evils in the administration of justice, and had proceeded irregularly without notice and without hearing any of the parties to be affected, Mr. Justice Mitchell expressed himself thus, in Franklin's Appeal, 163 Pa. 1 (A. D. 1894): "Grosser violations of all judicial principles, short of actual dishonesty, cannot be conceived. No citizen could be deprived of the most trifling right, nor the meanest criminal be condemned by an adjudication first and a hearing afterwards; yet in this case the money rights of sworn public officers, and the reputation of a member of an honorable profession are sought to be taken away by such method. Even if the results reached were correct, the method could not be tolerated. . . . A judge never serves either law or justice by proceeding lawlessly, or forgetting that a court is a tribunal where justice is judicially administered. Actual justice may be done and sometimes effectively by the summary action of a vigilance committee or a mob of lynchers, but it is not done judicially, and the dangers are such as no civilized community can afford to tolerate. Deliberate and orderly proceedings, including as a foremost requisite a full and impartial hearing before judgment, are the inviolable safeguards of public justice as well as of individual liberty." In the same line of exalted rebuke were his utterances in *Comm. vs. Smith*, 185 Pa. 553 (A. D. 1898), where there was an attempt to investigate a charge of jury fixing. He said: "The examination of L. J. Walker before this self-constituted tribunal reads less like a proceeding in a Pennsylvania court of law than like a page from the recent trial of M. Zola which shocked the sense of justice of the civilized world. It will not do to say that these proceedings were in the interest of the public for the exposure of a great wrong. We have not the least doubt that they were in good faith so intended, and many very

worthy people may think them justified for that reason. But they were none the less illegal, and it is none the less our duty to say so with emphasis. No man, even for the accomplishment of a great good, can be permitted to set himself above the law, and least of all the judge appointed to administer it. The French or Continental system of putting on the witness stand the person to whom the evidence or even suspicion points, and there subjecting him to an inquisitorial examination by the judges, as well as by the prosecutor, has very great and manifest advantages for the detection and punishment of crime. . . . But the system carries with it such danger to innocence, and to individual liberty, that it has never been tolerated in the common law of England and America, and has been expressly prohibited by safeguards written into every constitution of this commonwealth since 1776."

B. *As to the Bar.* His control of the Bar was equally vigorous. In *Comm. vs. Hill*, 185 Pa. 385 (A. D. 1898), he said: "The duty of counsel is to see that his client is tried with proper observance of his legal rights, and not convicted except in strict accordance with law. His duty to his client requires him to do this much, his duty to the court forbids him to do more. An independent and fearless Bar is a necessary part of the heritage of a people free by the standards of Anglo-Saxon freedom, and courts must allow a large latitude to the individual judgment of counsel in determining his action, but it must never be lost sight of that there is a corresponding obligation to the court which is violated by excessive zeal or perverted ingenuity that seeks to delay or evade the due course of legal justice." In *Scouten's Appeal*, 186 Pa. 270 (A. D. 1898), he declared: "The Bar have great liberty and high privileges in the assertion of their clients' rights as they view them, but on the other hand they have equal obligations as officers in the adminis-

tration of justice, and no duty is more fundamental, more unremitting or more imperative than that of respectful subordination to the court. The foundation of liberty under our system of government is respect for the law as officially pronounced. The counsel in any case may or may not be an abler or more learned lawyer than the judge, and it may tax his patience and his temper to submit to rulings which he regards as incorrect, but discipline and self-restraint are as necessary to the orderly administration of justice as they are to the effectiveness of an army. The decisions of the judge must be obeyed because he is the tribunal appointed to decide, and the Bar should at all times be the foremost in rendering respectful submission."

C. *As to Juries.* His long and varied experience as a trial judge had made him familiar with all the merits and weaknesses of the jury system, and as to these he expressed himself with refreshing frankness. In *Sharpless' Estate*, 134 Pa. 250 (A. D. 1890), where an apparently serious conflict of evidence was presented in support of an application for an issue of *devisavit vel non*, he paid the following tribute to the superiority of a trial by jury to an effort by judges to determine facts as presented upon paper: "Looking at the whole evidence as put before us in print, we do not think we can safely say that the balance is not doubtful. So much depends upon the means of knowledge, the interest or bias, the manner, the character and the personal weight which each witness carries as an individual among his neighbors and in the community, that a jury is the only appropriate tribunal, in such a case, to determine which way the balance inclines. Having the testimony present to their eyes as well as to their ears, the truth may be made manifest beyond any substantial doubt; and the judge, who will still have the same advantage, will still have the final result within his control. To decide it now, as presented,

would be to decide it in the dusk, if not in the dark, when full daylight is at hand."

In *Shultz vs. Wall*, 134 Pa. 262 (A. D. 1890), he declared: "Jurors are to exercise the same common sense and judgment in the jury box that they do as men in the affairs of life, only with a strict regard, under the direction of the court, to the nature, relevancy, and weight of evidence upon both sides. They cannot base verdicts on surmise or conjecture without evidence, but they are not bound to believe an incredible story because no witness contradicts it."

Sympathetic Verdicts. On the other hand, he was equally clear and firm in setting aside verdicts based upon sympathy and excitement, or upon a misconception of power. In *Smith vs. The Times Publishing Company*, 178 Pa. 481 (A. D. 1897), he traced the history of the constitutional provision that "trial by jury shall be as heretofore, and the right thereof remain inviolate," and after pointing out that the jury as an institution had been frequently commented upon by the most learned of historians as one of the most remarkable in the history of the world, for the length of time which it has existed, and the zealous care with which it has been cherished by the English-speaking race, he showed by equally reputable authority that the power of courts to control and revise excessive verdicts through the means of new trials had been firmly settled in England before the foundation of Pennsylvania as a colony, and had always existed here without challenge under any of our constitutions. He declared: "It is a power to examine the whole case on the law and the evidence, with a view to securing a result not merely legal, but also not manifestly against justice, a power exercised in pursuance of a sound judicial discretion without which the jury system would be a conspicuous and intolerable tyranny which no people could long endure."

In *Hennershotz vs. Gallagher*, 124 Pa. 1 (A. D. 1889), which was the first case he decided in the Supreme Court, he emphatically declared: "Juries cannot be allowed to guess at verdicts without legal evidence, and especially should the rule not be relaxed where both parties were present on the witness stand, and were silent when they could have given clear information if they had chosen to speak." Again, in *Collins vs. Leafey*, 124 Pa. 203 (A. D. 1889), he said: "A jury ought not to assume that 'it was negligence in law not to prevent an accident.' The tendency of juries to suppose that they may be generous rather than just is so strong, that it is not error to lay down for the guidance of the jury, in the most explicit terms, the limitation of their verdict to compensation and compensation alone."

In *Fox vs. Borkey*, 126 Pa. 164 (A. D. 1889), he dealt with a verdict in this fashion: "This is one of those verdicts, unfortunately too frequent, which are dictated by the sympathies and not by the common sense of juries. . . . It is manifest that the jury themselves did not believe in the plaintiff's case, but, on the communistic principle that as somebody was hurt, somebody else, right or wrong, ought to pay for it, rendered a verdict which in no possible view of the case did justice to either party. It is the duty of courts to handle such cases without gloves." So too, in *Collins vs. Chartiers Gas Co.*, 131 Pa. 143 (A. D. 1890), he said: "It may be well to say that in cases of this nature, juries should be held with a firm hand to real cases of negligence within the exception, and not allowed to pare down the general rule by sympathetic verdicts in cases of loss or hardship from the proper exercise of clear rights."

Negligence. In cases of alleged negligence on the part of employers, where damages were sought by an injured employee, he laid down the doctrine: "Absolute safety is unattainable, and employers are not insurers.

They are liable for the consequences not of danger, but of negligence, and the unbending test of negligence in methods, machinery and appliances is the ordinary usage of the business. No man is held to a higher degree of skill than the fair average of his profession or trade, and the standard of due care is the conduct of the average prudent man. . . . No jury can be permitted to say that the usual and ordinary way, commonly adopted by those in the same business, is a negligent way for which liability shall be imposed. Juries must necessarily determine the responsibility of individual conduct, but they cannot be allowed to set up a standard which shall, in effect, dictate the customs or control the business of the community." *Titus vs. R. R. Co.*, 136 Pa. 618 (A. D. 1890). He repeated this concisely in *Ford vs. Anderson*, 139 Pa. 260 (A. D. 1891), in the words: "The ground of liability is not danger, but negligence, and the test of negligence is the ordinary usage of business." The same thought was expressed in *Reese vs. Hershey*, 163 Pa. 253 (A. D. 1894): "The average untrained mind is apt to take the fact of injury as sufficient evidence of negligence. Moreover the use of a dangerous machine is very commonly considered ground for holding the employer responsible, whereas, the test of liability is not danger, but negligence, and negligence can never be imputed from the employment of methods or machinery in general use in the business."

Will Contests. In no class of cases was he happier in expression, in dealing with the frailties of juries, than in Will contests. In *Elcessor vs. Elcessor*, 146 Pa. 359 (A. D. 1892), he wrote: "Unfortunately, to redistribute a man's property after he is dead, in a manner different from that which he has chosen to do for himself, is one of the things that few juries can resist if they are allowed an opportunity; and this is a class of cases in which the jury must not only be held with a strong

hand to a decision in accordance with the evidence, but also in which care must be taken not to give them a chance to decide, except upon evidence strictly competent. . . . This State has been reasonably free from disgraceful scrambles over the property of dead men who passed as men of business character and capacity while they lived, and it is the duty of courts to see that no encouragement is given to any but really well-founded contests." In *Fidelity Co. vs. Weitzel*, 152 Pa. 498 (A. D. 1893), he was particularly forcible: "The tendency so notorious in juries to substitute their own notions in disposing of other people's estates differently from the way in which the owners themselves have done, is so insidious, as well as so strong, that even Courts of Equity have need to be on guard against it. Equity intervenes justly and properly to protect the weak and the aged against imposition by designing people, and even against manifest improvidence though there is no actual fraud in the other party. But on the other hand, it is not to be forgotten that the free control and disposition of property is often the sole means in the hands of age to secure kindly care and attention, as well as support from others, when greedy relations ignore the claims of relationship to the living but devote themselves with persistent assiduity to the estate after death."

So much for the regulation of the conduct of juries in civil cases. I turn now to the power and *rights of juries in criminal cases*. In the case of *Comm. vs. McManus*, 143 Pa. 64 (A. D. 1891), he delivered a concurring opinion, which it is a matter of deep and lasting regret was not adopted as the opinion of the court, so vastly superior is it in all respects to that of the then Chief Justice. Mr. Justice Mitchell said: "I concur in affirming this judgment, and in the reasons given, but upon one point I would go further and put an end once for all to a doctrine that I regard as unsound in

every point of view, historical, logical, or technical. The prisoner at the trial requested the judge to charge the jury that they were 'judges of the law as well as of the fact.' The learned judge, feeling himself bound by the language of *Kane vs. Commonwealth*, 89 Pa. 522, answered that the jury had been sworn to decide the case on the law and the evidence; that the statement of the law by the court was the best evidence of the law within the jury's reach, and that therefore, in view of that evidence and viewing it as evidence only, the jury was to be guided by what the court had said with reference to the law. The point should in my opinion have been answered with an unqualified negative. The jury are not judges of the law in any case, civil or criminal. Neither at common law, nor under the Constitution of Pennsylvania, is the determination of the law any part of their duty or their right. The notion is of modern growth, and arises undoubtedly from a perversion of the history and results of the celebrated contest over the right to return a general verdict, especially in cases of libel, which ended in Fox's Bill, 32 Geo. III, c. 60." Then followed a discussion which was exhaustive of the subject. Every authority, ancient or modern, English or American, was reviewed, and the conclusion reached: "As already said, there is not a single respectable English authority for the doctrine in question; and against the foregoing solid phalanx of the best American judicial and professional opinion, I have not been able to find a single well-considered case except *State vs. Croteau* (a Vermont case), which as already seen was by a divided court. Under these circumstances, whether the doctrine be of much practical importance or not, I cannot help thinking it a matter of regret that any vestige of it should be left in Pennsylvania."

D. *As to Orderly Methods of Pleading.* Judge Mitchell in describing his student days referred to

Stephen on Pleading as "the most perfect law book that ever was written." By pleading is meant, not forensic oratory but the scientific and logical mode of stating in writing to a court the grievances of a plaintiff, and the defensive matter relied on by a defendant in his own discharge. It was a science which had been developed with exquisite logical exactness, but had degenerated into many purely formal and frivolous technicalities, and the Legislature on May 25, 1887, had sought to abolish these by requiring a simple form of statement, and by the abolition of special pleas. Unfortunately this led, at first, to great looseness, and it was to extirpate these irregularities at the Bar that Justice Mitchell addressed himself. In *Hubbard vs. Tenbrook*, 124 Pa. 291 (A. D. 1889), he said: "This case affords one among many examples of the failure of the so-called reformed procedure to accomplish anything towards the brevity, the clearness, the accuracy, or the convenience of legal form. So long as the fundamental principle of our remedial jurisprudence shall be, that upon conflicting evidence the jury shall ascertain the facts, and upon the ascertained facts the judges shall pronounce the law, so long will it be a cardinal rule of pleading, by whatever name pleading shall be called, that the line of distinction between facts and the evidence to prove them shall be kept clear and well defined. The notion of the reforming enthusiast that the average litigant or his average lawyer can make a shorter, clearer or less redundant statement of his case if left to his own head, than if directed and restrained by settled forms, sifted, tested and condensed as they have been by generations of the acutest intellects ever devoted to a logical profession, is as vain as that of any other compounder of panaceas." In *Erie City vs. Brady*, 127 Pa. 169 (A. D. 1889), he concisely declared: "Affidavits to conclusions of law, carefully stated so as to appear to be facts are un-

candid and evasive. . . . Such a course cannot be too strongly reprobated." In *Fritz vs. Hathaway*, 135 Pa. 274 (A. D. 1890), the act of 1887 again aroused his criticism. "The Act is unwise, and is founded on the erroneous and superficial view that, by abolishing forms, it can get rid of distinctions inherent in the nature of the subject, but it would be doing injustice to the purpose of its framers to hold that it was meant to sanction mere looseness of pleading. Accuracy and technical precision have no terrors except for the careless and the incompetent, and the Act of 1887 was not intended to do away with them. As to all matters of substance, completeness, accuracy and precision are as necessary now to a statement as they were before to a declaration in the settled and time-honored forms." A third instance of his scorn of bungling methods occurs in *Connell vs. O'Neil*, 154 Pa. 582 (A. D. 1893), when, after a most careful review of what constituted a bill of exceptions under the old law, and what should constitute it under the new act, he denounced the new act thus: "This is part of that delusive idea of cheap law reform which appeals at all times so strongly to the popular and even to the superficial and unobservant professional mind, and which still flourishes though it has been pronounced futile, mischievous and productive only of expense, delay and injustice by the greatest and most experienced jurists of the Commonwealth from Chief Justice Tilghman to Chief Justice Sharswood." Ten years later, in *Barclay vs. Barclay*, 206 Pa. 310 (A. D. 1903), he returned to the charge: "The procedure Act of May 25, 1887, introduced clumsy and unscientific methods into the legal statements of the parties . . . but it did not go so far as to overturn and confuse the fundamental principles of pleading by requiring the plaintiff to set out his evidence or anticipate the defence."

I do not think that these criticisms, harsh though

they are, and although the ground for them has gradually disappeared, proceeded from a blind adherence to the habits of the past, but disclose Judge Mitchell's natural intellectual dislike of anything which savored of carelessness or vagueness in stating a cause of action or lack of precision in presenting a defence. He was also insistent upon the proper performance of the duty of counsel to study and refer to Pennsylvania decisions where relevant and material, instead of the slovenly parade so often made of extracts from *Cyc.* or other second-hand sources of learning. In *Duggan, Appellant, vs. B. & O. R. R.*, 159 Pa. 248 (A. D. 1893), these words occur: "The paper book of appellant is open to just complaint. In a rather full brief of cases from other states, not a single Pennsylvania decision is referred to, although, as this opinion shows, there are several which are much closer in point than any of those cited, and they are of course much more authoritative with us than those of other States, however well reasoned. In the pressure of business on this court we ought not to be called on to do counsel's work. It is not always possible to recall at once even cases with which we are familiar, and we should be able to rely on counsel for reference at least to everything relevant and material in our own reports. Counsel who neglect this duty take a risk not fair either to the court or their client."

II. CONTROL OF CORPORATIONS.

A second class of cases embraces those relating to the control of corporations, and of these *Comm., Appellant, vs. Lehigh Valley R. R.*, 165 Pa. 162 (A. D. 1893), stands as a type. "It is settled and unquestionable," said Mr. Justice Mitchell, "that corporations may be indicted at common law, and it necessarily follows that they may be brought into court by compulsion if required, for the law is never powerless to enforce

what it commands. Statutes may be imperfect, and proceedings under them for that reason may be abortive, but it is a settled rule of the common law that there is no right without a remedy. The question before us therefore is, really, what is the proper form of remedy in the case of a corporation indicted for misdemeanor, and refusing or neglecting to appear." Then came a thorough and successful search for a remedy through the tangled thickets of our colonial precedents until a broad pathway was found leading up to the earliest days of the Anglo-Norman law, accompanied by a philosophical explanation of the legal-engineering plan. The application of the drastic remedy of the entry of a judgment by default was but one of many illustrations of the truth of Mr. Justice Mitchell's belief, so beautifully expressed by him in *Saltsburg Gas Co. vs. Saltsburg Township*, 138 Pa. 250 (A. D. 1890), that "the common law is the living science of justice and adapts the application of first principles to changes in the affairs of men."

Another example of checking a usurpation of power, and a consequent encroachment upon public rights, by a corporation is to be found in *Comm. vs. Delaware, Lackawanna and Western R. R. Co. Appellant*, 215 Pa. 149 (A. D. 1906), in which it was held that where a railroad company in changing the site of a public road and reconstructing it, was bound to reconstruct it as of the original width, and if it failed to do so and erected buildings of its own within the legal width of the road, such buildings constituted a nuisance and would be enjoined. It may be of interest in passing to state that the result of the injunction granted in this case was to free the Delaware Water Gap, at the narrowest and most romantic portion of the mountain gorge, from the unsightly and destructive operations of a stone crushing plant.

Another and a very numerous class of cases in

which corporations were held to accountability, is that enforcing the liability of railroad companies for the safety of their passengers, and particularly of those improperly ejected from their trains. A remarkable instance of this is found in *Ham vs. D. & H. Canal Co.*, 155 Pa. 548 (A. D. 1893), but although the decision was concurred in by the majority of the court, I cannot but think, after reading the powerful dissenting opinion of Mr. Justice Green, that it is the least satisfactory and convincing of all of Justice Mitchell's well-considered opinions. A less extreme view, and a more moderate application of the rule, is to be found in his opinion in *Malone vs. Railroad*, 152 Pa. 390 (A. D. 1893).

In regard to the relations of those who were not passengers, but who had the usual rights of the public to notice and care on the part of railroads at a public crossing, he enforced under numerous circumstances the correlative duty of the citizen in approaching a crossing "to stop, look and listen." This, in *Aiken vs. Penna. R. R. Co.*, 130 Pa. 380 (A. D. 1889), he held to be imperative, and that "a failure to stop was not merely evidence of negligence, but negligence *per se*," and he explained that "the rule was as much for the safety and protection of passengers on the trains as of passengers on the highway." Later instances are to be found in *Whitman vs. Penna. R. R.*, 156 Pa. 175 (A. D. 1893), and *McCusker vs. Penna. R. R. Co.*, 198 Pa. 540 (A. D. 1901).

III. ENFORCEMENT OF CONTRACTS.

In the matter of contracts Justice Mitchell had small respect for the man who sought to repudiate his solemn agreement or haggled about its terms. Unless actual fraud or imposition appeared plainly, he did not favor relief. In *Huston's Appeal*, 127 Pa. 620 (A. D. 1889), he said: "Nothing is more dangerous than the so-

called equity to readjust rights or differences which the parties have settled for themselves, and in the absence of fraud or imposition, or such ignorance on one side as is equivalent to fraud on the other, nothing is more absolutely indefensible." In *Westmoreland Gas Co. vs. DeWitt*, 130 Pa. 235 (A. D. 1889), he said: "Forfeitures if no longer odious—and I for one am too strongly in favor of the enforcement of contracts as parties make them to apply harsh names to strict constructions—are not yet favored either at law or equity, and among the least favored have always been those founded on mere delay in the payment of money." In *Kleppner vs. Lemon*, 176 Pa. 502 (A. D. 1896), he declared: "I would reverse this judgment as a flagrant violation of the liberty and sanctity of contracts by raising a purely fictitious equity to enable the complainant now to make a better bargain at the defendant's expense than he chose or was able to make for himself at the time." Nor had he much sympathy with that simplicity which alleged as an excuse for a signature it was sought to avoid, that the written contract had not been read before signing. "Signing upon mere supposition," he said, "without knowledge or inquiry, comes dangerously near to negligence."

He had a strong dislike, too, for those metaphysical subtleties which would seek to withdraw substantial assets from the reach of partnership creditors so as to preserve them as the individual personal property of one of the members of the firm. In *Blood vs. Ludlow Carbon Black Co.*, 150 Pa. 1 (A. D. 1892), he declared: "Whether a partnership firm, being in law an entity distinct from the members that compose it, and, like a corporation, having no soul, can discover or invent anything, in the sense discussed by the learned Master, is a metaphysical subtlety over which we need spend no time. As a practical question, in the administration of the law, a firm may as well be said to invent a

machine as to invent a new enterprise, or a new trade name, or anything else in its business. All operations and ventures by a firm are the products of the mind of one or more of the members; the firm as a separate entity has no more mind to carry out a purchase of merchandise in one market and a sale in another than it has to conceive a mechanical idea and embody it in a machine. The minds are individual, but the results are joint, and the results of joint action of the members are results of the action by the firm, and if in the course of the partnership business, the result becomes partnership property."

As closely germane to this, he had no sympathy with the mock morality of one who taking the chances of a speculative transaction was silent as to gains which he willingly pocketed, but when losses occurred sought to escape them by taking the ground that it was a gambling transaction which the law would not recognize. Thus in *Peters vs. Grim*, 149 Pa. 163 (A. D. 1892), he said: "A purchase of stock for speculation, even when done merely on a margin, is not necessarily a gambling transaction. If one buys stock from A and borrows money from B to pay for it, there is no element of gambling in the operation though he pledge the stock with B as security for the money. . . . If there was not under any circumstances to be a delivery, as part of and completing a purchase, then the transaction was a mere wager on the rise and fall of prices, but if there was in good faith a purchase, then the delivery might be postponed, or made to depend on a future condition, and the stock carried on margin or otherwise in the meanwhile, without affecting the legality of the operation. . . . In dealing with stock transactions falling within or in any way connected with wagering contracts, the law of Pennsylvania is of exceptional, and for myself I would say, of illogical and untenable severity in its interference with the business

contracts of parties *sui juris* and entirely competent to manage their own affairs." The same result was reached in *Hopkins, Receiver, vs. O'Kane, Appellant*, 169 Pa. 478 (A. D. 1895), "Stocks," he said, "may be bought on credit, just as flour or sugar or anything else, and the credit may be for the whole price or for a part of it, and with security or without it. 'Margin' is security, nothing more, and the only difference between stocks and other commodities is that as stocks are more commonly made the vehicle of gambling speculation than some other things, courts are disposed to look more closely into stock transactions to ascertain their true character. If they are real purchases and sales, they are not gambling though they are done partly or wholly on credit." He steadily adhered to these views in *L. H. Taylor's Assigned Estate*, 192 Pa. 304 (A. D. 1899).

He had a scorn, too, for a man who relied on the statute of limitations as a sole defence, although as a judge he never failed to uphold it when properly pleaded. Thus in *Woods vs. Irwin*, 141 Pa. 278 (A. D. 1891), he said: "As a matter of public policy, recognizing that in the ordinary course of business life just debts are pressed with diligence, and that witnesses die and papers are lost, the statute is one of repose and protection. But speaking for myself, I cannot regard the statute, unaided by any equitable conditions or circumstances, as any other than a dishonest defence, for which alone a judgment should never be opened." And yet, yielding to his stern sense of duty as a judge, he upheld the statute in *Linderman vs. Pomeroy*, 142 Pa. 168 (A. D. 1891, giving an interesting review of phrases or expressions insufficient to toll the statute; and in *Miller vs. Miller*, 137 Pa. 47 (A. D. 1890), holding that clear evidence of an acknowledgment of an old debt is required to revive it. To which may be added *Barnes vs. Pickett Hardware Co.*, 203 Pa. 570 (A. D. 1902).

He believed in and fully sustained the freedom of men to make their own contracts, and this is best illustrated by the case of *O'Neil vs. Behanna*, 182 Pa. 236 (A. D. 1897), involving a labor strike. He stated fairly both sides of the question. " 'It is one of the indefeasible rights of a mechanic or laborer in this Commonwealth to fix such value on his services as he sees proper, and under the Constitution there is no power lodged anywhere to compel him to work for less than he chooses to accept,' nor, as the same right may be stated with reference to this case, to prevent his working for such pay as he can get and is willing to accept. . . . The strikers and their counsel seem to think that the former could do anything to attain their ends, short of actual violence. This is a most serious misconception. The 'arguments,' and 'persuasion' and 'appeals' of a hostile and demonstrative mob have a potency over men of ordinary nerve which far exceeds the limits of lawfulness. The display of force, though none is actually used, is intimidation, and as much unlawful as violence itself. . . . This was a violation of the rights of the new men who came to work.' "

In regard to the doctrine, which is peculiar to Pennsylvania, and which, so far as I have observed, is against the great current of authority elsewhere, that a moral obligation is a sufficient consideration to support a promise, Justice Mitchell became its foremost exponent, particularly in the case of *Bailey, et al*, Appellants, *vs. Philadelphia, et al*, 167 Pa. 569 (A. D. 1895), known as the Women School-teachers' case. He held that in this State a moral obligation will sustain an express promise to pay, and *a fortiori*, an actual payment. "If a mere promise to pay under such circumstances would be refused at law against an individual, certainly an actual payment or its equivalent, an order by the councils, or their ministerial officer, who has no duty in reference thereto except obedience, should be

sustained against a municipal corporation. . . . There is nothing in the law or in sound public policy to prohibit the city from being honest, and paying its bona fide debts which are good in conscience and justice, though, for sufficient other reasons, there is a general rule which prevents them from being enforceable by law."

IV. INTERPRETATION OF WILLS.

In the interpretation of wills, as in the interpretation of contracts, the same strong desire to sustain them as written or as meant was apparent. In *Woelpper's Appeal*, 126 Pa. 570 (A. D. 1889), he used this language: "In the construction of wills the great general and controlling rule is that the intent of the testator shall prevail. And by his intent is meant his actual intent. . . . It is often said that the 'question in expounding a will is not what the testator meant, but what is the meaning of his words.' But by this it was never intended to say that the testator's meaning when apparent can be disregarded, but that it cannot be got at aliunde, by what he might have meant, or even what under the circumstances perhaps he would have meant, but only by what he said. The search is confined to his language, but its object is still his meaning. . . . All of the canons of construction are subservient to the great rule as to intent and are made to aid, not to override it. As in all such cases, care is required that tools shall not become fetters, and that the real end shall not be sacrificed to what was intended only as the means of reaching it." In *Long vs. Paul*, 127 Pa. 456 (A. D. 1889), he said: "The draughtsman of this will had a very limited command of the English language and even this was evidently hampered by the recollection of the form book. But taking the whole will together the testator's intention is reasonably clear." In *Ferguson's Estate*, 138 Pa. 208 (A. D. 1890), he declared: "The principle is well settled that equity will depart

from the literal provisions of a will in order to carry out a superior or preferred intent of the testator which would otherwise fail. But the object is not to produce a distribution which the court may think more equal or more equitable, but to approximate as closely as possible to the scheme of the testator which has failed by reason of intervening rights or circumstances. Hence the regular order of the will is never departed from except of necessity, and then only to the extent that necessity requires." He summed the matter up very neatly in *Penney's Estate*, 159 Pa. 346 (A. D. 1893), by saying: "Precedents in construing the language of wills, except as to technical or quasi-technical phrases in the creation of trusts, or the limitation of estates, where they tend to become rules of property, are of little value. The same words may be used by different testators, and yet in their context or their connection with other parts, they may have widely different meanings. Wills like contracts must be read according to the intent of their makers and rules of construction are useful only as aids to the ascertainment of the actual meaning; when that is clear, no rule or method of construction can be permitted to override it." In dealing with technical words or phrases, however, which have become rules of property, binding on all testators irrespective of intent, a branch of the law which involves the higher mathematics of the real estate lawyer, Justice Mitchell was at his ease. His deep reading of Coke, Littleton and of Fearne here stood the strain. No more concise statement of the far-famed rule in *Shelley's case* can be found than in *Shapley vs. Diehl*, 203 Pa. 566 (A. D. 1902): "In determining whether the rule in *Shelley's case* is applicable, the test is how the donees in remainder are to take. If as purchasers under the donor, then the particular estate is limited by the literal words of the deed and the rule as in *Shelley's case* has no application. But if the re-

maindormen are to take as heirs to the donee of the particular estate, then what has been called the superior intent as declared in Shelley's case operates, and the first donee takes a fee, whatever words may be used in describing the estate given to him."

V. RESPECT FOR STATUTES.

Just as he had a respect for contracts and wills, and sought to uphold the real intentions of the parties, so had he a profound loyalty to the sovereign will of the people as expressed in statutes, giving full effect to their provisions where possible, but never stretching their terms to cover cases not fairly within their terms. Thus in *Usher vs. Railroad Co.*, 126 Pa. 206 (A. D. 1889), he refused to extend extra-territorially the right of a widow to sue for damages resulting from the death of her husband, the cause of action accruing in another State. In *Morrison vs. Henderson*, 126 Pa. 216 (A. D. 1889), he struck off mechanics' liens, where it appeared that the work done was of a different character from that authorized by the statutes. In *Small vs. Small*, 129 Pa. 366 (A. D. 1889), he held that The Married Persons Property Act of June 3, 1887, did not authorize a suit by a wife against her husband directly and in her own name for the recovery of money received by him from her separate estate. "So great a change in the policy of the law," he said, "upon a subject that may come home to every householder in the Commonwealth, should not rest on inference, or implication from general words, but should appear by the explicit and unquestionable mandate of the legislature; and when the change is made, if at all, it should be done in such form as to guard against the possibility of injustice in regard to past transactions such as are suggested by the present case." In *Hoffner's Estate* 161 Pa. 331 (A. D. 1894), he maintained this mental attitude so as to dissent from the opinion of the court

sustaining a gift to a religious use made in a will executed within thirty days of the testatrix's death, where it appeared that the gift was made in pursuance of a promise previously given for which a consideration had been received. It was, as will be perceived, an extreme case, but it fully illustrates the tenacity with which Justice Mitchell held his views. He said: "But it is thought that the bequest can be sustained in equity as a compliance with a moral obligation to pay the consideration on which the testatrix received certain property under her sister-in-law's will. . . . The conclusion does not seem to me to follow, because the statute plainly and peremptorily prohibits the payment of moral obligations in that way. It is probable that very few bequests are made to churches or religious uses except under a feeling of moral obligation for benefits received, either spiritual or temporal or both. The law recognizes such bequests as valid, but requires them to be made when the judgment is clear, and the obligation is not sharpened or exaggerated by the terrors of impending death. To allow such a bequest, made within the prohibited time, to be sustained by calling it an obligation which equity would have enforced, is simply to evade the statute. I do not understand that equity, even under the benign administration of the largest footed chancellor, undertakes to enforce moral obligations in the length and breadth of the Golden Rule, and it is important that we should keep its boundaries carefully marked." Even when the constitutionality of a statute was assailed he expressed a cautious respect for the law. In *Sugar Notch Borough*, 192 Pa. 352 (A. D. 1899), he said: "It must not be lost sight of that the attitude of courts is not one of hostility to Acts whose constitutionality is attacked. On the contrary all presumptions are in their favor, and Courts are not to be astute in finding or sustaining objections."

VI. HISTORICAL CASES.

There is a distinct class of cases which, for want of a better designation, I have termed historical cases, because they contain much history of the past and display the finest talents and knowledge of Justice Mitchell in a field peculiarly his own. In fact it is not too much to say that these opinions as written could have been written by no one else.

In *Cox vs. Ledward*, 124 Pa. 435 (A. D. 1889), he said: "This record is a legal curiosity. . . . The proceedings, however, anomalous as they were, had a perfectly regular and legitimate object. Indeed they would have been highly creditable to the ingenuity of counsel, had they been invented between the date when provincial simplicity put an end to Governor Keith's Court of Chancery, and the time when the legislature of the Commonwealth waked up to the fact that equitable powers and process are a necessary part of legal machinery in the complicated civilization of the present century. As it is, they seem to have been carried on by general agreement, and may stand as a survival of the makeshifts by which the early lawyers of Pennsylvania administered equity under the forms of the Common Law." He paid the following tribute to the early bench and bar in *Myers et al. Exrs. vs. S. Bethlehem*, 149 Pa. 85 (A. D. 1892): "When the early judges of Pennsylvania took the most brilliant and important step in the history of modern jurisprudence, and held, a century in advance of England and our sister States, not only that equity was a part of the Common Law of Pennsylvania, but also that it might be administered by the common law tribunals under common law forms, they might well have supposed that the conflict, as old as the days of Coke and Ellesmere over the right of equity to control proceedings at law, would thenceforth disappear. But it would

seem to be irrepressible. We have in this case a decree by which a judgment, entered upon a verdict after full trial and affirmed in this court, is vacated and set aside without any allegations of fraud, accident or mistake, solely by virtue of an act of the defendant subsequent to the judgment."

In the *Society of Cincinnati's Appeal*, 154 Pa. 621 (A. D. 1893), which sustained the right of that historic and honorable body to select a site for the great monument to George Washington which now adorns the Green Street entrance to our Park, Justice Mitchell gives a most interesting and needless to say an accurate account of the early efforts to erect such a monument in Washington Square and later in Independence Square, calling attention to the fact that in the Act of 1816, providing for the sale to the City of Philadelphia of the State House and State House Square there was a sad illustration of the want of reverence for historical and patriotic associations in our people at that time. The Governor was directed by the Act to appoint three commissioners, neither of whom should be a resident of Philadelphia, who were to lay out a street or streets through the State House Square, in such manner as would most conduce to the value of the property, to divide the square "into lots suitable for building," and put them up for sale at auction. The provisions as to the purchase by the City of Philadelphia were an alternative to be accepted by the City, within a time limited, and only in such case was the division and sale of lots for building to be avoided. The State House, now the sacred shrine of the nation, was then regarded as old material, for there was no reservation of it, and "the large clock now remaining within the State House," I quote the words of the Act, "shall be removed to Harrisburg if the commissioners think it of value enough to warrant the expense," but if not, they were to sell the same, "either separately or *with the house and lot* to

which the same is attached." That was the sole description of which Independence Hall was thought worthy. There was no reference to the Liberty Bell, at that very time in the belfry. No wonder Justice Mitchell laid aside for the moment the gravity of the judge, and rose to a strain of eloquence. "Notably does it illustrate the growth of national and patriotic sentiment," he exclaims, "that, while I am writing this review of the Act of 1816, the Liberty Bell, which was not thought worth mention in it, but left to be sold as old lumber with the walls and rafters of Independence Hall, is making a triumphant journey, in a special train with a special guard, to the gathering of nations at Chicago; and at every stopping place, by day or by night, meeting a spontaneous outpouring of love and pride and veneration not accorded to any ruler in the world." It ought perhaps to be said, that the people of Philadelphia took advantage of the terms of the Act, which, after directing that the sale of lots should not be made at an aggregate of less than one hundred and fifty thousand (\$150,000) dollars for the whole, offered the ground and building to the City at half price, and thus rescued the shrine from profanation and destruction upon the sole condition that the square "should remain to the people as a public green and walk forever."

In *Knox's Estate*, 131 Pa. 220 (A. D. 1889), an unusual question arose as to whether a signature to a will by the *first* name only was a valid signing. The precise case had never arisen either in England or the United States. A married woman had signed a paper in testamentary form with the simple word "Harriet." Justice Mitchell dealt with it in this fashion, and no one but an autograph collector could have thought of the illustrations used. "Custom controls the rule of names, and so it does the rule of signatures. The title by which a man calls himself and is known in the community is his name, whether it be the one he inherited

or had originally given him or not. So the form which a man customarily uses to identify and bind himself in writing is his signature, whatever shape he may choose to give it. There is no requirement that it shall be legible, though legibility is one of the prime objects of writing. It is sufficient if it be such as he usually signs, and the signatures of neither Rufus Choate nor General Spinner could be rejected, though no man, unaided, could discover what the ragged marks made by either of these two eminent personages were intended to represent. Nor is there any fixed requirement how much of the full name shall be written. Custom varies with time and place, and habit with the whim of the individual. Sovereigns write only their first names, and the Sovereign of Spain, more royally still, signs his decrees only, 'I, the King' (Yo el Rey). English peers now sign their titles only, though they be geographical names, like Devon or Stafford, as broad as a county. The great Bacon wrote his name Fr. Verulam, and the ordinary signature of the poet-philosopher of fishermen was Iz: Wa:. In the fifty-six signatures to the most solemn instrument of modern times, the Declaration of Independence, we find every variety, from Th. Jefferson to the unmistakably identified Charles Carroll of Carrollton. In the present day it is not uncommon for business men to have a signature for checks and banking purposes somewhat different from that used in their ordinary business and, in familiar correspondence, signature by initials, or nickname, or diminutive, is probably the general practice." As the evidence showed that the woman in question had had unfortunate differences with her husband, and a strong repugnance to the use of his name, as shown by her avoidance of it in her correspondence, and her direction not to put it on her tombstone, the court held that it was clear that the testatrix meant a complete

execution of the instrument, and there was nothing in the law to defeat its validity.

In the later case of *Plate's Estate*, 148 Pa. 55 (A. D. 1892), where the testator started to write his name and made a stroke which bore no resemblance to the form of mark ordinarily used for such purpose, and which two witnesses professed to recognize as the first part of the initial of his name, and then stopped and said, "I can't sign it now," it was held that the intention to execute by mark was affirmatively disproved. Paraphrasing the language of Chief Justice Gibson, Justice Mitchell said: "Without intent to sign, a cross or a scratch, or a scrawl, or a dot, or a dash . . . imports no more than would a blot or a stain, or any other accidental discoloration of the paper at the foot of the instrument."

Closely allied with the matter of signatures is that of Seals, and in *Lorah* to use of Evans, Appellant, *vs.* Nissley, 156, Pa. 329 (A.D. 1893), Justice Mitchell exhausts the quaint learning of the Middle Ages, as well as of the bold modern departures from the customs of ancient times.

In *Clement's Estate*, 160 Pa. 391 (A. D. 1894), he gives a full history of the celebrated French Spoliation Claims; in *Kuhlman*, Appellant, *vs.* Smeltz, 171 Pa. 440 (A. D. 1895), a full account of Local Legislation in Pennsylvania from the days of the Duke of York's laws; in *Gardner vs. Kiehl*, 182 Pa. 194 (A. D. 1897), a concise but satisfactory review of the British Statutes in force in Pennsylvania; in *Diehl et al. vs. Rodgers et al.*, Appellants, 169 Pa. 317 (A. D. 1895), an exhaustive review of the pardoning power from the days of Coke and Hale and the constitutions of the different States to the latest case in Oregon; in *Comm. vs. Hill*, 185 Pa. 385 (A. D. 1898), a complete discussion, inclusive of our earliest colonial instances, of the methods pursued by our governors in issuing mandates for the

execution of murderers, and in Philadelphia to use *vs. Eddleman*, Appellant, 169 Pa. 452 (A. D. 1895), he makes the dull subject of the paving of our streets the vehicle for much forgotten but entertaining learning. In *Bornot vs. Bonschur*, 202 Pa. 463 (A. D. 1902), he gives an interesting account of the widening of Chestnut Street and of the growth of the city since the days of Stephen Girard. We have already seen, while treating of juries, how the two opinions in *Smith vs. The Times Publishing Co.*, 178 Pa. 481, and *Comm. vs. McManus*, 143 Pa. 64 (*ut supra*) taken together and read consecutively embrace a full history of Trial by Jury.

VII. CONFLICT OF LAWS.

A small but interesting and intricate class of cases was presented by a conflict of laws, that is where there was a real or an apparent conflict between the laws of different sovereignties, and in no other field did Justice Mitchell show to greater advantage as a jurist of broad views and deep analysis. In *Forepaugh vs. Railroad Co.*, 128 Pa. 217 (A. D. 1889), he wrote an opinion which will rank with the profoundest efforts of his ablest predecessors. He was contesting the heresy of a general commercial, or general common law separate from, and irrespective of a particular state or government whose authority makes it law, a heresy originating in a misstep made by Mr. Justice Story of the Supreme Court of the United States in *Swift vs. Tyson*, 16 Peters 1, since which time the courts of the United States have persisted in the recognition of a mythical commercial law, and have professed to decide so-called commercial questions by it, in entire disregard of the law of the state where the question arose. Mitchell refused to follow their lead, and summoning to his aid the profound constitutional disquisitions of his former learned colleague in Philadelphia, Judge Hare, he dropped his plummet to the

bottom of the question. He reasoned thus: "Law is defined as a rule prescribed by the sovereign power. By whom is a general commercial law prescribed, and what tribunal has authority or recognition to declare or enforce it outside of the local jurisdiction of the government it represents? Even the law of nations, the widest reaching of all, is a law only in name. It has but a moral sanction, and the only tribunal that undertakes to enforce it is the armed hand, the *ultima ratio regum*. The so-called commercial law is likewise a law only in name. Upon many questions arising in the business dealings of men, the laws of modern civilized states are substantially the same, and therefore it is common to say that such is the commercial law, but except as a convenient phrase such general law does not exist. There must be a state, or government, of which every law can be predicated, and to whose authority it owes its existence as a law. Without such sanction it is law without reference to its origin or the commerce of other states or people. Such sanction it is the prerogative of the courts of each state itself to declare. Their jurisdiction is final and exclusive, and in this respect there is no distinction between statute and common law."

Another interesting instance of conflict arose in *Loftus vs. F. & M. N. Bank*, 133 Pa. 97 (A. D. 1890), where it was held that while it was a settled general rule that the validity of a transfer of personal property was to be determined by the law of the owner's domicile, yet this rule was subject to the power of a state to declare otherwise as to property having an actual or legal *situs* within its borders. Thus a married woman residing in England, but owning bonds of the City of Philadelphia, was held to be subject to the regulations of Pennsylvania as to the transfer of such bonds. After winding his way most skilfully through a maze of conflicting authorities he pays tribute to the

value of a lucid statement of principle by saying: "Mr. Dicey is a common law writer whose clear and accurate pages are as refreshing as the blue sky after the foggy disquisitions of Story and Wharton."

VIII. CONSTITUTIONAL QUESTIONS.

In dealing with questions affecting the powers of the government under our State Constitution, Mr. Justice Mitchell was at his best, his spirit was fully armed, and his great powers of reasoning and expression were exerted to the utmost. He sought steadily to preserve the independence of each branch from encroachments by the others, regarding the sovereignty of the legislature as representing the will of the people, and not to be confined too closely by constitutional clamps, unless the denials of power were plainly expressed, or irresistibly implied. The first marked exhibition of this doctrine is to be found in *Perkins vs. Philadelphia*, 156 Pa. 554 (A. D. 1893), in which the majority of the court held the Public Building Commission Act to be unconstitutional. Justice Mitchell dissented. He admitted that if the objections taken to the Act were substantial, then no matter how well meant and desirable the purpose, it must fail. That was "the penalty of living under the present Constitution," he said, "pervaded as it is by a profound distrust of the legislature. In the impatience of people with some of the evils of special legislation, they have rushed to the other extreme, and so hedged about and bound up the legislative arm of the government that legitimate and necessary powers can be exercised with difficulty, if at all. Article 3, on Legislation, as our brother Dean has pointed out, contains sixty specific prohibitions, besides other restrictions and regulations not absolutely prohibitory. It is a barbed wire fence around all legislative action, bristling with points of danger even to the most honest, desirable and essential laws. A

literal adherence to all its provisions would have stopped the wheels of government, and so this court was forced to hold when the first great question of the needs of municipal legislation came before it. Some elasticity was absolutely indispensable, and it was found in the principle of classification." He contended for a broad and liberal way of looking to the spirit of the constitution as more controlling than its words. In *Waters, Appellant, vs. Wolf*, 162 Pa. 153 (A. D. 1894), he again dissented, and on the same principle. He declared: "It is the province of the legislature to declare the public policy of the state, including what contracts shall be lawful, in what form they shall be made, and what shall be their effect. From the earliest days of the republic it has done this without question, wherever the contract itself or its collateral effect touches matters of public interest or policy, of which the legislature is the conclusive judge." These views found their triumphant expression in *Commonwealth vs. Moir*, 199 Pa. 534 (A. D. 1901), generally known as the Pittsburgh Ripper case, in which in the face of much loud public denunciation, he firmly adhered to his conception of his duty as a judge, to uphold an Act of the Legislature unless undoubtedly in conflict with the constitution. The merits or demerits of the Act did not concern the bench; it could deal alone with the question of power. With *Cooley*, he declared that the judiciary could not run a race of opinion upon points of right, reason, and expediency with the law-making power; with *Rogers* he agreed that he knew of no authority in this government to pronounce such an act void, merely because in the opinion of the judicial tribunals it was contrary to principles of natural justice, for this would be vesting in the court a latitudinarian authority which might be abused, and would necessarily lead to collisions between the legislative and judicial departments. With *Sharswood*, he believed

that nothing but a clear usurpation of power prohibited would justify the judicial department in pronouncing an act of the legislative department unconstitutional and void.

And yet when the test came, in the limit of a municipal debt, he did not waver: "the bar of the constitutional prohibition is clear, and we may not permit it to be evaded," as he said in *Keller vs. Scranton*, 200 Pa. 130 (A. D. 1901).

In *Commonwealth vs. Barnett*, 199 Pa. 161 (A. D. 1901), he maintained the independence of the Executive Department, holding that the Governor was an integral part of the law-making power of the state; that his approval, or disapproval known as a veto, was essentially a legislative act.

As a final stroke, so to speak, in completing the circle that enclosed his consideration of public powers and duties, he was called on to discuss in *Commonwealth vs. Shortall*, 206 Pa. 166 (A. D. 1903), the features of martial law in preserving the peace of the Commonwealth. "There may be peace for all the ordinary purposes of life, and yet a state of disorder, violence and danger in special directions which, though not technically war, has in its limited field the same effect, and, if important enough to call for martial law for its suppression, is not distinguishable, so far as the powers of the commanding officer are concerned, from actual war. The condition in fact exists, and the law must recognize it, no matter how opinions may differ as to what it should be most correctly called. When the civil authority, though in existence and operation for some purposes, is yet unable to preserve the public order and resorts to military aid, this necessarily means the supremacy of actual force, the demonstration of the strong hand usually held in reserve, and operating only by its moral influence, but now brought into active exercise, just as the ordinary criminal tendency in the

community is held in check by the knowledge and fear of the law, but the overt law breaker must be taken into actual custody."

At times he displayed a playful humor. In *Shulz vs. Wall*, 134 Pa. 262 (A. D. 1890), after discussing an innkeeper's liability to a guest for goods stolen, and likening it to that of an insurer of the safety of the goods, he pleasantly added: "And however it might have been in the days of good Queen Bess, when Calye's case (8 Rep. 63) was decided, and when the length of his wine bill might have been deemed sufficient consideration for the duty of an innkeeper to take care of his guest, drunk or sober, it is now held in our own case of *Walsh vs. Porterfield* (87 Pa. 376) that intoxication is no excuse for the negligence of a guest which contributes to his loss."

These instances sufficiently illustrate his judicial manner.

Lavater, whose great work on Physiognomy has kept his fame alive for more than a century and a half, once wrote: "Actions, looks, words, steps, form the alphabet by which you may spell *Character*: some are mere letters, some contain entire words, lines, whole pages, which at once decipher the life of a man. One such uninterrupted page may be your key to all the rest." In the spirit of this passage I have reviewed the opinions of Justice Mitchell, and now observe how completely they reveal his individual traits as an appellate judge, his easy mastery of principles, his firm control, his stability of judgment, his reverence for authority, his love of orderly procedure, his calmness of temperament, his clearness of statement, his vivacity of style, his enlightened sense of justice and his sturdy common sense, as well as his simplicity, steadfastness and courage as a man.

On January 4, 1904, Justice Mitchell became, through the death of Chief Justice McCollum, the official head

of his tribunal, although for more than a year previous he had been Chief Justice *de facto*. He lived to complete his full term, in the unabated vigor of his mind, and without the slightest relaxation of his judicial duties. In the consultation-room he was, I am told, a model colleague. "Of the labors of the consultation-room no one can judge who has not participated in them. There, the arguments of counsel are considered, the points discussed, and the cases decided. It often happens that this consumes more time than the argument at Bar. And all this is preceded by a careful examination of each case, and of the authorities cited, by the Justices respectively at chambers." So much was revealed to us by Chief Justice Paxson in his address at the opening of the New Court Rooms in the City Hall in January, 1891 (Introduction to 137 Pa., xxxiv). It remained for Chief Justice Mitchell to complete the revelation: "There learning counts, industry counts, as they always and everywhere count, but above either and both, most important of all, the judicial quality is inevitably displayed or found wanting." (*In Memoriam* John Dean, June 22, 1905, 211 Pa., xxxi.) I have been told by a former colleague that Chief Justice Mitchell in consultation was at his best: patient, tolerant, learned, industrious, punctual, courageous and firm. He retired at the close of December, 1909, to become the official custodian of the records of his court, and to begin a task for which no one was so well qualified, but which, alas, was not completed, of rescuing early archives and dockets from neglect and disorder, a service which Lord Langdale as Master of the Rolls had made so honorable in England.

He died on July 4, 1915, in the eighty-first year of his age. His life was like the stream described by Sir John Denham.

"Though deep, yet clear; though gentle, yet not dull;
Strong without rage; without o'erflowing, full."