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DEAN WIGMORE AT HIS LAST MEETING OF THE EDITORIAL BOARD

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"For now he lives in fame though not in life."

The monthly meeting of the Editorial Board of this Journal on April 20th was Dean Wigmore's last. The Editors recorded this fact and their sorrowful reaction to it in our last number.

It is appropriate to set down here a statement of the Dean's participation in that meeting based upon the author's notes. It was common knowledge that of all the meetings that the Dean was wont to attend, the monthly session of these Editors gave him especial pleasure because of the comradery among its members.

During luncheon in a private room at the Chicago Bar Association, Dean Wigmore and other members of the Board of Editors held conversation as usual, *ad lib.* Many were old friends of his and there was a freedom that comes only from long and mutual friendship. On that day, as usual, Dean Wigmore's conversational ability shone unequaled. He was genial as we always found him and his kind spirit and infectious smile were as I knew them when I was a student in his classes many years past. The day was damp and dreary and some one recalled Mark Twain's observation about the weather which reminded the Dean of an important case in Connecticut that turned on the question whether the court would take judicial notice of the weather. This in turn suggested the old story about Mr. Chief Justice Marshall and the Supreme Court of the United States in which a humorous incident in the history of the Court is concerned with an interpretation of the meaning of "raining." Only a few meager facts had been mentioned. The story was incomplete. Dean Wigmore came to the rescue and said: "Oh yes! I think you will find that in Warren's History of the Supreme Court." He told the story and observed: "In the days of Marshall, Story and Webster, many professional gentlemen imbibed rather freely."

The mention of Warren's masterpiece was the opening for a round robin upon books in general. Dean Wigmore said that he had just finished reading "Trouble Shooter; the Story of a North Woods Prosecutor," upon the recommendation of Frank Kolak, Librarian of the Chicago Bar Association. "I found it very interesting and unusually realistic. We academic lawyers who are not

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in the arena must keep in touch with the actualities of practice from such books." He concluded by reciting a few incidents from the volume and said casually that on finishing reading a book it was his custom to send it to Camp Custer in Michigan.

The war then absorbed the conversation and the recent best seller: "See Here! Private Hargrove," became the subject of comment. Dean Wigmore said he had read it and had found it very amusing. The subject of war led to mention of the use of dogs in warfare and of great dog stories. The Dean said that Richard Harding Davis' "The Bar Sinister" about the White Cavalier, the gladiator of the canine race, in which a mongrel, "The Kid," was chosen over his sire, Regent Royal, Champion of Champions as the best in the show, was a magnificent story.

For light reading nothing surpassed the detective story in the mind of the Dean and he told us he had a standing order with his neighborhood bookseller, Wright Howes, to send him every item of J. S. Fletcher that he could obtain, and likewise to include Freeman's works in his list.

At this point "Famous Criminal Trials" became the topic of conversation and Dean Wigmore remarked that he hoped someone would see to it that the series of "American State Trials" that was started so ably by John Lawson should be kept up to date and not be permitted to die.

An off-shoot of this talk was discussion of the recent United States Supreme Court decision in the McNabb case. Dean Wigmore had read it. He shook his head slowly as he said prophetically that he could see neither sense nor reason in it; that it is bound to cause trouble for it makes it almost impossible for either the police or the prosecutor to get anywhere with their cases; and that he did not know what the Supreme Court could have been thinking about when it wrote that opinion. Readers will recall that in July, 1943, the United Circuit Court of Appeals reversed the conviction of the defendants in the Chicago Treason case on the ground that the decision in the McNabb case tied the hands of the lower court and that there was nothing to do but follow it.

At the luncheon table a few minutes were spent demonstrating a "sleight of hand performance" that amused and intrigued the Dean, probably because he had used similar demonstrations in his course on Judicial Proof to illustrate the limitations of human capacity for observation and consequently for report.

The Dean was mindful of important questions relating to following issues of the Journal. The meeting lasted about two hours, and as he was taking his leave he did what was quite typical of him: he volunteered to assume responsibility for a small journalistic matter, and bade us all good day.

From the Bard of Avon, one of Dean Wigmore's greatest favorites,—the sentiment we all share:

"I count myself in nothing else so happy
"As in a soul remembering my good friends."

THERE MUST BE A PROBATIVE SCIENCE

"The study of the principles of Evidence, for a lawyer, falls into two distinct parts. One is Proof in the general sense . . . The other part is Admissibility . . . Hitherto the latter has loomed largest in our formal studies,—has in fact monopolized them; while the former, virtually ignored, has been left to the chances of later acquisition, casual and empiric, in the course of practice.

"Here we have been wrong; and in two ways:

"For one thing, there is, and there *must* be, a probative science —the principles of proof—independent of the artificial rules of procedure; hence, it can be and should be studied. This science, to be sure, may as yet be imperfectly formulated. But all the more need is there to begin in earnest to investigate and develop it. Furthermore, the process of Proof represents the objective of every judicial investigation. The procedural rules for admissibility are merely a preliminary aid to the main activity, viz the persuasion of the tribunal's mind to a correct conclusion by safe materials. This main process is that for which the jury are there, and on which the counsel's duty is focused.

"And, for another thing, the judicial rules of Admissibility are destined to lessen in relative importance during the next period of development. Proof will assume the important place; and we must, therefore, prepare ourselves for this shifting of emphasis. We must work to acquire a scientific understanding of the principles of what may be called 'natural proof'—the hitherto neglected process. If we do not do this, history will repeat itself, and we shall find ourselves in the present plight of Continental Europe. There, in the early 1800s, the ancient, wornout numerical system of 'legal proof' was abolished by fiat, and the so-called 'free proof'—namely, no system at all—was substituted. For centuries, lawyers and judges had evidenced and proved by the artificial numerical system; they had no training in any other,—no understanding of the living process of belief. In consequence, when 'legal proof' was abolished, they were unready, and judicial trials have been carried on for a century past (except for a few rules about proof of documents) by uncomprehended, unguided, and therefore unsafe mental processes. Only in recent times, under the influence of modern science, are they beginning to develop a science of proof.

"Such will be our own fate, when the time comes, if we do not lay foundations for the new stage of procedure."—From *Science of Judicial Proof*. By John Henry Wigmore, 3rd Edition, 1937.