



EVIDENCE  
IN  
TRIALS AT COMMON LAW

by  
JOHN HENRY WIGMORE

*In Eleven Volumes*

VOLUME XI

INDEX  
by Dorothy Thomas

TABLE OF AUTHORS CITED  
by Lucille Boorstein



ASPEN LAW & BUSINESS

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## Introduction to the Index

In order to best understand the exigencies peculiar to the task of creating an Index to *Wigmore on Evidence*, it is useful to have some knowledge of both the creator of the treatise and the influences that shaped the work's structure and language.

Born in California in 1863, John Henry (Harry) Wigmore was recognized for his intellectual prowess at a very young age. In 1887, he was graduated from the Harvard Law School and admitted to the Massachusetts Bar. He had studied under James Bradley Thayer, had written for the law review, and had been published in the *American Law Review*, but his efforts at practicing law met with little success.

Two figures stand out as influences on the work of Wigmore: Charles Doe and Professor Thayer. Doe, chief justice of the New Hampshire Supreme Court, was considered by many to be one of the greatest jurists of the nineteenth century. Wigmore was recommended to him as a researcher, and although they never met in person, a close relationship developed that lasted until Doe's death in 1896. Thayer was a professor of evidence at the Harvard Law School whose *Preliminary Treatise on Evidence at Common Law* was published in 1898 while Wigmore was deep in his work on the first edition of his own treatise. Thayer read Wigmore's early chapters, and Wigmore later noted that the professor "had accepted them," novel language and all.

It was Wigmore's misfortune to lose both these most valuable advisor-counselors within six years. One can sense the depth of his loss from his dedication to them in the *Treatise on Evidence*.

The first edition of the *Treatise on Evidence* was the result of 15 years' labor; most of it was completed after Wigmore started teaching at Northwestern University Law School in 1893. It was eventually published in 1904. The third and last of Wigmore's editions was published in 1940. Since then, the treatise has been completely revised and updated by John T. McNaughton, James H. Chadbourn, and Peter Tillers.

Wigmore was blessed with the physical and mental stamina to carry out his writings while sustaining an active professional and social life. He could work anywhere, was interested in everything, and above all had the gift of foresight, which was a major element of his success. It is for this reason that today, some eighty years after the first edition of the *Treatise*, the legal profession still asks, "What does Wigmore say?" And indeed, many of his recommendations that seemed most far-fetched at first glance have been adopted, and the law is turning more and more in the direction he believed it should take. But what distinguished Wigmore from other writers on evidence was the vigor, humor, and, always, the literary eloquence of his writings, to say nothing of the depth of his authorities.

## INTRODUCTION TO THE INDEX

Wigmore was a fine linguist and had the intellectual confidence that enabled him to take on the whole of evidence law, create a system of classification, and then devise what he called “scientific terms” to better describe and analyze legal concepts. It was his expectation that the vocabulary he used would be adopted by the legal community and thus make the law of evidence a body of scientifically organized rules and principles.

His terms are, after a fashion, a new shorthand. In Wigmore language, for example, “auxiliary policy” replaced the “exclusionary doctrine,” thereby covering in two words the concepts of confusion of issues, undue prejudice, and undue surprise. Similarly, “privilege” became “optional exclusion,” “contradiction” became “proof of material error.” While many of these *Wigmorisms* did not survive, one that is still frequently discussed is “autopic proference,” his term for real evidence.

People who heard Wigmore lecture still speak of him with awe and admiration; and lawyers researching in the *Treatise* are still drawn by his magnetic writing to read on long after they have found their points of law. Such is the power of John Henry Wigmore and his *Treatise on Evidence*, which continues to influence the law of evidence as we move into the twenty-first century.\*

It is axiomatic that the author of the index cannot rewrite the text *in* the index. Neither, however, can the index fill gaps in the text left by the author. Nevertheless, the index can perform the vital task of connecting different parts of a work to create a cohesive body of information that enables the user to take fullest advantage of the material. The result is synergistic in the best sense of the word.

The task of creating an Index to *Wigmore on Evidence* involved balancing the responsibility of providing to the user the fullest and easiest retrieval of references with the need to keep the Index a reasonable size. Matters were, of course, complicated by the complex mosaic of the work: Wigmore the author; *Wigmorisms*; three subsequent revisers; eight decades of societal, linguistic, and legal change since the first edition; and, most obviously, the size of the work with its 10,000 pages and thousands of footnotes. The net result is an index of approximately 25,000 entries.

What follows provides the user with a detailed guide to the style and structure of the Index.

### CHOICE OF HEADINGS

As far as possible the Index maintains fidelity to the original text so that section headings can be easily located. At the same time, every effort has been made to bring the language up to date. This has been accomplished by *See* and *See also* cross-references.

### INTERNAL CROSS-REFERENCES

There are topics in the law of evidence that generate numerous entries, for example: **DOCUMENTARY ORIGINALS**, **PRODUCTION OF**, and **TESTIMONY**. Internal cross-references, such as *See this heading* and *See also this subheading*, have been used so that the number of indentations is controlled. All the references

\*For further reading on Wigmore, see W. Roalfe, *John Henry Wigmore: Scholar and Reformer* (1977). For more on Doe, see J. W. Reid, *Chief Justice: The Judicial World of Charles Doe* (1967).

## INTRODUCTION TO THE INDEX

pertaining to the indicated heading are kept, as much as possible, in one place, thereby eliminating the need to search through the Index.

### REFERENCES

All references are to sections. However, section 4 and sections 4a, 4b, 4c, and so on each contain so many subsections that it was deemed necessary to indicate the subsection in the index reference. Without this additional indicator the user would need to spend an inordinate amount of time trying to locate the desired information in a considerable mass of material. A parenthetical reference following a section number is used to indicate a subsection within a main section. For example: Contempt proceedings, 4(4b), is a reference to subsection 4b of section 4, **MISCELLANEOUS PROCEEDINGS**. A reference to section 4b, without a parenthetical reference following, is to the main section 4b, **ADMINISTRATIVE PROCEEDINGS: HISTORY AND POLICY**.

### FOOTNOTES

Material in the footnotes has also been referenced. As a general rule, cases in footnotes are not indexed unless they contain unique information that would otherwise be lost.

### WIGMORE LANGUAGE

Wigmore's terminology for particular rules and policies has been included in the Index. This is in fidelity to the text, and is intended as an aid to understanding Wigmore language. The user will find **AUTOPIC PREFERENCE**, **AUXILIARY PROBATIVE RULES**, and various **RULES** accompanied by the appropriate references or cross-references.

DOROTHY THOMAS

August 1985

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