EVIDENCE

IN

TRIALS AT COMMON LAW

by

JOHN HENRY WIGMORE

In Ten Volumes

VOLUME 8

Revised by

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Preface

This volume deals with "rules of extrinsic policy." We would now call almost all of them "privileges." It is in this area of the law of evidence that development has been the greatest since the third edition of the treatise was published in 1940. The law relating to search-and-seizure and wiretap evidence has developed apace in both federal and state jurisdictions. The *Rochin* ("stomach-pump") principle has emerged. Many important cases involving the privilege against self-incrimination have been decided. Thousands of statutes — providing for out-of-state witnesses, for new privileges, for immunities from prosecution, for confidentiality of official information, and so on — have been enacted (and citations of almost all of the old statutes have been changed). Thousands of cases further developing all of the privileges have been decided. The supplement to the volume by 1959 had swollen to 313 pages.

My objectives in this revision of Volume 8 are two. One is to rewrite and expand the text where recent developments require it. My policy is to express my own views, but to retain for the reader, in one way or another, Dean Wigmore's as well. Where I agree with his views (which is of course most of the time), they remain in the text. Where I disagree with his views or where they for some reason seem to me to be inappropriate, they are in footnotes. For example, Dean Wigmore's unrestrained paragraphs in opposition to the federal rule excluding illegally obtained evidence, including his colorful and much-quoted parable of Titus and Flavius, now appear in §2184a, note 1 rather than in text; and §2251, note 1 contains in condensed form the dean's views, which formerly appeared in text, as to the policies underlying the privilege against self-incrimination. In the case of only one section — §2250 (Wigmore's famous history of the privilege against self-incrimination) — do I reverse the aforementioned policy and retain his text verbatim, clearly demarking my own additions.

The principal portions of text which are rewritten are those dealing with illegally obtained and wiretap evidence, privilege against self-incrimination, and state secrets and official information. There are, of course, major changes and additions in other areas also.

My second objective in this revision is to bring the documentation up to date. The magnitude of the undertaking can be fully appreciated only after it has been undertaken. When Dean Wigmore's first edition was published in 1904, the problem of comprehensive current research was big enough. One year's product of the American courts in those days produced a pile of reports shoulder high. Now American courts produce two piles reaching the ceiling. In 1904 the number of relevant Anglo-American legal periodicals was less than 40. Now there are more than 300. Indeed, a glance at the shelves containing only federal reports reveals the "explo-

sion": The cases decided in the six score years before Dean Wigmore's first edition, those decided in the two score years between his first and third editions, and those decided in the one score years since the third edition divide the space into almost equal thirds. With the assistance of the persons mentioned below, however, the recent material is incorporated and the older documentation is referred to by its modern citation.

First among the persons to whom I owe thanks is Richmond Rucker, of the North Carolina Bar, who collaborated with Dean Wigmore in preparing the 1943 supplement to the treatise and who, since that time, has been the author of the biennial supplements. The presence of Mr. Rucker's research, already packaged and coded, reduced the magnitude of revision to manageable proportions. Also I should mention John M. Maguire, a colleague of mine on the Harvard Law School faculty. Mr. Maguire read and advised me on difficult portions of this revision.

My right-hand man during the entire period while the revision was in gestation was Robert S. D'Andrea, now of the Connecticut Bar. My secretary was Mrs. L. Lister Hill. Her husband together with David S. Barr, Harry F. Goldberg, Gordon B. Greer, Arthur A. Leff, Mrs. H. Erik (Diane Theis) Lund, M. Melvin Shralow and David F. Snow comprised the remainder of the group which served on my student research staff. Mrs. John E. (Jean Cardell) Lawe also did research and was primarily responsible for seeing the book through the difficult days of galley and page proof.

A number of other persons volunteered valuable help by way of their third-year research papers: Thomas R. Appel, James E. Biava, James A. Churchill, Eugene G. Coombs, Jr., Richard S. Davidoff, Donald E. Endacott, William J. Hanlon, Pegram Harrison, William J. Jones, Jr., John S. Letts, Frank M. Rasmussen, Morton Rosen, Cliff F. Thompson, Alan D. Ullberg and John I. Van Voris.

I thank them all.

JOHN T. MCNAUGHTON

Harvard Law School
February 1961

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