

DISCOVERY IN CANADA, By Clare E. Choate,
Carswell, Toronto, 1977, 365 pp.
CORROBORATION IN CANADIAN LAW,
By Audrey A. Wakeling, Carswell, Toronto, 1977, 165 pp.
PHIPSON ON EVIDENCE, 12th ed. Edited by
Judge John Huxley Buzzard, Richard May, and M. N. Howard,
Sweet & Maxwell, Carswell, 1976, 1014 pp. and 1st Supplement,
1978, 46 pp.

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These three books are welcome additions to the tools of work-a-day law practice for those who toil in our Courts. One of them, of course, needs no introduction to Judges and lawyers — having been around since 1892's first edition¹ — but it is good to see it in a somewhat revised character.

Choate is the answer to the oft-made complaint that there is virtually no book on Discovery practice and procedure. The books by Bray and Ross are long out-of-date.² This new book is well-organized under five main Parts. The first (although I would have put it second) deals with Examinations for Discovery in all its aspects, including preparation, privilege and use at trial. *Silverman Jewellers (1974) Ltd. v. Trader's General Insurance Co.*,³ dealing with the *O'Sullivan v. Turk*⁴ problems of reading in at trial, came out too late for inclusion in the book, as did the article on this topic which appears in *Advocates' Quarterly*.⁵ The second Part of the book (which I would have put first) covers Discovery of Documents, and includes reference to authorities on the question of sufficiency of the affidavit and, in particular, the leading case *Myers v. Elman*,⁶ on the lawyer's duty to the Court. Then follows Interrogatories which, although seldom used, can be used in some circumstances cumulatively with Examinations for Discovery.⁷ Physical Examinations and Inspection and Preservation of Property comprise the fourth and fifth Parts.

One might have wished that Commission Evidence, Letters of Request, *de bene esse* evidence, and discovery in criminal cases (with particular reference to Preliminary Inquiries) could have been included within the scope of this valuable book. It is certainly to be hoped

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1. S. Phipson, *The Law of Evidence* (1892).

2. E. Bray, *Digest of the Law of Discovery with Practice Notes* (1910); R. Ross, *The Law of Discovery* (1912).

3. (1977) 3 C.P.C. 129 (Man. Q.B.).

4. [1947] 1 W.W.R. 673 (Man. K.B.) aff'd [1947] 2 W.W.R. 672 (Man. C.A.).

5. T. Kerzner, "Reading from Examinations for Discovery — Special Problems" (1977), 1 *Advocate's Q.* 98.

6. [1940] A.C. 282 (H.L.).

7. See *Olfman v. Westfair Foods Ltd.*, [1974] 3 W.W.R. 359 (Man. C.A.).

that Choate on *Discovery* will be kept up-to-date by annual supplements.

Wakeling on *Corroboration* fills a need in this important area of civil and criminal litigation, one that has not received much attention in book form since Graham and Read.⁸ Wakeling deals with the nature of corroboration with, of course, particular reference to *Baskerville*⁹ in the light of recent decisions of the Supreme Court of Canada. Corroboration issues in civil cases and criminal cases are compared, and the unsworn testimony of children receives, deservedly, a chapter unto itself. The author deals with the rape amendment to the Criminal Code, observing that it is not yet clear whether that provision eliminated the common law corroboration "warning" in sexual offences. The Appendix includes a useful list of statutes, federal and provincial, on corroboration, and a bibliography. A Manitoban is disappointed to see that Graham and Read's *Corroboration* is not mentioned, albeit it is rather dated.¹⁰

Phipson, which has been with the profession since 1892, has received, and is in the process of continuing to receive, something more than a mere up-dating. What is of special interest to Canadian lawyers and Judges is the inclusion of the *Civil Evidence Act, 1968*¹¹ as to civil hearsay, and the *1972 Act*¹² as to opinion. The 1978 Supplement contains some important case developments on Similar Fact evidence and the "striking similarity" test. The *Mansfield* case,¹³ came out too late for inclusion, but deserves careful attention concerning a multiple count indictment.

The editors observe that the retreat from *Conway*¹⁴ on facts excluded by Public Policy "continues apace."¹⁵ The House of Lords, "having given that tail muscle, have now set it to wagging the dog."¹⁶ Why is it that Public Policy gives rise to reference to unruly horses, dogs being wagged by their tails, and so on?

On legal professional privilege, it is emphasized that the privilege depends "on the relationship from which the document sprang, not from the identity of the person who has it in custody."¹⁷

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8. R. Graham and F. Read, *The Law Relating to Corroboration in Criminal and Illegitimacy Proceedings* (1928).
 9. *R. v. Baskerville*, [1916] 2 K.B. 658 (Crim. App.).
 10. *Supra* n. 8. Still, like the old Bray and Ross books on *Discovery*, there is much to be found that is very useful in the wisdom of our forefathers that ought not to be cast aside — "there is no new thing under the sun."
 11. 1968, c. 64 (U.K.). See J. Buzzard, R. May and M. Howard (eds.), *Phipson on Evidence*, (12th ed. 1976) 274-91.
 12. 1972, c. 30 (U.K.). See *Id.*, at 486-96.
 13. *R. v. Mansfield*, [1978] 1 All E.R. 134 (C.A.).
 14. *Conway v. Rimmer*, [1968] A.C. 910; [1968] 1 All E.R. 874 (C.A.).
 15. *Phipson on Evidence*, *Supra* n. 11, 1st Supp. (1978) at 563.
 16. See *D. v. National Society for the Prevention of Cruelty to Children*, [1977] 1 All E.R. 589 (H.L.).
 17. *Supra* n. 15, at 587. See also *Re B.X. Development Inc. and 9 Others and The Queen* (1977), 70 D.L.R. (3d) 366 (B.C.C.A.), as to search of law office.

The Privy Council, *Phipson's* new editors point out, have now placed an important qualification upon the view that silence in the face of an accusation cannot give rise to an inference that the defendant accepts the truth of the accusation against him. The concept of "speaking on even terms" is a factor.¹⁸

A number of cases in which police have refused to allow a suspect to contact his lawyer are noted in the 1978 Supplement. Finally, for present purposes, the Supplement, paragraph 827 A, on "discretion to exclude admissible evidence" deserves close attention in the light of *R. v. Wray*.¹⁹

The law of evidence continues to develop so rapidly, with recent Supreme Court of Canada pronouncements throwing out such old stand-bys as the *Sussex Peerage Case*²⁰ and *Hodge's Case*,²¹ and with proposals for codification that seems to affect the decision-making process, that trial lawyers and Judges need all the help they can possibly get. These three recent books are truly helpful. They are perhaps somewhat too much for law students to be expected to master, but are very important reference works for them.

It is not, I think, too much to suggest that any law office which does any litigation would be well-advised to invest in these three books; but, especially, Choate on *Discovery* in the field of civil litigation, care being used, of course, to note differences between Manitoba rules of practice and those of other jurisdictions from which the case-citations originate.

18. *Parkes v. The Queen*, (1977) 64 Cr. App. R. 25 (P.C.).

19. [1971] S.C.R. 272.

20. (1844), 11 Cl. and Fin. 85, 764; 8 E.R. 1034, 1292 (H.L.). See *R. v. O'Brien*, [1978] 1 S.C.R. 591. (1838), 2 Lewin. 227, 168 E.R. 1136 (Crown Cases). See *R. v. Cooper*, [1978] 1 S.C.R. 860. See also

21. L. Robinson, "Circumstantial Evidence: The Rise and Fall of the Rule in *Hodge's Case*," [1978] 2 C.R. (3d) 148.