BOOK REVIEWS

ODGERS' PRINCIPLES OF PLEADING AND PRACTICE
(22d ed., 1981);
Stevens, London, England;
Carswell, Agincourt, Ontario;
D.B. Casson and I.H. Dennis.
565 pp. $37.25
F.K. Turner, Q.C.*

For almost one hundred years Odgers' has served well the needs of students, teachers, practitioners and Judges in the field of civil procedure. Compact, concise and to the point, it still manages to deal authoritatively with pretty much the whole range of the subject of pleading and practice in civil actions in the High Court of Justice — and a very large and dynamic subject it is. This latest edition by Dr. Casson, Senior Lecturer in Law at the University of Surrey, and Mr. Dennis, Lecturer in Law at University College London, which is indeed a welcome addition to every working law library, certainly lives up to Odgers' well-earned and long-standing reputation. It is quite obvious from a perusal of the 22d edition that the editors and publishers have spared no effort in this post 1975 revision and up-date — "at a time of rapid and far-reaching change in the law of civil procedure. It is hardly an exaggeration to say that the last few years have produced more innovation and reform than at any time since the Judicature Acts of the last century", as Casson and Dennis point out in the Preface.

Having in mind students who may not as yet be familiar with this text, a brief overview of its content — in the light of our *Queen's Bench Act and Rules* — would seem to be in order. But, first, attention is directed to the observations of Mr. W.P. Fillmore, K.C. and Mr. F.J. Turner, K.C. with respect to the 1939 revision of our Rules, the last major revision. Mr. Fillmore states: — "The Rules of the Court of King's Bench were passed in England in 1875, following the Judicature Act of 1873. I thought that our rules of Court were comparatively modern but on glancing through a book entitled 'The Institutes of Justinnian', by Abdy and Walker, I note that our rules may be traced back approximately 1,400 years. In Book I of these Institutes we find the following: 'Justice is the constant and unceasing wish of rendering to everyone his right. The leading principles of right are these: To live honestly; not to injure another; to give to each his own.' This sounds," Mr. Fillmore continued, "like some expressions in the King's Bench Act and Rules. Under the heading 'Civil Judicature and Procedure under Justinian' we find (p. 500): 'No formal action or postulatio required; the plaintiff stated his case in any form of words he pleased, his verbiage being immaterial so long as his meaning was clear.'"[1] Mr. Turner stated: "'The procedure in our courts can be made as simple or complex as the judges and lawyers desire to make it. We now have in our new rules a finished tool with which to work. Let us use it intelligently and it will serve us, and the public whom we serve, well.'"[2] The 1939 Rules were the

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1. (1940) 12 Man. Bar News, at p. 49.
2. *Ib.*, at p. 48.

product of many years of hard work by a committee chaired by Mr. E.K. Williams, K.C. (later C.J.Q.B.). The serious student of civil procedure will consult the Table of Concordance of the 1939 Rules, which shows the sources, and Mr. Williams' text[3] comprising Annotations to the earlier Act and Rules — this being a subject in which the history and evolution of the precepts must not be ignored if the case law is to be understood and applied intelligently. It must, too, always be remembered that the Rules are an adjectival means to an end and not an end in themselves. Also, the authorities on substantive law frequently are dependent upon the procedural considerations which accompany or underlie them. Students need to appreciate that fact of legal life if they aspire to be competent practitoners. For instance, the very important equitable jurisdiction of the Court is, in large measure, a product of procedural precepts — and that is of great significance in practice both to barristers and solicitors, in a fused profession such as ours.

Against and in the context of that general background, the student will find Odgers an invaluable guide to the administration of civil justice in Manitoba. There are, of course, differences between English and Manitoba practice. But, for the most part, the basic precepts, especially in the matter of *pleading*, are substantially the same. It is in this area, I believe, that the book will be found to be of great help to our students. At the same time, it should not be overlooked that consideration of the differences serves a useful purpose, for they point up directions in which our work-a-day practice might be changed for the better. Comparative study is beneficial to students, both at the law school and at the bar admission course levels: — there is room for the responsible exercise of one's legal imagination in the field of civil procedure, having regard to the inherent jurisdiction of the Court and the opportunity for judicial law reform.

After an introductory survey of the subject, Odgers addresses the very important threshold topic — matters to be considered *before* commencement of action. This includes, *inter alia*, Parties and Joinder of Causes of Action (our Rules 49 - 84). A mis-step in this area can have serious consequences for the pleader *e.g.* as to the limitation of actions. One must give close attention, at this stage, to the facts of the particular cause and the substantive law pertaining to it, not overlooking the concurrent administration of law and equity rules within sections 63 - 65 of our *Queen's Bench Act*, and the equitable jurisdiction of our County Courts.

The *Mareva* injunction and *Anton Piller* order, described by the editors as among "the most remarkable judicial innovations of modern times" are described and discussed at pp. 59-65. These products of the inherent jurisdiction of the Court have found their way into Canadian jurisprudence. (May I say that I have considered them in "Headnotes & Footnotes" — the Manitoba Bar Association Newsletter — on previous occasions: — See, September, 1982 issue and the earlier references therein.) Developments such as these (as well as others not, perhaps, quite so remarkable) do render the subject of civil procedure-at-large more dynamic and interesting than some students confronting the black-letter Rules at first appreciate.

3. Williams. *Manitoba King's Bench Annotated* (1914).

The section of Odgers on the Function of Pleadings (p. 87) deserves close and repeated perusal, with special attention to the Cardinal Rules. First, the allegations in every pleading must be *Material*. Second, the allegations in every pleading must be *Certain*. Chapters 7 and 8 deal thoroughly with these rules, accompanied by meaningful illustrations. They should be studied in the context of our Rules 85 - 134, in particular Rule 101: — "Pleadings shall contain a concise statement of the material facts on which the party pleading relies, but not the evidence by which they are to be proved." When applied properly to the circumstances of particular causes the beneficial result is twofold: — (1) a good pre-discovery and pre-trial understanding of one's case, both in terms of the substantive law applicable to it and the evidence required to support it; and (2) the process of proper pleading on both sides enables the Judge to understand from the beginning just what the case, the dispute, is all about — something which Judges are, alas, too frequently denied only because of slipshod work on the part of lawyers at the pleadings stage itself.[4] Judges are naturally reluctant to visit upon the litigants the sins in pleading of their lawyers.

The book then proceeds to deal with the basic precepts which govern the task of Answering Your Opponent's Pleadings (our Rule 85 *et seq.*) with useful illustrations. Certain defences which require to be specifically pleaded are considered *e.g.* limitations, Statute of Frauds, and the like.

Chapter 20 contains helpful observations on the Examination of Witnesses and the use of Documentary Evidence,[5] but one must make due allowance for differences between English and Canadian law *e.g.*, as to self-incrimination.

There is scarcely any aspect of pleading and practice left untouched — this in a very readable book — and close attention to Odgers will enable the student the better to undertake working with the more encyclopedic books on Practice and Precedents, both Canadian and English, and precedents used in law offices where they are sponsored or articled.

Three important points are sometimes overlooked by some students. First, by virtue of section 103(5) of our *Queen's Bench Act* the Rules made by the Judges have the same force and effect as if they were embodied in, and shall be part of, the Act. The Rules are law. Second, implicit in the Act and Rules there resides the inherent jurisdiction of the Court, enabling the Court to prevent abuse of process and to develop process creatively as in *Mareva* and *Anton Piller*. There is a distinct role for counsel in this creative process. Third, the *Code of Professional Conduct* emphasizes practice and procedure in Chapter 2 on Competency. A knowledge of substantive law theory alone is not good enough.

May I suggest that close attention to the latest edition of Odgers will go a long way towards helping to fulfill the observation referred to earlier: — "The procedure in our courts can be made as simple or as complex as the judges and lawyers desire it to be . . . Let us use (the Rules) intelligently and (they) will

4. A.J. Christie (Prothonotary), "A Little More Care, Please" (1948), Man. Bar News 81.

5. It is useful to study this section along with Wrottesley on *The Examination of Witnesses* and Munkman on *The Technique of Advocacy*.

serve us, and the public whom we serve, well." Also, that it would be in the best interests of all concerned if a permanent committee or commission of representative members of the judiciary and the practising profession were constituted to review and make recommendations for the improvement of our Rules, and their use, on a continuing basis. This would tie in well with, but not be part of, the Standards Committee of The Law Society of Manitoba which took effect April 1, 1981. It could be done with or without amendment to section 103 of *The Queen's Bench Act* and, in any event, without detracting from the ultimate power of the Judges to make and interpret the rules.