CASE AND COMMENT

PARLIAMENT AND PIPELINE—BILL NO. 298 TO ESTABLISH THE NORTHERN ONTARIO PIPE LINE CORPORATION—"RIGHTS OF PARLIAMENT"—CLOSURE—IMPARTIALITY OF THE CHAIR—PARLIAMENTARY PROCEDURE AND THE CONDUCT OF LEGISLATIVE BUSINESS.—

> Last week brought to a close a session remarkable . . . in parliamentary history. . . . The proceedings . . . , in respect of the continuous length of sittings, are I apprehend, without parallel in parliamentary history. One sitting lasted from April 13 to April 16, i.e. 53½ hours; and another, and this more remarkable still, began on the afternoon of Monday, April 6, and lasted till midnight on Friday, April 10, the House having been uninterruptedly in session, except for the customary daily interval for the dinner hour from 6 to 8 p.m. for 131 hours. These drastic proceedings did not however secure the passing of the bill into law, and on the 16th April, the Bill was abandoned.[1]

Lord Aberdeen's description of the last days of the final session of the seventh Parliament, which expired ingloriously through the efflux of time in 1896, is a necessary reminder that parliamentary obstruction is not new in Canada. The introduction of closure into the rules of the House of Commons in 1913 did not remove the effectiveness of dilatory tactics on the part of the Opposition. Closure did ensure that a determined government could force a measure through, though at the price of a considerable amount of time, energy and dignity.

There has been some tendency in Canada to regard the whole pipe-line debate in the House of Commons as an unfortunate and disgraceful return to the bad old politics of our less inhibited ancestors. It seems to me that this view is both mistaken and dangerous. It is better on the whole to take political issues too seriously than not to take them seriously enough. The fact that the Liberal party has been in power since 1935 is due to the uninterrupted confidence of the country in the governments of

[1] Public Archives of Canada. Confidential Despatches (Governor General) G. 12, Vol. 92, pp. 353, 368. The bill in question was the Remedial Bill concerning the Manitoba Schools.

Mackenzie King and Mr. St. Laurent. There is little doubt that the historians of the future will agree that, on the whole, this confidence has been justified. But long-lived majority parties tend to create a danger to the public good. The opposition parties may not inspire much confidence in the minds of the majority, and the majority is likely to think that the opposition parties are frequently, if not usually, wrong. They may be. But it is extremely dangerous to be lulled into the belief that the opposition is wrong in opposing the government at all.

The late Lord Balfour, in a much quoted phrase, observed that our system of government "pre-supposes a people so fundamentally at one that they can safely afford to bicker; and so sure of their own moderation that they are not dangerously disturbed by the never-ending din of political conflict".[2] Two corollaries flow from this proposition. The majority should never allow itself to be persuaded that the defeat of the existing government is an utter calamity; and the parties in contending for political advantage should never allow their strife to bring the necessary processes of government to a standstill.

It is useful to be reminded by events that under our constitution there are other ways of curbing the government than through a general election. A government with a majority can get its way in the end. But concerted opposition may consume so much time that the government may have to choose between dropping a controversial measure and losing valuable parliamentary time for the consideration of the rest of its legislative programme. "It cannot be denied", says Lord Campion, "that under modern conditions the concerted action of the Opposition is the best means of controlling a Government—by criticizing defects in administration loudly enough for the public to take notice. This is not a particularly pleasant, if salutary, experience for Ministers; and it is only natural that they should be tempted to think both that the Opposition abuse their opportunities and that their opportunities are unnecessarily ample."[3]

The Opposition must use its rights to oppose with discrimination and responsibility, and not—as Lord Campion put it—"in a spirit calculated to ruin the game for the sake of the prize".[4] The Opposition should only employ obstruction where it has

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[2] In the introduction to the World's Classics edition of Walter Bagehot, The English Constitution (London, 1928) p. xxiv.
[3] Lord Campion (ed.), Parliament, A Survey (London, 1952) p. 30.
[4] *Ibid.*

what Mr. Herbert Morrison calls "a moral justification for sustained opposition". He continues:

> Even if a Government has a working majority there is a duty upon it to avoid highly controversial legislation or administrative policies for which it has no proper mandate from the people, unless circumstances have arisen which make action necessary in the public interest. If the Opposition is to be given no moral case for obstruction, the Government must 'play the game' and respect the principles of parliamentary democracy, otherwise representative government will be endangered.[5]

At twenty minutes past three, on the morning of June 6th, 1956, the Canadian House of Commons finally passed what is commonly known as the pipe-line bill, after a debate which had occupied practically the entire time of the house since the 14th of May—a total of seventeen sitting days. During that time the debate ranged far and wide over the field of national policy and parliamentary procedure. The cause of the debate was a bill to set up a crown corporation to build a gas pipe-line from the Ontario-Manitoba border to Kapuskasing, Ontario, to empower the corporation to lease the line (with the option to purchase) to a private company called Trans-Canada Pipe Lines Ltd., and to make short-term loans to the Trans-Canada company not in excess of $80 million or 90% of the cost of building a pipe-line from the Alberta-Saskatchewan border to Winnipeg.

It is not necessary here to enter into the complicated story of the scheme to pipe natural gas from Alberta wells to markets in Eastern Canada. Competing private firms had sought the privilege for several years and several times the House of Commons had debated the whole question when incorporation of one or other of the companies was sought by private bill. By 1955, however, the major questions had been resolved. The Trans-Canada company had been settled on as the "chosen instrument" to build and operate the pipe line. An all-Canadian line had been assured by the announced willingness of the governments of Canada and Ontario to bear the risk and burden of building that part of the line which ran through the rocky and un-lucrative Northern Ontario bush. Agreement had been reached to ensure that only a fraction of the gas would be exported to the United States, while the bulk of it was made available to Canadian consumers. On the strength of these arrangements the Trans-Canada company had made sufficient preliminary financial and engineering arrangements

[5] Herbert Morrison, Government and Parliament (London, 1954) p. 98.

to commence the western "leg" of the line from the Alberta border to Winnipeg in the early summer of 1956. All that remained was for Parliament to set up the crown corporation to build the Northern Ontario section of the line.

Before the bill could be introduced a further hitch developed. Trans-Canada informed the Government that they had not been able after all to complete the arrangements for financing construction, although they had provisional arrangements with their contractors and had secured options on the only available supply of 34-inch pipe. All that was needed was money. Confronted with this situation and aware that, if the company was not in a position to take up its arrangements with its suppliers and contractors by the end of the first week in June, the construction of the western "leg" might be indefinitely delayed, the Government agreed to meet the temporary financial requirements of the company.[6] On Thursday, May 10th, Mr. Howe (the Minister of Trade and Commerce) moved in the House of Commons that the house consider at its next sitting a resolution approving the introduction of a bill to establish a crown corporation to be known as the Northern Ontario Pipe Line Corporation.

Thereupon the opposition parties opposed to the bill, the Progressive Conservatives and the Co-operative Commonwealth Federation, began to introduce a series of dilatory motions and, by raising points of order and by forcing each question to a recorded vote, to obstruct passage of the bill. From that point the battle was joined. The Government was evidently prepared to fight, for Mr. Howe concluded his opening speech on the resolution stage by the unprecedented step of giving notice of closure. Under the closure rule a minister, having given notice of intention at the

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[6] Agreement was apparently not reached in the Cabinet without difficulty. From the beginning of May on the Opposition was pressing the Government at question time. For example, on May 4th, 1956, the following exchange took place in the house:

"*Mr. George H. Hees* (*Broadview*): May I ask a question of the Prime Minister? Could the Prime Minister advise the house whether the government is sufficiently united on the question of the pipe line to allow this very important question to be brought before the house early next week for debate?

"*Mr. St. Laurent* (*Quebec East*): As soon as there is a final decision made, it will be announced to the house, and I can assure the hon. gentleman and all hon. gentlemen that I shall be very glad to be able to make a definite announcement to the house as soon as that is possible. I can assure you that I do not enjoy as much as you do these questions that are constantly being thrown at us, and I should be very happy to reach a position where they will be no longer looked upon as desirable by those who are asking them now." (Canada. House of Commons Debates (unrevised) May 4th, 1956, pp. 3570-3571).

previous sitting, may move that consideration of the bill (or resolution) shall be the first business of the house and that "the consideration of the same shall not further be postponed". Speeches are limited to twenty minutes each, and the question must be put as soon as the member speaking at 1 a.m. has concluded his remarks. In the course of the next three weeks closure was again applied on the second reading of the bill, on the committee stage, and on third reading. By contrast the bill passed through all its stages in the Senate in less than ten hours and received royal assent on June 7th, the deadline set by the Government for passage of the measure.

Why did the two opposition parties oppose the bill so strenuously? The C.C.F.'s reasons were clear enough. They had persistently opposed proposals for the construction of the gas pipeline under private auspices. They believed that the line should be built and operated by the government of Canada as a public enterprise, and they were also strongly opposed to the Government's tactics in forcing the bill through under closure. The Conservatives were motivated by more complex reasons. Unlike the C.C.F., they believed that the line should be built by a private company. They criticized the Trans-Canada company for its inability to finance its operations and for its American sponsorship. They attacked it as the chosen instrument of the Government and they argued that other groups could have been found to build the line without government assistance. They did admit, somewhat reluctantly, that a government built and operated line might be necessary as a last resort.

The Conservative opposition to the bill was tactical in essence rather than doctrinaire. They had achieved, with the support of the Social Credit group in the house, a considerable parliamentary victory in the previous session when they had forced the Government to modify its proposed revision of the Defence Production Act. In the hot June days of 1955, "the Progressive Conservative party scored a very considerable victory, the government got a lesson, and we all saw a striking illustration of the way in which the supremacy of parliament has to be asserted under the conditions of party government".[7] It was a great parliamentary victory, but the constitutional issue of entrusting very broad powers to the discretion of a minister of the Crown is too abstract to interest the average man and the Conservatives found that they

[7] J. A. Corry, Arms and the Man (1955), 62 Queen's Quarterly at pp. 315-316.

had not succeeded in arousing much feeling in the country. Nor were they displeased that the minister under attack in the pipeline debate was the same Clarence Decatur Howe whom they had attacked the year before. That able and energetic minister has never concealed the low regard in which he holds politics and politicians, and the Opposition was delighted to renew their battle with him. It also appeared that the pipe-line issue, with its undertones of anti-Americanism, would have a wider public appeal. With Parliament in its third year, a general election is probable within one year and certain within two, so that any tactical gains in 1956 are that much greater than those in 1955.

The Social Credit party, which had supported the Conservatives in 1955, supported the Liberals in 1956. They did this for obvious reasons. With the bulk of their members from oil-rich Alberta, which is anxious to find an outlet for its gas, it is not difficult to see why the Social Credit party supported the Liberals on every single vote with one exception. As Mr. E. G. Hansell, the party whip in the house, explained it:

> When the Minister of Trade and Commerce first introduced his motion for closure at the resolution stage, we thought he was premature. We thought further time should be given to discussion of the resolution and we voted against closure. . . .[8]

In fact closure came to be the real issue of the debate. The opposition parties took it as a challenge and employed all the fertile ingenuity of their parliamentary experts in concocting procedural obstacles for the bill. Seldom in the history of Canadian parliamentary institutions can the works of Beauchesne, Bourinot, Campion and Erskine May have received such intensive study. The pages of Hansard were dredged for precedents and opposition speakers gleefully quoted the strictures of Laurier, Mackenzie King, Ernest Lapointe and other Liberal worthies against closure. No opportunity was lost to invoke the shades of Louis XIV and Charles I. When Mr. Donald Fleming was escorted from the house by the Sergeant at Arms on May 25th after being suspended for defying the chair, his front-bench colleague, Mr. John Diefenbaker, solemnly intoned, "Farewell, John Hampden".[9]

Why, in the circumstances, did the Government impose closure? The fact that no Liberal government had done so before had always held a proud place in the armoury of Liberal platitudes. In 1932 Mackenzie King had skilfully employed dilatory

[8] Canada. House of Commons Debates (unrevised) May 28th, 1956, p. 4402.

[9] *Ibid.*, May 25th, p. 4352.

tactics to force the Conservative government of R. B. Bennett to apply closure to ensure the passage of the Relief Bill.[10] There can be little doubt that the Liberals felt that similar tactics had been employed against them on the Pipe Line Bill. Mr. Harris, the Leader of the House, asserted that Mr. Diefenbaker had made it known as early as March 9th that the Opposition would employ obstruction that would make "the defence production filibuster . . . look like a 'skirmish' alongside [it]".[11] When Mr. Coldwell, the C.C.F. leader, accused the Government of having planned to introduce closure from the beginning since "that motion was agreed upon by the cabinet and by the minister long before what he calls the obstruction motions were ever moved", Mr. Howe replied that "It was agreed closure would be applied if necessary, but it was agreed that if there were no evidence of obstruction it would not be applied at that time" (that is, at the resolution stage).[12]

In that case why did the Government give notice of closure at the earliest opportunity on the resolution stage? Mr. Howe had concluded the opening speech of the debate by giving notice of closure. The Government's answer would be, first, that obstruction had already begun since the Opposition had taken up nearly ten pages of Hansard on the day that Mr. Howe's notice of motion had appeared on the order paper (May 10th) arguing that it was improper to proceed with the motion since a similar one (providing for the Pipe Line Corporation but without the provisions for lending money to Trans-Canada) had already been put down but not yet proceeded with. As soon as the Speaker had ruled that this objection was not in order, two further dilatory motions were put by the Opposition. The Government's second ground would be that, having decided that the bill must go through within the time they had allowed themselves, there was no choice except to impose closure and force the bill through.

How adequate this defence is must remain a matter of opinion. It is quite possible that the Government could either have arranged beforehand "through the usual channels" or have reached at some later stage a compromise with the Opposition on the terms of the bill. Instead they seem to have decided at the beginning that no compromise was possible. Within a few days after the debate began this was certainly true. The debate became a battle of wits

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[10] R. M. Dawson, The Government of Canada (Toronto, 1954) p. 416.
[11] Canada. House of Commons Debates (unrevised) May 25th, p. 4338.
[12] *Ibid.*, May 17th, 1956, p. 4048.

between the Government and the Opposition, in which the latter alternated attempts to raise debatable procedural points (which would consume time) with speeches on various stages of the bill (which the Government complained were irrelevant and repetitious). The hard-pressed Hansard reporters caught an interruption on May 30th which summed up the feelings of many Liberal members:

Une voix: Parlez donc du pipe-line![13]

The interruptions were not always phrased in what is known as parliamentary language and it is perhaps better that *Hansard* recorded the following than some of the less audible observations which were being made at that moment:

Some hon. Members:
There will always be a pipe line,
The pipe line shall be free;
The gas shall flow from west to east in each locality.
There'll always be a pipe line,
The pipe line shall be free—[14]

That was the point at which Mr. Speaker, on June 1st, announced that he had been in error the previous evening in allowing a motion of censure against certain statements in the press before he had ruled on an appeal from a chairman's ruling in committee. There was, for a few minutes, a scene of considerable disorder in the house before business was resumed.

It was perhaps inevitable that the Speaker, the Chairman of Committees and the Deputy Chairman became to some extent the victims of the debate. All three suffered visibly from the constant strain of dealing with a myriad of procedural problems, many of them both complicated and subtle. The handling of such a debate required experience, knowledge, firmness and tact. It was necessary to "keep the debate on the rails" and at the same time retain the good-will and respect of both sides of the house. That before the debate was over the Leader of the Opposition had moved a vote of non-confidence in Mr. Speaker is rather a reflection of the position of the chair in the history of the Canadian House of Commons than evidence of failure in his duties by Mr. Speaker Beaudoin. In fact, in Mr. Beaudoin the house has had one of the most conscientious and knowledgeable speakers in recent years. If he had, before the pipe-line debate, displayed any fault as a chairman it was too great a willingness to hear every side of the argument before making up his mind on a point of

[13] *Ibid.*, May 30th, 1956, p. 4475. [14] *Ibid.*, June 1st, 1956, p. 4553.

order. The rules of the Canadian House of Commons allow what some critics regard as an undue number of opportunities for appeal from the Speaker's ruling to the house. That there were only two appeals against Mr. Beaudoin's rulings between his election to the chair and the pipe-line debate is evidence of his skilful and impartial conduct of his office.

The circumstances surrounding the issue of parliamentary privilege raised by Mr. Colin Cameron of the C.C.F. on the evening of May 31st brought the question of the impartiality of the chair to a head. There can be no doubt that by this time two weeks of weary vigil in the chair had taken their toll of Mr. Speaker Beaudoin. Mr. Cameron rose to draw the attention of the Speaker to two letters in the Ottawa *Journal* which he asserted were a breach of the privileges of the house. Mr. Speaker then informed Mr. Cameron that in such a case the proper procedure was to move a motion of censure against the newspaper and the authors of the letters, and explained the appropriate procedure. Mr. Speaker thus fell into a trap which he himself, by indicating the appropriate form of motion, had helped to dig. For the motion was debatable, the pipe-line bill was still in committee and the Government's deadline for the bill was seriously menaced. In vain Mr. Harris, the Leader of the House, protested "that no intervening proceeding can occur", the appeal from committee having been sustained, and that the house should resume committee consideration of the bill.[15]

The next morning, at the commencement of proceedings, Mr. Speaker announced that he had given fuller consideration to the letters complained of in the motion of censure and had reached the conclusion that they did not go beyond the bounds of fair comment, and that he therefore ruled the motion out of order. He said:

> . . . I have come to the conclusion that because of the unprecedented circumstances surrounding this pipe-line debate and because of the remarks that were made in this house by members themselves, it was and is impossible, if we are to consider freedom of the press as we should, to take these two articles as being breaches of our privileges.[16]

He refused to hear further argument on the point and added further, when the C. C. F. Whip, Mr. Stanley Knowles, moved the adjournment:

> I am prepared to take the responsibility before this house and the country for what I do. Hon. members know that it is within my juris-

[15] *Ibid.*, May 31st 1956, p. 4531. [16] *Ibid.*, June 1st, 1956, p. 4537.

> diction—indeed it is my duty—to make a ruling whenever I consider that I must make one. The right of hon. members is to appeal a ruling. Once the appeal has been made, the house has decided. If hon. members feel that in the performance of my duty my conduct should be criticized they also know, as do I, that before six o'clock tonight they can put on the order paper a notice—48 hours' notice—of a substantive motion which I am sure will be brought up after the 48 hours have expired.[17]

In the event, this challenge was accepted by the Opposition and a motion of want of confidence in the chair was placed on the order paper and subsequently debated. When the debate on the motion concluded on June 8th it was negatived on division by 109 votes to 35.

One of the lesser ironies of the situation was that one of the letters complained of by Mr. Cameron had been written by a prominent member of his own party, Mr. Eugene Forsey. In his letter, that indefatigable writer on the constitution had argued strongly that the rules were being interpreted by the chair in the Government's favour. Mr. Forsey referred to a motion moved by Mr. Knowles on May 23rd:

> The Speaker admitted [Mr. Knowles'] right to do so. But he asked, rather plaintively (p. 4260), 'How long am I going to act as if the Minister of Trade and Commerce should not have his motion put forward from the chair and therefore should not be recognized at all, so as to give how many hon. members the chance to move many intervening motions in the meantime?'
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> The answer is, of course, 'Forever, if the motions are in order; not one minute if they are not'. What other answer can there be? The rules are there. It is the Speaker's duty to enforce them, let the chips fall where they may.[18]

Mr. Forsey has put a powerful case, and none stronger was put in the debate that followed. It assumes, however, a tradition of strictly non-partisan authority in the Speaker which has never really existed in Canada. For the Canadian speakership is now just approaching the point reached in the United Kingdom during the tenure of Mr. Speaker Shaw Lefevre (1839-1857). The difference was made very clear when, on June 29th, Mr. Beaudoin offered to lay his resignation before the house. The reason for his offer arose out of a private letter he had written to a Montreal journalist, Mr. Cinq-Mars. In the letter the Speaker had said that his accusers had distorted the facts of the pipe-line debate for their political ends, and this phrase and others had been quoted

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[17] *Ibid.*, June 1st, 1956, p. 4539. [18] *Ibid.*, May 31st, 1956, p. 4530.

in a newspaper article.[19] Now this was unfortunate. It was unfortunate in that the Speaker had allowed himself to express opinions which were both partisan and unwise. It was unfortunate that the Speaker's confidence had been abused by the publication of them. The fact that they were published in innocence, on the part of Mr. Cinq-Mars, that there was anything wrong with them is itself evidence that the notion of an impartial speaker is not fully understood, even among the press.

Far more revealing than this, however, were other remarks made by the Speaker in the course of his explanation to the house. For he evidently thought that he should have been able, when his conduct was under a motion of censure, to have replied in his own defence. "Some hon. members here know", he said, "that before the debate on the motion of censure started I wanted to speak. As a matter of fact I thought I had the right to be heard."[20] He wished, he said, to take the floor in the debate immediately after the mover and seconder of the motion, "but there was hesitancy as to whether I should do that, or whether I had the right to do it". He had therefore allowed the opportunity to pass, but on reflection had come to the conclusion that he did in fact have the right to speak. He referred to a debate in the house in 1931, in which both Mr. Bennett and Mr. King had asserted that the Deputy Speaker had the right, if his conduct were impugned, to reply in his own defence. He then produced further authority for this view:

> Looking further back into the record I find that in 1814, when Mr. Speaker Abbott had a motion of censure moved against him in the United Kingdom, he did take part in the debate soon after Lord Morpeth had moved the motion against him.[21]

Mr. Speaker Beaudoin's triumphant resurrection of a precedent from a period well before the modern traditions of the speakership had developed in the United Kingdom emphasizes the difference which now exists between the practice in the two

[19] It should be noted that the original passage in Mr. Beaudoin's letter was in French and there is some dispute over the precise shade of meaning intended:

> "*Mr. Speaker*: . . . I understand that it might arouse the indignation of some hon. members in this house when someone says that someone distorts the facts for his political ends.
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> "*Mr. Drew*: Falsifies.
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> "*Mr. Speaker*: Or falsifies. Of course if you want to use the most prejudicial translation you will use the word 'falsifies' but for my purpose the translation would be 'distorts'."

See Canada. House of Commons Debates (unrevised) June 29th, 1956, p. 5510.

[20] *Ibid.*, June 29th, 1956, p. 5509. [21] *Ibid.*, June 29th, 1956, p. 5510.

countries. A complete immunity from political considerations is the prerequisite of the judicial impartiality of the chair. The Speaker in Canada has no such immunity. He still has to contest elections; his future is not assured by usage and tradition; even the sight of his own vacant desk on the floor of the house to his right is a mute reminder that he has constituents. Mr. Beaudoin had gone far in raising the prestige and authority of the speakership. But the effect of the pipe-line debate and its aftermath has been to undo all that. When the Prime Minister announced in the house on July 9th that he had persuaded Mr. Beaudoin to reconsider his proffered resignation, he was merely facing the realities of Canadian political life.[22] The big question that remains is whether the damage can be undone.

The speakership has not, in Canada, been "taken out of politics" to the point where the Speaker can function with the complete authority of an absolutely impartial chairman. That successive speakers have, with great dignity and skill, preserved a considerable tradition of impartiality must be recognized with gratitude. But under severe pressure the independence of the Speaker becomes increasingly difficult to sustain.

The traditions surrounding the appointment and tenure of the Speaker in Canada militate heavily against his ever achieving or retaining that uncommitted position "above politics" which is the lot of the Speaker in the United Kingdom. For one thing his term is too short. With rare exceptions, the speakers of the house in Canada have held office for only one parliament. This is a consequence of the usage by which the speakership alternates in successive parliaments between French- and English-speaking members. Thus a Speaker has barely time to learn his job and suppress his partisan reflexes before he has finished with it. There has been a tendency in some quarters to regard the speakership as a sort of junior ministerial post. This impression has been heightened by the number of occupants of the chair who have achieved ministerial rank *after* they have served their term as Speaker.

Even the circumstances surrounding the election of the Speaker do not go far towards emphasizing the independence of the office from the government. In the United Kingdom the new Speaker is nominated and seconded by back-benchers, in order to emphasize the complete impartiality of his position. In Canada, on the other hand, he is usually nominated by the Prime Minister and

[22] *Ibid.*, July 9th, 1956, p. 5763.

seconded by another minister of the Crown, although in Mr. Beaudoin's case this long-standing tradition had been modified. He had been nominated by the Prime Minister, but seconded by the Leader of the Opposition.

There have been occasional attempts to place the speakership on a more permanent basis, but so far all have come to naught. The pipe-line debate has served to revive interest in the question. Mr. Coldwell referred to it when he rose to speak on the censure motion:

> I remember very well what took place about a year ago when a group of members of parliament in my office were discussing parliament and what had transpired. Among other things, we came to the conclusion that the time had arrived when this house might choose a Speaker who would preside over the house not for one parliament but for a number of years; and each and every one of us — may I say we were not of the language of the present Speaker of the house — were of the opinion that the present occupant of the Chair at the end of this parliament should be offered that position on a long-term basis.[23]

This would be a desirable reform. There is a further change which would not even modify the practice of the house and seems even more necessary to protect the chair from the appearance of partiality. Even in ordinary debate points of order and questions of the interpretation of the rules are most often brought up by the Opposition. In the pipe-line debate it was of course the Opposition which raised procedural questions. But there were few occasions when the Leader of the House intervened on these questions of procedure. In the main the Government was content to leave the chair to deal with them unaided. Nothing contributed more to create the impression that there were two sides to every question: that raised by the Opposition, and that taken by the chair and ultimately supported by the government majority. Nothing, it need hardly be said, could be more damaging to the prestige of the chair. Ministers have apparently taken the view that an exhaustive knowledge of the rules is expected of the Speaker and his deputies, but can otherwise be regarded as a hobby which can safely be left to the honourable member for Winnipeg North-Centre. It is to be hoped that when the house has risen for the summer at least a few ministers of the Crown will be found with Beauchesne and Bourinot among their vacation reading. So long as the chair must bear alone the responsibility of knowing the rules well enough to be able to argue with the Op-

[23] *Ibid.*, June 4th, 1956, p. 4650.

position, it is impossible for the Speaker and his deputies to avoid appearing to be both advocate and judge on each procedural point.

Did the pipe-line debate represent the House of Commons at its best or at its worst? Before dealing directly with the question, it is perhaps as well to anticipate the unctuous criticism (which inevitably arose in the debate itself) that such tawdry scenes could never have taken place in the "Mother of Parliaments". It may now be forgotten that a Prime Minister was howled down in the House of Commons by an opposition in which the voice of Lord Hugh Cecil was clearly audible, screaming "traitor!" After nearly an hour of this the Speaker adjourned the house without question put, "a state of grave disorder having arisen". As recently as 1925 a motion of censure of Mr. Speaker Whitley was introduced in the British house on the ground that he had allowed closure to be applied in the early stages of the Finance Bill. It is only fair to conclude that a certain robustness is characteristic of any House of Commons.

It is true that many of the speeches on both sides in the pipe-line debate are unlikely to rank with the immortal prose of Burke and Churchill. But it must be remembered that the principal asset of the Opposition was time. They may have deserved Mr. Pearson's complaint:

> The opposition, of course, claim, and they claim very often, to be gagged. If that is true, Mr. Speaker, they are the noisiest group of gagged men in history.[24]

Nevertheless, it must be admitted that they used—and used with skill and determination—the only means they possessed to carry out their purpose. If they could not delay the bill until the Government were forced to re-consider it, at least they could force the Government to appear as the enemy of free debate. The question is, Was their purpose legitimate?

To answer this we must recall that under modern conditions of party discipline a government with a clear majority is in a position of virtual dictatorship. In the reciprocal relationship between the Cabinet and the House of Commons, it is the Cabinet which is the dominant partner. Under the present rules, government business has priority to the near exclusion of other matters. The Government can use its faithful majority to overcome opposition at every stage of debate. The Cabinet, in fact, in its dealings with the House of Commons has all the legal and moral authority

[24] *Ibid.*, June 5th, 1956, p. 4742.

of a Victorian *paterfamilias*. It is one of the consequences of a democratic age, more than anything else, which has destroyed the moral authority of the Senate as a check on the majority in the elected lower house.

Most of the time, of course, on any given issue it is the Government which is right and the Opposition which is wrong. The fact that the Government is in power is a reflection of a popular feeling that it is better fitted to govern than any party in opposition. Furthermore, the Government with its army of experts in the civil service is in a position to know, whereas the Opposition can at best make an informed guess on any matter in dispute.

But even the best-informed of us are prone to make mistakes sometimes, and even the most considerate government is occasionally given to arrogance. The relationship between government and opposition in Parliament can only remain a happy one so long as it is based on mutual respect. Parliamentary government is dangerously ailing if the Opposition in the House of Commons is kept cowed and dispirited. The Opposition is, after all, both a necessary part of the process of government and a potential government itself. A government which forgets this is doing constitutional government in Canada a serious disservice. One of the most dispiriting things about Canadian politics, until the last two years, has been that it has not been the Government which has been discrediting the Opposition, but rather the Opposition which has been discrediting itself. The opposition parties, save in a few instances, were neither alert nor knowledgeable. The danger in any constitutional state in the twentieth century comes principally from an all-powerful and arrogant executive, immune from effective criticism or review. The fact that the Government must defend and carry its proposals in debate in the House of Commons is our greatest safeguard against the well-intentioned tyranny of the expert.

There is, of course, the opposite danger. We cannot afford to have the processes of government brought to a standstill by the mere obstruction of the minority. For anarchy is worse than mild tyranny. It is significant that the opposition parties, which had prolonged the pipe-line debate to the bitter end (thus throwing out the government's timetable to the point where interim supply had run out), held back from the temptation to obstruct further supply. They knew that obstruction is a double-edged weapon, and one that cannot be used too often, for the public will weary quickly of it.

The opposition show of strength over the pipe-line bill, whether it was justified on the merits of the bill alone or not, was without doubt a healthy thing. For a brief period the House of Commons showed a fierce vitality, because for once the outcome of a debate was not a foregone conclusion. No doubt the result is by no means all clear gain. There were bitter animosities stirred up which will not easily be healed in this Parliament. But time will heal the worst of them.

One good thing ought to come of it all, sooner or later. The procedural reforms introduced into the rules of the house during the present session were insufficient to place the House of Commons in a position to discharge its responsibilities in a workmanlike manner. No one regrets that there is now a time-limit on the debate on the address and on the budget. These should have been imposed years ago. But much remains to be done. It is now time to consider the introduction of what Lord Campion calls a "squeezing process" by some form of allocation-of-time orders. The effect of this would be to enable the house to fit an agreed legislative programme into a time-table. So many days or parts of days are allotted to each stage of a bill. In order to ensure proper consideration in committee, the chair is given the power to select the clauses and amendments to be discussed. It should also be noted that closure in the United Kingdom is granted only if the chair is satisfied that it does not impair the legitimate rights of the minority, whereas in Canada it is mandatory. Both these procedures depend on the impartiality of the chair and it is clear that—if they are to be followed in Canada—something will need to be done about the speakership.[25]

There is still insufficient incentive for the proper employment of parliamentary time. It is a serious defect in the rules that there is, practically speaking, nothing between the extreme rigour of full closure and an almost complete lack of time limit on discussion. If there were time limits on all stages of legislation, the Opposition would be forced to co-ordinate its attack and to make its criticism more telling. The present rules do the house a grave injustice, for they leave members free to debate matters of little weight until the approaching end of the session brings about a sudden docility about proposals which might have stood a more

[25] Cf. Lord Campion: "It may fairly be said that what prevents the closure from being used to destroy freedom of debate is that it cannot be imposed without the Speaker's acquiescence. It is very different in Chambers where the closure is not dependent on the Speaker's acceptance. Strange cases of democratic intolerance could be quoted even from the Dominions." Campion, *op. cit.*, p. 153.

severe scrutiny. It is to be hoped that the lessons of the pipe-line debate are not lost on those who are in a position to bring about reform in the rules of the House of Commons.

J. R. MALLORY*

* * *

OIL AND GAS LEASE—NATURE—SALE OF THE MINERALS—ADEMPTION OF PREVIOUS DEVISE.—Does a lease of petroleum and natural gas amount to a sale of those minerals so that a previously made devise of them is adeemed? The Saskatchewan Court of Appeal in *Re Sykes Estate* answered in the affirmative.[1]

In 1947 Mrs. Sykes devised a certain quarter section of land to her son-in-law. At the date of the will she was registered owner of the mines and minerals as well as the surface. In 1951, she gave a petroleum and natural-gas lease to Devonian Petroleums, under which she granted and leased to the company all the petroleum and natural gas and related hydrocarbons and

> all the right, title and estate and interest of the lessor in and to the leased substances or any of them within upon or under . . . together with the exclusive right and privilege to explore, drill for, win, take, remove, store and dispose of the leased substances. . .[2].

The lessee was to enjoy these rights for a period of ten years and so long afterwards as any of the leased substances was produced from the land. Then followed a clause providing for termination if drilling operations were not commenced within one year, with provision for annual extensions by payment of a delay rental of $160.00. When Mrs. Sykes died in 1953, although no wells had been drilled, the lease had been kept in force through the payment of delay rentals. The following year the company stopped payment of the delay rentals and as a result the lease came to an end.

The executors of the estate applied to the court for directions as to who was entitled to the delay rentals that had been paid under the lease as well as to the minerals. Applying authorities from *Gowan* v. *Christie*,[3] decided in the House of Lords in 1873, to the 1953 decision of the Supreme Court of Canada in *McColl-Frontenac Oil Co. Ltd.* v. *Hamilton*,[4] the court concluded that:

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[1] (1955), 16 W.W.R. 459. [2] *Ibid.*, at p. 460.

[3] (1873), L.R. 2 H.L. Sc. 273. [4] [1953] 1 S.C.R. 127.

> petroleum and natural gas leases in the form of the one under review are sales of a portion of the land with liberty to enter upon the land for the purpose of searching for and carrying away the petroleum and natural gas within, upon or under the land.[5]

Under the doctrine of conversion found in *Church* v. *Hill*,[6] this conclusion resulted in the benefits of the lease and the ownership of petroleum and natural gas going to the residuary legatee rather than the specific devisee.

What is the true nature of a petroleum and natural-gas lease? With the exception of one case, all Canadian authorities agree that it is not a lease at all. The exception is *Lynch* v. *Seymour*,[7] where the Supreme Court of Canada was asked to decide whether a particular indenture was a lease or a licence. The instrument, which related to the mining of iron ore, read in part as follows:

> Doth give, grant, demise and lease unto the said [lessees] the exclusive right, liberty and privilege of entering at all times for and during the term of ten years . . . to search for, dig, excavate, mine and carry away the iron ores in, upon or under said premises. . . .

The decision that such an instrument creates a lease has caused the courts some difficulty in subsequent cases. The case cannot be regarded, however, as laying down a general rule, for the Supreme Court was not asked to determine which of many possible interests was created by the instrument, but only to decide between a lease and a licence to find whether the lessor was entitled to distrain. Moreover, in the result, it was the decision of the lower court that prevailed, for the Supreme Court of Canada was evenly divided on the point. The case has usually been discredited or ignored in later decisions.[8] In any event, a petroleum and natural-gas lease cannot be a true lease, for it does not satisfy the basic requirement of exclusive possession in the lessee.

As to what interests such an instrument actually creates, two principle views have been put forth: first, that, with respect to the minerals, it is a grant of minerals as land; secondly, that it is a profit à prendre. The House of Lords' decision in *Gowan* v. *Christie*,[9] where the tenant attempted to throw up a lease on the ground that it could not be worked at a profit, is an example of

[5] (1955), 16 W.W.R. at p. 461.
[6] [1923] S.C.R. 642; *sub nom.*, *In re Church*, [1923] 3 W.W.R. 405.
[7] (1888), 15 S.C.R. 341.
[8] In *In re Heier Estate* (1952-53), 7 W.W.R. 385, Martin C.J.S., referring to *Lynch* v. *Seymour*, states at p. 394: ". . . the case is most unsatisfactory and I do not think it should be taken as affecting what appears to be the law with respect to the so-called mining lease established by many authorities".
[9] *Ante*, footnote 3.

the first approach. It was held that at common law "mere unworkability to profit" affords no ground for throwing up a lease of minerals, which are in their nature subject to great variances, but that in any case this was not a lease, but a sale out and out of part of the land. Lord Cairns in the course of his judgment stated:

> for although we speak of a mineral lease, or a lease of mines, the contract is not, in reality, a lease at all in the sense in which we speak of an agricultural lease. There is no fruit; that is to say, there is no increase, there is no sowing or reaping in the ordinary sense of the term; and there are no periodical harvests. What we call a mineral lease is really, when properly considered, a sale out and out of a portion of land.[10]

The second approach, that the lease is a profit à prendre, is supported by several Ontario authorities, including *Re Dawson & Bell*.[11] In this case, the owner of land entered into a lease very similar to the one before the court in *Re Sykes Estate*. After the owner died intestate the heirs-at-law became owners of separate parts of the land. Wells drilled under the lease were situate on only one of these parts and the question was whether both heirs-at-law were entitled to royalties. If the royalties were regarded as purchase price, they would go only to the owner of that part on which the wells were drilled. If, on the other hand, the royalties were considered rent, they should be shared between both heirs. Holding that the ordinary rule of apportionment of rent applied so that both parties were entitled to the rents, McRuer J. said:

> I do not think the amount paid for these privileges can under the English law be considered the purchase price of a chattel, *viz.*, gas or oil when the same has been severed from the realty at the head of the well, as is suggested in some of the American cases. It is the compensation that is paid for the right to exercise the privileges conferred under the lease. The land conveyed to the respondent was subject to the exercise of those rights and will continue to be subject to the exercise of those rights as long as gas is produced in paying quantities anywhere in the 125-acre tract demised.[12]

Which of these views is the Saskatchewan Court of Appeal taking in *Re Sykes Estate*, that is, does the court characterize the contract as a grant of minerals as land or as a profit à prendre? Martin C.J.S., speaking for the whole court, seems to imply that it is a profit à prendre, for he speaks of

[10] *Ibid.*, at pp. 283-284.

[11] [1945] O.R. 825. See also: *McIntosh* v. *Leckie* (1906), 13 O.L.R. 54; *Canadian Railway Accident Co.* v. *Williams* (1910), 21 O.L.R. 472; *Detomac Mines Ltd.* v. *Reliance Fluorspar Mining Syndicate Ltd.*, [1952] 3 D.L.R. 464, [1952] 4 D.L.R. 385.

[12] [1945] O. R. at p. 836.

> liberty to enter upon the land for the purpose of searching for and carrying away the petroleum and natural gas within, upon or under the land.[13]

This is the exact characterization of a profit à prendre: it is "a right to take something off another person's land".[14]

In reaching its decision, the Saskatchewan Court of Appeal relied in part upon two recent cases in which it was decided that a lease similar to the one in question here was a "sale of property". In the earlier of these, *In re Heier Estate*,[15] also decided by the Saskatchewan Court of Appeal, it was held that a petroleum and natural-gas lease is not a lease within the meaning of the Saskatchewan Devolution of Real Property Act[16] but a sale of property, and therefore an application made by the executors under the act for the approval of the instrument as a lease for a term longer than one year was dismissed.

In the later case, *McColl-Frontenac Oil Co. Ltd.* v. *Hamilton*,[17] the Supreme Court of Canada decided that a petroleum and natural-gas lease is a "contract for the sale of property" within the meaning of Alberta's Dower Act.[18] Here the owner of a homestead entered into a petroleum and natural-gas lease and, although the owner's wife signed the instrument, she did not do so apart from the husband as required by the Dower Act. After entering into a second and more advantageous lease, the owner attempted to rid himself of the first agreement because of alleged non-compliance with the act. The Supreme Court held that the first contract must stand, applying section 9(1) of the Dower Act, which provides:

> When any woman has executed a contract for the sale of property, or joined in the execution thereof with her husband, or given her consent in writing to the execution thereof, and the consideration under the contract has been totally or partly performed by the purchaser, she shall, in the absence of fraud on the part of the purchaser, be deemed to have consented to the sale, in accordance with the provisions of this Act.

In both cases, it should be noted, the question before the court was whether or not there had been a sale of property within the meaning of the particular act with which the court was dealing. The issues here were very different from the one before the court in *Re Sykes*. In the *Heier* case, the question was one of procedure

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[13] (1955), 16 W.W.R. at p. 461.
[14] *Duke of Sutherland* v. *Heathcote*, [1892] 1 Ch. D. 475, at p. 484.
[15] (1952-53), 7 W.W.R. 385.
[16] R.S.S., 1953, c. 118.
[17] *Ante*, footnote 4.
[18] R.S.A., 1942, c. 206.

only, and in the *Hamilton* case the lessors were admittedly attempting to break the first contract, so that the conclusion reached by the court in each case is not surprising. Perhaps for the particular issue in each of these cases, it was proper to characterize the contract as a sale of property, but the decisions should not be taken out of context and applied as a general rule.

In an early English case, *Doe d. Hanley* v. *Wood*,[19] a distinction is drawn between a mineral lease and a profit à prendre. In his judgment Abbott C.J. states that the indenture is not a lease,

> but the purport of the granting part of this indenture, is to grant, for the term therein mentioned, a liberty, licence, power, and authority, to dig, work, mine and search for metals and minerals, in and throughout the lands therein described, and to dispose of the ore, metals, and minerals only, that should within that term be there found. . . . Instead, therefore, of parting with, or granting, or demising all the several ores, metals, or minerals, that were then existing within the land, its words import a grant of such parts thereof only as should, upon the licence and power given to search and get, be found within the described limits, which is nothing more than the grant of a licence to search and get (irrevocable, indeed, on account of its carrying an interest) with a grant of such of the ore only as should be found and got, the grantor parting with no estate or interest in the rest.[20]

It is clear that the court regards a mineral lease as conveying ownership in the minerals whether or not they are reduced to possession and, therefore, this case stands for the proposition that a lease of minerals is in fact a sale of land. But once again we must bear in mind the problem facing the court in the particular case. Here, the original lessee stopped working the mines without cause, whereupon the owner entered into a second lease with another party. The court found that the lessor had been entitled to do so and that the first lessee had no action for ejectment.

That the petroleum and natural-gas lease in *Re Sykes Estate* is not a sale of land in the ordinary sense can be seen from the provisions of the instrument. The clause giving the lessee "all the right, title and estate and interest of the lessor in and to the leased substances . . ." at first appears to be an outright grant. But Mrs. Sykes "leased" as well as "granted" the minerals and, further, there was a time limit on the lease and grant. Moreover, the lessor did not dispose of the entire interest, but retained a percentage of the petroleums to be produced. In Saskatchewan there is now provision for registration of minerals with issuance

[19] (1819), 2 B. & Ald. 724.

[20] *Ibid.*, at pp. 738-739.

of mineral certificates,[21] as noted by Gordon J.A. in his dissenting judgment in *In re Heier Estate:*

> the agreement is not such a sale of the mineral rights or the leased substances as would ever lead to a certificate of title therefor being issued to the oil company.[22]

Therefore, reading the instrument as a whole, it should be construed as something less than an out and out grant of minerals.

With these qualifications in mind, can it be said that in *Re Sykes Estate* there was a sale of property that would extinguish the gift of minerals? The Saskatchewan Court of Appeal held that there had been an ademption, relying on the doctrine of *Church* v. *Hill*.[23] The rule in *Church* v. *Hill* is that there is an ademption of a gift not only where the testator ceases to own the property devised through loss, destruction or a completed sale but also where the testator has entered into an agreement for sale and dies before the conveyance is made. Even though the testator remains the legal owner, the agreement for sale converts the vendor's interest into a claim for the purchase moneys only, leaving no interest in the land to go to the devisee.

Section 19 of the Wills Act was advanced on the devisee's behalf. This section provides that:

> No conveyance or other act of or relating to any real or personal property affected by a will and made or done subsequently to the making of the will, shall prevent the operation of the will with respect to such estate or interest as the testator had power to dispose of by will at the time of his death.[24]

But this section was of no help to the devisee because the testator had no interest in the land at the time of his death as it requires.

Four of the six judges who sat on this case commented on the severity of the doctrine and expressed regret that such a decision had to be reached. The doctrine is generally recognized as harsh, as is shown by a draft of a new Uniform Wills Act submitted recently to the Conference of Commissioners on Uniformity of Legislation in Canada.[25] It was there proposed that a new clause be added to section 19 to put an end to the doctrine in situations similar to the one considered in *Church* v. *Hill*.

In conclusion it is submitted that the Saskatchewan Court of Appeal in *Re Sykes Estate* has, by the language of its judgment,

[21] The Land Titles Act, R.S.S., 1953, c. 108, s. 195.
[22] (1952-53), 7 W.W.R. at p. 397.
[23] *Ante*, footnote 6.
[24] R.S.A., 1942, c. 210.
[25] See Proceedings of the Thirty-fifth Annual Meeting of the Conference of Commissioners on Uniformity of Legislation in Canada, p. 38, in Proceedings of the Canadian Bar Association, Vol. 36, 1953.

impliedly characterized the petroleum and natural-gas lease in issue as a profit à prendre. If such a contract is a profit à prendre, it is clear from the Ontario cases referred to and the statement quoted from *Doe d. Hanley* v. *Wood* that there is a sale of only those minerals that are in fact reduced to possession. But, notwithstanding this implied characterization, the court calls the lease a contract for the "sale of property", thus creating an extension to the admittedly severe doctrine of *Church* v. *Hill*, an extension that should not have been made.

WILLIAM GORDON BROWN*

* * *

REAL PROPERTY—TORRENS SYSTEM OF LAND REGISTRATION IN SASKATCHEWAN—EXCEPTION TO INDEFEASIBILITY—ERROR IN NOT RESERVING MINERALS TO CROWN PURSUANT TO ORIGINAL GRANT. —The discovery of oil has caused an unprecedented number of land transactions in Western Canada. In the provinces of Saskatchewan and Alberta, which both have the Torrens system of land registration, the government-operated land-titles offices have registered thousands of instruments covering mines and minerals and the right to work them. In a number of instances, these registrations have brought to light errors which were made in the land-titles offices years ago at a time when little value was placed on minerals. So many of these errors have resulted in litigation that a line of case law, headed by the well-known *Turta* case,[1] now exists.

It is not unfair to say that these judgments are not all consistent. Thus the results flowing from an error in a certificate of title may well vary from case to case even though the facts are basically the same. As one more example, the principle of the *Turta* case does not seem to have been followed by the Court of Appeal of Saskatchewan in the recent *Re Prudential Trust Company Limited and Registrar of Humboldt Land Registration District*,[2] the case with which this commentary deals.

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[1] *Canadian Pacific Railway Company Ltd. et al.* v. *Turta*, [1954] S.C.R. 427. For a full discussion of this case see Whitmore, comment (1955), 33 Can. Bar Rev. 195.

[2] (1956), 18 W.W.R. (N.S.) 1; [1956] 2 D.L.R. (2d) 29 (Culliton J.A. dissenting).

That this confusion under the Torrens system should exist is somewhat paradoxical, for Sir Robert Torrens stated that he had undertaken the task of creating a radically new system of registration of title to land to avoid the "complex" and "cumbrous" nature of the then Australian law, which was causing "much perplexity". One observer of the new system stated in 1903 that "the declared object of the system is . . . to establish and certify to the ownership of an absolute and indefeasible title to realty, and to simplify its transfer".[3] The object of the system has not been achieved. The *Turta* case established that ownership of an indefeasible title is not always possible; the *Prudential Trust* case illustrates that a transfer of minerals is no simpler under the Torrens system (in Saskatchewan at any rate) than under any other system.

In *Re Prudential Trust*, Mr. Justice Gordon stated that he was "convinced that no search for the title to mineral rights would be sufficient without the production of the original grant from the Crown".[4] Chief Justice Martin was of much the same opinion. The two other majority judges did not deal directly with this question but, inasmuch as the trial judge quoted with approval a statement that the original grant must be searched, it appears that this is the law in Saskatchewan. Thus, by judicial pronouncement, the former common practice of examining only the last issued certificate of title is not sufficient in Saskatchewan. Rather, instead, "historical" searches must be made so that the various certificates can be compared with the grant from the Crown and the effect of any discrepancies determined.

The position is different in Alberta. McLaurin C.J.T.D. stated in *In re The Land Titles Act and Yukon Oils Limited* that "the whole purpose of the Torrens system of land registration would be defeated if those having transactions in land are not entitled to rely on the latest existing certificate of title. Any other view drives one to the proposition that no title can be relied on without a historical search back to the original grant from the crown."[5] Here the learned judge was not dealing with an exception in a Crown grant, but he was dealing with mines and minerals. A portion of the judgment of the Privy Council in *Gibbs* v. *Messer*[6] was quoted with approval by Harvey C.J.A. in *Essery* v. *Essery et al.; Tatko* v. *Liefke et al. (No. 2)*,[7] a judgment of the Appellate Division of the Supreme Court of Alberta:

[3] Niblack, Torrens System (1903) p. 8.
[4] (1956), 18 W.W.R. (N.S.) at p. 14.
[5] (1952), 7 W.W.R. (N.S.) 46.
[6] [1891] A.C. 248, at p. 254.
[7] [1947] 2 W.W.R. 1044, at p. 1050.

> The object [of the Act there in question] is to save persons dealing with registered proprietors from the trouble and expense of going behind the register, in order to investigate the history of their author's title, and to satisfy themselves of its validity.

This statement is of similar effect. It is common practice in Alberta to make historical searches when dealing with minerals, but not with the surface. No Alberta court, however, has stated that historical searches must be made.

Searching a Torrens title in Saskatchewan thus becomes as much of a chore as searching a title under a registry system. The result of the search can be more exciting however. Under a registry system, the searcher need not consider memoranda or notations written on or removed from the documents by persons other than the parties to them. The Torrens system, however, seems to foster a mysterious breed of writers and rubber stampers who place on certificates of title, or remove, such words as "cancelled", "and M & M", "minerals included". The searcher must ascertain first the validity and, secondly, the effect of each of these scribblings.

The *Prudential Trust* case, which I am discussing here, dealt with the result of an error in the Saskatchewan Land Titles Office, followed by a rubber stamping. When the original grant for the land involved in the case was issued, it contained a reservation to the Crown of "all Mines and Minerals . . .". The first certificate of title which issued (September 2nd, 1909) incorrectly failed to recite this reservation, and the next following certificate (September 7th, 1909) made the same omission. Certificates three (June 5th, 1911), four (June 11th, 1929) and five (October 29th, 1949) not only contained no mention of the reservation but were rubber stamped with the words "minerals included". In due course, the fifth owner of the property, relying on the information contained in the Register of Titles at the Land Titles Office, disposed of the interest in the mines and minerals which his certificate of title said he owned (and which the certificate of title of his predecessor said his predecessor owned). Eventually the Prudential Trust Company Limited and Prairie Leaseholds Ltd. acquired a fee simple and a leasehold interest, respectively, in the mines and minerals. Valuable consideration was given in both cases.

In 1953 it was discovered that the reservation of mines and minerals in favour of the Crown had been missing on all certificates of title to this parcel of land for the previous forty-four years, and that the opposite notice, "minerals included", had been

stamped on the certificates for forty-two years. During the period of forty-four years no less than seven purchasers or lessees had dealt with the land or the minerals on the basis of a certificate of title which made no mention of a mineral reservation. Five of those persons dealt on a title stamped "minerals included".

Nevertheless, the Crown felt that it was entitled to the minerals on the basis of the reservation contained in the original grant and a caveat was placed on the title to evidence its claim. The Prudential Trust Company moved to set the caveat aside and an issue was directed to decide the ownership of the minerals. The case involves two questions: firstly, was the Registrar of Land Titles authorized to deal with these minerals? Secondly, did the rubber stamp negative the implication that the Crown owned the minerals? These questions will be dealt with here in reverse order.

Section 200(1) of the Land Titles Act of Saskatchewan is worded:[8]

> Every certificate of title and duplicate certificate granted under this Act shall, except:
>
> (*a*) in case of fraud . . . ;
>
> (*b*) as against any person claiming under a prior certificate of title . . . ;
>
> (*c*) . . . wrong description . . . ;
>
> be conclusive evidence, so long as the same remains in force and uncancelled, in all courts, as against Her Majesty and all persons whomsoever, that the person named therein is entitled to the land included in the same for the estate or interest therein specified, subject to the exceptions and reservations implied under the provisions of this Act.

Thus, the title is subject to the *implied* exceptions and reservations. And what are these? Section 67 states:

> The land mentioned in any certificate of title granted under this Act shall by implication and without any special mention therein, unless the contrary is expressly declared, be subject to:
>
> (*a*) any subsisting reservations or exceptions contained in the original grant of the land from the Crown;

The Crown claimed, therefore, that all titles were subject to just such errors as this: that is, that a reservation in the original grant from the Crown is one of the implied provisions of the act and that a failure to carry such a reservation forward on each succeeding title is binding on no one.

In addition, it stated, because the mines and minerals were omitted from the original grant, they were never brought under the act and thus could never become the property of other per-

[8] R.S.S., 1953, c. 108, and amendments thereto.

sons through the operation of the machinery of the Land Titles Act. The errors made by persons in the Land Titles Office in leaving the reservation off the certificates and in placing the stamp on were completely unauthorized. By reason of sections 200(1) and 67 these errors could not, it was argued, give rise to rights of third parties, such as the Prudential Trust Company, against the Crown.

Counsel for the Crown cited, in support of its position on implied reservations and exceptions, the decision of the Appellate Division of the Supreme Court of Alberta in the *Hagen* case, *Reference re Title to Mines and Minerals*.[9] In this case a reservation in the original grant from the Crown had also, by error, not been carried forward on the first succeeding certificate of title. Ultimately, the oversight was discovered and the reservation noted on the title. The majority of the court held in that case that the title of every registered owner was subject to the implied reservations and conditions under the act, including reservations contained in the original grant from the Crown. Hagen, the surface owner, therefore did not own the minerals even though his title stated he did.

The Alberta statute which governed the *Hagen* case varies in a material respect from Saskatchewan's section 67 however. Section 61(1) of the Alberta act reads:[10]

> The land mentioned in any certificate of title granted under this Act shall by implication and without any special mention therein, be subject to,—
>
> (*a*) any subsisting reservations or exceptions including royalties contained in the original grant of the land from the Crown;

It does not contain the words, following "therein" and before "be subject to", "unless the contrary is expressly declared", which the Saskatchewan act does. Further, no reference to the ownership of the mines and minerals was contained in the Hagen title, but the title in the *Prudential Trust* case was endorsed with the words "minerals included". Surely the presence of those stamped words is an express declaration contrary to the implication that the Crown owns the minerals? Counsel for the Prudential Trust Company argued this point vigorously.

But only Culliton J.A. of the Saskatchewan court, dissenting, was of that opinion. On the contrary, Martin C.J.S. felt that the presence of the stamped words was "notice to the purchaser that

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[9] (1954), 13 W.W.R. (N.S.) 58; [1954] 4 D.L.R. 556.
[10] The Land Titles Act, R.S.A., 1942, c. 205, and amendments thereto.

he should search the original grant from the Crown". Gordon J.A. held that the stamp was unauthorized and inoperative, and that historical searches should be made anyway. Proctor J.A. said he did not see how the variation in wording between the Alberta and the Saskatchewan sections helped the Prudential Trust Company. At most the stamp was in conflict with the implied reservation in favour of the Crown. McNiven J.A. thought even less of the stamp: he called the stamping of titles a "practice of convenience", done without statutory authority, and of no effect even if contrary to the express terms of a grant.

The fact that the stamp was ostensibly placed on the certificates by some authorized persons in the Land Titles Office, and that persons paid valuable consideration for land as a result of relying on the stamped title, was not given any weight by the majority of the court. Unless the decision is reversed on further appeal, the rubber stamp "minerals included" apparently now is meaningless in Saskatchewan. Does this mean that, in Saskatchewan, all rubber-stamped memoranda are meaningless, or just those stamps used in error? In either event the Saskatchewan law will be different from Alberta law for, in the *Turta* case, a stamp bearing the word "cancelled" was placed on an Alberta certificate of title in error, but the Supreme Court of Canada held that it was effective.

Thus the court in the *Prudential Trust* case held that the presence of the stamp did not negative the implication that the Crown owned the minerals. The other question to be answered concerned the jurisdiction of the registrar to deal with the minerals. Three of the five judges decided after lengthy consideration that the omission of the reservation from the title and the rubber stamping were both done without jurisdiction and were therefore of no effect — this because the minerals were never brought under the Land Titles Act by the original grant, and that statute could not therefore operate so as to form the root of a good title to the minerals. Baalman[11] is cited as authority for this proposition, that unless land is properly brought under the act title to it cannot become indefeasible. A careful reading of Baalman at pages 148-149 indicates, however, that he is discussing only a case where land is by error not reserved to the Crown as the grant intended (as occurred in the *Prudential Trust* case). Baalman is saying nothing more therefore than that one of the exceptions to an indefeasible

[11] Baalman, Commentary on the Torrens System in New South Wales (1951).

Torrens title is the reservations contained in the original grant from the Crown. This exception, thus roughly described, is well-known to all Alberta and Saskatchewan solicitors, not because Baalman said it, but because words of similar effect are contained in the Land Titles Acts of both provinces. But the Saskatchewan act is not identical with that of New South Wales, to which Baalman refers, and it is this point which does not appear to have been considered by the majority of the court in the *Prudential Trust* case.

The Saskatchewan act states in "plain words"[12] that every certificate of title shall be conclusive evidence against Her Majesty of the ownership of the lands concerned. The New South Wales act does not. The Saskatchewan act further differs in that it indicates that the exception to indefeasibility with respect to Crown grants is only operative so long as the contrary is not expressly declared.

Can it not be argued that the failure of the registrar in the *Prudential Trust* case to carry the Crown reservation to the certificate of title was not the breach of some sacrosanct duty but merely an error? Was not the placing of the rubber stamp "minerals included" also an error? If this is so, then these errors can create a good root of title if the statute does not specifically declare otherwise. In the *Turta* case the registrar erred in cancelling the title of the Canadian Pacific Railway and issuing a new title to another party. In other words, as in the *Prudential Trust* case, someone acquired title to the minerals who was not entitled to them. This error was certainly not "authorized" by the act; in fact the registrar had purported to transfer property from one party to another without registering an instrument as required by the act. It was conceded in that case that the registrar acted without jurisdiction but that nevertheless the error gave root to a good title because bona-fide third parties had relied on the incorrect title and had given valuable consideration for it.

The Prudential Trust Company gave valuable consideration for the minerals in this case after the title had passed through a number of hands. The company was a third person just as Turta was a third person. This is an important point, because one case relied on by several of the judges in the *Prudential Trust* case was *Balzer and Balzer* v. *Registrar of Moosomin Land Registration*

[12] See *Province of Bombay* v. *Municipal Corporation of the City of Bombay*, [1947] A.C. 58, where at page 63 it is said that, "if it be the intention of the legislature that the Crown shall be bound, nothing is easier than to say so in plain words".

District et al.[13] The *Balzer* case was distinguished by Culliton J.A. in his dissenting judgment, where he pointed out that it dealt only with the effect of an error between the parties. No rights were acquired by any third party on the faith of an incorrect title. In the *Balzer* case, Kellock J. stated at page 88:

> There is no suggestion that any other person not a party to the proceedings has acquired any rights against the appellants on the faith of any of these endorsements.

Indeed the whole effect of the *Turta* case is that a third party may rely on the register or certificate of title. There was no third party in the *Balzer* case; there was in both the *Turta* and the *Prudential Trust* cases.

Another case referred to by one of the majority judges in the *Prudential Trust* case is *The District Registrar of the Land Titles District of Portage La Prairie* v. *Canadian Superior Oil of California Ltd. and Hiebert.*[14] This case appears not to be applicable, however, for as Professor Whitmore stated in his commentary on it:[15]

> The case is not an authority on any fundamentals of the Torrens system. . . .
>
> The decision furnishes direct guidance only where a Provincial Lands Act requires the excepting or reserving of minerals from dispositions of land by the Crown.

No disposition of land under the Provincial Lands Act of Saskatchewan was made in this case.

Cannot such "error" cases as this be thus simply characterized?

(1) It is envisioned that the registrar will make errors.

(2) These errors form the root of a good title if the property passes for value into the hands of bona-fide third parties and if the error is not one of the matters specifically dealt with by the Torrens statute.

(3) The registrar is not authorized to make corrections if by so doing he prejudices rights conferred for value. (This situation did not arise in the *Prudential Trust* case but did in the *Turta* case.)

There is unquestionably a number of exceptions to indefeasibility which cannot be overcome by a registrar's error. These include land contained in a prior title, titles acquired by fraud, titles containing land by misdescription and (in many jurisdic-

[13] [1955] S.C.R. 82.
[14] [1954] S.C.R. 321.
[15] (1955), 33 Can. Bar Rev. 1078, at p. 1085.

tions but not absolutely in Saskatchewan because of the peculiar wording of section 67 already referred to) reservations contained in the original grant from the Crown. If none of these situations exist, and it is submitted that none did in the *Prudential Trust* case, then the error should not be corrected and, here, the property should not be restored to the Crown. Rather the Crown, in order to be idemnified, must proceed against the assurance fund as must any other person deprived of land by the operation of the act.

It appears to this commentator that the principles laid down by Egbert J. in the *Turta* case,[16] which were adopted by the Supreme Court of Canada, have not been followed by the Court of Appeal of Saskatchewan. The result is, with deference to the late Sir Robert Torrens, causing practitioners "much perplexity".

IVAN L. HEAD*

The Decision-maker and the Scholar

The big trouble is that too many practical men of affairs expect the wrong services from the scholar. The scholar lives in a strange world, and the decision-maker often treats this world with patronizing contempt—sometimes with fear. I add the word 'fear' because in one sense all scholars are potentially subversive. This is true whether or not the scholar consciously indulges in social criticism. A systematic description of the way in which our state legislatures actually function, for example, might so clash with present stereotypes and value expectations held by the public at large as to stimulate a widespread movement for change. Simple description might have been the only concern of the scholar, but the results of research might be pregnant with implications for reform. The reluctance of Congress to allow the Census Bureau to collect political statistics is in part, I believe, the result of an almost visceral fear that accurate knowledge about voting behavior might stimulate popular demands for certain kinds of change. The recent congressional investigations into the operations and policies of private foundations—barbaric and distorted as these investigations were—reflected in part a true understanding of the possible consequences of social science scholarship. At least since the days of Socrates, the life of reason has had its occupational hazards. The Burkian conservatism, which is now the toast of certain groups in this country, seems temperamentally and logically opposed to the application of reason where prescription might be challenged. What some people fear is not the clash of orthodoxies, but the challenge that reason hurls at all orthodoxies. (Stephen K. Bailey, New Research Frontiers of Interest to Legislators and Administrators, in *Research Frontiers in Politics and Government* (1955) p. 3)

[16] (1952), 5 W.W.R. (N.S.) 529.

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