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JOHN CAMERON,
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God's in His heaven,
All's right with the world.
—Browning.

London, Wednesday, April 3.

DOMINION PARLIAMENT

THE MANITOBA SCHOOL CASE.

We have abstained from discussing this question at length up to the present time, not because the public were not deeply interested in it, but because we had not in our possession the full text of the judgment of the judicial committee of the British Privy Council and the arguments addressed to that august body upon the subject. This question, in the first case, was twice judicially dealt with by the courts of Manitoba, then by the Supreme Court of Canada, and finally by the judicial committee of the Privy Council. On the second occasion it was, in the first instance, argued before the Supreme Court of Canada upon six propositions submitted to that body by the Department of Justice; and from the judgments of the Supreme Court an appeal was taken to the judicial committee of the Privy Council. The case before the judicial committee was very ably argued on both occasions—the first time by Sir Horace Davey and Mr. McCarthy on behalf of Manitoba, and by Sir Richard Webster and Mr. S. H. Blake on behalf of the Roman Catholic minority. The second case was argued by Mr. Edward Blake and Mr. Ewart on behalf of the Roman Catholic minority, and by Mr. Cozens-Hardy and Mr. Haldane on behalf of the Province. Perhaps no other disputed provision of our constitution has been so fully and so exhaustively considered, and we feel it a duty we owe to our readers to give them a perfectly accurate summary of the interpretation put upon this part of our constitution by the highest court in the empire.

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The vast majority of the legislative powers of the Dominion and of each province are distributed by sections 91 and 92 of the constitution. Section 91 enumerates the powers of the Dominion, and 92 those which pertain to the provinces. These are mutually exclusive, each is sovereign within its own sphere, and the advocates of provincial rights have always maintained that in respect to anything coming within any of the enumerated powers of section 92, the Government of the Dominion ought not to interfere—that it is the constitutional right of the province to judge exclusively for itself what it shall undertake and what it shall abstain from undertaking within this exclusive sphere—that in respect to all such matters the system of Parliamentary Government constitutionally protects the province from any attempt at supervision on the part of the Federal Ministry.

When we look at section 95 we find power given to each province to legislate in respect to agriculture and immigration; but it also provides that such legislation shall be subordinate to the legislation of Canada upon the same subjects, and if repugnant to any act of the Parliament of Canada it shall not have effect. It is clear that upon these subjects the authority of Parliament is paramount; and whenever the legislation of a province becomes repugnant to the legislation of Canada, the provincial law gives way. It would then be wholly at variance with the letter and spirit of the law to attach the same meaning to provincial rights in respect to agriculture and immigration that one would attach in respect to municipal institutions, property and civil rights, the management and sale of public lands, and other matters which fall within the exclusive jurisdiction of the province.

* * * *

There is a third topic which falls short of the absolute jurisdiction of matters assigned exclusively to the provinces, but which nevertheless gives to the provinces a much wider authority than they possess in respect to agriculture and immigration. This is the subject of education. Now we desire our readers to bear in mind that the rights of the provinces under the constitution are the rights which the constitution bestows, and which the system of responsible government entitles them to exercise free from external interference. It does not warrant the encroachment by a province upon the sphere assigned to Dominion jurisdiction. It does not entitle the Province to say where the field is divided that it shall be allowed without question to appropriate the whole and to claim absolute authority where the authority bestowed is expressly limited.

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It is argued that in the Jesuits Estates Act the principle of provincial rights was recognized, and this was the ground upon which the Parliament of Canada refused to interfere. That is so. But it must be remembered that the Jesuits Estates were property situated in the Province of Quebec. So far as the crown possessed any right in them, it was the crown as part of the Government of Quebec. By section 109 of the British North America Act, "all lands shall belong to the province in which they are situate"; and by section 92 their management and sale are within the exclusive jurisdiction of the province. The provincial authority, in that case, was an absolute and not a qualified authority, and to have interfered with it by the Parliament of Canada would have been asserting a right to exercise a controlling influence over a matter which the constitution says shall be within the exclusive jurisdiction of the Province. In other words, it would have been a clear invasion of an absolute right. This invasion, too, would have related to a matter especially concerning the popular branch of the legislature, for the revenues of the Crown are even beyond ordinary questions of legislation subject to a paramount authority on the part of the people's representatives. This distinction must be borne in mind. The British North America Act, section 92, bestows upon the provincial legislature, as we have already said, but a qualified jurisdiction. It is declared that the provincial legislature "may exclusively make laws in relation to education, subject and according to the following provisions," and then are set out four sub-sections, which qualify these exclusive powers, and which limit the exclusive jurisdiction of the legislature. These powers of limitation relate to accomplished facts in part, and in part to what may transpire in legislating upon the subject.

* * * *

With regard to privileges relating to separate schools "at the union." Any violation of the right, any subsequent legislation which prejudicially affects the right, is ultra vires, and would be declared void by the courts; but there is a line of constitutional policy marked out by the act, and it is a part of the compact of the union that if the right does not exist at the union, but is subsequently bestowed, and the minority upon whom it is conferred, if they desire to maintain it, shall have the right to appeal to the Governor-General-in-Council, and he may call upon the proper provincial authority to uphold the right and to remove the ground of complaint; and if this is not done, the Parliament of Canada may, as far as each case may require, make remedial laws for the due execution of the provisions of this section.

It will be remembered that the time of the union, separate schools were conceded to the Roman Catholics of Ontario, and to the Protestant and Roman Catholic minorities in the Province of Quebec. In New Brunswick and in Nova Scotia there existed provincial systems, and the representatives of those provinces yielded to the supporters of the principle of denominational schools this far, that if they once conceded them they could not recall the privilege, if the minority upon whom the privilege was bestowed could make it clear to the Governor-General in Council that this privilege was affected by subsequent legislation.

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Such is the compact disclosed in this part of the British North America Act. This is made perfectly clear by the speech of Lord Carnarvon when proposing the second reading of the British North America Act. His words are:

"Your Lordships will observe some "rather complicated arrangements in "regard to education. I need hardly "say that this great question gives rise "to nearly as much earnestness, and "division of opinion, on that, as on this "side of the Atlantic. This clause has "been framed, after a long and anx-"ious controversy, in which all parties "have been represented, and on condi-"tions to which all have given their "consent. It is an understanding "which, as it only concerns the local in-"terests affected, is not one that Par-"liament would be willing to disturb, "even if in the opinion of Parliament "it were susceptible of amendment; "but I am bound to add, as the expres-"sion of my opinion, that the terms of "the agreement appear to me to be "equitable and judicious."

This quotation shows that the subject had been fully considered by the delegates, and that the terms of their agreement were embraced in these provisions of the act. When Manitoba entered the Union, the terms were substantially the same, in respect to education, as those embraced in the B. N. A. Act. The judicial committee say in their judgment:

"The terms upon which Manitoba was "to become a province of the Dominion "were matters of negotiation between "representatives of the inhabitants of "Manitoba and of the Dominon Govern-"ment. The terms agreed upon so far "as education was concerned, must be "taken to be embodied in the 22nd sec-"tion of the act of 1870. Their Lord-"ships do not think that anything is to "be gained by the inquiry how far the "provisions of this section place the "Province of Manitoba in a different "position from the other provinces, or "whether it was one more or less ad-"vantageous. There can be no pre-"sumption as to the extent to which a "variation was intended. This can only "be determined by construing the words "of the section according to their natur-"al signification. * * * * * At the "outset this question presents itself: "Are the second and third sub-sec-"tions, as contended by the respondent, "and affirmed by some of the judges of "the Supreme Court, designed only to "enforce the prohibition contained in "the first sub-section? The arguments "against this contention appear to their "Lordships conclusive. In the first "place, that sub-section needs no fur-"ther provision to enforce it. It im-"poses a limitation on the legislative "powers conferred. Any enactment "contravening its provisions is beyond "the competency of the Provincial "Legislature, and, therefore, null and "void. * * * * * The first sub-"section is confined to a right or a "privilege of 'a class of persons' with "respect to denominational education "'at the Union.' The second sub-sec-"tion applies to laws affecting a right "or privilege of 'the Protestant or Ro-"man Catholic minority' in relation to "education. If the object of the second "sub-section had been that contended "for by the respondent, the natural "and obvious mode of expressing such "intention would have been to author-"ize an appeal from any Act of the "Provincial Legislature affecting 'any "such right or privilege aforesaid.' The "limiting words at the Union are, how-"ever, omitted; for the expression 'any "class of persons' there is substituted "'the Protestant or Roman Catholic "minority' of the 'Queen's subjects,' "and instead of the words with respect "to 'denominational schools' the wider "term 'in relation to education' is used. "The first sub-section invalidates a law "affecting prejudicially the right or "privilege of any class of persons, the "second sub-section gives an appeal "only where the right or privilege af-"fected is that of the 'Protestant or "Roman Catholic minority.' Any class "of the majority is clearly within the "purview of the first sub-section, but "it seems equally clear that no class "of the Protestant or Roman Catholic "majority would have a locus standi "to appeal under the second sub-sec-"tion, because its rights or privi-"leges had been affected. Moreover, to "bring a case within that sub-sec-"tion it would be essential to "show that a right or privilege had "been affected. Could this be said to "be the case because a void law had "been passed which purported to do "something, but was wholly ineffectual? "To prohibit a particular enactment, "and render it ultra vires, surely pre-"vents it affecting any rights. It would "do violence to sound canons of con-"struction if the same meaning were "to be attributed to the very different "language employed in the two sub-"sections. In their Lordships' opinion "the second sub-section is a substantive "enactment, and is not designed merely "as a means of enforcing the provision "which precedes it."

Their Lordships then declare that the act applies to legislation subsequent to the Union, and to the rights and privileges existing at the time the act of 1890 was passed. They say that when the right to local assessment, the right to the school houses erected by their own money, is taken from them, it is impossible to say that the rights and privileges, in relation to education, which existed prior to 1890, have not been affected. They also say that it is not essential that the statutes repealed should be re-enacted, or that their precise provisions should again be made law.

"The system embodied in the act "of 1890 no doubt commends itself to "and adequately supplies the wants of "the great majority of the inhabitants "of the Province. And that all legiti-"mate ground of complaint would be "removed, if that system were supple-"mented by provisions which would "remove the grievance upon which the "appeal is founded, and were modified "so far as might be necessary to give "effect to these provisions."

* * * *

Nothing can be clearer than that the Judicial Committee of the Privy Council hold that the Legislature of Manitoba have legislated away a privilege. The plan of the B. N. A. Act is that in this respect, if the contract is broken, an appeal shall be had to the Governor-General, and upon that clearly appearing he has a constitutional discretion to act. It was not intended to tie the hands of the Legislature so as to make change in the law impossible; it may raise the standard; it may alter the mode of paying the teachers; it may change the system of inspection; but the privilege to the minority must remain untouched.

* * * *

It has been said that Parliament ought not to be called upon to interfere. We admit that interference is an extreme measure. We ought not to assume that Manitoba will not act in obedience to the law, and modify her system in conformity to the judgment of the Privy Council. It is true, as the Lord Chancellor said during the argument, "The constitution gives the ultimate remedy by legislation by the Dominion Parliament, which otherwise has no power to legislate on any such matter in the Province. That is the ultimate remedy it interposes between the action of the Dominion Parliament and the Provincial Legislature, the Governor and his consideration of the matter, and his decision, and, therefore, it is a check upon the interference by the Dominion Parliament in its legislative capacity with the Province as regards education."

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It must be borne in mind that under the English Parliamentary system all constitutional powers are political. There is no coercive power to enforce a political obligation. Nothing could be more preposterous than to argue that because Parliament is not compelled to act, therefore nothing should be done. Upon such a rule, no faith would be kept by any sovereign body. The United States might refuse, in Congress, to make any provision for paying the Canadian sealers. The question to be considered is, is this a case which, in its spirit, falls within the class of privileges to be safeguarded, or does it fall outside of that class and within the field allowed for progressive legislation? If within the first, the duty of interference exists; if within the second, it does not arise.

* * * *

We shall conclude this article with an observation by the Lord Chancellor during the argument, in reply to Mr. Haldane, who said this supervising power was a most unusual and extraordinary way of dealing with the matter. The Lord Chancellor replied "Is it so extraordinary when you remember that this was an arrangement as one of the terms on which the union was to be effected? It would be shutting one's eyes to the most obvious facts which were exhibited on the face of the British North America Act itself, if one were not to see that one of the obstacles to this federation scheme was the fear of educational legislation in the separate and distinct Provinces which might affect the position of those who desired a denominational education. That runs through all the provisions of section 93, and it appears to me to be on the face of section 22 also. Therefore it is not extraordinary in that case to find limitations and safeguards and superior legislative power given to the Dominion Parliament, which represents the country as a whole."

* * * *

Is it right for this country to keep faith, or should it assume that, so far as it can, it will act as freely as if no compact existed? One thing is clear, that the subject requires very much fuller discussion before the public can judge fairly in regard to it. There is a constitutional way of amending the constitution. Its political obligations call for honest observance no less than those which are under the jurisdiction of the courts. The law imposes no restraint upon a Provincial right. When the superintending authority of the Dominion Parliament arises, it is when the boundary of the Provincial right has been crossed and the compact broken; then it is the constitutional duty of Parliament to safeguard the privilege invaded. This is the law, and must so remain until it is changed by an Imperial Act, or by Revolution.