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Mr. EWART'S OPINION

Re Mr. BLAKE'S Opinion

On the PRIVY COUNCIL'S JUDGMENT And the REMEDIAL BILL.

The letter written by the Hon. C. Fitzpatrick to the Hon. Edward Blake, Q. C. dated 19th January 1897, asking for his opinion upon three points connected with the Manitoba School question, and Mr. Blake's reply of the following day, have been laid before me, and my opinion asked as to the validity of the conclusions arrived at by Mr. Blake.

Mr. Fitzpatrick informs Mr. Blake that certain persons have asserted "that the effect of the judgment recovered in the case of Brophy by the Privy Council was that the Roman Catholic minority in Manitoba were entitled to separate schools as they had enjoyed them previous to the Manitoba Act of 1890," and Mr. Fitzpatrick asks whether in Mr. Blake's opinion " the effect of the judgment has been correctly stated".

I agree with Mr. Blake's reply to this question, in fact the correctness of that reply cannot be questioned, for the Privy Council itselt stated that " it is certainly not essential that the Statute repealed by the Act of 1890 should be re-enacted, or that the precise provisions of this Statute should again be made law".

I cannot, however, agree with the opinion "that the Judicial Committee did nothing to define, and did not in fact define, what were the precise powers or duties of the Governor General in Council, further than that there was a jurisdiction to hear the appeal and to proceed under the Union Act".

It is in my judgment, extremely clear that the Privy Council did indicate, in general terms, the course which ought to be adopted for the purpose of removing the grievances which the Judicial Committee found to exist. The language of the judgment leaves, in my opinion, no room for dispute upon this point. While it says that "it is not for this tribunal to prescribe the precise steps to be taken", it immediately adds " their general character is sufficiently defined by the third subsection of section 23 of the Manitoba Act,"and the object to be attained by adopting steps of this general character, is clearly indicated in further language as follows :

"All legitimate ground of complaint would be removed if that system were supplemented 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".

This language makes it clear that while the Privy Couucil did not think that they ought themselves to prepare the legislation necessary for the purpose indicated, yet it did actually declare (1) what the grievances were ; (2) the extent to which legislation would have to go in order to remove those grievances, and (3) what was the general character of the steps to be taken for that purpose. Perhaps I may be allowed to fortify this opinion by reference to the generally received construction of the Privy Council judgment in Canada.

Mr. Mc Carthy's Opinion.

During the argument upon my application for the remedial order (5th March 1895) Mr. McCarthy quoted certain words used by Lord Watson during the argument before the Privy Council, in which Lord Watson said that he was "not prepared to relieve him (the Governor General) of the duty of considering how far he ought to interfere." Sir C. H. Tupper, interrupting Mr. McCarthy, said:

"I did not mention the point to refute your position as to whether we had the absolute duty to perform but merely to point out that Lord Watson's position was not acted upon when he said that he would not give a suggestion.There is a very marked suggestion there as to what we could do, and, perhaps, as some would argue, a suggestion as to what we should do."

To this Mr. McCarthy replied as follows :

"Possibly THAT OBSERVATION IS WARRANTED by what Lord Herschell has said. But the question was not asked what you should do, but whether you have jurisdiction. The Privy Council, if they venture to instruct this body, were stepping beyond their jurisdiction."

It will therefore be seen that Mr. McCarthy would not agree with Mr. Blake, that Mr. McCarthy's contention is that, although the Judicial Committee did do something to define the duties of the Governor General in Council, yet the Committee should not have done so, a point which I may fairly leave between the Privy Council and Mr. McCarthy.

Opinion of the Ontario Legislature.

On the 4th March 1896 the Liberal majority in the Ontario Legislative Assembly carried a resolution from which the following is an extract :

" That the said judicial committee has further decided that the provisions of the said Act deprive the Roman Catholic minority of 'affected rights or privileges in relation to education', in a manner which constitutes, in the language of the judgment, a legitimate ground of complaint which should be removed by supplemental provisions which would remove the grievance. "

Sir Oliver Mowat's Opinion.

Sir Oliver Mowat, in moving the adoption of the resolution just referred to, said that the Privy Council had decided,

"that while the Act was a valid exercise of authority by the Manitoba Legislature, the provisions of the Act deprived the Roman Catholic minority of certain rights and privileges and that those rights and privileges ought to receive attention AND THAT PROPER PROVISIONS OUGHT TO BE INTRODUCED by way of supplements or otherwiseFOR THE PURPOSE OF REMOVING WHAT THE JUDICIAL COMMITTEE CALLED A GRIEVANCE".

Afterwards at Oakwood on the 3rd of June 1896 Sir Oliver Mowat, in replying to the mandement issued by the Roman Catholic Bishops said as follows:

"The mandement thus claims no more than has been recognized to them by the privy council of England, whatever that was. This does not mean that, according to the Privy Council, there must be a return to the exact condition of the law as it stood in Manitoba before the legislation of 1890. On the contrary their Lordships expressly said that 'It is certainly not essential that the statutes repealed by the act of 1890 should be re-enacted, or that the precise provision of these statutes should again be made law". Their lordships said also that the particular course to be pursued must be determined by the authorities to whom it has been committed by the statute. It is not for this trbunal to intimate the precise steps to be taken. But their Lordships at the same time held, with no less distinctness, that in the Manitoba law of 1890 Roman Catholics had a grievance, and a legitimate ground of complaint, WHICH SHOULD BE REMOVED. Accordingly the "legislation" mentioned in the mandement is said therein to be 'A MEASURE WHICH WOULD BE AN EFFICACIOUS REMEDY FOR THE EVILS SUFFERED BY THE MANITOBA MINORITY'."

It will be observed from the above extracts that in the opinion of Sir Oliver Mowat the effect of the decision of the Privy Council is that the grievances complained of ought to be removed by "a measure which would be an efficacious remedy for the evils suffered by the Manitoba minority." This is all that the Catholics have ever asked. That is what the mandement claimed. This, in Sir Oliver Mowat's opinion, is what the privy council declared ought to be done.

The Hon Mr. Fitzpatrick's Opinion.

In the ante-election pledge of Mr. Fitzpatrick, date 5th June 1896, he promises 'to vote for a measure according to the Catholics of Manitoba that justice to which they have a right by virtue of judgment of the Privy Council'. It would be unfair to Mr. Fitzpatrick to suggest that when he penned this pledge he thought that the Catholics had no rights under the judgment of the Privy Council, and therefore that he might safely say that he would vote in favor of giving them such.

Even if, in company with all these gentlemen, I should be wrong in holding that the Privy Council did indicate what ought to be done, I could still contend that it was the duty of the Dominion Parliament to pass "a measure which would be an efficacious remedy for the evils suffered by the Manitoba minority."

It is admitted by Mr. Blake that the Privy Council has held (1) that the Catholics had certain rights; (2) that those rignts have been taken away; and(3)that the Dominion Parliament has jurisdiction to restore them. Such being the case, I think the argument of the Hon. David Mills (18th March 1896, Hansard 462) is unanswerable.

"Now, Mr. Speaker, let me say, that it is also a well settled rule that where there is a right by law in the suppliant to seek for relief, there is A CORRESPONDING DUTY to hear his complaint, and, if a substantial right or privilege be injuriously affected or destroyed, TO REDRESS THE GRIEVANCE AND RESTORE THE PRIVILEGE taken away."

The principle to which Mr Mills referred is well known, but in order that it may, for the purposes of the School case, be put beyond dispute, I quote from a speech of Mr. Dalton McCarthy (March 1889) when he was urging the Dominion Parliament to interfere with the local legislation of the Province of Quebec with reference to the Jesuits Estate act. He said as follows:

"I venture to ask the house seriously to consider the position in wnich we stand. The worship of what is called local autonomy, which some gentlemen have become addicted to, is fraught, I ventnre to say, with great evils to this Dominion. Our allegiance is due to the Dominion of Canada. The separation into Provinces, the right of local self-government, which we possess, is not to make us less citizens of the Dominion, is not to make us less anxious for the promotion and welfare of the Dominion, and it is no argument to say that because a certain piece of legislation is within the power of a local parliament, therefore the legislationis not to be disturbed. By the same Act of Parliament by which power is conferred upon the local legislature, the duty and power — because WHERE THERE IS A POWER THERE IS A CORRESPONDING DUTY — are cast upon the Governor-General in Council to revise, and review, the Acts of the legislative bodies. If you are to say that because a law has been passed within the legislative authority of the Province, therefore it must remain, we can easily see, sir, that before long these Provinces, instead of coming nearer together, will go further and further apart. We can see that the only way of making a United Canada, and building up a national life and sentiment in the Dominicn, is by seeing that the laws of one ppovince are not offensive to the laws and institutions, and it may be to the feelings, of another — I will go so far as to say that they must be to the same extent taken into consideration.

If in company with these last named gentlemen I am still wrong, there is a fnrther argument which is, to my mind, unanswerable. It cannot be put in better language than that used by tho Hon. Mr Foster (13th March 1896, Hansard 338) when he said:

"As in the case of an individual, so in the case of a society and a country, the highest form of freedom is invariably surrounded with the strongest limitations. Above the compelling powers of the courts of law, and above the compelling power of superior parliaments, there is a sentiment of justice, and fair-play, which compels, where there is no legal instrument ; — which compels, by the very force of the appeal which that sentiment carries to the heart and to the conscience of a parliament and a people, to do justice, and to exercise that unrestrained and unrestricted freedom in the interest of a minority, or of any class of people, plainly aggrieved, and asking redress."

II. — I do not differ from Mr. Blake in his statements with reference to the power of the Governor General and the Dominion Parliament. I distinguish of course botween power and right. Physically, Parliament has power to do wrong, and may, of course, do so if it chooses.

III. In reply to Mr. Fitzpatrick's third question, Mr. Blake said :

"It thus appears to have been conceded and as I conceive, rightly conceded, by the authors of the remedial bill, that the practical and constitutional difficulties in the way of imposing taxes on, or appropriating public funds of, the Province of Manitoba by the Parliament of Canada were overwhelming. The bill failed to become law. The whole question had been and remained a political question, such as I have described. All sides seem to have practically agreed that the complete restoration by the parliament of Canada was impossible, in view of the overwhelming difficulties to which I have refered as to the appropriation of public funds.

For this reason, and because of other practical difficultices, Mr. Blake considered that "the provisions of the settlement now under discussion, "were" infinitely more advantageous to the Roman Catholic minority than any remedial bill which it is in the power of the Parliament of Canada to force upon the Province of Manitoba."

Had Mr. Blake been in Canada, he would have been aware that the authors of the remedial bill did not in any way concede the existence of the difficulty to which he refers. His mind, no doubt, was directed to one point, namely, that the Dominion Parliament could not alter the destination of money voted by the local legislature. But the solution of what Mr. Blake suggests to be a difficulty in no way depends upon that qnestion. The solution was of the very simplest kind. As is well known, the ownership of the lands in Manitoba is vested in the Dominion authorities. By a Dominion Statute certain of the Manitoba lands were " set apart as an endowment for purposes of education, " and the administration of these lands was retained by the Dominion Government. Moneys derived from the sale of them were " to be invested in securities of Canada to form a school fund. " The interest arising from this fund was to " be paid annually to the government of the Province ..... towards the support of public schools therein, and the monies so paid shall be distributed for that purpose by the government of such Province .... in such manner as it deems expedient. " At the time that this Statute was passed there were both Prostestant and Roman Catholic schools in Manitoba, and it was assumed that the Government of the Province would fairly administer the fund. So long as it did so, the Dominion Parliament was justified in confiding the administration of it to the local authorities, but when the Province abolished the schools of one denomination and refused to give Catholics a share of the fund, the Dominion Parliament, which had intended, by its Statute, to donate the fund for the support of both Protestant and Catholic schools, would naturally amend its Statute and itself retain the disbursement of its own money. The trust confided to the local authorities, and the purposes of the Statute having thus been violated, the Dominion would itself see that its grant was properly applied. It will thus be seen that Mr Blake's difficulty could easily have been surmounted.

Mr Blake refers in general terms to other practical difficulties in enforcing the provisions of the remedial bill. For myself I know of none. I am aware that a great many people think that if the Province refused to sumit to the remedial bill nothing could be done. This is an entire misapprehension. The provinces have not to be consulted when the Dominion Parliament is exercising its jurisdiction, and although a Dominion statute may be quite objectionable to every man in a province, it nevertheless goes into operation, and is enforced by the ordinary machinery of the courts of law in case anyone is found foolish enough to set himself up against it.

One main provision of the remedial bill was a declaration that Catholics subscribing to separate schools should not be compelled to sucscribe to other schools. There could have been no difficulty in enforcing this law. Another main provision was that Catholics should be permitted to set up schools for themselves. No difficulty would have been found in carrying out this provision. A third main provision was that the Catholics should have a right to tax themselves for the support of their own schools. Could any one suppose that there would be any difficulty carrying out this law ? The remaining provisions were devoted to the administration of the schools, that is, providing for officials, teachers with certain prescribed authorithies etc. I can see no possible difficulty in carrying out this or any similar law.

16th.March.1897.

JOHN S. EWART.

It would be easy to collect from non-Catholic poets a number of passages showing in a striking way the instinctive tendency to invoke the intercession of the Blessed Mother of God. The latest addition to such a collection would come from Mr. Rudyard Kipling's new volume of poems "The Seven Seas." In a striking hymn before battle we find this stanza :

O Mary, pierced with sorrow,
Remember, reach and save
The soul that goes to-morrow
Before the God that gave ;
As each was born of woman,
For each, in utter need,
True comrade and brave foeman,
Madonna, intercede.

— Ave Maria.