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INTELLECTUAL COMBAT

Between Lawyer and Divine.

MR. EWART AND DR. CAVEN.

A Question of Moral Obligation.

IS THE PROVINCE BOUND BY TREATY?

From Toronto Globe.

WINNIPEG, Aug. 8.—(Special(—At a large meeting held in the Pavilion, Toronto, on the 11th March last, with reference to the Manitoba school case, Rev. Principal Caven, in the course of his address, said: "Much has been said of the binding nature of the act of 1870. The Manitobans of 1870 had no right to bind the Manitobans of 1895. The State was a living organism, and had no right to bind its future. Not only had the 12,000 Manitobans of 1870 no right to bind the future of the Province, but Great Britain herself had not that right. (Applause). It was not immoral doctrine to assert that every community had a right to grow. Had those present a right to bind the people of 25 years hence? (A chorus of "No !") Each generation must make its own laws, and he trusted the doctrine that it was immoral to do so would not again be heard."

The following correspondence has taken place between Rev. Principal Caven and Mr. John S. Ewart, Q. C., with reference to the contention contained in the paragraph :—

Toronto, March 13, 1895.

MY DEAR DR. CAVEN—I enclose a clipping from the Globe, which I am informed accurately represents a part of your speech at the Pavilion last Monday.

Will you allow me to say that I think you are confusing two very different doctrines, and applying one of them (a sound one) to circumstances which the other (a very unsound one) is alone applicable to. The sound one—the one I think that you had in mind—is that in matters of mere legislation, not only cannot one generation bind angther, but one Parliament cannot effectually, even as against itself, decree that its laws shall be unrepealable. Bentham, you will remember, particularly insisted upon this, holding up the ancestor fallacy to ridicule—ancestors, "whose skulls we toss about with shovels, and whose bodies only serve to give breadth to brocoli, and to aid the vernal irruption of asparagus." The other principle—the unsound one—is this, that a community cannot bind itself by agreement or promises for more than a generation. That this is not true follows from the assertion that "the State is a living organism." If it were not an organism—if it were not even in the rank of the articulata, but were a mere succession of separate and independent generations—the principle might be true. Being, as it is, an organism, it cannot be said that one generation promises or agrees for those succeeding it. The organism promises for itself, and is there to fill or repudiate its promises.

I am sure that while you will agree with Betham that Parliament, in mere matters of legislation, cannot declare its laws permanent, you will also agree with me that it would be highly immoral were the Province of Quebec to refuse to pay its 50-year debentures at maturity, on the ground that they were issued by a previous generation. Scotland, when it surrendered its own Parliament, and agreed to be represented by a small minority in a united Parliament, made various stipulations (one of which related to the freedom of the Presbyterian form of worship) as against the legislation which was to emanate from an Episcopalian Parliament. You will, I am sure, agree with me that it would have been, in the highest degree, immoral had that Parliament treated the bargain as binding only the existing generation. England recently transferred Heligoland to Germany. Are the conditions binding for a few years only? I feel satisfied that you agree with me as to both of these cases.

I think that it will now be seen that we have in the Manitoba case nothing to do with the first—the sound principle. It is not a question of Manitoba or Canada repealing a mere piece of domestic legislation. It is a question of Canada's moral right to repudiate the terms of the bargain under which she acquired Manitoba. The facts of the problem are :—(1) that the territory belonged to Great Britain and not to Canada ; (2) that Canada desired to annex the territory ; (3) that there were about 12,000 inhabitants there, half Protestants and half Catholics ; (4) that Great Britain required Canada to come to an agreement with these people before the annexation was consummated ; (5) that an agreement was come to, and part of it provided that for the future the schools were to be Separate (this provision was then thought to be one which would more probably be of advantage to the Protestants than to the Roman Catholics, but that is immaterial to the problem) ; (6) that thereupon the agreement was put in the form of a statute which the Imperial Parliament confirmed ; (7) that the clause embodying the agreement as to the schools being Separate was badly drafted, and when technically examined was held not so to provide ; (8) nevertheless the existence of the agreement, and the intent to embody it in the statute are undoubted.

Now, I thind you will agree with me, that,as a matter of morals,it is immaterial whether the agreement was properly transferred to writing or not ; no honorable man would take advantage of a slip of a draughtsman in order to repudiate his true agreement.

And I venture to think, too that you will, upon reflection, agree with me in saying that such an agreement ought to bind Canada for more than a generatton, even as England and Germany would be longer bound under the circumstances to which I have already referred.

I do not quite understand your reference to generations. I can hardly think that you mean that an agreement should bind a country for a generation, and then abruptly cease to do so. This would be something altogether new, and I think altogether arbitrary. How long, for example, would you estimate a generation to last—for 30 years, or until the youngest child then living died ?

Surely the country is bound altogether, or not bound at all. Would you say then, that England, Germany and Canada could make the provisions referred to, gain advantage thereby, and immediately after, or even a generation after the consummation of the agreement, violate its terms without immorality ? I am satisfied that such cannot be your opinion.

May I ask on account of the great importance of the subject that you will reply to me in such form as you would not object to have transferred to the press, in case either of us should think the correspondence had done anything towards illuminating a question which ought, if possible, to be made clear.

Yours truly,

JOHN E. EWART.

PRINCIPAL CAVEN'S REPLY.

Knox College, Toronto, March 14, 1895.

MY DEAR MR. EWART,—I regret that the many duties connected with the close of our session,do not leave me time to write any exposition or defence of what I said on Monday evening in the matter of the Manitoba schools in any shape for publication. With your exposition of principles in the communication which you have sent me I in substance agree. I take the liberty of enclosing the brief note of my Monday address that you may see that my eye was on the distinction which you properly make betwen treaty and legislation. (Paragraph four of notes).

I have been so busy that I have not yet been able to read, except in part the report of your pleadings and of Mr. McCarthy's before the Privy Council of Canada. I read enough to see that you spoke with great ability and with full historical knowledge.

I may say,just in a word, that in seeking to bring the situation under the sacred protection of treaty you fail, in my opinion, to take proper account of the fact that Manitoba herself wishes to be released from the conditions (so far as Separate Schools are concerned) under which she is said to have sought connection with the Dominion. There can be nothing corresponding to treaty obligations, therefore, on the part of the Dominion or of the Empire to hold her to these conditions, which were sanctioned entirely in the interest of Manitoba. Had Scotland (to refer to the case you adduce) become Episcopalian and wished to be released from obligation to Presbyterianism, England would not have been bound to hold her to Presbyterianism.

Excuse this very hasty note. I should very deeply regret to speak or write a sentence on this question which would not be in favor both of justice and of peace.

Will you kindly return the enclosed notes, as I may have occasion to look at them again.

Very sensible of the courtesy with which you write, yours sincerely,

WM. CAVEN.

John S. Ewart, Q. C.

ILLOGICAL AND IMMORAL.

MY DEAR DR. CAVEN,—I have to thank you for your letter of the 14th inst., and am glad to find that we are substantially agreed upon the principles referred to in my previous letter.

The point which you think I overlooked is, that, as "Manitoba herself wishes to be released" from a condition under which she sought connection with the Dominion, and which was "sanctioned entirely in the interests of Manitoba," there can be no reason why she should not be released.

This argument, if you will allow me to say so, is fallacious in using the word "Manitoba" in two different senses. In the phrase "Manitoba herself wishes to be released," you mean the majority of Manitobans ; but in the phrase, "sanctioned entirely in the interest of Manitoba," you mean the minority of Manitobans. I assume that the meanings which I attribute must be those you intended (although, no doubt, in the great pressure of your work you did not observe the effect) because no other meanings accord with the well-known facts. There can be no doubt that it is the majority only that desires the release ; and there can be no doubt also that it was for the protection of the minority that the condition was made. If, then, we substitute these meanings for the word "Manitoba" in your sentence, we have the proposition that, as the majority wishes Manitoba to be released from a condition which was sanctioned entirely in the interest of the minority there can be no reason why Manitoba should not be released—a proposition which is transparently illogical, and, to my mind, highly immoral.

Protestants and Roman Catholics being in about equal numbers at the time of the Union, the provision made for the protection of the future minority was eminently fair. Time having placed the Catholics in the minority, the period has arrived when they as a minority have become entitled to the protection furnished by that provision, and that is the very time selected by the Protestants for an attempt to disregard the agreement. In other words, the very situation foreseen by Protestants and Roman Catholics alike, and consequently intended to be provided for, has arrived, namely, a majority desirous of imposing its ideas as to education upon the minority, and the majority, not being able to deny the agreement, seeks to cancel it.. To my mind this is in the last degree immoral.

I have to apologize for the delay in sending you this reply. It was due to my journeyings to Winnipeg. I shall be very glad if you will take a similar or longer period, if necessary, for your next letter, should you think right to favor me with one, and should your engagements require it. I regard the statement in your Pavilion speech as one well calculated to have a very wide-spreading effect not only upon the question to which it was directly applied, but also upon the political conscience of Canadians. If they can be persuaded that such an agreement as the Manitoba one can be violated wituout immorality, the result (with the very highest and most unfeigned respect for your opinion) cannot, I believe, be other than most disastrous to the community. For this reason, and also because our positions have been taken publicly, will you allow me to urge that it is due to each of us, as well as to the public, that such explanations of our contentions as may in any way mollify or justify the divergent opinions should also be made public.

I should like to add the assurance that,whatever be the issue of our discussion,I shall not cease to regard you with those feelings which your ability and kindness have won from all those who have the privilege of your friendship. Yours very truly,

JOHN S. EWART.

THE OPPOSITE VIEW.

Knox College, April 1, 1895.

MY DEAR MR. EWART,—Your contention as I understand it, is that the "agreement" between parties in Manitoba, which is represented in the school act of 1871, cannot be departed from by the Legislature of the Province without a breach of morality. I maintain the opposite. We do not differ on the great question as to the sacredness of treaties while their conditions hold. Nor, in this particular case, do we differ as to the power of the Dominion, under the Manitoba act, to instruct Manitoba to re-establish Separate schools, or to re-establish them itself, should Manitoba decline to do so. My position is that the agreement (as you term it) is not of such a character that either Manitoba or the Dominion is chargeable with immorality, should Manitoba alter the statue of 1871, and should the Dominion not intervene for its restoration.

No legislation of a State or Province, can be regarded as a treaty or an inviolable "agreement." Parties within a State cannot be contracting parties in the proper sense ; to affirm that they can would be, I think, new doctrine. Treaties or conventions or agreements which have the characteristics of treaties are always between independent powers. If the legislation which is intended to satisfy parties in a state or to guard special interests is right in itself it should remain, but the mere fact of changing it implies no breach of contract or agreement—no immorality. If Manitoba in 1890 sees fit (from whatever reason) to abolish Separate Schools, which she established in 1871, she has broken no agreement which morality bound her to respect. She had a perfect right in 1871 to establish Separate Schools for Catholics and Protestants, and a perfect right in 1890 to change her school system. Individuals may have been guilty of bad faith in forgetting election promises (I know not), but the Province is free from blame.

The decisions of the Judicial Committee certainly rest on grounds quite inconsistent with the opinion that the act of 1871 was morally binding for all time or for any definite period, for the first decision held that the act of 1890 was intra vires, and the last decision does not say that the legislation of 1871 should be restored, but suggests something quite different. It is clear that if the repeal of the act of 1871 was morally wrong nothing could properly atone for this but the substantial restoration of that act.

When, in my first note, I say that "Manitoba herself wishes to be released" from conditions sanctioned entirely in the interest of Manitoba I do not use the term Manitoba in two senses and thus introduce a fallacy into my statement. In both instances by Manitoba I mean the Province as a corporate body—as a whole. No doubt both the acts referred to were supposed at the time they were passed to be in the interests of the entire Province. Your way of regarding the Province as a "minority" who entered into a compact or agreement I respectfully think leads you to wrong conclusions.

I should be greatly concerned to find that I had said anything which either directly or indirectly gives sanction to immorality ; greatly concerned, also, to to think that I had injured those who differ from me in their religious convictions. If it can be shown that Separate Schools are the best thing for Manitoba, or Canada, by all means let them be established, but if a system of education which declines to recognize ecclesiastical distinctions, and to bestow public money for sectarian purposes, is preferable—which is my earnest belief, surely no Province of Canada is in the predicament of being morally bound to perpetuate Separate Schools, whatever shall come to be the prevalent sentimant of its people upon that subject. If there are legal obstacles to a Province regaining its freedom of legislation the removal of these must, of course, be sought in a proper way.

I have a strong dislike to unnecessary publicity, but if you think that the interests of truth would in any way be served by the publication of this correspondence (too hurriedly written on my part), I do not refuse permission.

Very heartily do I reciprocate the kind sentiments which you so courteously express in both your letters to me.

Yours sincerely.

WM. CAVEN.

A TREATY AGREEMENT.

WINNIPEG, April 7, 1895.

MY DEAR DR. CAVEN,—I would be giving up a large part of my case did I agree to state the point in controversy in the narrow way that you have put it at the commencement of your letter.

If you will be kind enough to refer to my first letter you will find the "facts of the problem" as I understand them—facts which showed, as I think, the existence of a treaty between two parties not "within a State." In your answer of March 14th these facts were not questioned, but you suggest that there was a reason why Manitoba should be "released" from the agreement.

In your present letter you contend that there can have been no agreement or treaty, beceuse "parties within a State cannot be contracting parties in a proper sense"—treaties and agreements are "always between independent powers." Surely you do not contend that the Ontario municipalities cannot make an agreement between themselves, or that Canada and South Africa cannot make a treaty by which each would be bound? And yet, if not, why could not Canada make an agreement with the inhabitants of a territory which formed no part of her domain, even though it belonged to the Empire—more particularly when the Imperial authorities required an agreement to be made before the union was consummated ? Can it be contended that Canada could, in answer to the Imperial injunction to come to terms, enact those terms as part of a constitution for Manitoba, and in the next session alter those provisions because the contracting parties were not "independent powers" ?

There was, then, I contend, a treaty or agreement. It was intended by all that this agreement should have been embodied in the Manitoba act. It was intended by this act to provide for Separate Schools in Manitoba in such a way that Manitoba would have no power to enact otherwise (Sir John A. Macdonald's testimony ought to be sufficient for this). A slip was made in the drafting and Manitoba, taking advantage of it, did otherwise enact. This, to my mind, is immoral, and these facts form the problem.

With reference to the fallacy in your former letter you object to my "regarding the Province as a majority and a minority." Permit me to say that I do not so regard the Province, but that when you used the word "Manitoba" I suggested that you must have meant to say, "in the interests of the minority." If you will look at the statute you will see that I was justified in so assuming, for the right of appeal is not given to Manitoba, but to the "minority" alone. Without this the point would be clear, for what reason could be given for the imposing a constitutional limitation in favor of a majority ?

Perhaps an example will help. By the Confederation act the Province of Quebec is prohibited from changing twelve English constituencies for the Local Legislature. The Confederation Act was an agreement or treaty made by "parties within a State" in the same sense as were Canada and Rupert's Land—that is, they were both within the Empire. Now, if Quebec can find some loop-hole, do you think that she would be morally justified did she alter the boundaries of these constituencies and thus give the representation to the French ? Could she fairly urge either (1) that there really was no treaty or agreement, because "parties within a State cannot be contracting parties in a proper sense" ; or (2) that a province cannot be divided into a majority and a minority," and therefore, that Quebec, as a whole (which would mean the French), could properly vote itself clear of the limitation—that the provision, having been "sanctioned entirely in the interest of Quebec," there could be no reason why Quebec should not "be released from the agreement."

With reference to publication, I do not think that the correspondence, so far has

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