## A FAMOUS NOVA SCOTIA TRIAL.

The "picker up of learning's crumbs" in Nova Scotia will at rare intervals come across a little pamphlet in cheap, dark blue paper covers. There is no title or mention of contents on the cover, but the heading on the first page reads:—

"IMPORTANT TRIAL
SUPREME COURT—HALIFAX
*Carten vs. Walsh, et al.*—For Trespass.

Monday, December 31, 1849.
(Re-published from the *Sun.*)

(The demand for the papers containing the Report of this important Trial, having largely exceeded the supply, the Publisher is induced to give it to the public in this form. He proposed to give the evidence more at length, but time would not permit, and the Report—the accuracy of which has not been impugned—stands as originally published.)"

Nova Scotia has had its share of famous trials. During the War of the American Revolution, a young Irishman, Richard John Uniacke, was caught, arms in his hand, at what time the Rebels were attacking Fort Cumberland, Nova Scotia. He was tried for treason, but his youth pleaded in his favour and he was acquitted. He lived to become one of His Majesty's most devoted subjects, to be Attorney-General of Nova Scotia 1797-1830, to be one of the first to suggest the Union of the Provinces, and to found one of the most distinguished Nova Scotian families. Our greatest man, Howe, was tried criminally for libel, defended himself, and was acquitted; the jury, as he said, "vindicating in Nova Scotia at least for all time the freedom of the Press." And I might mention others,—for example that of Uniacke's son, Richard John Jr., afterwards Judge, for murder,—he had killed his man in a duel. But no trial I know of excited more interest or was more worthy of that interest, than that of *Carten* v. *Walsh*.

The plaintiff was a shoemaker in the City of Halifax, the defendant was the Bishop of Halifax. Carten was not quite illiterate. "He might," said defendant's counsel, "be able to write his name, but I am sure he could not write two grammatical sentences." He was, or had been, a Catholic. For thirty years he had been a pew-holder in the old Catholic Church, and in St. Mary's Chapel which succeeded it. Apparently he had ceased to believe in the doctrine of the Real Presence, the most august and solemn article of a Catho-

lic's faith, and at the celebration of the Eucharist, "not once but fifty times," (I am again quoting defendant's counsel) he "grinned" and behaved so badly that other members of the congregation complained; and "the officiating priest was compelled to keep his eyes turned from him in order to prevent his being insulted." It was not until all methods of charity and forebearance, accompanied by paternal advice, had been employed in vain, that the Bishop adopted extreme measures. On Sunday, the 15th of April, 1849, from the altar in St. Mary's the officiating clergyman read by command of the Bishop a document upon the meaning and intent of which the case eventually turned. Carten was present in the Church. Whether this document was only a "monition" as plaintiff claimed, or was both monition and excommunication as defendant alleged, became the real, indeed I may say the only issue. There was language in it that favoured both constructions as its closing paragraph as well as several others shows. That paragraph "enjoined, directed and commanded Carten not to enter this Church (St. Mary's) or any other Church in the diocese of Halifax . . . . under pain of excommunication, *to be* incurred by the very fact of such unlawful and sacreligious entry, so that if he presumed so to enter despite this prohibition *he is* and *shall be* thereby excommunicated." On Sunday, the 1st of July, accompanied by his daughter, Carten attempted to enter St. Mary's. He was stopped by Keefe the sexton, and Gowan his assistant, who were joined as defendants. After a scuffle and a second attempt to get in, they bundled him out on the street, which was the trespass complained of. Keefe and Gowan were admittedly acting under the authority and by the direction of the Bishop, who assumed full responsibility for their action.

If the case had been merely an ordinary one of trespass to the person, the prominence of the men engaged in it altogether apart from the issues involved would have invested it with great interest. The plaintiff had for his counsel Hon. John W. Ritchie and Hon. J. W. Johnstone. Mr. Ritchie was a member of the Legislative Council and Solicitor General of Nova Scotia; one of the "four lawyers and a doctor" sent as delegates from this Province to assist in the drafting of the British North America Act; a Senator of Canada and finally our second Judge in Equity and one of the best judges we ever knew; he was, by the way, a brother of Sir William J. Ritchie, once Chief Justice of the Supreme Court of Canada, and we in Nova Scotia regard him as the abler man and better judge of the two. Mr. Johnstone was for generations the leader of the Tory Party, but law, not politics, was always his mistress; he was a consummate

lawyer; deprived by an unfortunate turn of the political wheel from being Chief Justice, he became our first Equity Judge; later on he was appointed to succeed his great, but always friendly, rival, Howe, as Governor of Nova Scotia, but died before taking the oath of office. The defendant as we have seen was the Bishop of Halifax. His counsel was Hon. William Young, afterwards Sir William, once Speaker of the House of Assembly, then Attorney-General, then Premier, closing his career as Chief Justice of Nova Scotia 1860-81. Among the witnesses called on the defendant's behalf were Edward, afterwards Sir Edward, Kenney, the representative of the Irish Catholics of Canada in Sir John A. Macdonald's first Cabinet after Confederation; Thomas J. Connolly, afterwards Archbishop of Halifax, a great ecclesiastical statesman, and an enthusiastic and powerful supporter of Confederation; he was not officially one of the delegates to London in '66-67 to frame the B.N.A. Act, but he took care to be in London while the delegates were there, and assisted them in their deliberations; it had been prophesied that our first Dominion Day would be "a day of gloom—of intense sorrow"; the Archbishop did not think so; flags flew from his residence and in its windows were large placards,—"Today Union makes a Dominion of a Province, enlarges our country, dignifies our manhood, expands our sympathy, and links us with three million, five hundred thousand fellow citizens. God save the Queen;" "Halifax yesterday was a Provincial town, today a Continental city;" and Michael Hannan, a quiet, scholarly man who succeeded Archbishop Connolly in the diocese of Halifax. *And the Judge was "Sam Slick"!!* A Nova Scotian with a gift for fine writing could, with such material, "outglitter" Macaulay's famous purple patch description of the stage set for impeachment of Warren Hastings.

The addresses to the jury were of the high order to be expected from counsel so eminent. Mr. Ritchie's was a calm, clear and straightforward statement of the facts and the law bearing on those facts, a model of what an opening speech should be. Mr. Young's opening speech is fully reported and even if it does smell somewhat of the lamp is well worth perusal and study, but unfortunately there is not even a summary of his closing one. He was fond of the *ore rotundo*, and vain of his powers as an orator, and on this occasion, so my distinguished friend, Sir Nicholas Meagher who knew Carten and remembers his case informs me, he excelled himself and pronounced such an eulogy on the old Church as has seldom been heard. One wishes he had it if for no other reason than to compare with that of Macaulay published nine years earlier. Mr. Johnstone's

address is a masterpiece. He was apt to be too heavy to suit the popular taste, but given a theme or a cause that appealed to him, his beloved Acadia College for instance, and he would pour out a stream of sonorous eloquence. Let him be persuaded that a client, particularly if he were of low estate, was being wronged or oppressed, and the stream became a torrent of impassioned eloquence that carried his audience away. Gentlemen, he said:

My whole heart and soul is engaged in this case—if ever there was an occasion which would call forth the feeling and spirit of a man who possessed one spark of manhood, that occasion I feel has arrived. It is easy to sail down the smooth streams when the gales are favourable. It was so with the learned counsel with a bishop for a client for whom he was claiming unrestricted power, pleading for a powerful hierarchy, and cheered on by the plaudits of an excited and admiring audience he seemed almost to forget that *that* client was a *man* . . . It is not, gentlemen, when the rich and powerful are backing and applauding a counsel that he should exert all his powers, but when he feels that every influence is brought forward to depress, degrade and trample to the earth the humble and the weak . . . With me, gentlemen, just the weaker and more helpless a client is, if he be an honest and an upright man, so do I feel my duty to be more responsible; and did the opposite and more powerful party be the wearer of more mitres than Yorick ever imagined to be showered upon his luckless pate, that duty should be done only the more faithfully.

The whole speech should be read and no extracts can do it justice. Yet, I must ask space for two more. Mr. Young had been unwise and ungenerous enough frequently to refer to Carten's lowly position, while at the same time, as Johnstone said, "he clothed his own client with a degree of indefinable sacredness which one can feel but not express." Continuing Mr. Johnstone said:

This is not the first time, however, in matters connected with the present action that Mr. Carten has been reproached with the lowness of his condition. This reproach is *surely* not consistent with the principles of a Church, the glories of whose hierarchy extend back in one brilliant and magnificent line to the Apostles and the incarnate son of God. How can such a principle be contended for as held by one who was content to be upon earth a carpenter's son—or of those who as Mechanics were content to minister to their respective wants, and who neither laid claim to *all the power* nor *all the temporalities.*

I am sorry to have to divide the peroration, but it is too long to quote in full, and I must content myself with the final paragraph.

The learned counsel for the defence closed his speech with a reference to Mr. Carten's deathbed scene. This, gentlemen, though not often referred to in a Court of Justice, is not inappropriate here. But when we speak of *this,* earth and earthly things must be forgotten. Something higher and holier than casual interests of this earth are brought to bear upon our erring natures. But when the learned counsel referred to this I could not but feel that before the Tribunal of the Almighty he would scarcely urge a

distinction between a shoemaker and a bishop. No, gentlemen, Samuel Carten, the Shoemaker, and William Walsh the Bishop, before that awful throne will stand on an equal footing and on that day in which you will meet them there, you will be called upon to say whether you did them that justice which you yourselves will then require by the golden rule of him the mighty Lord of all.

Not satisfied with the report of his charge as published in the *Sun*, Judge Haliburton furnished that paper with an 'authenticated' copy which is given in an appendix. As might be expected, the language used is excellent. In fact as a literary effort the charge is a gem. But as a charge to a jury it leaves much to be desired. It gives no assistance to the jury in deciding the only question for them, and leaves one wondering why it was given at all. As I have already pointed out, after the evidence was in the only question left was the legality of the excommunication, and that surely was a matter of law. If the document read from the altar on April 15th was a monition only, then there was no sentence of excommunication and the defence must fail. If, on the other hand, this document was in itself both monition and excommunication, plaintiff is out of court, for the right of the Bishop to excommunicate was not and could not be denied. The Judge told the jury the conflicting views put forward by the counsel as to the law, but did not tell them what the law was. Lest I do him wrong, let me quote his own words:—"Such are the conflicting claims, and arguments, of the parties. I repeat that the question of regularity and formality of proceedings is what you are first to decide. If everything is correct there must be a verdict for the defendant. On the other hand, if Mr. Carten in your opinion has been irregularly and illegally, according to Roman Catholic views, expelled the verdict must be in his favor with large damages, for the injury sustained by him as I have already stated is very great." And again—"Such are their respective positions and such their claims and rights. Let there be no mistake as to my views. Even at the hazard of fatiguing you I must say for the last time, if you shall view the Bishop's expulsion of the plaintiff regular, according to the rules and discipline of his Church, there must be an acquittal. If not, he must pay damages accordingly."

I submit with deference that the question whether the document was an excommunication or a monition only was a question of law and should not have been left to the jury to decide. I think only one question should have been given to the jury—"Assuming the plaintiff is entitled to recover, what damages do you assess." May I without presumption add that in my opinion the document was

both monition and excommunication and that there should have been judgment for defendant.

Both counsel were allowed to cite cases and read law from the law reports to the jury, a practice that would not now be tolerated. Not to be outdone, the learned judge had recourse to an authority not frequently quoted in a court of law. "But there is one book bearing on the subject," he told the jury, "which had not been referred to by either side. We read that Festus told King Agrippa that Felix had left a man in bonds there, whom the chief priests wished him to deliver up for execution, but that he told them it was not according to Roman law that any man should suffer until he first knew what was alleged against him and saw his accusers face to face, which is good law bearing on this point which will not be disputed."

After studying Judge Haliburton's charge, one does not wonder that the jury was out the best part of a day and then disagreed. It was composed entirely of Protestants. All the counsel engaged were Protestants, and the Judge described himself as a "Tory Protestant Judge."

GEORGE PATTERSON.

New Glasgow, Nova Scotia.