"SAM SLICK" AS JUDGE

Some years ago I was browsing through 1 James' Law Reports Nova Scotia[1] when it suddenly occurred to me that I held in my hand in the small compass of this one volume, every reported decision of Judge Haliburton—"Sam Slick". I immediately conceived the idea of writing an article with the title as above and began making preparations for it. I had not gone far before I discovered that Chief Justice Sir Joseph Chisholm, while he was still a practising barrister, had as far back as 1895, contributed to the *Green Bag*—"that entertaining magazine for lawyers"—a scholarly leading article on Judge Haliburton, the whole latter part of it being devoted to a study of his career as Judge. Where our beloved Chief has reaped, not even the corners of the field are left for others; where he gleans his vineyard, nothing is left for the poor and the stranger; so my proposed article died still-born. Meantime, Chittick's most informing and valuable work on Haliburton has appeared;[2] it has a full, and on the whole an excellent chapter on Haliburton, "On the Supreme Court Bench"; his treatment of his subject in this chapter, however, leaves something to be desired. Where he relies on Chief Justice Chisholm's study as he largely does, he makes no mistake; but where he goes off on his own, as in his reference to *Carten* v. *Walsh*[3] at the close of the chapter, he is beyond his depth and falls into errors that no well informed lawyer would have made. It was after re-reading Chittick recently that, encouraged even abetted by Sir Joseph, who has actually made himself an accomplice before the fact, I have reverted to the subject.

Haliburton was not without experience in judicial work, when he went on the Supreme Court Bench. Admitted to the Bar in 1820, he had been appointed in succession to his father William Hersey Otis Haliburton, First Justice of the Inferior Court of Common Pleas and President or First Justice of the Court of Sessions for the middle division of the Province, in 1829. At Sessions of the Peace he would only have to deal with the petty offences; his Court, though issuing processes to any

[1] Though indorsed "James Vol. I" and so described on the fly leaf, there never was a second volume. The reporter was Alexander James, Judge of the Supreme Court 1877–89 and Judge in Equity 1882–89.

[2] THOMAS CHANDLER HALIBURTON (SAM SLICK) A STUDY IN PROVINCIAL TORYISM, V. L. O. CHITTICK, PH.D.; published by Columbia University Press, New York, 1924.

[3] See *A Famous Nova Scotia Trial*, 10 Can. Bar Rev. p. 361.

part of the Province and trying titles to land, was limited in actions in contract to £5; its jurisdiction, moreover, was concurrent with that of the Supreme Court, and to the Supreme Court most litigants preferred to go. The position involved a good deal of driving over bad roads; twice yearly, he held Sessions of the Peace at each of the four County Towns of Cumberland, Colchester, Hants, and Lunenburg, and on same occasions, heard whatever cases there were to hear in the Court of Common Pleas. His associates were laymen. There was little opportunity to learn law but ample for him to carry on the literary undertakings he had already begun. While never a popular Judge—he told the Jury in *Carten* v. *Walsh*[3] near the end of his career, "I find I have never been and I think I never shall be a popular Judge" — he at least was never accused, as some of his fellows were, of extorting unconscionable and illegal fees.

When the Reformers in their zeal proposed to reform out of existence his Court, he was the recipient of addresses from the "Associate Justices, Magistrates, Gentlemen of the Bar, High Sheriff and Grand Jury" of the Counties of Hants and Lunenburg expressing their approval of his faithful and successful endeavours to dispense the laws of the land wisely and well.[4] That was in 1838. Three years later, the reformation came with an Act[5] abolishing the Inferior Court of Common Pleas. The Act provided, however, that in view of the additional work that would thus be thrown on the Supreme Court, another Judge, chosen from those Chiefs or rather First Justices of the Inferior Court, should be added to that Bench. This Act became law on March 29th, 1841; two days later, Haliburton's commission was gazetted; and on April 7th, he was sworn in as a Judge of the Supreme Court. The Governor of Nova Scotia, at that time, was Viscount Falkland. Haliburton and he were warm personal friends; and the Governor, of his own motion without consulting his Council, appointed his friend. Howe was, at that time a member of the Council; the Governor's action was a clear violation of the principles of responsible government, but Howe uttered no word of complaint. He had once been Haliburton's warmest and best friend; and while the agitation for the abolition of the Inferior Court was going on, had recommended Haliburton for preferment, never anticipating

[4] Nova Scotian, April 19th, 1838.

[5] Acts of the General Assembly of the Province of Nova Scotia, 1841, 12*ff*.

we may be sure, that Viscount Falkland, who had been a Whig in England and was supposed to have Liberal tendencies, would do anything without advice of his Council. Then had appeared *The Attaché* in which Howe was meanly and untruthfully assailed. The one time friends became estranged; and when Governor Falkland ignored his Council in appointing Haliburton, Howe had his opportunity for revenge. An ordinary man would have jumped at it, but Howe was not an ordinary man; he preferred to be scored as inconsistent rather than be untrue to one with whom he had frequently sat at meat. He was not even allowed to keep silence; but was driven to attempt to justify the Governor's action. In such a predicament was he that he was forced to argue that Haliburton was entitled to the recognition because of the service he had rendered his country by his *History* and *"The Clockmaker"*. Surely it was a strange reason for choosing a man to dispense justice that he had written a passable History and a successful work of fiction.

Once seated upon the Supreme Court Bench, Haliburton remained upon it with only occasional absences until 1856. Twice each year in Spring and Fall, he went on circuit and in the winter, sat with his brother judges[6] in Halifax to hear appeals. It was not his custom on circuit to reserve decision: not that he had any principle about the matter but in those days, when practically all cases were tried with a jury, it was not usual to reserve decision; the appeals, if any, would be against the judge's charge to the jury. We have nothing tangible about his work on circuit. Contemporary opinion was against him; his appointment was regarded as a job; he was thought not to be qualified; and the nasty incident over his pension at the time of his retirement recalled and renewed the feeling of bar and laity against him, and confirmed the tradition of incompetency. It is to be feared that Haliburton made no or little effort to prove to the public that he *was* competent. On circuit, he hurried through his work and nothing apparently pleased him so much as to be able to get a "run" on the

[6] These judges were Halliburton C.J., Bliss, Dodd and DesBarres JJ. The Chief was often confused with his puisne Haliburton and once allowed himself to make the rather obvious pun that there was "an 'ell of a difference between them". Bliss was one of the ablest Judges Nova Scotia has ever had. Dodd had served as a Midshipman all through the war of 1812–14 and it is at least probable he would have made a higher reputation as a naval officer than he did as lawyer or judge. DesBarres was the last judge to be appointed in Nova Scotia directly by the Colonial Office. His appointment was so bad that the Reformers took care there should never be such another. When I was a youngster at the Bar, if you saw a group of the older lawyers talking and laughing together, it was a safe bet that one of them was relating some story of DesBarres' absurdities.

docket and rush through it; litigants and counsel not expecting to be called on so soon, were unprepared to go on and forced to let their cases go over to the next term. Then his unconquerable habit of punning and, what Chittick calls, his "uproarious lack of decorum" encouraged the belief that he did not take his judicial duties seriously — that he was more of a joker than a judge. The Halifax correspondent of the "Boston Post" during the session of the Supreme Court at Halifax in early winter of 1853, wrote to his paper: "The Supreme Court continues to be the favorite lounging place and has for the last fortnight engrossed the greatest part of the attention of some forty or fifty lawyers, hosts of gossips, loungers and other people who want to see justice done, besides those who can't help it, including a number of jail birds. Ever since my last, the author of Sam Slick has presided on the bench and great has been the mirth at his funny sayings and doings. The old fogy shivers the Prothonotary on a pun, scatters one Counsel's ideas in a fit of laughter, makes another wish himself dead by cutting the thread of his discourse with a witticism, and then cracks jokes on the head of the criminal he is sentencing until the poor devil begins to think it all a hoax. It is very funny, everybody admits, but some think it is not quite so dignified as it ought to be."

But with all his buffoonery, Haliburton was not altogether insensible to justice or the obligations of his position. The late Judge Savary,[7] a very able man whose opinion cannot be ignored, wrote of him in the "Halifax Herald" of March 9th, 1909: "Haliburton had a keen judicial mind, and was an able and rigidly upright judge, *at nisi prius perhaps the best of his day;* scorning mere technicalities when they interfered with the administration of strict justice between man and man, and was especially astute and strict in the administration of criminal law." The extreme extravagance of part of this opinion — that part which I have put in italics, casts doubt upon the value of the rest of it. *Per contra* I have the opinion of the late Chief Justice Sir Charles Townshend. Haliburton and he wore the same school tie; both were Tories of the stern and unbending type. Haliburton had left the bench before Sir Charles began practice; but he would know the younger generation of the barristers who had practised before him; would hear the Haliburton stories and the jokes he cracked, repeated by those

[7] First Judge of the County Court for Dist. No. 3, 1876; M.P. for Digby County 1876–72.

who had actually heard them. To speak to Sir Charles of Haliburton as a judge would always provoke a smile more eloquent than mere words, a smile of amusement as over a good story. Haliburton as an author he greatly admired but as a judge he felt, to put it mildly, he was not a success. But Sir Charles was himself so devoted to his work and so scrupulously honest about doing it, that he was inclined to be hyper-critical of one who admittedly was less serious. Probably the truth lies between the views of Judge Savary and Sir Charles; he was not the best of his day as the former would have us believe nor was he so inefficient as Sir Charles' attitude to him would imply.

So far, I have been dealing with Haliburton as a trial judge. Sitting with his four brethren on appeal, there would be little or no opportunity for his reprehensible punning nor would breaches of that decorum expected of a judge, be tolerated. Willy nilly, he would be obliged to be dignified and attentive to the argument of counsel. How then did he measure up as an Appeal Court Judge? Unfortunately, we have little on which to base certain judgment.

As already pointed out, the one volume of James' Reports contains all his reported decisions. Now James' Reports cover only the period between the Easter Term 1853 and the Easter Term 1855 inclusive. That is to say, for only two of the fifteen years that Haliburton was on the Supreme Court Bench. He was absent in Europe during the whole of the Easter and Trinity Terms 1853 and seems to have taken little part in the work of the Michaelmas Term that year. In the Reports, the names of the judges hearing the appeal are not given, and frequently as where the court is unanimous in its judgment, it is impossible to tell which judges heard argument and agreed in that judgment. Then there are a number of cases upon points of ancient practice; others upon questions of law long since settled and now of no interest or importance; from these, we can learn nothing. The result is that we are left with just over a dozen cases in which Haliburton took part and wrote, or, at any rate, delivered a judgment. Let us examine as many of these cases as limits of space will permit.

Davison v. *Kinsman*, James 1, was an action of trespass *quare clausum fregit*. Haliburton, who tried it, properly directed the jury on the doctrine of conventional lines as follows: "Where various parties holding adjoining lands meet upon the land and fix a boundary between their lots by verbal agree-

ment, such agreement will be binding upon them notwithstanding the boundary agreed upon may vary from the deeds or plans by which the parties hold." All his brethren agreed that his charge was proper. In *Koch* v. *Dauphinee*[8], James 159, a very much divided Court, Bliss, Haliburton and DesBarres JJ. Halliburton C.J. and Dodd J. dissenting, held that the title to the soil of the highways laid out under the statutes of the Province through the lands of private individuals and for which they have received compensation is diverted out of the owner of the adjoining land, and absolutely vested in the Crown for the use of the public. Haliburton himself wrote no decision; he was content to adopt that of Bliss J. In *Brennock* v. *Fraser*, James 178, the plaintiff sought and succeeded at the trial "to cure a latent defect in a grant by parol evidence". Haliburton's son in vain tried to uphold the judgment and his argument, according to the Chief Justice, "was very creditable to his ingenuity" but the Court his father included was against him. In *Creighton* v. *Union Marine Insurance Co.*, James 195, a question of the construction of an insurance policy, Halliburton C.J., Haliburton and DesBarres JJ. gave judgment for plaintiff; Bliss and Dodd JJ. dissenting. According to the Reporter, Haliburton J. delivered a long critical examination of the case with reasons *in extenso*. I cannot refrain from quoting a rather lengthy paragraph:—"Mr. Justice Bliss seems to think that we are bound by the opinion of Sir James Mansfield in *Spitta* v. *Woodman*, 2 Taunt, 416. I beg leave to dissent from that proposition. The unconditional surrender of private judgment to decided cases has drawn down the opprobrium of British statesmen on the study of law; and it has been broadly asserted that its tendency is to cripple and confine the mind. Most of these remarks have more in them of flippancy than of truth. It does not follow that the study of the law limits the mind; but the mind may cramp itself by the mode in which it studies. If decided cases are immutable, and so considered by the Courts where they are decided, as well as in those of more limited jurisdiction like our own, we commit the fatal error of surrendering up our judgments to those of other men. But I view the subject in a different light; and regard decided

[8] The question to the title to lands in a highway later arose in *Carney* v. *Dickson*, 20 N.S.R. 95 and *Koch* v. *Dauphinee* was not followed. *Carney* v. *Dickson* was decided in April 1887. In May, 1887, by Statute, chap. 23, s. 1, the Legislature nullified the decision. Meantime, an appeal had been taken to the Supreme Court of Canada and the judgment of the Supreme Court of Nova Scotia reversed. *Dickson* v. *Carney*, 19 S.C.R. 143; so that now both by Statute and the common law, the doctrine laid down in *Koch* v. *Dauphinee* has been confirmed.

cases not as law — but evidence of law — or expositions of law. Englishmen boast of their Common Law as if it were peculiar to themselves; we, however, know that a common law extensively prevailed in Greece and Rome, and has now its existence in every civilized country of Europe, in the United States, and the North America Colonies. That law has been defined by an ancient author of great celebrity to be 'the decision and adoption of certain principles subsequently recognized and sanctioned by the Courts'. He then winds up by stating it to be 'the golden rule of reason'. Lord Coke calls it the 'right reason'." He reaffirms the same doctrine but without the rhetoric in *Roberts* v. *Patillo*, James 367.

In the *Queen* v. *Belyea*, James 220, an indictment was quashed on highly technical grounds, Haliburton, Dodd and DesBarres JJ. being for quashing, Halliburton C.J. and Bliss J. dissenting. On exactly the same division of the Court in *Smith* v. *McKenzie*, James 228, there was judgment for plaintiff in an ejectment suit, the only evidence of title in plaintiff being a mere prior possession. In both *Queen* v. *Belyea* and *Smith* v. *McKenzie*, *malo mehercule errare* with the dissenting judges. In *Murdoch* v. *Pitts*, James 258, it was held that a promise to pay "as soon as possible" is not sufficient to take a case out of the Statute of Limitations without proof of defendants' ability to pay.[9] Haliburton who had tried the case held it was, and had directed the jury to find a verdict for plaintiff which they obligingly did. On the appeal, Haliburton sat with his brethren and stuck to his guns. He begins his judgment by saying "I do not look so much to the exact words as to general principles". Admittedly his decision ran contrary to *Tanner* v. *Smart*, 6 B.&C. 603. This is how he deals with that case— the quotation is long but I cannot shorten it without spoiling: "Although the decision in *Tanner* v. *Smart* was necessary at the time, too much has been made of it, and in fact, whenever it comes up, we hear of nothing else. It is applied like Procrustes' bed. If a case is too large for it, a piece is cut off and if too small, it is stretched to the requisite dimensions. But giving to that case the full force which is claimed, I do not consider that the evidence in the present case, comes within it. Had the defendant said 'I will pay as soon as I possibly

[9] Lawyers will remember that the Statute of Limitations did not originally require that the promise, in order to bar the Statute of Limitations should be in writing. In England, by an amendment commonly called "Lord Tenterden's Act", 9 George IV, c. 14, it was directed that the promise must be in writing to be of any effect; but in Nova Scotia, at the time of *Murdoch* v. *Pitts*, we had not adopted the amendment.

can' or 'as soon as I have the means' it would have been different. But I do not consider taking the whole evidence together that defendant referred to his means at all, as qualifying the promise when he used the expression. It is a very common expression to say 'I will pay as soon as possible', and its ordinary acceptation in such cases is that a party will pay very soon, if not immediately, and will exert himself to pay it. It does not follow that he did not make a promise which he knew he could not fulfil. This is very often done. Nor is it likely that the defendant had reference to the decided cases and wished to protect himself under them. On the contrary, he used the words in the ordinary sense and they should be interpreted by the rule that a man is to be understood to use words in their ordinary and popular signification. The witness swears that the promise was unconditional and such was my own impression which I still retain. The construction to be put on the words used is a question for this Court, and if we tie ourselves down too closely to the case of *Tanner* v. *Smart*, we are giving to it a legislative authority to which it is not entitled. My own opinion is that it may be called a *protrusive* decision, advancing far into the powers of legislation, and not so much explanatory of the Statute as imposing to it additional conditions. Abbott C.J. seems to have had this difficulty in view when he introduced the subsequent statute now known by his name." Well might Chief Justice Chisholm write,[10] "this decision is more interesting on account of the vigour of its rhetoric than the soundness of its law". One case remains,[11] *The Queen* v. *Martin*, James 322. It is a most interesting case but to deal with it properly would require more space than can be spared. Besides Halliburton's part in it was small and we learn nothing of him from it.

It is perhaps hardly proper to form an estimate of Haliburton's qualities as a Judge on appeal upon such scanty material as has been collected in James' Report; but after all, have we any reason for believing that a multitude of cases would disclose a different Haliburton? I think not. It is clear that the reporter did not pick and choose the cases to be reported; but took what came to his hand. Lord Campbell used to say that he had a drawerful of Lord Ellenborough's

[10] The Green Bag, Vol. VII, p. 494.

[11] Most interesting, because so far as will ever be known, it was the first case in Nova Scotia where defendant in a murder trial invoked the "unwritten law"; and was found not guilty because insane. The slain man was the son of Judge Dodd; he had seduced the daughter of defendant.

bad judgments which he had not reported. James, so far as we can tell, used no such discrimination; he was not elective but published everything he could obtain whether it was good, bad or indifferent. Assuming then, as I think we may, that the cases cited give a not unfair representation of Haliburton as an appeal judge, they prove him to have had little interest in his work. One could not well say of the author of *Sam Slick* and the *History of Nova Scotia* and many other works, that he was lazy; but certainly he showed no sign of industry in his judicial work. Rarely does he write a judgment; he contents himself with concurring. Never apparently was he ever asked to write the judgment of the Court. Why? Not certainly from lack of experience but because, I venture to say, to the knowledge of his brethren, he had fallen into careless, indolent habits. There are indications that if he had applied himself to the study of law, he might have become a learned lawyer and an excellent judge both at *nisi prius* and on appeal; but there are many more that he did not so apply himself. If I might without presumption adopt Sir Joseph Chisholm's summing up in the article earlier referred to[12] I would do so; it certainly is fair if not more than fair to Haliburton: "It is no injustice to the memory of this celebrated man to say that his work as a judge was not enduring. There are no great decisions of his to which we can point as land marks in the development of our law. Nevertheless, he did his work well, and was a long way off from failure. Bright, cultivated and versatile, he could not be a failure. But he found literary work more congenial than the ceaseless search for precedents."

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[12] *The Green Bag*, vol. vii, p. 492.