SELECTIONS.

THE CASE OF ANDERSON THE FUGITIVE SLAVE.

The application for the Writ of Habeas Corpus and Judgment considered; by THOMAS TAPPING of the Middle Temple.

(*From the Law Magazine and Review.*)

The application for the rule in Anderson's case has raised the most important point of colonial law that has occurred within modern times; viz., whether the Queen, by her Court of Queen's Bench at Westminster, has power to issue her prerogative *Writ of Habeas Corpus ad subjiciendum* into Canada, in respect of a matter arising entirely within that province, and over which the Canadian courts have jurisdiction?

The counsel for the applicants had to make out the affirmative of this very important question, and, in doing so, their argument would have been much more lucid, and better arranged, had it commenced with the most recent statute and authority, and worked chronologically back upon the older statutes and authorities, until all that was relevant had been exhausted, and all the observations necessary for the information of the court had been made. Such a course would have been not only in accordance with the practice of our best-trained and most eminent advocates, but have also had the paramount advantage of putting the court in possession of the latest judicial tests, whereby it could accurately ascertain the present legal value of the earlier cases.

But the argument addressed to the court in Anderson's case, was differently cast. It commenced with irrelevant authorities, nearly five hundred years old, about Calais, and, after discussing whether the English Court of Queen's Bench had power to issue a *certiorari* to Berwick, or a *habeas corpus* to Ireland, Guernsey, or Jersey, or other prerogative writs to the Isle of Man, and other British dependencies, this important case was left by counsel for the decision of the court. Not a single act of parliament either of the imperial parliament relating to Canada, or of the Canadian legislature, as to the constitution, jurisdiction, or procedure of its courts of justice, was cited; omissions the more remarkable as their citation would have saved the Court of Queen's Bench at Westminster a great deal of unnecessary doubt and difficulty, and prevented it from assuming a jurisdiction which, it is feared, will be not only opposed by the Canadians, but establish an evil precedent, and tend to unsettle the amicable relations which at present exist between this country and her North American possessions.

The argument had not, however, proceeded far before that very learned judge, Mr. Justice Hill, wishing to rightly direct it, called counsel's attention to the stats. 14 G. III. c. 83, "An Act for making more effectual provision for the Government of the Province of Quebec, in N. America," and the 31 G. III. c. 31, which divides the province of Quebec into Upper and Lower Canada; the citation of which by the learned judge, showed clearly that he wished to be informed how far recent statutory enactments had affected the jurisdiction of his court. But all the information he got from counsel was, "that the latter statute treated the province of Quebec, which comprehended both Upper and Lower Canada, as a colony and possession of the crown of England." Not a very profound observation, and certainly one not at all complimentary to the judge, who had the act of parliament before him.

After the customary pause that usually follows the answer of a judicial question, the counsel, still persevering with the original scheme of their argument, cited "Watson's case, 9 A. & E. 731; Vattel's "Law of Nations," B. I. c. 18, p. 210; 2 P. W. 75; 3 Bac. Ab. 424, 5th Ed. tit. *Habeas Corpus; Rex* v. *Cowle*, 2 Burr. 834, 855; *Grotius de Jure Belli ac Pacis*, b. ii. c. 9; Rymer's Fœd., vol. viii. p. 15, Lond 1709, vol. iii, part iv. p. 135, Hague, 1740; *Campbell* v. *Hall*. Cowp. 204: and were about to proceed further, when another learned judge, Mr. Justice Crompton, with characteristic acuteness, broke in upon the argument, and called attention to the real point in the case, saying—"You must make out that this court has concurrent jurisdiction with the courts in Canada." Whereupon Cockburn, C. J., also observed—"You must show that this court has the power of issuing the writ into a possession of the crown, in which there is not only an independent legislature but an independent judicature." To which the learned counsel replied by way of *petitio principii*, as follows:—"The fact that Canada has both a separate legislature and judicature makes no difference. The superior courts in England have a concurrent jurisdiction with the courts in Canada, as to issuing writs of *habeas corpus*;" and immediately referred to cases about the Isle of Man, *R.* v *Crawford*, 13 Q. B. 613; the stat. 5 G. III. c. 26; Carus Wilson's case, 7 Q. B. 984 (about Jersey), Dodd's case, 2 DeG. & J., 510, S. C. 4 Jur. *n. s.*, 291 (also about Jersey), and in *ex parte Lees*, El. Bl. and El., 828, S. C. 5 Jur., *n. s.* 333 (about St. Helena the writ being refused). At this juncture, Mr. Justice Hill, who during the citation of the last mentioned cases had evidently been pursuing a train of silent reasoning, remarked, "When writs of *habeas corpus* were issued to Ireland, there was an appeal from the courts there to this court;"* and Cockburn, C. J., immediately stated—"Lord Campbell seems to have had considerable doubt whether, in a case like the present, the writ of *habeas corpus* could be issued. He said (El. Bl. & El. 834, S. C., 5 Jur. *n. s.* 334)—'It was not at all explained in what manner our writs of error, *certiorari*, or *habeas corpus* could be enforced in such dependencies'"† and, after a few observations in reply from the learned counsel, the Chief Justice reiterated—"The question is, whether the issuing of this *writ is not beyond the ambit of our jurisdiction, and whether the right of issuing the writ is not vested in another jurisdiction; that is, in the courts of Canada.*" To this counsel made reply by erroneously informing the court, that—"The colonial courts in Canada are established by charter of the Crown, sanctioned by the Legislature, and further stated that the party (Anderson) was not in custody under the commitment of any court which had power to try him; nor was the court asked to interfere with any judgment or sentence of any court, but that the party (Anderson) was in custody under the warrant of a local magistrate." Cockburn, C. J., having here observed—"*It is a serious question whether we should attempt to exercise a jurisdiction which we have no means of enforcing;*" the argument ended. The judges retired, and upon their return into court—

SIR A. COCKBURN, C. J., said‡—"We have carefully considered this matter, and the result of our anxious deliberation is, that we think that the writ ought to issue. *We are sensible of the inconvenience which may result from the exercise of such a jurisdiction. We are also sensible that it may be thought inconsistent with that higher degree of colonial independence, both in legislation and judicature, which has been carried into effect in modern times with happy results.* At the same time, in establishing local legislative and judicial authority, the legislature of Great Britain has not gone so far as expressly to abrogate any jurisdiction which the courts in Westminster Hall possess, of issuing writs of *habeas corpus* to any part of her Majesty's dominions; and we find that that jurisdiction in these courts has been asserted from the earliest times, and exercised down to the most recent. We have it upon the authority of Lord Coke (2 Inst. 53), Lord Mansfield, Blackstone, and Bacon's abridgment, that these writs of *habeas corpus* have been and are to be issued into all the dominions of the crown of England, when it is suggested that one of the Queen's subjects is illegally imprisoned. And not only have we these authorities in the shape of *dicta* of eminent judges, and assertions of text writers, but we

* The learned judge was quite correct. *See Fryer* v. *Bernard*, 2 P. Wms., 261 cited *post*, p. 49.

† See also Brac. Lib. 3 vol. 106, 107, par. 4 & 5, cited *post* p. 57.

‡ We give the judgment in extenso, not only because it is a useful one to record, but because this article should not, for obvious reasons, go forth to the world without it.