

C. L. Cham.]

IN RE KINNE—THE QUEEN V. ROBINSON.

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who examined the child for some time apart from her father and aunt, to ascertain the degree of intelligence she had attained, and explained to her fully that she was free from all restraint of her aunt, and was then under their protection.

Judgment was thereupon given by

HAGARTY, C. J., C. P.—We have carefully examined this child and explained to her her position. We have also read with much care the affidavits filed on both sides. We think that the father, upon hearing the reports of the alleged cruelty, acted very properly in making this application, and did what we should expect a parent to do in such a case, but we do not think he can succeed in his present contention.

The affidavits are certainly conflicting, but there is a very satisfactory denial, well supported, of the alleged cruelty of the aunt; and the circumstances connected therewith are somewhat unusual, because it is seldom that parties are so fortunate as to be able to procure such strong corroboratory evidence in denial of such specific charges as is now produced. We consider the charge of want of intelligence of the child not in any way supported; her manners and answers establish to our satisfaction that the child is a peculiarly intelligent one, and fully understands her position.

The only order we can make is, that the child is free to go with whom she chooses. It is perhaps only natural that having lived nearly all her life with her aunt and not knowing her father, she will, if the latter has treated her well, prefer to remain with her aunt than go with her father; and it is important to be remembered that the aunt and her husband have, since the child was an infant, taken care of her and provided for her, at their own expense, and the father has not, until now, made any effort to get the child to return to him, and has paid no part of the expense of maintaining her. If she has not been well treated she has now an opportunity of leaving her aunt and going to her father and other relatives in New Brunswick.

We should regard the case very differently if this girl had recently left or been taken away from her father. In such a case the law apparently orders her to return to her father, without reference to her own choice, at all events until she attain the age of sixteen.

The case of *Reg. v. Howes*, ante, cited by Mr. O'Brien, is very strong as to the general rule. Our Statute, Con. Stat. Can. ch. 91, sec. 26, supports that general view.

We decide this case on its particular circumstances without infringing, as we believe, on the principles laid down in *Reg. v. Howes*.

Upon the child electing with whom she will go, the disappointed party must be careful not to resort to any improper means to deprive the other of the child.

The learned Chief Justice then told the child that she might go away either with her father or her aunt, and she at once with apparent willingness went to the latter.

QUEEN V. ROBINSON.

[Chambers, January 26, 1870.]

Extradition—Evidence—Deposition—31 Vic. cap. 94.
Under sec. 2 of the above Act, the depositions that may be received as evidence of the criminality of the prisoner must be those upon which the original warrant was granted in the United States, certified under the hand of the person issuing it.

A writ of *habeas corpus* was issued directing the keeper of the gaol of the county of York, to bring up the body of John O. Robinson. The body of the prisoner was accordingly produced before Morrison, J., with the writ and return.

The cause of detention was shewn to be a warrant of Alexander McNabb, Esq., the Police Magistrate of the City of Toronto, dated the 22nd day of January, 1870, setting out that the prisoner was charged, on the oath of one Warren, a deputy United States Marshal, and others, that he did on or about the 10th April feloniously &c. burn and consume a certain dwelling house in the town of Somerville, &c., in Massachusetts, one of the United States; to be detained in custody until surrendered according to the stipulations of the treaty between Her Majesty and the United States of America, or until discharged according to law.

A writ of *certiorari* was also issued at the same time under which the Police Magistrate retained all the proceedings had before him. It appeared from them that an information had been laid before Mr. McNabb on the 22nd December last, by one John C. Warren, a Boston Deputy United States Marshal, stating that he had been informed, and believed, that the prisoner on or about the 10th April last, did feloniously &c. burn and consume a certain dwelling house (not stating the owner), at the Town of Somerville, in the County of Middlesex, in the State of Massachusetts—and not even stating that the prisoner fled to Canada. On this the Police Magistrate issued his warrant on the same day for the prisoner's apprehension, and upon which warrant he was arrested. He was remanded until December 24th, when John C. Warren examined and deposed that—he knew the prisoner: that he left Somerville last June or July: that he was charged with setting fire to a house owned by one Bassett. A paper was produced to the witness which contained statements and depositions made by three persons, named Patton, Horton, and Fingay, stating conversations and facts with the prisoner relative to the burning of the house in question—underneath which statements and depositions was written—"Middlesex, December 13, 1869. There personally appeared the above named (naming the parties), and made solemn oath to the truth of the above statements by them subscribed. Before me, Isaac S. Muse, Justice of the Peace." The witness Warren stated he was present when these statements were made, and that he saw the Justice of the Peace, Muse, sign them; he also stated that he was not aware that any warrant issued on these statements or depositions—he said that a warrant had issued for the prisoner's arrest before the depositions in question—but he was not aware that any depositions were taken under such warrant; he also stated that he knew Patton and Horton, that he had had a bench warrant in July last against the prisoner upon a criminal