Province of New Brunswick.

SUPREME COURT.

Gregory, J.] RE KELLY. [June 12.

Extradition—Assault with intent to murder—Extradition Act, c. 142, R.S.C.—Treaty with United States—Evidence on enquiry before judge.

Where a fugitive offender from the United States is charged with an assault with intent to murder in an information laid under the Extradition Act, c. 142, R.S.C., the evidence must sufficiently establish the existence of the intent.

The prisoner was in custody under a warrant issued by the Chief Justice under the Extradition Act, c. 142, R.S.C., upon an information charging the prisoner with having on April 17 last, in the county of Arrostook, in the State of Maine, assaulted Frank W. Burns with intent then and there feloniously to kill and murder him. At the hearing before Mr. Justice Gregory evidence was given of the assault, and at its conclusion argument was considered upon the question whether the intent to murder was sufficiently made out. The learned judge, having taken time to consider now gave judgment as follows :—

GREGORY, J. :—One of the crimes mentioned in the Extradition Treaty between Great Britain and the United States is "assaulting with intent to murder." The right to have the prisoner extradited depends upon the establishment of the prisoner's intent to murder. The words "feloniously to kill" in the information are surplusage. No matter how serious the assault may be, unless it is accompanied with the intent to murder, the accused is not liable to be extradited. By sec. 9 of the Extradition Act the judge or commissioner before whom the fugitive is brought is directed to hear the case in the same manner as nearly as may be as if the fugitive were brought before a justice of the peace charged with an indictable offence committed in Canada. By sec. 394 of the Criminal Code, after all the witnesses on the part of the prosecution and the accused have been heard, the justice of the peace is directed, if upon the whole of the evidence he is of opinion that no sufficient case is made out to put the accused upon trial, to discharge him, and by sec. 596 if he thinks that the evidence is sufficient to put the accused on his trial he is to commit him for trial. Doubtless if the prisoner in this case was being examined before a justice of the peace on the offence laid against him, but committed in Canada, he would with propriety be committed for trial for some offence, but I do not think for the offence of assault with intent to murder, for the reason that I can see no evidence upon which any court or jury could hold that the assault was committed with