

C. L. Cham.]

IN THE MATTER OF MARY THERESE KINNE.

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aforesaid, to look after the child, and from the information I have received from inquiries made since my arrival in Chatham, I have no doubt that she is and has been most brutally and inhumanly treated by her aunt aforesaid, and that it is absolutely necessary that I should take her in my charge and provide for her myself at my home in New Brunswick.

Upon my arrival in Chatham, I had interviews with the said Keever, and informed them of my desire that the child should return to New Brunswick with me. They seemed at first disinclined to allow this, but afterwards appeared quite willing, and Mrs. Keever said she had only wanted a little delay to prepare clothing for the girl's departure, but this appears to have been only done to lull suspicion, as both the Keever's now absolutely refuse to give up the child, and state that she has left them, and they do not know where she is, but Mrs. Keever said she could find her."

On 17th December, Stephen Keever and Lucy Keever, made and filed a return to the writ to the effect that they could not produce the said child as commanded, as she was not and had not for some weeks past been in their custody or control. This return was verified by their affidavits.

An enlargement was thereupon obtained to enable Thomas Kinne to object to the sufficiency of the return to the writ, and to contradict the truth of the facts set forth in the return, under sec. 8 of 29 & 30 Vic. cap. 45.

Pending this examination of the truth of the return, and of an intended application under sec. 2 of the same act, for the apprehension of the Keever's for disobedience of the writ, Mrs. Keever appeared in Chambers with the child, alleging that since the filing of the return she had ascertained where the child was, and that she then produced her in obedience to the writ. The next day, Thomas Kinne, Mrs. Keever and the child being in court,

O'Brien moved for an order for the delivery of the child to her father. He filed affidavits charging Mrs. Keever with neglecting the child's education, with severe and improper punishment of the child: with gross acts of cruelty to her, which were alleged specifically: that Mrs. Keever was of such an ungovernable temper, that she was not fit to be entrusted with the care of a child: that the child was of weak mind from the effects of the ill treatment; and, from her youth, ill treatment and fear of her aunt, was not fit to judge for herself as to with whom she would prefer to remain. He contended that the father was legally entitled to the custody of the child, at all events as against a stranger, which, in the eye of the law, the aunt must be taken to be, and that an order should be made for the delivery of the child to the father: that the affidavits established improper treatment of the child generally, and several specific acts of personal violence towards the child of an outrageous kind: that the child should not be allowed to choose which she would prefer going to, being of such tender age, and not being of sufficient intelligence to exercise a reasonable judgment; and, that even if so very intelligent as the aunt contended, such precocity itself might be re-

quired to be guarded against: that being under fourteen years of age, she would in law be deemed incapable of exercising an election; that she was in fear and dread of her aunt, and would act under the influence of that fear, and that the aunt had taught the child to dislike her father: that it would be improper in every way, and contrary to the law of nature that a father should be deprived of his child whom he had not abandoned and was willing to support, and whom he had evinced his determination to protect by coming the great distance he had, upon hearing the reports of her ill treatment by her aunt, and that it would be great cruelty to the father to let him return home believing that his child was ill treated, and induced to dislike him.

J. B. Read, in reply, filed affidavits stating that the child was, when about seventeen months old, taken by its aunt, then unmarried, to bring up, with the consent of her father and mother: that the aunt had continued to have the care of the child until its mother's death: that after that event, with the consent of the father, the child continued to remain with the aunt: that with the same consent and permission the child was brought to the Province of Ontario from New Brunswick, where all the parties resided: and that the child had ever since remained with the aunt. The charges of cruelty, both general and specific, were denied by Keever and his wife, and their statements were corroborated by others. It was also stated that the child was sent to school and well taken care of: that there were feelings of hostility between Mrs. Keever and the relatives of her husband, who were said to be afraid that Keever, who was well off, would leave his property to the child: that the child's father had no house of his own but boarded out, and that the future welfare of the child required that she should remain with her aunt.

He urged that in addition to the evidence in the affidavits, that the very appearance of the child refuted the charges of neglect of her bodily wants or mental culture: that the child was resolved not to go with her father, but to remain with her aunt: that if the Judge was satisfied that the case was met on the affidavits, the father could not complain, as he had suffered the child to grow up from infancy with the aunt, who had all the care and trouble of training and providing for her, and was attached to her: that in law the father was not legally entitled to the custody of the child under the circumstances: that all the court or a judge could do would be to order that the child should be removed from any restraint on the part of her aunt, and be given to understand that she was free to go with whom she pleased, without fear of the consequences: that if she preferred to go with the father she should be allowed to go with him, if with the aunt, then to go with her.

The following cases were cited: *Rex v. Smith*, 2 Strange, 982; *Rex v. Greenhill*, 4 A. & E. 624; *Rex v. Isley*, 5 A. & E. 441; *Reg. v. Smith*, 22 L. J. Q. B. 116; *Ex parte Barford*, 3 L. T. N. S. 467; *Reg. v. Howes*, 17 Jur. N. S. 22; 8 El. & El. 332.

The case was argued before the Chief Justice of the Common Pleas and Mr. Justice Gwynne,