

Elec. Case.]

REG. EX REL. FORD V. McRAE—IN RE KINNE.

[C. L. Cham.]

that the sureties joined in the bond knowing such to be the case and only for the year, as sworn to by the defendant. It is true, as argued by Mr. Harrison, if the Treasurer had not been re-appointed, that under the 177th section of the Municipal Act he would hold office until removed by the Council. But the fact of his re-appointment in 1863 implied at all events that his term of office expired at the end of 1862, and his re-appointment by by-law in 1864, expressly limiting his appointment to that year. At the end of that year his term of office certainly expired, and as he made no default but faithfully performed his duty, &c., as Treasurer, up to that period, his sureties under the bond in question were discharged from all liability—if they had not been discharged at the end of 1861 or 1862. There are no words in the condition indicating that the sureties engaged to be liable upon his re-appointment from time to time. The council might have taken a bond continuing the liability of the sureties upon fresh re-appointments, but such an intention should expressly appear in the bond. What was said in giving judgment in the case of *Mayor of Cambridge v. Dennis*, E. B. & E. 659, which was the case of a treasurer's bond, has a strong bearing on this case. There the learned judges were of opinion that the sureties did in fact look beyond the current year, but they were constrained to give judgment for the sureties. Coleridge, J., said, "I incline from what generally passes on these occasions to believe that the parties did not think much about the point, but knowing that the office was annual gave their security for it as they found it. However supposing that not to be so, we are clearly not at liberty to resort to such considerations in construing this instrument; we must take its words and apply the law to them. It is admitted that, *prima facie*, the security would be limited to the time for which the office was appointed, and it lies on the plaintiff to displace this—and that seems to be just. The obligor knows at the time to what extent he is bound, and may estimate the liability which will devolve on him during the time, but he cannot know what liability may devolve on him at a distant time. Suppose two different instruments in writing were presented to him and he were asked, will you be surety for one year or for the whole life of the officer if he continues in office, would not any man consider there was a great difference between the two. I think therefore the presumption is, the defendant proceeded upon the rate of things which he knew to exist, and that was, that the officer was appointed for a year, and was liable to be not appointed for a second year; if that was presented to the mind of the surety he would execute the bond with the knowledge of his liability, unless the terms of the instrument were altered, would be over at the end of the year." And Crompton, J., said, "It is important that we should judge by the rules of law and not by guess. Nothing is better established than that a surety executing such an instrument as this is to be taken to be giving security only in respect of the existing office. When there is a re-appointment he has a right to say the office is not the same." I refer also to the various authorities cited in that case.

On the whole I am of opinion that this bond

was only a continuing security until the expiration of the Treasurer's term of office, which term ended upon his re-appointment in 1863, and at the furthest ended in 1864 under the by-law limiting it to that year, and as it appears that up to that period, and years after, the Treasurer duly performed the duties of his office, and the liability of the defendant ceased under the bond. And that at the time of the nomination of the defendant and of his election he had no interest in a contract with the corporation arising under the bond in question, and this application must therefore be discharged.

It is not necessary that I should give any judgment on the other point raised. I however considered the question, and I arrived at the conclusion, that as the defendant's qualification was not objected to at the nomination but at the time of the polling, when the electors could not nominate another candidate, it would be unjust to the electors and unreasonable under such circumstances, to deprive them of a further opportunity of electing a person of their choice.

The application must be discharged with costs.

Order accordingly.

COMMON LAW CHAMBERS.

IN THE MATTER OF MARY THERESE KINNE.

Custody of infant—Right of father.

A girl aged thirteen years and ten months, who had lived with her aunt from infancy, was allowed, on an application by her father for her custody, on allegations that she was illtreated by her aunt, to elect whether she would remain with her aunt or go to her father.

Semble, That if the child had recently left or been taken away from her father she would be ordered to return to him without reference to her own choice, at all events up to the age of sixteen.

[Chambers, January 12, 1870.]

On the 6th December, 1869, O'Brien, on behalf of Thomas Kinne, the father of Mary Therese Kinne, obtained a writ of *habeas corpus* under the provisions of 29 & 30 Vic. cap. 45, on the fiat of Mr. Justice Galt, commanding Stephen Keever and Lucy Keever, and such other person as might have the custody or control of the said Mary Therese Kinne, to have her body before the presiding judge in Chambers, &c.

The order for this writ was founded on the following affidavit of the father of the girl who described himself of the Town of Hopewell, in the County of Albert, in the Province of New Brunswick, farmer:

"Mary Therese Kinne, now to the best of my belief residing in the Township of Harwich, in the County of Kent, of Canada, is my daughter by my late wife, Mary Kinne, now deceased. She was born in Harvey, in the County of Albert aforesaid, on the fifth day of March, one thousand eight hundred and fifty six, and for the greater part of her life she has resided with her aunt Lucy Keever, wife of Stephen Keever, of Harwich aforesaid, yeoman. Her mother died about three years ago.

In August last I received letters from the said County of Kent, from persons acquainted with said Keever, and from the information they contained I was induced to travel from my home in New Brunswick to Chatham in Kent