

NOTES OF CASES.

COURT OF QUEEN'S BENCH.

[In Chambers.]

MONTREAL, April 9, 1883.

Before RAMSAY, J.

Ex parte GRACE HAM, Petitioner for Writ of Habeas Corpus.

Custody of minor—Right of mother.

The mother of a minor of twelve years of age (the father being dead) is entitled to the charge of her child, unless it appears that she is disqualified by misconduct or is unable to provide for the child.

The petition was presented by Grace Ham, widow of the late Abraham Burnet.

RAMSAY, J. On Friday, the 30th March, the petitioner applied for a writ of *habeas corpus* to Martin Phelan, to order him to bring up Emma Burnet, a child of tender years, daughter of the petitioner.

Mr. Phelan obeyed the writ immediately, and stated that the child was not detained against her will; that she had left the house of a Mrs. Dagle, where she had been living, and came to his house for protection, which was afforded her by himself and his wife; that the mother had consented to her daughter remaining with him, and had even in his absence obtained a small sum of money on the pretext of its being part of the child's wages, to which Mr. Phelan said she was not entitled, as he had taken her very badly clothed and had supplied her with all necessary clothing.

The mother in her affidavit said that she was a Wesleyan Methodist, and that her late husband, at all events since his marriage, had been a Wesleyan Methodist, and that they were married by a minister of that religion, that the child had been baptized in the Wesleyan Church and had been brought up in that belief, and was a Protestant till she had gone to Mr. Phelan's house. The petitioner also complained that an effort was being made to change the child's religion.

I examined the child apart from her mother and Mr. Phelan, and she told me she was perfectly happy with Mr. Phelan and his wife, that she wished to stay there, that she wished to become a Roman Catholic, and that she was only a little over twelve years of age. She was well clad and looked happy and in good health.

As the affidavits seemed to me insufficient, in not showing that the petitioner, who is a domestic servant, was in a position to provide for her child, and as the mother had already made an arrangement for her child which did not turn out satisfactory, and as the child seemed to be well cared for where she was, by people of great respectability, I adjourned the further hearing of the case until Saturday, in order to enable the petitioner to adduce other evidence of her being in a position to provide for the child's wants, and also in order that the Crown might be heard in the case. On Saturday Mr. Davidson and Mr. Cross resisted the application unless affidavits establishing the willingness and ability of the relations to take charge of the child were filed. Mr. Arthy, in whose service the petitioner is, then came forward and offered to take charge of the child until she could be sent to her relations in Upper Canada, who, it was alleged, were both able and willing to provide for her. I did not deem this sufficient, as it afforded only a temporary refuge for the child, and I further adjourned the case till Monday, the 2nd April, and finally until to-day, in order to afford the petitioner time to produce affidavits in support of her petition.

These affidavits are now before me, and I have to deal with the merits of the application. The husband being dead, it becomes the absolute right of the mother to have the charge of a child of twelve years of age, unless it can be shown that she is unfit for such a trust, by misconduct, or that she is unable from any other circumstance to provide for her child. In either of these cases she forfeits the right, and the claim of any other relative, or even of a stranger, who can offer sufficient guarantees of character and means, will be preferred. In this case there is nothing against Mrs. Burnet's character, and the affidavits now produced show that her relatives are able and willing to provide a home for the child. I must, therefore, order that the mother shall have possession of her child. At the same time it is proper to add that it is not without reluctance I am obliged to remove the child from the protection of Mr. Phelan, who, with his wife, has done a great duty by this little girl, and behaved in a way highly creditable to himself. The religious question does not enter into consideration in this matter,