1926

*Oct. 26.
*Dec. 1.

DAME MARY W. MARSHALL (PETITIONER) ..... } APPELLANT;

AND

ALDERIC A. FOURNELLE (DEFENDANT) ..... } RESPONDENT.

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC

Habeas corpus—Minor child in care of third person—Rights of parents—Child 14 years of age—Right to choose where to live—Lack of restraint—Interest of the child—Judicial discretion.

In the other circumstances of the case as found by the trial judge, the court declined to interfere with his order refusing a writ of *habeas corpus* to a mother asking for the possession of her daughter, when the latter, then being past 14 years and 8 months of age and not without adequate intelligence to make a reasonable choice, expressed her desire to remain with the respondent with whom she had been living happily for seven years.

Judgment of the Court of King's Bench (Q.R. 40 K.B. 391) aff.

APPEAL from the decision of the Court of King's Bench, appeal side, province of Quebec (1), affirming the judgment of Bruneau J. at the trial and refusing a writ of *habeas corpus* issued at the request of the appellant, the mother, asking for the possession of her minor daughter from the respondent.

The findings of facts by the trial judge are fully stated in the judgment now reported.

J. F. R. Wilkes for the appellant.

Auguste Lemieux K.C. for the respondent.

The judgment of the court was delivered by

NEWCOMBE J.—It was upon the following *considérants* that Bruneau J., the learned judge of the Superior Court who heard the application, based his order quashing the writ of *habeas corpus,* which had been obtained by the appellant, the mother of the girl, Violet Marshall:—

Considérant que ladite Violet Catherine Marshall est âgée de 14 ans et qu'elle préfère demeurer chez l'intimé que chez sa mère, la requérante, pour le motif que celle-ci l'a battue et qu'elle craint le même traitement en retournant avec elle;

Considérant que ladite Violet Catherine Marshall a été placée chez l'intimé du consentement de la requérante il y a plusieurs années; que le choix de ladite Violet Catherine Marshall est volontaire, libre, et n'a

*PRESENT:—Anglin C.J.C. and Duff, Mignault, Newcombe and Rinfret JJ.

(1) (1926) Q.R. 40 K.B. 391.

été aucunement influencé par l'intimé ou son épouse; qu'au contraire, ces derniers ont rappelé à ladite Violet Catherine Marshall les devoirs qu'elle avait envers sa mère; qu'elle persiste néanmoins à vouloir demeurer chez l'intimé où elle est traitée parfaitement bien sous tous rapports;

Considérant que ladite Violet Catherine Marshall ne parait pas agir par caprice mais par un sentiment que l'on peut estimer être légitime;

Considérant qu'il n'y a pas lieu, dans l'intérêt même de ladite Violet Catherine Marshall, d'intervenir dans le choix qu'elle a fait de demeurer chez l'intimé;

Proceeding upon the assumption that the evidence discloses such restraint of the girl by the respondent as would, if the case were proved in other particulars, justify relief by *habeas corpus,* it must be observed that there is contradiction in regard to some of the material facts; but it is certain that there is in the record evidence which, if believed, justifies the findings, and these have not been disturbed upon appeal; moreover the learned judge had the parties before him and heard them and their witnesses, including the girl, *viva voce,* and therefore had a better opportunity than we to appreciate the weight which ought to be given to their testimony, and also to judge of the intelligence of the girl and of her capacity to choose. She was then past 14 years and 8 months of age, and a perusal of her testimony indicates that she was not without adequate intelligence to make a reasonable choice. See *Stevenson* v. *Florant* (1), affirmed on appeal by the Judicial Committee.

That the learned judge had a judicial discretion, to be exercised having due regard to the facts of the case, is admitted. The appellant's case is that he used this discretion improvidently, but that has not been established; and, considering the girl's age, now within a few months of 16 years; her desire to remain with the respondent, with whom she has been living happily for seven years, and the other circumstances of the case, we are not satisfied that we would consult the true welfare of the girl by compelling her return to her mother. *The Queen* v. *Gyndall* (2).

The appeal should therefore be dismissed.

Appeal dismissed with costs.

Solicitors for the appellant: *Holt & Wilkes.*
Solicitors for the respondent: *Robillard, Julien & Allard.*

(1) [1925] S.C.R. 532, at p. 544. (2) [1893] 2 Q.B.D. 253.