of this act, in favor of a mother, against whom adultery has been established by judgment in an action for criminal conversation, at the suit of her husband against any person. 18 V. c. 126, s. 4."

Upon comparison of our act with the imperial act from which it is taken some differences will be discovered. One is, that under our act the mother is entitled to ask for the custody of the child if within the age of *twelve* years, and to keep the custody of the child till it attain that age, whereas the English act is restricted in that respect to children "within seven years of age." Another, is that under our act (though not under the English act) the court or judge may make an order for the maintenance of the infant by payment by the father thereof, or by payment out of any estate to which the infant may be entitled, of such sum or sums of money from time to time as according to the pecuniary circumstances of the father, or the value of the estate, the court or judge thinks just and reasonable. Another, is that the court or judge may not only, on applications under the act, receive affidavits as under the English act, but enforce the attendance of any person to testify on oath respecting the matter of the petition, for which there is no provision in the English act. These, appear to us to be the substantial points of difference between the two acts. Both acts, however, are in principle the same, and we apprehend that the same rules of construction will be applied to our act as have already prevailed in the construction of the English act. We need not therefore repeat them.

The right in Upper Canada of appointing guardians of an infant not having a father alive or any other legal guardian, belongs exclusively to the Surrogate Court of the county within which the infants reside (Con. Stat. U. C. cap. 74, s. 1).

The ordinary remedy of a father or other legal guardian complaining that an infant is in illegal custody, is the writ *habeas corpus*. It is a common law writ of right, and, as is well known, is of a highly remedial character. It in general lies to bring up persons who are in custody, and who are alleged not to be legally restrained of their liberty. When the court perceives that they are illegally restrained, it will discharge them (*Ex parte Glover*, 4 Dowl. P. C. 293). In cases where it is issuable under 31 Car. II. c. 2, s. 1, it may be issued as well in vacation as in term. But the statute of Charles is restricted to cases where the party is committed "for criminal or supposed criminal matter" The statute 56 George III. c. 100, s. 1, which extends the statute of Charles to cases of restraint other than those for criminal or supposed criminal matter, is not in force in Upper Canada; and owing to the unpardonable and long continued neglect on the part of those from time to time in authority, has never that we can discover been adopted by our legislature (see *Ex parte McLellan*, 1 Dowl. P. C. 81). The writ may be and often is granted in the first instance (*In re Pearson*, 4 Moore, 366); and in one case the court not only granted the writ in the first instance, but gave a rule calling upon the person in whose custody the child was to show cause why an information should not be filed against her (*The King* v. *Ward*, 1 W. Bl. 386). But inasmuch as the return cannot be controverted by affidavit, it is not prudent to take the writ in the first instance, but rather to move for a rule to shew cause why the writ should not issue, and then the grounds for and object of the writ, and necessity for it, will be discussed conveniently upon affidavits properly filed on both sides (*The Queen* v. *Sheriff*, 6 U. C. Q. B. 197).

Service of the writ need not be in all cases personal. Service by leaving it with the brother and agent of the party to whom addressed, at his place of abode, in a case where the writ was shown to have come to the knowledge of the party, was held sufficient (*In re Hakewell*, 12 C. B. 223); and the court will receive the return, although the party called upon to make it is not present. (Ib.) A return to the writ that a child under fourteen "is not *detained* by, or in the custody, power or possession, or under the care or control," of the party to whom addressed, or any person employed by him, was held insufficient (*Regina* v. *Roberts et al.* 2 Fort & Fire, 272). If a return, which on the face of it is ambiguous, is not fortified by affidavit clearing up all doubt, the return will be held evasive and bad (Ib) A case of cruelty should be raised on the face of the return, and not brought in by affidavit merely, to uphold a return which is evasive and bad. (Ib.) In cases of writs of *habeas corpus* directed to private persons to bring up infants, the court is bound *ex debito justitiæ* to set the infants free from improper restraint, but not bound to del er them over to any body, or to give them any privilege (per Lord Mansfield, in *Rex* v. *Delaval et al.*, 3 Burr. 1436). This latter is left to the discretion of the court, to be exercised according to circumstances. (Ib.) When the infant is of an age to exercise a choice, the court in general leaves him to elect where he will go (*Rex* v. *Clarke*, 1 Burr. 606; *In re Ann Lloyd*, 3 M. & G. 547; *Regina* v. *Butler* and *Regina* v. *Snooks*, 2 U.C.Q.B. 370). If he be not of that age, and a want of direction would only expose him to dangers or seductions, the court will make an order for his being placed in proper custody (per Denman, C. J., in *The King* v. *Greenhill*, 4 A. & E. 640). The difficulty is to fix the age at which the child can be said to be too young to exercise a choice (See *Regina* v. *Clarke*, 7 El. & B. 194). Cockburn, C. J., recently, in strong terms repudiated the doctrine that mental precocity