tently with the common law right of the father to the custody of his child, that right ought not to be interfered with (*In re Halliday*, 17 Jur. 56). In one case a petition had been presented on the part of a husband, praying that his two children, who were under the custody of their mother, from whom he was separated, should be transferred to him; and affidavits were made, as well on the part of the husband as the wife, detailing the several differences which existed between them and the various matters which led to their separation, when Sir Edwin Sugden, then Lord Chancellor of Ireland, spoke of the 2 & 3 Vic. cap. 54, as follows:—"I do not think the act contemplated this case. I myself paid great attention to the act in its progress through the Commons, but I did not imagine that it enabled the mother to make a *legal* defence against the application of her husband. The statute merely gives the mother a right to apply to the court for an order, either that she shall have access to the children, or that they shall be delivered unto her until the age mentioned in the statute. The act therefore does not enable the mother, in a case like the present, to resist the husband's application. At the same time this difficulty would necessarily follow, that although I should deliver over the children on his application to the husband, according to the general principle of this court, I should the next hour, on the application of the mother, under this act, take them back and transfer them again to her, assuming the case to be one in which the court would in its discretion interfere to this extent on behalf of the mother. It seems to me to be clearly a *casus omissus* in the act" (*Carsellis* v. *Carsellis*, 1 D. & War. 235; see also *In re Fynn*, 2 De G. & S. 457).

It will be observed that the act makes a difference in respect to the age of the child. With respect to that, the legislature evidently considered that as between the legal guardians and the mother the very young children (i. e. those under seven) required the mother's nurture; and notwithstanding the legal rights of the father, they should be entrusted to her; but still enabled the court, in its discretion, to do that which it thinks best for the interest of the children. It did not consider as between the father and mother that the father had an equal interest with her, but that in the majority of cases the custody should be given to the mother; but under ordinary circumstances it was most desirable that it should be made entirely discretionary in the court. In the exercise of that discretion the court must look at the interest of the children, which might be just as well preserved by giving the custody either to the father or mother, the tendency being to lean towards the mother where the children are of very tender age; but still the only material question was, what was for the children's benefit? (per Kindersley, V. C., in *Shilletto* v. *Collett*, 8 W. R. 683). Where it was shown that the mother was ignorant of managing her house and income, of non-domestic habits, married a second time, and concealed such marriage from the testamentary guardians, and was without means of personally contributing anything to the support of her children, the prayer of a petition presented by her under the above act was refused (*Shilletto* v. *Collett*, 8 W. R. 683; affirmed Ib. 696).

It now remains for us to add that our Legislature, in 1855, substantially adopted the Imperial statute 2 & 3 Vic. cap. 54, conferring the administration of the law as adopted upon the Superior Courts of Law and Equity in Upper Canada and to the Judges thereof (18 Vic. cap. 126). The act is now to be found in Con. Stat. U. C. cap. 74, s. 7, 8, 9, 10, and 11.

These sections are as follows:

"8. Any of the Superior Courts of Law or Equity in Upper Canada, or any judge of any such courts, upon hearing the petition of the mother of any infant, being in the sole custody or control of the father thereof, or of any person by his authority, or of any guardian after the death of the father, may, if such court or judge sees fit, make order for the access of the petitioner to such infant, at such times and subject to such regulations as such court or judge thinks convenient and just, and if such infant be within the age of twelve years, may make order for the delivery of such infant to the petitioner, to remain in the care and custody of the petitioner until such infant attains the age of twelve years, subject to such regulations as such court or judge may direct, and such court or judge may also make order for the maintenance of such infant by payment by the father thereof, or by payment out of any estate to which such infant may be entitled, of such sum or sums of money from time to time, as, according to the pecuniary circumstances of such father or the value of such estate, such court or judge thinks just and reasonable.

"9. The court or judge as aforesaid may enforce the attendance of any person before such court or judge, to testify on oath respecting the matter of such petition by order or rule made for that purpose, and on the service of a copy thereof and the payment of expenses as a witness, in the same manner as in a suit or action in the said courts respectively, or may receive affidavits respecting the matters in such petition.

"10. All orders made by the court or a judge by virtue of this act, shall be enforceable by process of contempt by the court or judge by which or by whom such order has been made.

"11. No order directing that the mother shall have the custody of or access to an infant shall be made by virtue