standing the legal rights of a father, they should be entrusted to her. But it still enabled the court to do that which it thought best for the interest of the children. It did not consider that, as between the father and mother, 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 entirely discretionary in the court." In the exercise of that discretion, the Vice-Chancellor was of opinion that he "must look at the interest of the children, which might be just as well preserved by giving the custody either to the father or the mother, the tendency being to lean towards the mother when the children were of very tender age; but still the material question was, what was for the children's benefit?" He then proceeds to show why, in that case, he thought the discretion of the court would be best exercised by leaving the children in the custody of the testamentary guardians. There is nothing in this case which countenances the idea that the learned Vice-Chancellor intended to cast any doubt on the propriety of the observations of Lord Cottenham in *Warde* v. *Warde;* of Turner, V. C., in *Re Halliday;* or of the Vice-Chancellor of England in *Re Taylor*, in a case where husband and wife were living apart.

In *Re Winscom*, 11 Jur. N. S. 297 (A.D. 1865), the application was by the mother for access to her female child eight and a half years old; but the principle upon which the right of access and custody depends is the same. In that case the husband had petitioned the Divorce Court for a divorce upon two allegations of adultery, one of which was condoned and the second not established, and so the petition for divorce was dismissed, but the husband and wife lived apart. Wood, V. C., in that case, rests upon Lord Cottenham's decision in *Warde* v. *Warde*, as establishing the intention of the Act, and the course of the court in relation to it; and applying these observations to the case before him, after stating the circumstances under which the husband and wife were living separate, he says, p. 299: "The consequence is, that they are not separated from the matrimonial tie; but it could not, as I apprehend, be with any great hope of success suggested, that the lady is in a position to institute any suit for restitution of conjugal rights. Nothing of the kind is suggested, and they must for the present remain apart." And again: "But further, I have had to consider most seriously how far it would help her for me to interfere at all with the father's directions in a case circumstanced like the present. In the first place, it is not clearly a case in which, according to Lord Cottenham's view, the court is called upon for any interference whatever. It is not a case in which, to use Lord Cottenham's expression, the mother requires protection from the tyranny of her husband."

Our Act, Con. Stat. U. C. cap. 74, sec. 8, is identical with the Imperial statute 2 & 3 Vic. cap. 54, with the exception that in our Act the age of twelve years is substituted for seven years, and that the jurisdiction which the English Act confers on the Lord Chancellor and Master of the Rolls is by our Act conferred upon the Superior Courts of Law and Equity, or any judge of any of such courts.

From all of the above cases, the true principle to be collected, I think, is, that the court or a judge, in the exercise of the discretion conferred by the Act, is bound to recognise the common law right of the father, and should not assume to impair or interfere with that right, so long as the father fails not in the due discharge of his marital duties. In order to induce the court to interfere on behalf of the wife, she should satisfy the court that the separation, if the act of the husband, is in disregard of his marital duties, that is, without sufficient cause given by the wife; or, if the act of the wife, that, although she may not have cause sufficient to entitle her to a decree for judicial separation, she has reasonable excuse for leaving her husband and living apart from him: and further, that it should not appear that it is not the interest of the children that she should have access to them, or the custody of those under the age mentioned in the Act in that behalf The object of the Act being to protect wives "against the tyranny of husbands who ill-use them," a wife can have no right under the Act, who should capriciously or without some reasonable excuse, desert her husband, absent herself from his home, and abandon her duties as a wife and mother. In view of these principles, it will now be necessary to enquire whether the petitioner in this case brings herself within them, so as to entitle her to the interposition of the jurisdiction conferred by the Act.

It is difficult to conceive anything more contradictory than the statements contained in the affidavits of the wife, her mother, and of Margaret McKay, on the one side, and in the affidavits of the husband and others, filed upon his part, in the material points. By the affidavit of Mrs. Leigh it appears that she and Mr. Leigh have been married for ten years; and she alleges that for the last eight years her husband has been in the habit of abusing, insulting, and maltreating her in the most shameful manner, not only in vituperative language, but also by inflicting upon her grievous bodily injury; and she says that to such an extent has he carried his cruelty towards her, that frequently, through the effect of his brutal treatment of her, she has been so ill that her life has been despaired of; and that whilst so ill, her husband manifested such perfect indifference as to her condition, and so neglected her, that she had to apply to her mother for her care and protection, and even for the common necessaries of life; and that finally, from the continued and constant ill-treatment she received from her husband, and being pregnant of her youngest child, and being apprehensive of danger to its life and to her own, she, in pursuance of the advice of her physician, left her husband's house in April, 1870, taking with her her three children, now aged nine, eight and four years respectively, and has since continued to reside with her mother. The affidavit then alleges that the father, on the 5th April, 1871, succeeded in getting possession of her child of four years of age, and in taking it away; and avers that since it was so taken away, the mother has never seen the child, nor does she know of its whereabouts. The affidavit then proceeds to allege that two of the husband's brothers have for a long time been subject to fits of insanity, and that the wife, from her husband's treatment of her, and his general demeanor, has no hesitation in saying that he is, and for some time has been, subject to fits of