

MIDDLETON, J. (after setting out the facts):—Upon the material there is nothing to justify my making any order giving the father custody of the child. It is manifestly in the interest of the child that it should remain in the mother's custody, and I do not think that I can use the threat of an order to deprive the mother of the custody for the purpose of compelling a course of conduct on her part which might appear to be reasonable. The parties have made their agreement, and all I can do is to construe the agreement as I find it.

At the same time I may say that I am not satisfied that there is any reason why the wife should refuse to afford to the husband the satisfaction of being alone with his child during the short visits that he pays to it at her apartments. . . .

This case affords an illustration of the fact that there are many things which cannot be worked out through the Courts and must be left to the good sense of the parties concerned.

...
All that the agreement gives to the father is a right of "access" to the child. I find that these words are employed not only in statutes but in the forms given for orders dealing with the custody of children and in precedents for separation agreements. I should therefore have expected to find somewhere an exposition of what this right of access really involves. The only case which I have found is *Evershed v. Evershed* (1882), 46 L.T.R. 690, where Kay, J. . . . said: "Access is a thing which can only be dealt with after the question of custody is determined. It means access to children who are in the custody of some other person. Custody is a much larger and more important thing than access." . . .

[Reference also to *Rice v. Frayser* (1885), 24 Fed. Repr. 460.]

I think the meaning of the clause in the separation agreement is, that the father is entitled to access to the child only while it is still in the mother's custody and control; and I cannot say, in the absence of any stipulation in the deed, that the mother is guilty of any breach of its provision by remaining in the room where the father is seeing the child. It is clear, I think, that the father has no right to have the child taken to his house or in any way to have it taken out of the mother's custody and control. He must be content with access to it while still in her custody and control. . . .

The husband must pay the wife's costs of these proceedings.