VISAGIE v. VISAGIE.

1910. *August* 15. WARD, J.

Husband and wife. — Divorce. — Children. — Access. — Discretion of Court.

Where a decree of divorce on the ground of adultery had been granted against W, H having been given custody of the minor children of the marriage, and W applied for an order granting her access to the children, *Held*, that the Court may exercise a discretion, and that, as W was living in adultery, the application must be refused.

The respondent had obtained a decree of divorce on 11th March, 1910, on the ground of adultery, and the custody of the minor children had been granted to him. On the 2nd August the applicant had asked for an order granting her access to the children, but the matter had been postponed to enable her to reply to an affidavit of the respondent to the effect that she was still cohabiting with the adulterer, the respondent's brother. The applicant did not deny the alleged cohabitation.

Rorich, for the applicant: The applicant is prepared to accept the order subject to the respondent being present during the interview.

Blaine, K.C., for the respondent: The matter is entirely in the discretion of the Court, and respondent's refusal to allow access is only subject to applicant's leading an honourable life. The only authority in our courts apparently is an *obiter dictum* of INNES, C.J., in *Mitchell* v. *Mitchell* ([1904] T.S. 128).

WARD, J.: It is within the recollection of the Court that the adultery on the ground of which the divorce was granted was of a most flagrant character, and from the applicant's behaviour it was evident that she was infatuated with her husband's brother and apparently under his influence. Without any consideration for her husband or children, she gave way to her passion and

broke up the respondent's home, the children being left worse than motherless. It is now alleged that she is living in adultery on a neighbouring farm, and after postponement of the matter no denial of this allegation is forthcoming. She now applies to have access to the children, and counsel has not been able to cite any South African case in which such an application has been refused. In England a special law was enacted about the year 1832 by which access under similar circumstances was refused to a guilty wife. This continued in force for some years, when no doubt it was discovered to be too harsh a measure, for a wife may make a mistake and repent of it and thereafter live an honourable life, and it would be harsh that she should be debarred from seeing her children for ever. This law was then repealed, and subsequently the Probate Division of the High Court has claimed to exercise a discretion in the matter and to refuse applications when made for the purpose of again rendering the home unhappy; see *Philip* v. *Philip* (41 L.J. P.D. 89). Supposing in this case the applicant were living a chaste life, the Court would not lightly contemplate the refusal of the application, unless it were convinced that its object was to break up the home once more. But applicant is living in adultery, and the effect on the children must necessarily be bad. The Court will therefore refuse, as long as that state of affairs continues, to grant her any facilities of access to the children, as in view of the facts the Court does not consider her to be a fit and proper person to have access to them. The application must be refused with costs.

Applicant's Attorneys: *Marais & De Villiers.*