

MIDDLETON, J., in a written judgment, said that the parties were married in Scotland in 1911, and in 1913 came to Canada, and settled in Toronto. In 1914, they went back to Scotland. In 1916, the wife returned to Toronto, bringing the children with her. The intention at this time was that the husband should follow her to Toronto; but he did not do so—on account of war-conditions, he said. He came out to Toronto recently and found that his wife had been living with another man, by whom she had two children. On the 19th April, 1920, the wife was convicted before the Judge of the Juvenile Court, Toronto, of the statutory offence of causing the four children to be in danger of becoming immoral, dissolute, or criminal, or having their morals injuriously affected; sentence was suspended upon condition that she should stay entirely away from her paramour, she being allowed to retain the custody of her two illegitimate children, and the other two being committed to the custody of the Children's Aid Society, which society made no claim to the custody of the children, but was ready to hand them over to either parent as might be determined by the Court.

The wife was now ready to allow her husband to have the custody of the boy, but desired to retain the girl. She based her contention upon the admitted fact that it was the intention of the husband to take the children beyond the jurisdiction of the Court, and that, in the girl's own interest, she should be allowed to remain with her mother.

The fact that the husband intends to take the children beyond the jurisdiction of the Court is not a sufficient answer. His domicile is in Great Britain; and no case shews that a father who is domiciled abroad cannot invoke the assistance of the Courts of Ontario to give him the custody of his children merely because he intends to return to his domicile.

By the Infants Act, R.S.O. 1914 ch. 153, sec. 2 (3), no order directing that the mother shall have the custody of or access to an infant shall be made in favour of a mother against whom adultery has been established by judgment in an action for criminal conversation or for alimony. The wife was not within the provision of this enactment, but her unfaithfulness had been proved by a Court of competent jurisdiction, and her adultery was amply proved and not disputed. If the spirit of the statute was to be regarded, she had no right to either of the children.

Having regard to the welfare of the little girl, she ought not to be left with the mother; and, having regard to all the circumstances, the right of the father to the custody of his children and his obligation to care for them and bring them up must prevail—he has real affection for them and the ability to discharge his obligations.