

FIRST DIVISIONAL COURT.

FEBRUARY 22ND, 1917.

SCHMIDT v. SCHMIDT.

Husband and Wife—Separation—Agreement for Custody of Children—Action to Set aside—Undue Influence—Misrepresentation—Concealment of Facts—Public Policy—Alimony—Adultery—Condonation.

Appeals by Christine Schmidt, the plaintiff in two actions, one for alimony and the other to set aside an agreement, and the applicant in an application for the custody of her two infant children, from judgments of LATCHFORD, J., dismissing the actions and the application.

The appeals were heard by GARROW, MACLAREN, and MAGEE, JJ.A., and MASTEN, J.

Peter White, K.C., and A. Bicknell, for the appellant.

George Wilkie, for Frederick Schmidt, the defendant and respondent.

MACLAREN, J.A., in a written judgment, set forth the facts in regard to the differences between the plaintiff and defendant, who were husband and wife. Negotiations between solicitors for both parties culminated in an agreement of the 12th May, 1914, providing, *inter alia*, that the custody of the children up to the 31st December, 1918, should be determined by each of them severally, after spending separately a week with their mother, during which time neither parent was to attempt to prejudice them against the other parent. At the close of these experiments, each of the children expressed a desire to live with the father. This agreement the plaintiff now sought to set aside, on the grounds of undue influence, misrepresentation, concealment of facts, etc., and as being contrary to public policy. The trial Judge, before whom the plaintiff was examined at great length, found that she had wholly failed to make out a case of undue influence, and pointed out the great length of time over which the negotiations extended, and the fact that throughout she had had independent legal advice. The misrepresentation and concealment of facts were at the argument narrowed down to the complaint that it was concealed from her that the affection of the children had been completely estranged from her, and that, if the defendant had disclosed this, as it was his duty to do, she