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DOMESTIC RELATIONS

JAMES F. DREHER*

Sanders v. Sanders[1] was basically an affirmance by the Supreme Court of the Circuit Court's division of custody of two children between their parents, but its greatest interest, both from a legal viewpoint as well as an illustration of the vagaries of human nature, lies in the fact that the wife insisted that the children should be adjudged illegitimate so that she might be given full custody. The husband had sued for an annulment of the marriage on the ground (sound as a matter of law) that the Alabama court which had divorced the wife and a former husband had been lacking in jurisdiction. After preliminary hearings had been had by Judge Moss, who did not therefore sit on the case in the Supreme Court, Judge Pruitt adjudged the marriage between the parties null and void and, after a careful weighing of the course which would best fill the needs of the children, divided the custody between the parents.

The mother appealed and took the position that although the issue of legitimacy had not been made by the pleadings, a determination of the question was essential to the disposition of the issue of custody, because if the children were adjudged illegitimate, the Court had no alternative but to award her full custody. Mr. Justice Legge, who wrote the Court's opinion, held that legitimacy need not be decided because even if the children were illegitimate, it did not follow as a matter of law that the mother should be given sole custody. He accepted the general rule that the mother of an illegitimate child has a legal right to its custody superior to that of the father unless she be adjudged unfit, but said that the rule, which had its origin in the common law of England, was based upon

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1. 232 S. C. 625, 103 S. E. 2d 281 (1958).

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three reasons: (1) That the mother is the parent whose identity cannot be doubted, (2) that the legal obligation to maintain the child is primarily hers and (3) that her natural love for the child is probably greater than the father's. Judge Legge said, however, that:

> These reasons are not impressive where the child was born in wedlock entered into by both parents in good faith and belief in its legality, but that has proven invalid because of the jurisdictional defect in a former divorce proceeding.

He went on to point out that even where such factors are not present, the mother of an illegitimate child does not have an absolute right to the custody of the child, the dominant consideration always being the welfare of the child.

Judge Pruitt's order, quoted in part in the Supreme Court's opinion, had admonished the parents not to let their animosity toward each other interfere with the duty which they each owed toward their children. The final paragraph of Mr. Justice Legge's opinion continued this theme with much eloquence. "We speak from the bench," said Justice Legge, "not the pulpit; but—"; and the moving discourse which follows could serve as a model for any minister, judge, marriage counselor or psychiatrist who has before him a family hopelessly disorganized through the discord of the parents but whose children still have salvable lives.

Grant v. Grant[2] involved domestic relations law only in the sense that the marital status of the parties and the nature of a divorce decree made more difficult the always troublesome question of when a litigant in default may be permitted under Section 10-1213 of the 1952 Code to open up a judgment taken against him through "his mistake, inadvertence, surprise or excusable neglect."

The plaintiff was a Myrtle Beach airman who had instituted his divorce action against the wife in the Civil Court of Horry County. The wife was served in Connecticut, where she had been living since her separation from the plaintiff a year earlier. She employed Hartford counsel who wrote plaintiff's attorneys asking for a delay until they could investigate their client's position. This was on February 15, 1957, and about a month later plaintiff's counsel filed an affidavit of default

2. 233 S. C. 433, 105 S. E. 2d 523 (1958).

and asked for a hearing. At the hearing, the Judge was shown the Hartford lawyer's letter but said that it was "only a request for a delay in moving for a default" and that "a sufficient delay had been granted." A decree of final divorce was therefore entered.

In May, 1957, the Hartford attorneys employed South Carolina counsel who discovered on June 6, 1957, that a decree by default had already been obtained. However, nothing was done about the matter until the latter part of November, 1957, when the motion to vacate the judgment was filed. In the meantime, the plaintiff had remarried on August 4, 1957, and was then living with his second wife.

The Supreme Court, in an opinion by Mr. Justice Oxner, said that although judgments by default are not favored in divorce suits and will be set aside more readily than in other actions, a party seeking to set aside a divorce decree may be barred by laches "where he does not act diligently in seeking relief and innocent third parties have acquired rights by or through marriage in the meantime." He says that although the re-marriage of the spouse who obtained the divorce is not of itself a sufficient reason to deny the reopening of a divorce decree, it is always an important factor. Weighing all of the facts in the present case, and with the realization that an abrogation of the divorce decree would make an adultress of the plaintiff's second wife, presumably an innocent party, the Court affirmed the trial judge's exercise of his discretion in denying relief to the defendant.