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DOMESTIC RELATIONS

JAMES F. DREHER*

Probably the most important divorce decision by the Supreme Court since the 1949 Constitutional amendment authorizing the granting of divorces was *Mincey v. Mincey*,¹ decided on February 1, 1954. In *Machado v. Machado*,² decided in 1951, the Court had held that the ground of "desertion" in our law included "constructive desertion" and that a spouse who had been so wronged by the other spouse as to require departure from the home could secure a divorce from the wrong-doer on the ground of desertion. Because certain elements of desertion were absent, the Court in the *Machado* case did not have to decide, and expressly reserved decision on, the question of whether constructive desertion may be established on the basis of acts not sufficient in themselves to be the grounds of divorce. The question is squarely presented in the *Mincey* case and squarely answered in the negative.

The plaintiff wife in the *Mincey* case had originally sued for divorce on the ground of physical cruelty but, upon the Master's finding that she was not entitled to a divorce on that ground, she had brought a new action on the ground of constructive desertion. Upon the two cases being consolidated, the Master, the Judge of the Richland County Juvenile-Domestic Relations Court and Circuit Judge Eatmon had all held that the plaintiff's ground of constructive desertion had been established by proof showing that the defendant's conduct had made the plaintiff's life so intolerable that she was forced to leave their Columbia home with her children and reside with her parents in Winnsboro. Acting Associate Justice G. Badger Baker, who wrote the opinion of the Supreme Court, thus pithily summarizes the factual situation and the problem which it posed:

Here we have a course of conduct by the husband consisting of personal indignities, but without physical

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1. 224 S.C. 520, 80 S.E. 2d 123 (1954).
2. 220 S.C. 90, 66 S.E. 2d 629 (1951).

cruelty; indiscreet and undue attentiveness to another woman of a suspicious nature, but without proof of adultery; intoxication, without habitual drunkenness, which made living conditions for respondent intolerable, and continued cohabitation impossible.

The Court recognized that it had a completely free choice between adopting the liberal rule that the conduct of one spouse compelling the other to leave the house may justify a divorce to the departing spouse on the ground of constructive desertion even though such conduct is not in itself a ground for divorce, and the conservative rule that the acts or omissions of the wrong-doing spouse must be in themselves sufficient grounds for a divorce. Although acknowledging that a majority of the courts which recognize constructive desertion follow the liberal rule, the South Carolina Court chooses for itself the conservative rule. The orders below were therefore reversed and the plaintiff denied a divorce. The Court held, however, that the plaintiff was entitled to separate maintenance and support for herself and the children because of the husband's conduct, and that the defendant was not entitled to a divorce on the ground that she had deserted him.

The Court acknowledges that "the liberal view is supported by respectable authority and when applied to extreme cases is sound in principle * * *", so its adherence to the conservative view may be considered as almost altogether a decision of policy. Judge Baker's opinion emphasizes at several places the State's historical opposition to divorce on any ground, and unquestionably he is correctly appraising the attitude of the majority of our people when he states that the policy of South Carolina is against easy divorce. This important question of judicial policy having been determined by a unanimous court, there would seem to be little chance of any relaxation of the rule by judicial decree in the foreseeable future.

It might be wondered why a plaintiff would ever seek a divorce on the ground of constructive desertion if one or more of the other permitted grounds must be proved to establish it. The only reason which comes immediately to mind is that the sensibilities of litigants and their families may thus be spared if on the record the divorce is obtained on a ground other than adultery, habitual drunkenness or physical cruelty.

The other decisions by the Supreme Court in the field of Domestic Relations during the review period involve no novel

points and are of little general interest. For example, in *Williams v. Rogers*³ the Court merely states and applies to the facts before it principles common to all custody cases—that the best interest of the child is the controlling consideration; that the decision of the Circuit Judge who heard the conflicting testimony will not be disturbed unless clearly wrong, and that no adjudication of custody is ever final.

*Simonds v. Simonds*⁴ is worthy of comment, however, as illustrating the necessity of weighing the status of the Federal Tax Collector in any litigation. The wife in the *Simonds* case had procured the allowance of substantial temporary alimony, the record showing that her counsel had argued to the Circuit Court that the monthly alimony payments would be tax deductible by the husband and taxable to the wife. It appears that counsel were in error in this contention and that the Federal income tax rule as to *temporary* alimony is exactly *contra*, with the wife receiving it tax free and her husband having no deduction. The Supreme Court held that, although there was no positive showing that the erroneous argument influenced the amount of the allowance, the financial importance of the difference made it quite possible that the Trial Judge had given weight to it. The cause was reversed for a further consideration by the Circuit Court of the amount of the allowance in the light of the correct rule as to which party will have to pay the tax.

3. 224 S.C. 425, 79 S.E. 2d 464 (1954).

4. 81 S.E. 2d 344 (S.C. 1954).