

any policy notion as to the extent to which the civil courts should interfere with the military.

### UNCONSTITUTIONALITY OF ILLINOIS DIVORCE ACT

The rising tide of family dissolution has at last attracted the attention of the Illinois legislature. In the 1947 session, several pieces of new "husband and wife" legislation were placed on the statute books.<sup>1</sup> Unfortunately, these acts are at best only a surface medication for a serious and many-faceted social problem. Even more unfortunately, the little assistance they promised to courts now struggling with crowded dockets and inadequate administrative facilities has been drastically curtailed by the decision of the Illinois Supreme Court in *Hunt v. Cook County*<sup>2</sup> holding that the Domestic Relations Act,<sup>3</sup> the most important of the statutes, is unconstitutional.

The Domestic Relations Act would set up, "in judicial circuits of 500,000 or more," a Divorce Division with masters in chancery to hear complaints for divorce, annulment, separate maintenance, petitions regarding custody of children, alimony, and child support. The principal purpose of the Act is to provide reconciliation machinery. For example, one provision allows the court to impound the records for at least thirty days after filing of the complaint in any action in which the rights of minor children are involved,<sup>4</sup> so as to prevent undesirable publicity during the time in which reconciliation will be attempted and to protect minor children from embarrassment. Other provisions require the payment of alimony and support directly to the Divorce Division (unless the court otherwise directs),<sup>5</sup> and allow the court to require reports on the welfare of the children from any person or agency to whom custody is awarded.<sup>6</sup>

The direct supervision given to the court over the payment of alimony and support is one of the most important features of the act. Judge Robson of the Superior Court of Cook County, in a comprehensive analysis of Cook County's problem with the children of divorced parents, has shown that the inadequacy of the financial protection they receive is increased by the fact that many support orders are in arrears because the mother has no funds with which to engage an attorney, and the orders are either abandoned or allowed to accumulate until

<sup>1</sup> Ill. Ann. Stat. (Smith-Hurd, 1947) c. 68, § 34 (limiting recovery in alienation of affections actions to actual damages and expressly barring recovery of punitive, exemplary, vindictive, or aggravated damages); *ibid.*, c. 68, § 41 (substantially identical statute on criminal conversation actions); *ibid.*, c. 40, § 13 (extending in injunction powers of court in divorce actions to restrain third party's interference with possibility of reconciliation or other amicable adjustment of the suit); *ibid.*, c. 40, § 19 (allowing court to modify permanent alimony decree in proceeding separate and subsequent to divorce action upon obtaining jurisdiction of the person of defendant unless alimony was expressly waived or denied, or another settlement made); *ibid.*, c. 37, § 105 (new divorce statute).

<sup>2</sup> 398 Ill. 412, 76 N.E. 2d 48 (1947).

<sup>3</sup> Ill. Ann. Stat. (Smith-Hurd, 1947) c. 37, § 105.

<sup>4</sup> *Ibid.*, at § 105.10.

<sup>5</sup> *Ibid.*, at § 105.15.

<sup>6</sup> *Ibid.*, at § 105.16.

they are impossible to collect.<sup>7</sup> The payment of support and alimony directly to the court, however, would bring the first default immediately to the court's attention and give it power to follow up immediately and on its own motion. Judge Robson makes this comment on the value of the court's power to require reports on the child's custody: "Conditions existing at the time a custody award is entered cannot be presumed to continue without alteration in the future. A subsequent marriage, change of residence or employment, the death or departure of the person in whose care an employed mother has placed the child, or any other factor which might affect the minor adversely should be brought to the court's attention and investigation made where warranted, by a proper agency, so the court can maintain the security of its wards."<sup>8</sup>

This act was held unconstitutional in a taxpayer's suit<sup>9</sup> to enjoin its enforcement on the grounds that, since it applied only to Cook County, it was repugnant to Article IV, Section 22 of the Illinois Constitution. It is difficult to determine the exact objection which the court found. Section 22 lists a number of specific subjects on which special or local legislation is prohibited, including legislation "granting divorces," and concludes with the provision that "in all other cases where a general law can be made applicable, no special law shall be enacted." The court indicates that the specific prohibition on granting divorces does not apply to the procedural aspects of divorce actions such as are provided for in this act. Historically, however, it would be more accurate to say that it does not apply because that prohibition seems to have reference to individual divorces granted by an act of the legislature.<sup>10</sup> As to the general provision, it is worth noting that the principal purpose of this section, as shown in the debates of the 1870 Constitutional Convention's Legislative Committee which drafted the article, was to prohibit the granting of individual charters and other privileges to corporations, especially the railroads, because of the danger of corruption. When representatives from Chicago, which was already outdistancing other areas in population, inquired as to whether these prohibitions would prevent legislation for Cook County's needs, they were assured that such legislation would be possible by appropriate classification.<sup>11</sup>

A preferable decision is that of the Tennessee Supreme Court affirming the constitutionality of an act appointing divorce proctors in counties of that state having a population of over 100,000, judicial notice being taken of the fact that it would apply to only two counties in the state.<sup>12</sup> The Tennessee Constitution

<sup>7</sup> Address to annual meeting of Illinois Circuit and Superior Court Judges, February 6, 1948.

<sup>8</sup> *Ibid.*

<sup>9</sup> *Hunt v. Cook County*, 398 Ill. 412, 76 N.E. 2d 48 (1947).

<sup>10</sup> 17 Am. Jur. § 23 (1938); 2 Vernier, *American Family Laws* § 64 (1934). In the absence of express constitutional prohibition, divorces granted by state legislatures are valid. *Maynard v. Hill*, 125 U.S. 190 (1888).

<sup>11</sup> 1 Report of Committee on Legislation, Debates and Proceedings of the Constitutional Convention of 1869-1870, 576-87, 591-608.

<sup>12</sup> *Wilson v. Wilson*, 134 Tenn. 697, 185 S.W. 718 (1916).

requires that only general laws be passed,<sup>13</sup> and that divorce laws have a general and uniform operation throughout the state.<sup>14</sup> The Tennessee court said that the legislature could pass special legislation where, as here, only governmental or political agencies were involved and the rights of individuals were not immediately affected. Furthermore, since no change was made in the substantive grounds for divorce, such procedural regulations as were necessary in the opinion of the legislature would be constitutional. Since the expressed purpose of the act was the preservation of the marriage relation, the court said that the judgment of the legislature as to the proper means should be respected.

When the Illinois court says that "the incidents of divorce and separation of married persons and parents with those attendant social instabilities and possible dependency and delinquency are largely the same throughout the state,"<sup>15</sup> there is need for a Brandeis brief. It is elementary sociology that urbanism raises all the indexes of social morbidity, among which is family disorganization.<sup>16</sup> Illinois is no exception. In a comparative study of the divorce problem in Cook County and the rural areas of Illinois, Professor Mowrer points out that, while in the period from 1887 to 1924 the divorce rate in ten rural counties hardly doubled, the rate in Chicago almost tripled.<sup>17</sup> More than one-half of all Illinois divorce decrees in 1947 were entered in Cook County.<sup>18</sup> The sheer volume makes special administration for particular subjects of judicial control the appropriate treatment. In rural and semi-rural areas, the judge is more likely to know something about the parties, making special investigation less necessary. Urban living, on the other hand, is characterized by anonymity and mobility. Social pressure by the community to meet such obligations as support is weaker. It is easier to move out from under them, so that special supervision by the courts is more necessary. Furthermore, Chicago's problem with regard to the kind of narrow interpretation which the *Hunt* case represents is particularly acute. The population of Cook County is more than half of the total population of Illinois.<sup>19</sup> In no state is there a greater difference between the population of the principal metropolitan community and the next most populous area in the state.<sup>20</sup>

<sup>13</sup> Tennessee Constitution, Art. II, § 8.

<sup>14</sup> *Ibid.*, at § 4.

<sup>15</sup> *Hunt v. Cook County*, 398 Ill. 412, 76 N.E. 2d 48 (1947).

<sup>16</sup> See Mowrer, *The Family*, Part III (1932); Odum, *American Social Problems* (1945); Mumford, *The Culture of Cities* (1938).

<sup>17</sup> Mowrer, *Family Disorganization* 54 (1939).

<sup>18</sup> Out of 26,031 decrees entered in Illinois, 14,791 were in Cook County, according to figures compiled by Judge Robson.

<sup>19</sup> In the 1940 census, Illinois' population was approximately 7,900,000; Cook County's was 4,000,000. The population of the next largest county was 167,000.

<sup>20</sup> The fact that Illinois is peculiarly a one-city state is shown by the figures for Michigan, the nearest equivalent: total population in 1940, 5,250,000; Wayne County, 2,000,000; next largest county, 254,000; and two additional counties, over 200,000.

Against this factual background, it is regrettable that the court in the *Hunt* case concluded that the legislative classification which singles out Cook County is "unreasonable." It is not consistent with an earlier decision which recognized that the greater problem of juvenile delinquency and dependency in Cook County required a special Juvenile Court in that circuit alone.<sup>21</sup> Divorce and delinquency are intimately related; "80% of the cases appearing before the Juvenile Court of Cook County and the Boys Court of Chicago can be traced to divorce-broken homes."<sup>22</sup> This same Juvenile Court Act was allowed to give another and indirect recognition of the relation of population congestion and delinquency in providing that the salary scale for probation officers would be fixed on the basis of the size of the county.<sup>23</sup>

No doubt, ideally, the state's policy of preventing family dissolution should be implemented with machinery capable of dealing with each and every case. On the other hand, legislation which gives some practical assistance where the problem is greatest cannot fairly be discarded as arbitrary, especially where, as here, no individual rights are directly concerned and the effect is merely on administrative conveniences.<sup>24</sup>

---

#### ELIGIBILITY FOR CERTIFICATE OF INNOCENCE UNDER FEDERAL ERRONEOUS CONVICTIONS ACT

The plaintiff, counsel for the German-American Bund, and twenty-four others were indicted in 1942 for conspiring to counsel evasion of the draft in violation of the Selective Service and Training Act of 1940.<sup>1</sup> At the trial, evidence was introduced to indicate that the defendants had promulgated and distributed National Bund Command Order Number 37 urging members of the organization to register for Selective Service but "to refuse to do military duty" until repeal of Section 8 (c) of the Act, which declared the "policy of Congress" to be opposed to filling vacancies in private employment created by induction under

<sup>21</sup> *Lindsay v. Lindsay*, 257 Ill. 328 (1913), sustaining the constitutionality of the Juvenile Court Act, Ill. Rev. Stat. (1945) c. 23, § 192.

<sup>22</sup> Note 7 *supra*.

<sup>23</sup> Ill. Rev. Stat. (1945) c. 23, § 195.

<sup>24</sup> Another example of the sterile approach to family relations problems which the Illinois court has been taking is illustrated by the holdings in *Heck v. Schupp*, 394 Ill. 296, 68 N.E. 2d 464 (1946), that the 1935 act outlawing "heart balm" suits was unconstitutional and the decision in *Johnson v. Luhman*, 330 Ill. App. 598, 71 N.E. 2d 810 (1947), that alienation of affections actions can be brought by minor children. See 15 Univ. Chi. L. Rev. 400 (1948), noting the *Johnson* case, *supra*.

Family relations law in Illinois would be better able to deal with the volume of litigation now crowding the courts if the Supreme Court were less interested in reading into the Constitution the sociology of a hundred years ago to protect technical and largely useless common law tort actions and more interested in the practical effects of procedural changes of considerable benefit in the area where volume makes the problem greatest.

<sup>1</sup> 54 Stat. 885 § 11 (1940); 50 U.S.C.A. App. §§ 301, 311 (1944).