able as any other would be the conclusion that the owner of a penknife carried it for the purpose of trimming his nails. If a loaded pistol is substituted for the open penknife, the range of inferences is narrowed and the relevance increased correspondingly. If a closed penknife is substituted for the open one, relevancy approaches the vanishing point.

A determination of the admissibility of nonassertive conduct of the Griffin type should depend on a consideration of whether, in view of the particular facts of the case, evidence of this bit of the deceased's conduct prior to the homicide increased the likelihood of subsequent aggressive conduct on his part toward the defendant. When evidence of the nonassertive conduct is newly discovered and a new trial is sought, an application of the reasonable-possibility test demands a close examination of all of the relevant facts, a case-to-case determination, not the drawing of conclusions based on generalizations.

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LEGISLATIVE PROGRESS AND JUDICIAL RELUCTANCE IN ILLINOIS DIVORCE REFORM

By declaring the Domestic Relations Act of 1949 unconstitutional in *People ex rel. Bernat v. Bicek,* the Illinois Supreme Court again invalidated legislative experiments for a new approach to divorce. The Act was designed to obviate the objection to, and achieve the same ends as its ill-fated predecessor, the Domestic Relations Act of 1947. The earlier Act was held to be a special law because it limited the establishment of a divorce division to Cook County. The 1949 Act provided for the establishment of a divorce division in any circuit where the majority of circuit court judges so voted, thus rendering the

23 At trial, a doubt as to the relevancy of the evidence might properly be resolved in favor of admissibility.

24 A showing that the deceased habitually carried a weapon, for example, would detract from the probative value of evidence that he carried a weapon on the occasion of the homicide.

25 There is great difficulty in applying any standard depending on the weight of evidence. Harmless Error Rule Reviewed, 47 Col. L. Rev. 450 (1947). Perhaps in allowing Griffin a new trial the Court of Appeals simply demonstrated its reluctance to utter the final word condemning him to death. But if the evidence of the type put forth in the Griffin case is of sufficient weight to raise the necessary reasonable possibility it is difficult to see how any relevant evidence discovered after the trial could fail to meet that standard.

26 405 Ill. 510, 97 N.E. 2d 588 (1950).


3 Hunt v. Cook County, 398 Ill. 412, 76 N.E. 2d 48 (1947); Ill. L. (1947) 875. The divorce division proposed in the 1947 Act was to perform the same functions as the divorce divisions proposed in the 1949 Act, discussed herein. The basic difference was that the 1947 Act applied only to Cook County. For a full discussion of the 1947 Act see Unconstitutionality of Illinois Divorce Act, 15 Univ. Chi. L. Rev. 770 (1948).

4 Ill. Rev. Stat. (1949) c. 37, § 105-20. In Cook County the circuit and superior courts were to establish the divorce division by joint resolution, the city courts having no vote. See note 10 infra.
institution dependent on "local" circumstances. As in the old Act, the divorce divisions in the new Act were to provide the machinery for reconciliation in the form of masters' hearings which would apply the social agency technique to marital discord. Investigations and reports about the financial, cultural, moral, and social background of the parties, which would enable the judge to make more intelligent disposition of custody and support matters, were to be made. In addition, the divisions were to act as a clearing house for support payments, enabling the court to check arrearages at the earliest possible moment.

In upholding the petitioner in a taxpayer's suit to enjoin the enforcement of the Act, the Court relied on the following grounds: (1) an unconstitutional delegation of legislative powers to the judiciary was found in the fact that judges were permitted to determine what the law shall be in their circuit; (2) the constitutionally guaranteed powers of city courts were held to be infringed by the fact that judges were not given a vote in the establishment of the divorce division in their circuit; (3) since the circuit court judges in Cook County and the city court judges throughout the state constitute a minority of those exercising divorce jurisdiction within each circuit, it was argued that the power of these courts to make their own rules was usurped—a majority vote being sufficient under the Act to establish binding rules; (4) the Act lacked the required uniformity throughout the state, since parties in some circuits would be subject to special divorce division procedure and those in others would not; (5) deprivation of the parties' rights was found because the masters were given power to investigate and hear, the possible result of which was a material delay in the formal hearing of a cause; (6) the First Amendment of the federal Constitution was held to be violated by allowing ministers, rabbis, and priests to be called in by the master in attempts to reconcile the parties; and (7) due

The real need for such a plan was believed to be in Cook County, because there the anonymity of urban living is said to reduce the social pressures of responsibility toward the family in matters of support and the provision of a stable home life for the children of broken or about to be broken families. In Hunt v. Cook County, 398 Ill. 412, 76 N.E. 2d 48, 53 (1947), the court took a different view: "The incidents of divorce and separation of married persons and parents with attendant social instabilities and possible dependency and delinquency are largely the same throughout the State." For comment on this point, see Unconstitutionality of Illinois Divorce Act, 15 Univ. Chi. L. Rev. 770, 772 (1948).
process was found to be jeopardized as investigations and reports would take the place of evidence received subject to cross-examination.\textsuperscript{15}

A critique of the court's reasoning may help to steer future draftsmen of similar legislation around the barriers that have been placed in their predecessors' way. As to the delegation of legislative powers to the judiciary, the court, reasoning from authority,\textsuperscript{16} assumed that legislation must be "absolute" when it leaves the legislature. However, as far back as 1848 in \textit{People v. Reynolds} the Supreme Court of Illinois said: "While all must be done under their [the legislators'] sanction, yet they need not do all, nor command all. A law may depend upon a future event or contingency for its taking effect, and that contingency may arise from the voluntary acts of others."\textsuperscript{17}

The court proceeded to explain that private corporations and municipal corporations may be created by local option, and further stated: "All such laws are perfect and complete when they leave the hands of the legislature, although a future event shall determine whether they can take effect or not."\textsuperscript{18}

This line of reasoning was followed in \textit{People ex rel. Grinnell v. Hoffman},\textsuperscript{19} where the court upheld a law regulating elections which depended upon local voting to take effect. Local option laws have been used to set up the Municipal Court of Cook County\textsuperscript{20} and various city courts throughout the State.\textsuperscript{21} Local option need not be restricted to the electorate; in fact judges have been allowed to exercise such power.\textsuperscript{22} Since judges are in the best position to determine the advisability of a divorce division in their circuit, there appears to be no justifiable reason for the exclusion of the city court judges from voting.\textsuperscript{23} Future draftsmen should note this easily correctible oversight.

On the other hand, city court judges were given a vote in making rules for the divorce division.\textsuperscript{24} Nevertheless, the court held that the Act invited a usurpation of their judicial powers, at least in Cook County. The court argued, that because the Superior Court of Cook County had twenty-eight judges, the Circuit Court of Cook County twenty, and the city courts in Cook County two, the Superior Court could enforce its will upon the circuit and city courts. Joint rule-making power does not necessarily lead to usurpation of any court's


\textsuperscript{16}R. G. Lydy, Inc. v. Chicago, 356 Ill. 230, 190 N.E. 273 (1934); Welton v. Hamilton, 344 Ill. 82, 176 N.E. 333 (1931).

\textsuperscript{17}10 Ill. 1, 12, 13 (1848).

\textsuperscript{18}Ibid., at 13.

\textsuperscript{19}116 Ill. 587, 5 N.E. 596 (1886).


\textsuperscript{21}City Court Act, Ill. Rev. Stat. (1949) c. 37, § 333.

\textsuperscript{22}See People ex rel. Dunham v. Morgan, 90 Ill. 558, 563 (1878).

\textsuperscript{23}Note 10 supra.

\textsuperscript{24}Note 11 supra.
judicial power, unless every court is held to be constitutionally vested with a right to make its own rules independent of all other courts. Since no authority which grants such a right has been found, there is no reason why any one vote should be counted differently than others. It must also be noted that the problems of divorce division administration would have been the same within the contiguous confines of Cook County and merited the uniform procedure which would have been the result of joint rule making.\(^{25}\)

The argument that the law lacked uniformity is based upon the assumptions that the problems of divorce are the same throughout the State, and that the statute would not operate equally upon all persons. The court's first assumption is contrary to the expert opinion of sociologists and social welfare workers who have consistently emphasized that the problems of divorce are not the same in rural and urban areas.\(^{26}\) The legislature appeared to recognize this when they employed the "local option" form. The second assumption is equally fallacious. Since divorce jurisdiction is limited to the county where the plaintiff or defendant lives,\(^{27}\) the Act would apply equally to all parties seeking a divorce in any given circuit.\(^{28}\) In *Hinckley v. Dean* it was held that the uniformity clause of the Illinois Constitution is not violated if a court in one circuit adopts a rule of procedure which operates fairly, equally, and uniformly on all litigants within the circuit.\(^{29}\) The 1949 Act was in terms a procedural reform rather than a change of the substantive law and would readily come under the doctrine of the *Hinckley* case.

In sustaining the petitioner's argument that the master's hearing would deprive the parties of their rights without due process, the court rejected the showing, by amicus curiae,\(^{30}\) that there were precedents for the proposed procedure. Amicus curiae pointed to the act relating to treatment of dependent, neglected, and delinquent children,\(^{31}\) and the adoption act.\(^{32}\) These statutes provide for preliminary investigations and reports which have to be filed before formal hearing will be given. The court distinguished these statutes by stating that divorce was an adversary procedure, while the two acts cited related to "agency type" procedure. This reasoning neglects the fact that formerly juvenile

\(^{25}\) The city courts of Calumet City and Chicago Heights would quite probably have been opposed to joint rule making. If these courts could maintain "liberal" rules for divorce while the circuit and superior courts adopted a more orderly divorce procedure, their divorce business would flourish even more.

\(^{26}\) Note 5 supra.


\(^{28}\) Whether a couple is divorced in a circuit where there is a divorce division or not does not depend upon their volition, but rather upon the judicial appraisal of local circumstances in the first instance of establishing the division.

\(^{29}\) 104 Ill. 630, 636 (1882).

\(^{30}\) Mr. Charles Leviton was asked to file an amicus curiae brief by the judges of the Circuit and Superior Courts of Cook County for the Chicago Bar Association. Amicus Curiae brief at 2.


\(^{32}\) Ibid., at c. 4, § 1-1 et seq.
court matters were decided in adversary procedure until replaced by the modern agency type procedure. There seem to be no "vested rights" standing in the way of revising divorce procedure in the same manner. The laws granting and regulating divorce are privileges granted by the state. The law, and quite particularly that of Illinois, is explicit in not making divorce dependent on the wishes of the individual; consequently, the individual can as little claim that he is being deprived of a "right" when the state decides to change its divorce procedure to allow pre-trial hearing as he could if the state should decide to eliminate one of the grounds for divorce or to abolish divorce altogether.

The court relied on Illinois ex rel. McCollum v. Board of Education to support their conclusion that the First Amendment of the United States Constitution would be violated when religious representatives would be called into the master's hearing to advise the parties. It is difficult to determine the exact scope of that interpretation of the First Amendment. The best solution, to avoid controversy of a highly speculative nature, would be to draft the related provision in general terms avoiding specific reference to religious representatives. If this were done the master still would be able to call in religious representatives, but objections of the type raised in Bernat v. Bicek would be avoided.

The argument that the Act permitted violations of procedural due process by substituting reports based on investigations for evidence subject to cross-examination assumes that parties will not obtain a judicial consideration of the relative claims of their case nor an opportunity to rebut factual statements gathered by experts and conclusions drawn therefrom. Investigations serve as a basis for decisions in other areas. The act relating to the treatment of dependent, neglected, and delinquent children utilizes this method of ascertaining facts. The court in Lindsay v. Lindsay, upheld this act and its method of

**Footnotes:**

33 Other procedural trends, designed to define the issues before formal hearings or trials begin, are reflected by Supreme Court Rule 23A, Ill. Rev. Stat. (1949) c. 110, § 259.23A, which calls in all ordinary civil cases for a pre-trial conference, and the similar Federal provision, Rule 16 of the Federal Rules of Civil Procedure, 28 U.S.C.A. 16 (1949). Pre-trial conferences are had at the judge's discretion and are designed to simplify the formal proceedings. The 1949 Act is similar to Rule 23A in its provisions for a master's hearing, investigation and report. The referral to the divorce division was designed to aid the judge by simplifying the issues and supplying the judge with information gathered prior to the trial.

34 See Andrews v. Andrews, 188 U.S. 14 (1903); Miner, Conciliation Rather Than Reconciliation, 43 Ill. L. R. 464, 468 (1948). This article discusses the right of the state to set conditions for divorce, as well as procedural rules.


36 Ill. Rev. Stat. (1949) c. 37, § 105-30. The provision might be drafted to read: "In a hearing to ascertain the possibility of reconciliation, the master shall, at his own discretion, utilize the resources, information, counselling and advice available in the community." This is general enough to include religious representatives as well as sociologists, psychologists, and others.

37 405 Ill. 510, 525, 91 N.E. 2d 588, 595 (1950).


39 257 Ill. 328, 100 N.E. 892 (1913).
investigation and report. In *People v. Miller* the court sustained investigations and reports in probation matters. The petitioner in that case claimed that the report rendered to the judge precluded judicial discretion in determining whether probation was to be granted or not. But the court held that even though there was a report before the judge, it would not mean that full judicial consideration of the petitioner's cause was precluded.

The Domestic Relations Act of 1949 would have been a step in the attempt to revise the laws relating to divorce in the United States. Proponents of a general revision movement point out that the present system of divorce law does not address itself to the basic issues of divorce but concerns itself with irrelevant formalities. A total revision of divorce law has been said to require two steps: first, a change of procedure; and second, a change in the substantive law. The 1949 Act was of the first type, a procedural reform.

The substitution of an "agency" approach to divorce for the traditional adversary procedure is expressive of a trend similar to that appearing in the handling of juvenile court matters. Steps toward a new approach to divorce have been adopted in some form in several jurisdictions; they have been proposed in others. Detroit uses a divorce proctor, known as Friend of the Court, who tries to reconcile the parties and who makes reports based on investigation of custody and support matters. Milwaukee, Wisconsin, has a similar plan. Ohio has what might be called a "true family court," combined juvenile and divorce jurisdiction, in seven circuits. These courts are aided by a social service investigative arm. They try to maintain informal procedure which will arrive at the underlying causes of the "litigants'" problems. At the present time, plans for a conciliation service, similar to the 1949 Illinois Act's divorce divisions, are under way in New Jersey, while the District of Columbia is studying a plan modeled on Detroit's Friend of the Court.

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40 *317 Ill. 33, 147 N.E. 396 (1925); also see New York v. Williams, 337 U.S. 241 (1949).*


42 *The State as Parens Patriae: Juvenile versus The Divorce Courts on Questions Pertaining to Custody*, 21 Rocky Mt. L. Rev. 375 (1949), a discussion of the merits of "agency" procedure as against adversary procedure. Also, Alexander, op. cit. supra note 41, at 707-8, for the outline of an ideal family court based on juvenile court practice.


44 *Wis. Stat. (Brossard, 1949) § 252.07.*

45 *The two most outstanding Ohio courts in this field are Hamilton County (Cincinnati) and Lucas County (Toledo). Ohio Code Ann. (Throckmorton, 1948) §§ 1532, 1639-8.*

46 *N.Y. Times, p. 23, col. 5 (Sept. 8, 1950); Chicago Daily Law Bulletin, p. 1, col. 6 (Sept. 11, 1950); the plan calls for conciliation especially where children are involved.*

47 *District of Columbia Court Plans To Set Up Office of Marital Affairs Counsel, 34 J. Am. Jud. Soc. 55 (1950).*
The Illinois Act would have remedied many of the shortcomings of our present divorce system. Improper custody awards or failure of the courts to keep abreast of current facts and make changes in custody, where the original custody has been unsatisfactory, are said to be a substantial causal factor in child delinquency. The pre-decree hearings, investigations, and report of the divorce division would have partially eliminated errors in original custody which are brought on by lack of such information, while the periodical reports required of the person or the agency to whom custody has been awarded would have enabled the court to keep abreast of the child's current welfare and bring about needed adjustments. Dependency upon state funds is sometimes the result of poor administration of alimony and support orders. If the father-husband falls behind in his payments, the court has no knowledge of this fact until the injured party comes into court through a private attorney or legal aid. Under the 1949 Act alimony and support money would have had to be paid into the divorce division to be distributed to the beneficiaries. The court would have been able to keep a constant surveillance of support payments and detect arrearage at the earliest possible moment.

In spite of all the above listed benefits, the Act has not gone unchallenged. Some point out that the master's hearing, with its concomitant investigation, would uncover collusion which had heretofore remained undiscovered in the mock battle of the adversary procedure, thereby substantially decreasing the number of divorces where "legal guilt" is absent. It is their contention that such a result would be inherently evil, since those couples who are basically incompatible would be forced to maintain their marital status. However, as has been observed, divorce is not a right but a privilege granted by the state. It cannot be said, therefore, that there is a "right" to collusive divorce. What is involved here is a serious objection based on notions of social policy. This is not an objection to the 1949 Act, but rather an objection to the present status of the substantive law of divorce.

Others, authorities in the field of family relations, have categorically, though confidentially, stated that reconciliation through a legal agency is impossible. This position seems unduly fatalistic. The state is vitally interested in the problem of conserving the family and could well adapt itself to such a function.

Judge Julius Miner of the Circuit Court of Cook County opposed the Act. This statement is based on a study by Judge Edwin A. Robson of the Superior Court of Cook County; for figures on this proposition see Unconstitutionality of Illinois Divorce Act, 15 Univ. Chi. L. Rev. 770 (1948).

49 Note 48 supra.
50 The Court Service of the Welfare Department of Cook County also represents needy parties in support enforcement proceedings, but there, too, the injured party must take the initiative. Obscurity to the public and lack of adequate staff render it less effective than it should be.
because he believes that reconciliation after the parties have filed divorce actions comes too late. He would substitute a pre-filing conciliation procedure.\footnote{Miner, op. cit. supra note 34; Miner, Pre-Divorce Suit Conciliation, 36 Ill. Bar J. 207 (1948).} This plan actually amounts to "passive" reconciliation. If the parties are made to file a declaration of intent sixty days prior to the suit, it reasonably may be assumed that the "breaking point" has already been reached. Judge Miner merely proposed a "cooling off period" during which the parties are left to their own initiative. The Act, on the other hand, would have brought the resources of the community to bear in an active attempt to settle the difference between the parties.

Merely because acts like the Domestic Relations Act of 1949 are only part of a needed scheme of revision in the field of divorce, their enactment should not be defeated. Many of the problems in the area of divorce administration would be remedied, while the remaining substantive evils would be sharply defined, to be corrected by additional legislative action.

\textbf{CONSEQUENTIAL DAMAGES AND "JUST COMPENSATION"}
\textbf{IN FEDERAL CONDEMNATIONS}

In federal condemnations\footnote{Many state constitutions provide that compensation must be paid for property "taken or damaged." In such cases consequential damages may be recovered. 2 Nichols, Eminent Domain § 6.4432[2] (1950). See Dolan, Consequential Damages in Federal Condemnation, 35 Va. L. Rev. 1059 (1949).} the courts have applied the term "consequential damages" to all losses which have been excluded from the "just compensation" provision of the Fifth Amendment.\footnote{"[N]or shall private property be taken for public use without just compensation." United States v. Petty Motors Co., 327 U.S. 372 (1946); United States v. General Motors Corp., 323 U.S. 373 (1945); United States v. Powelson, 310 U.S. 266 (1943); Mitchell v. United States, 267 U.S. 341 (1925); Joslin Manufacturing Co. v. Providence, 262 U.S. 668 (1923); Omnia Co. v. United States, 261 U.S. 502 (1923).} In seizing private property the government has had to pay only for tangible interests actually taken\footnote{United States v. Willow River Power Co., 324 U.S. 499 (1945); Redman v. United States, 136 F. 2d 203 (C.A. 4th, 1943); Karlson v. United States, 82 F. 2d 350 (C.A. 8th, 1936).} and those intangible interests which the courts have held to be directly connected with the physical substance of the thing taken.\footnote{United States v. Miller, 317 U.S. 369 (1943); Campbell v. United States, 266 U.S. 368 (1924); Sharp v. United States, 191 U.S. 341 (1903); Stephenson Brick Co. v. United States, 110 F. 2d 360 (C.A. 5th, 1940).} No payment has been necessary for in-