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## Contributors to the March Issue/Notes

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## CONTRIBUTORS TO THE MARCH ISSUE

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Hon. Warren R. Austin, Representative of the United States to the United Nations; Chairman of the Advisory Committee, Permanent Headquarters, United Nations. United States Senator from Vermont, 1931-1946.

William Q. de Funiak, Professor of Law, University of San Francisco School of Law; L.L.B., University of Virginia. Author of several leading works on Community Property.

Hon. Pat McCarran, United States Senator from Nevada since 1932. Chief Justice, Supreme Court of Nevada 1917-18. Vice President, American Bar Association 1922-25.

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## NOTES

CO-OPERATIVES—TAXATION OF "PATRONAGE REFUNDS" THE REAL ISSUE?—The first concentrated attack on the existence of co-operatives since their judicial recognition is now under way. This is easily understandable because the very nature of a co-operative is such as to give rise to heated discussion in circles of inquiring theoretical economists and practical businessmen. Basically co-operatives are organizations by which or through which goods are purchased or sold, the members of the organization exercising the co-operative unity of action to improve their bargaining power. It is this unity of action, the very heart of the co-operative, which foments discussion and objection.

From the very beginning co-operatives have undergone a rigid judicial examination because of this principle of unified action. Opponents of the co-operative principle demanded that co-operatives, which at first were almost exclusively agricultural marketing groups, be tested on the same basis as every other business organization or economic method. Many men felt that the rules of law as well as the rules of business in the United States excluded anything so opposed to the tenets of free enterprise as a co-operative. But the courts almost unanimously upheld,

as valid, statutes which authorized the co-operative combinations; the courts justified this deviation from the free enterprise system on the grounds that the inferior bargaining power of the farmer resulted in economic injustice.<sup>1</sup> Evidence abounded, said the courts, that the principles of free enterprise as practiced did not result in economic justice to the agricultural group; therefore if the legislature so decided, farmers, as a group, had the right to combine in co-operative efforts to balance the bargaining scales.

With legislative<sup>2</sup> and judicial<sup>3</sup> blessing co-operatives have steadily grown until today it is reported that two-thirds of the farmers of the United States are members of co-operatives,<sup>4</sup> either marketing or consumer. But the method of cooperation has not been confined solely to agricultural activities. In fact, practically every phase of business has been carried on by one group or another on co-operative principles.

Very few of those who opposed co-operatives in their inception have been converted to an acceptance of them as legitimate parts of a free enterprise economy. The co-operatives' reception and expansion have not convinced the rugged individualist of their validity. It is the opinion of the free enterprise businessman that the courts are in error when they permit co-operatives to exist while the Fourteenth Amendment remains in effect. They also feel that co-operatives are no more than a governmentally privileged restraint of trade.<sup>5</sup> Even further, the free enterprise economic philosopher points to the great material wealth and progress that the United States has made under the individualistic system, and he cannot help but question the wisdom of undermining this heretofore successful method of economic activity by the institution of planned economy measures, one of which, he feels, is co-operative activity.

It has now become apparent that, for the above reasons, there is a concerted program being carried out to completely eradicate co-operatives from the American economic field. The strongest force laboring against the co-operatives is the National Tax Equality Association. This association exploits the fact that the co-operative does not pay

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1 Note, 22 NOTRE DAME LAWYER 413 (1947) providing a discussion and citation of the cases evidencing judicial acceptance of co-operatives.

2 All states have statutes authorizing the incorporation of co-operatives.

3 Note, 22 NOTRE DAME LAWYER 413 (1947), *supra*, note 1.

4 UNITED STATES NEWS, September 12, 1947, p. 15-16.

5 But see Note, 23 NOTRE DAME LAWYER 110 (1947). Also UNITED STATES NEWS, September 12, 1947, p. 15-16, *supra*, note 4, reports that a study made by the Small Business Committee headed by Representative Patman (D. Texas) in 1946 concluded that co-operatives had no unfair advantage over private competitors. It must be remembered that this survey was conducted in 1946 by a Congress of more progressive philosophies.

taxes on what is known as a "patronage refund".<sup>6</sup> This labelling of the co-operative as a "tax evader" is part of the propaganda designed to smooth the path for revision of tax statutes so as to include co-operatives' "patronage refunds" in the co-operative tax bill. In addition to the tax issue, co-operatives have been attacked in the public eye as unfair monopolies through the recently popularized method of majority representation propaganda, the congressional investigation.<sup>7</sup> The free enterprise businessman of today cites the existence of tremendous manufacturing and industries operating on the co-operative principle in the same locality as competing non-co-operative concerns, the co-operative paying no taxes on its members' income, whereas the competitor operates under the tax burden on its profits.<sup>8</sup> How then, legally, does the co-operative avoid taxation?

As has been stated, a co-operative is an organization by which or through which goods are purchased or sold. The co-operative functions as the fiduciary of the producers or consumers. In the case of a marketing co-operative the co-operative advances to the producer a certain sum for the member-producer's goods. Then after an agreed period the co-operative calculates the price at which the goods of all the members were sold and refunds to each producer the difference between the price at which the goods were sold by the co-operative and that advance already given the producer, less co-operative operating expenses. Under this basic co-operative theory, then, we see that the profits at no time accrue to the co-operative itself. The member is the party who realizes the profits on the goods produced and sold. That this is and must be the situation, under law, in which a co-operative exists becomes apparent when we examine the construction that courts have given to the contracts between the co-operative and its members which enunciate the relationship of the parties to the contract.

It is generally held that co-operative marketing contracts create between the members and the association the relation of principal and

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<sup>6</sup> Also known as patronage dividends or patronage rebates.

<sup>7</sup> Representative Walter Ploeser (R. Missouri) heads the House Small Business Sub-committee which is going about the country investigating co-operatives. This investigation has found, among other things, that the Greenbelt Consumer Service, a consumer co-operative venture which embraced two food stores, a drugstore, a variety store, a movie theatre, a garage, a bus line, a traveling store, a laundry and dry cleaning establishment, a tobacco and candy store, a barber shop and a beauty parlor all operating on the co-operative principle, to be a monopoly. *THE NATION*, August 30, 1947, p. 194. *THE CHRISTIAN CENTURY*, September 17, 1947, p. 1100.

<sup>8</sup> State *ex rel.* Arn, Attorney General v. Consumers Co-operative Association *et al.*, 163 Kan. 324, 183 P. (2d) 423 (1947), Noted in 23 *NOTRE DAME LAWYER* 110. The abuse on which investigation of co-operative activities may focus attention is private business masquerading as co-operative ventures. *UNITED STATES NEWS*, September 12, 1947, p. 15-16.

agent.<sup>9</sup> The courts subscribe to this construction of the majority of co-operative-member contracts because, they say, it is the intention of the parties when setting up a co-operative that such a relationship be created. Any other construction, the courts feel, would negative the overall purpose of a co-operative. Therefore to carry out the obvious intent of the parties, the principal and agent relationship must result. Concededly, the co-operative is a fiduciary for the members, and the most apparent type of fiduciary under these circumstances would be an agent; thus the principal and agent construction, the courts hold, must logically follow. A few courts have construed the relationship to be that of vendor and vendee in a strict construction of the terms of the contract.<sup>10</sup> Others, however, even when the wording of the contract indicates that the products are to be sold by the member and bought by the co-operative, look to the overall purpose of the agreement and construe the relationship to be one of principal and agent rather than vendor and vendee.<sup>11</sup>

Ultimately, of course, the courts announce their decision as to the relationship between co-operative and member as resulting from a perception of the intention of the parties in drawing up the contract. The overall purpose of a co-operative, naturally, lends great weight to the principal-agent presumption but the courts examine other circumstances of the relationship also. Intention of agency is principally shown, of course, by the fact that the selling price of the goods is not the property of the co-operative but rather is the property of the members and is refunded accordingly at specified times. Also indicative of agency is the fact that the co-operative can only act in relation to the goods in the capacity authorized by contract. The co-operative takes goods for a definite and restricted purpose, namely sale<sup>12</sup> for the benefit of members.

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<sup>9</sup> AM. JUR., AGENCY 24.

<sup>10</sup> *Texas Farm Bureau Cotton Association v. Stovall*, 113 Tex. 273, 253 S.W. 1101 (1923); *Dairy Products Association v. National Cheese Producers' Federation*, 217 Wis. 202, 257 N.W. 624, 98 A.L.R. 1403 (1934).

<sup>11</sup> "It is generally recognized that there are two kinds of co-operative marketing agreements, sales and agency, and that the determination of whether a particular agreement is to be classified as one or the other depends upon the intention of the parties thereto. (Citing cases). In California, however, co-operative marketing agreements have been classified or construed as contracts of agency even when, as in this case, they contained language of sale." *Irvine Company v. McColgan*, Franchise Tax Commissioner, 26 Cal. (2d) 160, 157 P. (2d) 847 (1945). In *Texas Certified Cottonseed Breeders' Association v. Aldridge*, 122 Tex. 464, 61 S.W. (2d) 79 (1933), the court held that the intent of the parties to create a typical co-operative must control literal wording even though that wording indicates a sale agreement. The opinion states, "If necessary, to give effect to intention of parties to marketing contract, courts will brush aside mere form and examine the contract as a whole, in the light of the nature and circumstances of the transaction."

<sup>12</sup> "The profit incentive is the mainspring of commerce, but it is the antithesis of co-operation. The co-operative principle requires that services be performed for

The inference that the relationship is one of vendor and vendee is based on the fact that the co-operative exercises dominion over the goods by mingling, handling, processing, storing, borrowing money thereon, pooling and selling the goods. Once the member parts with the goods there is no provision for return, and his goods are mingled with all others so that his patronage refund is not based on the result of the sale of his particular goods but on his membership in the co-operative.<sup>13</sup> In a sale it is not necessary that the price be paid at the time of contracting. In view of this, some courts have held that the patronage refund, so called, was merely the final installment of the purchase price paid by the co-operative to the member.

It is apparent, then, that in a true co-operative the proceeds referred to as "patronage refunds" (which the National Tax Equality Association demands be included in the co-operative tax expense) never, by virtue of the fiduciary capacity of the co-operative, are to be considered co-operative property, much less co-operative profits. The "refund" is either the final installment of a sales price being paid by a vendee to a vendor or it is a fund of the principal which the agent was authorized to collect and return to the principal at a designated time. The "refunds", being member-producer property, should be included in the members' taxable incomes, of course.

Thus we see that it is not tax equality at all which is desired but rather a restriction on co-operatives as co-operatives. We are brought back in our discussion, then, to what now appears as the basic point in

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the co-operating members by their appointed representatives, and not by independent business units dealing at arm's length and striving for profit. It implies that the co-operating members are the real parties in interest in any transaction undertaken by their association. At no time can the association as a corporate entity have any interest in the marketed product adverse to the interest of the members for whose benefit the operations are conducted. Yet so far as it is possible without sacrificing this essential characteristic, the association must adapt itself to the usages of trade. The merchant who buys its products, the banker who lends it money, properly insist that there be a responsible legal entity with which dealings can be had, that the property contributed by the members be subjected to the hazards of the venture in which it has been launched, that the officers of the association have the powers normal in the conduct of trade, and that no secret and unusual restrictions hamper their authority in ordinary business transactions. By conferring on the association legal title with the powers of disposition which are incident to legal title the members have successfully achieved these results. By insisting that this legal title exists for a special and limited purpose, for the benefit only of those who deal with the association in good faith and in the normal course of business, the rights of the members as the real parties in interest are preserved. Thus the corporate entity, that useful legal mechanism, has served once more to effect a practical adjustment between the interests of a group and the habits and customs of society." Henderson, *Co-operative Marketing Associations*, 23 Col. L. Rev. 91 (1923).

<sup>13</sup> Dairy Products Association v. National Cheese Producers' Federation, 217 Wis. 202, 257 N.W. 624, 98 A.L.R. 1403 (1934), *supra* note 10.

issue—that is, the feasibility of co-operatives, a governmentally privileged group, existing in American business. The issue reduces itself to an acceptance in some degree of economic planning or a return to laissez-faire capitalism.

This issue, of course, is not peculiar to co-operatives; rather it permeates the very structure of any government as far as economic policy is concerned.

When laissez-faire capitalism was the economic policy of the United States, farmers suffered a very meager compensation for their productive activity. At the same time there existed a great gap between the payment the farmer received and the cost the consumer expended for the product. The government recognized that the largest portion of the selling price of agricultural products was going to the middleman rather than to the farmer producer. Co-operatives were sanctioned by the government in an effort to alleviate this apparent injustice. True, this deviated from the uncontrolled free enterprise theory of business, but government felt that laissez-faire capitalism had failed to bring economic justice to the farmer and that some positive governmental action would be necessary to correct the injustice. Thus this co-operative type of government planning became a part of our economy.

Co-operatives have expanded because they have aided the farmer and because other groups have seen how *the principle of co-operation tends to narrow the distribution of wealth more to those who are active in its production*. The co-operative expansion has been at the expense of the middleman and the speculator.<sup>14</sup> These are the groups now which are activating the opposition to the co-operatives. They are of the group that prefer a world in which a free hand is given to the strong and the clever. This group holds that a free struggle makes for strong, vigorous character and that large inequalities are necessary to support the economic incentives. The group which supports co-operatives holds that the strong have a decided obligation to society and stresses the solidarity of human interest. This group dislikes and doubts the wisdom of great inequalities.

The laissez-faire capitalist states that the acceptance of co-operatives opens the door to either socialism or communism. Supporters of planning in government answer that the member of a co-operative is just as much an individual as any other producer in the free enterprise

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<sup>14</sup> "The main reason why co-operatives are disliked in some quarters is that they cut out the middleman and the speculators. The farmer is at a natural disadvantage and the only way he can gain an equality of bargaining power in the market place is to form co-operatives." *NEW REPUBLIC*, September 8, 1947, p. 32-33.

system.<sup>15</sup> He benefits only to the extent to which he produces but he claims rewards from the co-operative system because he is assured of a more equitable distribution of the final sale price because of his enhanced co-operative bargaining position. The planning, states the supporter of co-operatives, is exercised to correct the past inequity of distribution in which a parasitic middleman who contributed nothing reaped handsome harvests through speculation.

As a result of the alleged failure of laissez-faire capitalism in providing for a just and equitable distribution of its concededly tremendous production of material goods, we see many humanitarians clamoring for correction of this purported abuse in the free enterprise system. They feel that for production to be progressive, it must benefit society at large and especially those who assist in the production. This benefit to society, they hold, must be proportionate to the scope of the production, thus demanding an equitable distribution of wealth.

There is a just order in society. It is the role of government to guarantee the public well being and private prosperity, so that the material benefits of the earth may fill the needs of all its inhabitants. Organizing to bring about this commutative justice is a natural right. The guiding principle of economic life and of this organizing should be social justice and social charity.<sup>16</sup> Co-operatives, the progressives hold, are one of the forces attempting to correct the distribution evils of laissez-faire capitalism.<sup>17</sup> This is the present situation, as the forces for and against co-operatives spar in the American economic ring.

This is an election year, however, and two-thirds of the farmers are members of co-operatives. Therefore it is extremely doubtful that the present Congress will derogate from the power of co-operatives and thus incur the ire of such a powerful voting bloc, even though the economic philosophy of the present Congress might dictate otherwise.

*Thomas F. Broden.*

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<sup>15</sup> See address of Clinton P. Anderson, Secretary of Agriculture, delivered at a special meeting of farmers and representatives of farmers co-operatives of Washington, Oregon and Idaho held at Everett, Washington, Dec. 11, 1947. This speech is printed in *VITAL SPEECHES*, January 15, 1948, p.220.

<sup>16</sup> *THE CONDITION OF LABOR*, Pope Leo XIII: *RECONSTRUCTION OF THE SOCIAL ORDER*, Pope Pius XI.

<sup>17</sup> *THE CHRISTIAN CENTURY*, April 23, 1947, p. 516. On the appointment of Jerry Voorhis, former California congressman to the head executive post of the Co-operative League, the *Christian Century* said, ". . . Mr. Voorhis takes over at a strategic moment. Millions of Americans believe that laissez-faire capitalism is on its last legs, and are looking for some alternative other than state ownership and control. The co-operatives say they have the alternative . . ."



LABOR LAW—COMMENT ON THE TAFT-HARTLEY ACT, TITLE II.—Senator Taft, in a recent magazine article said, “Little attention has been given to that portion of the act establishing an independent Federal Mediation and Conciliation Service.”<sup>1</sup> He was referring to Title II of the statute which presumes to make available a Federal Mediation and Conciliation Service to labor-management disputants. It also presents something of a plan for dealing with a threatened strike or lock-out approaching a national emergency.

The new Federal Mediation and Conciliation Service, called “Service” in the Act, was removed from the Department of Labor to an independent status because, in the words of Senator Taft, “Since the Department of Labor was expressly created to advance the cause of unions, conciliators coming from that department were frequently handicapped by the belief on the part of employers that they would not act impartially.”<sup>2</sup>

The Service is under the direction of a Federal Mediation and Conciliation Director, called “Director” in the Act. The office is filled by appointment by the President by and with the consent of the Senate. Mr. Cyrus S. Ching today fills that position. The Director is authorized to establish the principal office in the District of Columbia and such regional offices as his judgment might consider necessary. The Director is permitted to delegate any or all authority and discretion conferred upon him by the Act to regional directors or other subordinates. He is encouraged to cooperate with state and local mediation agencies. Congress asks of him a written report at the end of each fiscal year. Previous mediation and conciliation functions of the Department of Labor and the United States Conciliation Service were transferred to the new department with a specific legislative declaration of independence of jurisdiction and authority for the newly created Service.

The Service is to prevent or minimize interruptions in the flow of commerce which grow from labor disputes. Mediation and conciliation services are to be available upon call from either of the parties to a labor dispute or upon a decision of the Service officials that the labor dispute threatens to cause a substantial interruption of commerce. If the Service activates its own facilities, it must contact both parties and exert its best efforts to bring agreement through mediation and conciliation.<sup>3</sup> If the Service’s “best efforts” are unavailing within a reasonable time, it shall seek by “other means”, including submission to the employees by secret ballot the employer’s last offer of settlement, to

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<sup>1</sup> Collier’s, March 6, 1948, p.39.

<sup>2</sup> *Ibid.*, p.42

<sup>3</sup> Labor Management Relations Act of 1947, 61 Stat. 136, 29 U.S.C.A. 144, 203  
(a) (b).

avoid a strike, lockout, or other coercion. Rejection by either party of procedure suggested by the Director is *not* a violation of the Act.<sup>4</sup>

Section 204 directs disputants to meet in collective bargaining and to participate in meetings undertaken by the Service, but it attaches no penalty for failure or refusal to do so.

Provisions are made for the establishment of a twelve-man National Labor-Management Panel to be appointed by the President. Six members are to come from the field of management and six from labor. The stated purpose of the panel is to advise at the request of the Director in the avoidance of industrial controversies as well as the desirable manner of administering mediation and arbitration, especially "with reference to controversies affecting the general welfare of the country." Much constructive study aiming toward the development of labor statesmanship might be pursued if this group were formed with care and permitted to act beyond the borders of its stated purpose.

When, in the opinion of the President, a threatened strike or lock-out imperils the national health or safety, he may appoint a special board of inquiry. This special board of inquiry shall have a chairman and such other members as the President determines. It shall have power to compel attendance of witnesses and to compel production of books, papers, and documents. After inquiry into the issue of the dispute, the board shall make a full written report to the President revealing each party's statement of its position. The President shall then file a copy of such report with the Service and make its contents available to the public. After receiving the report from the board of inquiry, the President may direct the Attorney General to petition any United States District Court having jurisdiction of the parties to enjoin such strike or lock-out, if the court finds the threatened strike or lock-out is likely to affect "an entire industry or substantial part thereof" or imperil the national health or safety. Such court injunctions are subject to appellate review by appropriate Circuit Court of Appeals or by the Supreme Court. Section 208 (b) has caused and will cause much questioning. It reinstates a limited use of the injunction in labor disputes of a given magnitude. Perhaps Congress felt that delaying tactics plus investigation and publication of issues would serve to eradicate or eliminate severe strikes or lock-outs. Some anti-labor employers might see a strike-breaking tool in the injunction. Impartial observers might wonder why the injunction would be resurrected in preference to compulsory arbitration by a board appointed by the President. How otherwise can settlement machinery go to the merits of a bona fide dispute imperiling the national health and safety to resolve it equitably for labor, management, and the general public? Has the shadow of John L. Lewis

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<sup>4</sup> *Ibid.*, 203 (c)

clouded legislative thinking? Labor injunctions ring with historical overtones which many Americans would like to forget. When such an injunction is issued,

. . . it shall be the duty of the parties to the dispute giving rise to such order to make every effort to adjust and settle their differences, with the assistance of the Service created by this act. Neither party shall be under any duty to accept, in whole or in part, any proposal of settlement made by the Service.<sup>5</sup>

Upon the issuance of the injunction, the President must reconvene the board of inquiry to reinvestigate and report again at the end of a sixty day period the current position of the parties and the efforts made toward settlement, as well as the employer's last offer of settlement. The President shall make that report public. Within the following fifteen days, the National Labor Relations Board shall determine by secret ballot whether the employees wish to accept the employer's final offer of settlement. The Board shall report the results of the voting to the Attorney General within five days after their determination. Upon certification of the results of the ballot or upon a settlement being reached, whichever happens sooner, the Attorney General shall move the court to discharge the injunction. When such a motion is granted and the injunction is discharged, the President shall make a comprehensive report of the whole dispute to Congress together with his recommendations. It is possible that Congress would then enact legislation compelling submission to a board of arbitration whose decision would be final and binding on both parties. Congress has, to date, shown a reluctance to consider this step.

Section 211 establishes in the Bureau of Labor Statistics and in the Department of Labor a file of copies of collective bargaining agreements and similar material useful in settling disputes. All except confidential material shall be available to the Service, employers, employees, or their representatives.

Section 212 exempts all matter subject to the Railway Labor Act from the provisions of Title II of the Taft-Hartley Act.

President Truman, in his veto message, had criticism for Section 208 of the bill. He felt that the elaborate procedure, the approximately eighty days' waiting period and the secret ballot on the employer's last offer reflected either improper planning or misunderstanding. Since the board of inquiry is "specifically forbidden to offer its informed judgment concerning a reasonable basis for settlement of the dispute," its

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<sup>5</sup> An Associated Press release from Washington dated March 6, 1948, quoted Senator Alexander Wiley (R., Wis.) as demanding compulsory arbitration to settle labor disputes in all atomic energy plants.

function would serve only "to dramatize the respective positions of the parties". Fact-finding should precede, not succeed, a breakdown of labor relations. Experiences with the War Labor Disputes Act have shown that most secret ballots sustain the bargaining representatives as votes of confidence. After the elaborate procedure "it would be mandatory for the President to transfer the whole problem to the Congress even if it were not in session." Thus a major economic dispute would enter the political arena. "One could scarcely devise a less effective method for discouraging critical strikes."

This entire procedure is based upon the same erroneous assumptions as those which underlay the strike-vote provision of the War Labor Disputes Act, namely, that strikes are called in haste as the result of inflamed passions, and that union leaders do not represent the wishes of the workers. We have learned by experience, however, that strikes in the basic industries are not called in haste, but only after long periods of negotiation and serious deliberation; and that in the secret-ballot election the workers almost always vote to support their leaders.

Furthermore, a fundamental inequity runs through these provisions. The bill provides for injunctions to prohibit workers from striking, *even against terms dictated by employers after contracts have expired*. There is no provision assuring the protection of the rights of the employees during the period they are deprived of the right to protect themselves by economic action (italics supplied).<sup>6</sup>

However imperfect the Act may be and however prejudice may have prompted some of its features, it can be hoped that fair administration by a new organization can overcome many defects. Already the five man board and federal judges are accepting their duties under the Act with wisdom and fairness.<sup>7</sup>

On August 1, 1947, when the newly created National Labor Relations Board of Chairman Paul M. Herzog, John M. Huston, James J. Reynolds, Jr., Abe Murdock, and J. Copeland Gray was formed, it joined General Counsel Robert N. Denham in the following statement:<sup>8</sup>

We start upon our new tasks with deep determination. We have pledged to ourselves and to each other, to administer the new law with all the diligence and fair-mindedness in our power.

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<sup>6</sup> Labor Management Relations Act Veto Message, U. S. CODE CONG. SERVICE, 1851, (80th Cong., 1st Sess., 1947.)

<sup>7</sup> Denham, *The Taft-Hartley Act*, 20 TENN. L. REV. 168 (1948).

<sup>8</sup> Release of National Labor Relations Board, August 1, 1947.

We accept the trust of our new positions with intent to do our utmost to make every provision of the law work as effectively as possible. As members of the Executive Branch of the Government we repeat our single-minded purpose to carry out the congressional intent as provided in the Labor Management Relations Act of 1947.

To the employers and employees of the Nation our message is simply this: At this time, as at all others, labor and management will serve their mutual welfare best by working together with full recognition by each of the legitimate rights of the other. And, equally important, they must at all times be sensitive to the needs and rights of the public.

Beyond this, in the words of the Chief Executive:

Insofar as management and labor are concerned, there is a vital responsibility upon them to comply with the law in a spirit of tolerance and fair play. Neither management nor labor will achieve any long-range benefit by seeking to use the provisions of this act to gain unfair advantage or to sustain arbitrary attitudes. It is in the interest of both to maintain steady production at fair wages while the effect of the new act is being tested by experience.

It is of interest to note that three thousand eight petitions were filed before the board during the month of January, 1948. Two thousand six hundred eighty-five petitions were for various types of elections. Two hundred fifty-two petitions alleged unfair labor practices by employers. Seventy-one petitions alleged unfair labor practices by unions. The nation observes closely the administration of the Act.<sup>9</sup>

*Robert F. Burns.*

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UNITED STATES—CONGRESSIONAL INVESTIGATIONS.—The investigation of the Hollywood film industry by the House Committee on Un-American Activities has recently evoked throughout the nation a clamor of protest in which the squeals of Communists whose toes had been stepped on mingled with the cries of leading jurists and lawyers whose legal sensibilities had been wounded by the high-handed procedural methods of the Thomas Committee. Whether any unjust charges were made, or any innocent citizens were prejudiced as a result of the inves-

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<sup>9</sup> Title I of the Act is discussed in 23 NOTRE DAME LAWYER 238 (1948). The NOTRE DAME LAWYER anticipates the publication of additional articles as decisions and rulings mark a trend.

tigation, the fact remains that in many instances the proceedings violated the fundamental Anglo-American principles of fair procedure and the spirit of the Constitution, not to mention natural justice.

Persons against whom accusations of Communism were made in public hearing were denied the right to cross-examine their accusers. Many of the charges were unsupported by concrete evidence, and no evidence was allowed to show their falsity. Persons were asked to testify as to their political affiliations, and, refusing to do so, were cited for contempt of Congress. Thus, a blight was cast upon the reputations of persons who, innocent or not, will have difficulty cleansing their name from the Communist taint for a long time to come. An ironic note is added when one considers that all this was done in the name of the Congress of the United States for the purpose of investigating un-American activities.

It seems clear that the committee was acting within Constitutional limits;<sup>1</sup> at least it is extremely doubtful that the Supreme Court of the United States will declare unconstitutional either the actions of the Committee or the House resolution<sup>2</sup> which created it. The power to investigate, carrying with it the ability to summon witnesses and punish them for contumacy, has been considered a necessary adjunct to legislative power since the early days of the British Parliament. Typical of the many committees of inquiry created by the House of Commons in the tumultuous period immediately following the Revolution of 1688 was the one authorized to investigate "Miscarriages in the Victualling in the Navy".<sup>3</sup> Lord Coleridge in 1845<sup>4</sup> quoted with approval Lord Coke's statement that the Commons were the "general inquisitors of the realm" and added that "Coextensive with the jurisdiction to inquire must be their authority to call for the attendance of witnesses, to enforce it by arrest when disobedience makes that necessary . . ." While the investigatory function of Congress is by no means as broad as that of its British counterpart, it is considered implicit in its grant of legislative power that Congress should be able to obtain information upon any matter which might become the subject of a law. The power to investigate is at least as great as the power to legislate, and is probably necessarily greater.<sup>5</sup> That this power must be implemented by demanding the testimony of witnesses and punishing them if they prove recalcitrant is obviously necessary to its existence. That was decided in 1897 in the case of *In re Chapman*.<sup>6</sup> The Supreme Court upheld the power

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1 United States v. Bryan, 72 F. Supp. 58 (D. D.C. 1947).

2 H. Res. 5, 79th Cong., 1st Sess., 91 CONG. REC. 10, 15 (1945).

3 5 HANSARD, PARL. HIST. ENG. 282 (1689).

4 Howard v. Gossett, 10 Q.B. 359, 116 Eng. Rep. 139 (1845).

5 See: United States v. Josephson, 165 F. (2d) 82 (C. C. A. 2nd 1947).

6 166 U. S. 661, 17 S. Ct. 677, 41 L. Ed. 1154 (1897).

of Congress to make criminal the contumacy of a witness called to investigate charges of corruption of members of Congress.

In *Kilbourn v. Thompson*,<sup>7</sup> decided in 1880, the Supreme Court delimited the investigatory power of the legislature when it held for the plaintiff in an action for false imprisonment against the Sergeant-at-Arms of the House of Representatives, who had jailed the plaintiff for refusing to testify before a House Committee investigating the bankruptcy of a debtor of the United States. Justice Miller said:

We are sure that no person can be punished for contumacy as a witness before either House unless his testimony is required in a matter into which that House has jurisdiction to inquire, and we feel equally sure that neither of these bodies possesses the general power of making inquiry into the private affairs of citizens.

This decision has been criticised as too narrowly confining the limits of congressional activity.<sup>8</sup> Later cases<sup>9</sup> have allowed greater latitude to Congress, and the present trend is to uphold the legitimacy of the inquiry, even where there is only a remote possibility of congressional action by legislation.<sup>10</sup> This policy was followed as lately as February, 1948, when the Supreme Court denied certiorari to the Second Circuit Court of Appeals in *United States v. Josephson*.<sup>11</sup> The appellant was summoned as a witness before the Sub-Committee of the Committee on Un-American Activities. He appeared, but refused to answer any questions or be sworn until he had "an opportunity to determine through the courts the legality of this committee". He was convicted on an indictment based on 2 U.S.C.A. § 192,<sup>12</sup> which declares a refusal to appear, or to answer any question pertinent to the question under inquiry to be a misdemeanor. The Court of Appeals<sup>13</sup> put down Josephson's objections to the measure, declaring that they could not presume that Congress would abuse its power, and that the possibility of such abuse was not grounds for holding that the power did not exist.

The authority, then, of the Committee is incontestable. Equally impregnable to attack on purely constitutional grounds is its activity

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<sup>7</sup> 103 U. S. 168, 11 D. C. 401, 26 L. Ed. 377 (1880).

<sup>8</sup> The court in *United States v. Josephson* intimated that had it been necessary for the decision, it would have examined the *Kilbourn* case with some doubt as to its avowed limitations upon Congressional investigations. 165 F. (2d) 82, 88 (1947).

<sup>9</sup> *McGrain v. Daugherty*, 273 U. S. 135, 47 S. Ct. 319, 71 L. Ed. 580 (1927); *Sinclair v. United States*, 279 U. S. 263, 49 S. Ct. 268, 73 L. Ed. 692 (1929).

<sup>10</sup> *Barry v. United States ex rel Cunningham*, 279 U. S. 597, 49 S. Ct. 452, 73 L. Ed. 867 (1929).

<sup>11</sup> .... U. S. .... (decided February, 1948).

<sup>12</sup> 52 STAT. 942, 2 U. S. C. A. § 192 (1938).

<sup>13</sup> 165 F. (2d) 82 (C. C. A. 2nd 1947).

in last October's hearings, for the time-honored procedural safeguards which antedate and are assured by our Constitution apply only to criminal proceedings.<sup>14</sup> It is no crime to be a Communist. Therefore, a man who is accused of Communism cannot demand the right to cross-examine his accuser, or the right to be immune from testifying against himself. Nevertheless, linking a man's name with Communism stigmatizes him far more effectively than would conviction of a minor crime.<sup>15</sup> Thus it becomes important that if rights of reputation are to be protected in Congressional hearings as well as in the criminal courts, procedural safeguards must be adopted by Congress itself to be used in investigations in which a man's good name is at stake. This need has been recognized by members of Congress who realize that that body has lost the confidence and respect of many citizens as a result of the inquisitorial tone of the hearings. Congresswoman Helen Gahagan Douglas, of California, felt strongly enough about the situation to introduce a bill in the House of Representatives providing for regular procedure to prevent further abuses.<sup>16</sup>

Mrs. Douglas's proposed enactment is divided into three sections. The first is a declaration of policy, to the effect that these committees and sub-committees should conduct their proceedings not as forums for making unsupportable charges detrimental to the persons involved, but in a manner calculated to be fair to all who may be affected thereby. Section two implements this policy. Paragraph (a) would assure witnesses at committee hearings the right to aid of counsel and to have "a full and fair presentation of the matter under investigation." Paragraph (b) provides that after every witness in a hearing has testified, he shall have the right to make either an oral statement, or, if he choose, to file a sworn statement relevant to the subject, which shall be made part of the record. Paragraph (c) is the core of the bill:

(c) If a committee or any member thereof shall make public any report furnished to it by its staff or others, or if any witness shall make, by oral testimony or documentary evidence, any statement reflecting adversely upon the character or reputation of any other person (including governmental officials or employees) the committee shall either at once strike such material from the record or shall grant to the person referred to an opportunity to cross-examine the person responsible for the report or making the statement, and to present countervailing evidence. Such cross-examination and evidence

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<sup>14</sup> *Hale v. Henkel*, 201 U. S. 43, 26 S. Ct. 370, 50 L. Ed. 652 (1906).

<sup>15</sup> Loss of employment could conceivably work as a bill of pains and penalties included within the prohibition against bills of attainder. See: *United States v. Lovett*, 328 U. S. 303, 66 S. Ct. 1073, 90 L. Ed. 1252 (1946).

<sup>16</sup> H. R. 4564, 80th Cong., 1st Sess., November 24, 1947.



shall be relevant to the interests of the individual who is involved, and may be subject to such reasonable limits of time and duration as the committee may impose. In addition, the persons concerned shall have the right, but unless subpoenaed shall have no obligation, to file with the committee any denial, defense, or explanation they may see fit and they shall have the right to testify in person.

Section three of the bill would secure members of the press from being compelled to answer for any adverse criticism of Congress or its members, before a Congressional committee, unless his testimony be deemed essential "upon vote of a majority of the committee or subcommittee before whom he is called to testify: *Provided*, That no person shall be called before any committee or subcommittee having less than five members."

The provisions of the bill are nothing more than obvious concessions to fair play; certainly they are not more stringent than the occasion demands.<sup>17</sup> Neither can it be said that they would in any way hamper Congress in its quest for the information necessary to its function. The lamentable fact is that such measures have been so forcibly shown to be necessary. To merely give to the person whose reputation has been unjustly damaged a recourse to the courts may be merely an attempt to lock the barn door after the horse has been stolen. Certainly, the adoption of these or similar procedural safeguards would do much to restore the prestige of congressional investigations.

F. H. Hicks

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INTERSTATE COMMERCE—THE NATURAL GAS ACT—DIRECT SALES TO ULTIMATE CONSUMERS.—The odious burden of regulation has led many companies engaged in interstate commerce into the courts in search of a "twilight zone" between state and federal jurisdiction. In one field, at least, such an hiatus seems now nonexistent. As Mr. Justice Rutledge said in *Panhandle Eastern Pipe Line Company v. Public Service Commission of Indiana et al.*,<sup>1</sup> in ruling that Congress intended by the Natural Gas Act<sup>2</sup> that the states were to control direct sales to

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<sup>17</sup> For a good discussion of the constitutional aspects of the problem, see Note, 47 COL. L. REV. 416 (1947). A penetrating analysis of the sometimes inquisitorial techniques of the Thomas Committee on Un-American Activities will be found in Walter Gellhorn's stimulating article: Gellhorn, *Report on a Report of the House Committee on Un-American Activities*, 60 HARV. L. REV. 1193 (1947).

<sup>1</sup> ....U. S....., 68 S. Ct. 190, 92 L. Ed. 173 (1947).

<sup>2</sup> 52 Stat. 821, 15 U. S. C. A. § 717 *et seq.* (1938).

industrial consumers, "The attractive gap which appellant has envisioned in the coordinate schemes of regulation is a mirage."

The "mirage" which Panhandle Eastern saw looks very real at first glance. The Public Service Commission of Indiana had ordered Panhandle Eastern to file its tariffs and reports for purposes of regulating its direct sales to ultimate consumers in Indiana. The pipe line company replied by seeking an injunction to set aside and enjoin the enforcement of the commission's order. The specific sale in question was one made by Panhandle Eastern direct to the Anchor-Hocking Glass Corporation. The trial judge granted the injunction, but the order was reversed by the Indiana Supreme Court.<sup>3</sup> Though sales of this type have been held to be interstate in character,<sup>4</sup> Congress, through the Natural Gas Act, expressly exempted them from federal jurisdiction. Congress cannot grant to the states control over interstate commerce, since that would be equivalent to a delegation of legislative power, but Congress can allow the states to regulate interstate commerce not then regulated by the federal government. The problem presented for decision in this case was, therefore, twofold. Did Congress by prohibiting the exercise of federal jurisdiction over these sales, intend to deliver them to state control? In the absence of such intent, were the local interests of the state so vital as to allow the state to operate in an area which the federal government had not occupied? In answering these questions in favor of state control the Court did not have to go far beyond precedent. Control of such direct sales, when made to both industrial and domestic consumers, had previously been held to be of such a local character as to justify state regulation, in the absence of Congressional action.<sup>5</sup> It was not necessary to rely on that, however, since it was clear from the circumstances surrounding the passage of the Natural Gas Act that it was the intent of Congress that the federal government should only regulate those sales which the Supreme Court had held to be beyond the regulatory power of the states.<sup>6</sup> It was equally clear

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<sup>3</sup> .... Ind. ...., 71 N. E. (2d) 117 (1947).

<sup>4</sup> *Western Union Telegraph Co. v. Foster*, 247 U. S. 105, 38 S. Ct. 438, 62 L. Ed. 1006 (1918); *Haskel v. Kansas Natural Gas Co.*, 224 U. S. 217, 32 S. Ct. 442, 56 L. Ed. 738 (1912); *West v. Kansas Natural Gas Co.*, 221 U. S. 229, 31 S. Ct. 564, 55 L. Ed. 716 (1911). Sales to local public utilities for resale have been held to be in interstate commerce until the gas enters the service pipes of the utility. *Public Utilities Commission v. Landon*, 249 U. S. 236, 39 S. Ct. 268, 63 L. Ed. 577 (1919).

<sup>5</sup> *Pennsylvania Gas Co. v. Public Service Comm.*, 252 U. S. 23, 40 S. Ct. 279, 64 L. Ed. 434 (1920).

<sup>6</sup> *Public Utilities Comm. v. Attleboro Steam & Electric Co.*, 273 U. S. 83, 47 S. Ct. 294, 71 L. Ed. 549 (1927); *State of Missouri v. Kansas Natural Gas Co.*, 265 U. S. 298, 44 S. Ct. 544, 68 L. Ed. 1027 (1924). These cases declared invalid state laws regulating sales to local distributing companies for resale.

that Congress intended that the natural gas industry be subject to regulation. As the Court said:<sup>7</sup>

The scheme was one of cooperative action between federal and state agencies. It could accomplish neither that protective aim nor the comprehensive and effective dual regulation Congress had in mind, if those companies could divert at will all or the cream of their business to unregulated industrial uses.

The bare question of the power of the State to regulate such direct sales seem, then, irrefutably answered. Mr. Justice Rutledge knew, however, that the problem had not been solved by that answer alone. When counsel for the pipe line company expressed concern that such state regulation would result in impeding the free flow of commerce, he answered:<sup>8</sup>

State power to regulate interstate commerce, wherever it exists, is not the power to destroy it, unless Congress has expressly so provided. It is the power to require that it be done on terms reasonably related to the necessity for protecting local interests on which the power rests.

Thus, the power of the states to regulate this commerce seems clearly limited. In examining the facts further, however, some doubt arises as to the meaning of this passage.

The sale which Panhandle Eastern made to Anchor-Hocking is typical of direct sales. The pipe line company and the factory enter into an agreement whereby gas is piped direct from the main pipe line to the factory. The factory, which up to then probably bought its natural gas from the local public utility, now becomes a customer of the pipe line company. Assuming that this sale is unregulated, the pipe line company may then determine its price on a competitive fuel basis. This is the danger of which the Public Service Commission complained. Yet, whether the sale to the factory be regulated or unregulated, the pipe line company cannot charge a price higher than that charged by the regulated public utility, since the factory would then, of course, resume dealings with the public utility. Thus, regardless of the monopolistic character of the natural gas industry, the factory owner is not put in an inferior bargaining position. On the contrary, he can probably get a much cheaper rate from the pipe line company as an inducement to deal with him. The only benefit he would receive from regulation would be the assurance that the pipe line company could not give undue advantage to his competitors. Thus, all the pipe line company and the factory owner are doing is dividing the difference between the respective costs

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<sup>7</sup> Panhandle Eastern Pipe Line Co. v. Public Service Comm. of Indiana, note 1 *supra*, 68 S. Ct. 190, 197.

<sup>8</sup> *Id.* at 198.

of the pipe line company and the public utility. The public utility company is not the only loser in this transaction, however. Ultimately, it is the consumer dealing with the public utility who pays the difference, as is illustrated by this footnote to Mr. Justice Rutledge's opinion in the *Panhandle Eastern Case*:<sup>9</sup>

Over 38 per cent of the gross revenues of the local Indiana utilities from the sale of gas is derived from service to the approximately 250 industrial consumers served by them. If service to any substantial number of the industrial users were to be taken over by appellant, the local utilities not only would suffer great losses in revenue, but would be unable to dispense with more than a trivial percentage of their present properties. *The resultant increase in unit cost of gas would lead necessarily to increased rates for the consumers served by the local companies.* (italics supplied).

In other words, if this trend toward direct sales to industrial consumers is allowed to continue, the unit costs of the public utilities will rise considerably, to the detriment of its customers. The interest of the state regulatory commission is not in uniform regulation, but in keeping utility rates as low as is consistent with sound business practice. To spell it out more simply, the state commission's interest is in discouraging, if not entirely prohibiting, these sales, and not in merely regulating them.

A recent case decided in a Circuit Court of Michigan<sup>10</sup> illustrates the problem. There, the Michigan Public Service Commission prohibited a sale by the same Panhandle Eastern Pipe Line Company to the Ford Motor Company. Panhandle sought an injunction to restrain the Commission from interfering with its contractual relations with Ford, which relief was granted. The court agreed that the sale was in interstate commerce, yet subject to state regulation, but denied that such power of regulation gave the power to prohibit direct sales entirely. The court relied on authority denying the state's power to "seriously interfere" with interstate commerce.<sup>11</sup> Although this case was decided before the Supreme Court handed down its decision in the aforementioned *Panhandle Eastern* case, it is difficult to see that the judge's ruling would be any different today. The Supreme Court's dictum that the power to regulate is not the power to destroy, unless expressly provided by Congress, could only serve to buttress the authority which

<sup>9</sup> *Id.* at 197.

<sup>10</sup> *Panhandle Eastern Pipe Line Co. v. Michigan Public Service Comm.*, Circuit Court of Ingham County, October 5, 1946.

<sup>11</sup> *Southern Pacific Co. v. Arizona*, 325 U. S. 761, 65 S. Ct. 1515, 89 L. Ed. 1915 (1945). An intervener, the Michigan Consolidated Gas Company, complained that if this sale were allowed, the company would sustain a loss in gross revenue of \$1,600,000 a year. The court felt that this was a matter for Congress to consider.

the court then had at its command. Yet, can the Supreme Court's decision be given this interpretation when the vital local interests which the Court deemed paramount, can only be protected by prohibiting, or at least discouraging, such sales? To answer this question, it is necessary to look further into the meaning given the Natural Gas Act by the Supreme Court.

The Court likened the Natural Gas Act to the McCarran Act,<sup>12</sup> which defines the limits of state power over insurance. In interpreting the McCarran Act in *Prudential Insurance Co. v. Benjamin*,<sup>13</sup> the Supreme Court held that, in allowing the states to tax interstate insurance companies, Congress had permitted them to levy discriminatory taxes.<sup>14</sup> In levying discriminatory taxes, states place a very definite burden on interstate commerce.<sup>15</sup> Moreover, discriminatory taxation could accomplish the same purpose as prohibitory regulation. It would be dangerous, however, to take Mr. Justice Rutledge's identification of the Natural Gas Act and the McCarran Act too literally. It seems clear from his opinion that he felt that any grave danger to interstate commerce occasioned by the Court's construction of the Natural Gas Act was dispelled by reaffirming the states' lack of power to destroy, in the absence of express permission of Congress. This would, of course, imply that the Court felt that the Natural Gas Act does not give this permission. This brings us, then, squarely to the problem. If the above explanation of the Supreme Court's interpretation of the Natural Gas Act is to be accepted, the states have not, by this act, been permitted to destroy interstate commerce. The vital local interests which the Court has thus far been careful to protect, demand, however, that these sales be prohibited. The situation takes on all the aspects of a dilemma.

Perhaps the solution lies in Congressional action. In hearings held in April of last year, before the final determination of the *Panhandle Eastern* case, John E. Benton, representing the National Association of Railroad and Utility Commissioners, recommended that Section One of the Natural Gas Act be amended to conform substantially with Sections One and Two of the McCarran Act.<sup>16</sup> Though this measure was

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<sup>12</sup> '59 Stat. 33, 15 U. S. C. A. § 1011 *et seq.* (1945).

<sup>13</sup> 328 U. S. 408, 66 S. Ct. 1142, 90 L. Ed. 1342 (1946).

<sup>14</sup> "We assume that the tax would be discriminatory in the sense of *Prudential's* contention." *Id.*, 328 U. S. at 429.

<sup>15</sup> Chief Justice Stone, in declaring a state tax discriminatory, said: "The vice characteristic of those which have been held invalid is that they have placed on the commerce burdens of such a nature as to be capable, in point of substance of being imposed or added to with equal right by every state which the commerce touches, merely because interstate commerce is being done, so that without the protection of the commerce clause it would bear cumulative burdens not imposed on local commerce." *Western Live Stock v. Bureau of Revenue*, 303 U. S. 250, 255, 58 S. Ct. 546, 82 L. Ed. 823 (1938).

<sup>16</sup> The proposed amendments would not have made any change in federal

never carried to a vote,<sup>17</sup> in all probability future legislation will take substantially the same form. If that is the case, it would not be difficult for the Supreme Court to construe the Act as allowing State Commissions to prohibit direct sales. Authority for such action has been held by the Court to have been given in construing statutes in other fields of interstate commerce. Congress has, at times, withdrawn from certain fields of interstate commerce in order to leave the states free to prohibit it. This has happened in the case of liquor,<sup>18</sup> oleomargarine,<sup>19</sup> and convict-made goods,<sup>20</sup> and in each case the laws have been upheld.<sup>21</sup> In none of these, however, was an express statement of power to prohibit felt necessary.<sup>22</sup> A case clearly analogous to the situation stated here is that of *Vance v. Vandercook*,<sup>23</sup> in which the Supreme Court upheld the power of the state to prohibit interstate commerce where Congress had given power to regulate under the Wilson Act.<sup>24</sup>

Perhaps the Supreme Court can protect these local interests without waiting for Congress to act. The cases cited by the Supreme Court<sup>25</sup>

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jurisdiction, but would only have strengthened the states' control over what they already have power to regulate. They provided that "silence on the part of Congress shall not be construed to impose any barrier to such regulation by state authority," and that those parts of the business not controlled by the federal government are "declared to be local in character, and shall continue to be subject to regulation under the laws of the several states, and such regulation shall not be held to be a burden on interstate or foreign commerce." Hearings before Committee on H.R. 2185, H.R. 2235, H.R. 2292, H.R. 2569 and H.R. 2956, 80th Cong., 1st Sess. (1947) 641.

<sup>17</sup> The history of these amendments has been extensively reviewed earlier in the NOTRE DAME LAWYER. Scanlon, *Administrative Abnegation in the Face of Congressional Coercion: The Interstate Gas Company Affair* (1948) 23 NOTRE DAME LAWYER 173.

<sup>18</sup> 26 Stat. 313, 27 U. S. C. A. § 121 (1890) (Wilson Act); 49 Stat. 877, 27 U. S. C. A. § 122 (1913) (Webb-Kenyon Act).

<sup>19</sup> 32 Stat. 193, 21 U. S. C. A. § 25 (1902).

<sup>20</sup> 45 Stat. 1084, 49 U. S. C. A. § 60 (1929) (Hawes-Cooper Act); 49 Stat. 494, 18 U. S. C. A. § 396b-e (1935) (Ashurst-Summers Act).

<sup>21</sup> *In re Rahrer*, 140 U. S. 545, 11 S. Ct. 865, 35 L. Ed. 572 (1891) (Wilson Act); *Clark Distilling Co. v. Western Md. Ry.*, 242 U. S. 311, 37 S. Ct. 180, 61 L. Ed. 326 (1917) (Webb-Kenyon Act); *United States v. Green*, 137 Fed. 179 (1905) (oleomargarine); *Kentucky Whip & Collar Co. v. Illinois Cent. R. R.*, 299 U. S. 334, 57 S. Ct. 277, 81 L. Ed. 270 (1937) (convict-made goods statutes).

<sup>22</sup> The Wilson Act provides that liquors transported into a State shall "be subject to the operation and effect of the laws of such State . . ." An act passed in 1902 regulating the sale of oleomargarine had substantially the same provision, as does the Hawes-Cooper Act. The Webb-Kenyon Act and the Ashurst-Summers Act made it unlawful to import "in violation of any law of such State . . ." see note 16, *supra*.

<sup>23</sup> 170 U. S. 438, 18 S. Ct. 674, 42 L. Ed. 1100 (1898).

<sup>24</sup> 26 Stat. 313, 27 U. S. C. A. § 121 (1890).

<sup>25</sup> *United States v. Darby*, 312 U. S. 100, 61 S. Ct. 451, 85 L. Ed. 609 (1940); *Kentucky Whip & Collar Co. v. Illinois Cent. R. R.*, *Clark Distilling Co. v. Western Md. Ry.*, both *supra* note 18.

in support of the state's lack of power to destroy interstate commerce, in the absence of the approval of Congress, differ from this situation in one important respect. In those cases, interstate commerce had been directly prohibited, *e. g.* liquor.<sup>26</sup> In the factual situation presented to the Michigan Circuit judge, the pipe line company was not prevented from selling its gas within the state, it was merely told to whom it could sell. True, such an instruction involved a prohibition of interstate commerce, but a very logical distinction can be made between the sort of obstruction of commerce which the commerce clause was designed to prevent, and prohibition as an aspect of valid regulatory powers. As one court expressed it, in speaking of federal power over interstate commerce: <sup>27</sup>

In other words, although the power over interstate transportation was to regulate, that could only be accomplished by prohibiting the use of the facilities of interstate commerce to effect the evils intended.

By weighing the local and national interests involved, a workable and well-known test is provided for determining whether particular prohibitory state statutes destroy, or merely regulate, interstate commerce. As the Court itself said, such regulation must "be done on terms reasonably related to the necessity for protecting local interests on which the power rests."<sup>28</sup> That the Supreme Court has this power over state statutes is well recognized.<sup>29</sup> To the argument that this unduly widens the discretionary power of the Supreme Court, there is the answer of the long history of decisions where this power has been logically and effectively used.<sup>30</sup> It would be presumption, however, to say that this is the real construction which the Supreme Court placed on the Natural Gas Act. It is still difficult to avoid the fact that the Court answered the appellant's fears that its commerce would be impeded by defining the states' power to destroy. One thing, at least, is certain. The problem cannot be avoided. The trend toward this type of sale can only result in restrictive and prohibitory regulation by the states. Perhaps the resultant litigation will produce a clearer definition of the limits of state power on the natural gas industry.

*John H. O'Hara*

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<sup>26</sup> *In re Rahrer*; *Clark Distilling Co. v. Western Md. Ry.*, both *supra*, note 18.

<sup>27</sup> *Hammer v. Dagenhart*, 247 U. S. 251, 38 S. Ct. 529, 62 L. Ed. 1101 (1918).

<sup>28</sup> *Panhandle Eastern Pipe Line Co. v. Public Service Comm. of Indiana*, note 1 *supra*, 68 S. Ct. 190, 198.

<sup>29</sup> *Southern Pacific Co. v. Arizona*, 325 U. S. 761, 65 S. Ct. 1515, 89 L. Ed. 1915 (1945).

<sup>30</sup> An analysis of the cases on the Supreme Court as the arbiter of State laws can be found in a recent article by N. T. Dowling. Dowling, *Interstate Commerce and State Power—Revised Version* (1947) 47 *COL. L. REV.* 547.

MARRIAGE—CONTRACEPTION AS A GROUND FOR ANNULMENT ON THE BASIS OF FRAUD.—The English House of Lords has recently caused much comment and controversy both in the United States and in England by a decision relating to an interpretation of the primary purpose of matrimony. In the decision, in the case of *Baxter v. Baxter*,<sup>1</sup> England's highest court decided that a husband, who had been married ten years, was not entitled to an annulment of the marriage on the grounds of non consummation because his wife insisted on the use of contraceptives and would not have intercourse with him unless he used adequate means to avoid conception.

The case was notable, not so much for the decision itself, which seems to reiterate much which has already at least been implied in American law, but for the statements regarding the primary purpose of matrimony. The House of Lords seems to be of the opinion that the procreation of children is not the primary end of matrimony; that it is only one of the results to be achieved by marriage, and that, in this enlightened day, it is not essential.

This erroneous enunciation of the primary purpose of marriage necessarily caused much adverse comment; it focuses attention on the small, but rapidly growing body of law and jurisprudence in this country on the effect of contraception as a ground for avoiding a marriage upon the basis of fraud. It can be said at the outset that it is very doubtful if at this time an enlightened American court would make such statements concerning the end of matrimony as did the House of Lords. But, as will be seen, the same result might be reached through different reasoning. The decision in the House of Lords was not cause for surprise or consternation. The reasons for the decision, however, undermine the basic principles of the law of marriage as it has been constituted by God and as it has always existed.

In order properly to understand the law as it exists today, it is necessary to dwell briefly upon the possible rationale of an annulment on the grounds of contraception. This rationale is to be found in the doctrine that any fraud material to the inducement of the marriage contract, which goes to the essence thereof, and by which the other spouse is really deceived, is cause for an annulment on the ground of fraud.<sup>2</sup> Certainly, as will afterwards be seen, an ecclesiastical court, applying the principles of the canon law, would employ entirely different reasoning to reach similar conclusions, if the facts of the case warranted an ecclesiastical decree of initial nullity.

At the common law of England, the courts, not too far removed from the ecclesiastical jurisdiction which formerly adjudicated marriage

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<sup>1</sup> 1948 A.C. . . . See *Time*, Feb. 2, 1948, p. 40.

<sup>2</sup> MADDEN, *PERSONS AND DOMESTIC RELATIONS* 13, and cases cited therein.



cases, would not recognize fraud in the inducement of the marriage contract as a basis for an annulment thereof. The ecclesiastical courts, as will be seen more fully shortly, treated the subject of fraud as misrepresentation as to the subject matter of the contract of matrimony, to the ends thereof, or to the identity of a person, and not as a "deception which induced a marriage which the complaining party intended as such, with the party he intended to marry."<sup>3</sup>

The doctrine of fraud first appeared in America in the guise of duress.<sup>4</sup> In the first important recorded case on the subject,<sup>5</sup> the Supreme Judicial Court of Massachusetts gave an interpretation to a divorce statute, holding it to mean that fraudulent misrepresentations affecting the essence of a marriage contract would permit the deceived spouse to avoid the contract. This proposition remains the law to this day.

Since 1900 the cases have multiplied rapidly, and now practically all states carry annulment statutes which authorize annulment on the ground of fraud. However, the same interpretation is usually given to the law whether or not a statute exists.<sup>6</sup>

Any consideration of contraception by the courts must necessarily be related to fraud in its contractual meaning, since it must stand upon the doctrine of fraud going to the essence of the marriage contract rather than upon the canonical concept of the "end of marriage" *per se*. It will not be based upon the sacramental-contractual idea of the canon law, in view of the fact that the end of marriage is susceptible of varying interpretations by different courts. It is here that the danger of extension of the reasoning of the House of Lords seems to lurk. For an understanding and comparison of the basic principles of the doctrine of both civil and canon law, and their application to contraception cases, it is desirable first to examine the canon law on the subject.

As has been previously indicated, the Catholic Church views the procreation of children as the primary end of marriage, as Canon 1013 of the Code of Canon Law specifically enacts.<sup>7</sup> In the canonical view, the nature of marriage, while based on a free-will contract, is elevated to the dignity of a sacrament. Its roots are deep in natural and divine law, and its necessary monogomy is based upon the inherent nature of man as a rational being.

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<sup>3</sup> *Ibid.*

<sup>4</sup> *Ferlat v. Gojon*, 1 Hopk. Ch. (N.Y.) 478, 14 Am. Dec. 554 (1825).

<sup>5</sup> *Reynolds v. Reynolds*, 3 Allen (Mass.) 605, 85 Mass. 605 (1862).

<sup>6</sup> MADDEN, PERSONS AND DOMESTIC RELATIONS, 14.

<sup>7</sup> "The primary end of marriage is the procreation and education of children; its secondary end is mutual help and the appeasement of concupiscence. The essential properties of marriage are unity and indissolubility, which acquire a special stability in Christian marriage in virtue of its sacramental character." CANON 1013, THE CODE OF CANON LAW.

Because of this nature of valid Christian marriage of baptized consorts, the Church considers it to be indissoluble. "What God hath joined together, let no man put assunder."<sup>8</sup> As Canons 1015 and 1118 of the Code of Canon Laws specifically declare, there is no such thing as a divorce obtainable in the Catholic Church from the bonds of a consummated marriage between two baptized consorts.

Consequently, references to the sentences of ecclesiastical courts as "divorces" are misleading and entirely erroneous.

The ecclesiastical remedy for a "marriage" not contracted according to the laws of the Church, or one in which no real consent has mutually been exchanged, is an authoritative adjudication that no true contract ever existed *ab initio*. Here there is no real severance of the marriage tie, for no valid or sacramental marriage ever existed in fact. The Church issues a declaration of the nullity of a matrimonial alliance, *ab initio*, in cases of impotency, nonage, consanguinity, affinity, and certain other impediments, some of which are also recognized by the common law and the courts of this country. While the roots of these impediments are generally based on the natural law or divine law as expressed in the canon law, the present day civil law does not take cognizance of them as canonical, but recognizes their origin only historically. The basis of civil annulments is civil only, and is determined by the exigencies of expediency, by experience, and by social policy.

The Church's procedure in cases involving consent to the marriage is directly related to the problem here at hand, for it is within this realm that contraception cases arise. The Church recognizes marriage as based on contractual consent. So too does the state. The Church, however, as seen above, views the resulting contract as elevated to the dignity of a sacrament. Elements, therefore, which would not invalidate a civil marriage on the ground of fraud, such as a marriage with a condition against the permanency of the marriage, may be grounds for a canonical declaration of the initial invalidity of the marriage on the ground of lack of consent. Nevertheless, declarations by the Church of the nullity of marriage contracts which were invalid *ab initio* are very infrequent in view of the Church's conscientious carefulness in preparing contractants for the proper understanding of the sacred and enduring nature of the Christian marriage contract. Furthermore, in view of its sacramental character, there is no human power or cause, except death, which can dissolve a valid and consummated marriage of two validly baptized persons, as Canon 1118 of the Code of Canon Law enacts.

When any future condition contrary to the substance of the marriage contract is attached thereto by either consort, or by both, without which condition the marriage would not be contracted, the marriage is

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<sup>8</sup> Ephesians V, 21-30.

invalid.<sup>9</sup> Thus, an absolute condition, placed at or before the marriage, that the consort or consorts would not enter into the marriage if it were indissoluble, which condition is contrary to the substance of marriage, would be a sufficient cause for declaring the nullity of the marriage *ab initio*.<sup>10</sup> Accordingly, the practice of contraception, with the firm intent of totally excluding children from the marriage, so long as it should endure, which condition, placed at or before the marriage, was a *sine qua non* thereof, would likewise be cause for annulment.<sup>11</sup>

It is to be clearly understood at this point that the mere practice of contraception alone would not be a basis in canon law for a declaration of the nullity of a marriage *ab initio*. The law of the Church makes a very clear distinction in cases of simulated matrimonial consent between the firm intent of not contracting a valid marriage and the intention of contracting a marriage but not living up to its sacred obligations in relation to the "boon of progeny". Experience proves that most people who are unfaithful to their marriage vows contract a real marriage fully accepting the marriage contract and obligating themselves to it. At the same time, however, they may have the firm intention of abusing their matrimonial right by insisting on contraception and even abortion. In such cases, the marriage is unquestionably valid in view of the juridical fact that the intention of contracting a valid marriage and of obligating oneself thereby can well coexist with the intention of violating the obligations assumed in the marriage contract. Consequently, it is clear that a couple could practice contraception in abuse of their marriage obligation without thereby nullifying their marriage contract, which was valid *ab initio* and remains valid despite the practice of contraception.<sup>12</sup>

When the very right to the conjugal act is clearly and definitely excluded from the matrimonial contract by a positive act of the will of the contractant, the marriage is invalid according to the law of the Church. The reason is that the absolute and positive exclusion of the right to the conjugal act has deprived the contract of the primary purpose of marriage. Hence, there can be no valid contract. Consequently, in a case like this the question would not be the performance or non-performance of the act proper to the state of matrimony, but it would be a matter of the absolute exclusion of the basic right that is essential to marriage, which thereby constitutes the marriage invalid, *ab initio*.<sup>13</sup>

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<sup>9</sup> WILLIAM J. DOHENEY, C.S.C., CANONICAL PROCEDURE IN MATRIMONIAL CASES, I, 944 (1948).

<sup>10</sup> *Id.* at 983-1003.

<sup>11</sup> *Id.* at 950-978.

<sup>12</sup> *Id.* at 857-895.

<sup>13</sup> *Id.* at 890.

A brief discussion of two Rota cases may help to illustrate the points just made. In one case,<sup>14</sup> A and L were married, but only after the husband had placed a *conditio contra bonum prolis* (condition against the boon of progeny) in the contract, to which condition the wife had assented. The court held the marriage invalid ab initio because A never intended to contract a real marriage with L. A's intent was to consent to no real marriage, and because of this fact, no consent to a valid sacramental marriage had passed. There was no validity in the alliance.<sup>15</sup>

In another case,<sup>16</sup> the facts proved that there was really no *conditio contra bonum prolis*. In fact, if there was any semblance of such a condition, it was only temporary, because of the state of the wife's health, and was not intended to exclude children altogether from the union. There was only to be a delay in the fulfillment of the primary obligations of the married state. Consequently, the sentence of the Tribunal of the Sacred Roman Rota declared that the marriage was valid ab initio.<sup>17</sup>

It will again be observed that these cases do not group the invalidity of marriages for conditions *contra bonum prolis* into the general category of fraud. The so-called marriage is not a real marriage whenever both consorts agree to a condition contrary to the essence of the marriage contract. Similarly, there is no valid marriage contract when one contractant fraudulently conceals a condition contrary to the essence of the same marriage contract. As will be observed shortly, the civil law will not annul for a condition *contra bonum prolis* unless it is fraudulently concealed.

Returning now to a discussion of the law in this country on the effect of a condition or intent that there shall be no children in the marriage, it is first advisable to discuss briefly the attitude of American courts toward the canonical impediments and the end of matrimony. As has been noted, the civil courts do not give effect to canonical or other religious impediments in most cases.<sup>18</sup> Marriage is a civil contract. True, it has certain peculiarities and is regulated by law more than are other contracts, but it is not a sacrament as far as the law is concerned. Its principal end, however, is the procreation of children. That this interpretation of the end coincides with the canonical doctrine is fortunate, but it is not necessarily guaranteed that the two will continue to coincide.

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<sup>14</sup> *S.R. Rotae Dec.*, VIII (1916) 139.

<sup>15</sup> See WILLIAM J. DOHENEX, C.S.C., *op. cit. supra* note 9, pp.953-955 for discussion.

<sup>16</sup> *S.R. Rotae Dec.*, XIV (1922) 180 ss.

<sup>17</sup> See WILLIAM J. DOHENEX, C.S.C., *op. cit. supra* note 9, pp. 957-959 for discussion.

<sup>18</sup> *Gatto v. Gatto*, 79 N.H. 177, 106 A. 493 (1919).

The last vestige of direct canonical control in the civil law of matrimony passed from the Anglo-Saxon countries on this continent in 1921.<sup>19</sup> Previous to that time, the civil courts of Quebec had given the canonical impediments effect. But in 1921, in the celebrated case of *Despatie v. Tremblay*,<sup>20</sup> an appeal was taken from the Supreme Court of Canada, where the canonical impediments had been upheld, to the Privy Council of England. The decision was reversed. In that case the parties were fourth cousins, and the Canadian Court, in upholding the canonical impediment, had recognized the disability of the parties, who were Catholics. The Superior Court of Canada, which also had upheld the annulment, had said,

Virtually, article 127 subordinates marriage, as a civil contract, to the authority of the ecclesiastical power, since the secular power recognizes as validly contracted only that marriage which has been contracted according to the rules administered by the ecclesiastical authorities, of whatever denomination they may be. (translated from the French.)

But the Privy Council refused to recognize these principles. The law of England does not recognize a disability of a religious character.<sup>21</sup>

The one possible American exception is the recognition by some courts, particularly in some New York decisions, that a fraudulent promise by one party to participate in a religious ceremony after a civil ceremony is sufficient fraud to invalidate the marriage.<sup>22</sup> But even in New York, and elsewhere, there is authority contrary to this proposition.<sup>23</sup> And whether or not it is given effect by the courts, it cannot properly be said to be the recognition of a canonical disability, since the decisions in favor of the annulment have been on the grounds of fraud, an impediment not recognized, as we have seen, at canon law. In New York, also, the fraud need not go to the essence of the marriage contract peculiarly, as will be seen. As far as the canon law is concerned, those Catholics who are not married before a priest are not married at all, and so the question is of more than academic importance in some

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<sup>19</sup> See generally, Herbert A. Smith, *Church and State in North America*, 35 YALE L.J. 461 (1926).

<sup>20</sup> 1 A. C. 702; noted in 30 YALE L. J. 756 (1921).

<sup>21</sup> 16 HALSBURY, LAWS OF ENGLAND 283 (1901) § 524.

<sup>22</sup> *Watkins v. Watkins*, 197 App. Div. 489, 189 N.Y.S. 860 (1921); *Rutstein v. Rutstein*, 221 App. Div. 70, 222 N.Y.S. 688 (1927); *Rosza v. Rosza*, 117 Misc. Rep. 728, 191 N.Y.S. 868 (1922); *Aufiero v. Aufiero*, 222 App. Div. 479, 226 N.Y.S. 611 (1928).

<sup>23</sup> *Schatcher v. Schatcher*, 109 Misc. Rep. 152, 178 N.Y.S. 212 (1919); *Wells v. Talham*, 180 Wis. 654, 194 N.W. 36 (1923); *Boehs v. Hanger*, 69 N.J.Eq. 10, 59 A. 904 (1905). See: *Mirizio v. Mirizio*, 242 N.Y. 74, 150 N.E. 605, 607, 44 A.L.R. 714 (1926). See also New York Civil Practice Act (Laws of 1920 c. 925, Art. 68, § 1139.)

cases. An interesting and confusing case is *Mirizio v. Marizio*,<sup>24</sup> where the court refused to allow the plea that a promise to be married before a priest had been made prior to a civil ceremony, while holding, at the same time, that there was a natural duty on the part of the wife to engage in intercourse and raise a family.

It may be interjected at this point that *Baxter v. Baxter* was not decided upon the ground of fraud, but of nonconsummation, which was claimed by the husband. It is too abstruse a theological problem to say here what constitutes consummation, but it may generally be said that the courts in the United States have not decided a contraception case upon that ground alone, but upon the ground of fraud. Consummation has been treated only in considering waivers of the fraud.

There is some conflict as to whether or not the fraud which induces the contract must go to the essence of the marriage contract peculiarly. Some cases have held that a fraud which would be enough to vitiate an ordinary contract would suffice. In the classic New York case of *DiLorenzo v. DiLorenzo*,<sup>25</sup> the rule was laid down that marriage is a civil contract, requiring for its validity that free consent which is the essence of all ordinary contracts, and every misrepresentation of a material fact, made with the intent to induce the other party to enter the agreement, and without which it would not have been made, authorized the vacation of the marriage contract. The general proposition, outside of New York, remains that the fraud must go to the essence of the marriage contract.<sup>26</sup> In the *DiLorenzo* case, the court said:

While the marriage contract, in its legal aspects, has no peculiar sanctity as a social institution, a due regard for its consequences and for the orderly constitution of society has caused it to be regulated by laws in its conduct as well as in its dissolution.

The observation may be made that the court has mistaken the entire true concept of the matrimonial relation, has treated it as a convenient creature of the civil law, and has implied its essential dissolubility. This doctrine, of course, squarely conflicts with the canon law and natural morality.

In New York, as well as in the states where a fraudulent promise must go to the essence of the marriage contract before a marriage in reliance thereon will be annulled, it is settled law that a promise to en-

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<sup>24</sup> 242 N.Y. 74, 150 N.E. 605, 607, 44 A.L.R. 714 (1926).

<sup>25</sup> 174 N.Y. 467, 67 N.E. 63 (1903). But see dissenting opinion beginning at page 62 in *Schonfeld v. Schonfeld*, 260 N.Y. 477, 184 N.E. 60 (1933).

<sup>26</sup> *Reynolds v. Reynolds*, 3 Allen (Mass.) 605, 85 Mass. 605 (1862); *Allen's Appeal*, 99 Pa. 196, 44 Am. Rep. 101 (1881); *Wells v. Talham*, 180 Wis. 624, 194 N.W. 36 (1923).

gage in marital intercourse is implied in the marriage contract, and that a refusal so to engage, after marriage, when the conduct has not been condoned or waived by the other spouse, is sufficient to invalidate the marriage because of fraud.<sup>27</sup>

Implicit in this doctrine is the fact that the courts recognize normal marital relations as essential to the marriage contract. Included in those normal relations is the begetting of children, which in the view of the courts<sup>28</sup> is necessary for the stability of society.<sup>29</sup> It is upon these grounds that the fraudulent concealment of an intention not to have intercourse at all, or to have intercourse so that the natural and expectable result thereof is thwarted, is sufficient reason to declare an annulment of a marriage contract when there has been an implied or express promise to fulfill those obligations.

The development of the law in contraception cases has been very late. Perhaps this fact results from the comparatively late general acceptance of artificial birth control devices, which, although extant for centuries, have only recently come into such wide use that attempts to control them have proved futile. The first recorded case directly involving contraceptives was not decided until 1937.<sup>30</sup> It is upon the authority of this principal New York case that subsequent cases have been decided.

In that case, *Coppo v. Coppo*,<sup>31</sup> the court held that a husband, who entered a marriage on the express promise that his wife would have children, was entitled to an annulment of the marriage even though there was subsequent intercourse before the discovery of the real intention of the wife. As a rule, the courts are reluctant to annul a marriage when it has been consummated;<sup>32</sup> but since, apparently, the courts agree with the English decision that contraceptive consummation is really consummation, their annulment of a "consummated" marriage is upon the basis that the fraud continues until discovery, when any subsequent intercourse waives it.

After *Coppo v. Coppo*, other cases clearly intimated that, although a family was intrinsic to the marriage contract, an agreement between the spouses not to have children because of contraception would not be grounds for annulment. This point will be observed in the discussion of the cases below. By agreement, then, husband and wife are able to live

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<sup>27</sup> *Millar v. Millar, et al.*, 175 Cal. 797, 167 Pac. 394, L.R.A. 1918B 415, Ann. Cas. 1918 E (1917) and cases cited therein.

<sup>28</sup> See: *Mirizio v. Mirizo*, 242 N.Y. 74, 150 N.E. 605, 607 (1926).

<sup>29</sup> *Id.*

<sup>30</sup> *Coppo v. Coppo*, 163 Misc. Rep. 249, 297 N.Y.S. 744 (1937).

<sup>31</sup> 163 Misc. Rep. 249, 297 N.Y.S. 744 (1937).

<sup>32</sup> See MADDEN, PERSONS AND DOMESTIC RELATIONS 19, and cases, treatises, and articles cited therein.

legally together, in some cases, when no consent to a valid canonical marriage has ever been given.

In *Schulman v. Schulman*,<sup>33</sup> there was no adequate statement of facts in the reporter. From subsequent cases, citing the *Coppo* and *Schulman* decisions, it may reasonably be inferred that the wife in the *Schulman* case had insisted, after marriage, on the use of contraceptives. Previous to the marriage, nothing had been said about children. The court held that the wife's silence as to children implied her acquiescence to usual marital implications, and that subsequent insistence on her part as to when she would have a child constituted injecting into the marriage contract a provision that the law does not place there when parties enter into the contract silently. This case clearly implies that there would be no grounds for annulment when both parties consented to contraception.

But a controversy as to the number of children is harder to prove as fraud. In *Bohok v. Bohok*,<sup>34</sup> the *Coppo* and *Schulman* cases were cited as authority. The court there said that it would be necessary to prove that there was a continuing fraudulent intent, notwithstanding the birth of a child, unknown to the deceived party, and that the deceived party did not acquiesce in the fraud. The implication here that the marriage would be annulled under those circumstances seems very unsound, and is probably due to the loose so-called "New York" rule, since few courts would hold that a restriction on the *number* of children would be a fraud going to the essence of the contract.

A waiver of the fraud will constitute a bar to an annulment action in most cases. In *Dodge v. Dodge*,<sup>35</sup> the defendant promised the plaintiff that, in addition to embracing her religion, subsequent to the ceremony, he would have a family. Shortly after the ceremony, when the defendant had marital intercourse with the plaintiff, he used a contraceptive. She acquiesced in this contraceptive intercourse because he said that he was about to be drafted and that having a family should await his return. The court held that by her acquiescence she was put upon notice of the fraud, so that either the promise did not concern a matter which the plaintiff considered material, or her acquiescence with knowledge was a waiver of the fraud.

And in *Gerwitz v. Gerwitz*,<sup>36</sup> the defendant husband agreed to have children, but after the marriage he insisted on using contraceptives. The wife submitted to this practice for three and one half years, when she finally brought suit for annulment. There was held to be a waiver, and no annulment was granted. There the court said,

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<sup>33</sup> 180 Misc. Rep. 904, 46 N.Y.S. (2d) 158 (1943).

<sup>34</sup> 186 Misc. Rep. 991, 63 N.Y.S. (2d) 560 (1946).

<sup>35</sup> 64 N.Y.S. (2d) 264 (1946).

<sup>36</sup> 66 N.Y.S. (2d) 327 (1945).



Implicit in the marriage contract is the representation that the parties will have normal and natural relations, and that they will not do anything which will frustrate the normal and natural result of those relations. Where nothing is said prior to the marriage by a spouse on the subject of children, it is presumed that he or she intends to enter the marriage contract with all the implications, including a willingness to have children.

The fraud does not consist in the failure to have children, or the failure to have normal and natural relations. The fraud consists of the promise to have proper relations without any intention of keeping the promise to deceive the other spouse.

Here, again, the court is bedeviled by the spectre of the ever-present idea of a mere civil contract. It is here again implied that in the absence of any such agreement by an express exclusion of children from the marriage, no annulment can possibly be obtained because there would be no fraud. The quoted statements seem to be an adequate summary of the attitude of the courts in general.

A much better perception of the true end of matrimony is observed in *Hafner v. Hafner*.<sup>37</sup> Here the court, while it denied an annulment because there was cause to believe that a fraud was being worked upon the court, laid down very blunt observations concerning the real nature of marriage and the natural law. The court, through Judge Walsh, said,

The primary end of marriage by the law of nature is the procreation of children. It is the plan of nature and of nature's God for the perpetuation of the human family. Each spouse has a right to expect that the other will accept the obligations as well as the privileges and rights of marriage.

It is common knowledge, however, that sometimes both spouses enter marriage intending not to have children. They use devices to prevent the birth of children. Many people know, but some apparently do not know, that such practices are contrary to the natural law.

The judge, however, did not feel that he could annul the marriage under the law, because the spouses had been married six years. Reference was made in the opinion to a growing practice in New York of using this means to avoid an unhappy marriage. Apparently there are many cases which are not reported, because the judge took occasion to castigate those who brought such suits into court, and, by answering merely "yes" or "no" to leading questions from their attorneys, sought to prove fraud in the practice of contraception. *Hafner v. Hafner* apparently was such a case.

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<sup>37</sup> 66 N.Y.S. (2d) 442 (1946).

In *Berger v. Berger*,<sup>38</sup> it was held that the fact that the husband cohabited with the wife for nearly eleven months after the marriage did not constitute condonation.

There seems to be but one case outside the New York jurisdiction on the point of contraception as fraud. This case is reported from Michigan.<sup>39</sup> Obviously, the easy divorce laws in most states are the reason. Where such divorce laws exist, people with no religious scruples to the contrary obtain divorces, often collusive, while Catholics have recourse to the ecclesiastical courts and then to the regular divorce courts when the marriage has been declared null ab initio according to the laws of the Church. Nevertheless, there are undoubtedly many cases decided upon the point each year, but, as so many divorce and annulment actions are uncontested, no appeals from the decision of the lower courts are made. For that reason the law on many points of marriage and divorce is still sketchy.

In the Michigan case, it was decided that a husband who married his wife on the promise that she would have children was entitled to an annulment on the basis of fraud going to the essence of the marriage contract when the wife, after marriage, refused to have intercourse with him unless contraceptives were used.

Such, then, is a general view of the few decisions relating to contraception and annulment. Since they come from but two states, it may be folly to draw from them any general observations. However, they rest upon well-defined and well-settled points of law. There seems to be no reason why other courts would not follow them should a case arise. But a recent New Jersey case,<sup>40</sup> stating that morality was a matter of mores, might be expanded into a reiteration of the notion of the House of Lords.

Undoubtedly, the attitude of the courts toward marriage is secular. But our society is composed of many religious groups, none of which have any special standing under the law. Since the courts have not recognized canonical impediments as such for many years, it is not to be expected that they will do so now. That they are generally agreed that the prime end of matrimony is the procreation of children is to their credit, and one should not be too exacting in requiring that they conform to the views of the canon law *in toto*. It would be bootless to advocate such a fundamental change in American law. As long as the courts do not depart from the true doctrine in the direction of the opinion of the House of Lords, we cannot, at this time, expect much more from them. They can, and should, clarify what they mean by "consum-

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<sup>38</sup> 73 N.Y.S. (2d) 384 (1947).

<sup>39</sup> *Stegienko v. Stegienko*, 295 Mich. 530, 295 N.W. 252 (1940).

<sup>40</sup> *Petition of Smith*, 71 F. Supp. 968 (D. N. J. 1947).