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## The Law of California Co-Operative Marketing Associations

### SCOPE

THIS paper deals with specific performance of the crop agreements of the California co-operative agricultural marketing associations. These agreements are the contracts between the associations as buyers or agents and the grower-members or stockholders as sellers or principals, and are variously termed marketing agreements, crop contracts, produce sale agreements, members' contracts and growers' contracts.

The legality of the associations will first be considered, followed by a discussion of the California law of specific performance. After establishing the necessary jurisdictional facts showing the lack of an adequate remedy at law, the various defenses to an action of specific performance will be considered. These will include the questions of mutuality, personal service, continuous acts, uncertainty and unfairness.

But the economic and legal aspects of the subject are connected so closely that a thorough understanding of the one is essential to a proper discussion of the other. For this reason, the economic basis of co-operative associations will be considered before their purely legal principles.

### THE ECONOMIC BASIS

In order that agriculture may continue, it is obvious that the producer must receive an amount at least equal to the cost of production.<sup>1</sup> The achievement of this important end brings into play two fundamental economic principles—first, the law of increasing returns; second, the law of supply and demand.

The law of increasing returns clearly applies to the marketing

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<sup>1</sup> The weather hazard is so great that the average costs over a series of years must be taken to arrive at the true cost basis. See 1912 Yearbook, Dept. Agric. 354.

of agricultural products. The three factors which enter into the distribution of farm products are packing, shipping and selling. Each of these can be conducted at a less cost per unit on a large scale; the larger the scale, the smaller the unit cost.<sup>2</sup>

Our second principle, the law of supply and demand, is of equal importance. If the demand will not absorb the supply at a price equal to the cost of production, then the cost must be decreased or the demand must be increased.

The producer should receive a price sufficient to pay him a fair return for his labor and investment, and at the same time to enable the entire supply to be absorbed by the demand. Instead, however, the price has usually been determined without reference to cost production and with little thought to the ultimate effect of supply and demand. Usually the grower either sold to a speculative buyer several months before the product was ripe, or took a gambling chance and sold through a commission man. Sometimes the buyers agreed among themselves to fix a maximum price, or to apportion the producing territory; sometimes only one buyer would appear in a given district; and on some occasions there would be no buyer at all.

Selling on commission had its unpleasant features. The marketing hazards were borne by the farmer; he was often entirely dependent upon the integrity of an unknown and distant agent. It was not uncommon for neighboring growers to receive entirely disproportionate returns for the same products; nor was it uncommon for growers to sell their crops far below the cost of production, and it was by no means a rare occurrence when fruit rotted on the trees or was fed to the hogs.<sup>3</sup>

Meanwhile the consumer was paying high prices. Contracts for farm products often changed hands six or eight times before delivery was made. Each purchaser added his profit, with the resultant addition to the consumer's burden. At one locality, the market would be congested and tons of produce would be wasting in the fields, while at another there would be a scarcity of the same product, with prices rising. There was no relation between

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<sup>2</sup> Plehn, *The State Market Commission of California*, *American Economic Review*, Vol. VIII, p. 1.

<sup>3</sup> Cumberland, *Co-operative Marketing* (1919), p. 43 ff; Powell, *Co-operation in Agriculture*, p. 206 ff; Coulter, *Co-operation Among Farmers*, Ch. X; Lloyd, *Co-operative and Other Organized Methods of Marketing California Horticultural Products*, Univ. of Ill. Studies in Soc. Sciences, Vol. VIII, No. 1, Chs. 1, 2 (March, 1919); *Fourth Annual Report State Market Director of California* (1920), p. 8 ff.

the amount paid by the consumer and the amount received by the producer, while neither the amount paid or received had any relation to the cost of production.<sup>4</sup>

From such conditions as these came the need for a radical change. It was apparent that some system must be evolved whereby both the producer and consumer would benefit. Certain factors are essential to such a system. In order to distribute his products scientifically, the grower should be served by an efficient information service; his products should be standardized and made known to the buying public by means of trade brands and names combined with an extensive publicity campaign; he should be assured of an average price for the entire season instead of being compelled to gamble on large profits or large losses; his packing costs should be reduced by large-scale purchases of materials, and the most efficient transportation services should be at his disposal. Most important of all, he should be able to obtain credit at reasonable rates.

Working alone, the average farmer is helpless to develop along these lines. He has not the facilities to grade and inspect his own product; he does not produce enough to create a reputation beyond the limits of his private trade, or to warrant any great expenditure in securing information as to market conditions and prices, or to finance a campaign of educational advertising.<sup>5</sup>

Applying the economic law of increasing returns, the farmer has endeavored to accomplish these objects by means of united action. The principles of co-operation have been applied to the greatest problem of agricultural economics—the problem of marketing agricultural products.<sup>6</sup>

With the actuating motives for farmers' marketing organizations

<sup>4</sup> 1914 Yearbook, Dept. Agric. 185 ff; 1912 Yearbook, Dept. Agric. 353.

<sup>5</sup> Report of the Secy. of Agriculture for 1913, in 1913 Yearbook, Dept. Agric. 30; 1914 Yearbook, Dept. Agric. 185, 187.

<sup>6</sup> For the results of co-operative marketing, see Cumberland, *Co-operative Marketing*; Powell, *Co-operation in Agriculture*; Coulter, *Co-operation Among Farmers*; Lloyd, *Co-operative and Other Organized Methods of Marketing California Horticultural Products* (supra, n. 3); Ford, *Co-operation in New England*, 112 ff; Haggard, *Rural Denmark*, p. 203 ff; Plehn, *The State Market Commission of California* (supra, n. 2); Coulter, *Co-operation Among Farmers*, Chs. 1, 10, 11, 12; United States Department of Agriculture Yearbooks 1910, 391 ff; 1912, 353 ff; 1913, 254 ff; 1914, 185 ff; 1917, 385 ff; United States Department of Agriculture, Bulletin 547 (Sept. 19, 1917); Report of the Secy. of Agriculture for 1913 (supra, n. 5); Monthly Bulletin, State Commission of Horticulture, State of California Vol. 8, No. 4 (April, 1919); First, Second, Third and Fourth Annual Reports of the State Market Director of California, 1917 to 1920.

in mind, we may now turn to a consideration of the form taken by some of the important California organizations.

#### FORM OF THE CALIFORNIA CO-OPERATIVE ASSOCIATIONS

The co-operative agricultural marketing associations of California are of various forms and natures. Some are local associations with central exchanges; others have one large association with no locals. Some have capital stock; others are non-stock organizations. The latter either distribute their votes equally or base their voting power upon acreage or tonnage of the product. In stock corporations, the voting power is determined by the number of shares owned by each member. In some of such corporations the amount of stock held by the member is determined by his acreage or tonnage, so that in the final analysis these elements govern the voting power. Most of the associations are limited to growers only, but a few of the capital stock corporations contain non-growers as well.

The form of contract adopted by these associations depends to a certain extent on the form of the association. The capital stock corporations usually operate under sale contracts; the non-stock corporations under agency contracts. The sale contracts provide either for a sale to the association at the price obtained on resales or at a fixed minimum price plus the increase secured on resale. The agency contracts appoint the association the marketing agent of the grower member.

These distinctions are of paramount importance in considering the question of specific performance of these contracts.

#### COMBINATIONS IN RESTRAINT OF TRADE

It has been contended on various occasions that the California co-operative marketing associations are combinations in restraint of trade, and therefore illegal. If this contention be true, the association contracts could be enforced neither in law nor in equity. It is, therefore, necessary to consider this question before proceeding to the discussion of specific performance itself.

Co-operative marketing associations are excluded from the Cartwright Act, which penalizes trusts and combinations in restraint of trade.<sup>7</sup> But equitable remedies may be refused although penal laws are not violated.

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<sup>7</sup> Cal. Stats. 1909, pp. 593-4: ". . . Every such trust as is defined herein is declared to be unlawful, against public policy and void, *provided* that no agreement, combination, or association shall be deemed to be unlawful or within the provisions of this act, the object and business of which are to

*The Rule of Reason*

The rule of reason has been applied by the California courts in both law and equity whenever a monopoly or combination in restraint of trade has been involved:

"With respect to contracts in restraint of trade, the earlier doctrine of the common law has been subsequently modified in adoption to modern conditions. But the public interest is still the first consideration. To sustain the restraint it must be found to be reasonable both with respect to the public and to the parties, and that it is limited to what is fairly necessary in the circumstances of the particular case, for the protection of the covenantee. Otherwise restraints of trade are void as against public policy. . . . Public welfare is first considered and if it be not involved and the restraint upon one party is not greater than the protection of the other party requires, the contract may be sustained. The question is whether under the peculiar circumstances of the case, and the nature of the particular contract involved in it, the contract is or is not unreasonable."<sup>8</sup>

*What Is an Unreasonable Restraint of Trade?*

Pacific Factor Company v. Adler,<sup>9</sup> Santa Clara Valley Company v. Hayes,<sup>10</sup> Vulcan Powder Company v. Powder Company,<sup>11</sup> and Getz Brothers v. Federal Salt Company<sup>12</sup> are the principal cases in which the California courts have found an unreasonable restraint of trade. The first involved plans contemplating the control of the entire output of grain bags throughout the state through the suppression of part of the supply. The second involved an attempt to raise lumber prices by shutting down some of the mills and thereby limiting the supply through restriction of output. In the third case, the parties divided the territory and allotted the business

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conduct its operations at a reasonable profit or to market at a reasonable profit those products which cannot otherwise be so marketed, *provided further* that it shall not be deemed to be unlawful or within the provisions of this act, for persons, firms or corporations, engaged in the business of selling or manufacturing commodities of a similar or like character, to employ, form, organize or own any interest in any association, firm or corporation having as its objects or purposes the transportation, marketing, or delivery of such commodities."

<sup>8</sup> Dr. Miles Medical Co. v. Parks (1911) 220 U. S. 373, 406, 55 L. Ed. 502, 31 Sup. Ct. Rep. 386; D. Ghirardelli Co. v. Hunsicker (1912) 164 Cal. 355, 128 Pac. 1041; Grogan v. Chaffee (1909) 156 Cal. 611, 105 Pac. 745, 27 L. R. A. (N. S.) 395.

<sup>9</sup> (1891) 90 Cal. 110, 27 Pac. 36, 25 Am. St. Rep. 102.

<sup>10</sup> (1888) 76 Cal. 387, 18 Pac. 391, 9 Am. St. Rep. 211.

<sup>11</sup> (1892) 96 Cal. 510, 31 Pac. 581, 31 Am. St. Rep. 242.

<sup>12</sup> (1905) 147 Cal. 115, 81 Pac. 416, 109 Am. St. Rep. 114.

among themselves with prices fixed by a standing committee. The agreement, moreover, was to be terminated at any time that any other party entered the field in competition with the contracting parties. In the fourth case, the plaintiff agreed to refrain from purchasing salt within the state and also to "discourage in any possible manner any such shipments or importations for sale by other parties."

In the *Pacific Factor* case, the court considered unreasonable:

"Agreements entered into not for the purpose of aggregating capital nor for greater facilities in the conducting of their business, nor for the protection of themselves by a reasonable restraint upon active competition, but for the purpose of regulating, controlling and withholding the supply . . . and thereby to take an unjust advantage of the farmer's necessities by disposing of the fruits of its unlawful labors at an unreasonable advance of price."

In *Herriman v. Menzies*,<sup>13</sup> on the other hand, a group of master stevedores of San Francisco formed an association with the power to fix prices.

"The parties, it is true, have combined their business as severally carried on by them, and have agreed to be bound by a schedule or rate of charges to be fixed by the association; but this in itself is not an unlawful restraint of trade as long as it does not appear that the rates to be charged are unreasonable, or the restraint such as to preclude a fair competition with others engaged in the same business."

It did not matter that such an association might charge unreasonable rates or preclude fair competition; the essential point was that in fact such conditions did not exist.

*Grogan v. Chaffee*,<sup>14</sup> *D. Ghirardelli Company v. Hunsicker*,<sup>15</sup> and *Munter v. Eastman Kodak Company*<sup>16</sup> involved the right of manufacturers to fix the resale price of their products. In the first two cases, the manufacturer sought to enjoin the retailer from selling at less than the contract re-sale price. In the third case, the retailer sought damages under the Cartwright Act because the manufacturer sold to others in the same business, but refused to sell to him. The retailer had been selling the product at less than the contract price and the manufacturer refused to sell to anyone

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<sup>13</sup> (1896) 115 Cal. 16, 44 Pac. 660, 730, 35 L. R. A. 318, 56 Am. St. Rep. 82.

<sup>14</sup> *Supra*, n. 8.

<sup>15</sup> *Supra*, n. 8.

<sup>16</sup> (1915) 28 Cal. App. 660, 153 Pac. 737.

who did business on such terms. The rule of reason was applied to all these cases, two in equity, and one at law for statutory damages. In the equity case, the injunction was granted; in the damage cases the remedy was refused.

California Cured Fruit Association v. Stelling,<sup>17</sup> and California Raisin Growers' Association v. Abbott<sup>18</sup> involve associations similar in certain respects to the ones under discussion. These cases involve contracts which are legal on their faces, but to which the defense of illegality, because in restraint of trade, was pleaded. Both cases were decided on questions of pleading, and do not aid us to determine what is a reasonable restraint of trade. In the first case, the court held that the illegality of the contract could not be raised in an action for claim and delivery. In the second case, the co-operative association controlling 87 per cent of its product sued its members for an accounting, as some had been overpaid and some underpaid. Those who were overpaid appealed from the order granting the accounting, claiming that equity would leave parties to an unlawful agreement in exactly the same position as it found them. The court, however, held that in such an action the illegality, if it existed, could not be pleaded.

In the light of these cases, let us examine the California marketing associations.

#### *Co-operative Associations Are Monopolies in Fact*

Many of the important California agricultural co-operative associations control the greater portion of their respective crops. The California Fruit Growers' Exchange, for example, controls over 70 per cent of the citrus crop;<sup>19</sup> the California Associated Raisin Growers, over 80 per cent of the raisin crop;<sup>20</sup> the California Almond Growers' Exchange, 80 per cent of the almond crop;<sup>21</sup> the Central California Berry Growers' Association, 85 per cent of the local territory;<sup>22</sup> and the California Peach Growers, Inc., 75 per cent of the dried peach crop.<sup>23</sup> Economists claim that a monopoly is essential to the success of such organizations.<sup>24</sup> Assum-

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<sup>17</sup> (1904) 141 Cal. 713, 75 Pac. 320.

<sup>18</sup> (1911) 160 Cal. 601, 117 Pac. 767.

<sup>19</sup> Report of California Development Board, 1920, p. 54.

<sup>20</sup> Plehn, The State Market Commission of California, supra, n. 2.

<sup>21</sup> Supra, n. 20.

<sup>22</sup> Fourth Annual Report State Market Director of California (1920) p. 41.

<sup>23</sup> Idem, p. 12.

<sup>24</sup> Supra, n. 20.

ing this theory to be true, will specific performance be granted to aid such a corporation?

*Though There is a Monopoly in Fact, There is No  
Restraint of Trade*

A co-operative association saves money for the producer, not because it is a monopoly and can control the price, but because the law of increasing returns enables it to lower the marketing costs per unit. A co-operative association restrains competition among its members. They no longer compete with each other for the patronage of the packer or commission house. They compete in the quantity and quality of production, but not as to the sale of their product. The courts have recognized that a mere restraint of competition may be entirely different from a restraint of trade.<sup>25</sup>

Most of the leading California co-operative associations have stimulated rather than restrained trade. By standardizing their pack and by extensive advertising, they have increased the demand for their products to a large extent.<sup>26</sup>

The California co-operative associations have increased trade, but have retained speculation. The marketing of the California fruit crops was formerly one of the most lucrative and extensive forms of speculation known in California, and if any trade has been restrained by co-operative associations, it is that of speculating in food products.

*If There is a Restraint of Trade, it is a  
Reasonable Restraint*

In discussing this question, two facts must be borne in mind—first, the executive branches of the state and Federal governments have placed the seal of approval upon these associations; and, second, the judicial branches have determined that the restraints adopted by such organizations were reasonable and, therefore, not unlawful.

*State and Federal Sanction*

The State of California has appointed a market director who devotes his whole time, attention and ability to the marketing problems of the state.<sup>27</sup> He has encouraged and aided the incorpo-

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<sup>25</sup> U. S. v. DuPont (1911) 188 Fed. 127, 150.

<sup>26</sup> Cumberland, Co-operative Marketing, p. 161 ff (citrus fruits); Fourth Annual Report State Market Director of California (1920), pp. 7-11 (General), 12-16 (peach), 17-20 (prune and apricot), 21-23 (rice), 24 ff (poultry).

<sup>27</sup> Cal. Stats. 1917, Ch. 802, § 1, subdivs. 3 and 4.



ration of co-operative organizations, and a large number provide that he shall appoint one of the members of their board of directors.<sup>28</sup>

The Federal government has taken a similar course. The Department of Agriculture has issued many books, pamphlets and reports on all phases of the movement; has sent organizers of co-operative associations into the field; and has fostered their organization and growth.<sup>29</sup>

Various state governments have done similar work. The Oregon Co-operative Association Act contains this interesting section:<sup>30</sup>

"Every group of persons contemplating the organization of an association under this act are urged to communicate with the director of the bureau of organization and markets of the Oregon Agricultural College, who shall inform them to the best of his ability as to whether or not a survey of the locality and marketing conditions indicate that the proposed association is such as to succeed and meet the needs of the neighborhood in which it is to be established."

More and more states are adopting legislation for the promotion of this class of organization.<sup>31</sup>

#### *Each Association Must Be Considered by Itself*

Each co-operative association must be dealt with on its own merits to determine whether it unreasonably restrains trade. "The question is whether under the particular circumstances of the case and the nature of the particular contract involved in it the contract is or is not unreasonable."<sup>32</sup>

No general rule can be made for co-operative associations; each must be considered individually. Some associations are co-operative in name only;<sup>33</sup> some are owned and controlled by large

<sup>28</sup> These include the following associations: California Pear Growers' Association, California Prune and Apricot Growers' Association, Central California Berry Growers' Association, Poultry Producers of Central California, California Bean Growers' Association, Alfalfa Growers of California, Inc., California Associated Olive Growers, California Honey Producers' Co-operative Exchange, Pacific Rice Growers' Association. For the activities of the Market Director, see First, Second, Third and Fourth Annual Reports of his office.

<sup>29</sup> For a partial list of the Department of Agriculture publications on co-operative marketing, see those listed in note 6, *supra*.

<sup>30</sup> Ore. Gen. Laws, 1915, Ch. 226, § 2, as amended by Ch. 411, Gen. Laws, 1917.

<sup>31</sup> For a collection of the various state laws, see Bulletin 547, Dept. of Agric. (1917).

<sup>32</sup> *Supra*, n. 8.

<sup>33</sup> 1917 Yearbook, Dept. Agric. 392.

packing corporations who have hidden their ownership and reaped the benefits of the good-will acquired by the ostensible co-operative character of their subsidiaries.<sup>34</sup> Other so-called co-operative associations have been merely parts of real-estate schemes to sell orchard land; others have been used by professional promoters to victimize farmers; others have been organized for the benefit of financiers instead of producers;<sup>35</sup> still others have joined hands with the distributors in illegal combinations. It is, therefore, essential that each association be dealt with individually. If any of the factors that show an unreasonable restraint of trade appear in a co-operative association, its contracts cannot be enforced.

#### *Methods of Restraining Trade*

The methods of unreasonably restraining trade can be divided into four general classes:<sup>36</sup>

- First: Oppression and coercion of competition.
- Second: Arbitrary fixing or manipulation of prices.
- Third: Production of artificial scarcity.
- Fourth: Impairment of quality.

#### *Oppression or Coercion of Competition*

Membership in a true co-operative association is open to any grower. This is the universal rule among the large California associations. A non-member cannot be frozen out of business by the association, and his farm or orchard closed. If he finds he cannot compete with his neighbor who belongs to the association, he can join on the same terms as his neighbor and secure all the advantages of superior marketing facilities that the association offers. Associations organized by professional promoters or financial instead of agricultural interests may resort to coercion and oppression to secure members or sign up acreage, but a legitimate co-operative association cannot stoop to such tactics.

#### *Arbitrary Fixing or Manipulation of Prices*

The perishable fruit associations usually sell their products on the open market with free and unrestricted bidding. Such sales present no question of fixing prices. Dried fruits and nuts, on the other hand, are customarily sold by future contracts. The associations handling such products begin to receive their orders early in

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<sup>34</sup> The Federal Trade Commission ordered Armour & Co. to desist from operating under the name of the Farmers' Co-operative Fertilizer Co. (Complaint No. 231, decided April 15, 1919).

<sup>35</sup> Bulletin 547, Dept. of Agric. (1917), p. 7.

<sup>36</sup> U. S. v. Keystone Watch Case Co. (1915) 218 Fed. 502, 518.

the year. They survey the market, estimate the crop and endeavor to determine the demand. From these estimates they attempt to arrive at a fair price at which the entire supply will be absorbed by the demand. When the co-operative association sets its price, it wants to sell the entire crop, rather than part of it, and to fix a price low enough to move the entire crop, and high enough to pay the cost of production. If the supply of the fruit is increased so that the demand will not be able to absorb it except at a price which is less than the cost of production, then the co-operative association must increase the demand. This may best be done by advertising, and the remarkable results attained by the Sunkist Orange, Sunmaid Raisin, and Diamond Brand Walnuts are well known.

Such a course of conduct clearly does not smack of price manipulation or arbitrary fixing of prices. On the other hand, should an association arbitrarily fix prices ignoring the laws of supply and demand and securing an excessive return to the grower, it would then operate in restraint of trade;<sup>37</sup> hence each association must be considered on its own merits.

#### *Production of Artificial Scarcity*

The important California co-operative associations have increased the supply of their product. The California Fruit Growers' Exchange, for example, has increased the shipment of oranges over 500 per cent while the population of the United States increased but 60 per cent.<sup>38</sup> The farmer-members are assured a fair price—the same price received by every other producer of a like quality.<sup>39</sup> They know that marketing costs, per unit, decrease as the volume of product handled increases. The California associations, by national advertising, have enlarged the demand for their products and have done everything in their power to increase supply.<sup>40</sup> Again, if a contrary policy were pursued, the legality of the organization might well be questioned.

<sup>37</sup> Carroll, J., in *Owen Co. Burley Tobacco Society v. Brumback* (1908) 128 Ky. 137, 107 S. W. 710: "If under this act the farmers associated with defendant were combining and pooling their crops for the purpose of obtaining for them a greater price than the real value, and it should be judiciously determined that this was true, the contract entered into in my judgment would be without binding force or effect upon the defendant."

<sup>38</sup> Cumberland, *Co-operative Marketing*, p. 161; Lloyd, *Co-operative Methods of Marketing*, Ch. 1.

<sup>39</sup> This is because the product is pooled.

<sup>40</sup> *Supra*, n. 26, n. 38.

*Impairment of Quality*

Investigations by the Department of Agriculture show that the co-operative associations have been able to standardize their products and improve their quality, to put out a uniform pack, to adopt brands and trade names and to make them nationally known.<sup>41</sup>

*Public Welfare*

The test laid down by the California courts has been :

"Public welfare is first considered and if it be not involved and the restraint upon one party is not greater than the protection of the other requires, the contract may be sustained."

The questions of public welfare can best be considered by a study of the opinions of authorities in the field of agricultural economics.

The Department of Agriculture of the United States, the Commission of Horticulture of the State of California, and the head of the Department of Economics of the University of California agree that, from the standpoint of public welfare, co-operative agricultural associations are a real success.

"Co-operative associations have attained the only durable and far-reaching success in remedying the high cost of marketing."<sup>42</sup>

"In the U. S. Department of Agriculture, co-operative organization is considered to be a primary and fundamental project, for it is believed that co-operation in agriculture is a corrective measure that will place the industry upon a solid basis and do much to insure the future happiness and prosperity of the nation."<sup>43</sup>

"More and more is the value of fruit growers' associations being recognized and it may be said that in many cases they have been the salvation to the fruit business."<sup>44</sup>

"The production, buying, distribution, and selling of crops

<sup>41</sup> 1914 Yearbook, Dept. Agric. 185 ff; 1912 Yearbook, Dept. Agric. 355; 1912 Yearbook, Dept. Agric. 444; Bulletin 547, Dept. Agric. (1917), p. 9; Lloyd, Co-operative Methods of Marketing, *supra*, n. 3, p. 27. "There can be no question of the improvement in position of both farmer and consumer in cases where co-operative marketing has resulted in lowering average prices to consumer, better quality, and better returns to the growers."—Herbert Hoover, *Some Notes on Agricultural Readjustment and the High Cost of Living*, Saturday Evening Post, Vol. 192, No. 41 (April 10, 1920) pp. 3, 49.

<sup>42</sup> *Supra*, n. 8.

<sup>43</sup> Prof. Plehn, head of the Department of Economics of the University of California, *supra*, n. 2.

<sup>44</sup> 1914 Yearbook, Dept. Agric. 210.

<sup>45</sup> Monthly Bulletin, Cal. State Com. Hort. (April, 1919) *supra*, n. 6.

must be accomplished by working together. . . . No other agency is so powerful in bringing about better farming, better methods of handling the industry, a greater prosperity, and a better community than a group of farmers who are successfully organized to protect and develop their agricultural interests."<sup>46</sup>

*Is the Restraint Greater Than Protection Demands?*

Is the restraint upon one party greater than the protection of the other requires? In the Yearbooks of the Department of Agriculture, the official publication of that department, the question of how much restraint is necessary has been discussed and considered by specialists.

"A farmers' organization must be conducted strictly upon business lines. There should be an agreement setting forth the terms of the relationship between the member and the association, for without such an agreement an organization lacks stability and rarely succeeds. A member should have the right to give away or retain for his own use such of his farm products as he may wish, but he should not make a sale of crops promised to the association to outside parties except any product not accepted by the association. . . .

"Some provision should be made that when any member has failed to live up to his agreement, by failing to ship exclusively through the association, or by any other breach of his contract, and provided further that his failure has resulted in a loss or damage to the association, then the defaulting member shall forfeit to the association such a sum as would reimburse the association for the loss or damage thus sustained, in lieu liquidated damages. Some form of binding contract is essential to hold the members of an association together. Many an organization has failed because members were only bound by a 'gentleman's agreement.' Such membership is totally inadequate for a stable and long-enduring organization. The laws of the state should be studied so that this by-law for holding members may be drawn legally."<sup>47</sup>

If we apply to the contracts under discussion the requirements set by the investigators of the Department of Agriculture, we find them practically identical. If such provisions are considered necessary for a stable and long-enduring organization by government marketing specialists, can it then be said that the restraint imposed by such provision is greater than the protection to the other requires?<sup>48</sup>

<sup>46</sup> 1910 Yearbook, Dept. Agric. 391, 393.

<sup>47</sup> 1914 Yearbook, Dept. Agric. 185-194.

<sup>48</sup> The importance of considering each organization and each contract

*Summary*

When questions of combinations in restraint of trade have been involved, the California courts have applied the rule of reason. In applying this rule, each co-operative association must be considered by itself to determine whether there is a restraint of trade in fact. If there is, is it a reasonable restraint without oppression or coercion of competition, without arbitrary fixing or manipulation of prices, without the production of an artificial scarcity or impairment of quality? Is public welfare involved? Is the restraint upon one party greater than the protection of the other demands? The answers to these questions will determine whether the contracts of a particular association are objectionable as being in restraint of trade.

If these questions are satisfactorily answered, and if we may assume that the contracts are legal, may the contracts of the co-operative marketing organizations be specifically enforced?

SPECIFIC PERFORMANCE OF CONTRACTS UNDER THE LAWS OF  
CALIFORNIA

The California Civil Code limits the remedy of specific per-

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upon its own merits is shown by a consideration of the few cases that have arisen in other jurisdictions.

In *Castorland Milk and Cheese Co. v. Shantz* (1919) 179 N. Y. Supp. 131, a co-operative milk association was involved. The producer had agreed to deliver to the association all the milk which his cows produced. Upon his default, he was sued for liquidated damages provided in the contract. The question of illegality was raised and the court said: "I cannot see how the agreement in any respect offends the law as being an illegal monopoly and an unreasonable restraint of trade."

*Reeves v. Decorah Farmers' Co-operative Society* (1913) 160 Iowa, 194, 140 N. W. 844, 44 L. R. A. (N. S.) 1104, involved a selling agency composed mostly of farmers. It was a stock corporation handling the products of both members and non-members. Its by-laws provided a penalty for every sale made by a member other than through the association. A competitive middleman sought to enjoin the association from collecting this penalty from defaulting members. The court held that the by-law in question was illegal as being a restraint upon the freedom of trade and granted the injunction to the competing middleman. It must be borne in mind that the association handled the products of non-members as well as members and was not a purely co-operative association. But even considering these facts, the decision is difficult to justify and hard to understand. It was adversely criticised by the annotator in L. R. A.

In *Georgia Fruit Exchange v. Turnipseed* (1913) 9 Ala. App. 123, 62 So. 542, 60 per cent of the peach growers signed subscription and marketing agreements with a selling association making the association the exclusive sales agent of the growers. The contract provided "in consideration of a protected market and constant enhanced prices, I agree to pay the Exchange 5 per cent of orchard and other sales f. o. b. my station." The contract, as interpreted by the court, bound the grower indefinitely.

In view of these clauses and in view of the fact that the Alabama code provided that any corporation, individual or firm which monopolized or

formance to contracts that are certain,<sup>49</sup> just and reasonable<sup>50</sup> and that are supported by adequate consideration.<sup>51</sup> It further provides that specific performance will not be granted of obligations to render personal services<sup>52</sup> nor of agreements to submit a controversy to arbitration,<sup>53</sup> nor of contracts in which there is no substantial mutuality of equitable remedy.<sup>54</sup>

No reference is made by the code, however, to the lack of an adequate remedy at law as a necessary jurisdictional fact for specific performance. Must the remedy at law be inadequate in order that a contract be specifically enforced?

The amendment to section 3384 of the Civil Code placed considerable doubt on the question. The point was first raised in 1895 before the Supreme Court of California in *Krouse v. Woodward*,<sup>55</sup> where Justice Temple stated:

"Appellant's first contention is that the plaintiff has an adequate remedy at law and is therefore not entitled to equitable relief.

"It appears somewhat singular that upon this proposition the peculiar language of our code has never been noticed. As originally enacted, section 3384 of the Civil Code read as follows:

"Except as otherwise provided in this article, the specific performance of an obligation may be compelled: 1. When the act to be done is in the performance, wholly or partly, of an express trust; 2. When the act to be done is such that pecuniary compensation for its non-performance would not afford adequate relief; 3. When it would be extremely difficult to ascertain the actual damage caused by the non-performance of the act to be done; or 4. When it has been expressly agreed in writing, between the parties to the contract, that specific

attempted to monopolize the control or sale of any commodity shall be illegal, the court held the contract in question to be unenforceable.

In *Ford v. Chicago Milk Shippers' Association* (1895) 155 Ill. 166, 39 N. E. 651, 27 L. R. A. 298, an association of 1500 milk producers and shippers was declared illegal in view of a penal statute which declared that any association or corporation organized to regulate or fix the price of any article of merchandise was illegal.

On the other hand, in *Owen County Tobacco Society v. Brumback* (1908) 128 Ky. 137, 107 S. W. 710, a co-operative pool of tobacco growers was held legal and not a monopoly by Kentucky courts under the Kentucky law.

<sup>49</sup> Cal. Civ. Code, § 3390, subdiv. 6.

<sup>50</sup> Cal. Civ. Code, § 3391, subdiv. 2.

<sup>51</sup> Cal. Civ. Code, § 3391, subdiv. 1.

<sup>52</sup> Cal. Civ. Code, § 3390, subdivs. 1-2.

<sup>53</sup> Cal. Civ. Code, § 3390, subdiv. 3.

<sup>54</sup> Cal. Civ. Code, § 3386.

<sup>55</sup> (1895) 110 Cal. 638, 641, 42 Pac. 1085.

performance thereof may be required by either party, or that damages shall not be considered adequate relief.'

"In 1874 this section was amended by striking out all the subdivisions. This apparently established the rule that all obligations may be specifically enforced, unless it is otherwise provided in that title, and not that certain specified obligations may be specifically enforced. At the same time, section 3385, which provides that where one party was entitled to specific performance the other was also entitled thereto, although not within the rule as then established in section 3384, was repealed. Then follow quite a number of instances in which it is expressly provided that specific performance cannot be enforced. It would seem that it was intended to reverse the usual test of the jurisdiction of a court of equity to enforce specific performance of a contract and to place the burden upon the party resisting such action to show that the case in hand comes within some exception. The subdivisions of section 3384 stricken out contain a concise statement of the jurisdiction of courts of equity as stated in text-books.

"This amendment was made in 1874 and there are numerous cases since in which it has been assumed that the rule was as established by the decisions of courts of equity. It is not necessary here to determine whether the jurisdiction of courts of equity has been enlarged by this change in the law. Appellant claims that such jurisdiction has been narrowed because section 3366 limits the relief to the cases specified in title III, but section 3384 is a later section and reverses the rule stated in section 3366 or it may be regarded as itself a specification under section 3366. At all events, there is no ground to claim that the power of the court to enforce specific performance has been narrowed by the code."

The court then granted specific performance on the ground that there was no adequate remedy at law. It merely decided that its power to enforce specific performance had not been narrowed by the change in the code; but it did not decide whether the jurisdiction of the courts of equity had been thereby enlarged.

In 1910, the Court of Appeals of the Second Appellate District, in *Shannon v. Cavanaugh*,<sup>56</sup> also commented at length on the amendment of 1874, and without any reference to *Krouse v. Woodward*, by way of dictum announced the same conclusion as had been reached in the former case.

"Respondents also insist that the plaintiffs are precluded from the benefit of the relief by reason of the fact that the complaint shows they had an adequate remedy at law. In *Senter v. Davis*, 38 Cal. 450, it is said 'The jurisdiction of a

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<sup>56</sup> (1910) 12 Cal. App. 434, 439, 107 Pac. 574.



court of equity to decree specific performance does not turn at all upon the question whether the contract relates to real or personal property, but altogether on the question whether the breach complained of can be adequately compensated in damages. If it can, the plaintiff's remedy is at law only; if not, he may go into a court of equity which will grant full redress by compelling specific performance on the part of the defendant.' When announced, this statement was in full accord with the general equitable principle announced in section 3384 of the Civil Code, which as it stood prior to the amendment of 1874 expressly denied the right to specific performance of an obligation when the act to be done was such that pecuniary compensation for its non-performance would afford adequate relief. In 1874, this section was amended by striking out, among other clauses, the subdivisions which denied the remedy in those cases where the law afforded adequate relief. The section, as it now stands, reads as follows: 'Except as otherwise provided in this article, the specific performance of an obligation may be compelled.' And thus amended, it would seem that every obligation may be specifically enforced, unless it be an obligation as to which the remedy is denied in other provisions of the article. There appears to be no provision in the article entitled 'Specific Performance of Obligations,' which limits the remedy to those cases where an adequate remedy at law is wanting.

"Conceding, however, that the amendment makes no change in the law. . . ."

The question came before the Supreme Court in bank in 1915 in *Morrison v. Land*,<sup>57</sup> where the court stated:

"Specific performance will be decreed only when no other adequate relief is available to the plaintiff. . . . The jurisdiction of a court of equity to decree specific performance does not . . . depend at all upon the question whether the contract relates to real or personal property, but altogether upon the question whether the breach complained of cannot be adequately compensated in damages. If it can, the action has no place in a court of equity, and the plaintiff's remedy is strictly in law. So it will be found that in all of the cases in which specific performance of these agreements . . . have been decreed. . . ."

"There is no force in the plaintiff's contention that the rule in this respect has been changed in this state by an amendment of section 3384 of the Civil Code. That section as originally enacted in 1872, in addition to providing as it does now, that 'except as otherwise provided in this article

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<sup>57</sup> (1915) 169 Cal. 580, 387-8, 147 Pac. 259.

specific performance may be compelled,' contained four subdivisions in which such relief would be granted, and the second of the subdivisions read, 'When the act to be done is such that pecuniary compensation for its non-performance would not afford adequate relief.' This section was amended in 1874 by striking out all of these four subdivisions. There is no provision in the article in terms precluding the relief of specific performance in the case of such a contract as the one before us, even though pecuniary compensation would afford adequate relief. Neither is there any provision in terms precluding such relief as to any obligation to pay money. If counsel's claim in this behalf be correct, the effect of the amendment is to authorize a decree of specific performance of the obligation of the maker of a promissory note or any other obligation to pay money. Of course, no such intent as that claimed can be attributed to the amendment. The reason for the amendment apparently was that it was deemed unwise to attempt to specify by statute all the particular circumstances under which such relief might be granted, and it was thought best to provide simply that it could always be granted except as otherwise provided in the article. But this obviously was not intended to dispense with the fundamental requirement that the law does not afford an adequate remedy. That section simply means that specific performance of an obligation may be compelled in any case where the circumstances are such as to authorize such relief under the well settled doctrines of equity jurisprudence, except as otherwise provided in the article. Over and over again since such amendment was made, this court has said that inadequacy of any remedy at law is absolutely essential to the granting of a decree of specific performance. The only intimation to the contrary we have referred to or have found is in the opinion in *Shannon v. Cavanaugh*, decided by the District Court of Appeal of the Second District. No application for a hearing in this court was made in that case. We cannot follow or approve any intimation in the opinion in that case to the effect that under our code, as it now stands, specific performance may be decreed, notwithstanding the plaintiff may be fully compensated at law. It was held in that case, passing the suggestion we have referred to, that the circumstances were such as to require the conclusion that there was no complete remedy at law."

It is unfortunate that *Krouse v. Woodward* escaped the notice of the court. The dictum in *Shannon v. Cavanaugh* is repudiated, but would the action of the supreme court have been the same if its former opinion in *Krouse v. Woodward* had been called to its attention? It seems strange that both *Shannon v. Cavanaugh* and *Morrison v. Land* should have overlooked the opinion in *Krouse v.*

Woodward; but the law is well settled in California that the lack of an adequate remedy at law is a necessary jurisdictional fact in specific performance.<sup>58</sup>

Whether the legal remedies available upon a breach of the marketing contracts of co-operative associations are adequate or not is the next phase of our discussion. This question will be considered in conjunction with the various contracts of specific California associations.

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*(To be continued.)*

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<sup>58</sup> Morrison v. Land, supra, n. 57; Gilfallan v. Gilfallan (1914) 168 Cal. 23, 141 Pac. 623, Ann. Cas. 1915D 784; Emirzian v. Asato (1913) 23 Cal. App. 251, 137 Pac. 1072; Wait v. Kern River Co. (1909) 157 Cal. 16, 106 Pac. 98; Fleishman v. Woods (1901) 135 Cal. 256, 67 Pac. 276. See also Young v. Matthew Turner Co. (1914) 168 Cal. 671, 143 Pac. 1029; Owens v. McNally (1896) 113 Cal. 444, 45 Pac. 710, 33 L. R. A. 369; Christin v. Clark (1918) 36 Cal. App. 714, 173 Pac. 109; Sherwood v. Wallin (1905) 1 Cal. App. 532, 82 Pac. 556.