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The Law of Co-operative Marketing

THE history of the Anglo-American legal system discloses few instances of such a rapid adaptation of the law to meet the needs of changing economic conditions as that presented by the development of the law of co-operative marketing. The co-operative marketing movement itself has only attained real importance in the United States within the last decade. Before the year 1916 the proportion of the country's agricultural products which was marketed co-operatively was inconsequential. Since that time there have been organized thousands of co-operative marketing associations, which now handle and sell the crops of several millions of farmers. Only within the last five years has the co-operative marketing plan been applied to the great staple crops of the country. Yet today, while many of the financial and technical problems of this new marketing method are still being worked out, there has already been provided an almost complete body of law, defining the status, the rights and the obligations of co-operative marketing associations, and sweeping away the legal obstacles which at first interfered with the effective functioning of this new type of marketing organization.

The story of co-operative marketing in the United States begins about the middle of the last century. About the year 1840 there were organized in Wisconsin, New York and Connecticut a number of co-operative associations for the marketing of cheese. These so-called "cheese rings" were the first successful co-operative marketing organizations in the United States. For nearly thirty years after this early beginning the co-operative marketing movement made little progress, being confined almost exclusively to the dairy industry. With the development of the Grange movement about 1870 co-operative associations were organized for the marketing of a variety of farm products, but these associations generally operated on a small scale. Many of them were ordinary stock corporations serving members and non-members alike, being "co-operative" in no other respect than that their stock was owned by farmers.

The co-operative marketing system was first applied on a large scale in California. In 1905 there was organized the California Fruit Growers' Exchange, an association controlling 46 per cent of the California citrus fruit crop. In 1912 the California raisin growers expressly recognized the importance of large-scale organization by making the formation of the co-operative California Associated Raisin Company[1] contingent upon the affiliation of at least 60 per cent of the growers of that commodity. The California Walnut Growers' Association, organized in 1913, controlled 40 per cent of the California walnut acreage in its first year of existence. In the years 1916, 1917 and 1918 co-operative associations were organized for the marketing of a considerable number of California's most important crops, including prunes, apricots, pears, cherries, berries, beans, wheat, olives and poultry products.

The California co-operatives differed from their predecessors in the eastern and middle-western states in two important respects. In the first place, nearly all of them were state-wide organizations, having a practical monopoly upon the crops which they handled. In the second place, they entered into long-term contracts with their members, thereby enabling themselves to survive the temporary depressions which had caused the downfall of many of the earlier associations.

From California the large scale form of co-operative organization was imported into the southern states, where within a short time the cotton and tobacco associations were organized. Several of these associations operated in two or three states. The movement then spread into the northern, middle-western and eastern states where it was applied to a great variety of crops, the most important of which was the middle-western wheat crop.[2]

So rapid has been the growth of agricultural co-operation that there are now in existence in the United States approximately 12,000 farmers' co-operative associations, with a total estimated membership of 2,700,000.[3] Two-thirds of these associations have been organized since 1915.[4]

As might have been expected, many legal difficulties were encountered in the organization and operation of co-operative asso-

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[1] Now the Sun-Maid Raisin Growers of California.

[2] An engrossing account of the origin and development of co-operative marketing is to be found in a book entitled "Co-operative Marketing" by Herman Steen.

[3] Agricultural Co-operation (published by the Bureau of Agricultural Economics, United States Department of Agriculture), Vol. IV, No. 6.

[4] Agricultural Co-operation, Vol. IV, No. 7.

ciations. To obviate these difficulties a model Co-operative Marketing Act was drafted by Aaron Sapiro, the chief exponent of the so-called "California plan" for co-operative marketing, and the man principally responsible for the general adoption of this plan in the other states of the Union. This model act has since been adopted by the legislatures of over thirty states. The California legislature adopted the act in 1923, and it is now embraced in sections 653aa-653xx of the Civil Code. As a result of the general adoption of this act, the law of co-operative marketing is probably more nearly uniform throughout the United States than the law upon any other subject not within the jurisdiction of the federal government.

Within the last four or five years the courts have been called upon to decide a great variety of questions relating to the operation of co-operative associations and to the enforcement of their marketing contracts. There has thus been developed, within a very short time, a considerable body of case law, supplementing and interpreting the provisions of the Co-operative Marketing Act.

So recent is the development of this new branch of the law that there does not exist at the present time any adequate compilation of it. It is the purpose of this article to present in concise form the more imporant phases of the law of co-operative marketing.

I. The Co-operative Marketing Contract

The first step in the organization of a co-operative marketing association consists in the circulation of a pre-organization agreement among the growers of the particular product which the association expects to handle. If the association is to be organized as a stock corporation this agreement is generally known as a "subscription agreement." If it is to be a membership corporation the agreement is known as a "membership agreement."

By the terms of the pre-organization agreement the grower either subscribes for stock in the corporation to be organized, or applies for membership and agrees to pay a membership fee, depending upon whether the corporation is a stock or a membership corporation. The agreement usually provides that the proposed association shall not be organized unless a certain proportion of the acreage or the tonnage within the district is first "signed up." It is further generally provided that the certificate of the organization committee that the required acreage or tonnage has been signed up shall be conclusive.

Attached to or embodied in the pre-organization agreement is

a "marketing agreement." By the terms of the pre-organization agreement the growers agree to be bound by the marketing agreement at the option of the association, or to execute a marketing agreement in terms similar to the marketing agreement attached to or embodied in the pre-organization agreement. Other terms of the pre-organization agreement are not sufficiently uniform, or not sufficiently important to be mentioned here. Upon the organization of the association the marketing agreements are accepted and notice thereof is mailed to the growers, or new marketing agreements are circulated to be executed in accordance with the terms of the pre-organization agreement.

The marketing agreements of co-operative marketing associations are of two general types, the agency type and the purchase and sale type. By the terms of the agency type of agreement the grower agrees to deliver his crop to the association and appoints the association his agent to handle and market the same and to return the net proceeds to him. This agency is coupled with an interest, or with an obligation, and is not revocable by the grower.[5] By the purchase and sale type of contract the grower agrees to sell, and the association to buy, the grower's crop. This type of contract constitutes an executory agreement for the sale of the crop to the association,[6] and title to the crop passes to the association upon delivery, unless otherwise expressly provided.[7] As the purchase and sale type is by far the more common, particularly among the large associations, its terms may be discussed in some detail.

The purchase and sale contract provides that the association may grade the crop according to size, quality or variety, that it shall pool or mingle the product of each grower with the product of other growers, and that it shall sell the crop and pay over the net proceeds to the growers from time to time on a proportional basis. It is provided that the association shall be entitled to the remedies of specific performance and injunction to compel delivery by the grower in case of a breach or threatened breach by him. It is also provided that the grower shall pay the association liquidated damages at a certain rate in case he shall dispose of any of his product to any person other than the association in violation of the terms of the marketing agreement. It is provided in the marketing agree-

[5] Phez Co. v. Salem Fruit Union (1921) 103 Ore. 514, 201 Pac. 222, 25 A. L. R. 1090.

[6] Tobacco Growers' Co-op. Ass'n. v. Harvey (1925) 189 N. C. 494, 127, S. E. 545.

[7] Cal. Civ. Code, § 653oo; Texas Farm Bureau Cotton Ass'n. v. Stovall (1923) 113 Tex. 273, 253 S. W. 1101.

ments of some of the associations that the obligation of the grower to deliver his crop to the association during the term of the contract shall constitute a lien on the land then owned by him, the land being described in the contract. Where such a provision is inserted the contract is recorded. Generally, however, the contract covers all crops produced by the particular grower signing the marketing agreement, rather than all crops produced on the particular land owned by him at the time he signs, the more common provision being that the agreement shall cover all crops produced or acquired by the grower on any land during the term of the contract.

The provisions of the marketing agreements of the agency type vary considerably, but those most recently adopted generally contain most of the essential provisions of the purchase and sale type of contract outlined above.

The majority of modern co-operative associations are organized on the centralized plan, under which all the growers enter into marketing agreements with a single association, and deliver their products to it. However, some associations are organized upon the so-called local unit plan, under which each grower contracts with, and delivers his crop to, a local association, and the local associations in turn deliver to the central association, or to purchasers secured by the central association. Except for the variation made necessary by this difference in the structure of the association, the essential provisions of the marketing agreement are the same under either form of organization.

The marketing agreement also contains many other provisions, but they are of minor importance as compared with those above mentioned.

II. The Co-operative Marketing Act

The provisions of the Co-operative Marketing Act, as adopted in most of the states of the Union, are practically uniform. Specific reference will be made here only to the California act.

Non-profit co-operative associations may be formed under the act by five or more persons engaged in the production of agricultural products.[8] Such associations may be organized as stock corporations or as membership corporations.[9] Associations existing before the passage of the act may adopt its provisions by limiting their membership to producers of agricultural products and adopting the other restrictions prescribed by the act.[10]

[8] Cal. Civ. Code, § 653cc.
[9] Cal. Civ. Code, § 653cc.
[10] Cal. Civ. Code, § 653vv.

It is provided that any association organized under the act shall be deemed not to be a combination in restraint of trade nor an illegal monopoly, and that the marketing contracts of the association shall be considered not to be illegal nor in restraint of trade.[11]

The act enumerates provisions which may be inserted in the articles of incorporation,[12] in the by-laws,[13] and in the marketing contract,[14] and contains provisions relating to membership,[15] powers of the association,[16] and other incidental matters.

The most important section of the act, and the one most frequently invoked, is the section relating to remedies of the association for breach of the marketing agreement. By the terms of this section the marketing contract or by-laws may fix, as liquidated damages, specific sums to be paid by the grower to the association in the event of a breach by him of the provisions of the contract requiring the delivery of his product to the association. The section also provides that in the event of a breach or threatened breach of such provisions by a grower, the association shall be entitled to an injunction to prevent the further breach of the contract and to a decree of specific performance thereof.[17]

III. The Constitutionality of the Co-operative Marketing Act

No sooner had the Co-operative Marketing Act been adopted in the principal agricultural states than it was attacked as being unconstitutional. The argument that the act was unconstitutional was generally invoked in actions brought by associations organized under the act to compel specific performance of their marketing agreements, and to enjoin the breach thereof. Consequently the attack was directed particularly against the specific performance and injunction provisions of the act.

The principal argument urged against the constitutionality of the act is that it violates the "equal protection of the laws" clause of the Fourteenth Amendment to the Federal Constitution, in that it confers upon farmers' organizations rights and remedies (such as the right to the enforcement of the pooling contract by injunc-

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[11] Cal. Civ. Code, § 653ww.
[12] Cal. Civ. Code, § 653hh.
[13] Cal. Civ. Code, § 653jj.
[14] Cal. Civ. Code, § 653oo.
[15] Cal. Civ. Code, § 653gg.
[16] Cal. Civ. Code, § 653ff.
[17] Cal. Civ. Code, § 653pp.

tion and decree of specific performance) which are denied to other individuals and organizations. The answer to this is that the act is based upon a reasonable classification, to-wit, the classification which divides farmers from other members of the community insofar as the marketing of their products is concerned. That this classification is reasonable is now fully established, and the highest courts of five different states have consequently held that the act does not violate the equal protection provision of the Fourteenth Amendment.[18]

Closely related to the argument that the act denies the equal protection of the laws is the argument that it violates the provisions of the various state constitutions prohibiting special legislation. But since the act is based upon a reasonable classification the provisions of the state constitutions prohibiting special legislation are no more applicable than is the equal protection clause of the federal constitution. Accordingly, it is held that the act does not constitute special legislation.[19]

It has also been argued that the provisions of the act conferring upon the associations the right to the exercise of the remedies of specific performance and injunction to enforce the marketing contracts are void as an attempt to enlarge the constitutional jurisdiction of courts of equity. But the specific enforcement of contracts and the prevention of their breach by injunction have always been within the jurisdiction of courts of equity.[20] Legislation which merely permits the exercise of these remedies in new classes of cases does not enlarge the equity jurisdiction. Hence, the specific performance

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[18] Liberty Warehouse Co. v. Burley Tobacco Growers' Co-op. Ass'n. (1925) 208 Ky. 643, 271 S. W. 695; Potter v. Dark Tobacco Growers' Co-op. Ass'n. (1923) 201 Ky. 441, 257 S. W. 33; Minn. Wheat Growers' Co-op. Marketing Ass'n. v. Huggins (1925) 162 Minn. 471, 203 N. W. 420; Dark Tobacco Growers' Co-op. Ass'n. v. Dunn (1924) 150 Tenn. 614, 266 S. W. 308; No. Wis. Co-op. Tobacco Pool v. Bekkedal (1923) 182 Wis. 571, 197 N. W. 936. In the arguments against the constitutionality of the act the case of Connolly v. Union Sewer Pipe Co. (1901) 184 U. S. 540, 46 L. Ed. 679, 22 Sup. Ct. Rep. 431, has been frequently cited as holding that a classification which divides farmers from all other members of the community is unreasonable. The Connolly case is adequately distinguished in Dark Tobacco Growers' Co-op. Ass'n. v. Dunn, Minn. Wheat Growers' Co-op. Marketing Ass'n. v. Huggins, and Potter v. Dark Tobacco Growers' Co-op. Ass'n., supra. An able discussion of the Connolly case and its bearing upon the constitutionality of the Co-operative Marketing Act is to be found in Henry W. Ballantine, Co-operative Marketing Associations, 8 Minnesota Law Review, 1.

[19] Rifle Potato Growers' Co-op. Ass'n v. Smith (1925) 75 Colo. 171, 240 Pac. 937; Clear Lake Co-op. Live Stock Shippers' Ass'n. v. Weir (1925) 200 Iowa, 1293, 206 N. W. 297; Kan. Wheat Growers' Ass'n. v. Schulte (1923) 113 Kan. 672, 216 Pac. 311; Ore. Growers' Co-op. Ass'n. v. Lentz (1923) 107 Ore. 561, 212 Pac. 811.

[20] Pomeroy, Equity Jurisprudence (4th ed.) § 131.

and injunction provisions of the act are not vulnerable upon this ground.[21]

Various other provisions of the act have been assailed as being unconstitutional on grounds other than those heretofore considered. Among these is the provision that associations which shall adopt the provisions of the act shall be entitled to the remedies therein provided for breach of the marketing contract even as against growers who signed the contract prior to the adoption of the act.[22] The effect of this section is to make the specific performance and injunction provisions of the act retroactive, and it has been argued that for this reason the section above paraphrased impairs the obligation of the grower's contract. It is held, however, that the section is not unconstitutional on this ground, since it relates merely to the remedies upon the contract, and not to the substantive rights of the parties under it.[23]

Growers occasionally attempt to evade their obligations under the marketing agreement by leasing their land to others, thus supposedly divesting themselves of control over the crop. To render this device ineffectual, it is provided in the Co-operative Marketing Act that in any action upon the marketing agreement it shall be conclusively presumed that the landowner is able to control the delivery of products produced on his land by tenants or others, whose tenancy or possession were created or changed after the execution of the marketing agreement.[24] This provision has been declared constitutional.[25]

In some states, though not in California, the act provides that an association may recover a certain sum as a penalty against any third person who induces a member to violate the marketing contract.[26] The constitutionality of this provision has been argued before the highest courts of two different states, which have reached contrary conclusions upon the question.[27]

The appellate courts of California have not yet passed upon the constitutionality of the Co-operative Marketing Act. The act has

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[21] Ark. Cotton Growers' Co-op. Ass'n. v. Brown (1925) 168 Ark. 504, 270 S. W. 946.

[22] Cal. Civ. Code, § 653vv.

[23] Brown v. Staple Cotton Co-op. Ass'n. (1923) 132 Miss. 859, 96 So. 849.

[24] Cal. Civ. Code, § 653pp (c).

[25] Feagain v. Dark Tobacco Growers' Co-op. Ass'n. (1924) 202 Ky. 801, 261 S. W. 607. But see La. Farm Bureau Cotton Growers' Co-op. Ass'n. v. Clark (1926) 160 La. 294, 107 So. 115.

[26] See, for example, Minn. Laws, 1923, ch. 264, § 27.

[27] Liberty Warehouse Co. v. Burley Tobacco Growers' Co-op. Ass'n., supra, n. 18 (constitutional); Minn. Wheat Growers' Co-op. Marketing Ass'n. v. Radke (1925) 163 Minn. 403, 204 N. W. 314 (unconstitutional).

uniformly been sustained as constitutional by the superior courts of the state except in one instance. In the case of *California Prune and Apricot Growers' Association v. The Pomeroy Orchard Company, et al.*,[28] an action brought in the Superior Court of Santa Clara County, the trial judge refused to grant a preliminary injunction to restrain a breach of contract by three growers, members of the plaintiff association, on the ground that the act was unconstitutional. The association appealed, but before the transcript on appeal was settled, the defendants sold their crops and also their land. For this reason the Supreme Court dismissed the appeal as being moot, holding that it would serve no useful purpose to direct the trial court to grant the preliminary injunction when the defendants were no longer in possession of any crops or of any land upon which to produce other crops.[29] As a result of the dismissal of this appeal, the constitutionality of the Co-operative Marketing Act is not yet definitely established in this state. In view of the unanimous agreement among the courts of last resort of other states that the act is constitutional, it seems probable that the Supreme Court of California will reach the same result.

IV. Co-operative Marketing Associations as Combinations in Restraint of Trade

The earlier co-operative marketing associations organized in the United States operated, as a rule, in a small producing area. The modern form of co-operative organization, however, is generally state-wide, and every effort is made to include within its membership as many of the producers in the district as possible. It is generally provided in the pre-organization agreements signed by the growers, that the association shall not be organized unless a certain proportion (in many cases 75 per cent) of the acreage or tonnage produced within the area covered is first signed up. As a consequence, it frequently happens that the association has a virtual monopoly upon the product which it handles in the area within which it operates. Because of this apparently monopolistic character of many of the associations, and also because of their very size and power, they have frequently been subjected to attack upon the ground that they are combinations in restraint of trade.

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[28] Superior Court of Santa Clara County, Dept. 2, November 16, 1923, commented on in 12 California Law Review, 146.

[29] Cal. Prune and Apricot Growers' Ass'n. v. The Pomeroy Orchard Co., et al. (1925) 195 Cal. 264, 232 Pac. 463.

The argument that farmers' co-operative marketing associations are *per se* combinations in restraint of trade ignores the economic considerations which have rendered this form of combination essential to the welfare of a large proportion of the agricultural population. All other producers except the farmer have long ago developed highly specialized organizations to handle the marketing of their products. The manufacturer, for example, has one organization to make his product, another to sell it. The farmer, on the other hand, has until recent years concentrated on production. For three hundred and sixty days in the year the farmer has been a producer. Then for a few days he has suddenly become a trader. He has lacked the training and the specialized knowledge necessary to enable him to market his product as efficiently as do other producers. He has lacked the facilities and the capital necessary to enable him to hold his product until the market is favorable. The result has been that until recent years he has dumped his crop on the market as soon as it is ready for sale, has broken his own price, has taken what he could get for his product, and has permitted the speculative buyer to purchase the crop at the price made by the weakest and neediest of the growers.

The evils of this system of individual marketing could not be removed except by a co-operative selling system. The farmer is an individual producer. He must continue to concentrate upon production as he has in the past. He cannot develop a specialized and efficient selling organization unless he combines with other farmers. Neither can he eliminate the dumping system except by combination. He has neither the capital nor the knowledge of market conditions necessary to enable him to withhold his crop from the market until the proper time to sell comes.

Furthermore, if farmers are to attain the same degree of efficiency in marketing which other producers have attained, they must not only combine, but they must combine in large groups. In the manufacturing field a force of producers may support an almost equally large selling or marketing force. But in the agricultural field, a small marketing staff can handle the crops of a very large number of producers. A small combination of producers is unable to support an efficient and highly specialized marketing organization.

The farmer must also combine on a larger scale than other producers for the additional reason that his individual capital is not so great as theirs. The resources of the individual farmer being smaller than those of other producers, farmers must combine in larger numbers than other producers if their organizations are to have the same aggregate strength.

These and other considerations render large scale combination among farmers a necessity if the prosperity of the farmer is to keep pace with that of the rest of the population. In passing upon the legality of this form of combination the courts have undoubtedly been influenced far more by the economic factors which are responsible for the development of co-operative marketing than by the technical doctrines of the law of restraint of trade.

The law is now thoroughly established to the effect that co-operative marketing associations are not *per se* combinations in restraint of trade. Co-operative marketing associations are specifically excepted from the provisions of the Sherman Act by the Clayton Act.[30] Many of the state anti-trust acts, including the Cartwright Act[31] in California, contain similar exemptions. Furthermore the Co-operative Marketing Act provides that:

> "Any association organized hereunder shall be deemed not to be a conspiracy nor a combination in restraint of trade nor an illegal monopoly; nor an attempt to lessen competition or to fix prices arbitrarily or to create a combination or pool in violation of any law of this state."[32]

The courts have construed these statutory exemptions liberally, and, in all cases where they have been invoked, have held that the associations are not combinations in restraint of trade.[33]

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[30] Act of Congress of Oct. 15, 1914, c. 323, 38 U. S. Stats. at L. 730, U. S. Comp. Stats. (1918) §§ 8835a-8835p. The exemption provided in the Clayton Act extends to all "labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit." It is held that a non-stock co-operative association is a non-profit organization within the meaning of this provision, although it has power to create subsidiary warehouse corporations having capital stock and paying dividends. Dark Tobacco Growers' Co-op. Ass'n. v. Mason (1924) 150 Tenn. 228, 263 S. W. 60. The Capper-Volstead Act, Act of Congress of Feb. 18, 1922, c. 57, § 1, 42 U. S. Stats. at L. 388, U. S. Comp. Stats. (1925) § 8716½, Fed. Stats. Ann. (2d ed., 1922 Supp.) 2, extends the exemption to stock as well as membership corporations.

[31] Cal. Stats. 1907, p. 984, as amended Cal. Stats. 1909, p. 593.

[32] Cal. Civ. Code, § 653ww.

[33] Brown v. Staple Cotton Co-op. Ass'n., supra, n. 23; Burley Tobacco Growers' Co-op. Ass'n. v. Rogers (1926) — Ind. App. —, 150 N. E. 384; Dark Tobacco Growers' Co-op. Ass'n. v. Mason, supra, n. 30; Dark Tobacco Growers' Co-op. Ass'n. v. Robertson (1926) — Ind. App. —, 150 N. E. 106; Kan. Wheat Growers' Ass'n. v. Schulte, supra, n. 19; Minn. Wheat Growers' Co-op. Marketing Ass'n. v. Huggins, supra, n. 18; Neb. Wheat Growers' Ass'n. v. Norquest (1925) 113 Neb. 731, 204 N. W. 798; No. Wis. Co-op. Tobacco Pool v. Bekkedal, supra, n. 18; Ore. Growers' Co-op. Ass'n. v. Lentz, supra, n. 19; Potter v. Dark Tobacco Growers' Co-op. Ass'n., supra, n. 18; Tobacco Growers' Co-op. Ass'n. v. Jones (1923) 185 N. C. 265, 174 S. E. 174; S. C. Cotton Growers' Co-op. Ass'n. v. English (1926) — S. C. —, 133 S. E. 542; Warren v. Ala. Farm Bureau Cotton Ass'n. (1925) 213 Ala. 61, 104 So. 264. In the case of People v. Milk Exchange (1894) 145 N. Y. 267, 39 N. E. 1062, 45 Am. St. Rep. 609, 27 L. R. A. 437, a co-operative milk association was held to be a combination in restraint of trade. In that case, how-

The Cartwright Act[34] in California expressly exempts from its own operation associations organized to conduct their business at a reasonable profit or to market at a reasonable profit those products which cannot otherwise be so marketed, and corporations organized, by persons engaged in selling commodities of similar character, for the purpose of marketing such commodities. It has been twice decided that co-operative marketing associations are not trusts or combinations in restraint of trade, in violation of the provisions of this act, because they fall within the terms of the exemption above referred to.[35]

It is of course true that a co-operative marketing association may so conduct itself as to restrain trade, and if it indulges in any practices which have this effect it will be held liable therefor.[36] The effect of the statutory exemptions above referred to is only to prevent the associations from being declared *per se* combinations in restraint of trade. Such exemptions do not enable the associations to adopt with impunity practices which in fact restrain trade.

The Co-operative Marketing Act provides not only that an association organized under the act

> "shall be deemed not to be a conspiracy nor a combination in restraint of trade nor an illegal monopoly"

but also that

> "the marketing contracts and agreements between the association and its members and any agreements authorized in this act shall be considered not to be illegal nor in restraint of trade nor contrary to the provisions of any statute enacted against pooling or combinations."[37]

Accordingly, it is held that the marketing contracts of associations organized under the act are not contracts in restraint of trade.[38]

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ever, the association did not itself handle the milk, its sole function being to find purchasers for the milk produced by its members, and to fix the price which purchasers should pay. It was thus not a true marketing association, but merely a price fixing organization. In Ford v. Chicago Milk Shippers' Ass'n. (1895) 155 Ill. 166, 39 N. E. 651, 27 L. R. A. 298, another co-operative milk association was held to constitute a combination in restraint of trade under the Illinois anti-trust act. But here again it affirmatively appeared that the purpose of the organization was to limit the quantity of milk shipped and to fix the price.

[34] Supra, n. 31.

[35] Poultry Producers of So. Cal., Inc. v. Barlow (1922) 189 Cal. 278, 208 Pac. 93; Anaheim Citrus Fruit Ass'n. v. Yeoman (1921) 51 Cal. App. 759, 197 Pac. 959.

[36] Minn. Wheat Growers' Co-op. Marketing Ass'n. v. Huggins, supra, n. 18; Warren v. Ala. Farm Bureau Cotton Ass'n., supra, n. 33.

[37] Cal. Civ. Code, § 653ww.

[38] Brown v. Staple Cotton Co-op. Ass'n., supra, n. 23; Neb. Wheat Growers' Ass'n. v. Norquest, supra, n. 33; Potter v. Dark Tobacco Growers' Co-op. Ass'n., supra, n. 18; Rifle Potato Growers' Co-op. Ass'n. v. Smith, supra, n. 19; Warren v. Ala. Farm Bureau Cotton Ass'n., supra, n. 33.

Neither are these marketing contracts invalid under the common law rules regarding restraint of trade.[39]

V. Rights and Remedies of the Association Against the Grower

A. The Right to the Delivery of the Grower's Crop.

The right to the delivery of the grower's crop is the most important right of the association under the marketing agreement. It may be enforced either by an action for liquidated damages or by an action for specific performance and injunction.

1. *Actions for Liquidated Damages.*

It is uniformly provided in the marketing agreements of co-operative marketing associations that if the grower shall fail to deliver his product to the association in accordance with the terms of the contract, he shall pay liquidated damages to the association at a specified rate.[40] The necessity for including this provision in the marketing agreement arises from the fact that it is impossible to ascertain the actual damages resulting from a breach by the grower. Such a breach causes the association to suffer many elements of

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[39] Neb. Wheat Growers' Ass'n. v. Norquest, supra, n. 33; Potter v. Dark Tobacco Growers' Co-op. Ass'n., supra, n. 18; Wash. Cranberry Growers' Ass'n. v. Moore (1921) 117 Wash. 430, 201 Pac. 773, 25 A. L. R. 1077. In the case of Reeves v. Decorah Farmers' Co-op. Society (1913) 160 Iowa, 194, 140 N. W. 844, 44 L. R. A. (N. S.) 1104, the court held that a clause in the contract of a hog raisers' association providing that stockholders must pay the association five cents per hundred pounds for all hogs sold through persons other than the association, was in restraint of trade. The association involved was not a true co-operative, since it handled the products of both members and non-members. The Supreme Court of Iowa has recently held that co-operative marketing contracts are not in restraint of trade, in the case of Clear Lake Co-op. Live Stock Shippers' Ass'n. v. Weir, supra, n. 19, in which Reeves v. Decorah Farmers' Co-op. Society was distinguished if not overruled.

[40] The following is a typical liquidated damage clause:

"Inasmuch as the remedy at law would be inadequate and inasmuch as it is now and ever will be impracticable and extremely difficult to determine the actual damage resulting to the Association, should the Grower fail to sell and deliver all of his prunes and apricots and pits, the Grower hereby agrees to pay to the Association for all prunes and apricots and pits withheld, delivered, sold, consigned or marketed by or for him other than in accordance with the terms hereof of the sum of two cents per pound of prunes, and particularly the sum of four cents per pound of prunes running larger than thirty to the pound and the sum of four cents per pound of apricots and ½c per pound of apricot pits, as liquidated damages for the breach of this contract, all parties agreeing that this contract is one of a series dependent for its true value upon the adherence of each and all of the Growers to each and all of the said contracts."

damage which cannot be accurately estimated. For example, the proportionate overhead expense to be borne by the other members is increased since the association must maintain an organization capable of handling all of the products of all of its members. The association is also damaged in that the breach of one member causes dissatisfaction among other members and often causes them to refuse to deliver. Again, the associations generally control a large proportion of the products which they handle in the districts within which they operate. They are thus able to maintain a steady market and to prevent speculation in the product, thereby insuring fair prices and an unbroken demand. But their power to do this is reduced by every breach on the part of a member, for his product then goes into the hands of their competitors. Finally, every breach by a member weakens the trade standing of the association, for the trade will not buy from an association if any considerable number of its members are failing to deliver and thus impairing the association's ability to perform its contracts of sale. These and other elements of damage result from a member's breach, and they are not capable of being measured in terms of dollars and cents. It is therefore necessary that the damages be liquidated in advance of the breach.

The Co-operative Marketing Act provides that the by-laws or the marketing agreement may fix, as liquidated damages, specific sums to be paid by the grower upon the breach of any provision of the marketing agreement regarding the delivery of the product, and that such clauses shall be enforceable and shall not be regarded as penalties.[41] Under this section, any reasonable provision for liquidated damages is held to be enforceable.[42]

In California, the validity of the liquidated damage clause in co-operative marketing contracts was fully established even before the adoption of the Co-operative Marketing Act. The Civil Code

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[41] Cal. Civ. Code, § 653pp (a).

[42] Brown v. Staple Cotton Co-op. Ass'n., supra, n. 23 (10c per pound of cotton); Dark Tobacco Growers' Co-op. Ass'n. v. Alexander (1925) 208 Ky. 572, 271 S. W. 677; Dark Tobacco Growers' Co-op. Ass'n. v. Robertson, supra, n. 33 (5c per pound of tobacco); Potter v. Dark Tobacco Growers' Co-op. Ass'n., supra, n. 18 (5c per pound of tobacco); Minn. Wheat Growers' Co-op. Marketing Ass'n. v. Huggins, supra, n. 18 (25c per bushel of wheat); Rowland v. Burley Tobacco Growers' Co-op. Ass'n. (1925) 208 Ky. 300, 270 S. W. 784; Tobacco Growers Co-op. Ass'n. v. Jones, supra, n. 33. In Dairymen's League Co-op. Ass'n. v. Holmes (1924) 207 App. Div. 429, 202 N. Y. Supp. 663, it was held that the liquidated damage provision in the contract in suit was void, as the damages fixed bore no reasonable relation to the actual damages which would ordinarily be suffered by the association as the result of a grower's breach.

provides that the parties may agree upon liquidated damages "when, from the nature of the case, it would be impracticable or extremely difficult to fix the actual damages."[43] It has been shown above that there are many elements of damage suffered by a co-operative marketing association as the result of a breach by a member, which are incapable of exact estimation. It is therefore "impracticable or extremely difficult to fix the actual damage" within the meaning of the code provision. Consequently, in a series of cases arising prior to the adoption of the Co-operative Marketing Act, the California courts have sustained and enforced the usual form of liquidated damage clause found in the marketing agreements or by-laws of nearly all co-operative marketing associations.[44] The law of the state upon this question was thus unaffected by the adoption of the provision of the Co-operative Marketing Act, above referred to, which declares that the by-laws or marketing agreements of associations organized under that act may provide for liquidated damages to be paid by the grower in the event of a breach of any provision of the marketing agreement regarding the delivery of the product.[45]

2. *Actions for Specific Performance and Injunction.*[46]

As has been pointed out, it is essential to the successful functioning of a co-operative marketing association that the marketing contract contain a provision for liquidated damages, since the actual damage is not capable of exact estimation. But even the remedy of liquidated damages is not wholly adequate, for it cannot completely compensate the association for the damages suffered by it. The injury resulting to the association from loss of trade standing, defection of other members, etc., which follows from the failure of a grower to deliver, is really irreparable. For this reason the association does not have a completely adequate remedy unless it can secure an injunction to restrain the grower from delivering his product to persons other than the association, and a decree of specific performance to compel him to deliver to the association.

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[43] Cal. Civ. Code, § 1671.

[44] Anaheim Citrus Fruit Ass'n. v. Yeoman, supra, n. 35; Poultry Producers' of So. Cal. Inc. v. Barlow, supra, n. 35; Poultry Producers of Central Cal. Inc. v. Murphy (1923) 64 Cal. App. 450, 221 Pac. 962.

[45] Supra, n. 41.

[46] The various objections which have been raised to the exercise of these remedies by co-operative marketing associations were analyzed in, Stanley M. Arndt, The Law of California Co-operative Marketing Associations, 8 California Law Review, 281, 384, 9 id. 44. The conclusion was there reached that none of these objections were valid, and that co-operative marketing contracts were specifically enforceable even under common law principles.

The standard form of marketing agreement provides that the association is entitled to an injunction and a decree of specific performance in the event of a breach or threatened breach by the grower.[47]

The right of the co-operative marketing associations to the exercise of these two remedies has been more bitterly contested than any of the other rights which they have sought to acquire. The Co-operative Marketing Act specifically provides that in the event of a breach or threatened breach, by a grower, of any provision of the marketing contract regarding the delivery of the grower's product to the association, the association shall be entitled to an injunction and to a decree of specific performance thereof.[48] It might be supposed that this statutory enactment would have eliminated all doubt as to the right of the association to exercise these two remedies. However, a great variety of objections to their exercise have been raised even since the almost nation-wide adoption of the uniform act. Space does not permit a detailed discussion of these objections, but the more important of them may be listed for purposes of convenience.

It has been argued that co-operative marketing associations are not entitled to the remedies of specific performance and injunction for the following reasons: because the standard marketing agreement is too uncertain for specific enforcement;[49] because the liquidated damage clause in the contract provides an adequate remedy at law so as to prevent the granting of equitable relief;[50] because

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[47] The following is a typical provision:
"The Grower agrees that in the event of a breach or threatened breach by him of any provision regarding delivery of prunes or apricots or pits, the Association shall be entitled to an injunction to prevent breach or further breach hereof and to a decree for specific performance hereof; and the parties agree that this is a contract for the purchase and sale of personal property under special circumstances and conditions; and that the buyer cannot go to the open markets and buy prunes or apricots or pits to replace any which the Grower may fail to deliver."

[48] "In the event of any such breach or threatened breach of such marketing contract by a member, the association shall be entitled to an injunction to prevent the further breach of the contract and to a decree of specific performance thereof. Pending the adjudication of such an action and upon filing a verified complaint showing the breach or threatened breach, and upon filing a sufficient bond, the association shall be entitled to a temporary restraining order and preliminary injunction against the member." Cal. Civ. Code, § 653pp (b).

[49] Tex. Farm Bureau Cotton Ass'n. v. Stovall, supra, n. 7; Warren v. Ala. Farm Bureau Cotton Ass'n., supra, n. 33.

[50] Dark Tobacco Growers' Co-op. Ass'n. v. Dunn, supra, n. 18; Kan. Wheat Growers' Ass'n. v. Schulte, supra, n. 19; Minn. Wheat Growers' Co-op. Marketing Ass'n. v. Huggins, supra, n. 18; Neb. Wheat Growers' Ass'n. v. Norquest, supra, n. 33; Ore. Growers' Co-op. Ass'n. v. Lentz, supra, n. 19; Tex. Farm Bureau Cotton Ass'n. v. Stovall, supra, n. 7; Tobacco Growers' Co-op. Ass'n. v. Pollock (1924) 187 N. C. 409, 121 S. E. 763; Wash. Cranberry Growers' Ass'n. v. Moore, supra, n. 39.

the specific enforcement of the marketing agreement would require continuous supervision;[51] because the standard marketing agreement is too unjust and unreasonable to merit the exercise of equitable remedies for its enforcement;[52] because the marketing agreement cannot be specifically enforced by the grower against the association, and therefore lacks mutuality of remedy;[53] and because that section of the uniform act which provides that the association shall be entitled to these remedies constitutes an attempt to deprive courts of equity of their judicial discretion.[54]

All of the foregoing arguments have been rejected by the courts to which they have been presented. The right of an association organized under the Co-operative Marketing Act to exercise the remedies of specific performance and injunction is now firmly established by a large number of decisions.[55]

The California courts were first called upon to decide whether these remedies could be invoked by co-operative marketing associations against their members prior to the adoption of the Co-operative Marketing Act. In 1922 the Supreme Court held, in the case of *Poultry Producers of Southern California v. Barlow*[56] that a co-operative association could not compel one of its members specifically to perform the marketing agreement. The court conceded that the remedy at law was inadequate, but held that the association could not sue for specific performance because there was lack of mutuality, in that the member could not compel the association to perform specifically on account of the personal nature

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[51] Tex. Farm Bureau Cotton Ass'n. v. Stovall, supra, n. 7.

[52] Warren v. Ala. Farm Bureau Cotton Ass'n., supra, n. 33.

[53] Rifle Potato Growers' Co-op. Ass'n. v. Smith, supra, n. 19; Tex. Farm Bureau Cotton Ass'n. v. Stovall, supra, n. 7.

[54] Kan. Wheat Growers' Ass'n. v. Schulte, supra, n. 19.

[55] Dark Tobacco Growers' Co-op. Ass'n. v. Dunn, supra, n. 18; Feagain v. Dark Tobacco Growers' Co-op. Ass'n., supra, n. 25; Kan. Wheat Growers' Ass'n. v. Schulte, supra, n. 19; Long v. Tex. Farm Bureau Cotton Ass'n. (1925) 270 S. W. 561 (Tex. Civ. App.); Main v. Tex. Farm Bureau Cotton Ass'n. (1925) 271 S. W. 178 (Tex. Civ. App.); Minn. Wheat Growers' Co-op. Marketing Ass'n. v. Huggins, supra, n. 18; Neb. Wheat Growers' Ass'n. v. Norquest, supra, n. 33; Ore. Growers' Co-op. Ass'n. v. Lentz, supra, n. 19; Potter v. Dark Tobacco Growers' Co-op. Ass'n., supra, n. 18; Rifle Potato Growers' Co-op. Ass'n. v. Smith, supra, n. 19; Tex. Farm Bureau Cotton Ass'n. v. Stovall, supra, n. 7; Tobacco Growers' Co-op. Ass'n. v. Battle (1924) 187 N. C. 260, 121 S. E. 629; Tobacco Growers' Co-op. Ass'n. v. Patterson (1924) 187 N. C. 252, 121 S. E. 631; Tobacco Growers' Co-op. Ass'n. v. Pollock, supra, n. 50 (injunction may be granted covering entire remaining period of contract, although defendant has already sold crop raised in particular year in which suit is brought); Tobacco Growers' Co'op. Ass'n. v. Spikes (1924) 187 N. C. 367, 121 S. E. 636; Warren v. Ala. Farm Bureau Cotton Ass'n., supra, n. 33.

[56] Supra, n. 35.

of the services to be rendered by the association. Having decided that the association was not entitled to specific performance, the court was compelled to hold that it was not entitled to enjoin the breach of the marketing agreement.[57]

In 1923 the legislature adopted the Co-operative Marketing Act,[58] thereby conferring the right to exercise the remedies of specific performance and injunction upon all co-operative marketing associations organized under the act and upon all previously organized associations which should adopt its provisions. A considerable number of the California associations have adopted the provisions of the act.[59]

In 1925 the legislature adopted certain code amendments which confer the right to the remedies of specific performance and injunction upon all non-profit co-operative associations, whether or not they have been organized under the Co-operative Marketing Act, or have adopted its provisions.[60]

3. *Defenses Advanced in Actions for Liquidated Damages, Specific Performance and Injunction.*

The number of defenses which may be urged by the grower in actions brought on account of his failure to deliver his crop is, of course, infinite. Only a few of the more important and more common defenses can be considered here.

Insufficient Sign-Up

It is generally provided in the pre-organization agreement that the association shall not be organized and the marketing agreements shall not become binding upon the growers unless by a certain date the signatures of growers of a certain proportion of the tonnage or acreage within the district shall have been secured. In actions upon the marketing agreement, growers frequently endeavor to avoid liability upon the agreement by attempting to show that the required acreage or tonnage has not been "signed up." This defense is generally referred to as the defense of "insufficient sign-up."

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[57] Cal. Code Civ. Proc. § 526.

[58] Cal. Civ. Code, §§ 653aa-653xx.

[59] Among these are the California Prune and Apricot Growers' Association, the California Pear Growers' Association and the Sun-Maid Raisin Growers of California. The California Peach and Fig Growers' Association and the Poultry Producers of Central California have been incorporated under the provisions of the act.

[60] Cal. Civ. Code, §§ 3397, 3423; Cal. Code Civ. Proc. § 526.

In order to relieve the association of the burden of proving in each action upon the marketing agreement that the required number of signatures has been obtained, a provision is usually inserted in the pre-organization agreement to the effect that the written statement of the organization committee as to the tonnage or acreage or number of growers signed up shall be conclusive. In actions upon the marketing agreement in which the sufficiency of the sign-up is in issue, it is the practice to introduce the written statement in evidence, this being permissible by virtue of the provision in the contract just referred to.

It is settled that the written statement of the organization committee constitutes conclusive proof of the sufficiency of the sign-up in the absence of a showing of fraud.[61] Where, however, it is shown affirmatively by the defendant that the organization committee has acted fraudulently in making the written statement,[62] or that, although acting in good faith, they have based their statement upon data fraudulently prepared by their subordinates,[63] the conclusive character of the certificate is destroyed.

Like other defenses in actions upon contract, the defense of insufficient sign-up may be waived. If, after the association has commenced to function, the grower delivers his product to it and accepts payments therefor he waives this defense, and the association, in an action upon the marketing agreement, is not obliged to offer any affirmative proof of the sufficiency of the sign-up.[64]

Fraud

It is a general rule of law that mere promissory representations or statements of opinion as to what will happen in the future do not constitute fraud. This rule is followed in actions brought by co-operative associations upon their marketing agreements. Mere promises or representations made by solicitors or growers' committees as to what the association will do in the future, such as statements that certain advances will be made to the growers upon delivery of their crops, do not constitute such fraud as will enable the grower to avoid liability upon the marketing agreement.[65]

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[61] Pittman v. Tobacco Growers' Co-op. Ass'n. (1924) 187 N. C. 340, 121 S. E. 634; Rowland v. Burley Tobacco Growers' Co-op. Ass'n., supra, n. 42; Wash. Wheat Growers' Ass'n. v. Leifer (1925) 132 Wash. 602, 232 Pac. 339.

[62] Northwest Hay Ass'n. v. Chase (1925) 136 Wash. 160, 239 Pac. 1.

[63] Wenatchee Dist. Co-op. Ass'n. v. Mohler (1925) 135 Wash. 169, 237 Pac. 300.

[64] Cal. Raisin Growers' Ass'n. v. Abbott (1911) 160 Cal. 601, 117 Pac. 767.

[65] Burley Tobacco Growers' Co-op. Ass'n. v. Rogers, supra, n. 33; Dark

Lack of Consideration

It has frequently been contended that the standard marketing agreement lacks consideration in that the association incurs no obligations under it. An inspection of the agreement discloses, however, that the association agrees to buy the grower's product, to mingle it with the products of other growers of like quality and grade, to resell the product at the best prices obtainable, to pay over the net proceeds to the growers on a proportional basis, and to perform various other services for the grower. These promises on the part of the association constitute ample consideration for the promises of the grower under the marketing agreement, including his promise to deliver his product to the association. The argument that the marketing agreement lacks consideration has been rejected in every case in which it has been advanced.[66]

Prior Breach by the Association

The defense most frequently relied upon by defaulting growers who are sued for breach of the marketing agreement is that the association has broken the contract prior to the breach by the grower. The nature of co-operative associations renders the doctrine of immaterial breach peculiarly applicable to actions by such associations against their grower members. An act on the part of the association which constitutes a breach of the contract of one grower may constitute a breach of the contracts of all the growers. If the court finds that there has been such a breach, not merely the particular defendant, but all the grower members of the associations will be released from the performance of their contracts. The courts have applied the doctrine of immaterial breach in a number of cases, and have held that only a relatively important and substantial breach

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Tobacco Growers' Co-op. Ass'n. v. Mason, supra, n. 30; Kan. Wheat Growers' Ass'n. v. Floyd (1924) 116 Kan. 522, 227 Pac. 336; S. C. Cotton Growers' Co-op. Ass'n. v. English, supra, n. 33.

[66] Burley Tobacco Growers' Co-op. Ass'n. v. Rogers, supra, n. 33; Dark Tobacco Growers' Co-op. Ass'n. v. Robertson, supra, n. 33; Dark Tobacco Growers' Co-op. Ass'n. v. Mason, supra, n. 30; Minn. Wheat Growers' Co-op. Marketing Ass'n. v. Huggins, supra, n. 18; Potter v. Dark Tobacco Growers' Co-op. Ass'n., supra, n. 18; Rifle Potato Growers' Co-op. Ass'n. v. Smith, supra, n. 19; Tex. Farm Bureau Cotton Ass'n. v. Stovall, supra, n. 7; Warren v. Ala. Farm Bureau Cotton Ass'n., supra, n. 33. In Tex. Farm Bureau Cotton Ass'n. v. Stovall (1923) 248 S. W. 1109, the Texas Court of Civil Appeals held that the marketing agreement of the plaintiff association was void for lack of consideration, but the decision was reversed by the Supreme Court in Tex. Farm Bureau Cotton Ass'n. v. Stovall, supra, n. 7.

by the association will excuse the growers from the performance of their contracts.[67]

It is also held that a breach by the association which does not affect the particular grower relying upon the same, but affects other growers only, does not excuse performance by the grower setting up this defense.[68]

If a substantial breach of the marketing agreement is established, all growers affected thereby are released from their obligations under the agreement, not only in the particular year in which the breach occurs, but during the full term of the agreement.[69]

It is customary for co-operative associations to send to each member, upon the closing of a pool, a statement of his account and a check in settlement thereof. If the member makes no objection to the account within a reasonable time, and cashes the check tendered in final settlement, an account stated and an accord and satisfaction are created so that the member cannot later rely upon alleged breaches by the association in the handling of the pool in question.[70]

Certain particular acts on the part of the association frequently alleged to be in violation of the marketing agreement may be briefly considered. It is the practice of most associations to make sales for future delivery before the product is received from the growers. It is held that this procedure does not constitute a violation of the usual form of marketing agreement.[71]

In some cases it becomes expedient for an association to dispose of the whole or a part of its product through brokers instead of maintaining its own selling agency for this purpose. Such practice is not in violation of the usual form of marketing agreement.[72] However, the marketing agreements of some co-operatives expressly prohibit sales through brokers, and a sale by the association in violation of such a provision will excuse the grower from the performance of his contract.[73]

The marketing agreement sometimes contains a provision that the association shall make final settlement on a certain date for the

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[67] Tobacco Growers' Co-op. Ass'n. v. Bland (1924) 187 N. C. 356, 121 S. E. 636; Wash. Co-op. Egg and Poultry Ass'n. v. Taylor (1922) 122 Wash. 466, 210 Pac. 806.

[68] Wash. Co-op. Egg and Poultry Ass'n. v. Taylor, supra, n. 67.

[69] Ore. Growers' Co-op. Ass'n. v. Lentz, supra, n. 19.

[70] Cal. Bean Growers' Ass'n. v. Rindge Land & Navigation Co. (1926) 72 Cal. Dec. 149, 248 Pac. 658.

[71] Ark. Cotton Growers' Co-op. Ass'n. v. Brown, supra, n. 21.

[72] Rifle Potato Growers' Co-op. Ass'n. v. Smith, supra, n. 19.

[73] N. J. Poultry Producers' Ass'n. v. Tradelius (1924) 96 N. J. Eq. 683, 126 Atl. 538.

proceeds of so much of the crop received in the previous season as shall have been marketed prior to such date. A provision of this kind does not bind the association to make final settlement by this date for the *whole* crop of the previous season, however, for a part of the crop may have been marketed subsequent to the date fixed. If, therefore, the association cannot dispose of the entire crop prior to this date, the fact that final settlement for the entire crop is made after the date fixed does not constitute a violation of this provision of the contract, provided settlement is made by such date for all of the crop marketed prior to that time.[74]

The marketing agreement usually defines the deductions which may be made by the association from the gross proceeds of the crop for handling, marketing, and other expenses. An association may violate the marketing agreement by making deductions not authorized by it before paying over the net proceeds to the growers.[75]

It has been held that where the association executes releases in favor of a considerable number of its members, authorizing them to give trust deeds on their crops to persons other than the association, there has been a breach of the marketing agreement which releases other members from their obligation to perform the agreement.[76]

Prior Breaches by Other Growers

When a co-operative association sues a grower member for a breach of the marketing agreement, it sues as the agent of the other grower members of the association. Consequently, it has been argued that a breach by any of these other grower members will constitute a defense to the action against the particular grower who is sued. The result of such a holding would be, however, that after the contract had been breached by any one grower, it could not be enforced against any of the others. The courts might be expected to refuse to adopt a rule which would lead to such an unreasonable result. It is held that a grower who is sued by an association cannot rely upon prior breaches by other growers as a defense to the action.[77]

Mismanagement by the Association

In actions upon the marketing agreement, acts of mismanagement

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[74] Cal. Prune and Apricot Growers, Inc. v. Baker (1926) 49 Cal. App. Dec. 845, 246 Pac. 1081; Northwest Hay Ass'n. v. Hanson (1925) 236 Pac. 561 (Wash.).

[75] N. J. Poultry Producers' Ass'n. v. Tradelius, supra, n. 73.

[76] Staple Cotton Co-op. Ass'n. v. Borodofsky (1926) 108 So. 802 (Miss.).

[77] Cal. Bean Growers' Ass'n. v. Rindge Land & Navigation Co., supra, n. 70; Wash. Co-op. Egg and Poultry Ass'n. v. Taylor, supra, n. 67.

on the part of the officers of the association, not amounting to actual breaches of the marketing agreement, are sometimes relied upon as constituting a defense. However, the grower's remedy for such acts of mismanagement is by action within the association to remove the officers or to compel them to act in accordance with the desires of the members of the association. It is settled that the grower cannot excuse his breach of the marketing agreement nor establish a right to rescission thereof by proving mismanagement on the part of the association.[78]

Mortgage of Crop by the Grower

It is sometimes provided in the marketing agreement that if the grower places a mortgage on his crop the association shall have the right to take delivery of the crop and to pay off all or a part of the mortgage and charge such payment to the grower's account. Under this provision of the contract, the association may enjoin the transfer of the crop by the grower to a mortgagee who has taken a mortgage on the crop subsequent to the execution of the marketing agreement.[79]

Lease of the Land by the Grower

The Co-operative Marketing Act (except in a few states) provides that in any action upon the marketing agreement it shall be conclusively presumed that the landowner is able to control the delivery of products produced on his land by tenants or others, whose tenancy or possession or labor thereon were created or changed after the execution of the marketing agreement by the landowner.[80] Under this section the association is entitled to the delivery of the *entire crop* produced by the tenant provided his tenancy was created or changed after the execution of the marketing agreement.[81] In a few of the states which have adopted the Co-operative Marketing Act, the provision just referred to has been omitted. In these states it is held that the landlord's share of the crop under a crop rental

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[78] Pittman v. Tobacco Growers' Co-op. Ass'n., supra, n. 61.

[79] Kan. Wheat Growers' Ass'n. v. Floyd, supra, n. 65; Redford v. Burley Tobacco Growers' Co-op. Ass'n. (1924) 205 Ky. 515, 266 S. W. 24. In Tobacco Growers' Co-op. Ass'n. v. Harvey, supra, n. 6, the contrary result was reached because of a local statute giving special protection to agricultural liens.

[80] Cal. Civ. Code, § 653pp (c).

[81] Dark Tobacco Growers' Co-op. Ass'n. v. Daniels (1926) 284 S. W. 399 (Ky.); Feagain v. Dark Tobacco Growers' Co-op. Ass'n., supra, n. 25. But see La. Farm Bureau Cotton Growers' Co-op. Ass'n. v. Clark, supra, n. 25.

lease is subject to the marketing agreement.[82] The cases are in conflict as to whether, in these states, the tenant's share of the crop is also subject to the marketing agreement.[83]

B. The Right to Recover Over-Payments.

One of the most difficult problems which co-operative associations are called upon to meet is that of financing their members. Under the co-operative system of marketing it is impossible for the association to effect a final settlement with the growers for a considerable time after the delivery of the crop. Most of the growers are not in a position to wait until this final settlement for the proceeds of their crops. It is, therefore, the usual practice of the associations to make advances to the growers in proportion to their deliveries, as fast as the sale of the crop will permit.

Upon the making of a final settlement, it sometimes happens that the advances to some growers are found to be greater than the amounts to which they are entitled under the settlement. Under these circumstances the association may recover these over-payments from those growers who have been advanced too much, in order that the other growers may receive their proportionate share of the proceeds of the crop. This result may be accomplished by joining all the growers in one single accounting suit, in which the court may order the overpaid growers to turn over the amounts by which they have been overpaid to the growers who have been underpaid.[84] Or the association may maintain a separate action against each overpaid grower to recover from him the amount of the over-payment.[85]

C. The Right to Specific Enforcement of the Grower's Contract to Sign the Marketing Agreement.

The pre-organization agreement often provides that the grower shall execute, when requested by the association, a marketing agreement in terms similar to that embodied in the pre-organization agree-

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[82] Long v. Tex. Farm Bureau Cotton Ass'n., supra, n. 55; Main v. Tex. Farm Bureau Cotton Ass'n., supra, n. 55; Tex. Farm Bureau Cotton Ass'n. v. Kyle (1926) 281 S. W. 629 (Tex. Civ. App.).

[83] Cre. Growers' Co-op. Ass'n. v. Lentz, supra, n. 19 (tenant's share subject to marketing agreement); Tobacco Growers' Co-op. Ass'n. v. Bissett (1924) 187 N. C. 180, 121 S. E. 446 (tenant's share not subject to marketing agreement).

[84] Cal. Raisin Growers' Ass'n. v. Abbott, supra, n. 64.

[85] Sugar Loaf Orange Growers' Ass'n. v. Skewes (1920) 47 Cal. App. 470, 190 Pac. 1076.

ment. The association is entitled to specific enforcement of this provision in the pre-organization agreement, and may obtain a decree compelling a refractory grower who has signed the pre-organization agreement, to execute the marketing agreement.[86]

VI. Rights and Remedies of the Association Against Third Persons

Lessees of Grower's Land

Reference has already been made to the provision of the Co-operative Marketing Act[87] which establishes a conclusive presumption that the grower is able to control the delivery of crops produced by tenants whose rights accrued subsequent to the execution by the landlord of the marketing agreement. In states where this provision has been adopted, the association is entitled to an injunction against a tenant coming within the terms of the section, restraining him from delivering his crop to persons other than the association, where the tenant has knowledge of the fact that the landlord is a member of the association at the time he takes the lease.[88]

Third Persons Inducing Growers to Breach Contracts

An association may maintain an action to enjoin third persons from inducing members of the association to breach their contracts.[89]

In some states, though not in California, the Co-operative Marketing Act provides a penalty recoverable in a civil action by the association against third persons inducing growers to breach their contracts. Reference has already been made to the conflicting decisions upon the question of the constitutionality of this section.[90]

VII. Rights and Remedies of the Grower Against the Association

A member of a co-operative marketing association may maintain an action against the association to recover his share of the net pro-

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[86] Poultry Producers of Central Cal. Inc. v. Murphy, supra, n. 44.

[87] Cal. Civ. Code, § 653pp (c).

[88] Feagain v. Dark Tobacco Growers' Co-op. Ass'n., supra, n. 25. The same result was reached in the absence of any such statutory provision in Ore. Growers' Co-op. Ass'n. v. Lentz, supra, n. 19. But see La. Farm Bureau Cotton Growers' Co-op. Ass'n. v. Clark, supra, n. 25.

[89] No. Wis. Co-op. Tobacco Pool v. Bekkedal, supra, n. 18.

[90] Supra, n. 27.

ceeds received from the sale of the product.[91] The rights of the grower are less frequently asserted in actions brought by the grower for their enforcement than in actions brought by the association against the grower. For this reason some of the grower's rights under the marketing agreement have been considered heretofore in connection with the discussion of the defenses which the grower may interpose in an action brought against him by the association.

VIII. Rights and Remedies of Third Persons Against the Grower

In some cases farmers' co-operative associations are organized solely for the purpose of obtaining the advantages of collective bargaining, and do not actually market the crop, as does the true co-operative marketing association. In some of these associations the growers contract to deliver their crops to the association or at the place directed by it, and the association then arranges with a selling agent to handle the actual marketing of the crop. In others, the association sells the crop outright to a wholesaler or dealer and the grower contracts with the association to deliver directly to such wholesaler or dealer.

When a selling arrangement of the first kind is made, the selling agent generally makes advances on the crop, either directly to the growers, or to the association, which in turn distributes the sums advanced among the growers. Whether the advance is made directly to the growers or to the association as their representative, the selling agent may maintain an action even against the growers to recover the amount of the over-payment in case the advances exceed the ultimate net resale price of the crop.[92]

Where the growers contract with the association to deliver the crop directly to a designated buyer to whom the association has sold the crop, this buyer, as a third party beneficiary, may invoke the same remedies against the grower which might otherwise be invoked by the association. Thus, the buyer may enjoin the grower from selling his crop to others in violation of his contract. And if it appears in the course of the action that the grower has already disposed of his crop in violation of the contract, the court may

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[91] Silveira v. Associated Milk Producers (1923) 63 Cal. App. 572, 219 Pac. 461.

[92] Lake Charles Rice Milling Co. v. Pacific Rice Growers' Ass'n. (C. C. A. 9th Circ. 1924) 295 Fed. 246; Mandell v. Moses (1924) 209 App. Div. 531, 205 N. Y. Supp. 254.

retain jurisdiction of the case for the purpose of awarding the liquidated damages provided by the contract.[93]

CONCLUSION

There are many legal questions relating to the organization and operation of co-operative marketing associations which cannot be discussed in an article of this length. For example, the courts have considered various questions relating to the powers of co-operative associations,[94] their activities in interstate commerce,[95] the application to them of the foreign corporation acts of the various states,[96] the taxation of their property,[97] their power to take advantage of the provisions of the Bankruptcy Act,[98] and questions of evidence in actions by the associations against their grower members.[99] All of these subjects might be discussed at considerable length. They are, however, of less importance than the questions which have been presented herein, and the law in regard to some of them has not yet been so completely worked out by the courts as to justify a consideration of the decisions.

Mention has already been made of the great rapidity with which the law has been adapted to encourage the development of co-operative marketing associations and to enable them to function effectively. Special statutes have been enacted to provide for their organization, exceptions to the operation of the anti-trust acts have been created for their benefit, and they have been permitted to exercise every remedy known to the law which could assist them in the enforcement of their marketing contracts.

In thus extending to the organizations engaged in this new system of marketing all the advantages which the law can confer upon them the legislatures and the courts are fully justified. Many plans

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[93] Phez Co. v. Salem Fruit Union, supra, n. 5.

[94] Tobacco Growers' Co-op. Ass'n. v. Jones, supra, n. 33.

[95] Liberty Warehouse Co. v. Burley Tobacco Growers' Co-op. Ass'n., supra, n. 18; Minn. Wheat Growers' Co-op. Marketing Ass'n. v. Huggins, supra, n. 18; Neb. Wheat Growers' Ass'n. v. Norquest, supra, n. 33.

[96] Brown v. Staple Cotton Co-op. Ass'n., supra, n. 23; Burley Tobacco Growers' Co-op. Ass'n. v. Rogers, supra, n. 33; Dark Tobacco Growers' Co-op. Ass'n. v. Mason, supra, n. 30; Dark Tobacco Growers' Co-op. Ass'n. v. Robertson, supra, n. 33; Neb. Wheat Growers' Ass'n. v. Norquest, supra, n. 33.

[97] Burley Tobacco Growers' Co-op. Ass'n. v. City of Carrollton (1925) 208 Ky. 270, 270 S. W. 749.

[98] In re Dairy Marketing Ass'n. of Ft. Wayne, Inc. (Dist. Ct. Ind. 1925) 8 Fed. (2d) 626.

[99] Dark Tobacco Growers' Co-op. Ass'n. v. Mason, supra, n. 30; Gray's Harbor Dairymen's Ass'n. v. Engen (1924) 130 Wash. 169, 226 Pac. 496; Tobacco Growers' Co-op. Ass'n. v. Jones, supra, n. 33.

have been proposed and tried within recent years for the purpose of alleviating the present unfortunate condition of the American farmer. The co-operative marketing system has accomplished more toward this end than any other plan or agency. Only with the full co-operation of the law-making bodies and the courts can a fair trial be given to "the most hopeful movement ever inaugurated to obtain justice for and improve the financial condition of farmers."[100]

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[100] Tobacco Growers' Co-op. Ass'n. v. Jones, supra, n. 33.