The Constitutionality of Cooperative Marketing Statutes

COOPERATIVE marketing has written new law upon our statute books. When some ten or twelve years ago the cooperative marketing association first attracted attention it stood before the law as an unusual legal problem. These marketing organizations were often composed of over half the growers of a single commodity, and were formed chiefly to improve prices for producers. Whether or not they restrained trade was a difficult question.^{1a} One answer was a chain of statutes, which, today, binds forty-two states.¹ It was this legislation, placed on our statute books by the leaders of the cooperative marketing movement,² that expressly legalized the associations—their structures and their contracts—and definitely stated that they did not restrain trade.³

But these statutes themselves were attacked. Could state legislatures provide that certain organizations were not within the laws which forbade combinations in restraint of trade? Was not such discrimination

^{1a} The writer wishes to acknowledge the aid, in discussing cases which have arisen on cooperative marketing problems, received from the briefs of the following persons: Mr. Aaron Sapiro, Mr. Milton Sapiro, Mr. David Livingston and Mr. Lawrence Livingston.

¹ *Alabama*, Laws, Special Session 1921, no. 31; *Arizona*, Laws 1921, c. 156; *Arkansas*, Acts 1921, no. 116; *California*, Stat. 1923, c. 105; *Colorado*, Laws 1923, c. 142; *Connecticut*, Acts 1923, c. 251; *Florida*, Laws 1923, c. 9300; *Georgia*, Laws 1921, no. 279; *Idaho*, Laws 1921, c. 124; *Illinois*, Laws 1923, p. 286 (Senate Bill 165); *Indiana*, Acts 1925, c. 20; *Iowa*, Laws 1921 (41 G. A.), c. 122; *Kansas*, Laws 1921, c. 148; *Kentucky*, Acts 1922, c. 1; *Louisiana*, Acts 1922, no. 57; *Maine*, Laws 1923, c. 88; *Maryland*, Laws 1922, c. 197; *Massachusetts*, Acts 1923, c. 438, § 4, (GEN. LAWS, c. 157, §§ 10-18); *Michigan*, Acts 1921, no. 84, c. 4; *Minnesota*, Laws 1923, c. 264; *Mississippi*, Laws 1922, c. 179; *Missouri*, Laws 1923; *Montana*, Laws 1921, c. 233; *Nebraska*, Laws 1925, c. 79; *Nevada*, Stats. 1921, c. 236; *New Hampshire*, Laws 1925, c. 33; *New Jersey*, Laws 1924, c. 12; *New Mexico*, Laws 1925, c. 99; *New York*, Laws 1924, c. 616; *North Carolina*, Laws 1921, c. 89; *North Dakota*, Laws 1921, c. 44; *Ohio*, Laws 1923, p. 91; *Oklahoma*, Laws 1923, c. 181; *Oregon*, Laws 1915, c. 226; 1917, c. 411; 1921, c. 490; *Pennsylvania*, Laws 1919, no. 238; *South Carolina*, Acts 1921, no. 203; *South Dakota*, Laws 1923, c. 15; *Tennessee*, Acts 1923, c. 100; *Texas*, General Laws 1921, c. 22; *Utah*, Laws 1923, c. 6; *Virginia*, Acts 1922, c. 48; *Washington*, Laws 1921, c. 115; *West Virginia*, Acts 1923, c. 53; *Wisconsin*, Stat. 1921, § 1786 (e1-17a); *Wyoming*, Laws 1923, c. 83.

² The work of one man, Mr. Aaron Sapiro, is chiefly responsible for these statutes.

³ A typical provision is that of The Bingham Cooperative Marketing Act, Kentucky Acts 1922, c. 1, § 28: "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; and the marketing contracts and 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."

unconstitutional under the Fourteenth Amendment and under the state statutes and constitutional provisions modeled upon it? These questions were not satisfactorily answered, and remain, in the writer's opinion, confused to this day. This article will set itself to the problem of the constitutionality of these statutes, the decisions reached by the courts, the principles involved.

The case of *Liberty Warehouse Co. v. Burley Tobacco Growers Cooperative Association*,⁴ recently decided by the Supreme Court, does not address itself directly to the problem. The court does not give separate treatment to the question whether the associations restrain trade, or whether, if they do, the statutes can protect them. True, the warehouse company attempted to raise these issues in the first section of its amended answer and counter-claim. As stated by the Supreme Court:

"The first sets up 'in estoppel and in bar' of the alleged action that the association, since January 13, 1922, has been a trust or combination of the capital, skill and acts of divers persons and corporations doing commercial business in Kentucky and between that state and other states and foreign countries 'organized and conducted for the express purpose of unlawfully and contrary to the common law, creating and carrying out restrictions in trade,' under the guise of stabilizing prices."

"Section 1 presents no Federal question. It does not mention the Constitution or any statute of the United States, but claims that the association is an unlawful trust or combination under common-law rules. But the present controversy concerns a statute, and the state may freely alter, amend, or abolish the common law within its jurisdiction."

Hence, the restraint of trade issue and the constitutionality of the exempting statutes were not weighed as major issues of the case.

According to the court, the problem before it was the constitutionality of the provision of the marketing statute⁵ which made interference by third parties with contracts between cooperative marketing associations and their members a crime.

"Do the provisions of the Bingham Act which afford peculiar protection to marketing contracts with members of the association deprive the warehouse company of equal protection of the laws, or conflict with the due process clause of the 14th Amendment because without reasonable basis and purely arbitrary? These questions may be fairly said to arise upon the present record."

While the court narrows the question to the constitutionality of the "peculiar protection" afforded marketing contracts by the criminal provisions of the Bingham Act, its discussion goes beyond this. A statute forbidding interference with a marketing contract can be sustained only if the contract itself is legal. And the court did consider its legality. Since the marketing contract is the core of the marketing association, its legality is bound up with the legality of the association itself. The

⁴ (Feb. 20, 1928) 276 U. S. 71, 48 Sup. Ct. 291.

⁵ Sections 26 and 27 of the Bingham Act, *supra* n. 3.

court did consider the legality of the association. Having earlier in its opinion dismissed the claim "that the association is an unlawful trust or combination" as a question not raised by the record, the court later is forced to consider the lawfulness of the association. And the court devotes considerable space to a very general discussion of the legality of the marketing system. Typical of the quotations accepted from the state courts is the following:

"In view of the necessity of protecting those engaged in raising tobacco against the combination of those who buy the raw product at their own figures and sell it to the public at prices also fixed by themselves, this movement has been organized. By a careful examination of all the provisions of the act under which the association is acting, it will be seen that every precaution has been taken to insure that it will not be used for private gain and can operate only for the protection of the producers."⁶

Thus the Supreme Court eventually does consider the legality of the cooperative system. It finds itself compelled to discuss this general issue. In passing upon the legality of a particular device provided for the maintenance of the cooperative system, the question whether the system itself promoted illegal ends—restrained trade, raised prices, etc.—naturally arose.

While the court sustained the cooperative marketing association, the grounds for its approval are so broad that we must still theorize as to the specific reason for the legality of the associations if there is any reason at all. The court did not isolate the separate problems involved. That is, the court did not face these questions: Do the associations violate the Sherman Anti-Trust Act or the statutes and common law rules against monopolies? If so, has a legislature the power, under the Fourteenth Amendment or the state statutes modelled upon it, to exempt the associations from these laws? Yet upon the determination of these problems the legality of the whole system must rest.

RESTRAINT OF TRADE

The decisions have almost uniformly steered clear of the second question and have held, without the aid of the statutory exemption, that the associations do not violate the laws against monopoly. The reasons adduced for this holding are not always satisfactory. The courts prefer to reason badly rather than consider the statutes.

There are three groups of cases: first, those that accept the doctrine that *any* reduction of competition is illegal, but which, somehow, declare the associations are legal; second, those that uphold the associations because, as now conducted, they commit no "overt harmful acts";

⁶ Tobacco Growers' Co-op. Ass'n v. Jones (1923) 185 N. C. 265, 117 S. E. 174, 33 A. L. R. 231.

third, those that admit that the associations violate the accepted notions of restraint of trade but which rest the legality of the associations upon the statutes.

It is unfortunate that courts in the first group, which hold that *any* reduction of competition is illegal, should insist that the cooperative association does not, in fact, reduce competition. If courts must interpret the anti-trust laws strictly, they should rest the legality of the cooperative association upon the statutes exempting them from such laws rather than upon artificialities.⁷

The courts in the second group hold that all combinations do not restrain trade but only those that harm the public. The cooperative association, due to its unique constitution, is said to be unable to harm the public. It is open to all farmers who wish to become members;⁸ it is semi-public in its nature since representatives of the state government sit on its board of directors;⁹ and it is sometimes publicly financed.¹⁰

Although these alleged safeguards to protect the public are of a

⁷ There have been many decisions based upon a strict interpretation of the state anti-trust laws in states where no statutes have exempted the associations from the anti-trust laws or in cases in which the association has not incorporated under the cooperative marketing statutes. The following decisions have condemned these associations as monopolies in restraint of trade: *Georgia Trust Exchange v. Turnipseed* (1913) 9 Ala. App. 123, 62 So. 542; *Burns v. Wray Farmers' Grain Co.* (1918) 65 Colo. 425, 176 Pac. 487; *Atkinson v. Colorado Wheat Growers' Association* (1925) 77 Colo. 559, 238 Pac. 1117; *Reeves v. Decorah Farmers' Cooperative Society* (1913) 160 Iowa 194, 140 N. W. 844; *Ludowese v. Farmers' Mutual Cooperative Co.* (1914) 164 Iowa 197, 145 N. W. 475; *Tord v. Chicago Milk Shippers' Association* (1895) 155 Ill. 166, 39 N. E. 651; *Fischer v. El Paso Egg Producers' Association* (1925) 278 S. W. 262 (Texas). The following decisions even on this strict construction of the trust laws have held the associations not in restraint of trade: *Owen Co. Burley Tobacco Society v. Brumback* (1908) 128 Ky. 137, 107 S. W. 710; *People v. Milk Exchange* (1895) 145 N. Y. 267, 39 N. E. 1062; *Phez Co. v. Salem Fruit Union* (1921) 103 Ore. 514, 201 Pas. 222.

⁸ Some cases regard this characteristic as a deterrent to monopolistic practices. *Kansas Wheat Growers' Association v. Schulte* (1920) 113 Kan. 672, 216 Pac. 311; *Nebraska Wheat Growers' Association v. Norquest* (1925) 113 Neb. 731, 204 N. W. 798; *Oregon Growers' Cooperative Association v. Lentz* (1923) 107 Ore. 561, 212 Pac. 811. The theory is that a high price will attract an increased membership. An increased membership will, in turn, reduce prices. This may be true of products which readily come into bearing. But many commodities handled by cooperative associations, such as fruits and nuts, require years of culture before production, so that a temporary control of the supply is feasible. *Cf.* (1926) 4 NEBRASKA L. BULL. 361.

⁹ The power of a single director representing the public is apt to have little effect upon the far larger number of other directors. The court in *Tobacco Growers' Association v. Jones*, *supra* n. 6, alludes to the revocability of the organization's charter by the legislature. This is no greater protection than ordinary quo warranto proceedings present in all cases to protect the public from corporate wrongdoing.

¹⁰ It has been stated that the associations rely upon the Federal Reserve Banks for their credit; and these banks will lend only for purposes beneficial to the public. Not only are the associations usually financed by other means (*Cf.* E. G. MEARS and M. O. TOBRINER, *PRINCIPLES AND PRACTICES OF COOPERATIVE MARKETING* (1926) 220 *ff.*), but also the Federal Reserve Banks refuse loans for capital expenditures. *Cf.* Federal Reserve Board Regulations A, 1923.

somewhat doubtful nature, the courts prefer to base the legality of the cooperative organization upon them rather than upon the statutory clauses excepting the associations from the anti-trust laws.¹¹ There are, however, in this second group also many decisions which sustain the associations upon the broad ground that they are of benefit to the public.¹² Some cases particularize this test and examine the practices of each association to find if it unduly raises prices, withholds products from the market, reduces production or indulges in unfair trade warfare. This approach has led certain courts to say that in the future the associations may become monopolistic, in which event the exempting statutes must come into operation;¹³ but no court, accepting this test, has found the organizations in restraint of trade at the present day.¹⁴ Future attempts by cooperative marketing associations to correlate the farm output to market demand for foodstuffs through stringent reduction of supply is not altogether improbable.¹⁵ Even the more liberal

¹¹ Cases so holding where there was an exempting statute in the state: *Kansas Wheat Growers' Association v. Schulte* (1923) 113 Kan. 672, 216 Pac. 311; *Nebraska Wheat Growers' Association v. Norquest* (1925) 113 Neb. 731, 204 N. W. 798; *Pierce County Dairymen's League v. Templin* (1923) 124 Wash. 567, 215 Pac. 352; *Northern Wisconsin Cooperative Tobacco Pool v. Bekkedal* (1924) 182 Wis. 571, 197 N. W. 936. Case so holding where there was no exempting statute in the state: *Oregon Growers' Cooperative Association v. Lentz* (1923) 107 Ore. 561, 212 Pac. 811.

¹² The following cases, arising in jurisdictions where there were exempting statutes held the associations not to be in restraint of trade because they benefited the public: *Burley Tobacco Growers' Association v. Rogers* (1926) 150 N. E. 384 (Ind.); *Brown v. Staple Cotton Cooperative Association* (1923) 132 Miss. 859, 96 So. 849; *South Carolina Cotton Growers' Cooperative Association v. English* (1926) 135 S. C. 19, 133 S. E. 542; *Hollingsworth v. Texas Hay Association* (1923) 246 S. W. 1068 (Tex. Civ. App.). The following cases arising in jurisdictions where there were no exempting statutes, held the associations not to be in restraint of trade because they benefited the public: *Burley Tobacco Society v. Gillaspy* (1912) 51 Ind. App. 583, 100 N. E. 89.

¹³ *Warren v. Alabama Farm Bureau Cotton Association* (1925) 213 Ala. 61, 104 So. 264; *Minnesota Wheat Growers' Association v. Huggins* (1925) 162 Minn. 471, 203 N. W. 420; *Northern Wisconsin Cooperative Tobacco Pool v. Bekkedal* (1924) 182 Wis. 571, 197 N. W. 936.

¹⁴ The following cases, where there were no exempting statutes, depend mainly on this test: *Dark Tobacco Growers' Cooperative Association v. Robertson* (1926) 84 Ind. App. 57, 150 N. E. 106; *Phez Co. v. Salem Fruit Union* (1921) 103 Ore. 514, 201 Pac. 222; *California Bean Growers' Association v. Rindge Land and Navigation Co.* (1926) 199 Cal. 168, 248 Pac. 658.

¹⁵ Over-production is one of the most difficult problems faced by the cooperative association. A high price will invariably stimulate a greater output. Unlike the factory, the marketing association cannot control the sources of supply of its product. It must market all its members' produce or none. Yet the demand for food products is static. The consuming capacity of a human stomach does not expand simultaneously with increased production. Cf. an article by Alonzo E. Taylor in the *SUNSER MAGAZINE* for February, 1924. As the Annual Report of the California Walnut Growers' Association for 1925 points out, the situation becomes serious when, though the present supply of walnuts more than fills the demand, only one-third of the acreage is in full bearing, another third of the walnut acreage now in partial bearing and a final third not at all in bearing. These partially productive areas will soon produce great quantities of walnuts which the association must

courts could sustain such practices only if authorized by statute. A determination of the constitutionality of the statutes would then be unavoidable.

The third group of cases actually consider the problem of the constitutionality of the cooperative marketing legislation. One view is that the associations are legal only because the statutes make them so.¹⁶ A second opinion is that the statutes do not in themselves make the associations legal. The associations, anyway, are legal. The statutes only corroborate that conclusion. But the legislation is, of course, constitutional.¹⁷ One case, however, doubted the constitutionality of the statutes.¹⁸

CLASSIFICATION OF FARMERS AS DISTINCT FROM OTHER CLASSES

Perhaps the chief cause for the tendency of many courts to avoid dealing with these statutes has been doubt as to their constitutionality under the Fourteenth Amendment of the Federal Constitution,¹⁹ and under provisions in practically all state constitutions which are very similar to the Fourteenth Amendment. A common claim has been that the statutes give farmers privileges denied to other classes, permitting conspiracies of farmers which restrain trade, but condemning as criminal such combinations of other persons.

Yet the Fourteenth Amendment has not been construed to command uniformity in the effect of legislation. A statute need not be undis-

sell. In the future, the organizations will probably attempt various plans of restricting production. Cf. H. E. Erdman, *The Cooperative Marketing Association as a Factor in Adjusting Production to Demand* (1927) J. FARM ECON. 73-82; O. B. Jesness, *Relation of Cooperative Marketing to the Adjustment of Agricultural Production* (Ap., 1925) J. FARM ECON. 176-190.

¹⁶ *Atkinson v. Colo. Wheat Growers' Association* (1925) 77 Colo. 559, 238 Pac. 1117; *Fisher v. El Paso Egg Producers' Association* (1925) 278 S. W. 262 (Tex. Civ. App.).

¹⁷ "If the decisions of this court in *Reeves v. Decorah Farmers' Cooperative Association* . . . are in any way in apparent conflict with the conclusion herein reached it must be remembered that they were both decided prior to the enactment of Chap. 122, Laws of 39th General Assembly, and involved almost wholly dissimilar facts. The conclusion reached in the above cases is based upon the statute or upon common law principles and not upon constitutional grounds." *Clear Lake Cooperative Live Stock Shippers' Association v. Weir*, *infra* n. 22, at 301. "If monopoly results, it is lawfully monopoly, and the Legislature has a right to legalize monopoly." *Northern Wisconsin Cooperative Tobacco Pool v. Bekkedal*, *supra* n. 13, at 945. In *Liberty Warehouse Co. v. Burley Tobacco Growers' Cooperative Association* (1925) 208 Ky. 643, 271 S. W. 695 the court answered the argument that the decision in *Potter v. Dark Tobacco Growers' Cooperative Association* (1923) 201 Ky. 441, 257 S. W. 33, did not restrain trade by saying: "We do not base the Potter opinion as being wholly based upon the absence of such facts."

¹⁸ *Beatrice Creamery Co. v. Cline* (1925) 9 F. (2d) 176 (D. Colo.). Cf. Note (1926) 74 U. OF PENNSYLVANIA L. REV. 400; (1926) 4 TEXAS L. REV. 382.

¹⁹ "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of law."

criminating in its scope, legislating without recognition of varying circumstances for every human being. The Supreme Court has said: "What the equal protection of the law requires is equality of burdens upon those in like station or condition. It has always been held consistent with this general requirement to permit the states to classify the subjects of legislation and make differences of regulation where substantial differences of condition exist."²⁰

In the leading case of *Barbier v. Connelly*, the court declared: "Class legislation, discriminating against some and favoring others, is prohibited but legislation which in carrying out a public purpose is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment."²¹ Discrimination, based upon reasonable classification, is not unconstitutional.

In passing upon the constitutionality of statutes which exempt farmers' cooperative marketing associations from the anti-trust laws many state courts have strongly relied upon the reasonableness of this classification of farmers as distinct from other classes of the community.²² Certainly the position of the farmer is unique. While other industries have concentrated production under single management in a factory system, the farmer remains, to a great extent, isolated. The farmer is ignorant of his fellow farmers' operations, of the quantity, the grade, the character of the general crop, of his foreign and domestic market, of general trading and credit conditions. He does not know what will be the nature of his own output because this is dependent upon the forces of nature. He is handicapped not only by this lack of information but also by his inexperience in bargaining. When he has produced too great quantities of little needed crops he reduces prices further by his own competition with other farmers. Such characteristics as these

²⁰ *South Carolina v. Phoenix Insurance Co.* (1915) 237 U. S. 63, 72, 59 L. Ed. 839, 35 Sup. Ct. 504.

²¹ *Barbier v. Connelly* (1885) 113 U. S. 27, at 31-32; 28 L. Ed. 923, 5 Sup. Ct. 361.

²² The court in *Clear Lake Cooperative Livestock Shippers' Association v. Weir* (1925) 200 Iowa 1293, 206 N. W. 297, says (p. 300): "There is no industry to be found anywhere in which classification based thereon is more natural, various, and exclusive than in agriculture. It is as distinct in its character as mining, manufacturing, banking, or any other branch or division into which society is economically divided." Other cases which announce a similar viewpoint are: *Potato Growers' Association v. Smith* (1925) 78 Colo. 171, 240 Pac. 937; *Kansas Wheat Growers v. Schulte* (1923) 113 Kan. 672, 216 Pac. 311; *Liberty Warehouse Co. v. Burley Tobacco Growers' Cooperative Ass'n* (1925) 208 Ky. 643, 271 S. W. 695; *Tobacco Growers' Association v. Jones* (1923) 185 N. C. 265, 117 S. E. 174; *Dark Tobacco Growers' Cooperative Ass'n v. Dunn* (1924) 150 Tenn. 614, 266 S. W. 308; *Hollingsworth v. Texas Hay Association* (1923) 246 S. W. 1068 (Tex. Civ. App.); *Northern Wisconsin Cooperative Tobacco Pool v. Bekkedal* (1924) 182 Wis. 571, 197 N. W. 936. Cf. A. C. Cherry, *The Cooperative Marketing Association as Being Monopolistic and in Restraint of Trade* (1924) 36 WASHINGTON STATE BAR ASS'N REP. 119, 125.

may well justify separate classification of farmers, and a special treatment fitted for their peculiar needs.

The Supreme Court of the United States has recognized classifications similar to that based upon the difference between farmers and other members of the community. It has held a law which taxed all anthracite coal mined in Pennsylvania, but exempted bituminous coal, not to be a denial of the equal protection of the laws to the owners of anthracite mines.²³ A Louisiana statute which required the payment of a license tax by refiners of sugar, but excepted planters and farmers grinding and refining their own sugar, was held not violative of the Fourteenth Amendment.²⁴

Such classification has not been confined to cases of taxation. A law of Kansas which placed burdensome regulations upon all insurance companies, except farmers' mutual insurance companies which insured farm property, was sustained,²⁵ and the provisions of the Federal Farm Loan Act,²⁶ which rested entirely upon special legislation for farmers was likewise upheld.²⁷ Exemption of farmers from operation of workmen's compensation acts²⁸ and of the fruit harvesting and canning industries from the Woman's Eight Hour Law of California²⁹ were sustained. Similarly, state courts have declared such classification to be constitutional.³⁰

The problem, in fact, would not be difficult were it not for *Connolly v. Union Sewer Pipe Co.*³¹ In this case, Connolly gave the Sewer Pipe

²³ *Heisler v. Thomas Colliery Co.* (1922) 260 U. S. 245, 249, 67 L. Ed. 237, 43 Sup. Ct. 83.

²⁴ *American Sugar Refining Co. v. Louisiana*, 179 U. S. 89. The Court said (p. 95): "The Constitution of Louisiana classifies the refiners of sugars, for the purpose of tax, into those who refine their products of their own plantations and those who engage in the general refining business and refine sugar purchased by themselves, or put into their hands by others for that purpose, imposing a tax only upon the better class. . . The discrimination is obviously intended as an encouragement to agriculture and does not deny to persons and corporations engaged in a general refining business the equal protection of the law."

²⁵ *German Alliance Insurance Co. v. Lewis* (1914) 233 U. S. 389, 58 L. Ed. 1011, 34 Sup. Ct. 612.

²⁶ 39 Stat. 360 (1916), amended, 40 Stat. 431 (1918).

²⁷ *Smith v. Kansas City Trust Co.* (1921) 255 U. S. 180, 65 L. Ed. 577, 41 Sup. Ct. 243.

²⁸ *New York Central Railroad Company v. White* (1917) 243 U. S. 188, 61 L. Ed. 667, 37 Sup. Ct. 247; *Ward v. Krinsky* (1922) 259 U. S. 503, 66 L. Ed. 1033, 42 Sup. Ct. 529.

²⁹ *Miller v. Wilson* (1915) 236 U. S. 373, 59 L. Ed. 628, 35 Sup. Ct. 342.

³⁰ *Ex parte Lichtenstein* (1910) 67 Cal. 359, 7 Pac. 228; *In re Martin* (1910) 157 Cal. 51, 106 Pac. 235; *In re Cardinal* (1915) 170 Cal. 519, 150 Pac. 348; *Western Indemnity Co. v. Pillsbury* (1915) 170 Cal. 686, 151 Pac. 398; *Hansen v. Vallejo Power Co.* (1920) 182 Cal. 492, 188 Pac. 999; *City of Louisville v. Coulter* (1917) 177 Ky. 242, 197 S. W. 819; *Bickett v. Tax Commissioner* (1919) 177 N. C. 433, 99 S. E. 415; *Beach v. Cooperative Savings Association* (1898) 10 S. D. 549, 74 N. W. 889.

³¹ (1901) 184 U. S. 540, 46 L. Ed. 679, 22 Sup. Ct. 431.

Co. two promissory notes in return for sewer pipe which had been delivered to him. When sued upon these notes Connolly defended upon the ground that the company was a combination in restraint of trade organized in violation of the Sherman Act and the Illinois anti-trust laws. Connolly claimed to be able to keep the property and to avoid payment of the purchase price. But the Supreme Court held him liable. The court said a contract which itself inhered in an illegal scheme of combination, and was part and parcel of a monopoly would not be enforced by the courts; but this sale to Connolly was entirely unconnected with the company's illegality. Recovery by the company was barred, however, by another problem. Section 10 of the Illinois anti-trust statute read:

"Any purchaser of any article or commodity from any person, firm, corporation, or association of persons, or of two or more of them, transacting business contrary to any provision of the preceding sections of this act, shall not be liable for the price or payment of such article or commodity and may plead this act as a defense to any suit for such price or payment."

The Sewer Pipe Company could succeed only if the anti-trust statute were held unconstitutional, and the Supreme Court found the offending clause of this act to be: "The provisions of this Act shall not apply to agricultural products or livestock while in the hands of producer or raiser."

Holding that this clause denied to persons who were not farmers or livestock raisers the equal protection of the law, the court said: "Two or more agriculturalists or two or more livestock raisers may, in respect of their products or livestock in hand combine their capital, skill or acts for the purpose of creating or carrying out restrictions in the sale of such products or livestock; or limiting, increasing, or reducing their price; or preventing competition in their sale or purchase; or fixing a standard or figure whereby the price thereof to the public may be controlled; or making contracts whereby they would become bound not to sell or dispose of such agricultural products below a common standard, figure or card or list price; or establishing the price of such products or stock in hand, so as to preclude free and unrestricted competition among themselves or others; or by agreeing to pool, combine or unite any interest they may have in connection with the sale or transportation of their products or livestock that the price may be affected. All this, so far as the statute is concerned, may be done by agriculturalist or livestock raisers in Illinois without subjecting them to the fine imposed by statute. But exactly the same things, if done by two or more persons, firms, corporations or associations of persons . . . is made by the statute a public offense . . ." ³²

³² *Ibid.*, p. 556.

CLASSIFICATION OF COOPERATIVE ASSOCIATIONS AS DISTINCT FROM
OTHER COMBINATIONS

So far as the present statutes exempting cooperative marketing associations are concerned, the *Connolly* decision must either be evaded or overruled. Many conservative courts have tried to evade it. Let us at the outset consider this possibility.

The *ratio decidendi* of the decisions of the courts which distinguish the *Connolly* case is that the legality of the statutory exemption rests not upon the uniqueness of farmers but upon the special nature of cooperative marketing associations. Farmers are not distinguished from bankers, business men, or laborers, but cooperative associations for "orderly marketing" from illegal schemes of monopoly. Whereas one class of persons cannot be privileged to evade the law, special immunity may be conferred upon a well-defined type of organization, governmentally supervised.³³ The Illinois statute, condemned in the *Connolly* case, provided that agricultural products and livestock while in the hands of producers or livestock raisers could be monopolized by *any* form of combination, no matter how odious, and yet remain without the operation of the anti-trust laws. The Illinois statute pronounced an illegal special exemption, whereas present statutes only lend legal recognition to a regulated organization.³⁴

³³ As to the public protection from this supervision, see *infra* notes.

³⁴ The following cases proceed on this reasoning: *Warren v. Alabama Farm Bureau Cotton Association* (1925) 213 Ala. 61, 104 So. 264; *Anaheim Citrus Fruit Association v. Yeoman* (1921) 51 Cal. App. 759, 197 Pac. 959; *Owen County Burley Tobacco Society v. Brumback* (1908) 28 Ky. 137, 107 S. W. 701; *South Carolina Cotton Growers' Cooperative Association v. English* (1926) 135 S. C. 19, 133 S. E. 542; *Pierce Co. Dairymen's Association v. Templin* (1923) 124 Wash. 567, 215 Pac. 352. The following cases have specifically discussed the *Connolly* case: *Dark Tobacco Growers' Cooperative Association v. Dunn*, *supra* n. 22; *Minnesota Wheat Growers' Cooperative Association v. Huggins* (1925) 162 Minn. 471, 203 N. W. 420. This last decision distinguishes the *Connolly* case on the ground that, "If the Minnesota Cooperative Marketing Law may be read or construed to authorize the producer to carry out a common plan of restraint in the sale of agricultural products, limiting, increasing, or reducing the price, preventing competition in their sale or purchase, fixing a standard or figure whereby the price thereof to the public may be controlled, making contracts whereby they would become bound not to sell or dispose of such produce below a common figure or card or list price or establishing the price of such produce so as to preclude free and unrestricted competition among themselves or others or by agreeing to pool, combine, or unite their interest in connection with the sale and transportation of such produce so that the price might be affected then the *Connolly* case might be authority . . . This act does not authorize, permit, or make it possible for the association to do any of these things now enumerated . . . Such a view is antagonistic to the spirit and intent of the law . . . For insurance against misuse of a valid law, public supervision and government protection have been extended to it." However, the cooperative marketing association, and the Minnesota law authorizing it, actually contemplate the very purposes, which, according to the court, should have legalized the scheme. Certainly the marketing association instituted a "common plan" for the sale of agricultural products. It "limited, increased, or reduced price." To bargain with the buyers and set prices is the principal purpose of such associations as the New York Canning Crops Association, the Dairymen's

At first glance it does not seem unreasonable to hold the *Connolly* case rests upon the principle that *farmers* cannot be given special privileges; that the present statutes distinguish *cooperative* combinations from other combinations. But the reasonableness of this classification depends upon there being so great a difference in the form of the cooperative organization from the structure of an ordinary combination that the legislature may decree the one legal and the other illegal.

To test the theory let us assume that the court has thoroughly considered the status of the cooperative association. It has found that the public is not protected by the form of the organization from injurious trade practices and that such an association is a combination in restraint of trade. The court turns to the statute. The validity of the statute must rest upon reasonable classification. The court is told that the cooperative association, as such, is so different from the ordinary harmful combination that it can be specially exempted from the anti-trust laws. Yet the court has already found that the cooperative association is harmful. If the legislature has differentiated between two harmful organizations, the court might well incline to hold that the legislature has done so arbitrarily. The statute, then, is unconstitutional.

But now let us suppose, instead, that the court has examined the cooperative association and found that the form of its organization did protect the public from commercial aggression and did remove it from the class of illegal combinations which restrain trade. The statute, then, is constitutional because it rests upon a reasonable classification. But the association is not illegal. The classification is valid because the cooperative organization need not be excepted from the anti-trust laws. The statute, again, is ineffective.

There may be some doubt if a legislature can discriminate between two forms of business organization, holding the one in restraint of trade

League Cooperative Association, the Chicago Milk Producers' Association, the New England Milk Producers' Association, the California Pear Growers' Association, the California Canning Peach Growers' Association. Until recently, a common practice of the associations was not only to name, at the opening of the season, a price, but also to guarantee buyers that this price would not later be reduced. In 1924, 12 associations of 110 interrogated by Professor E. G. Mears and the author reported the use of this "firm-at-opening" price. Clearly this was "fixing a standard or figure whereby the price thereof to the public may be controlled,"—an activity condemned by the *Connolly* case. The scheme of the Minnesota Wheat Growers, and of all the Sapiro-formed cooperative organizations entails "making contracts whereby they (the producers) would become bound not to sell or dispose of such produce below a common figure or card or list price." According to the questionnaire mentioned above, 82 associations used contracts; only 28 did not. Moreover, the growers agreed "to pool, combine or unite their interests in connection with the sale and transportation of such produce so that the price might be affected." Thus it is apparent that the language of the *Connolly* case does specifically condemn the cooperative association; and even if the decision itself may be avoided the words can not be.

and the other not, when both forms do restrain trade. Considered as mere business structures, two such combinations are both harmful forms of organization. Resting the classification on the form of organization alone leads invariably to the question: Does the form restrain trade? This question takes us back to the law of restraint of trade. It sustains the statute only if the association would have been legal without it, and only if the statute itself is a nullity.

Of course it is arguable that a legislature may exempt cooperative associations from the anti-trust laws even though their form is an empty protection to the public and as dangerous as any other business structure. The legislature may favor the associations merely because they *are cooperative*. This is a possible classification. Yet by hypothesis we have eliminated the distinguishing characteristics which would entitle the cooperative association, as such, to special treatment. We have said it endangers public welfare as much as the ordinary combination. That it has a constituency of farmers cannot be material because this consideration leads us to the classification based upon the unique character of farmers. The chief objection to this basis of structural classification is that, as handled by the courts, it leads to a consideration of the restraint of trade problem, and the courts have sometimes become much confused in handling this latter issue.

And, actually, the courts which have advanced the theory that the statutes rest upon a classification of cooperative associations have always insisted that cooperative associations do not restrain trade.³⁵ This has been the universal justification for such a classification. Of course, this restricts the extent of the statutes. It limits the statutes to a declaration that the association is not illegal if it is legal.

REASONABLENESS OF *Connolly v. Union Sewer Pipe Co.*

The better basis upon which to sustain the cooperative marketing statutes would seem to be that a separate classification of farmers is constitutional. True, this conclusion conflicts with the *Connolly* case, but many reasons urge the overruling of that decision. In the first place, the litigants in that case were a merchant and a large combination; the farmers themselves, whose rights were adjudicated, had neither counsel to represent them nor opportunity to present their views. One page and a half of defendant counsel's brief was devoted to the entire subject of

³⁵ South Carolina Cotton Growers' Cooperative Association v. English, *supra* n. 34; Dark Tobacco Growers' Association v. Dunn, *supra* n. 22; Pierce Co. Dairy-men's Association v. Templin, *supra* n. 34; Anaheim Citrus Fruit Association v. Yeoman, *supra* n. 38; Burley Tobacco Growers' Association v. Rogers, *supra* n. 12; Minnesota Wheat Growers' Association v. Huggins, *supra* n. 13. Cf. Theodore Meyer, *Law of Cooperative Marketing* (1926) 15 CALIFORNIA L. REV. 96; J. D. Miller, *Farmers' Cooperative Associations* (1922) 7 CORNELL L. Q. 293.

sustaining the exemption. Moreover, the *Connolly* case was decided at a time when every contract combination or conspiracy in restraint of trade was considered illegal, while today many courts have shifted to the view that only unreasonable restraints of trade violate the Sherman Anti-Trust Act, and this view presents to the court a different approach to the matter.³⁶ But most important of all is the altered position of the farmer. There was no such agricultural depression in 1901 as there is today. What in view of the economic conditions of that year may have been unreasonable classification, may well be legal under changed economic circumstances. A decision predicated upon economic conditions of the past should not halt a court from altered action on a present and different situation.

Since the rendition of the decision, two Supreme Court cases in particular have been retracted from its rather extreme standpoint. When *International Harvester Co. v. Missouri*³⁷ was presented to the Supreme Court, only two justices who had heard the *Connolly* case remained on the bench. One was Mr. Justice White; the other, Mr. Justice McKenna. Mr. Justice McKenna, who had dissented from the *Connolly* decision, now wrote the majority opinion. In *International Harvester Co. v. Missouri* the Missouri Anti-Trust Law³⁸ prohibited combinations between persons making or selling products but did not prohibit combinations of purchasers of products. Manufacturers and sellers were put into one class; purchasers and laborers into another, just as, in the Illinois statute, manufacturers and sellers had been set apart from farmers and stockraisers. In answering the argument of the Harvester Company that a law against restraints cannot distinguish between dif-

³⁶ It is arguable that the *Connolly* case may be distinguished upon this basis alone. While, in 1901 the law of Illinois provides that all combinations were illegal except farmers', the modern law permits reasonable combinations. The statutes which we are now considering, may be said to do no more than classify the farmers' organizations according to one or the other of these two groups—reasonable and unreasonable combinations in restraint of trade. Statutory allocation of an organization into one or another of two existing classes may be more reasonable than statutory exemption from a single existing class, as in the *Connolly* case. This distinction, however, is a rather difficult one. To exempt an organization from the anti-trust laws by placing it in an already defined class is little different from exempting it and thereby forming a new class. So long as what would otherwise be illegal is termed by the exemption legal, the *Connolly* case is applicable, forbidding the special immunization of farmers from the anti-trust laws. Cf. J. D. Miller, *Farmers' Cooperative Associations as Legal Combinations* (1922) 7 CORNELL L. Q. 293.

³⁷ (1914) 234 U. S. 199, 58 L. Ed. 1276, 34 Sup. Ct. 859.

³⁸ MO. REV. STAT. (1909) § 10301, provided that "all arrangements . . . made or entered into between two persons . . . which tend to lessen . . . free competition in the importation, transportation, manufacture or sale of any product, commodity, bought or sold" and all such arrangements "which are designed or made with a view to increase or which tend to increase, the market price of any product, or article, or thing, or commodity of any class or kind whatsoever bought and sold are declared to be against public policy, unlawful and void."

ferent restraints according to their purposes or their constituents, Mr. Justice McKenna said:

"This court has decided many times that a legislative classification does not have to possess such comprehensive extent. Classification must be accommodated to the problem of legislation. . . If this power of classification did not exist to what straits legislation would be brought. . . Under the principle applied a combination of all the great industrial enterprises (and why not the railroads as well) could not be condemned unless the law applied as well to a combination of maidservants or to infants' nurses whose humble functions preclude effective combination. . . The foundation of our decision is, of course, the power of classification which a legislature may exercise, and the cases we have cited, as well as others which may be cited, demonstrate that some latitude must be allowed to the legislative judgment in selecting the 'basis of community' . . . Whether the Missouri statute has set its condemnation on restraints, generally, prohibiting combined action for any purpose and to everybody, or confined it as the statute does to manufacturers and vendors of articles and permitting it to purchasers of such articles; prohibiting it to sellers of commodities and permitting it to sellers of services, was a matter of legislative judgment, and we cannot say that the distinctions made are palpably arbitrary, which we have seen is the condition of judicial review. It is to be remembered that the question presented is of the power of the legislature, not the policy of the exercise of the power. To be able to find fault, therefore, with such policy is not to establish the invalidity of the law based upon it."³⁹

While the court, in the last line of its opinion, states that the ruling in *Connolly v. Union Sewer Pipe Co.* would be applied if the case at bar fell within it the strength of the *Connolly* decision is reduced. Literally, a classification of purchasers and laborers distinguished from manufacturers and sellers may differ from a classification of farmers and stockraisers distinguished from manufacturers and sellers, but if one classification is reasonable, it is difficult to find the other is not.

The second decision which weakens the *Connolly* case is *National Fire Insurance Co. v. Wanberg*.⁴⁰ According to a North Dakota statute, a policy of insurance against loss by hail becomes effective twenty-four hours from the receipt of the application by the local agent of the company. If the insurance company desired to decline the risk, it was to notify by telegram both applicant and agent. An application for hail insurance was made by Wanberg to an agent on July 12, 1917. This was received by the company on July 16th. It was declined by the company on July 17th. Meantime, on July 14th, without knowledge of the company, hail had destroyed Wanberg's crop. When the company was sued, it claimed that the statute denied it the equal protection of the laws. The court answered this argument by stating:

"The statute treats the business of hail insurance as affected with a public interest. In that country where a farmer's whole crop, the work and product of a year, may be wiped out in a few minutes and where the recurrence of such manifesta-

³⁹ At p. 215.

⁴⁰ (1922) 260 U. S. 71.

tions of nature is not infrequent and no care can provide against their destructive character, it is of much public moment that agencies like insurance companies to distribute the loss over the entire community should be regulated so as to be effective for the purpose . . .

"There is no discrimination and no denial of the equal protection of the laws."

Hence a statute may place certain obligations upon a particular class of insurance companies because the protection of a farmer's crop is a matter of public interest and justifies special legislation. The Supreme Court recognizes that the farmer is a member of a class so widely separated economically from other producers that he may be differently treated by the legislature. Such an attitude is hardly in accord with the *Connolly* case.

Finally, the Supreme Court, in the recent *Liberty Warehouse* decision, once more distinguished the *Connolly* case. It held that the statute in the *Connolly* case permitted some people to do what other people were forbidden to do (i. e. restrain trade) but that the Bingham Act only made criminal what all people could not do (i. e. break their contracts). The decision reads (p. 91):

"*Connolly v. Union Sewer Pipe Co.* 184 U. S. 540, 46 L. Ed. 679, 22 Sup. Ct. 431, is much relied upon. But there the circumstances differed radically from those here presented; and always to determine whether equal protection is denied there must be consideration of the peculiar facts. *Connolly* resisted judgment for the purchase price of pipe upon the ground that the Union Company, the vendor, belonged to a combination or trust forbidden by an Illinois statute. The statute defined a trust, made participation therein criminal, and directed that those who purchased articles from an offending member should not be held liable for the price. Section 9 declared — 'The provisions of this act shall not apply to agricultural products or live stock while in the hands of the producer or raiser.' This court held that because of the exemption the Union Company was denied the equal protection of the law. It was forbidden to do what others could do with impunity. Here the situation is very different. The questioned statute undertakes to protect sanctioned contracts against any interference—no one could lawfully do what the warehouse company did."

Thus the Supreme Court follows the many decisions before it, which in evading and distinguishing the *Connolly* case, have in effect overruled it.

CONCLUSION

The recent case of *Liberty Warehouse Co. v. Burley Tobacco Growers Cooperative Association* has not concluded the legal problems of cooperative marketing. Though indirectly the Supreme Court has approved the system, it has not clearly stated the grounds for its decision. Since the court has attempted to confine itself to the constitutionality of only a single provision of the Bingham Act (that penalizing interference with cooperative marketing contracts) it did not consider the two great problems of cooperative marketing; whether the associations restrained

and whether the statutes which exempted them from the restraint of trade laws were legal.

Briefly we may recapitulate the legal course of these statutes. Their consideration has been shunned by most courts; yet they offer a better means for sustaining the associations than the methods often adopted. The statutes do not require, in order to sustain the associations, the misstatement that cooperation does not reduce competition, which has been the conclusion reached by courts following the older and stricter law of restraint of trade. Even other courts which interpret the Sherman Act more liberally must determine the constitutionality of the statutes if the association commits illegal overt acts.

The statutes do not deny to other persons than farmers the equal protection of the laws. Farmers, due to their isolation and their inability to produce by group methods, may be distinguished from other producers. Separate classification of farmers is reasonable.

But the authority of the *Connolly* case which denies the reasonableness of such classification, has led many courts to state the classification is not of farmers but of cooperative associations. Cooperative associations have been distinguished from other combinations because they are publicly regulated and of little danger to society. Yet the truth of this assertion is open to question, since the public regulation is slight and since the associations may, at times, become anti-social in their operations. Once a court has found the form of the organization obnoxious and in restraint of trade, it is difficult to convince it that the form, as such, is reasonably distinguishable from other obnoxious forms. Thus, this approach when adopted by the courts has led them to narrow the statutes to a mere declaration of existing law, and this, in turn, has engendered difficult problems of the law of restraint of trade that have not been adequately handled.

It is submitted the justification for the statutes lies in the constitutionality of a separate classification of farmers, and that *Connolly v. Union Sewer Pipe Co.*, resting upon different economic conditions and weakened by subsequent decisions of the Supreme Court, should not be taken to condemn that classification.

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