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Agricultural Cooperatives and the Search for Parity - A Confrontation with the Antitrust Laws

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NOTES

AGRICULTURAL COOPERATIVES AND THE SEARCH FOR PARITY—A CONFRONTATION WITH THE ANTITRUST LAWS

I. INTRODUCTION

> In summing up, the cooperatives do perform many necessary services, but their individual structures make it impossible for them to effectively compete with organized, volume buyers. No one can argue against the theory of cooperatives, but their fixed structures and lack of volume keep them from meeting modern day agricultural pricing problems.[1]

Although the preceding statement hardly does justice to the accomplishments and importance of the farmers cooperative movement in the United States, it does point out the growing dissatisfaction of American farmers with the existing framework of agricultural marketing mechanisms. This dissatisfaction, coupled with what is called the "price-cost squeeze," are the ingredients of discontent that produced the hesitant birth and stormy growth of the National Farmers Organization—the self-acclaimed David who is doing battle with the Goliath food store chains in an effort to secure the blessing of parity and thus maintain an American institution, the family farm.[2]

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1. National Farmers Organization Pamphlet, Necessary Steps To Be Taken For Successful Bargaining In Agriculture, Page 3 (Undated).

2. See BRANDSBERG, THE TWO SIDES OF NFO'S BATTLE (1964). In an extremely well written account of the National Farmers Organization's inception and subsequent growth and problems, Mr. Brandsberg points out that every 20 to 30 years for the past century " . . . a radical or at least loudly protesting farm movement has risen and fallen with almost predictable regularity." *Id.* at 260. Brandsberg points out that the "price—cost squeeze" is one of the evils the NFO is fighting. The phrase is descriptive of the situation where the price for the farmer's product remains static or declines while the cost of farm production steadily rises. As to the success of the NFO's efforts, the author states: "Examined objectively, the NFO record did not show too many constructive accomplish-

This note will not attempt to analyze the economic implications of agricultural cooperative marketing, but rather it will be confined to the question of whether the cooperative entity, as a legal concept, is an adequate marketing arrangement in view of current antitrust policy. The note will briefly outline the legislative scheme of the agricultural cooperatives within the broader spectrum of the antitrust laws; trace the development of judicial interpretation of such legislation; and finally, appraise the strength and status of the North Dakota cooperative movement.

II. LEGLISLATIVE BACKGROUND AND HISTORY

In 1890, Congress formulated one of the most far-reaching pieces of legislation ever conceived—the Sherman Act.[3] It was the culmination of post civil war unrest on the part of the nation's consumers and small producers regarding the economic power of the large business combines.[4] One of the most ardent groups urging adoption of the Act was the farmers since they, as a class, were particularly susceptible to the monopoly practices then employed by industry.[5] An amendment was offered to except farmers from the operation of the Act but it was defeated,[6] probably less from anti-farmer sentiment than the generally accepted view that farmers could not, due to their dispersed numbers and lack of concentrated marketing power, monopolize the agricultural products industry.[7]

The Sherman Act provides that contracts or combinations in the form of a trust or otherwise, or conspiracy, which result in restrain in trade among the several states, or between the District of Columbia and any state or states, are illegal and punishable as a misdemeanor. Moreover, an attempt to monopolize is also prohibited. The obvious purpose of the Act is to foster competition, or rather, enforce it.

The states were quick to follow with antitrust legislation of their

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ments. Because it involved conflict and controversy, the NFO's activities had netted a great deal of attention in the news media. This in a way was useful since many nonfarm persons had no idea of the farmer's plight. At the same time, much of this publicity distorted the farm problem and implied that all farmers were in a state of poverty. However, controversy is one criterion of what is news and the NFO promoted plenty of controversy. Thus some segments of the popular press turned some NFO activities into big stories that they perhaps did not deserve to be." *Id.* at 263.

3. 26 Stat. 209 (1890), 15 U.S.C. §§ 1-3 (1964).
4. Tigner v. Texas, 310 U.S. 141, 145 (1940).
5. *Id.* n. 1.
6. The proposed amendment read:
"Provided, that this act shall not be construed to apply to any arrangements, agreements or combinations between laborers made with a view of lessening the number of hours of their labor or of increasing their wages; nor to any arrangements, agreements, associations, or combinations among persons engaged in horticulture or agriclture made with a view of enhancing the price of their own agricultural or horticultural products." 21 CONG. REC. 2726 (1890).
7. Tigner v. Texas, *supra* note 4, at 145.

own.[8] Many of them, however, exempted organizations of farmers from the operation of the acts which the Sherman Act failed to do. This exemption was not to be enjoyed for long. In the case of *Connolly v. Union Sewer Pipe Co.*,[9] the Supreme Court was faced with the constitutionality of the Illinois Trust Statute of 1893 which contained the exemption. The pipe company had sued Connolly on a note and Connolly contended that the note was void as the pipe company had violated the Trust Statute.[10] The Illinois federal district court disagreed and held that the statute was unconstitutional.[11]

The Supreme Court affirmed the unconstitutionality of the Illinois statute as a denial of equal protection of the laws under the fourteenth amendment since it applied to non-agricultural producers but not agricultural producers.[12] In effect, the Court recognized no difference, in 1902, as between the economic realities of agriculture and industry and concluded that any such distinction would be a manifest denial of the equal protection of the law as to preclude any "further or extended argument."[13]

Illinois was not the only state to have its antitrust statute challenged on the same basis as that of *Connolly*.[14] The net effect of these decisions was to invalidate state antitrust laws containing the exemption, but they did not prohibit the formation of cooperatives.[15]

In 1940, the doctrine of the *Connolly* case was finally rejected in *Tigner v. Texas*.[16] Although the time span between *Connolly* and *Tigner* covers 38 years, *Connolly* had been under attack for at least

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8. North Dakota exemplifies the action taken by the states. Chapter 51-08, Pools and Trusts, of the NORTH DAKOTA CENTURY CODE was originally enacted in chapter 174 of the Session Laws of 1890, the same year the Sherman Act was enacted.

9. Connolly v. Union Sewer Pipe Co., 184 U.S. 540 (1902). [hereinafter cited as *Connolly*] Neither party to the action was engaged in agricultural pursuits.

10. The statute voided any contracts made in violation of its terms. *Id.* at 554. Illinois Laws of 1893, p. 89, § 1 (repealed 1965).

11. 99 F. 354 (N.D. Ill. 1900). The court held that the exemption given to farmers was clearly an exercise of improper class legislation. *Id.* at 355.

12. "These principles [regarding equal protection of the law under the fourteenth amendment] condemn the statute of Illinois. We have seen that under that statute *all* except producers of agricultural commodities and raisers of livestock, who combine their capital, skill or acts for any of the purposes named in the act, may be punished as criminals, while agriculturists and livestock raisers, in respect of their products or livestock in hand, are exempted from the operation of the statute, and may combine and do that which, if done by others, would be a crime against the State. The statute so provides notwithstanding persons engaged in trade or in the sale of merchandise or commodities, within the limits of a State, and agriculturists and raisers of livestock, are all in the same general class, that is, they are all alike engaged in domestic trade, which is of right, open to all, subject to such regulations, applicable to all in like conditions, as the State may legally prescribe." 184 U.S. at 560 (emphasis supplied by the Court).

13. *Id.* at 564.

14. A similar statlte was declared unconstitutional under the fourteenth amendment in Texas. In Re Grice, 79 F. 627 (N.D. Tex. 1897), *rev'd on other grounds*, 169 U.S. 284 (1898).

15. HULBERT, LEGAL PHASES OF COOPERATIVE ASSOCIATIONS, FARM CREDIT ADMINISTRATION, USDA, BULLETIN NO. 50, 204 (1942)

16. Tigner v. Texas, *supra* note 4.

10 years prior to the *Tigner* coup de grace.[17] The Court in *Tigner* recognized that there was a very real difference between agriculture and other economic pursuits and held that the Texas legislature had the power to exempt agricultural producers from its antitrust law without violating the equal protection clause of the fourteenth amendment.[18] The Court said that "[T]he Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same. . . . *Connolly's* case has been worn away by the erosion of time, and . . . it is no longer controlling."[19]

Back at the farm, however, there was no little apprehension that the Sherman Act, in the years immediately following its passage, would be a substantial threat to the continued operation of the cooperatives. Technically, this apprehension was well founded. A cooperative certainly consists of a combination of individual farmers, and by attempting to market their products collectively, such activities might be held in violation of the Act.

Congress, in 1914, made a qualified step in the direction of exempting agricultural cooperatives from the antitrust laws by passing the Clayton Act.[20] Section 6 of the Act provides:

> The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.[21]

A cursory examination of the section reveals that it applies only

17. *See* Liberty Warehouse Co. v. Burley Tobacco Growers' Co-operative Marketing Ass'n, 276 U.S. 71 (1928). The Court indicated that the states might legislate regarding farmers as a class without violating the fourteenth amendment. The Court upheld the constitutionality of the Bingham Cooperative Marketing Act (Ch. 1, Acts of Kentucky 1922), which was widely used throughout the states as a model. Section 28 of the Bingham Act, for example, declaring cooperatives not to be in violation of the antitrust provisions, is substantially the same as North Dakota's statute. N.D. CENT. CODE § 10-15-59 (1960).

18. "At the core of all these enactments [state agricultural cooperative legislation] lies a conception of price and production policy for agriculture very different from that which underlies the demands made upon industry and commerce by the antitrust laws. These various measures are manifestations of the fact that in our national econmy agriculture expresses functions and forces different from the other elements in the total economic process. Certainly these are differences which may be acted upon by the lawmakers." 310 U.S. at 146, 147.

19. *Id.*

20. 38 Stat. 730 (1914), 15 U.S.C. §§ 12-27 (1964).

21. 15 U.S.C. § 17 (1964).

to non-stock, non-profit cooperatives. Moreover, in the *Duplex*[22] case, the Court held that the section would not grant immunity where the organization (a labor union in this case) violated the antitrust laws by departing from its legitimate objects.[23] The section does, however, relieve such organizations from prosecution under the antitrust laws in one respect: the mere existence and operation of the organization is not, per se, a violation of such laws.

Shortly after the *Duplex* decision was rendered in 1921, Congress again began, in earnest, to clarify the status of the cooperatives. The result was the passage of the Capper-Volstead Act[24] in 1922—the Magna Carta of the cooperatives. The Act allows farmers, planters, dairymen, nut or fruit growers to act together in associations with or without capital stock, corporate or otherwise, in processing, preparing for market, and marketing their products in interstate or foreign commerce. Marketing agencies in common are permitted and the associations and their members may make any necessary contracts to effect the purposes of the association. To qualify under the Act, an association must be operated for the mutual benefit of the members; it must allow each member one vote regardless of stock or membership capital held, or it must not pay dividends in excess of 8 per cent per annum on stock or membership capital; and, in all cases, the association may not handle the products of non-members in an amount greater in value than it handles for members.

Section 2 of the Act provides that the Secretary of Agriculture shall have the authority to determine whether such association is monopolizing or restraining trade to the extent that the price of agricultural products is unduly enhanced. If the Secretary so determines, a cease and desist order is to be issued, which is to be enforced by the Department of Justice. The Department of Justice has hotly contested this apparent authority of the Secretary of Agriculture in the antitrust area, as will be shown in part III. of this note.

The intent of the Capper-Volstead Act as to a cooperative's status under the antitrust laws is not clear. Indeed, there were conflicting statements on the matter during the various debates on the merits of the Act.[25] And although the legislative intent may not be clear, it is

22. Duplex Printing Press Co. v. Deering, 254 U.S. 443 (1921).
23. *Id.* at 469.
24. 42 Stat. 388 (1922), 7 U.S.C. §§ 291-292 (1964).
25. Perhaps the most convincing argument for the contention that the Act does not exempt the cooperatives from the antitrust laws was that provided by Rep. Volstead: "The objections made to these organizations at present is that they violate the Sherman Antitrust Act, and that is upon the theory that each farmer is a separate business entity, when he combines with his neighbor for the purpose of securing better treatment in the disposal of his crops, he is charged with a conspiracy or combination contrary to the Sherman Antitrust Act. Businessmen can combine by putting their money into corporations, but it is impractical for farmers to combine their farms into similar corporate form. The object

useful to ask what was to be accomplished by the Act if exemption from the antitrust laws was not intended since the Clayton Act had already provided that non-stock cooperatives were not in violation of the antitrust laws. Another argument in favor of exemption is that the purposes of the antitrust laws and the Federal Government's commitment to maintain agricultural prices at a reasonable level are inconsistent with each other.[26]

Significant subsequent legislation containing references to the antitrust immunity of agricultural cooperatives acting alone or with the Secretary of Agriculture are the Agricultural Adjustment Act of 1933,[27] the Robinson-Patman Act,[28] the Agricultural Marketing

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of this bill is to modify the laws under which business organizations are now formed, so that farmers may take advantage of the form of organization that is used by business concerns. It is objected in some quarters that this repeals the Sherman Antitrust Act as to farmers. That is not true any more than it is not true that a combination of two or three corporations violates the Act. . . . If these organizations should combine with corporations not organized as provided in this bill to thus monopolize or restrain trade, they will become subject to the Sherman Antitrust Act just the same as any other combination of corporations. We are merely seeking to give them a status that may be necessary to meet industrial conditions." 61 CONG. REC. 1033 (1921).

Rep. Volstead's emphasis on the objective of allowing farmers to band together in corporations to achieve greater marketing strentgh was pertinent at the time of the Act's passage. In light of the subsequent growth of corporate farming, however, can it be said that the agricultural industry no longer requires or justifies the antitrust immunity provided by the act? It would appear that the question should be answered in the negative.

First, it must be emphasized that the legal form or organization has little to do with the farming unit's bargaining power. A small family farm with a modest income could perhaps be incorporated, but the change in legal form, per se, hardly can be said to increase the unit's bargaining strength. The Capper-Volstead Act recognizes this fact by allowing individual farm units to collectively incorporate and thus provides for the concentration of large numbers of producers that is essential to effectively compete in the market place.

Second, the corporate form is still far from being a dominant part of the agricultural scene. As of 1961, corporations held only 5% of the nation's farmland. STATISTICAL ABSTRACT OF THE UNITED STATES 614 (Bureau of the Census, 78th Ed. 1961). Moreover, in 1965, there were only 23,000 corporations engaged in agricultural, forestry, and fishery industries as compared to 3,578,000 sole proprietorships and partnerships. The corporations accounted for $5,978,000,000 in gross receipts as compared to $35,183,000,000 reported by sole proprietorships and partnerships. STATISTICAL ABSTRACT OF THE UNITED STATES 489 (Bureau of the Census, 86th Ed. 1965). These figures indicate that the extent of corporate activity is still relatively small and would not appear to demand any change in the antitrust immunity provided by the Capper-Volstead Act.

There is some indication, however, that the Act was at least intended to relieve cooperatives from criminal prosecution under the Sherman Act:

"It is intended, then, as I understand the Senator, to make all such organizations absolutely immune from criminal prosecution?" (question by Senator King 62 CONG. REC. 2049 [1922]).

"They are immune from criminal prosecution, and I think they ought to be." (reply by Senator Kellogg, 62 CONG. REC. 2049 [1922]).

26. The purpose of the antitrust laws is to foster competition while the Capper-Volstead Act's purpose is to reduce competition by allowing farmers to collectively market their goods. These conflicting policies are difficult to harmonize and to avoid such conflict, it would seem that the cooperatives should not be subjected to the antitrust laws. *See* Note, *Cooperatives and the Antitrust Laws*, 27 IND. L.J. 430, 436 (1952).

27. "In order to effectuate the declared policy of this chapter, the Secretary of Agriculture shall have the power, after due notice and opportunity for hearing, to enter into marketing agreements with processors, producers, association of producers, and others engaged in the handling of any agricultural commodity or product thereof, only with respect to such handling as in the current of interstate or foreign commerce or which directly burdens, obstructs, or affects, interstate or foreign commerce in such commodity or product thereof. The making of any such agreement shall not be held to be in violation of any of the antitrust laws of the United States, and any such agreement shall be deemed to be lawful . . . ." 48 Stat. 34 (1933), 7 U.S.C. § 608b (1964).

28. "Nothing in sections 13-13b and 21a of this title shall prevent a cooperlative as-

Agreement Act of 1937,[29] and the Cooperative Marketing Act of 1926.[30] The Fisherman's Collective Marketing Act,[31] while not dealing with agricultural cooperatives, is most valuable in determining the antitrust exemption of cooperative enterprises generally. These Acts will be considered further in part III.

III. COURTS AND THE COOPERATIVES—AN UNEASY ALLIANCE

PART A — PROLOGUE

> The status of agricultural cooperatives, in relation to the federal antitrust laws, is in many respects unique. In examining this status, we are faced, on the one hand, with the principle of free competition embodied in the Sherman Act; and on the other hand, with numerous congressional enactments favoring cooperation among farmers, and fostering the growth of agricultural cooperatives.[32]

The above statement by Stanley Barnes reflects the enigmatic situation with which the courts have been confronted. Subsequent judicial interpretation of the Capper-Volstead and Clayton Acts, especially since 1939, has shown that exemption under the antitrust laws is not to be lightly implied;[33] but yet agricultural cooperatives have enjoyed some measure of immunity as a development of the cases will indicate. Whatever immunity exists is perhaps due to the federal policy of encouragement noted by Barnes. However that may be, the ultimate question of specific limits beyond which the cooperative may not go is not settled.

PART B — THE ISSUES ARE JOINED

In 1939, the Supreme Court announced the "other person" doctrine.[34] A criminal action brought under Section 1 of the Sherman Act against the Pure Milk Association, a cooperative, and a group of major milk distributors had been dismissed by the Illinois federal district court.[35] The indictment alleged a conspiracy to fix and main-

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sociation from returning to its members, producers, or consumers the whole, or any part of the net earnings or surplus resulting from its trading operations, in proportion to their purchases or sales from, to, or through the association." 49 Stat. 1528 (1936). 15 U.S.C. § 13b (1964).

29. "No meeting so held and no award or agreement so approved (by Secretary of Agriculture) shall be deemed in violation of any of the Antitrust laws." 50 Stat. 248 (1937), 7 U.S.C. § 671 (1964).

30. 44 Stat. 802 (1926), 7 U.S.C. §§ 451-457 (1964).

31. 48 Stat. 1213 (1934), 15 U.S.C. §§ 521-522 (1964). The Act is almost identical to the Capper-Volstead Act except that it deals with fishermen and was enacted in 1934, 12 years after the Capper-Volstead Act was passed.

32. From an address by Stanley N. Barnes to the American Institute of Cooperation held at the University of Missouri in 1953. At that time Mr. Barnes was the Assistant Attorney General in Charge of Antitrust Division, United States Department of Justice. AMERICAN COOPERATION 26 (1953) [hereinafter cited as Barnes or Barnes' address].

33. California v. Federal Power Comm'n., 369 U.S. 482, 485 (1961).

34. United States v. Borden Co., 308 U.S. 188 (1939) [hereinafter cited as *Borden*].

35. 28 F.Supp. 177 (N.D. Ill. 1939). There were miltiple defendants named in the in-

tain uniform, arbitrary and non-competitive milk prices in the Chicago area. The lower court held that the production and marketing of milk were controlled by the terms of the Agricultural Marketing Agreement Act of 1937, and that the cooperative's officers were exempt from prosecution by virtue of Section 6 of the Clayton Act and the Capper-Volstead Act.

In overruling the decision of the district court, the Supreme Court rejected the premise that, in the absence of an agreement entered into by the Secretary of Agriculture, the terms of the Agricultural Marketing Agreement Act prevented the Justice Department from prosecuting under the Sherman Act.[36]

The Court, in discussing the protection against antitrust action afforded by the Capper-Volstead Act said:

> The right of these agricultural producers thus to unite in preparing for market and in marketing their products, and to make the contracts which are necessary for that collaboration *cannot be deemed to authorize any combination or conspiracy with other persons in restraint of trade that these producers may see fit to devise.*[37]

A severe blow was also struck in *Borden* to the contention that the Secretary of Agriculture had exclusive jurisdiction, under the Capper-Volstead Act, to police the cooperative's activities. There the Court said:

> We think that the procedure under Section 2 of the Capper-Volstead Act is auxiliary and was intended merely as a qualification of the authorization given to cooperative agricultural producers by Section 1, so that if the collective action of such producers, as there permitted, results in the opinion of the Secretary in monopolization or unduly en-

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dictment. Besides the Pure Milk Association, Borden Co., the distributors, Milk Wagon Drivers Union Local No. 753, the Chicago Board of Health and numerous others were joined as defendants.

36. The lower court had determined that the " . . . power of regulation, supervision, and control of the milk industry, in any given milk shed, is, by the Agricultural Marketing Agreement Act of 1937, vested exclusively in the Secretary of Agriculture. It follows further that the Secretary . . . cannot by his own action, or inaction, divest himself of this power so long as the statute remains in force. The marketing of the agricultural products, including milk . . . is removed from the purview of the Sherman Act." 28 F.Supp. at 187.

The Supreme Court answered this contention by saying: "We are of the opinion that this conclusion is erroneous. No provision of that purport appears in the Agricultural Act. While effect is expressly given . . . to agreements and orders which may validly be made by the Secretary . . . . There is no suggestion that in their absence, and apart from such qualified authorization and such requirements as they contain, the commerce in agricultural commodities is stripped of the safeguards set up by the Antitrust Act and is left open to the restraints, however unreasonable, which conspiring producers, distributors and their allies may see fit to impose. We are unable to find that such a grant of immunity by virtue of the inaction, or limited action, of the Secretary has any place in the statutory plan. We cannot believe that Congress intended to creat 'so great a breach in historic remedies and sanctions.' " 308 U.S. at 198.

37. *Id.* at 204 (emphasis added)

> hanced prices, he may intervene and seek to control the action thus taken under Section 1. But as Section 1 cannot be regarded as authorizing the sort of conspiracies between producers and others . . . the qualifying procedure for which Section 2 provides is not to be deemed to be designed to take the place of, or to postpone or prevent, prosecution under Section 1 of the Sherman Act for the purpose of punishing such conspiracies.[38]

The *Borden* decision clearly shows that an agricultural cooperative cannot combine with non-cooperative entities in restrictive trade practices prohibited by Section 1 of the Sherman Act and expect to receive the blessings of the courts.[39]

In *United States v. Elm Spring Farm*,[40] the defendant had attempted to change his status from a handler of milk products to a producer in order to avoid making payments to the Market Administrator under a marketing order issued under the Agricultural Marketing Agreement Act. As the court said, " . . . [t]he plan adopted was ingenious but transparent."[41] In other words, a cooperative in name will not be accorded the legislative benefits given a cooperative in fact. Sham transactions do not create a bona fide cooperative and the thin veneer of appearance will be disposed of quickly by the courts.

Judge McColloch endeared himself to the cooperatives' cause in a short but very explicit opinion in *United States v. Dairy Co-op Ass'n*.[42] It was a critical test case for the Justice Department since only a cooperative was involved. In the absence of other conspirators, cooperative or not, the stage was set for a direct confrontation with the issue of whether a cooperative, acting alone, could be held in violation of the antitrust laws. The opinion does not set forth the specific allegations, but rather Judge McColloch devoted his energies to assuring the Justice Departmtnet that he would not violate the clear intent of Section 6 of the Clayton Act by holding to their position.[43] The defendant's motion for a finding of not guilty was granted.

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38. *Supra* note 36, at 206.
39. "Students of cooperative and antitrust law have attempted to analyze the full import of the Borden decision. It is clear that the sort of conspiracies between producers and others . . . charged in [the Borden] indictment fall within the ambit of antitrust coverage. But the question arises whether the result reached in Borden stems exclusively from the fact that there the cooperative combined with non-agricultural entities, or whether it reflects, in the particular circumstances of that case, the principle that a cooperative may not inflict on commerce restraints beyond those inherent in the nature of the organization." Saunders, *The Status of Agricultural Cooperatives Under the Antitrust Laws*, 20 FED. B.J. 35, 47 (1960).
40. 38 F.Supp. 508 (D. Mass. 1941).
41. *Id.* at 511.
42. 49 F.Supp. 475 (D. Ore. 1943).
43. "An older generation of judges interpreted the Clayton Act . . . to defeat the plain intent of the law, and almost perversely, it seemed, sought to impose their economic views on the American scene in the controversial field of capital and labor . . . . Now I am

After a few years of relative peace,[44] the struggle resumed in 1949 with a series of cases involving the Maryland and Virginia Milk Producers Association. The first decision[45] was the result of an appeal from the district court dismissing an indictment against the cooperative as not setting forth sufficient facts to constitute a conspiracy in violation of the Sherman Act.[46] As a technical matter, however, the indictment itself was held sufficient on appeal, the court holding that violations of the Sherman Act were alleged without passing on their merits.[47] Moreover, the court said:

> Although the Capper-Volstead Act . . .and the Clayton Act . . . give some privileges to combinations of agricultural producers, a combination of producers and distributors to eliminate competition and fix prices at successive stages in the marketing of an agricultural product is not privileged.[48]

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asked to "interpret" the other provisions of the Clayton Act which say generally that a farmers' cooperative shall not be subject to the antitrust laws. I am asked to hold that under certain circumstances, even when acting solely in its self-interest, and not in concert with others, a farmers' cooperative can be punished as a monopoly. I am asked to hold that in this case, which I am told is the first case brought by the Antitrust Division of the Dept. of Justice against a farmers' cooperative acting alone and not in concert with others, the defendant is attempting to create a monopoly and is punishable criminally. In short, I am asked to scuttel the plain language of the Clayton Act as to cooperatives, as anti-labor courts scuttled the labor provisions of the same act, with the serious consequences that endure to this hour." *Id.*

44. At this point it would be usedful to insert two cases arising under the Fisherman's Collective Marketing Act. *supra* note 31. In Hinton v. Columbia River Packers Association, 131 F.2d 88 (9th Cir. 1942) the appellant was the representative for the Pacific Coast Fisherman's Union. The Union, a cooperative, had from 90 to 100% of the fishermen on the coastal states of Oregon, Washington and Alaska as members. The Union told the Packers Association that it would have to buy fish from the Union. The Packers' Association refused and the Union brought pressure to bear on the fishermen to coerce them not to sell to the Association. In an earlier decision, 117 F.2d 310 (9th Cir. 1941), the court had held that a labor dispute was involved (apparently because of the "union" designation of the cooperative) and that the provisions of the Norris LaGuardia Act were applicable and had not been complied with. That judgment was reversed by the Supreme Court, 315 U.S. 143 (1942), on the ground that there was no labor dispute involved. In the instant case, the Court held that the "Union" was not exempt from Sherman Act and that the decision in *Borden* was controlling. The Union was held liable since it combined with individual fishermen and thereby acquired the power to fix prices and control production which effectively precluded competition in the market.

In Manaka v. Monterey Sardine Industries, 41 F.Supp. 531 (N.D. Cal. 1941), an association was held liable under the antitrust laws where the plaintiff, although he had a contract with a canning company, was not permitted to fish in the area of Monterey and to market his fish there because the boat he had chartered was not "assigned" to the company as was the practice of the association. This restrictive practice engaged in by the defendant association and cooperating canners was held to be an illegal combination in restraint of trade.

The two cases indicate that the Fisherman's Collective Marketing Act provides no greater imumnity to fisherman cooperatives than the Capper-Volstead Act gives to their agricultural counterparts.

45. United States v. Maryland & Virginia Milk Producers Ass'n., 179 F.2d 426 (D.C. Cir. 1949), *cert. denied* 338 U.S. 831 (1949).

46. The indictment charged that the Association, comprised of nearly 1,500 producers, its Secretary-Treasurer and seven milk distributors had conspired together to eliminate and suppress competition. The indictment further charged that the distributors had entered into "full supply" contracts whereby the distributors were bound to buy all of their milk requirements from the Association. The indictment also alleged that the conspirators fixed the price of milk in the Washington, D. C. area and entered into agreements to that effect. *Id.* at 427, 428.

47. Indeed, the court said that price-fixing agreements are unlawful per se under the Sherman Act. 179 F.2d at 428.

48. *Id.*

When the case was remanded,[49] the district court held that the Association and those distributors who persisted in the use of full supply contracts embodying the classification plan,[50] after the Secretary of Agriculture had withdrawn as a party to the agreement, were guilty under Section 3 of the Sherman Act.[51] Judge Holtzoff, however, upheld a cooperative's apparent monopoly privilege:

> . . .[F]armer's cooperatives are expressly exempted from the provisions of the antitrust laws. Farmers have a special dispensation. They may combine with impunity. . . . Consequently, the Maryland and Virgina Milk Producers Association, in marketing the milk shipped by its members, and acting as an agent for that purpose, does not violate the Sherman Act, even if in so doing it fixes prices and restrains trade. Its impunity ends, however, at the point where it commences to act in concert with others. Its exemption ceases when it crosses the line of individual action and combines with other persons who are not farmers.[52]

If Judge Holtzoff's utterance on the freedom of cooperatives to individually fix prices and restrain trade was not enough to shake the very foundation of the Justice Department itself, the subsequent decision on appeal from the district court must have been a traumatic experience for the Antitrust Division.[53] The court of appeals reversed the conviction of the association and the distributors, holding that the evidence was insufficient to sustain the charges. The opinion cannot be regarded as an unqualified approval of full supply classified use contracts since the court only held that the Justice Department failed to sustain the burden of proof.[54]

Two years later, in the summer of 1953, the American Institute

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49. 90 F.Supp. 681 (D.D.C. 1950).

50. The classification plan is simply a system of milk pricing. "Farmers, through their cooperative associations, devised a plan to encourage handlers to accept milk regularly from farmers who had made the investment required to produce high-quality milk, even in periods in which the handlers had no fluid outlets for some of the milk purchased. Through their cooperative associations, they worked out with dealers a system of differentiated prices. These were called classified use plans, and required the payment of a higher price to farmers for milk sold in fluid outlets than for milk processed and sold as a product like butter and cheese. These plans were in effect in a number of the largest markets in the country by about 1920." Brooks, *The Pricing of Milk Under Federal Marketing Orders*. 26 GEO. WASH. L. REV. 181, 185 (1958).

51. In 1940, the parties had entered into a marketing agreement with the Secretary of Agriculture pursuant to the Agricultural Marketing Agreement Act of 1937, *supra* n. 29, which included the classification plan. In 1947, the Association became restive and wanted to rid itself of the controls inherent in a marketing agreement administered by the Department of Agriculture. The agreement was dissolved but the alleged conspirators continued the use of the full supply-classified use contracts. Judge Holtzoff felt that after the Government had removed itself from the agreement, the parties were at the mercy of the antitrust laws. "The Court is of the opinion that 'full supply' contracts which embodied the classification plan for arriving at the price of milk constituted, in effect, agreements to fix prices. It is well settled that an agreement to fix prices of a commodity is per se an unreasonable restraint of trade and . . . a violation of the Sherman Act." *Supra* note 49, at 689.

52. *Id.* at 685, 686.

53. 193 F.2d 907 (D.C. Cir. 1951).

54. "But the trouble is that, as plausible as the government's economic theory is, it

of Cooperation invited Stanley Barnes to speak at its Summer Institute in Missouri.[55] Barnes warned the producers that although current congressional policy encouraged cooperatives, no blanket immunity from the antitrust laws was conferred upon them.

Furthermore, the privilege conferred by Section 6 of the Clayton Act and the Capper-Volstead Act was stated by Barnes as being limited to the right of producers to " . . . associate for the lawful carrying out of the legitimate objectives of agricultural associations."[56] The address also emphasized the illegality of combining with non-cooperatives (the other persons doctrine), and speculated on the possible adverse consequences of farmers limiting their production or destroying crops in the field in the absence of governmental participation.[57] But Barnes left much unanswered when he said:

> We are on firm ground in saying that farmer cooperatives are in all respects accountable under the antitrust laws except as to conduct authorized by the Clayton Act or the Capper-Volstead Act. The difficult problem is determining the scope of sanctions given by these acts.[58]

The message of the Justice Department had been delivered.

The cranberry industry was also experiencing its antitrust problems. In a civil suit[59] brought against a cranberry cooperative by a non-cooperative competitor, the plaintiff alleged that through the concerted effort of the cooperative and a bank he could not effectively compete for a share of the market.[60]

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is not enough to sustain these convictions. It must apepar beyond a reasonable doubt that these . . . corporations were guilty as charged, or their convictions cannot stand. In pronouncing them guilty, the court was relying on the economic hypothesis that full supply-classified use contracts tend unlawfully to fix prices and to restrain trade. There was no expert evidence to support the hypothesis and, had there been, it would not have supported a finding of guilt. It is still the law that there can be no conviction of crime on circumstantial evidence unless the only possible inference to be derived from it is that of guilt . . . It is equally true that guilt cannot be inferred from an unsupported economic theory. *Id.* at 917.

55. Barnes, *supra* note 3?

56. *Id.* at 28.

57. "It would also appear clear that an agricultural cooperative association would run afoul of the antitrust laws if it should undertake, by agreement among its members, to limit production or to destroy crops in the field. In this regard, I would like to point out that about two years ago, the Antitrust Division brought action against lettuce growers in California charging that they had agreed to restrict the amount of lettuce produced by destruction of crops in the peak period of the harvesting season. Such an agreement would be permissible only if the Capper-Volstead Act grants an exemption. But that act, in authorizing collective action by farmers for the 'processing, preparation for market, handling and marketing' of agricultural products, does not appear to authorize *limitations upon production* . . . my concern is to point out to you the *profound distinction* between *private action* in this field and action by *duly constituted officials* of a representative government." (emphasis supplied by Barnes) *Id.* at 31, 32. Barnes was obviously referring to governmental production control programs as opposed to individual actions.

58. *Id.* at 29.

59. Cape Cod Food Products v. National Cranberry Ass'n., 119 F.Supp. 900 (D. Mass. 1954).

60. In 1946, there was an overproduction in the cranberry industry. Demand was in the area of 3,000,000 cases, production was nearer 6,000,000 cases. The Association members themselves produced about 3,000,000 cases and it was their desire to satisfy tne de-

Judge Wyzanski, in his extensive instructions to the jury, said that it was not unlawful under the antitrust laws for a cooperative to capture 100 per cent of the market, if it is done by way of marketing agreements as contemplated under the Capper-Volstead Act.[61]

The jury returned an award of $175,000.00 to the plaintiff. It should be noted that this case again involved "other persons."

In 1956, the Justice Department orignated in action against the Maryland Cooperative Milk Producers and the Maryland and Virginia Milk Producers Association for alleged violations of Sections 1 and 3 of the Sherman Act.[62] The gravamen of the action was the combining and conspiring of the two cooperatives to fix the price of milk sold to distributors who, in turn, sold it to the Government at Fort Meade, Maryland. It was the premise of the Antitrust Division that notwithstanding the fact that only cooperatives were involved, this combination between them violated the "other persons" rule set forth in *Borden*.[63]

Judge Holtzoff rose to the challenge and held that inter-cooperative action was not in violation of the principles set forth in *Borden*, and that the immunity provided by the Clayton Act was sufficiently broad to include such inter-cooperative actions.[64]

The National Cranberry Association was also involved in 1958 with the issue of immunity in an action brought under Section 4 of the Clayton Act.[65] Two of the Association's members and a number of its officers were joined as defendants. The opinion provides

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mand exclusively from their production. The plaintiff claimed that the Association conspired with a bank to force him out of business. The bank made loans to the plaintiff and mortgages were given on all of the plaintiff's corporate property as security. The mortgages were foreclosed when the plaintiff could not obtain sufficient working capital to repay the loans. The foreclosures were allegedly due to the devious manipulations of the conspirators. *Id.* at 912-915.

61. The contracts envisaged by Judge Wyzanski as authorized by the Capper-Volstead Act are those in which the cooperative would fix the price of its products and sell those products at the same price to everyone. *Id.* at 907. The cooperative would still be subject to the provisions of section 2 of the Capper-Volstead Act, however, in that the Secretary of Agriculture could intervene if the price of the commodity were unduly enhanced.

62. 145 F.Supp. 151 (D.D.C. 1956).

63. It appeared that the prices charged the Government were still lower than those charged the general public. Judge Holtzoff remarked: "It may be said perhaps, in a sense, that the defendants are accused of conspiring to undercharge the Government." *Id.* at 152. The Government contended, however, that absent the alleged illegal conspiracy of the cooperatives, the price would have been lower.

64. "The Government argues that the exemption contained in the Clayton Act does not apply to a combination of two or more agricultural cooperatives and urges that such a combination is within the rule of the Borden case . . . this contention cannot be sustained. The obvious purpose of the Clayton Act was to liberate combinations of farmers and their cooperative organizations from the prohibitions of the antitrust laws as long as they do not combine with others who are outside of this category . . . . The exemption should be construed as applicable to a group of farmers irrespective of whether they are joined into a single cooperative or into several cooperative associations acting jointly. Any other construction would result in partially defeating the intent of the Congress and frustrating the meaning of the Act." *Id.* at 153, 154.

65. April v. National Cranberry Ass'n., 168 F.Supp. 919 (D. Mass. 1958). Section 4 of the Clayton Act allows private individuals to sue for damages arising out of violations of the antitrust laws. If successful, the plaintiff's damage award is trebled as a form of punitive damages. 38 Stat. 731 (1914), 15 U.S.C. § 15 (1964).

little information as to the factual nature of the complaint except that some type of predatory practice was engaged in by the defendants in violation of Sections 1 and 2 of the Sherman Act. The defendants made a motion for summary judgment on the ground that they were ". . . wholly immune from suit where there is no allegation of conspiracy with outsiders."[66]

The court denied the motion, at least as to Section 2, by holding that the Capper-Volstead Act allowed farmers to organize and lawfully carry out their legitimate objects but did not authorize such organizations to indulge in purely predatory practices.[67]

It was not long before the Justice Department again attempted to attack the legality of the Maryland and Virginia Milk Producers Association's conduct. In 1958, a complaint was filed based on three causes of action: (1) violation of Section 2 of the Sherman Act by attempting to monopolize the fluid milk market in Washington D. C., Maryland, and Virginia; (2) violations of Sections 1 and 3 of the Sherman Act in combining and conspiring with others to foreclose and eliminate competition by acquiring the assets of the chief competitor of the Association, Embassy Dairy; and (3) that such acquisition was also in violation of Section 7 of the Clayton Act.[68]

The Association raised the affirmative defense of immunity under the Clayton and Capper-Volstead Acts and the court directed a separate trial of the defense under the provisions of Rule 42(b).[69] Judge Holtzoff held that the defense was good as to the first cause of action since cooperatives were immune from the antitrust laws in the absence of any combination or conspiracy with other persons.[70]

As to the second and third causes of action, however, Holtzoff ruled that the defense was not good since the immunity granted to cooperatives did not extend to contracts made with other organizations not entitled to exemption. Moreover, the court ruled

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66. *Id.* at 920. The defendants, of course, were relying on *Borden.*

67. *Id.* at 923.

68. United States v. Maryland & Virginia Milk Producers Ass'n., 167 F.Supp. 45 (D.D.C. 1958). Section 7 of the Clayton Act generally provides that corporations shall not acquire the stock or assets of other corporations where the effect may be substantially to lessen competition, or to tend to create a monpoly. The section does not apply to transactions duly consumated pursuant to authority given to the Secretary of Agriculture under the statutory provision vesting such power in the Secretary. 38 Stat. 731 (1914), 15 U.S.C. § 18 (1964).

69. FED. R. CIV. P., 28 U.S.C. (1964). The Rule provides that any issue, claim, or counterclaim may be tried separately when it is more convenient or to avoid prejudice.

70. United States v. Maryland & Virginia Milk Producers Ass'n., *supra* note 68, at 52. Judge Holtzoff concluded that the cooperative could engage in unreasonable restraints of trade with impunity, as long as it did not combine with non-cooperative entities. He realized that this position might be harmful to the public but he was definitely of the opinion that the decision in *Borden* went no further than to subject Cooperatives to the anti-trust laws only when they combined with others not entitled to the immunity provided by the Clayton and Capper-Volstead Acts. He determined that if the aforesaid acts were inadequate to protect the public, it was the function of Congress to amend them, not that of the court.

that the Capper-Volstead Act did not exempt agricultural cooperatives from the terms of Section 7 of the Clayton Act.[71]

When the third cause of action was tried,[72] the court held that the acquisition of Embassy Dairy was in violation of Section 7 of the Clayton Act. As a result of the acquisition, the Association now controlled 91.7 per cent of the government sales market whereas it controlled only 45 per cent before the acquisition. Further, the most significant competitor of the association had been eliminated and non-member producers who had previously sold their milk to Embassy were now forced to join the Association or find a market elsewhere. There could be no doubt that the transaction had the effect of lessening competition in the milkshed area. The Association was ordered to divest itself of the Embassy Dairy assets within a reasonable time.[73] The second cause of action was tried two months later and Judge Holtzoff held that the acquisition of Embassy Dairy was a per se violation of Section 3 of the Sherman Act as well as a violation of Section 7 of the Clayton Act.[74]

The decisions were appealed to the Supreme Court[75] and the district court's holding at 167 F. Supp. 45 that the Association acting by itself could not be held in violation of Section 2 of the Sherman Act was reversed.[76] The Court said:

> We are satisfied that the allegations of the complaint and the statement of particulars . . . charge anticompetitive activities which are so far outside the "legitimate objects" of a cooperative that, if proved, they would constitute clear violations of Section 2 of the Sherman Act. . . .[77]

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71. As Judge Holtzoff viewed the matter, section 7 of the Clayton Act constituted a limitation on the cooperative's power to make contracts pursuant to section 1 of the Capper-Volstead Act. *Id.* at 53.

72. 167 F.Supp. 799 (D.D.C. 1958). After a short recess following the decision in 167 F.Supp. 45, *supra* note 68, regarding the defense of immunity, the trial on the merits of the second and third causes of action ensued. The third cause of action was tried first.

73. The cooperative had contended that the purchase had been approved by the Secretary of Agriculture and therefore the transaction would be exempted from § 7 of the Clayton Act. Although there was some evidence that the Marketing Division of the Farmer Cooperative Service of the Department of Agriculture had approved the acquisition of Embassy Dairy, Judge Holtzoff ruled that there was no statutory provision as required by § 7 authorizing the Secretary of Agriculture to approve such a transaction. *Id.* at 808.

74. 168 F.Supp. 880 (D.D.C. 1959). Judge Holtzoff rejected the contention of the cooperative that transactions between cooperatives and organizations not clothed with the immunity of the Clayton and Capper-Volstead Acts should not be subject to the scrutiny of the antitrust laws unless the transaction resulted in a benefit to the organization not enjoying cooperative status.

75. 360 U.S. 927 (1959).

76. 362 U.S. 458 (1960) [hereinafter cited as *Maryland and Virginia*]. The Government had appealed on the basis of Judge Holtzoff's ruling in 167 F.Supp. 45 that the cooperative acting alone, could not be held under section 2 of the Sherman Act; and the cooperative appealed the rulings holding it liable for violations of section 3 of the Sherman Act and section 7 of the Clayton Act.

77. *Id.* at 468. Indeed, it would appear that the Association was engaging in some rather predatory practices. Besides the purchase of Embassy Dairy, there were a number of instances where the Association attempted to interfere with truck shipments of nonmembers' milk, and an attempt during 1939-1942 to induce a Washington dairy to exclude its non-Association producers from the market. Moreover, a boycott of a dairy owner in order to coerce him to buy Association milk was also charged.

As to the exemption granted by Section 6 of the Clayton Act, the Court said:

> Thus, the full effect of Section 6 is that a group of farmers acting together as a single entity in an association cannot be restrained from "lawfully carrying out the legitimate objects thereof," but the section cannot support the contention that it gives an entity full freedom to engage in predatory trade practices at will.[78]

The Court recognized that the Capper-Volstead Act was intended to allow individual farmers acting through cooperatives the same competitive advantages as other forms of corporations, but also emphasized that cooperatives must be subject to the same responsibilities, such as compliance with the provisions of the antitrust laws. The Court summarized its position on the Capper-Volstead Act:

> . . . [t]he Act did not leave cooperatives free to engage in practices against other persons in order to monopolize trade, or restrain and suppress competition with the cooperative.[79]

Reaffirming its position in the *Borden* case, the Court held that the Secretary of Agriculture does not have exclusive jurisdiction in prosecuting cooperative monopolizations; nor does the Secretary have the authority under Section 7 of the Clayton Act to approve an agreement between a cooperative and others which would result in creating an unlawful monopoly position.

The court concluded by discussing the issue as to whether the acquisition of Embassy Dairy was a valid transaction under the Capper-Volstead Act which authorizes cooperatives to make the necessary contracts and agreements for the purpose of processing, preparing, handling and marketing its members' products.

Under ordinary circumstances, the Court felt that the acquisition might very well be valid as an exercise of the cooperative's contractural authority. But when considered in view of the pattern of events, the transaction was tainted with the illegality of the Association's prior conduct.[80]

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78. *Id.* at 465, 466.
79. *Id.* at 467.
80. "The Embassy assets [that] the Association acquired are useful in processing and marketing milk, and we may assume, as it is contended, that their purchase simply for business use, without more, often would be permitted and would be lawful under the Capper-Volstead Act. But even lawful contracts and business activities may help to make up a pattern of conduct unlawful under the Sherman Act . . . We hold that the privilege the Capper-Volstead Act grants producers to conduct their affairs collectively does not include a privilege to combine with competitors so as to use a monoply position as a lever further to suppress competition by and among independent producers and processors." *Supra* note 76, at 471, 472.

The judgment of the district court was upheld as to violations of Section 7 of the Clayton Act and Section 3 of the Sherman Act. For the Justice Department, a victory had been won. No longer could it be said that a cooperative, acting alone, could not be held accountable under the Sherman and Clayton Acts whenever such actions went beyond the legitimate objects of the organization.

Sunkist Growers, Inc. is one of the largest agricultural cooperatives in existence. It consists of some 12,000 growers who are organized into local associations, which associations are further organized into district exchanges, and representatives from the district exchanges form the governing body of Sunkist. Exchange Lemon Products is a processing cooperative formed in 1915 by a group of associations within the Sunkist family engaged in processing and developing lemon by-products. Exchange Orange Products serves the same function as Exchange Lemon, but its facilities are available to all of the growers since Sunkist acquired all of its assets in 1931. All products of Exchange Lemon and Exchange Orange are marketed through the central Sunkist products department which is managed by directors from both processing cooperatives.

Sunkist's operations are conducted in the California-Arizona area. Within that area there were four competing independent processors who largely relied on Sunkist for their supply of by-product oranges which were mainly processed into orange juice.

Silzle and TreeSweet, two of the independent processors, held process-purchase contracts[81] with Exchange Orange in 1951, with a net cost per ton of oranges to the processors of $17.66 and $25.10, respectively. Winckler & Smith, another of the independent processors, allegedly was refused a similar contract and could not buy oranges from Sunkist except at the list price which averaged from $40.00 to $44.00 per ton. As a result, Winckler & Smith claimed that it could not compete in the single strength juice market.

Winckler & Smith brought suit against Sunkist, Exchange Orange, Exchange Lemon, Silzle, and TreeSweet for alleged violations of Sections 1 and 2 of the Sherman Act.[82] The complaint alleged, in substance, that a conspiracy existed between the defendants to restrain and monopolize interstate trade and commerce in citrus fruits and its products. The trial court awarded judgment to Winckler & Smith. A portion of the jury instructions inferred that the jury could find that Sunkist, Exchange Orange, and Exchange Lemon could be guilty of unlawfully conspiring under the

81. Generally, such contracts provided that the independent processors would process a quantity of fruit for Exchange Orange at cost and then the processor would purchase the resultant juices at Sunkist's list price less discounts and allowances. Sunkist Growers, Inc. v. Winckler & Smith Citrus Prod. Co., 284 F.2d 1, 13 (9th Cir. 1960).

82. The action in the district court is unreported. Any references to that action must be taken from the appeal as reported *supra* note 81.

Sherman Act without any additional finding that they had conspired with the other defendants, Silzle and TreeSweet.[83] Sunkist appealed, claiming, inter alia, that the instruction was erroneous since the verdict very probably was based on the premise that Sunkist had conspired with itself.

The decision on appeal was delayed until the Supreme Court had given its opinion in the *Maryland and Virginia* case. Armed with the decision in that case, the court of appeals affirmed the liability of Sunkist but reversed on the determination of damages, holding that they were too speculative. Judge Barnes[84] used the language in *Maryland and Virginia* with great effect. He concluded that the cooperatives had no blanket exemption and could be held responsible under Section 2 of the Sherman Act for unlawful monopolization or attempts to monopolize and under Section 1 for unlawful acts constituting restraints and suppression of competition.[85] As to Sunkist's contention that the jury instructions were improper, Barnes said:

> We do not now understand (since the Milk Producers decision) that different agricultural cooperatives, combining together, are entitled to claim a total immunity for acts which they may lawfully do unilaterally, any more than individuals may claim for certain of their joint actions the same immunity under antitrust laws which would exist as to their several independent acts.[86]

The court further refused to disturb the jury's finding that the alleged refusal to sell to Winckler & Smith was unlawful, holding that the verdict could have been based on either (1) the alleged

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83. A portion of the jury instructions read: "Unless you find, therefore, from the preponderance of the evidence, that Sunkist or Exchange Orange or either of them, combined or conspired with either TreeSweet, or Silzle, or ELP (Exchange Lemon Products), and in 1951 did one or more of the specific acts charged . . . . Unless you find from the preponderance of the evidence that defendants Sunkist and Exchange Orange, or either of them, and one or more of the alleged conspirators [one of which was Exchange Lemon] combined and conspired, and pursuant to such combination or conspiracy . . . ."

The trial judge huddled with the attorneys and then issued what he believed to be a clarification of the instructions: "I am told that I spoke about how the defendants had conspired on one occasion. The charge is not that the defendants conspired. The charge is that the defendants and co-conspirators conspired.

"However, as a matter of fact, you may find that nobody conspired, or you may pick out and decide that some number less than the total conspired." 284 F.2d at 21, 22.

It is questionable whether the jurors could comprehend the long and detailed instructions. The judge was giving the instructions thusly: "Now, so that you will not be confused, let's back up. Here are cooperatives which are permitted to combine together to produce and market their fruit. The antitrust laws say that they may lawfully do that, and the antitrust laws say that they shall not be in violation of any—are you sleepy down there?" Juror Dalker: "No." The Court: " . . . shall not be in violation of the antitrust law . . . ." *Id.* at 19, 20.

84. Judge Barnes is the same individual who spoke at the American Institute of Cooperation in 1953 when he was then heading the Antitrust Division of the Justice Department, *supra* note 32.

85. *Supra* note 83, at 9.

86. *Id.* at 22.

illegal conspiracy and agreement to make contracts constituting a restraint of trade or (2) the alleged illegal sole trader decision not to sell, made with an intent to illegally restrain trade or commerce, or (3) a similar unilateral decision not to sell, except at a fixed price, made from a monopoly position, with an intent or purpose to eliminate a competitor.[87]

The conclusion drawn from the case is one that must have stunned the cooperatives. It appeared that the results in *Maryland and Virginia* and the instant decision stripped the cooperatives of all immunity under the Sherman Act except that regarding the basic right to organize guaranteed by the Clayton and Capper-Volstead Acts.

Certiorari was granted to Sunkist and limited to the issue of the immunity of interorganizational dealings between the cooperatives from the conspiracy provisions of the antitrust laws.[88]

Justice Clark delivered the decision.[89] He noted that the jury instructions clearly would allow a finding of liability on a determination that an unlawful conspiracy existed between Sunkist, Exchange Orange, and the allegedly distinct and separate entity of Exchange Lemon. The lower courts had concluded that Sunkist and Exchange Orange were, in fact, one cooperative and Exchange Lemon was another cooperative entity.

In a summary manner, Clark concluded that the three cooperatives were all part of one organization, and therefore no conspiracy could exist.[90] Since one theory of liability was in error, the Court

87. The court determined the applicable product as single strength Valencia orange juice and the appropriate market area as confined to California and Arizona. The court stated that Sunkist controlled about 70% of the product oranges in 1951. The other 30% was grown by smaller associations. When Winckler & Smith was organized in 1946 it bought a considerable amount of oranges from Sunkist but its purchases tapered off until. in 1950, they were very insignificant customers of Sunkist. In 1951, Sunkist started a policy whereby it would dispose of all of its product oranges through Exchange Orange Products. Sunkist did sell some 46,000 tons to independent processors in 1951, and EOP was left with an additional 122,800 tons on hand. Silzle and TreeSweet processed a significant share of that amount.

In 1950, EOP processed 11% of the single strength orange juice in the relevant market area, and 58% in 1951, after its decision to integrate. As to Sunkist's alleged refusal to give Winckler & Smith a contract similar to the process-purchase contracts held by Silzle and TreeSweet, the court said: "An individual refusal to deal is preserved wherever it is reasonably ancillary to the effectuation of lawful marketing objectives. . . . Thus, in this case we conclude the question as to whether there had been a concerted refusal to sell, were questions of fact for the jury's determination." *Id.* at 17.

In any event, Judge Barnes determined that the alleged refusal to sell could be illegal under the antitrust laws whether such action was taken unilaterally, or in combination with others and that there was sufficient evidence to justify the jury's consideration of all three theories of liability.

88. 368 U.S. 813 (1961).

89. 370 U.S. 19 (1962) [hereinafter cited as *Sunkist*].

90. "There can be no doubt that under these statutes (Clayton and Capper-Volstead) the 12,000 California-Arizona citrus growers ultimately involved could join together into *one* organization for the collective processing and marketing of their fruit and fruit products without the business decisions of their officers being held combinations or conspiracies." *Id.* at 28. Moreover, the Court said: "With due respect to the contrary opinions of the Court of Appeals and the District Court, we feel that the 12,000 growers here involved are in practical effect and in the contemplation of the statutes one 'organization'

went no further in its examination of the others. Certiorari was granted to determine immunity from conspiracy charges in inter-organizational dealings, but the decision only settled Sunkist's conspiracy immunity in *intraorganizational* matters.[91] The decision did not alter the previous holdings in *Borden* and *Maryland and Virginia* in any respect. Certainly it would be erroneous to state that *Sunkist* stands for the proposition that conspiracies between separate cooperatives are immune from conspiracy charges brought under Sections 1 and 2 of the Sherman Act.[92]

The Sunkist saga was far from finished. Case-Swayne Co., the other independent processor allegedly the victim of Sunkist's manipulations, also brought an action charging unlawful monopoly practices. The case was brought before the district court after the decision of the Supreme Court in *Sunkist* had been rendered, and presumably, a motion for a directed verdict was granted Sunkist partially on the basis of that decision.[93]

The court of appeals held that the evidence was sufficient to present a jury question. Viewing the evidence in its most favorable light to the plaintiff, the court held that if the jury found that the relevant product market was Southern California and Arizona, they could find that Sunkist was guilty of unlawful monopoly practices or an attempt thereof.[94]

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or 'association' even though they have formally organized themselves into three separate legal entities. To hold otherwise would be to impose grave legal consequences upon organizational distinctions that are of *de minimus* meaning and effect . . . . There is no indication that the use of separate corporations had economic significance in itself or that outsiders considered and dealt with the three entities as independent organizations." *Id.* at 29.

91. The Court rested its decision only on the ground that Sunkist, Exchange Orange and Exchange Lemon were not separate entities insofar as the conspiracy provisions of section 2 of the Sherman Act is concerned.

92. The Court qualified its approval of intercooperative dealings by stating that in this case, it did not appear that the " . . . use of separate corporations had economic significance in itself or that outsiders considered and dealt with the three entities as independent organizations." Supra note 90. It is doubtful whether different cooperatives, combining together into one organization, could claim the benefit of the Sunkist decision if they did not meet the qualifications named above. Furthermore, any acquisition of the assets or stock of other corporate associations would doubtless receive the scrutiny of the courts under section 7 of the Clayton Act as applied in *Maryland and Virginia.*

93. Again, the district court decision is not reported. The complaint charged violations of sections 1 and 2 of the Sherman Act. Case-Swayne Co. v. Sunkist Growers, Inc., 369 F.2d 449, 451 (9th Cir. 1966). The district court also had held that Sunkist and its affiliates were engaged in an integration program whereby Exchange Orange was processing nearly all of the organization's by-product oranges used in making single strength orange juice; that the relevant market area was not limited to the California-Arizona sphere but had to be considered as nationwide in view of the competition from the orange juice industry in Florida; that because of the low prices for oranges in Florida, processors there could sell their juice in the California market at a lesser price than juice produced locally; that as a result of competition from Florida, the price to the consumer throughout the states of single strength orange juice depended a great deal on the price of oranges to the Florida processors; and that the relevant product market was not limited to single strength orange juice but must include orange juice concentrates (which neither party to the instant action produced). As the district court found that the relevant market area was nationwide in scope, Sunkist was held as not constituting a monopoly. On the national scene, Sunkist controlled only 6 to 7% of the orange production, as compared to 70% in the California-Arizona area. *Id.* at 452, 453.

94. The court merely concluded that there was evidence that the relevant geographic

Sunkist contended that size alone nor the mere possession of monopoly power violated the Sherman Act but rather the wrongful use of such power. The court agreed but held that the ultimate issue in determining liability under Section 2 was ". . . whether the defendants control the price and competition in the market for such part of trade or commerce as they are charged with monopolizing."[95]

At the time this action was prosecuted, Exchange Lemon had been completely absorbed by Sunkist which was not the case when Winckler & Smith litigation was current. Sunkist's membership now consisted of 80.12 per cent fruit growers, 4.97 per cent were corporate growers, and 14.91 per cent were private corporations, partnerships and individuals. The latter group, called agency associations, were not growers but merely handled fruit for growers and marketed it through the Sunkist organization.[96]

The court held that the organizational structure of Sunkist was in compliance with Section 1 of the Capper-Volstead Act. Moreover, the contracts with the agency associations were valid since they were of a nature that were contemplated under Capper-Volstead.[97] Judge Ely dissented.[98]

Notwithstanding the validity of the organizational structure under Capper-Volstead, the court remained firm in its position that the question of liability under Sections 1 and 2 of the Sherman Act was a question for the jury and the directed verdict could not stand.

Case-Swayne appealed the court of appeals ruling that Sunkist was a bona fide Capper-Volstead cooperative and certiorari was granted by the Supreme Court on the question as to whether Sunkist forfeited its antitrust immunity by including non-growers (the agency associations) in its membership. The Court, per Justice Marshall, answered in the affirmative.[99]

Justices White and Stewart concurred in the result but felt that the Court went too far in holding that Sunkist forfeited its anti-

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market could be limited to California and Arizona and therefore a directed verdict was not proper. *Id.* at 458.

95. *Id.*

96. The agency associations were independent contractors furnishing packing facilities to the Sunkist organization. The parties stipulated that such agency associations were not Capper-Volstead cooperatives. 369 F.2d at 460, n. 18.

97. The majority felt that such packing contracts with the agency associations were certainly within Sunkist's "legitimate objects," and since such contracts could have been legally made with separate organizations, the fact that such associations constituted a class of membership did not affect the exempt status of the entire organization. *Id.* at 462.

98. Judge Ely felt that the Supreme Court decision in *Sunkist* was limited to cooperatives whose members were bona fide growers or producers. Ely noted that the parties agreed that the agency associations were not entitled to the Capper-Volstead exemption and concluded that since Sunkist had combined with non-cooperative entities in the form of agency associations, the protection offered it by the Capper-Volstead Act was destroyed. Judge Ely certainly had authority for his position in *Borden* and *Maryland and Virginia*. *Id.* at 464.

99. Case-Swayne Company v. Sunkist Growers, Inc., 88 S.Ct. 528 (1967).

trust immunity completely. The concurring opinion would have limited Case-Swayne's recovery to only those damages which arose from the restraint of trade resulting from agreements between the Sunkist organization and the non-grower agency associations. No recovery would thus be allowed from injuries caused by transactions between Sunkist and its member grower cooperatives.

Justice Harlan also concurred in the Court's finding that Congress did not intend that cooperatives with non-grower members should enjoy the antitrust immunity provided by Section 1 of the Capper-Volstead Act, but dissented from the Court's apparent holding that Sunkist's immunity should be removed from those transactions which the agency associations entered into for their own benefit rather than the benefit of the grower members.

Justice Douglas filed a dubitante opinion, stating that the question of the *extent* of the cooperative's loss of immunity when non-growers are included in its membership was not argued and should be reserved.

The *Denver Milk Producers*[100] case, decided in 1964, reflects the Supreme Court ruling in *Sunkist*. The complaint was dismissed on the ground that it alleged only an intracooperative conspiracy. The court held that Section 1 of the Sherman Act prohibited conspiracies in restraint of trade between separate business entities and that the plaintiff's failure to allege such a conspiracy was fatal to the action. The court rejected the plaintiff's contention that the cooperatives's officers, directors, and employees could unlawfully conspire with each other and the cooperative.

> . . . [n]othing . . . suggests that a corporate officer can be regarded as a conspirator with his fellow officers and his own corporation in violation of the conspiracy provisions of Section 2 when he merely acts as an officer to establish the policy and advance the interests of the corporation—and this is so even when the policy of the corporation is to monopolize.[101]

The factual situation in *Bergjams Dairy Company v. Sanitary Milk Producers*[102] is reminiscent of *Maryland and Virginia*. The complaint alleged violations of Sections 1 and 2 of the Sherman Act and Section 2 of the Clayton Act. The cooperative acquired the assets of its chief competitor and granted rebates to retailers in an effort to gain a monopoly position. The court stated that Sanitary

100. Schoenberg Farms, Inc. v. Denver Milk Producers, Inc., 231 F.Supp. 266 (D. Colo. 1964).
101. *Id.* at 270. See Tillamook Cheese & Dairy Ass'n. v. Tillamook County Creamery Ass'n., 358 F.2d 115 (9th Cir. 1966).
102. 241 F.Supp. 476 (E.D. Mo. 1965).

had entered the milk processing field in bad faith and the Capper-Volstead Act would not immunize the cooperative from liability for its trade practices where such practices were executed by illegal means.[103] On appeal, the judgment for the plaintiff was affirmed.[104]

The Texas range wars probably provided less excitement than *North Texas Producer's Ass'n. v. Metzger Dairies, Inc.*[105] The defendant-appellee, a large processor, filed suit against the cooperative alleging seven counts in violation of Section 2 of the Sherman Act including a boycott and coercion. The evidence appeared to vindicate Metzger's complaint.[106] The principles set forth in *Maryland and Virginia* were applied and the cooperative was found to be far from pursuing any legitimate objects that it might have.

On October 4, 1966 the "embattled farmers" of Pennsylvania filed suit against a group of milk processors. On October 25, 1966 the processors filed suit against the "embattled farmers." Both suits charged violations of the Sherman Act.[107] The United Dairy Farmers charged that the processors were using a front organization, Dairyman's Cooperative Sales Association, Inc., to serve its own interests rather than the farmers comprising the association. The processors countered with the charge that the UDF was conspiring to monopolize the Pittsburgh milk market.[108]

The court quickly recognized that the two complaints were an effort to conduct collective bargaining of milk prices in the guise

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103. The court refused to hold that a conspiracy existed between the retail dealers and the cooperative. *Id.* at 486.

104. 368 F.2d 679 (8th Cir. 1966).

105. 348 F.2d 189 (5th Cir. 1965), *cert. denied* 382 U.S. 977 (1966).

106. The Association was comprised of about 2500 dairymen who supplied about 85 to 90% of the raw milk marketed in the Dallas-Fort Worth area. Metzger was a large processor in Dallas and purchased 75% of his requirements from the Association. The Association raised the price of its milk and Metzger reluctantly acceeded to the demand. The Association further demanded that Metzger stop buying milk from producers other than the Association but Metzger refused and started purchasing his milk elsewehre at considerably higher prices.

The Association attempted to stop Metzger's alternative supply of milk and made several efforts to purchase the assets of Metzger. The broker who was to negotiate the sale testified that he had heard Association officers speak of their desire to " . . . get Jake Metzger out of the dairy business . . . ." so that the Association could control the price of milk in the area.

Metzger suffered boycotts of grocers handling his milk; the evidence tended to support that such boycotts were instigated by the Association. A letter was also circulated by the Association which stated: "Metzger is still shipping in milk from the north and paying up to 75c per hundred more for some of it than is being paid for local milk . . . . We would like to urge all members to talk with their friends, neighbors, grocers and business associates and suggest to them that they should buy milk from a plant that distributes local milk—not northern milk." *Id.* at 194, 196.

107. Isaly Dairy Co. of Pittsburgh v. United Dairy Farmers, 250 F.Supp. 99 (W.D. Penn. 1966).

108. The United Dairy Farmers (hereinafter referred to as the UDF) charged that the Dairyman's Cooperative Sales Association (hereinafter referred to as DCSA) was being used and controlled by the processors as a means of forcing the members of the DCSA to accept low prices for milk and that the Association was not truly representing the farmer members. The UDF was formed apparently to give the dairymen a more efficient voice in collective bargaining.

The processors charged the UDF with violations of the antitrust laws in the form of picketing the processors' plants. *Id.* at 100.

of antitrust actions. The processors real complaint was that the UDF was attempting to persuade members of the DCSA to join the UDF, and the gist of UDF's action was dissatisfaction with the efforts of DCSA as a bargaining agent for the area dairy farmers. The court conceded that the regulation of milk prices was a problem of no little significance, but referred the parties to the legislature for a solution to their problem.[109] The processor's application for a preliminary injunction was refused.

The processors complained of demonstrations and picketing organized by the UDF but which had been judicially supervised. The court summarily rejected the allegation that such demonstrations, peaceful in nature, were unlawful by stating:

> The "embattled farmers" . . . are therefore simply making a successful "adjustment" to the surroundings of their modern cultural milieu when they dramatize their claims by demonstrations. Their standing is not inferior to that of other protesting groups merely because they did not hire Mike Quill or Martin Luther King to serve as impressario of their show.[110]

In *Otto Milk Company v. United Dairy Farmers' Cooperative Ass'n.*,[111] the defendant cooperative combined with the UDF and engaged in a boycott and picketing of plaintiff's retail outlets in an effort to persuade the retail stores to buy defendants' milk. The court held such activities in violation of the Sherman Act as exceeding the boundaries of the cooperatives' legitimate objects. Indeed, such group boycotts are per se violations of Section 2.[112]

Notwithstanding the absence of actual monopolization, the court said that it was sufficient if a tendency toward monopolization or a reasonable likelihood of a substantial lessening of competition existed to justify injunctive relief.[113]

The defendants' contention that the picketing was an exercise of their constitutional right of free speech was rejected. The court held that the objective of the picketing was to accomplish a result which violated the Sherman Act. As such, the picketing went further

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109. "Pennsylvania has also established milk price legislation . . . The fact that the Milk Control Board has recently been in bad odor, and may be considered as an illustration of the rule that the passage of time often dims the crusading zeal of regulatory bodies and makes them attentive rather to the interests regulated than to the interests of the public, does not detract from the truth of the proposition that the milk problem is one for solution by legislative and administrative action . . . rather than by litigation in the courts." *Id.* at 101.

110. *Id.* at 102.

111. 261 F.Supp. 381 (W.D. Penn. 1966). The UDF was a co-defendant and is an entirely separate organization.

112. The boycott was carried out in 5 counties. Many retail dealers who were picketed acquiesced and refranied from purchasing the plaintiff's milk. *Id.* at 383, 385.

113. The court relied on United States v. Penn-Olin Co., 378 U.S. 158 (1964).

than merely "telling their story," and could not be afforded the immunity given to other modes of expression.[114]

PART C—EPILOGUE

> . . . agricultural cooperatives can no longer be thought of in terms of infinitesimal economic units revolving about the orbit of the nation's economy. As the balance of power between agricultural cooperatives and other units of the nation's economy approaches equality, these associations will find themselves more and more amenable to the economic premise which governs the rest of business.[115]

Although this statement by Judge Barnes was uttered almost 15 years ago, it is as pertinent now as it was then. The accuracy of the prophecy is particularly strengthened by the decision in *Maryland and Virginia* and subsequent decisions relying on that case for authority. It can be stated with reasonable certainty that a cooperative will be held responsible under Section 2 of the Sherman Act for monopolization whenever it engages in unilateral monopoly practices which do not meet the "legitimate objects" test and may be held liable for joint trade practices with "other persons" notwithstanding that such practices would not be unlawful if executed solely by the cooperative. Further, the contracts which a cooperative may enter into pursuant to Section 1 of the Capper-Volstead Act cannot operate to suppress competition and restrain trade in violation of the antitrust laws. In short, it would appear that any immunity beyond the fundamental premise that cooperatives, as a form of business combination, are not to be held in violation of the antitrust laws, is illusory.

The legislative intent, and even the plain language of the Capper-Volstead Act has been violated insofar as the role of the Secretary of Agriculture is concerned.[116] The Department of Justice has assumed almost complete jurisdiction in the policing of the coopera-

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114. The picketing consisted of a great deal more than a mere peaceful demonstration as was the case in Isaly Dairy Co. of Pittsburgh v. United Dairy Farmers, *supra* note 107.

115. Barnes, *supra* note 32 at 33.

116. Section 2 of the Capper-Volstead Act appears quite clear on the point of jurisdiction. The Congress, in its debates on the Act, stated: "The first question which has arisen is why the Secretary of Agriculture should be named as the officer to find whether the associtaion has unduly enhanced prices. I know of no officer more competent to deal with that question than the Secretary of Agriculture. He has in his department a Bureau of Markets. He keeps track of the cost of production, the cost of selling, and what the public is paying. He has the statistics and he, through his Bureau of Markets, can determine better than any other agency of the Government whether such a cooperative marketing association is really being operated in restraint of trade as a monopoly and is unduly enhancing prices.

"The Attorney General has the duty placed upon him to take charge of the suit in the court and to prosecute it, but the Attorney General has not the machinery to study these cooperative associations, to find out the cost of production, the cost of selling, the reasonable prices to the consumers, and various other elements which it is easy for the Secretary of Agriculture to find out." 62 CONG. REC. 2049 (remarks of Sen. Kellogg).

tives, which does not seem wise in terms of which agency is best equipped to make an intelligent evaluation of the economic realities of agricultural monopolizations. It would appear that the Secretary of Agriculture and his staff are far more able to determine when the activities of cooperatives restrain trade and *unduly* enhance the price of agricultural products. It must be recognized that the sole object of an agricultural cooperative is to enhance the price of products handled for its members—this is the "legitimate object." If the courts shackle the cooperatives with all of the burdens created by the antitrust laws, one of the most effective private means for agricultural collective bargaining power will be destroyed.

The search for parity goes on. Whether the "embattled farmers" succeed in their search by means of cooperative action largely depends on the attitude of the courts toward the ultimate status of the cooperatives under the antitrust laws.

III. NORTH DAKOTA COOPERATIVES—CLOUDS ON THE HORIZON

In 1966, North Dakota cooperatives listed 242,319 stockholders, transacted $323,494,915.71 in business, and had net earnings of $13,080,648.72.[117] The figures amply support the statement that cooperatives are big business in the State. The totals, however, include non-agricultural cooperatives as the North Dakota Department of Agriculture and Labor, through its Cooperative Division, is charged with encouraging the formation of cooperatives of all kinds.[118] Statutory authority exists for the following kinds of cooperative enterprises: Cooperative Marketing Associations,[119] Mutual Aid non-profit Cooperatives,[120] Electric Cooperative Corporations,[121] Grazing Associations,[122] Credit Unions,[123] and for any other lawful business except banking, insurance, and building or operating public railroads.[124] In North Dakota, authorization for the cooperative form of business organization nearly blankets the economy.[125]

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117. 1965 STAT. REP. DIV. OF COOPERATIVES 109, NORTH DAKOTA PUBLIC DOCUMENTS.
118. N.D. CENT. CODE §§ 4-06-09 and 4-06-11 (Supp. 1967). The agricultural cooperatives (elevators and creameries) listed 92,288 stockholders, transacted $182,585,287.32 in business, and had net earnings of $5,996,845.32. NORTH DAKOTA PUBLIC DOCUMENTS, *supra* note 117, Tables 2 and 4.
119. N.D. CENT. CODE Ch. 10-15 (Supp. 1967).
120. N.D. CENT. CODE Ch. 10-12 (1960).
121. N.D. CENT. CODE Ch. 10-13 (Supp. 1967).
122. N.D. CENT. CODE Ch. 36-08 (Supp. 1967).
123. N.D. CENT. CODE Ch. 6-06 (Supp. 1967).
124. N.D. CENT. CODE § 10-15-02 (1960).
125. N.D. CENT. CODE Ch. 4-06 (Supp. 1967) provides for a "Federated Co-operative Agricultural Association" which would be organized in conjunction with similar Associations in other agricultural states having a community of interest in agricultural problems. The Associations thus organized would be sponsored under the auspices of the particular state involved and would then merge to form one Association which would maintain lobbies in the state legislatures and Congress to present data on agricultural subjects to the end that wise legislation may be enacted in the interests of agriculture.

The provisions of Chapter 4-06 provide an excellent means of organization pursuant

There are extensive provisions in the North Dakota Century Code specifying the requirements for organization and operation of the cooperatives.[126] One of the most important provisions provides:

> No association organized under this chapter (10-15) shall be deemed to be a combination in restraint of trade or an illegal monopoly, or an attempt to lessen competition or fix prices arbitrarily. The marketing contracts or agreements between any such association and its members, or any agreements authorized in this chapter, shall not be considered illegal nor in restraint of trade.[127]

The above section would appear to be sufficient to allow farmers the right to organize into cooperatives without being held in violation of the State antitrust laws.[128] To date, however, the agricultural cooperatives have not been forced to litigate their rights and immunities under the antitrust provisions.

It would be wise for the cooperatives to heed the decisions in *Borden, Maryland and Virginia,* and *Sunkist* as a guide to their activities. From a reading of the statutes, section 10-15-59 confers no greater immunity in intrastate commerce from the State antitrust laws than the immunity the Capper-Volstead and Clayton Acts provide from the Sherman Act when interstate commerce is involved.

It should be noted that section 51-08-01 of the North Dakota Century Code prohibits any individual or association from creating, entering into, or being a party to any contract or agreement which fixes the amount of production of any commodity within the State.[129] Such unilateral limiting of production in order to raise prices has a doubtful legality, especially in view of Judge Barnes's statement that there is a profound difference in limiting agricultural production by governmental programs as opposed to private action.[130] If any cooperative, or group of cooperatives, attempts such a move, it is fairly certain that the courts will be called upon to settle the issue.

North Dakota cooperatives have yet another hurdle and potential stumbling block. The State Constitution provides:

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to the cooperative concept among states, but as yet no implementing action has been taken. In fact, it is highly doubtful that this concept will ever materialize since the statute has been in effect since 1935.

126. *See N.D.* CENT. CODE, *supra* note 119.

127. N.D. CENT. CODE § 10-15-59 (1960).

128. N.D. CENT. CODE Ch. 51-08 (1960) § 51-08-01 provides: "Any corporation organized under the laws of this state or doing business in this state, or any partnership, association, or individual, creating, entering into, or becoming a member of or a party to, any pool, trust, agreement, contract, combination, or confederation, to regulate or fix the price of any article of merchandise, commodity, or property, or to fix or limit the amount or quantity of any articles, property, merchandise, or commodity to be manufactured, mined, produced, exchanged, or sold in this state, is guilty of a misdemeanor."

129. *Id.*

130. See the text contained in note 57.

> Any combination between individuals, corporations, associations, or either having for its object or effect the controlling of the price of any product of the soil or any article of manufacture or commerce, or the cost of exchange or transportation, is prohibited and hereby declared unlawful and against public policy. . . .[131]

The sweeping constitutional declaration could provide no small amount of trouble to the cooperatives. Like the antitrust laws, the cooperatives have not tested its provisions. Perhaps the best solution, as stated by another author, is to initiate an amendment to Section 146 which would reflect ". . . new policies and attitudes."[132] It is also arguable that the section should be completely repealed as subsequent legislation has more adequately enunciated the State's position on monopoly and the remedies incident thereto.[133]

North Dakota is at peace with the cooperatives today. Tomorrow may bring the storm.

BRUCE E. BOHLMAN

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131. N.D. CONST. art. 7, § 146.

132. Nelson, *Co-operatives Can Be In Restraint of Trade,* 23 N.D. STATE BAR ASS'N. BAR BRIEFS, 37, 42 (1947).

133. The State Constitution was adopted in 1889. Shortly thereafter, in 1890, the legislature enacted chapter 174 of the Session Laws of that year which is now § 51-08-01 of the Code prohibiting pools and trusts. By 1907, all of what is now chapter 51-08 was enacted. Certainly, § 146 of the Constitution is now unneeded in view of Chapter 51-08 and Chapter 4-14 which prohibits unfair discrimination in the purchase of farm products.

The framers of the State Constitution were mindful of the evils of monopoly when they drafted § 146 and the susceptibility of the State's agricultural population to the industrial predators of the day. It would be unfortunate if the same section which was designed to protect the farmer would now be used as a bludgeon to destroy his means of collective bargaining power. Such a situation could, and should be avoided by repealing the section. In any event, it is very unlikely that the courts will accord § 146 any great weight if and when a cooperative is prosecuted under its provisions. Time has mellowed it and it is most surely clothed by more than 75 years of judicial and legislative decisions and enactments dealing with the rights and liabilities of the cooperatives under the antitrust laws.