North Dakota Law Review

Volume 23 | Number 3 Article 7

1947

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CO-OPERATIVES CAN BE IN RESTRAINT OF TRADE

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Agassiz, the famous naturalist, is said to have remarked that all great scientific discoveries travel through three stages in their way to final acceptance. First, people say the discovery conflicts with the Bible; next, they say it has been discovered before; lastly, they say they have always believed it. The history of the rise of co-operatives to responsibility may in a way parallel the road of scientific discoveries. At the turn of the century co-operative business enterprises were suspected and maligned as in violation of the law prohibiting monopolies and unreasonable restraints of trade. Today they are pretty firmly established as secure and scented with propriety. Indeed, the post-war years may even see a slight reaction in regard to them, as their relatively free tax status is questioned and reexamined by lawmakers. Indicative of the trend now is the account which appeared in the newspapers last year telling of the serious study made by one of the largest mail order houses looking towards the transformation of that business into the cooperative matrix.

There has had to be a radical about-face on the part of courts and lawmakers to establish the co-operative business organization as legitimate, and there has been this turn-about on the part of both Federal and State determiners of policy. In 1900 the common law centuries old doctrine aided by the Sherman Anti-Trust Act seemed fairly unqualified to be an effective contraceptive legal bar to the birth of co-operative business organizations. The common law doctrine with respect to monopoly and restraint of trade makes a first appearance in a recorded case five hundred and thirty years ago when during the reign of Henry V a certain dyer made a contract agreeing for six months not to carry on his trade in the same town with the promisee, and the agreement in question was held invalid.[1] In all liklihood today Equity would not regard such a partial restraint as unreasonable and unenforceable. In 1602, the so-called Case of Monopolies[2] based the doctrine among other things upon "the equity of the law of God, as appears in Deut. Chap. 24, verse 6. . . 'You shall not take in pledge the neather and upper millstone, for that is his life.' (Ancient version)" During the reign of Edward VI, Parliament prohibited forestalling, engrossing, and regrating[3], thus restricting trading in victuals and provisions and manifesting the intention of keeping the distance very short between producer and consumer. But Parliament repealed the entire Act in 1844, stating that the prohibited conduct had come to be considered favorable rather than unfavorable to the development of trade.

How were co-operatives faring in the year 1902? The outstanding Connelly Case[4] throws some light upon the situation. An Illinois anti-trust act declared that "the provision of this act shall not apply to agricultural products while in the hands of the producer or raiser." In that case when Connelly was sued by the Sewer Pipe Company on two notes given by him on account of the purchase of sewer pipe, he defended

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[1] *Year Books*, 2 Hen. V.

[2] 77 Eng. Rep. 1260, 1263, 11 Coke, 84b, 86b.

[3] *Statutes at Large*, 7 Edw. VI, Vol. 5, Chap. 14.

[4] *Connelly v. Union Sewer Pipe Co.*, 184 U. S. 540, 22 Sup. Ct. 431, 46 L. Ed. 679, (1902).

on the ground that the plaintiff was a trust and that the applicable antitrust act of Illinois specifically provided that any purchaser from a corporation of any article was not liable for the price if the seller was operating as a trust. The Sewer Company argued that the antitrust act aforesaid was void, because its exemption of products in the hands of producers violated the equal protection clause of the Constitution of the United States. The Supreme Court upheld the contention of the company. The decision even at the time actually was not one holding that farmers are barred from forming co-operative associations; it merely invalidated the antitrust statute of Illinois and, presumably, any others like it. Nevertheless the *Connelly Case* was looked upon for a generation as controlling against the constitutionality of state co-operative marketing statutes. But in 1928 the case of *Liberty Warehouse Company v. Burley Tobacco Growers' Co-operative Association*[5] manifested an attitude favorable to the right of states to provide expressly for the organization of co-operative association; and finally five years ago the *Connelly* Case was expressly overruled.[6]

And the position of co-operatives must also be examined in the light of acts of Congress and judicial interpretations thereof, this being particularly necessary when interstate activities are present. The Sherman Anti-Trust Act[7] passed by Congress in 1890 declared illegal and criminal "every contract, combination, in form of trust or otherwise, or conspiracy in restraint of trade or commerce" in any territory or the District of Columbia or in interstate commerce. An amendment was proposed to this Act which would have excepted persons engaged in agriculture or horticulture, but it failed of acceptance.[8] In the construing of the Act, the Supreme Court has held that only unreasonable restraints are illegal. In *Board of Trade of the City of Chicago v. United States,*[9] the Court said: "The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby encourages competition or whether it is such as may suppress or even destroy competition." But in cases where manufacturers of the same product have agreed upon a price schedule, the Court has looked upon the price fixing in itself as a violation of the Sherman Act and has refused to look into the reasonableness of such prices.[10]

As the interest in agricultural co-operatives became more insistent after 1900, Congress moved to clarify somewhat their position under the Sherman Act by practically amending the Act in certain particulars. The Clayton Act[11] was passed in 1914 and Section 6 of this provides: "Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of . . . . agricultural and horticultural organizations, instituted for the purpose of mutual help, and not having capital stock or conducted for profit . . . nor shall such organizations be held or be construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws."

This Clayton Act has been held to protect agricultural organizations from being broken up as illegal or deemed combinations in restraint of

[5] 276 U. S. 71, 48 Sup. Ct. 291, 72 L. Ed. 473, (1928).
[6] *Tigner v. Texas*, 310 U. S. 141, 60 Sup. Ct. 879, 84 L. Ed. 1124, (1940). See a helpful annotation on this case and point in 130 A. L. R. 1321.
[7] 26 Stat. 209. 15 U.S.C.A., 1.
[8] *Cong. Record*, 51st Congress, 1st Sess. p. 2726.
[9] 246 U. S. 231, 38 Sup. Ct. 242, 62 L. Ed. 683, (1918).
[10] *U. S. v. Trenton Pottery Co.*, 273 U. S. 392, 47 Sup. Ct. 377, 71 L. Ed. 700, (1927).
[11] 38 Stat. 730, 731, 15 U.S.C.A. 12.

trade but as no mandate in the least for the carrying on of business by methods not permitted to other lawful business organizations. In the case of the *United States v. King*[12] the Aroostook Potato Shippers' Association was engaged in blacklisting and boycotting certain potato buyers. The Court ruled that Section 6 of the Clayton Act was no defense to the defendants, members of the Association, and held that coercion of outstiders by a secondary boycott was not a lawful means of carrying out the legitimate objects of the organization.

The Clayton Act, by its terms, was limited to agricultural organizations having no capital stock and not organized for profit. Early in 1922 another Act passed by Congress went into effect—the *Capper-Volstead Act*[13], and it is not limited to nonstock organizations. Its title is "An act to authorize association of producers of agricultural products." To come within its provisions and benefit thereby it is required that the association be operated for the mutual benefit of members, as producers, and conform to either one or both of the following prerequisites: (a) no member is to have more than one vote; (b) the dividends on stock or membership capital must not exceed 8 per centum per annum. And in no case shall the association deal in products of non-members to an amount greater in value than such handling by it for members.

The Clayton Act is, in effect, an amendment of the antitrust law, authorizing and sanctioning the elimination of competition among farmers by their acting through co-operative associations. As Mr. L. S. Hulbert expressed it on page 145 of a most comprehensive bulletin[14] he prepared a few years ago for the Farm Credit Administration: ". . . . the fundamental object and result of the Capper-Volstead Act are to authorize farmers to unite in organizations that may or may not be incorporated, which organizations, insofar as the assembling, the processing, the handling and the marketing of the products dealt in by the association are concerned may act with the same force and effect as though all the agricultural products in question were being handled by one farmer."

But the Clayton and Capper-Volstead Acts would be erroneously interpreted if regarded as laying down the bars for any course of conduct which as association under them might pursue. For example, if such an association engaged in unfair competition it would undoubtedly have to defend itself against the Federal Trade Commission, while other culpable and improper conduct might subject it to the jurisdiction of the Department of Justice of the United States as in violation of the anti-trust laws. Nor should it be overlooked that the Capper-Volstead Act does not apply to purely purchasing associations, co-operative store, or associations engaged in rendering business services to farmers, as these are neither expressly nor impliedly included within its terms.

The Capper-Volstead Act does not provide for incorporation of co-operatives. For this one must look to state laws. The Act can scarcely be looked upon as encouraging the stifling or restricting of production. It deals only with organizations which engage in interstate commerce and which have met the conditions specified by the Act; and these organizations must be engaged in processing, preparing for market, handling, and marketing in interstate or foreign commerce. And under this Act there are safeguards against the charging of excessive prices

[12] 229 F. 275, 250 F. 908, 910. (1915).
[13] 42 Stat. at Large 388, 77 U.S.C. 291 and 292.
[14] Bulletin No. 50, May 1942. "Legal Phrases of Cooperative Associations," Farm Cred. Adm., U.S. Dept. of Agric.

for products by co-operatives. Section 2 of the Act gives to the Secretary of Agriculture authority to enforce in federal courts orders he may make to prevent monopolizing or restraining of trade by such associations when the Secretary has "reason to believe . . . that the price of any agricultural product is unduly enhanced." The effectiveness of Section 2 will admittedly depend upon what the Secretary of Agriculture believes in respect to "enhanced" prices, and he probably will be slow to discourage good prices for farm products.

Section 2 has been held by the Supreme Court in the recently decided *Borden Case*[15] not to give immunity from the operation of the Sherman Act in the absence of a proceeding by the Secretary. This case held that if co-operatives enter into conspiracies or combinations with third persons they are as amendable to prosecution under the antitrust laws as are any other organizations. The Borden Company was held not protected by the Capper-Volstead Act when it had engaged in conspiracies with major distributors and other allied groups designed to maintain artificial and non-competitive prices on fluid milk. The Secretary of Agriculture had not acted under Section 2, and this failure by him to act was no defense.

Turning now from the effects of Congressional Acts and the Federal Constitution upon co-operatives, we have now to see how states laws impinge upon co-operative associations. Co-operatives are organized by conforming with the provisions of the applicable state law, usually set out in specific chapters, while commonly the statutes governing private corporations in general must also be observed unless expressly or impliedly excluded by the specific act.

North Dakota has a number of acts authorizing the creation of co-operatives of various kinds. Thus the Legislature has provided for the organizing of Co-operative Marketing Associations,[16] of Mutual Aid non-profit Co-operative Associations, [17] of Electric Co-operative Corporations, (including rural plumbing),[18] of Co-operative associations or corporations to engage in the following lines of business: agriculture, grain elevator, dairy, mercantile, mining, manufacturing, mechanical and telephone,[19] of Co-operative Grazing Associations,[20] and of Co-operative Credit Unions.[21]

Section 146 of the Constitution of the State of North Dakota reads:

> "Any combination between individuals, corporations, associations, or either, having for its object or effect the controlling of any price of any product of the soil . . . . is prohibited and hereby declared unlawful and against public policy. . . ."

There are also statutory enactments pertaining to pools and trusts. Section 51-0801 of the North Dakota Revised Code, 1943, reads:

> "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

[15] *U. S. v. Borden Co.* 308 U.S. 188, 60 Sup. Ct. 182, 84 L. Ed. 181 (1939)
[16] *N. D. Rev. Code*, 1943, Ch. 4-07.
[17] *N. D. Rev. Code*, 1943, Ch. 10-12.
[18] *N. D. Rev. Code*, 1943, Ch. 10-13.
[19] *N. D. Rev. Code*, 1943, Ch. 10-15.
[20] *N. D. Rev. Code*, 1943, Ch. 36-08.
[21] *N. D. Rev. Code*, 1943, Ch. 6-06.

> merchandise, commodity, or property, or to fix or limit the amount or quantity of any article, property, merchandise, or commodity to be manufactured, mined, produced, exchanged, or sold in this state, is guilty of a misdemeanor."

Pools or trusts are defined in Section 50-0802 as including combinations for the purposes of, inter alia, "to create or carry out restrictions in trade; to limit or reduce the production, or increase or reduce the price, of property, merchandise, or commodities." Sources of Section 51-0801 and 51-0802 just quoted are all given as between 1895 and 1913, when anti-trust sentiment was so much in flower.

Of course, there is nothing in the material quoted from the North Dakota Constitution or Code which could very reasonably be taken as prohibiting the formation of co-operatives. How literally are these quoted materials to be interpreted, a question of some importance, as in practice the normal cooperative usually does to some degree, however slight in many instances, affect prices; this being probably most true with reference to the public at large in cases of marketing co-operatives. A marketing organization naturally hopes for best possible prices on its products and commodities. The marketing contract between members and co-operative can be specifically enforced and include terms for liquidated damages as means of encouraging dealings exclusively with the co-operative. Conceivably a marketing co-operative could obtain the marketing rights as to all, or almost all, let us say, of sweet corn or potatoes grown for resale within a large and controlling area.

If these commodities involve interstate commerce, it seems clear that any attempt by even a co-operative marketing association to manipulate prices would run afoul the Sherman Act and in some flagrant instances arouse the Secretary of Agriculture to proceed under the Capper-Volstead Act. What is interstate commerce is outside the scope of this article. Our question is primarily the one of the practical force and place of North Dakota law upon co-operatives. In making conclusions offered as answers to this question, we have little or no help from any decided North Dakota cases. Hence the conclusions must be based upon decisions elsewhere, upon analogies, trends, and the like.

Should any provisions of the chapters authorizing formation of co-operatives conflict with Sections 51-0801 and 51-0802 of the Code, there is sound authority for favoring the former, as all such chapters have been enacted years later than the Code Sections 51-0801 and 51-0802. Naturally, no specific authority is given in these later chapters to manipulate prices or even to limit production. However, insofar as marketing co-operatives are concerned, there is a specific statute[22] which says:

> "No association organized under this chapter 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. . ."[23]

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[22] *N. D. Rev. Code*, 1943, Section 4-0733.

[23] Section 4-0727 provides for the marketing contract, authorizing liquidated damages clauses and the use of injunctions and specific performance. Early in the development of co-operatives provisions for liquidated damages in the contract were held by many courts an illegal restraint as stifling competition.

Undoubtedly the most serious obstacle to any kind of price control by co-operatives under North Dakota Law is found in Section 146 of the State Constitution, previously quoted, which outlaws combinations having as their object the controlling of any price of any product of the soil. In the face of this, how much effectiveness resides in the attempted exemption of co-operative marketing associations from the bans of monopoly, illegal restraint of trade, and so on, by the Legislature? It is believed that if any case should arise under the Legislative exemption aforementioned as in possible conflict with the State Constitution, the modern trend and line of judicial decisions elsewhere would be strongly persuasive and given to favoring co-operatives in all but extreme and perverted instances of clear abuse of present rights and privileges. The expressed sentiment of judicial decisions and legislation of the past quarter of a century demonstrates plainly that a former hostility and suspicion towards co-operatives has been supplanted by an attitude in full tide today which supports their legality, particularly if they are agricultural associations.

Definite recognition has been gained of the farmer's unique position in our modern economy and a cogent appreciation registered of the advisability and need for doing all within reason to maintain agriculture and the farmer upon a stable and prosperous economic plane. The natural individualism of the farmer competing for a living in a strongly organized business world has called for teasing and encouraging such individualism somewhat out of itself along the way of co-operation. National prosperity and well-being in the long run cannot survive a prolonged period of seriously ailing farm economy. The depressions between the two World Wars have indelibly instructed us. Whether we shall swing too far in the other direction, in line with traditional American fashion of arriving at the proper middle-ground, is even a matter agitating the fear and trepidation departments of some citizens today.

And it must never be overlooked that a great many activities of co-operatives which are of great value and benefit to members are in no sense directed at all towards price or production control. A co-operative is usually defined as an association not for profit. The shareholders or members benefit from services received, from economies in buying and selling which result from concerted and large scale transactions by efficient, expert management, in the course of which prices of products of the soil to the general public are not appreciably affected.

Returning to the Section 146 of the State Constitution we can adopt a line of logic and argument that requires taking the Constitution of the State literally and viewing any control or attempted control of the price, say of sweet corn or potatoes by a co-operative in the State in any slight appreciable degree, as unlawful and against public policy. This line of reasoning would counsel that new policies and attitudes should be embodied in a properly adopted amendment articulating the new, and not by means of liberal interpretations which distort the old. Such strict constructionism and logic are neither new nor unprecendented. For example, in regard to the Federal Constitution and Acts there are vigorous differences of opinion whether changed definitions and concepts with respect to old constitutional and statutory provisions are to be adopted.[24]

[24] See "*Old Statutes and New Constitutions*," by C. S. Lyon, 44 Columbia Law Rev. 599.

Yet actually the courts generally in recent times have adopted non-literal and liberal interpretations in cases persuasively relevant. One of the most instructive judicial decisions comes from our neighbor to the East, Minnesota. Section 35, Article LV, of the Minnesota Constitution says that any combination to monopolize the markets for food products or to interfere with, or restrict the freedom of, such markets is a criminal conspiracy. In the case of *Minnesota Wheat Growers' Co-op Marketing Assoc. v. Huggins*[25], suit was brought by the Association to enforce a membership contract made in harmony with the Minnesota Co-operative Marketing Law. One of the defenses offered was the contention that the Act contravened the article of the Minnesota Constitution mentioned above. The Court held for the Association,—that the complaint stated a good cause of action and that the contention of unconstitutionality was not well taken. The Court terms the Co-operative Marketing Act an enabling act (writers have called attention to the frequency with which cooperative acts are called such as indicative of a new departure in the law with respect to such associations.) and said that its language must be liberally construed for the purpose of promoting the object. Conceding that if the Association bringing the suit could raise or lower prices at will this would be a monopoly, the Court finds that in fact it can by no means do this. The Court states: "This provision of the Constitution is restrictive only. It says that persons must not monopolize the markets for food products or interfere with or restrict the freedom of such markets. . . . (it) does not say how marketing shall be done; nor does it preclude regulation thereof. As indicated above the Legislature has surrounded this law with every safeguard against it possibly resulting in a monopoly, and if its declared lawful purpose should by unscrupulous officials, be diverted into these illegal transactions, which would subject it to the assault now made upon it, its immediate death would be certain. The law is purely one of expediency, and to better the economic condition of the producers. This statute makes the association possible. The association frees the market, makes it more open, less one-sided, less subject to manipulation and monopoly control on the part of those who deal in the commodities. It aids and harmonizes with this constitutional provision, which is aimed at those who hoard and speculate in food products and who interfere arbitrarily and artificially with the natural flow of commerce in such products."

The Minnesota Court notes the widespread adoption of co-operative marketing laws in the United States and the need for such, and it categorically finds no necessary monopoly or restraint of trade involved in their connection. But if co-operative associations actually resort to monopolistic practices or "abnormal conduct", then a sure and available remedy exists for the public. The Court says, "In fact, this law puts the association under the supervision of the public examiner, who is authorized to take possession of its property if he is of the opinion that its further operation is hazardous to the public interest."

This last might be especially helpful in considering a hypothetical North Dakota case raising questions similar to those under discussion in the Minnesota case. In supposing that our Court would not depart far from the views expressed by the Minnesota Court, we can also expect our attention to be called to the likelihood that public interest is adequately protected here against real and substantial monopolistic practices. In the instances of unfair discriminations throughout the State, espec-

[25] 162 Minn., 471, 203 N.W. 420 (1925).

ially as by depressing prices, remedies are provided under Chapter 4-14, North Dakota Revised Code of 1943; while Chapter 10-16 of the same Revised Code, dealing with dissolution and annulment of corporations should be broad enough to furnish the State with remedial measures against baneful associations embarked upon careers inimical to the public interest.

Co-operatives today may be in restraint of trade and suffer remedial consequences, but the chances of such possibilities materializing as realities are relatively remote insofar as the usual and normal agricultural co-operative is concerned.