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# Contributors to the November Issue/Notes

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## CONTRIBUTORS TO THE NOVEMBER ISSUE



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## NOTES

**SALES—TITLE TO GOODS SHIPPED F. O. B. WITH SIGHT DRAFT ATTACHED TO THE BILL OF LADING.**—A method of sale which is becoming very common today and which is frequently adopted by manufacturing corporations which distribute goods on an interstate basis is the f.o.b. shipment in which the seller has the bill of lading made out to his own order accompanied by a sight draft payable to the seller, the seller thus being assured of payment and the buyer of delivery. In cases of this general type the seller often sends the order bill of lading, properly indorsed, to an intermediary bank at the buyer's destination, accompanied by a draft on the buyer for the price of the goods. The buyer can then, by settling with this bank for the price, receive the bill of lading, which in turn enables him to get delivery of the goods from the carrier. But despite the popularity of this type of transaction, there is a lamentable lack of unanimity among the courts of the various

states as to whether title passes immediately upon delivery to the carrier, as is the general rule in f.o.b. "point of shipment" contracts, or whether the title remains in the seller until the draft is paid.

It is well settled in England<sup>1</sup> that the seller's retention of ownership is merely for the purpose of security, and the beneficial interest as well as the risk of loss is in the buyer. In this respect the English point of view is similar to the arrangement for divided property interests involved in conditional sales in which the buyer has the usual benefits and burdens of beneficial ownership, but at the same time the seller retains a sufficient security interest in the seller to assure him the payment of the purchase price.

The English rule is usually regarded, at least by the text writers,<sup>2</sup> as the better one, and was supported by Justice Cardozo in *Standard Casing Company, Inc. v. California Casing Company, Inc.*<sup>3</sup> In this case the plaintiff buyer, the Standard Casing Company, sued the defendant seller, California Casing Company for breach of a contract made in San Francisco wherein it was agreed that the defendant company would send the plaintiff 20 casks of salted pigs guts. The goods were to be shipped *f. o. b. point of shipment* and payment was to be by *sight draft, bill of lading attached with the privilege of examining the goods on arrival*. None of the shipments were made, and the seller's breach was conceded, and the only question was the extent of the recovery. The plaintiff to prove its damages, gave evidence of the market value in New York which was to have been the destination of the goods. The defendant offered evidence, which the lower court would not receive, of the market value in San Francisco, which was the place from which the goods were to have been shipped. Mr. Justice Cardozo pointed out that the general rule is that upon a sale "f.o.b. point of shipment" title passes to the buyer at the moment of delivery to the carrier. He ruled that the fact that the buyer reserved the right to inspect the goods upon their arrival, and the fact that payment was to be made subject to such inspection and on presentation of a draft with a bill of lading attached, did not evidence any intention not to pass title to the goods and that the general rule stated above applied in this case. Cardozo quoted Personal Property Law Section 103 which states that "where delivery of goods has been made to the buyer, or to a bailee for the buyer in pursuance of the contract, and the property in the goods has been retained by the seller merely to secure performance by the buyer of his obligations, the goods are at the buyer's risk from the time of such delivery." Cardozo held that it was immaterial whether the bill of lading was made out to the buyer or the seller, saying that "the risk of transit was the buyer's whether the bill of lad-

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1 Vol. 1 Williston on Sales, Section 280b.

2 Williston on Sales supra note 1; Vold on Sales, page 215.

3 238 N. Y. 413, 135 N. E. 835 (1922).

ing was made out to him or to the seller. The undertaking here was merely that the goods be delivered to the carrier. The place where that was to be done, as it would be the place of final performance by the seller if the contract had been kept, must also be the place of default when performance was refused. Market values in California, and not market values in New York, must therefore be the measure of value of the bargain.

Unfortunately, not only is there much opposition to this view, but it is actually in the minority as is shown by the fact that Arkansas,<sup>4</sup> Alabama,<sup>5</sup> Tennessee,<sup>6</sup> Texas,<sup>7</sup> Kentucky,<sup>8</sup> California,<sup>9</sup> Georgia,<sup>10</sup> Indiana,<sup>11</sup> Missouri,<sup>12</sup> Michigan,<sup>13</sup> Minnesota,<sup>14</sup> Oklahoma,<sup>15</sup> South Carolina,<sup>16</sup> and Wisconsin,<sup>17</sup> hold that title remains in the seller until the goods reach their destination and the sight draft is paid when the goods are shipped f.o.b. with a sight draft attached to the bill of lading. On the other hand New York,<sup>18</sup> North Dakota,<sup>19</sup> Connecticut,<sup>20</sup> Illinois,<sup>21</sup> Massachusetts,<sup>22</sup> Pennsylvania,<sup>23</sup> and Washington,<sup>24</sup> hold that title passes to the buyer immediately upon delivery to the carrier. It is noted, perhaps in favor of the latter view, that the states supporting it are more highly commercialized states along the eastern seaboard.

Williston, in his book on sales,<sup>25</sup> suggests that Section 22 of the Uniform Sales Act should "Remove any doubt that the rule in the

<sup>4</sup> *Gibson v. Vinton*, 21 F (2d) 168 (1927).

<sup>5</sup> *Browne v. Giger*, 221 Ala. 176, 128 So. 174 (1930).

<sup>6</sup> *Davis v. Sloan Oil Co.*, 13 Tenn. App. 405 (1931).

<sup>7</sup> *H. L. Edwards Co. v. Wolf*, — Tex., —, 23 S. W. 700 (1930).

<sup>8</sup> *L. Lazarus Liquor Co. v. Julius Dessler & Co.*, 269 F. 520 (1920).

<sup>9</sup> *Puritas Coffee Co. v. DeMartini*, 206 F. 96 (1920).

<sup>10</sup> *Smith v. Callaway*, 29 Ga. App. 565, 116 S. E. 214, (1924).

<sup>11</sup> *Bruno v. Phillips Co.*, 80 Ind. App. 658, 142 N. E. 21 (1924).

<sup>12</sup> *Levine v. Hochman*, 217 Mo. App. 76, 273 S. W. 204 (1916).

<sup>13</sup> *Star Transfer Line v. General Export Co.*, 308 Mich. 86, 13 N. W. (2nd) 217 (1944).

<sup>14</sup> *Presley Fruit Co. v. St. Louis R. Co.*, 130 Minn. 121, 153 N. W. 115 (1915.)

<sup>15</sup> *St. Louis Carbonating Co. v. Lookeba St. Bank*, 35 Okl. 434, 130 P. 280 (1913).

<sup>16</sup> *State v. Malony*, 59 S. C. 402, 62 S. E. 215 (1908).

<sup>17</sup> *Libman v. Fox Pioneer Scrap Iron Co.*, 175 Wis. 485, 185 N. W. 551 (1921).

<sup>18</sup> *Pennsylvania R. R. Co. v. Bank of U. S.* 214 App. Div. 410, 212 N. Y. S. 437 (1926).

<sup>19</sup> *Braufman v. Bender*, 58 N. D. 165, 225 N. W. 69 (1929).

<sup>20</sup> *Alderman Bros. v. Westinghouse Air Brake Co.*, 92 Conn. 419, 103 A. 267 (1918).

<sup>21</sup> *Maffei v. Sinocchio*, 299 Ill. 254, 132 N. E. 518 (1921).

<sup>22</sup> *Peoples National Bank of Boston v. Mulholland*, 224 Mass. 448, 113 N. E. 365 (1916).

<sup>23</sup> *New York & Pennsylvania Co. v. Cunard Coal Co.*, 286 Pa. 72, 132 A. 828 (1926).

<sup>24</sup> *Norbom Engineering Co. v. A. H. Cox & Co.*, 120 Wash. 675, 208 P. 87 (1922).

<sup>25</sup> Williston on Sales, *supra* note 1.

United States is the same as the rule in England." The Section provides that "Where delivery of the goods has been made to the buyer, or to a bailee for the buyer in pursuance of the contract and the property in the goods has been retained by the seller merely to secure performance by the buyer of his obligation under the contract, the goods are at the buyer's risk from the time of such delivery." Section 20 (2) of the Act also seems applicable to the situation in providing that "If, except for the form of the bill of lading the property would have passed to the buyer on shipment of the goods, the seller's property in the goods shall be deemed to be only for the purpose of securing performance by the buyer of his obligation under the contract."

Although these provisions of the Uniform Sales Act should "remove any doubt" as is stated by Mr. Williston, it is apparent that they have not done so. An Alabama court<sup>26</sup> ruled that where a draft drawn on the buyer for the price and with the bill of lading attached was forwarded, though the bill was in the buyer's name, title to the goods did not pass until the draft was honored and the bill delivered. It was held in Wisconsin<sup>27</sup> that by attaching the bill of lading to a sight draft indorsed to a bank, title to the goods passed to the bank and could not vest in the purchaser until the draft was paid. In Minnesota<sup>28</sup> it was said: "The contract specifically provides that the company will ship vehicles to him, with sight draft against bill of lading attached, to be paid with exchange upon presentation. Under such circumstances it is clear that the intention was that the consignor retain title to the property until the same was in some way settled for by the consignee." Where goods were consigned to the seller, the bill of lading issued to the order of the seller, and the bill of lading with a draft attached was assigned to a bank for collection, title was held<sup>29</sup> to remain in the seller until the draft was paid. Under a contract providing for payment on presentation of invoices and bills of lading at a named bank at the buyer's residence, a Maryland court<sup>30</sup> held that the title remained in the seller until the invoices and bills of lading were presented.

On the other hand, cases supporting the view that although the power of disposal of the goods, sometimes called "title retained only for security," is retained in the seller as a form of security for the price, nevertheless the beneficial interest passes to the buyer on shipment in accordance with the ordinary rules of appropriation. Title to goods sold f.o.b. point of delivery, payment to be made by draft bill of lading attached was held<sup>31</sup> to pass to the vendee on delivery to the carrier,

<sup>26</sup> *Browne v. Giger*, supra note 5.

<sup>27</sup> *Libman v. Fox Pioneer Scrap Iron Co.*, supra note 17.

<sup>28</sup> *Mansen v. Shepherd*, 154 Minn. 227, 191 N. W. 599 (1923).

<sup>29</sup> *Pottash v. Cleveland-Akron Bag Co.*, 235 N. Y. 520, 139 N. E. 717 (1923).

<sup>30</sup> *Edgar v. Imperial Ice Cream Co.*, 139 Md. 630, 116 A. 461 (1922).

<sup>31</sup> *Penna. R. R. v. Bank of U. S.*, supra note 18.

subject only to a right in the vendor to withhold delivery until payment in view of Section 20 of the Uniform Sales Act. In another New York case<sup>32</sup> title was held to have passed to the buyer on delivery to the carrier under a contract for the purchase of the goods f.o.b. at a certain place to be paid for on the delivery of shipping documents. An Illinois<sup>33</sup> court stated, "The rule is that, subject to the intention of the parties, the property in the goods shipped under an f. o. b. contract passes to the buyer at the moment of delivery to the carrier, and the fact that the bill of lading is made out to the seller does not indicate an inconsistent intention."

For reasons of convenience and the security which this method of doing business provides for both buyer and seller, the practice of shipping goods f.o.b. with sight draft attached to the bill of lading will undoubtedly continue to be utilized by business men and organizations in the United States. However, due to the great uncertainty as to whether the title is in the buyer or the seller, the parties might do well to express their intention as to this point in writing in the contract of sale.

*John M. Anderton*

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**JOINT TENANCIES—CONVEYANCE BY ONE TO HIMSELF AND ANOTHER.**—The joint tenancy in real estate has long been in disfavor in the law.<sup>1</sup> At least one state has abolished it altogether, as it was known at common law.<sup>2</sup> A great majority of the states have passed statutes which, although still recognizing the tenancy, provide that the courts shall construe a deed to two or more grantees to create a tenancy in common, and not a joint tenancy, unless the intent to create the latter estate shall clearly be manifested upon the face of the instrument.<sup>3</sup> It is paradoxical, therefore, that there should be discernible lately a trend to liberalize the rules for the creation of the joint tenancy. Yet, such a trend exists, and it is pointed up by a recent enactment of the Wisconsin legislature.<sup>4</sup>

In May, 1947, § 230.45(3) was repealed and re-enacted to read:<sup>5</sup>

Any deed to two or more grantees, including any deed in which the grantor is also one of the grantees, which by the

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<sup>32</sup> *Disch v. National Surety Co.*, 203 App. Div. 723, 196 N. Y. S. 833 (1922).

<sup>33</sup> *Alberti v. Associated Fruit Co.* 238 Ill. App. 11, 163 N. E. 198 (1925).

<sup>1</sup> 2 THOMPSON REAL PROPERTY (3d. ed. 1939) §420.

<sup>2</sup> GEORGIA CODE (1933) § 85-1002.

<sup>3</sup> ILL. STAT. ANN. (Jones, 1935) § 70.01; IND. STAT. ANN. (Burns 1943 Rep.) § 56.111; MICH. STAT. ANN. (1936) § 26.44; WIS. STAT. (1945) § 230.45(1) are examples chosen at random.

<sup>4</sup> Chap. 140, Laws of 1947, approved May 19, 1947.

<sup>5</sup> *Ibid.*

method of describing such grantees or by the language of the granting or habendum clause therein evinces an intent to create a joint tenancy in grantees shall be held and construed to create such joint tenancy.

The import of the statute is obvious. It permits a person to deed his interest to himself and another in joint tenancy. This result, here achieved by statute, is in line with the liberal rule of some other jurisdictions which either by express statute or by broad court constructions obviate the necessity of a strawman deed.

Long before this particular statute was enacted, Wisconsin had a liberal statute governing the creation of a joint tenancy between husband and wife. Any deed from husband to wife, or vice versa, which conveyed an interest in the grantor's lands and evinced an intent to create a joint tenancy between grantor and grantee, was to be construed to create that joint tenancy.<sup>6</sup> No strawman deed was necessary here.

Nonetheless a grave doubt existed as to the grantor's ability to deed "straight across" into a joint tenancy where the parties were not husband and wife. § 230.45(3) (before re-enactment) provided, "Any deed to two or more grantees which by the method of describing such grantees . . . shall be held and construed to create (a) joint tenancy."<sup>7</sup> In the face of that section, the court in *Hass v. Hass*<sup>8</sup> held that a deed which purported to convey a joint tenancy in both realty and personalty between a mother (grantor) and son, containing a granting clause granting a life estate as joint tenants during their joint lives and an absolute fee to the survivor, was not effective to create a joint tenancy. Rather it held that the deed created a tenancy in common for the joint lives of the parties with the survivor to take the remainder. Such a decision presented many problems of rights under the tenancy,<sup>9</sup> not discussed by the court. A rehearing was immediately requested, on the grounds that the decision had thrown the law of the tenancy into dismal confusion. The court thereupon explained that the son, provided he outlive his mother, would take the fee by virtue of an indestructible remainder, not by survivorship.<sup>10</sup>

Perhaps this is not what the legislature had in mind when the statute was enacted, or perhaps it was felt that a revision was necessary to put an end to all indecision; at any rate, the phrase, "including any deed in which the grantor is also one of the grantees" was added. There have been as yet no cases decided under the new enactment, but to permit a deed "straight across" is the only possible result, in view of

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<sup>6</sup> WIS. STAT. (1945) § 230.45(2).

<sup>7</sup> WIS. STAT. (1945) 230.45(3).

<sup>8</sup> 248 Wis. 212, 21 N. W. (2d) 398 (1946).

<sup>9</sup> See case noted, (1946) Vol. 1 Wis. Law Rev. 117.

<sup>10</sup> On rehearing, 248 Wis. 212, 22 N. W. (2d) 151 (1946).

the history of the legislation. To the layman, this is nothing startling. "Well, why not?" he asks. Many lawyers, who appreciate the "why not," say, "It's about time."

For a grantor to deed an interest to himself was impossible at common law. First, delivery is essential to the operation of a deed,<sup>11</sup> and one cannot effect a delivery to himself. Secondly, essential to a joint tenancy is the concurrence of the unities of time, title, interest and possession.<sup>12</sup> In a deed from one to himself and another, the unities of time and title would be missing.<sup>13</sup> Thirdly, one cannot give himself that which he already has.<sup>14</sup> These are given as reasons when courts, struggling with the technicalities of the common law, have arrived at greatly varied and irreconcilable conclusions. In construing deeds purporting to convey one's interest to himself and another, the courts have reached four separate results:<sup>15</sup>

1) There are cases holding that the entire fee vests in the grantee(s) not the grantor.<sup>16</sup> The theory is that one cannot give himself that which he already has, but that since the intent of the parties should be given effect where possible, the fee will vest in any named grantee capable of taking.

2) A large group of cases are to the effect that such a deed will create a tenancy in common in the grantees.<sup>17</sup> Although the unities of time and title are missing, the deed is capable of passing an undivided interest and creating such an estate.

3) In states where tenancies by the entirety exist, such a deed is capable of creating that tenancy, if the parties are husband and wife.<sup>18</sup> Married Women's Statutes enabling spouses to contract freely with one another permit such a result, if that would be the result of a conveyance to them jointly by a stranger.

<sup>11</sup> 4 THOMPSON REAL PROPERTY (3d. ed. 1939) § 1033.

<sup>12</sup> 2 BL. COMM. 179-182; vol. 4 Am. Jur., Cotenancy, § 7.

<sup>13</sup> See: *Union Guardian Trust Co. v. Vogt*, 263 Mich. 330, 248 N. W. 639 (1933).

<sup>14</sup> See: *Hicks v. Sprankle*, 149 Tenn. 310, 257 S. W. 1044 (1924).

<sup>15</sup> See, generally: Notes (1929) 62 A. L. R. 514; (1942) 137 A. L. R. 348; (1947) 166 A. L. R. 1026.

<sup>16</sup> A good case to this result is *Hicks v. Sprankle*, 149 Tenn. 310, 257 S. W. 1044 (1924).

<sup>17</sup> *Green v. Cannady*, 77 S. C. 193, 57 S. E. 832 (1907); *Price v. Nat. Union Fire Ins. Co.*, 294 Mich. 289, 293 N. W. 652 (1940); *Deslauriers v. Senesac*, 331 Ill. 437, 163 N. E. 327 (1928); and See: *Fay v. Smiley*, 201 Iowa 1290, 207 N. W. 369 (1926).

<sup>18</sup> In *Re Klatzl's Estate* 216 N. Y. 83, 110 N. E. 181 (1915); In *Re Vogelsang's Estate* 122 Misc. 599, 203 N.Y.S. 364 (1924); *Johnson v. Landefield*, 138 Fla. 511, 189 So. 666 (1939); *Cadgene v. Cadgene*, 124 N. J. L. 566, 12 A. (2d) 635 (1940); *Re Vandergrift*, 105 Pa. Super. Ct. 293, 161 Atl. 898 (1932).



4) Lastly, a few jurisdictions permit the creation, in this manner, of a joint tenancy. In almost every instance, the parties involved in these cases were husband and wife.<sup>19</sup>

In every instance of this last-mentioned category, the result has been based upon the construction of some statute. Nebraska has achieved it by uncompromising statutory phraseology:<sup>20</sup>

Any person or persons owning property which he or they have power to convey, may effectively convey such property by a conveyance naming himself or themselves and another person or persons, as grantees, and the conveyance has the same effect as to whether it creates a joint tenancy, or tenancy in common, or tenancy in partnership, as if it were a conveyance from a stranger who owned the property to the persons named in the conveyance . . . any "person" mentioned in this section may be married, and any "persons" so mentioned may be married to each other.

Iowa,<sup>21</sup> New York,<sup>22</sup> Rhode Island,<sup>23</sup> and New Hampshire<sup>24</sup> achieve the same result by construction of statutes not so unequivocal, but sufficiently broad to justify the decisions. A federal court<sup>25</sup> has decided that a strawman deed is unnecessary in California. Massachusetts has taken the view that one could not create a tenancy by the entireties in such manner, but that such a deed purporting to do so would create a joint tenancy.<sup>26</sup> Whether the result is rationalized upon the theory that the grantor reserves an interest,<sup>27</sup> or upon the theory that the unities requirement is outmoded and absurd,<sup>28</sup> the courts are certain that directness and simplicity in conveyancing are not evil *per se*.

Such courts and legislatures have fulfilled a long felt need. The view of the layman, annoyed by the irksome formalities encumbering the transfer of his real estate, is shared by the lawyer who must defer to the often absurd technicalities. "The necessity of requiring an extra deed makes a fetish out of form and compels the parties to the instrument to employ an indirect maneuver of the 18th Century merely to satisfy the outmoded unities rule."<sup>29</sup>

<sup>19</sup> See cases cited *infra*, notes 21-24.

<sup>20</sup> REV. STAT. OF NEB. (1943) § 76-118(1).

<sup>21</sup> *Switzer v. Pratt*, — Iowa —, 23 N. W. (2d) 837 (1946).

<sup>22</sup> *Saxon v. Saxon*, 46 Misc. 202, 93 N.Y.S. 191 (1905).

<sup>23</sup> *Lawton v. Lawton*, 48 R. I. 134, 136 Atl. 241 (1927).

<sup>24</sup> *Therrien v. Therrien*, —N. H.—, 46 A. (2d) 538 (1946).

<sup>25</sup> *Edmonds v. Comm. of Int. Rev.*, 90 F. (2d) 14 (C.C.A. 9th, 1937), *certiorari* denied, 302 U. S. 713, 82 L. Ed. 551, 58 S. Ct. 32 (1937).

<sup>26</sup> *Ames v. Chandler*, 265 Mass. 428, 164 N. E. 616 (1929).

<sup>27</sup> See: *Dutton v. Buckley*, 116 Ore. 661, 242 Pac. 626 (1926.)

<sup>28</sup> See: *Therrien v. Therrien*, —N. H.—, 46 A. (2d) 538 (1946).

<sup>29</sup> *Therrien v. Therrien*, —N. H.—, 46 A. (2d) 538 (1946).

One of the courts adopting this liberal rule has been of the opinion that it represents the weight of authority.<sup>80</sup> A review of the cases makes this statement doubtful. But perhaps the strength of these authorities will prompt other jurisdictions to institute a modernization of the whole law of conveyancing. To do so would be to perform a service to layman and lawyer alike.

*B. M. Apker*

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**CIVIL RIGHTS—THE TREND IN STATE FAIR EMPLOYMENT PRACTICE LEGISLATION.**—A last minute<sup>1</sup> check conducted in forty-eight states by the Notre Dame Lawyer shows that legislation providing against discrimination in employment on racial or religious grounds has been enacted in seven states<sup>2</sup> and was proposed during 1947 in seventeen additional states. The attempt to secure laws forbidding this type of discrimination has been made at three levels: in the Congress to re-create the war-time Fair Employment Practice Committee<sup>3</sup> with some extension of the powers which that committee exercised during the war; in the state legislatures, to create similar committees with statewide powers; and in municipal assemblies for city anti-discrimination ordinances. These endeavors seem most likely to meet with success at the second, or state, level.

The acts and bills may be classified into three groups: first, those whose legal effect is little more than a resolution, or a more particularized restatement of the state bill of rights; secondly, those setting up committees to explore the need for further legislation, and to make recommendations; thirdly, those which define certain discriminatory practices, provide a commission for hearing of complaints and issuing cease and desist orders, and which contain a penalty clause.

The first type is exemplified in the very recent Oregon Fair Employment Practice Act, which declares it the “. . . public policy of this state to encourage the employment of all persons in accordance with their fullest capacities, regardless of their race, color, religion, sex, union membership, national origin or ancestry . . .” The act goes on alterna-

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<sup>80</sup> *Edmonds v. Comm. of Int. Rev.*, 90 F. (2d) 14, 16, (C.C.A. 9th, 1937).

<sup>1</sup> Completed October 15, 1947.

<sup>2</sup> New York: N. Y. Laws, c. 118; New Jersey: N. J. Laws 1945, c. 169; 18 N. J. STAT. ANN. (West, Supp. 1946) 25-1; Indiana: Ind. Laws 1945, c. 325; IND. STAT. ANN. (Burns, Supp. 1945) 40-2301; Wisconsin: Wis. Laws 1945, c. 490; Massachusetts: Mass. Laws 1946, c. 368; Connecticut: Public Act. No. 171; Oregon: see Enrolled House Bill No. 385, enacted in 1947.

<sup>3</sup> Created by President Roosevelt in 1941 through executive orders No. 8802 and 9346. The famed FEPC was allowed to die an unnatural death through failure of appropriation to sustain it. A new federal FEPC has been proposed in the Senate (S.984) and by several House bills.

tively to declare state policy to be against racial or religious discrimination on the part of any agency of the state. It concludes by authorizing the state department of education to ". . . prepare such educational program as is deemed necessary, calculated to discourage prejudice against minority groups, and point out its incompatibility with American principles of equality and fair play." This act, it will be noted, merely *authorizes* the preparation of "educational programs *as is deemed necessary*," without more. No administrative machinery for the educational program is provided for; no allocation of funds to support such a program is mentioned. Although the purpose of the act is stated to be "To discourage discriminatory employment practices," it was apparently the mind of the Oregon legislature that this declaration of policy—for that is all the act really amounts to—would be sufficient to accomplish that purpose. Critics of FEPC legislation will no doubt take heart in the passage of Oregon-type acts, which nominally respond to the cry for anti-discrimination laws, but in fact are acts which do not act. Proponents of FEPC legislation may take comfort at least in the fact that the Oregon-type law lays a valuable precedent for further, more definite laws, in that it declares discrimination in employment to be against *public policy*.

Examples of the second type of legislation are found in the Indiana and Wisconsin statutes. The Indiana act has reference to racial and religious discrimination on the part both of employers and labor unions. The Wisconsin act, in its "definitions" clause, "also includes discrimination . . . in the fields of housing, recreation, education, health and social welfare." The Indiana law confers upon the commissioner of labor the functions of appointing such employees as are necessary for carrying out of a program of "comprehensive studies" of discrimination in employment, "formulating . . . plans" for its elimination, "receiving and investigating" complaints, and "making specific and detailed recommendations to the interested parties . . . as to ways and means for the elimination of any such discrimination." The commissioner may, under the act, recommend a specific plan to the general assembly after study and investigation. The act provides for salaries and expenses of the employees appointed by the commissioner (not to exceed in total \$15,000 annually).

The Indiana act, it will be observed, considers the discrimination problem worthy of study, but indefinitely postpones a solution. The wonder of the statute consists in this: the act and its passage admit a discrimination problem serious enough in scope to warrant legislative action; but the legislative action expressed in the act only leads up to ascertaining the scope of the problem. It may be argued that comprehensive study ought to precede comprehensive action, but the Indiana statute has now been in effect since March of 1945, and the stage of "studies," "formulating," "investigating," and "making recommenda-

tions" still obtains, with neither effective legislative fruits of such a stage in sight, nor, on the other hand, the prospect of a forthright abolishment of the existing agency with its attendant expense to the public.

Of the third type of proposed or existing statutes are the New York, New Jersey, Massachusetts, and (very recent) Connecticut acts. They differ somewhat in their scope of operations. The act in each of these states sets up a Fair Employment Practice Commission. In general, the commission has the power and duty <sup>4</sup> (1) to investigate complaints alleging discrimination in employment because of "race, color, religious creed, national origin, or ancestry," (2) to hold hearings, subpoena witnesses thereto, and take testimony relating to matter under investigation, (3) to create "conciliation councils" on a statewide basis to study the discrimination problem and to make recommendations to the commissioner for development of policies. The act defines certain unlawful employment practices. These include the refusal of an employer "to hire or employ or to bar or discharge from employment" a person on account of race or creed, or to "discharge from employment such individual or to discriminate against such individual in compensation or in terms," unless based upon a "bona fide occupational qualification" (the last-quoted term undefined in the statute). A procedure for complaint is set forth. Where a commissioner determines probable cause to exist, he takes the first remedial step of "conference, conciliation and persuasion." Where this step fails, the commissioner issues written notice to the party complained against, requiring the latter to appear at a hearing before the commission in order to answer charges. Should the commission now determine that the respondent has engaged in unlawful employment practices specified in the act, a third step is taken: an order to cease and desist from the practice. Judicial review is provided for. Punishment by fine or imprisonment, or both, is specified for wilful violation of a final order of the commission, or the filing of a false complaint.

Turning to the bills introduced in state legislatures in 1947, by far the greater number of these, it would seem, follow the model of the New York, New Jersey, and Massachusetts laws. Only in one state, Connecticut, did such a bill succeed in passing. A Missouri FEPC bill was recommended "Do not pass" by the Labor Committee; a strong FEPC bill in Pennsylvania was not reported out of committee. So in Rhode Island (senate FEPC bill failed of passage), Minnesota (bill passed senate but was defeated in house), Washington (FEPC bills either defeated or never got out of committee), West Virginia (bill killed in committee), Ohio (several bills, none of which passed), California (FEPC bill never came to a vote), Utah (FEPC bill failed of passage). In Michigan, Delaware, Colorado, Iowa, Illinois, and Ne-

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<sup>4</sup> The Massachusetts act is here described. Its main features are identical with those of the other three FEPC states.

braska, bills proposing some sort of anti-discrimination legislation in employment failed to become law. In Indiana and Wisconsin measures purporting to "put teeth" in the present laws of these two states likewise failed to pass.

The trend in proposed legislation is plainly in the direction of the New York FEPC type law. There is, apparently, however, a consistent determination in the present state assemblies to defeat such strong anti-discrimination measures. In at least one state having an FEPC law, the attempt has been made to repeal it.<sup>5</sup> Extension of the scope of operation of existing laws has been urged in the seven states having anti-discrimination laws. In half of the states, however, no such laws have been proposed.<sup>6</sup>

*William B. Ball*

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CO-OPERATIVES—A PRIVILEGED RESTRAINT OF TRADE.—Both reason and history convince us that it is wise to keep the bridge short between the producer and the consumer. Logically a saving of time and money is made if the "middleman," in so far as is conveniently possible, is removed from the chain of the satisfaction of human wants. The past and present can be called upon to relate the incongruous situation, present in times of economic depression, of stockpiles of rotting food and manufactured products casting shadows over the hungry and destitute.

An early English statute prohibited forestalling, engrossing and regrating measures undertaken by tradesmen to place themselves between the producer and the consumer for purposes of profit. These three typical early English statutory terms defined methods by which a person bought from the producer at one price and sold to the consumer at, naturally, a higher price.<sup>1</sup> This middleman activity was legislatively

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<sup>5</sup> Massachusetts.

<sup>6</sup> Alabama, Arizona, Arkansas, Florida, Georgia, Idaho, Kentucky, Louisiana, Maine, Maryland, Mississippi, Montana, Nebraska, Nevada, New Mexico, North Carolina, North Dakota, New Hampshire, South Carolina, South Dakota, Tennessee, Texas, Vermont, Virginia, Wyoming.

<sup>1</sup> Statutes at Large, 7 Edw. VI Vol. 5, ch. 14.

*Forestalling* consisted of buying victuals on their way to market and before they reached it, with the intent to sell again at a higher price.

*Engrossing* was the buying at any place of certain necessities of life from producers with a view to resale at a higher price.

*Regrating* was the purchase of provisions at a fair or public market for the purpose of resale at a higher price in the same market or in any market within four miles thereof.

The statutes which designated the indicated practices illegal were repealed by 12 George III, chap. 71, (1772) 7,8 Victoria, chap. 24 (1884). It was decided by the English legislative body that the prohibited acts had come to be considered as favorable to the development of, and not in restraint of, trade.

determined to be repugnant to the best interests of society in that it obstructed the free flow of want-satisfying goods. American common law inherited this principle of public policy—the principle and tradition against restraints of trade.

With the increasing complexity of communal life, intermediaries in the form of wholesalers, jobbers and retailers proved themselves to be convenient, but only as they aided and not hindered the free flow of goods. Thus we see the common law demanding that the bridge between the producer and the consumer be kept as short as possible for the protection of the public.

In a discussion of the co-operative as a legally privileged body, it would be well to keep in mind that the early common law tradition opposing restraints of trade was based on a sound principle of public policy, namely, the consumer should pay only a just and reasonable price for the goods and at the same time guaranteeing to the producer a reasonable return for his expended effort. Measures devised by men in the business world which either forced the consumer to pay an exorbitant price or withheld from the producer a reasonable remuneration were, and are, said to be contrary to public policy. Generally an unfair price adjustment was brought about by a stifling of competition preventing the buyer from purchasing at a reasonable price or prohibiting the seller from marketing at a reasonable profit. Such a stifling of competition, when it did tend to bring about unfair price adjustment, was considered an unreasonable restraint of trade. English and American common law considered these unreasonable restraints of trade as unlawful.<sup>2</sup>

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<sup>2</sup> "It is certain that at a very remote period the words 'contract in restraint of trade' in England came to refer to some voluntary restraint put by contract by an individual on his right to carry on his trade or calling. Originally all such contracts were considered to be illegal, because it was deemed they were injurious to the public as well as to the individuals who made them. In the interest of the freedom of individuals to contract, this doctrine was modified so that it was only when a restraint by contract was so general as to be coterminous with the kingdom that it was treated as void. That is to say, if the restraint was partial in its operation, and was otherwise reasonable the contract was held to be valid." This passage is from Mr. Chief Justice White's opinion in the *Standard Oil Co. v. United States* 221 U. S. 141, 55 L. Ed. 619, 31 S. Ct. 502 (1910).

"Applying the rule of reason to the construction of the statute (Sherman Anti-Trust Act) it was held in the *Standard Oil* case that, as the words 'restraint of trade' at common law and in the law of this country at the time of the adoption of the anti-trust act only embraced acts or contracts or agreements or combinations which operated to the prejudice of the public interests by unduly restricting competition . . . if possible serves to strengthen our conviction as to the correctness of the rule of construction—the rule of reason—which was applied in the *Standard Oil* case the application of which rule to the statute we, now, in the most unequivocal terms, re-express and re-affirm." *United States v. American Tobacco Co.* 221 U. S. 106, 179, 55 L. Ed. 663, 694, 31 S. Ct. 632 (1910).

Also see American Jurisprudence "Monopolies" Sec. 8 and the voluminous list of cases and annotations appended thereto.

Even with this generally accepted interpretation of the common law, courts reflected anything but a consistent view when the question of the legality of a co-operative association contract was presented to them. Some courts, ostensibly relying on the common law, ruled that the co-operative agreement was an unreasonable restraint of trade. These courts took the view that it was unreasonable to prohibit a wholesaler from dealing with a co-operative member who, were he to obey the contract, could sell only to the co-operative itself. Following this same reasoning, the courts deemed it unreasonable to hold a member to a contract which permitted him to sell only to the co-operative. It was reasoned that economic success in a free enterprise system depends on a competitive market. Those contracts which tended to stifle competition were held to be unreasonable restraints of trade.<sup>3</sup> Other jurisdictions faced with the same or comparable facts, and employing the same common law interpretation of fair trade practices, stamped co-operative activities as reasonable and beneficial methods of trade. These courts decided that an agreement to raise the remuneration to the producer and yet maintain a fair price to the consumer was definitely beneficial to the public. It was a worthy and wholesome endeavor, said these courts, to guarantee both a reasonable price to the consumer and a fair return to the producer.<sup>4</sup>

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<sup>3</sup> *Reeves v. Decorah Farmers Co-operative Society*, 160 Iowa 194, 140 N. W. 844, 44 L. R. A. (N. S.) 1104 (1913), decided that a co-operative contract of exclusive sale by the member producer to the co-operative was illegal. The Supreme Court of Iowa held that such a contract stifled competition and was, therefore, an unreasonable restraint of trade. The plaintiff, a buyer of hogs for a Chicago wholesaler, was prevented from buying from the farmer members of the co-operative and thus, the court felt, he was a victim of unreasonable measures of business activity.

In *Ludowese v. Farmers' Mut. Co-op. Co.*, 164 Iowa 197, 145 N. W. 475 (1914), the *Reeves Case*, *supra*, was specifically followed but in this case, it was the producer member of the co-operative, the court held, who was unjustly treated. The member had sold to another when his contract of membership stipulated exclusive sale to the co-operative. This type of contract, which prevented the producer from freely choosing his buyer stifled competition and was an unreasonable restraint of trade, the court said.

In accord are: *Burns v. Wray Farmers' Grain Co.*, 65 Col. 425, 176 P. 487 (1918); *Atkinson v. Colorado Wheat Growers' Ass'n.*, 77 Col. 559, 238 P. 1117 (1925); *Georgia Fruit Exchange v. Turnipseed*, 9 Ala. App. 123, 62 So. 542 (1913); *Ford v. Chicago Milk Shippers Ass'n.*, 155 Ill. 166, 39 N. E. 651, 27 L. R. A. 298 (1895).

However as the public policy of the country changed, all the jurisdictions which refused to accept the co-operative method of doing business, at first, later manifested a different view, reversing their previous holdings. *Rife Potato Grower's Co-op. Ass'n. v. Dexter Smith*, 78 Col. 171, 240 P. 937 (1925); *Ex parte Baldwin County Producers Corporation*, 203 Ala. 345, 83 So. 69 (1919); *Milk Producers' Marketing Co. v. Bell*, 234, Ill. App. 222 (1924).

<sup>4</sup> "In this case, we think it may be admitted that the contract in suit was executed in furtherance of a combination in restraint of trade by the growers of Burley tobacco, the market for which was controlled by a trust. But the purpose

The inconsistent holdings of courts in various jurisdictions regarding the legality of co-operative exclusive marketing contracts testified to the fact that courts were not, as yet, convinced that co-operative activity was in the public interest. The courts were still pondering the implications of the Sherman Anti-Trust Act. Some, only too recently faced with the odious results of business when it becomes "big," were prone to decree any and all combinations unlawful restraints of trade.

There is no question that the Sherman Act and state anti-trust measures were aimed at the great evil of the day, industrial giants who displayed an utter disregard for the general welfare in their ruthless, rampant race for economic profit and power.<sup>5</sup> Legislators, apparently, little considered the effect their laws would have on agriculture. But since agriculture was not specifically excluded from the acts, courts which preferred a literal translation saw no reason to free farm-

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of the combination does not appear to be other than to secure a fair and adequate price for their product. We think such acts could not be held to be in conflict with the morals of the time or to contravene any established interest of society. Public policy does not ask those who till the soil to take less than a fair return for their labor. Public policy safeguards society from oppression; it is not an instrument of oppression." *Burley Tobacco Society v. Gillaspay*, 51 Ind. App. 583, 100 N. E. 89 (1912). In this case a co-operative member was being sued for liquidated damages by reason of his selling tobacco to other than the co-operative with whom he had contracted. The court upheld the right of the co-operative to recover as per contract stipulations, thus announcing the validity of the co-operative contract.

In accord are *Milk Producers' Marketing Co. v. Bell*, 234 Ill. App. 222 (1924); *Bullville Milk Producers' Ass'n. v. Armstrong*, 178 N. Y. S. 612 (1919); *Castorland Milk and Cheese Co. v. Shantz*, 179 N. Y. S. 131 (1919); *Ex parte Baldwin County Producers' Corporation*, 203 Ala. 345, 83 So. 69 (1919).

<sup>5</sup> "The evils of the 'trusts,' as the public without much discrimination described all big businesses, became increasingly apparent. Prices were fixed without the benefit of competition, and sometimes at higher levels than before the trust was formed. Raw producers were compelled to take what the trust chose to pay, for there was no one else to whom to sell. Labor was forced into line by the closing of troublesome plants, and by the circulation of 'blacklists' that made it difficult for agitators to obtain employment. Politicians were influenced by free passes from the railroads, by campaign contributions, and by outright bribes. \* \* \* Powerful lobbies appeared in Washington and in the several state capitals charged with the duty of winning favors from lawmakers and law-enforcers. The Washington lobbyists were sometimes described as the 'third house' of Congress. Plants that experience had shown to be well located were enlarged, and others less ideally situated were closed down, without regard to the inevitable unemployment involved or the municipal problems that arose from the concentration of vast numbers of people at whatever centers business leaders deemed strategic. Individual freedom suffered blow after blow as the owners of small establishments became the employees of larger ones and as the chance to enter business independently grew less and less. Employees were pushed farther and farther from the sight and hearing of employers, and fewer occasions existed for emotions of the 'heart' to influence the conduct of businessmen who prided themselves upon their 'hard-headedness'." These are the conditions which existed in the United States says Hicks in *The American Nation* (1946) previous to the passage of the Sherman Anti-Trust Act.



ers from the effects of anti-trust legislation. Obviously these jurisdictions saw no reason to differentiate agriculture from industry in the formation of their views of public policy. In fact the United States Supreme Court in 1902 emphatically denied to agriculture the privilege of exemption as a class from the legislation.<sup>6</sup> These circumstances may explain, in part, the original reluctance by some courts to legally bless the co-operative movement.

The co-operative movement, although not peculiar to agriculture, rose to prominence in the United States by its use in rural areas. In the marketing of their crops, farmers were searching for relief from their position of bargaining slaves, a status to which the organized buyer had reduced them by his business tactics. Some farmers, then, turned to the power of unity offered by the co-operative as an avenue of escape from their unfavorable bargaining predicament.<sup>7</sup>

As the plight of the farmer grew worse, public sympathy for the agricultural element increased. Likewise it became apparent to the economists of the day that a healthy country demanded a vigorous, substantial farm body. It was obvious that there was a wide divergence between the interests of industry as far as legislation was concerned. More jurists were convinced that agriculture as a class could be, at times, excluded from legislative action if it were necessary for the public good. Recognition of the farmers' dilemma resulted in positive legislative action for his benefit. An amendment was enacted to the Sherman Anti-Trust Act specifically exempting the farmer from some of its effects.<sup>8</sup> Other legislation also gave the farmer the privilege of com-

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<sup>6</sup> *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 46 L. Ed. 679, 22 S. Ct. 431 (1902) held that agriculture as a class could not be exempt from legislative acts. *Connolly* purchased sewer pipe from the defendant and refused to pay for it, claiming that he was not liable for the goods purchased from the trust as stipulated in the Illinois Anti-Trust Act. *Connolly* contended that the Sewer Pipe Co. was a trust. The Pipe Co. countered by maintaining that the anti-trust statute was void because it exempted agriculture as a class from its provisions. The Supreme Court of the United States upheld this contention.

The *Connolly* Case was specifically overruled in *Tigner v. Texas*, 310 U. S. 141. 84 L. Ed. 1124, 60 S. Ct. 879 (1940).

<sup>7</sup> A co-operative is a business organization, usually incorporated, owned and controlled by member producers and consumers, which operates for the mutual benefit of its members or stockholders, as producers and patrons, on a cost basis after allowing for expenses of operation and maintenance and any other authorized deductions for expansion and necessary reserves. Hulbert, *Legal Phases of Co-operative Associations* (May 1942).

In essence a co-operative association is an entity through which producers sell and consumers buy.

<sup>8</sup> Clayton Act 38 Stat. 730 (1914), 15 U. S. C. Sec. 12-27 (1934).

Section six of the Clayton Act reads, in part: "Nothing contained in the anti-trust acts shall be construed to forbid the existence and operation of labor, agricultural or horticultural organizations, instituted for the purpose 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

binning for the purpose of guaranteeing a reasonable return for his labor.<sup>9</sup> The courts, then, took judicial notice of the fact that agriculture as a class could be legally differentiated from other groups.

In upholding the validity of an exclusive marketing contract between a member and the co-operative, one court said:

We take judicial knowledge of the history of the country and of current events and from that source we know that conditions at the time of the Bingham Act (Co-operative Incorporating Statute) were such that the agricultural producer was at the mercy of speculators and others who fixed the price of the selling producer and the purchasing price of the final consumer through combinations and other arrangements, whether valid or invalid, and that by reason thereof the former obtained a grossly inadequate price for his products. So much so was that the case that the *intermediate handler between the producer and the final consumer injuriously operated upon both classes and fattened and flourished at their expense*. It was and is a well known fact that without the agricultural producer society could not exist, and the oppression brought about in the manner indicated was driving him from his farm, thereby creating a condition fully justifying an exception in his case from any provision of the common law, and likewise justifying legislative action in the exercise of its police power. (Italics ours).<sup>10</sup>

It was apparent that a change had taken place in the public policy of the United States. The freedom of contract dogma which industrialists and middlemen had argued to the courts in an effort to stem the early advance of co-operatives into the business world became tempered with the interest of the country as a whole. The right to freedom of contract can never be upheld if an individual or a group is unreasonably injured thereby. It was felt that the best interest of the public would be served if co-operative agreements were formed, pro-

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objects thereof: nor shall such organizations, or members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the anti-trust laws."

<sup>9</sup> Capper-Volstead Act, 42 Stat. 388 (1922) 7 U. S. C. Sec. 291-292 (1934), expressly authorized marketing combinations for the mutual benefit of members as producers if (1) no member is allowed more than one vote because of his stock or membership capital or the association does not pay dividends on capital in excess of eight per cent, and (2) the association does not deal in the products of non-members in an amount greater in value than those of members.

The Act also provides for a procedure to prevent marketing associations from restraining trade to such an extent that prices are unduly enhanced.

<sup>10</sup> Liberty Warehouse Company v. Burley Tobacco Growers' Co-operative Marketing Association, 208 Ky. 649, 271 S. W. 695 (1925). Quoted by United States in 276 U. S. 71, 72 L. Ed. 473, 48 S. Ct. 291 (1928), and substantiated by a long list of cases cited therein.

tected, and carried out. This necessarily deprived certain middlemen of their past freedom in choosing their producer and vested this right largely in the co-operative. The courts admitted that these results were inevitable, if a change from the past inefficient and wasteful method of marketing was to be replaced by a more efficient and equitable procedure of bringing producer goods to the consumer.<sup>11</sup> The good of the general public demanded a revised system of marketing. The rights of the producer and the consumer exceeded those of the middleman.

Co-operatives expanded rapidly under friendly judiciary and legislative influence.<sup>12</sup> All those jurisdictions which had previously outlawed co-operatives now reached different conclusions in response to the obvious advantages of the new method of marketing. Naturally, the financial interest which was injured by the influx of co-operatives, the

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<sup>11</sup> Northern Wisconsin Co-Op. Tobacco Pool v. Bekkedal, 182 Wis. 511, 197 N. W. 936 (1924), tells us that the reasons for the juristic change in policy "sprang from a general, if not well-nigh universal, belief that the present system of marketing is expensive and wasteful and results in an *unconscionable spread between what is paid the producer and that charged the consumer*. It was for the purpose of encouraging efforts to bring about more direct marketing methods, thus benefiting both producer and consumer, and thereby promoting the general interest and the public welfare, that the legislation was enacted."

In this case the co-operative is the plaintiff in an action to prevent defendant, Bekkedal, from interfering with the plaintiff's contracts of exclusive purchase with the co-operative member growers. Bekkedal seeks to purchase from members. He not only denies the allegations of knowingly purchasing from contracting co-operative members, but affirmatively answers that the plaintiff's contract in effect creates a monopoly, stifles competition, fixes prices and is an unlawful and unreasonable restraint of trade and therefore the contract is unlawful and void.

On appeal the contract was upheld as valid because, the court felt, it was in the interest of the public that such a contract should be made.

Wisconsin had an anti-trust statute which condemned contracts or combinations in the nature of a trust or conspiracy in restraint of trade or commerce. The statute was a confirmation of the common law condemnation of monopolies. But since the anti-trust statutes went on the books, the legislature has provided for the incorporation of co-operative associations. This definitely demonstrates the shift in the public policy of the state. The court said: "It may be well that the time is approaching, if not already here, when monopolies or business combinations controlling the market, (subject, however, to efficient government control) will be found more desirable than unrestrained competition; but that is a question for the lawmaking power to decide, not for the courts."

Combinations and agreements creating co-operatives have in the past been regarded as unlawful because it was felt that their existence was, and in actual practice were, prejudicial to the public interest. But changing conditions bring on different economic necessities and viewpoints.

There is no doubt that, as the defendant contends, the co-operative will have a very serious effect on the defendant's business. That was the very purpose of the legislation—to definitely and convincingly change the system of marketing. Middlemen, like Bekkedal, are most seriously affected but the change is felt by the legislature to aid the public generally even though it injures the special interest here represented.

<sup>12</sup> Delaney, Farmers Co-operatives and Tax Exemption (Feb. 1, 1947) 76 America 18 traced the advance of the co-operative movement.

middleman, was not so willing to see the status of the producer improved at his expense. The wholesalers and buyers continued their questioning of the legality of the co-operative by court room attacks.<sup>13</sup> Their arguments were generally the same pattern. They contended that co-operative contracts denied citizens equal protection under the laws as guaranteed by the Fourteenth Amendment to the Constitution. However, if the co-operative was operating in the interest of the public, the courts generally followed the doctrine that the legislature had the power to treat certain groups specially, if the character of the division warranted such treatment. The courts were of the opinion that agriculture, as a group, was worthy of special treatment.<sup>14</sup>

Another general objection to the co-operatives pressed by the middleman was that exclusive sale contract on which the co-operative was based deprived the buyer of the liberty of contract. The courts answered this objection, we have seen, by an appeal to the public interest involved. Benefits to the public as a whole, brought by the co-operatives exceeded the contract benefits that would accrue to the middlemen as individuals, these courts decided.

We may safely surmise from a careful examination of the cases that true co-operatives are definitely accepted as beneficial instruments in distributing producer goods to the consumers as far as the courts are concerned.<sup>15</sup> However, it is absolutely necessary that a co-operative ful-

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<sup>13</sup> *Rifle Potato Grower's Co-op. Ass'n. v. Dexter Smith*, 78 Col. 171, 240 P. 937 (1925); *Ex parte Baldwin County Producers Corporation*, 203 Ala. 345, 83 So. 69 (1919); *Milk Producers' Marketing Co. v. Bell*, 234 Ill. App. 222 (1924).

<sup>14</sup> In *Northern Wisconsin Co-op. Tobacco Pool v. Bekkedal*, 182 Wis. 511, 197 N. W. 936 (1924) the court said that the legislature has the power to classify certain agreements, condemn some, authorize others, if there are reasonable and proper economic, political and social reasons for making the classification.

The co-operative function is to enable co-operation among the weaker and more scattered members of society, and this on the theory that the welfare of society as a whole is promoted by enabling the weaker members thereof to cooperate for the purpose of improving their condition. There is a difference between a combination of a strong and powerful few who control a particular industry and a combination of many individually weak farmers. The former tends toward oppression of society. Concerted action of the farmers is very difficult and the most that can be expected is improvement of their own condition with no apparent harmful social results.

A look at the Co-operative Act of any state will show that its fundamental purpose is not the promotion of a monopoly. Its dominant purpose is to promote the welfare of its members.

" . . . the Bingham Act, by enabling the farmers to market their crops cooperatively for the purpose, as declared in the act, of regulating distribution and stabilizing the prices of farm products, serves a pressing public need that justifies the classification of the farmers as a distinct class, and treats all of the class equally and fairly, . . . It does not, therefore, offend the equal protection of the Federal Constitution." *Potter v. Dark Tobacco Growers' Co-op. Ass'n.*, 201 Ky. 441, 257 S. W. 33 (1923).

<sup>15</sup> Note (1947) 22 NOTRE DAME LAWYER 413 gives a discussion of the necessity of exclusive marketing agreements to the success of the co-operatives.

fil the purpose for which it is organized if it wishes to continue as a privileged association in the eyes of the law.<sup>16</sup> State statutes set out clearly in their organizing acts the activities which co-operatives are to perform.<sup>17</sup> If any co-operative ceases to promote, foster, and encourage the orderly marketing of goods for the benefit of the consumer, as well as the producer, it will be treated by the courts as an unreasonable restraint of trade. The co-operative is not and can never be above the law. The law has set out its purpose and it must fulfil that purpose or cease to exist. This reiterates a basic tradition of our legal system—the repugnance toward unreasonable and unnecessary restraints of trade.

Co-operatives, then, are a link in the chain of the satisfaction of human wants. They represent a necessary conduit in the passage of goods from producer to consumer. Courts tell us that unrestrained competition was found wanting in developing a mutually satisfactory system for bringing goods to the consumer.<sup>18</sup> A corrupt middleman

<sup>16</sup> Hanna, *Law of Co-operative Marketing* (1931).

"A granting of extensive power to agricultural co-operative associations and the liberal interpretation of these authorizations do not mean that the associations are exempt from the law in respect to restraints of trade. If an association, by arbitrary and oppressive measures tended to deprive the public of a reasonable supply of the product of its members at a fair price, if it attempted to compel its members to agree to unwise restrictions of production, if its selling and other policies were designed to drive competitors out of business for reasons of spite or revenge, or in general if the association acted in a high handed manner, having little relation to its fundamental purposes, the association might be enjoined from continuing its restraints, contracts essentially connected with its unfair conduct might be avoided and in extreme cases the association itself might be dissolved."

See: *Barnes v. Dairymen's League Co-op. Ass'n., Inc. et al.*, 220 App. Div. 6-24, 222 N. Y. Supp. 294 (1927); *Duplex Printing Press Co. v. Dearing*, 254 U. S. 443, 65 L. Ed. 349, 41 S. Ct. 172 (1921).

<sup>17</sup> *Indiana Statutes Annotated* (Burns, 1933) Sec. 15-1601, "Declaration of Policy. (a) In order to promote, foster and encourage the intelligent and orderly production and marketing of agricultural products through cooperation; and to eliminate speculation and waste; and to make the distribution of agricultural products between producer and consumer as direct as can be efficiently done; to stabilize the marketing of agricultural products, and to provide for the organization and incorporation of agricultural cooperative associations and societies, this act is passed.

"(b) It is here recognized that agriculture is characterized by individual production in contrast to the group or factory system that characterized other forms of industrial production, and that the ordinary form of corporate organization permits industrial groups to combine for the purpose of group production and the ensuing group marketing and that the public has an interest in permitting farmers to bring their industry to the high degree of efficiency and merchandising skill evidenced in the marketing industries; and that the public interest demands that the farmer be encouraged to attain a superior and more direct system of marketing in the substitution of merchandising for the blind, unscientific and speculative selling of crops." (Acts 1925, chap. 20, sec. 1 p. 42; 1931, chap. 34, sec. 1, p. 79).

<sup>18</sup> *Supra*, note 10.