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POWER OF AGRICULTURAL CO-OPERATIVE ASSOCIATIONS TO LIMIT PRODUCTION*

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FARMERS within recent years have recognized the necessity of combining in larger and still larger numbers, and great co-operative farm organizations have been formed, some of them with sales reaching $100,000,000 each year. These organizations in 1923 did a combined business estimated at $2,200,000,000. "Giant marketing associations, covering whole states, and even groups of states, have been organized with startling rapidity in the great cotton and tobacco growing states."[1] Co-operative marketing legislation has given these groups great and far reaching powers to attain the end of making agriculture more profitable and to secure better returns to the producers of farm products. The question of whether these groups have power to limit or restrict production to obtain the desired end of better and higher prices is now being raised for the first time in the courts.

Co-operative marketing by farmers has been engaged in for generations, especially in Europe. However, it was not until the agricultural depression following the great war that a serious and extensive wave of co-operative legislation swept this country in an effort to meet the needs of those farmer groups engaged in co-operative marketing as other laws have met the needs of those who for generations have been engaged in collectively making and selling wide varieties of articles and commodities. Co-operative Marketing Acts similar to the Bingham Marketing Act of Kentucky[2] have been passed by more than three-fourths of the states of the Union. These acts authorize the creation of farm marketing corporations after the fashion of industrial corporations.

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[1]Henderson, Gerard C., "Cooperative Marketing Associations," 23 *Col. L. Rev.* 91 (Feb. 1923).

[2]Ky. Laws 1922, Ch. 1.

The economic forces bringing about their passage, the purposes, hopes and limitations of such legislation are manifold.[3] One of the important, expressed legislative purposes found in practically all these marketing acts is that "agriculture is characterized by individual production in contrast to the group or factory system that characterizes 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 by manufacturing industries."[4]

The laws enacted for ordinary industrial corporations contemplate an organization which owns and operates production plants as well as marketing agencies. These laws are very ill-suited to the needs of the farming situation where it is not expedient for the farmers to vest the titles of their farms and herds in the corporate entity. This inherent difference led to many indictments against farmers' associations under the state and federal Anti-Trust Laws. As long as farmers operated only local selling organizations, they were unmolested; but, when they commenced to form large organizations, their right thus to combine in large numbers was immediately challenged under the Anti-Trust Laws. Co-operative Marketing Acts were passed to permit farmers to continue to produce singly, but, from that point on, to emulate the efforts and practices of industrial corporations in processing, preparing for market and marketing the farm products.

Ordinary industrial corporations are prevented from exercising power to limit or stifle production for purposes of price fixing by the state and federal Anti-Trust Laws as well as the common law against monopolies. These agricultural Co-operative Marketing Acts, however, nearly all have the following, or a similar, provision:

"No association organized hereunder and complying with the

[3]Maklin, T., "Financial Gains of Marketing Successfully Through Co-operation;" Erdman, H. E., "Possibilities and Limitations of Co-operative Marketing;" Miller, John D., "Sound Principles in Co-operative Legislation;" in 17 *The Annals of Am. Acad. of Pol. & Soc. Sc.* 208, 217, 227. (Jan. 1925).

[4]Colo. Session Laws 1923, Ch. 142, sec. 5.

terms hereof shall be deemed to be a conspiracy or a combination in restraint of trade or an illegal monopoly; or an attempt to lessen competition or to fix prices arbitrarily nor shall the marketing contracts and agreements between the association and its members or any agreements authorized in this Act be considered illegal as such or in unlawful restraint of trade or as part of a conspiracy or combination to accomplish an improper or illegal purpose."[5]

These acts authorize, within certain time limits, marketing contracts between the corporate association and the members, giving the association great power to keep the farmers in line for such period. The remedy of specific performance against the members for breach, or threatened breach, of contract is provided for. Any one inducing, or attempting to induce, a member to breach such contract is made liable both civilly and criminally.

Associations marketing over a large competitive area with many purchasers of the product are mainly interested in development of new markets, improving and standardizing the product and thereby increasing production, for example the California Fruit Growers Exchanges with their "Sunkist" oranges and "Sun-Maid" raisins. However, growers of crops with only a few large purchasers, for example, tobacco and sugar beets, have a different problem, and such associations may take on the aspect of a labor union rather than that of an ordinary industrial corporation. The power to restrict, or even stop, production is more or less desirable to such associations and if successfully used by these groups, that power may be found attractive to other farmer combinations.

If Co-operative Marketing Acts authorize a production strike for the purpose of enhancing or fixing prices, these associations are given greater powers than labor unions. The only weapons the labor union has to keep its members in line during a strike are persuasion, expulsion from the union, or the alternative of fining the member if he remains in the union and refuses to strike.[6] However, these farm organizations would have their farmer members

[5] *Ibid.*, sec. 29.

[6] Jetton-Dekle Lumber Co. v. Mather, 53 Fla. 969, 43 So. 590, 592; Longshore Printing Co. v. Howell, 26 Ore. 527, 38 Pac. 547, 551, 28 L. R. A. 464.

bound over a number of years[7] by the marketing contracts to grow or not to grow as the association should determine. Under the Marketing Acts injunctive relief would be available to the association to prevent the members from withdrawing during a production strike and to enjoin any threatened breach of the member's contract not to grow.[8] These acts would further make any third party both civilly and criminally liable who attempted to induce the farmer to breach his contract not to grow a given crop.[9] In addition, a great practical advantage to the associations over labor unions is that during a production strike by growers of a given farm product the members can, with comparative facility, convert their land to the raising of other crops, thereby largely eliminating the financial loss to those engaged in the strike, while during an industrial strike the members of a labor union ordinarily are idle with all income shut off.

Whether the state legislatures adopting the so-called Marketing Acts have attempted to authorize such farmer's production strikes, and, if so, whether they have power to legalize them, involves, first of all, the question of public policy.

Public Policy

Prior to these Marketing Acts, farm marketing contracts were commonly held void by the courts as against public policy even though no attempt was made to stifle or limit production. The public policy of a state is to be determined by the common law, the legislative enactments, and the state and federal constitutions. It seems quite clear that a legislature, within constitutional bounds, can control the public policy of a state. That these Marketing Acts have changed the public policy of the various states, to some extent at least, also seems clear.

In *Northern Wisconsin Co-op. Tobacco Pool v. Bekkedal, et al.*,[10] the Wisconsin Supreme Court said:

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[7]Colo. Session Laws 1923, Ch. 142, sec. 18 limits contracts to ten years.

[8]*Ibid.*, sec. 19 (b).

[9]*Ibid.*, sec. 28.

[10]182 Wis. 571, 197 N.W. 936, 942. See also Tobacco Growers Co-operative Ass'n v. Jones, 185 N. C. 265, 117 S.E. 174, 33 A. L. R. 231, 244, where the court said: "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.

"Such combinations and agreements have been condemned by the law, because their existence was regarded as prejudicial to the public interest. If in the course of time changing conditions should give rise to economic views and public opinion wiping out the prejudice hitherto entertained with reference to such combinations, and they should come to be regarded as beneficial, rather than injurious, to the public interest, there is no doubt of the power of the Legislature to completely reverse the public policy of the state with reference to such combinations and agreements, and to promote rather than suppress the same."

As to the change in public policy, the Kentucky court, in *Potter v. Dark Tobacco Growers' Co-op. Ass'n*,[11] said:

"Nor are the Clayton Act and the many other recent acts of Congress treating farmers as a distinct class the only expressions of such a change in public opinion and the public policy of our nation with reference to them and their economic problems. The enactment by the Legislatures of 30 or more of the states of * * * acts precisely like the Bingham Co-operative Marketing Act is further evidence of the present state of public opinion on the matter. * * *

"The basis of this change in public opinion * * * is not in any sense political, but economic rather, and, in our judgment, it is because of basic economic conditions, affecting vitally not only the farmers, but also the public weal. * * *"

However, the marketing associations did not attempt to restrict the production of tobacco in either of the above cases.

Such incidental and voluntary restriction of production as may result from educational bulletins on crop rotation and market reports and forecasts would not be illegal. The membership of the Burley Tobacco Growers Co-op. Association, a Kentucky corporation, organized under the Bingham Co-operative Marketing Act of Kentucky, is upwards of 100,000 and includes about three-fourths of the producers of tobacco in Kentucky, Ohio, Indiana and Tennessee. The production of Burley tobacco had been increasing year

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Public policy does not ask that those who till the soil shall take less than a fair return for their labor. Public policy safeguards society from oppression."

[11]201 Ky. 441, 257 S.W. 33, 35.

by year until more tobacco was being produced than the market would absorb. As a consequence, the association was unable to market the product of its members within the year of production. The association issued a publication known as "The Burley Tobacco Grower" disseminating information to the growers of crop conditions, of the market needs, of the surplus of Burley tobacco on hand and urging cultivation for better quality and less quantity. The growers were also advised by the officers of the association to plant less acreage in tobacco and to employ their lands in growing alfalfa and other soil building crops which were more needed.

The Ohio supreme court in *List v. Burley Tobacco Growers' Co-op. Ass'n*[12] took the view that this educational work was in harmony with the efforts of the federal Department of Agriculture and was legal. However, "there was nothing in the (marketing) agreement, or in the by-laws of the association, which became part of the agreement * * * which required the members to limit the production of tobacco, and * * * there were enough independent producers and enough members of the association who disregarded the advice of the officers of the association to increase the production of Burley tobacco from year to year."[13]

As to whether, by these Marketing Acts, the legislatures have attempted to or could change the public policy of the states to the extent of legalizing contracts by these giant marketing corporations to limit or stifle production of a particular product for the purpose of fixing prices and of bringing their prospective purchasers to

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[12]151 N.E. 471, 476, 480: "It is true that the association carried on certain educational work, and freely advised its members as to marketing conditions and the supply and demand in the tobacco industry, and even advised the growers to grow less tobacco and employ their lands in raising alfalfa and other forage producing and soil building crops. Such efforts on the part of the association differed in no wise from the efforts of the federal Department of Agriculture, but, on the contrary, coincide perfectly with the efforts of the federal Secretary of Agriculture in all agricultural lines. * * * Nothing is so conducive * * * to promote normal relations between producer and consumer as a regular supply of products in accordance with a normal demand for same. * * *

"In the last analysis this controversy turns upon a question of public policy." One judge dissented and two judges concurred in the judgment only.

[13]*Ibid.*, p. 473.

terms, is a much more difficult question. The Ohio court's opinion was clearly limited to the educational work described and such voluntary decrease in production as might result therefrom. The court said: "The transactions which are forbidden include agreements to restrict production for the sole purpose of enhancing price, stifling competition, or creating a 'corner,' fixing prices at a definite standard, or combining in a manner that has a necessary tendency to oppress * * * the public."[14]

The supreme court of Washington has also expressed the view that public policy has not been changed to the extent of legalizing such contracts. In *Washington Cranberry Growers Ass'n v. Moore,*[15] the court said: "The appellant contends that * * * the output of cranberries (has been) limited. * * * It may be admitted that if this is the effect of the (marketing) contract and the business transacted under it, it would be void and unenforceable." However, the court found: "There is nothing in the contract or the operation under it that limits the production" of cranberries, and upheld the marketing contract.

An association operating under the Colorado Marketing Act of 1923 inserted a covenant in the contracts with its members whereby it claimed the members were bound not to grow a given crop if the association should so determine. This provision was held void by the trial court, but was not passed upon by the Colorado supreme court owing to the fact that the case became moot before it reached the appellate court.

Restriction of production is not in express terms mentioned in these acts. Whether a legislature in passing such a Marketing Act attempts to change the public policy of the state to the extent of legalizing the restriction of production of a farm product to enhance or fix prices, is a question of construction for the courts. The state and federal Anti-Trust Laws also are declaratory of public policy. The public policy declared by the Marketing Acts must be harmonized with the public policy declared by the Anti-Trust Laws. Whether a legislature has power to change the public policy to authorize a farmer production strike is a constitutional question.

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[14] *Ibid.*, p. 476.

[15] 117 Wash. 430, 201 Pac. 773, 775.

These statutes have certainly changed the common law to some extent. Consequently, courts may properly invoke the well known rule of statutory construction that statutes in derogation of common law should be strictly construed. On the other hand there is the equally well known rule that remedial statutes should receive a liberal construction. And finally, if a constitutional question is involved, it is a settled rule that courts, if possible, will adopt a construction that will avoid serious constitutional questions. These points will be discussed in the above order.

State Anti-Trust Laws

There can be little doubt but that the exercise of the power to restrict production to raise prices by these associations would violate most any species of state Anti-Trust Laws unless by the Marketing Acts the legislatures have given these associations an immunity guarantee. Contracts which limit or stifle production for such purposes have always been held void and unenforceable both at common law and under the Anti-Trust Laws.[16] In practically all cases attacking these marketing associations and the marketing contracts, the allegation is made that there is a violation of the state Anti-Trust Laws. The typical case is where a farmer member grows a crop and breaches his marketing contract by selling his product to outside parties. Since in none of these cases has it been necessary to pass on the legality of restriction of production to enhance prices, the courts have with practical unanimity decided in favor of the association. The reasoning of some of the courts has been:

"If monopoly results, it is lawful monopoly, and the Legislature has a right to legalize monopolies. * * * If in the course of time operation under the law gives rise to oppressive monopolies, the Legislature may either repeal the law or fence it with further restrictions, as in its opinion public interest may require."[17]

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[16]Santa Clara Val. M. & L. Co. v. Hayes, 76 Cal. 387, 18 Pac. 391, 9 Am. St. Rep. 211; Cravens v. Carter-Crume Co., 92 Fed. 479, 34 C. C. A. 479.

[17]Northern Wisconsin Co-op. Tobacco Pool v. Bekkedal, 182 Wis. 571, 197 N.W. 945. The court, however, suggested that the Marketing and Anti-Trust Acts might be harmonized upon the theory of classification, saying, page 944: "Unless there be something novel about this subject, taking it out of

Other courts have avoided passing upon whether the Marketing Act repeals the state Anti-Trust Laws. For example, the supreme court of Iowa states that the contention that the association violated the state Anti-Trust Laws may be answered in two ways: "In the first place (the Marketing Act) * * * was enacted subsequent to (the Anti-Trust Statute) * * * If the later act is repugnant to the prior statute and the two are wholly irreconcilable, then the prior must * * * yield to the later statute * * * It is a well established rule that * * * a former enactment to which it (the Marketing Act) is repugnant will be deemed to have been repealed by implication. * * * In the next place, a mere selling agency is not, per se, a monopoly. * * * The result must be the same in either case; that is, the (Marketing Act) * * * will be followed. We therefore find it unnecessary to pass upon these questions."[18]

The Colorado supreme court made a similar answer, saying that the Marketing Act, being the later act, controls the earlier Anti-Trust Law.[19]

However, in those cases where an association is engaged in interstate commerce, it is frequently charged with a violation of both the state and federal Anti-Trust Laws. The question there can not be met by saying the later Marketing Act controls, and the courts in these cases have given more careful consideration to the problem. Such cases give the Marketing Act a construction that will permit the Marketing Act and the Anti-Trust Statutes, both state and federal, to exist and function side by side.[20] They hold that a co-operative association engaged in marketing the agricultural pro-

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the general rule, the Legislature may classify such agreements, condemning some and authorizing others, if there are reasonable and proper economic, political, and social reasons for making the classification."

[18]Clear Lake Co-op. Live Stock Shippers' Ass'n v. Weir (Iowa 1925) 206 N.W. 297, 300.

[19]Rifle Potato Growers' Co-op. Ass'n v. Smith (Colo. 1925), 240 Pac. 937, 939.

[20]Dark Tobacco Growers' Co-op. Ass'n v. Dunn, 150 Tenn. 614, 266 S.W. 308; Liberty Warehouse Co. v. Burley Tobacco Growers' Co-op. Ass'n (Ky. 1925), 271 S.W. 695; Potter v. Dark Tobacco Growers Co-op. Ass'n, 201 Ky. 441, 257 S.W. 33; Tobacco Growers Co-op. Ass'n v. Jones, *supra;* Louisiana Farm Bureau Cotton Growers' Co-op. Ass'n v. Clark (La. 1926), 107 So. 115; List v. Burley Tobacco Growers' Co-op. Ass'n *supra.*

ducts of its members is not, *per se,* a monopoly or in restraint of trade. For the legislature to declare it such is a reasonable classification, and whatever restraint of trade, if any, ordinarily results from this collective marketing is a reasonable restraint of trade and not obnoxious to the Anti-Trust Laws. This classification necessitates a slight modification in the state Anti-Trust Laws, but beyond this the agricultural associations are answerable to the Anti-Trust Laws.

The analysis by the supreme court of Tennessee is typical of these views. The court held that the "Act did not authorize a trust or combination; but rather negatived any such idea," saying: "the purpose (of the Marketing Act) is to reduce rather than increase the price paid by the consumer, and thereby create a demand for larger quantities of farm products. The object sought is an increased return to the producer by eliminating speculation and waste, obviating dumping, reducing freight rates, marketing in an orderly and economic manner, making the distribution between producer and consumer as direct as can be efficiently done, studying marketing problems from the standpoint of the consumer, and creating new markets. * * * The policy of the state as expressed by the legislature, is found in section 5 of said act, as follows: * * * 'that the public interest urgently needs to prevent the migration from the farm to the city in order to keep up farm production and to preserve the agricultural supply of the nation.' * * * In our opinion, the classification of farmers into co-operative associations for the purposes set forth * * * is reasonable."[21]

According to the North Carolina supreme court, the Marketing Act of that state "does not empower, those who produce the raw material to create a monopoly in themselves * * * and the courts will intervene to prevent it becoming a monopoly."[22] "The act * * * does not contemplate any monopoly to corner the market," in the opinion of the supreme court of Louisiana.[23] A similar view is

[21]Dark Tobacco Growers' Co-op. Ass'n v. Dunn, *supra.*

[22]Tobacco Growers Co-op. Ass'n v. Jones, *supra,* 33 A. L. R. 238-239.

[23]Louisiana Farm Bureau Cotton Growers Co-op. Ass'n v. Clark, *supra.*

expressed by the Washington supreme court in a dictum covering restriction of production.[24]

When the association is merely engaged in marketing the product of its members after the crops have been produced, a court can properly declare the association is not violating the state Anti-Trust Laws and harmonize its decision with such laws either upon the theory that the mere existence of the association, so engaged, is not, *per se,* a violation of the state Anti-Trust Laws even without the Marketing Act; or, if so, then the Marketing Act has modified the Anti-Trust Laws to that extent and the classification is reasonable, and whatever restraint of trade exists is a reasonable restraint of trade. But when the association attempts to limit production to enhance or fix prices, and claims immunity under the Marketing Act, a severe strain is put upon the definition of a reasonable classication. Whether such a construction can be placed upon a Marketing Act without entirely repealing the state Anti-Trust Statutes is a constitutional question, both state and federal, and will be discussed later. However, if we look to the history of the legislation by Congress and of the State Marketing Acts, little foundation can be found for the contention of some of these associations that they have power to limit production with impunity. Those sections of the Marketing Acts declaring that no association shall be deemed a conspiracy or a combination in restraint of trade or an illegal monopoly are undoubtedly all descendants of the Clayton Amendment to the Sherman Anti-Trust Act. They seem to have been inserted to clarify a disputed point of law—namely, whether the mere existence and operation of a farmers' organization for cooperative marketing was, *per se,* a violation of the Anti-Trust Laws. A number of indictments against them under the Anti-Trust Laws already had been dismissed prior to the Marketing Acts. The clarification provision was scarcely intended to be revolutionary and should not be extended by the courts to grant immunity to a

[24]Washington Cranberry Growers Ass'n v. Moore, *supra;* "The appellant contends that a monopoly is created, trade restrained, the output of cranberries limited, and prices are controlled. It may be admitted that if this is the effect of the contract and the business transacted under it, it would be void and unenforceable."

farmers' combination to restrict or stifle the production of products however effective such a power might be to enhance prices and bring the purchasers to terms.

Federal Anti-Trust Laws

In 1914, a number of years prior to the state Marketing Acts, Congress passed the Clayton Act, section 6 of which is almost identical with those sections of the state Marketing Acts under which the agricultural associations claim immunity from the state Anti-Trust Laws:

"Nothing contained in the anti-trust laws shall be construed to forbid the existence and operation of labor, agricultural or horticultural associations, instituted for purposes of mutual self-help * * * 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 anti-trust laws."[25]

As above stated, this section is undoubtedly the parent of those similar sections in the state Marketing Acts. The Supreme Court of the United States has held that this language cannot be taken as a cloak for an illegal combination in restraint of trade as defined in the Anti-Trust Laws in *Duplex Printing Press Co. v. Deering.*[26] A suit in equity was brought against members of a labor union during a strike to enjoin an alleged violation of the Anti-Trust Statutes. The labor union claimed immunity under section 6 of the Clayton Act. In ordering the injunction to be granted, the Court, through Mr. Justice Pitney, said:

"As to Sec. 6, it seems to us its principal importance in this discussion is for what it does *not* authorize, and for the limit it sets to the immunity conferred. The section assumes the normal objects of a labor organization to be legitimate, and declares that nothing in the Anti-Trust Laws shall be construed to forbid the existence and operation of such organizations, or to forbid their members from

[25]Act of Congress Oct. 15, 1914, C. 323, 38 Stat. 730, sec. 6.
[26]254 U. S. 443, 65 L. ed. 349, 358, three justices dissenting.

lawfully carrying out their *legitimate* objects; and that such an organization shall not be held in itself—merely because of its existence and operation—to be an illegal combination or conspiracy in restraint of trade. But there is nothing in the section to exempt such an organization or its members from accountability where it or they depart from its normal and legitimate objects, and engage in an actual combination or conspiracy in restraint of trade. And by no fair or permissible construction can it be taken as authorizing any activity otherwise unlawful, or enabling a normally lawful organization to become a cloak for an illegal combination or conspiracy in restraint of trade, as defined by the Anti-Trust Laws."

Eight years after the Clayton Act, Congress passed the so-called Capper-Volstead Act,[27] a Marketing Act authorizing farmers to "act together in associations in collectively processing, preparing for market, handling and marketing in interstate commerce, such products of persons so engaged." The act provided for procedure through the Secretary of Agriculture and the federal courts for enjoining an association in the event it monopolizes or restrains trade in interstate or foreign commerce. A co-operative marketing measure passed by the Sixty-ninth Congress was approved by the President last July. This act created a new division in the Department of Agriculture to handle co-operative marketing problems.

These acts, in conjunction with the Clayton Act as construed by the United States Supreme Court in the *Duplex* case, *supra,* permit the effective functioning in interstate commerce of farmers' Marketing Acts and labor unions' laws on the one hand, and the Anti-Trust Statutes on the other. State courts have the same problems in construing the state Marketing Acts and necessarily must follow and have followed the above construction of the Supreme Court of the United States where the association is engaged in interstate or foreign commerce.[28] While the question has not been passed upon by the federal courts, it would seem that an association engaged in interstate commerce could not exercise the power to restrict or stifle production of a given farm product for the purpose of enhancing

[27]Act of Congress Feb. 18, 1922, C. 57, U. S. Comp. St. Ann. Supp. 1923, §§8716½, 8716½a.

[28]See cases cited n. 20, *supra.*

prices. The dicta in the state court decisions which discuss this point are a pretty definite warning that it cannot be done.

Constitutionality

The constitutionality of these Marketing Acts has been upheld by the courts of last resort in at least sixteen states of the Union.[29] Restriction of production was involved in only one of these cases. In that case the Ohio supreme court properly held that such incidental and voluntary restriction of production as may result from educational bulletins on crop rotation and market reports and forecasts does not violate the 14th Amendment.[30] In none of these cases did the association attempt to restrict production by a covenant to that effect in the marketing contracts or by the by-laws of the association which became part of the member's agreement. The question of whether a state legislature has constitutional power to legalize such contracts is still open in the courts.

If included among the powers granted to marketing associations is the power to restrict production on farms for the purpose of enhancing or fixing prices, then, unless unconstitutional, the courts must lend their aid to these associations during a production strike and enforce by injunction the marketing contracts which permit the association to prevent its farmer members from growing or producing a given crop. The question then arises whether such interference with the farmer's liberty, with his right to use his land for lawful purposes, is violative of the 14th Amendment to the Constitution of the United States.

The right of a man to farm his land, to plant his soil in those crops to which it is best suited, is clearly one of those fundamental constitutional rights guaranteed by the 14th Amendment. Any direct interference with a farmer's liberty in this respect, either by a legislature or by a creation of a legislature such as a marketing association would be unconstitutional.

The Supreme Court of the United States in enjoining the enforcement of the Arizona Anti-Alien Law on the ground that it

[29]See List v. Burley Tobacco Growers' Co-op. Ass'n, *supra* and cases cited 151 N.E. 480.

[30]List v. Burley Tobacco Growers' Co-op. Ass'n, *supra*.

was in conflict with the 14th Amendment said, through Mr. Justice Hughes: "It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the Amendment to secure."[31]

In *Meyer v. Nebraska,* the Supreme Court said: "Without doubt it (the liberty thus guaranteed) denotes not mere freedom from bodily restraint, but also the right of the individual * * * to engage in any of the common occupations of life, * * * and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."[32]

Neither a legislature nor an association can directly interfere with the farmer's constitutional right to plant his soil in crops. The next question is whether a legislature can authorize an association to contract these rights away from its farmer members.

It is well known that within certain limits as to time and place and conditions contracts to refrain from doing business or from entering or carrying on an occupation have been upheld by the courts; for example, restrictive covenants accompanying the sale of the good will of a business or accompanying the promisor's entry into an apprenticeship arrangement.[33]

On the other hand, the validity of a contract frequently is determined by whether or not it violates the constitutional rights of one of the parties. For example, if a statute authorized a contract of slavery, the contract of A to become B's slave would not be valid. The fact that A entered into such a contract voluntarily and the contract had legislative sanction would not make it legal. There are certain rights, although apparently of a personal nature, which, as the courts have said, "No man can barter away." There are certain rights, primarily individual rights, but secondarily social rights, and these the individual person may not do away with. While a marketing contract not to grow a crop is somewhere between the above examples of the apprenticeship contracts and con-

[31]Truax v. Raich, 239 U. S. 33, 60 L. Ed. 131, 135.

[32]262 U. S. 390, 67 L. Ed. 1042, 1045.

[33]Kales, Albert M., "Contracts to Refrain from Doing Business or from Entering or Carrying on an Occupation," 31 *Harv. L. Rev.* 193-209 (Dec. 1917).

tracts for slavery, it would seem to fall in the latter class. Every member of society is interested in having the soil tilled to produce the necessities of life, and a farmer's right to till his land would seem one of those fundamental constitutional rights which he cannot barter away in such fashion even with legislative sanction.

The Oregon supreme court touched this constitutional point by a dictum, saying: "He (the farmer member) probably could not be compelled * * * to grow loganberries, even if he had obligated himself to do so, because, in the language of Justice Harlan: 'It would be an invasion of one's natural liberty to compel him to work for or remain in the personal service of another. One who is placed under such a constraint is in a condition * * * which the supreme law of the land declares shall not exist.' "[34]

If the 14th Amendment would forbid an association from contracting that its farmer member shall grow a given crop, a contract not to plant or grow such a crop would violate the same constitutional right; namely, the member's right to plant his soil as he sees fit.

In 1876, the Supreme Court, through Mr. Chief Justice Waite, speaking of that part of the 14th Amendment which provides that no state shall "deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the law" said: "While this provision of the Amendment is new in the Constitution of the United States * * * it is an old principle of civilized government. It is found in Magna Carta, and, in substance if not in form, in nearly or quite all the constitutions that have been from time to time adopted by the several states of the Union. * * * Looking then to the common law, from whence came the right which the Constitution protects, we find" etc.[35]

For centuries at common law contracts not to engage in any of the common occupations of life, as in these marketing contracts where the promisor was already engaged in it and the promisee did

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[34]Oregon Growers' Co-op. Ass'n v. Lentz et al, 107 Ore. 561, 212 Pac. 811, 818, subquote from Arthur v. Oakes, 63 Fed. 310, 11 C. C. A. 209, 25 L. R. A. 414.

[35]Munn v. Illinois, 94 U. S. 113, 24 L. Ed. 77, 83-84.

not intend to be, have been held void because they disregarded the freedom of the individual, lost him his livelihood, and the subsistence of his family, deprived the public of a useful member, prevented production and tended toward monopoly.[36]

The labor union man who goes back to work to support his family during a strike, in violation of the union's by-laws and orders to which he has agreed, is clearly within his constitutional rights. No court has ever questioned his right to return to any work he chooses and it has been enforced by injunction.[37] The New Jersey court in recognizing the labor union members' constitutional rights said: "The common law has long recognized as a part of the boasted liberty of the citizen the right of every man to freely engage in such lawful business or occupation as he himself may choose, free from hindrance or obstruction by his fellow men. * * * This right is declared by our constitution to be unalienable."[38]

The Supreme Court of the United States has declared upon a number of occasions that this is an inalienable right. In *Butchers Union, etc., Co. v. Crescent City, etc., Co.*,[39] three justices in a concurring opinion say: "The right to follow any of the common occupations of life is an inalienable right. * * * To deny it * * * is to invade one of the fundamental privileges of a citizen, contrary not only to the common right, but * * * to the express words of the Constitution. It is what no legislature has a right to do, and no contract to that end can be binding. * * *"

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[36]*Williston, Contracts,* sec. 1652, *"Agreements unduly restricting personal liberty are invalid,"* 3:2911-2912: "One of the prominent reasons for holding contracts invalid which restrict the right of a party to carry on trade or business, is the hardship upon him, and though in most cases this reason is combined with others * * * there is a broad public policy forbidding a man from contracting himself into slavery or unduly restricting his personal liberty." Citing in footnote 70: "'There are certain fundamental rights which no man can barter away, such, for instance, as his right to life and personal freedom.' Pope Manufacturing Co. v. Cormully, 144 U. S. 224, 234, 36 L. Ed. 414, 12 Sup. Ct. 632."

[37]Jetton-Dekle Lumber Co. v. Mather, *supra,* 43 So. 592: "Each member has a perfect right to withdraw from the union, to seek to get back his former employment, and to be protected by the injunction still in force."

[38]Brennon v. United Hatters of North America, et al., 73 N. J. L. 729, 65 Atl. 165, 118 A. S. R. 727, 9 L. R. A. (N. S.) 254, 9 Ann. Cas. 698, 703.

[39]111 U. S. 746, 28 L. Ed. 585, 589.

Similar language was used in a concurring opinion by Mr. Justice Field. Thirteen years later, in *Allgeyer v. Louisiana,*[40] the court, in reviewing the above case, said, through Mr. Justice Peckham:

"It was said by Mr. Justice Bradley * * * in that case, that 'the right to follow any of the common occupations of life is an inalienable right.' It was formulated as such under the phrase 'pursuit of happiness' in the Declaration of Independence, which commenced with the fundamental proposition that 'all men * * * are endowed by their Creator with certain inalienable rights; and among these are life, liberty and the pursuit of happiness.' Again * * * the learned justice says: 'I hold that the liberty of pursuit—the right to follow any of the ordinary callings of life—is one of the privileges of a citizen of the United States.' * * * these remarks * * * well describe the rights which are covered by the word 'liberty' as contained in the 14th Amendment."

Since these decisions, the tendency of the Supreme Court has probably been to enlarge the definition of the word "liberty," and the scope of the rights which are protected thereby.[41] It certainly seems broad enough to protect the farmer in his right to plant his soil in crops and to hold violative of the constitutional guarantee a marketing contract which seeks to take away that right even though done with legislative sanction.

The contention of some of the marketing associations that they are granted the power to restrict production involves another very serious constitutional difficulty. The 14th Amendment provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." The question of how far a state legislature can go in granting these associations immunity under the Anti-Trust Laws is of vital importance to the commonwealths because such legislation whenever it goes beyond the pale of reasonable classification will repeal all the state Anti-Trust Laws by virtue of

[40]165 U. S. 578, 41 L. Ed. 832, 836.

[41]Truax v. Raich, *supra;* Meyer v. Nebraska, *supra;* Pierce v. Society of the Sisters of the Holy Name of Jesus and Mary, 268 U. S. 510, 69 L. Ed. 1070; Warren, Charles, "The New 'Liberty' under the Fourteenth Amendment;" 39 *Harv. L. Rev.* 431 (Feb. 1926).

the "equal protection" clause and make monopolies to restrict production an open field for all.

In 1901, the United States Supreme Court in *Connolly v. Union Sewer Pipe Company*[42] held unconstitutional an Illinois Anti-Trust Statute, the 9th section of which provided: "The provisions of this Act shall not apply to agricultural products or livestock in the hands of the producer or raiser." The question was whether the Sewer Pipe Company, a prohibited combination and monopoly under the act, was immune from the act because of the "equal protection" clause. In holding the entire Illinois Act void, the court said:

"The 14th Amendment * * * undoubtedly intended * * * that no impediments should be interposed to the pursuits of anyone except as applied to the same pursuits of others under like circumstances * * * the equal protection of the laws is a pledge of the protection of equal laws. * * *

"The difficulty is not met by saying, generally speaking, the state when enacting laws may * * * make a classification of persons * * * in order to subserve public objects. For this court has held that classification 'must always rest upon some difference which bears a reasonable and just relation to the Act in respect to which the classification is proposed.' * * * But arbitrary selection can never be justified by calling it classification. The equality protection demanded by the 14th Amendment forbids this. * * *

"In prescribing regulations for the conduct of trade it cannot divide those engaged in trade into classes and make criminals of one class if they do certain forbidden things, while allowing another and more favored class * * * to do the same things with impunity."

While in co-operative marketing cases a few state courts[43] have by dictum criticized the above decision, it has never been overruled by the United States Supreme Court and is still in good standing. The case was very recently followed by the United States district court for the district of Colorado[44] in holding that the Colorado

[42]184 U. S. 540, 22 S. Ct. 431, 46 L. Ed. 679, 689-691; Mr. Justice McKenna dissenting.

[43]Northern Wisconsin Co-op. Tobacco Pool v. Bekkedal, *supra*, 197 N.W. 944.

[44]Beatrice Creamery Co. v. Cline, 9 F. (2d) 176, 179-180.

Co-operative Marketing Act as construed by the Colorado supreme court annulled the Anti-Trust Statutes of that state in their entirety. The case was a suit in equity by the Beatrice Creamery Company, *et al* against Cline, as district attorney for the City and County of Denver, to enjoin the enforcement of the Colorado Anti-Trust Act. In granting a decree for complainants, the court said:

"We now come to consider another ground on which the (Colorado Anti-Trust) act is said to be invalid. On March 30, 1923, what is known as 'the Co-operative Marketing Act,' was passed by the Colorado General Assembly. * * * In a decision by the State Supreme Court (Rifle Potato Growers' Co-operative Assn. v. Smith, 240 P. 937) rendered on October 19, 1925 * * * this Act was sustained. That court in answering the contention that such an association was in restraint of trade * * * under the Colorado Anti-Trust Law said: * * * 'the Act of 1923 (the Marketing Act) being the later Act, controls the earlier (Anti-Trust Act).'"

Then after an extended review of *Connolly v. Union Sewer Pipe Co., supra,* the federal district court said: "We reach a like conclusion as to the Colorado Anti-Trust Act."

If the Colorado supreme court in *Rifle Potato Growers' Co-operative Assn. v. Smith, supra,* meant that the Colorado Marketing Act legalized all monopolies and contracts in restraint of trade by farm co-operative associations, then the decision of the federal district court is correct. If, however, the Colorado court merely meant that the Marketing Act had only slightly modified the Anti-Trust Act to the extent of declaring that the mere existence of a co-operative association engaged in marketing the products of its farmer members was not, *per se,* a monopoly or in restraint of trade, then it is submitted the case of *Connolly v. Union Sewer Pipe Company, supra,* is distinguishable.

In those state Co-operative Marketing Act cases where no restriction of production is involved, the correct view is that of the supreme court of Tennessee and a number of other states holding that the mere existence of a farmers' association, as such, lawfully engaged in co-operative marketing after crops were produced, is not a monopoly as defined by the state and national Anti-Trust Laws, and, therefore, does not violate the 14th Amendment as denying

the equal protection of the laws to non-farmers. This construction distinguishes the case of *Connolly v. Union Sewer Pipe Company, supra,* and leaves the Anti-Trust Laws in force and effect as to farmers as well as to non-agricultural groups.

In *Dark Tobacco Growers' Co-op. Ass'n v. Dunn, supra,* the Tennessee court said: "It is further insisted that the Bingham (Marketing) Act violates the equal protection clause of the Fourteenth Amendment * * * and counsel cite * * * Connolly v. Union Sewer Pipe Co. * * in which the Supreme Court held that the Illinois Anti-Trust Statute violated said provision of the Constitution because it excepted from the provisions of the act 'agricultural products * * while in the hands of the producer or raiser.' * * * Certainly no reasonable justification could be offered in support of a classification of that nature. If it is wrong for a merchant to monopolize a particular business, it is likewise wrong for a farmer to do so. The principle is the same in both cases. If the act here involved has for its object * * * the creation of a monopoly, then it violates the equal protection clause of the Constitution and is invalid. * * * the Bingham Act did not authorize a trust or combination, but rather negatived any such idea."

Then, after reviewing the purposes of the Bingham Marketing Act and stating that the classification of farmers into co-operative associations for those purposes was reasonable, the court concluded: "In our opinion, Connolly v. Union Sewer Pipe Co., supra, is not in point nor in conflict with the conclusions which we have reached."

Such a construction would permit the Marketing Acts and the Anti-Trust Acts to exist and function side by side. However, it could not permit an association to restrict or stifle production of a farm product for the purpose of price fixing, for to do so would necessarily repeal the Anti-Trust Laws by virtue of the equal protection clause.

Since the language of the 14th Amendment is found in substance, if not in form, in nearly all the state constitutions, the above discussion of the federal constitutional questions involved is equally applicable to such state constitutions.

In addition, a number of the states in their constitutions have expressly declared a public policy forbidding monopolies. Cer-

tainly, in those states, the state legislatures could not by enacting Marketing Acts change the public policy of those states so as to legalize a monopoly by farmers.[45]

Rules of Statutory Construction

Up to the present time, no state Co-operative Marketing Act expressly grants an association the power to restrict production. For the courts to upheld the exercise of such power, they must do so by implication from very general language of the acts. Aside from constitutional questions, the courts' problem is one of construction.

Prior to the Marketing Acts, farm marketing combinations were frequently declared illegal at common law even where no restriction of production was involved.[46] Whatever changes the Marketing Acts made in this respect were, therefore, made in derogation of the common law. "Statutes in derogation of common law are to be strictly construed * * * 'where the general system of laws is departed from, the legislative intention must be expressed with irresistible clearness to induce a court of justice to suppose a design to effect such objects.'—Chief Justice Marshall in U. S. v. Fisher, 2 Cranch, 389."[47]

Where an association claims power to restrict production, it is not only proper but would seem to be the duty of a court to invoke the above well known rule against the association. For, in the language of the United States Supreme Court: "Conceding it to be within the power of the legislature to make this alteration in the law, if it saw fit to do so, nevertheless such * * * far reaching changes should only be wrought by language so clear and plain as to be unmistakable evidence of legislative intention."[48]

On the other hand, the associations have urged the equally elementary rule that remedial statutes should receive a liberal con-

[45]Tobacco Growers' Co-op. Ass'n v. Jones, *supra;* Louisiana Farm Bureau Cotton Growers' Co-op. Ass'n v. Clark, *supra.*

[46]Burns v. Wray Farmers' Grain Company, 65 Colo. 425, 176 Pac. 487; Reeves v. The Decorah Farmers' Co-operative Society, 160 Iowa 194, 140 N.W. 844, 44 L. R. A. (N. S.) 1104.

[47]Griswold v. Griswold, 23 Colo. App. 365, 370, 129 Pac. 360.

[48]Thompson v. Thompson, 218 U. S. 611, 51 L. Ed. 1180, 1182-3.

struction. Some support for this view is found in the language of a recent Arkansas case where the question was not restriction of production but the power of a co-operative association to make a sales contract for the future delivery of cotton. The court said: "Any other interpretation would be a very restricted one and would not evince the liberality with which we should view remedial operations of this kind, which are wholly for the benefit of the members of the association."[49]

However, this language is not of much value here as the court further said: "It calls for no execessive degree of liberality in the construction of the statute. * * * There is no other way it seems to us to interpret the language."

Owing to the constitutional difficulties involved in permitting farm associations to restrict production, perhaps the most important rule is that a statute, if possible, shall be construed so as to avoid grave constitutional questions. This rule was recently affirmed by Mr. Justice Van Devanter in *Panama Railroad Co. v. Johnson,* as follows: "As this Court often has held, 'a statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts on that score.' "[50]

Mr. Justice White has explained the rule as follows: "The rule must plainly mean that where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter."[51]

It seems quite obvious that serious constitutional questions arise if these Marketing Acts be so construed as to authorize the restriction of production to enhance or fix prices and an interference with the farm owners right to grow a given crop on his land. On the other hand, if these acts be so construed as to limit the powers of the associations to co-operative marketing after crops are produced, these grave constitutional questions do not arise.

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[49]Arkansas Cotton Growers' Co-op. Ass'n v. Brown (Ark. 1925), 270 S.W. 946, 947.

[50]264 U. S. 375, 390.

[51]United States ex rel Atty. Gen. v. Delaware & H. Co., 213 U. S. 366, 407, 53 L. Ed. 836, 849.

Conclusion

There are two kinds of restriction of production. The first may result from efforts of the associations to stablize production. One of the most important and most difficult problems of agriculture is fitting production to the market. In the first place, market demands are always changing. Stabilizing production in agriculture is also most difficult because the greatest single factor in determining production in any one year is the uncontrollable element of weather. Some have attributed the post-war plight of the farmers to overproduction. The Secretary of Agriculture in a recent public address declared: "Fluctuations in prices are due to economic surpluses more than to any other single cause." While a reasonable surplus, including a necessary carryover from one season to the next, is desirable, there should not be overproduction beyond the domestic and world demand. And educational work by co-operative marketing associations calculated to bring about a normal supply of products in accordance with a normal demand for the same is commendable, legal and highly desirable. Their efforts at stabilization of production to prevent the recurrence of successive periods of surplus and shortage should be encouraged by the courts as has been done by the Ohio supreme court. How much can be accomplished along these lies is an economic problem rather than a legal problem.

However, the second variety, namely restriction of production by these great farm associations for the purpose of enhancing or fixing prices, cornering the market, or bringing the purchasers to terms by a threatened or actual production strike, is a different matter and involves many legal questions. Up to the present time, restriction of production is not mentioned in the Co-operative Marketing Acts although the associations are given very broad powers and immunities in general language. Whether the state legislatures in passing these acts have changed the public policy of the various states to the extent of legalizing such restriction of production is a question of construction for the courts. In construing these acts, the courts should leave the associations ample powers for co-operative marketing and encourage any reasonable effort by these groups to bring the great agricultural industry up to the high degree of efficiency evidenced in the other great industries of the nation.

But such construction must also preserve the farmer member's inalienable constitutional right to plant his soil in any crop he sees fit. It must permit the Marketing Acts and the state and national Anti-Trust Acts to exist and function side by side.

To accomplish this, the courts cannot construe the Marketing Acts so as to legalize marketing contracts between an association and its farmer members where those contracts contain covenants to grow or not to grow a given crop according as to the association shall determine. To enforce such a marketing contract would deny the farmer member his liberty and pursuit of happiness, guaranteed by the 14th Amendment. It would necessarily repeal state Anti-Trust Laws *in toto* and make monopolies to restrict production open to all; and, if the subject matter involved interstate commerce, the contract would run afoul of the federal Anti-Trust Laws. It would also bestow upon such an association revolutionary powers no court has ever bestowed upon a labor union during a strike. While such a contract has not yet been squarely passed upon by any of the appellate courts, many of the most carefully considered cases have expressed the view that such a contract is void, and it has been so held by at least one *nisi prius* court.

Whether the farmer members of these giant farm associations could voluntarily stage a producers' strike after the fashion of a labor union strike is another question. It would seem that a striking farmer could no more be compelled to grow a given crop against his will than could a striking union man be compelled to labor in some industry against his will. However, food is the first of human needs and a successful farmers' strike stopping production of a necessity of life would affect the public interest much more seriously than an industrial strike.

While in construing the Marketing Acts the wisdom of the legislation is not a judicial question, nevertheless the economic problems involved do and should play an important part in the decisions. Agriculture is the basic industry of a great majority of the states. The great agrarian population numbers about six millions according to the last census, and, although scattered, has formed colossal marketing associations covering great sections of the nation. This rapid beginning promises rather startling increases in future size

and economic power. Society is interested in seeing the farmer get a fair return for his labor; but the welfare of society demands that, while accomplishing this, the soil must be tilled to produce the necessities of life and that no class, capital, labor, or farmers, shall be given autocratic powers.