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## CAN THE COURTS AID COOPERATIVE MARKETING?†

By CARL F. ARNOLD\*

A COLOSSAL pyramid is rising in the traditional desert of economic life on the American Farm. It is cooperative marketing. At the base of this pyramid are more than a million *individual* farmers. These are organized into little community "locals," formed to market one of many agricultural commodities. Still higher, founded upon these, are state-wide associations; and they in turn support a National Corporation which controls the whole American marketing system of one agricultural product. Nearly every conceivable farm product is included in one or another of the associations. At the top, supervising and coordinating, is the Federal Farm Board.

Cooperative marketing associations have many difficult problems to solve in finance and marketing methods. More difficult still, however, is the problem of gaining and retaining the largest possible number of producer members.<sup>1</sup> Such a study necessarily should cover many fields: from psychology through marketing economics to law. Nevertheless, the part which the courts have been called on to play in this development is a large one. The function of the courts with reference to this problem is the subject of this article. To what extent can the machinery of the courts be used to aid in solving the membership problem? Where

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†This paper is one of a contemplated series of three papers dealing with cooperative marketing problems. The initial work was done at the suggestion of Professor Walter F. Dodd as graduate work in Yale Law School. The writer wishes to express his sincere appreciation of the valuable criticism and the great amount of time given the paper by Professor Dodd, both before and after the completion of the work at Yale.

The other papers referred to will deal with the light thrown on the general problems of "liquidated damages" and "specific performance" by cooperative marketing experience. The facts presented in this paper will constitute a considerable part of the data on which the other papers will be constructed.

<sup>1</sup>On this subject in general see Nourse, *The Legal Status of Agricultural Co-operation*, chapters 8, 9, & 10; *Institute of American Co-operation*, 1925, Vol. 1, pages 213-379; *Institute of American Co-operation*, 1927, Vol. 2, pp. 97-143; *Institute of American Co-operation*, Vol. 1, pp. 231-349.

does the usefulness of the court's machinery end? What other devices may be used in solving this problem?

The writer starts by assuming that cooperative marketing associations are desirable and that all that can be done to further their development should be done.<sup>2</sup> He intends, however, to analyze carefully the results obtained through the measures already taken to solve the membership problem, and to estimate the possibilities in the future use of such measures without being too sanguine of what they may accomplish.

This is the second great attempt to substitute huge cooperative marketing associations for our present system of marketing farm products. The first great effort covered the years 1918-1924. It is often called the Sapiro movement. That development reached its height in about the year 1922 and then suffered a sharp decline. Many of the associations organized in those years, however, continued in business. These associations have utilized much that was learned in the preceding years and have learned much from their own experience. A study of their practices and the results obtained should be useful.

#### THE PART PLAYED BY THE COURTS FROM 1918-1924—THE LONGTERM CONTRACT

A flood of statutes, litigation and expansion of many of the principles of sales, corporations and equity jurisdiction accompanied the development of 1918-1924. The use of contracts between the associations and the members was one of the principal features of this program.

In 1923 the Texas court of civil appeals<sup>3</sup> refused the remedy of specific performance of contracts between the Texas Farm

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<sup>2</sup>The field of cooperative marketing is usually divided into two large divisions: associations which operate on a commodity basis and those which do not. Of course many associations cannot be classified under either head. The movement here referred to and which is the subject of this paper is often called commodity marketing. Its chief exponent was Aaron Sapiro and its early development was often identified with his name. Its major features were: (a) control of a large enough percentage of the total production of a single crop to give the association a dominant position in the market with a view to directly influencing prices; (b) a strong tie-up between the member and association maintained by legal enforcement of member contracts. The very large, if not larger, field of cooperatives which confine themselves to the elimination of certain elements of marketing expense or those which depend for member patronage purely on the service they give, enter only incidentally into this paper.

<sup>3</sup>Texas Farm Bureau Ass'n v. Stovall, (Tex. Civ. App. 1923) 248 S. W. 1109, reversed in (1923) 113 Tex. 273, 253 S. W. 1101.

Bureau Cotton Association and its farmer members. This and a few other decisions of like character provoked a storm of protest and alarm in the newspapers which echoed even in the more conservative field of the law journal. The following is an example of the reaction:

"The specific enforceability of the contract, upon which the life of the Association depends, was denied in March, 1923, by the Texas court of civil appeals. . . . The existence of substantial mutuality of performance, the great damage to other members to result if enforcement is refused, and the blow to the economic life of the farming states to be struck by the failure of the cooperative marketing system should weigh the scales conclusively in favor of enforcement."<sup>4</sup>

This statement, as do many similar statements<sup>5</sup> in the law reviews and court decisions,<sup>6</sup> assumes that this type of contract and its enforceability is not only useful but even essential to successful cooperative marketing. The first purpose of this article is to examine the truth of this assumption in the light of actual experience.

A short statement of the nature of the cooperative marketing associations of the period 1918-1924 and of these contracts is necessary. These associations were to be organized and controlled by the producers themselves. Through them the producer hoped to take over the concentration, distribution, sale and to some extent the price determination of one or more agricultural commodities.<sup>7</sup> Such a purpose could not be accomplished in a day. It

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<sup>4</sup>(1923) 37 Harv. L. Rev. 145, 148.

<sup>5</sup>For similar comments, see (1924) 12 Calif. L. Rev. 146; (1922) 10 Calif. L. Rev. 518; (1927) 15 Calif. L. Rev. 261; Arndt, *The Law of Co-operative Marketing Associations*, (1920) 8 Calif. L. Rev. 280, 384, (1920) 9 Calif. L. Rev. 44; Meyer, *The Law of Co-operative Marketing*, (1927) 15 Calif. L. Rev. 85; Wilson, *Co-operative Marketing*, (1928) 14 A. B. A. Jour. 575; *Specific Performance of Co-operative Marketing Agreements*, (1923) 37 Harv. L. Rev. 145-8; Henderson, *Co-operative Marketing Associations*, (1923) 23 Col. L. Rev. 96-97; Keegan, *Power of Agricultural Co-operative Associations to Limit Production*, (1928) 26 Mich. L. Rev. 648, 650; (1928) 38 Yale L. J. 259-61, 821; Hamilton, *Judicial Tolerance of Farmers' Co-operatives*, (1928) 38 Yale L. J. 936; Sapiro, *Co-operative Marketing*, (1923) 8 Iowa L. B. 193; Ballantine, *Co-operative Marketing Associations*, (1923) 8 MINNESOTA LAW REVIEW 1-27; Nourse, *Legal Status of Agricultural Co-operation* 329.

<sup>6</sup>For example, see *Minnesota Wheat Growers v. Huggins*, (1925) 162 Minn. 471, 203 N. W. 420.

<sup>7</sup>The briefest possible statement of the aims of the movement is here given. Much has been written on the subject. See in particular, Nourse, Sapiro, Ballantine, Meyer, Arndt, cited in note 5; also Erdman, *Possibilities*

was essential that the association be guaranteed, at the outset, a time long enough to demonstrate its possibilities. Class consciousness or a realization of a community of interest might have furnished this guarantee. Unfortunately this was lacking, and only a long campaign of education could bring it into existence. Self interest in the form of a greater return to the farmer for his labor might have sufficed. Such a return, however, could not be counted on in the first years of operation. Even though a greater return was realized, the producer might not appreciate that fact. It is not strange then that the courts were called on to aid in furnishing this guarantee of an adequate trial period. A highly specialized form of contract was devised to make the power of the courts available for this purpose.

This contract was an agreement between the producer members and the association. The producers agreed to deliver their crops to the association, and the association agreed to prepare the commodity for market, market it and return the proceeds to the producer under agreed regulations. These contracts were made irrevocable and covered a period of five to seven years. They included an agreement that a certain sum should be paid as liquidated damages in case of breach of the contract by the producer. The use of injunctions and decrees of specific performance to compel obedience to its terms was expressly authorized. Campaigns were put on in many states which resulted in statutes specifically authorizing all features of the contract.<sup>8</sup> For the sake of brevity this contract will hereafter be called the "*long-term contract*."

Beginning in 1918 cooperative marketing associations were organized in cotton, tobacco, wheat, fruit, poultry products, potatoes, beans, peanuts, pecans, walnuts, cabbages, dairy products

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and Limitations of Cooperative Marketing, 117, *Annals of Amer. Acad. of Pol. Sci.* 227. Many valuable concrete studies of these associations have been made by the Division of Cooperative Marketing, Federal Bureau of Markets (now under the Federal Farm Board) which will be referred to throughout this article.

<sup>8</sup>Alabama, Arizona, Arkansas, California, Colorado, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Louisiana, Maine, Maryland, Mississippi, Montana, Oklahoma, Oregon, Rhode Island, South Carolina, Tennessee, Utah, Virginia, Washington, West Virginia, and Wyoming. Three states allow liquidated damages in "amounts fairly related to the actual damage ordinarily suffered in like cases," New Jersey, New York, and Pennsylvania. Three states omit the enforcement provisions from the statute, Massachusetts, Michigan, Minnesota. Only two states do not have a cooperative statute in some form, Nevada, Vermont.

and many other commodities. Most of these associations aimed at control of fifty to seventy-five percent of the entire production of their particular commodity. Many associations succeeded in signing up that percentage on contracts covering five to seven years. Control was to be maintained by the use of the *longterm* contract. The sums set as liquidated damages were placed so high that payment of them meant ruin to defaulters.<sup>9</sup> Further, if the crop had not been sold to a bona fide purchaser for value, breach by a producer could be prevented by an injunction backed by the threat of imprisonment. Or at the option of the association a decree of specific performance would give physical possession of the crop.

It was feared that even this ironclad contract would not be sufficient. Other legal sanctions were added. One state added the powers of the criminal court and made the breach of the contract a misdemeanor.<sup>10</sup> In many states statutes made the "inducing or attempt to induce a breach of the contract" by a third party a misdemeanor carrying a fine of \$1,000 payable to the association.<sup>11</sup> In addition, a penalty of \$500, also payable to the

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<sup>9</sup>The damages in the tobacco associations were 5c or 6c per lb., or, in one case, 30% of the market value of the crop; in cotton 5c or 10c per lb.; in wheat 25c per bu.; in beans 1c per lb.; in peaches 50% of the market price.

Taking the average yield per acre, the average cost of production and the average gross value at the farm (1924-25) payment of these damages for the five years covered by the contract would mean: to the tobacco growers a net loss of \$456.10 per acre, to the cotton grower \$80.50 per acre, to the wheat grower \$6.60 to \$19.50 per acre. In *Dairymen's League v. Holmes*, (1924) 207 App. Div. 429, 202 N. Y. S. 663 the court found the gross receipts of the defendant to be \$3,300 and the damages \$1200.00. No producer could pay such damages and remain in business.

A comparison with actual expenses of the different cooperatives if they handled the crop through the entire marketing process shows a startling disproportion between the damages and the injury to the co-operative. Tobacco five year damages \$456.20 compared with five year expense on average yield per acre \$62.00; cotton five year damages \$80.50 compared with five year expense \$11.00; wheat five year damages (averaged) \$13.80 per acre, expense \$2.80. In addition to the damages as figured above, the grower was liable by contract for costs, attorney's fees, and reasonable expenses of suit.

Associations which do not seek to hold members by this method but merely seek to provide against financial loss from a breach of the contract use a very different measure of damages. One of the older California Cooperatives, not a part of this movement, the California Fruit Growers, places its damages at about twice the actual cost of handling the crop per bushel instead of eight times as in the case of the tobacco associations, and about 8% of the gross farm value, instead of 30 to 50%.

<sup>10</sup>*Commonwealth v. Ruffit*, (1912) 149 Ky. 300, 148 S. E. 48. This statute, as the date indicates, antedates the movement under discussion.

association was imposed for circulation of false reports about the cooperative.<sup>12</sup> Other loopholes of possible evasion were plugged as tightly as possible. Recording acts gave notice of the contracts to prospective purchasers of the crops.<sup>13</sup> Efforts to escape performance through mortgages, sales of the crop, subleases and crop liens received special attention.<sup>14</sup> If the associations could keep control of more than 50% of the production for five to seven years, independent buyers must meet association terms or go out of business. All the powers of the courts were mobilized to keep control in the association.<sup>15</sup>

This cooperative marketing program required for its success a great change in existing conditions. The change required was both economic and social. The economic change has received the greatest attention, but it would be a mistake to suppose that pecuniary gain through more efficient marketing methods or through control of the price was the only thing in the minds of the leaders of the movement. Almost equally desired was the social and political benefit supposed to follow. In recent years in particular, one sometimes hears the social side of the movement stressed until it becomes an appeal, semi-religious in character, an appeal to the "brotherhood of farmers."<sup>16</sup>

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<sup>11</sup>Kentucky, Acts 1922, ch. 1 sec. 18 (c), upheld in *Liberty Warehouse Co. v. Burley Tobacco Growers*, (1925) 208 Ky, 643, 271 S. W. 695 affirmed (1927) 276 U. S. 71, 48 Sup. Ct. 291, 72 L. Ed. 473. Other states with the same statute are Arkansas, Colorado, Maine, Mississippi, Missouri, North Carolina, Texas, Virginia and Wyoming. Illinois, Indiana, Virginia and West Virginia add a penalty on a warehouse man who aids in the breach of a contract "by accepting his products for sale or for auction or for display for sale" with knowledge of the membership in the association. See Illinois Comp. Stat. 1927, sec. 455 (28).

<sup>12</sup>Upheld in *Reeves Warehouse Corp. v. Commonwealth*, (1925) 141 Va. 194, 126 S. E. 87; *Danville Warehouse Corp. v. Tobacco Growers*, (1925) 143 Va. 741, 129 S. E. 739.

<sup>13</sup>Arizona, Maine, Montana, Oregon, South Carolina, Virginia, Wisconsin, and Illinois. See for example Illinois, Comp. Stat. 1927, ch. 32, sec. 454.

<sup>14</sup>"It shall be conclusively presumed that a landowner or landlord or lessor is able to control the delivery of products produced on his land by tenants or others," Art. 18 (c), Kentucky, Acts 1922, ch. 1. Also California, Colorado, (prima facie "presumed" instead of "conclusively") Georgia, Mississippi, Missouri, New Hampshire, and West Virginia.

<sup>15</sup>With the exception of Oklahoma where the statute was held an impairment of the obligation of contract as applied to contracts made before its passage and two or three isolated decisions, the courts gave their enthusiastic support to the program.

<sup>16</sup>"Seven months ago a call came from the hay growers of Colorado. 'Come and help us. Can you come Sunday?' 'Sure we can.' There were a number of haygrowers, ranchers who needed money. They must have it

In other words, this movement involved both a change in marketing machinery and also a change in the farmer himself. On the one hand cooperative marketing, if it had been successful to the extent hoped for, would have resulted in the elimination of countless "middlemen," buyers and salesmen, processors of many kinds, warehousemen, elevator men, commission merchants, speculators, etc. The cooperative would take over their functions. But in many cases the only change would have been the substitution of a salaried employee in the place of an independent operator. In other cases economy of operation resulting from the elimination of bad practices or from quantity handling would eliminate the necessity for doing some of the work at all. In still other cases needs, new and peculiar to the cooperative structure, would have required new and additional salaried employees. The change in marketing methods involved when one of the staple commodities is considered was so great as properly to be called revolutionary. It was this change and the resulting struggle which chiefly worried the leaders of the movement.

The change in social habits was of no less magnitude and one too little appreciated, then or now. It involved the transformation of most of the business, credit, and social habits of the producer. Not only must he give up his old habits of bartering for his price, selecting the time at which he would sell, naming the terms of payment and the person to whom he would sell, but far more important, he must be willing to take an average price for his grade of product.<sup>17</sup> The old spirit of competition, of rivalry between producers, of pride in the personal product had to go. In addition, a highly independent type of individual had to learn to relinquish possible personal advantages for group prosperity. Further, this man who hitherto had confined most

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immediately, and the hay trade, knowing, was offering them \$9.25 a ton for the native grown hay that costs \$16.00 to produce. On a Sunday afternoon in a church—not politics; it is a religion, the new religion, the brotherhood of man—we organized 99% (one got away but we got him again the next morning) 100% of the hay growers of South Park, and in forty-eight hours that hay advanced \$2.00 per ton." Remarks of director of markets, Colo. Report of Proceedings, Institute of American Cooperation, (1928). See also, How firm a foundation? Wilmarth, (1927) 25 Successful Farmer 5.

<sup>17</sup>This is one of the essential features of the normal cooperative. It is called the "pooling system." It is usually impossible to keep the individual deliveries separate thru the marketing process, and hence the grower takes an average price for his grade of product. See post page 70 for further discussion.



of his attention to production must now educate himself to be a part manager of a huge marketing system.

Of the two changes in conditions, the change in the farmers' habits has proved the most difficult of achievement. The lever by which this change in habits was to be accomplished was the *longterm* contract, or to put it shortly, punishment for failure to change. To what extent was this plan effective?

In this, as perhaps in all investigations of the effect of the law on human conduct, one can hardly hope to reach many definite conclusions. However, in the broader aspects of this problem, some fairly definite statements may be made.

I. *The longterm contract with all of its enforcement features, criminal and civil, was unable to hold any large percentage of the membership until the usefulness of the association had been demonstrated or until a majority of the members themselves were convinced of its failure.* It is obvious that the mere use of the enforcement program could hardly in itself be blamed for a failure of the association. Nevertheless a comparison of the amount of the commodity originally held on contract with the amount actually delivered, prior to the release of the members from their obligations, will indicate to what extent the *longterm* contract was able in itself to hold the membership.

(a) TOBACCO.—Seven tobacco associations were organized. These had a total of 298,000 members.<sup>18</sup> The Burley Association alone had a total of 108,000 members. This association claimed to have control of 75% of the total production of its type of tobacco. It was by far the most successful of the southern associations. It received in 1921, 57% of the total production; in 1922, 72.5%, in 1923, 75.2% and in 1924, 54.8%. In 1925 it released its members from their contracts. Of the 50% signed up by the Tri-State Association, the highest percentage ever delivered was 35.4% in 1922. In 1923 it received 28.5% and in 1924, 22.8%.<sup>19</sup> It is evident that the contract was unable to enforce deliveries under the circumstances. Nor was this failure due to failure on the part of the associations to pursue vigorously their legal remedies. The attorney for the tobacco growers stated that at

<sup>18</sup>U. S. Department of Agriculture Bulletin No. 40, page 61.

<sup>19</sup>Report of the Federal Trade Commission on, The American Tobacco Co. and the Imperial Tobacco Co. 69th Congress 1st Sess. Sen. Doc. No. 34, pages 40-47.

one time he had 10,000 suits pending.<sup>20</sup> This association spent \$138,806 on legal fees and expenses in one year, collecting \$47,000 in liquidated damages.<sup>21</sup> In hardly a single instance did the courts refuse to exercise all the power in their hands to aid in preventing breaches of the contract.<sup>22</sup>

(b) COTTON.—Of the thirteen cotton associations<sup>23</sup> organized during this period, the Staple Cotton Growers reached the highest percentage of actual deliveries in comparison with its original sign-up. In one year it received 49% of the amount contracted to it. The association making the worst showing was the Arkansas Farmers' Union. This association received only 10% of its sign-up. Even in the Staple Cotton Growers only 37% of the members delivered crops each of the four years during which the contract was in force.<sup>24</sup>

(c) WHEAT.—Figures showing the amount of the original sign-up are not generally available in this field. The Colorado Wheat Growers reported actual delivery of 50% of the sign-up. The Montana Wheat Growers, The California Farm Bureau Exchange and the Minnesota Wheat Growers seem to have had about the same experience.<sup>25</sup> In other cases we are forced to rely on the less satisfactory evidence presented by the rise or fall in actual deliveries. Applying this test we find that the Texas Wheat Growers in 1925 fell off to 1/10 of their 1924 deliveries. The Kansas Wheat Growers and the Oklahoma Wheat Growers show a loss of 1/3 or more in deliveries between 1924 and 1925.<sup>26</sup> While crop shortage may account for some of this loss, it cannot explain such a large decrease.

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<sup>20</sup>(1925) Report of Proceedings, Institute of American Cooperation, 352.

<sup>21</sup>Exh. E. Report of the Federal Trade Commission, *supra* note 19.

<sup>22</sup>Only two of the seven large tobacco associations are functioning today, and these have abandoned the use of the *long term* contract and the effort to affect prices directly. Farmers' Cooperative Ass'n, U. S. Dept. Agriculture Circular 94 (1929) 42; (1929) American Cooperation, 352.

<sup>23</sup>Fourteen state-wide associations are operating today, but with considerable change of method and purpose. "Commodity Control" together with the long term contract has been abandoned. Greatest emphasis is placed on certain definite economies in marketing. Farmers' Cooperative Ass'n U. S. Dept. Agriculture Circular, no. 94 (1929) 38.

<sup>24</sup>Jones, Membership Relations of Cooperative Associations, Cotton & Tobacco U. S. Dept. Agriculture Circular, No. 407 (1927).

<sup>25</sup>(1927) Proceedings of the Second International Wheat Pool Conference 86.

<sup>26</sup>Report Federal Trade Commission, Cooperative Marketing, Sen. Doc. No. 95, 70th Congress 1st Session, page 73.

On the other hand, we have three associations which were successful both in maintaining and increasing membership and deliveries.<sup>27</sup> These associations, the Central States Wheat Growers, the North Dakota and the South Dakota Wheat Growers all used an irrevocable five year contract. It is impossible of course to measure the effect which the contract had in their success. It was without doubt of some value. Several features, however, peculiar to those associations should be kept in mind. First, the cooperative marketing of grain is one of the oldest forms of cooperation in the United States. In addition, while the contract was binding for five years, the farmer had the option of feeding his grain if he desired. Knowledge of the nature and possibilities of the movement prevented hasty action in joining the association, and the option to feed gave an outlet for discontented members that did not subject them to legal action. Further, there is little evidence of any use of the legal remedies to force deliveries. The most natural conclusion would seem to be that in these associations there was less need of the enforcement program, and that the part played by it was at least a minor one.

Outstanding in the field of grain marketing and in the whole field of cooperative marketing, for that matter, are the Canadian grain marketing associations. Their continued success and their apparent ability to hold their own in the marketing field are well known. These associations are still using the *longterm* contract and are even making it more rigid than ever.<sup>28</sup> However, study of their operations seems to indicate that a minimum of suits have been brought and that the contract has never been subjected to any real test of its ability to hold membership under adverse conditions.

II. *The longterm contract has not proved itself necessary for successful cooperation.* The importance of this form of the *longterm* contract in the development and present operation of cooperatives has been over-emphasized. There are, of course, many forms of contracts, and the value of reducing the obligations of the parties to a written form is not questioned. Yet of the 10,000 cooperatives in the United States, only 16.4% use a written contract in any form.<sup>29</sup> The balance hold the members solely by the

<sup>27</sup>For a short history of these associations, see Farmers' Coop. Ass'n (1929) supra note 23. Eight associations are still active.

<sup>28</sup>See page 53.

<sup>29</sup>Development and Present Status of Farmers' Cooperative Business

services rendered. That the *longterm* contract is not essential for successful cooperation is evident from the fact that the West North Central portion of the United States<sup>30</sup> had, in 1915, 57.5% of the total number of cooperative associations, did 45% of the total business done by cooperatives in the United States and had 39% of the total membership. Yet at this time the use of any formal contract was very unusual in these states. In 1925, the same section had 44% of the total number of associations, and did 34% of the business done in the United States. Only 6.2% of these associations were using any form of contract, and the *longterm* contract was not used at all.<sup>31</sup> Even the largest and most successful of these associations, the Twin City Milk Producers, did not use any form of contract as late as 1922, and has never used the *longterm* contract.<sup>32</sup> In the large Canadian wheat cooperatives the contract form was not adopted until 1923, long after the movement was well under way.<sup>33</sup> This form of contract originated in California, yet the remedy of specific performance was not available until 1928,<sup>34</sup> and there is no evidence that the cooperatives were hampered in any way. Again, one of the most successful California cooperatives, The California Fruit Growers, has never used such a contract.

Additional proof of the minor importance of the *longterm* contract is found in the success of the liberalization of the contract in recent years by permitting members to withdraw annually.<sup>35</sup> It is particularly interesting in this connection to note that

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Organizations, Dept. of Agr. Bull., 1302 (1924).

<sup>30</sup>This geographic division includes the following states: North Dakota, South Dakota, Minnesota, Nebraska, Iowa, Kansas and Missouri.

<sup>31</sup>These figures are compiled from statistics in publications of the Dept. of Agriculture. See in particular Technical Bulletin No. 40 (1928), and Development and Present Status of Farmers' Cooperative Business Organizations, Dept. Bulletin No. 1302 (1924).

<sup>32</sup>"This is a feature of these organizations that is worthy of notice, especially since the cooperative creameries of Minnesota which produced 67.5% of the state butter in 1922 have attained this position without the general use of contracts (of any kind) between creameries and patrons. Price & Black, Farmers' Cooperation in Minnesota 1917-1922. Minn. Agricultural Station Bulletin No. 202 (1923).

<sup>33</sup>It was, however, made the basis of the great move for control of the wheat supply which started in that year. Booth, Cooperative Marketing of Grain in Western Canada. U. S. Dept. Agr. Technical Bulletin 63 (1928) at page 35 et seq.

<sup>34</sup>Poultry Producers v. Barlow, (1922) 189 Cal. 278, 208 Pac. 93. Changed by Act of 1923. Colma Vegetable Ass'n v. Bonettie, (Cal. App. 1928) 267 Pac. 176.

<sup>35</sup>See post page 69.

the Oklahoma courts at the outset held both the specific performance and liquidated damage provisions of the contract of the Oklahoma Cotton Growers' Association unenforceable.<sup>36</sup> Yet this association, in spite of its apparent handicap, ranked eighth out of thirteen cotton associations in the percentage which deliveries bore to the original sign-up.<sup>37</sup>

III. *The mere presence of the enforcement features in the longterm contract in itself had bad results.* For the lack of better evidence on this problem resort was had to a questionnaire directed to the managers of the cooperatives themselves. It was thought that they, being especially interested in the membership problem, would not underestimate the advantages of such a contract.

The writer sent a questionnaire to all of the associations in the United States and Canada which used a written contract in any form. This list included all of the larger associations in both countries and covered associations marketing many different commodities. Answers were received from twenty-five associations. These included all of the large associations which were still in business at the time the questionnaire was mailed. Thus, while the replies were not complete, they should furnish a fair basis for estimation of the current opinion on the subject.

In the opinion of many, the mere existence of the *longterm* contract in itself was a source of difficulty in holding the membership. The manager of the Poultry Producers of California reported that the release from compulsory delivery "seems to have entirely overcome the discontent of the members." The manager of the Colorado Bean Growers Association replied that the introduction of the withdrawal privilege reduced the opposition to the contract to less than one-half of one percent and that new members exceeded withdrawals. "A group of 1,400 loyal members of the Colorado Wheat Growers delivered as much in 1925 (after the abandonment of the compulsory features of the contract) as did 5,800 members in the first year of organization (1923)." The experience of the Staple Cotton Growers Association indicated

<sup>36</sup>Okla. Cotton Growers v. Salyer, (1925) 114 Okla. 77, 443 Pac. 232; Carmicheal v. Okla. Cotton Growers Ass'n, (1926) 117 Pac. 24, 245 Pac. 598; Cunningham v. Okla. Wheat Growers Ass'n, (1926) 120 Okla. 19, 250 Pac. 71. The ground of these decisions was that the Marketing Act was passed after the contract was made and hence to apply its provisions would impair the obligation of the contract.

<sup>37</sup>Supra note 24.

that their appeal for purely voluntary patronage resulted in an increase of 37% in actual deliveries.

Compulsory adherence to any course of business over a long term of years is contrary to all our traditions. The very existence of such compulsion, even though more or less consciously agreed to seems to have resulted in an overmastering desire to break loose and reassert independence from the association. On the other hand, the release of the members seems to have had favorable results to the cooperative in many instances. The farmer so situated seems to be in a better position to estimate the advantages of continued cooperation.<sup>38</sup>

Another bad result of the mere existence of such a contract is the temptation to rely on legal remedies to keep the members in line. The manager of the cooperative has two things to sell, one is the commodity which he handles, the other is the services of the association. The latter has proved much the more difficult problem. No merchant can hold patronage by threats of legal action, and the same has been found true of attempts to hold the membership of a cooperative by like means. In several cases such an attempt has been primarily blamed for the disintegration of the entire association.<sup>35</sup>

#### ELEMENTS OF VALUE OF THE LONGTERM CONTRACT FOR MODERN ASSOCIATIONS

I. *For holding membership.*—It probably may be stated without objection that few in this day will countenance the use of law suits to hold membership. It cannot be denied, however, that the general habits of our people do give to the formal signing of a contract a certain guarantee of performance. This guarantee exists quite independently of any attempt to force performance by court action. The questionnaire already referred to included the question "What is the practical value of the *longterm* contract for the purpose of holding membership?" Only three of the associa-

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<sup>38</sup>See also Proceedings of First International Wheat Pool Conference 157; Nourse, Legal Status of Agricultural Co-operation 210; Proceedings, Institute of American Cooperation 1925, Vol. 1 at page 297.

<sup>39</sup>The Colorado Cabbage Growers Ass'n furnishes one example. Such an attitude on the part of the directors is largely blamed for the tragic failure of the dark tobacco growers. The following quotation from testimony given by its manager on the witness stand illustrates the attitude. "Assuming that there is dissatisfaction I would say that it is for the same reason that the children of Israel were dissatisfied when Moses was leading them out of the Wilderness." See Legal Battles in the Black Patch, O'Hara, Cooperative Marketing Journal, Jan., 1929.

tions in the United States which answered found any practical value in this sense. Of these, the answer of the manager of the Burley Tobacco Growers was based on the greatest experience. His answer was:

"We have a five-year contract with no withdrawal privilege and have filed 300 suits in six years. I find that it is necessary to resort to injunction in order to let the membership know that there is some sanctity in their contracts, but generally speaking, I think that practical business services outweigh these remedies." The manager of the California Fruit and Apricot Growers replied that he found a "moral" or "psychological" value in the *longterm* contract. All the other associations in the United States which answered, considered the enforcement provisions of no "practical value." These answers can hardly be taken as denying the psychological value of a signed contract. Rather, they stand as an opinion that the balance of advantage lies against the use of the *longterm* contract. The severity of the penalties overbalanced the normal effect of the signature.

(a) THE CANADIAN EXPERIENCE WITH THE LONGTERM CONTRACT.—The answers received from the Canadian Associations, together with information derived from other sources, shows a completely different estimate of the value of the *longterm* contract. Almost unanimously these cooperatives endorse its use. There is little evidence of any tendency toward liberalization of its terms. Indeed, a strong movement appears toward making it even more rigid than it has been in the past, or, as the secretary of the Manitoba Wheat Growers' Association, F. W. Ransom, puts it, "As near a *life time contract* as possible." This movement has the solid support of the members. In November, 1928, the annual shareholders' meeting of the Manitoba Cooperative Wheat Producers voted unanimously to adopt a continuous contract binding in any event for a *five-year* period, and at the close of such period allowing a short time in which the member could exercise a privilege of withdrawal, and if this privilege were not exercised, the contract to be binding automatically for another five-year period, etc.<sup>40</sup>

It is important to understand something of the background of the Canadian Cooperative movement.<sup>41</sup> One of the major indus-

<sup>40</sup>See 1927 Proceedings of the Second International Cooperative Wheat Pool 10; First International Conference (1926) at 158 and 96.

<sup>41</sup>See in general, Booth Cooperative Marketing of Grain in Western Canada, U. S. Dept. of Agr. Technical Bulletin No. 63 (1928).

tries of the interior of Canada is the raising of grain. Canada exports 90 percent of the grain raised, and this exportable surplus is said to equal 51% of the world's exportable wheat surplus. The wheat is practically all of one type, hard winter wheat. It is grown two thousand miles from the sea coast, and five thousand miles from its principal market, Liverpool. No local alternative market exists for it. In the period between 1902 and 1925, production of wheat in Canada increased tenfold. This increase in production resulted in inadequacy of transportation facilities, inadequacy of storage, and a break-down of the marketing machinery. Neither the railroads nor the independent marketing concerns kept pace with the development. In 1919 the Canadian government took over both the railroads and the marketing of all the wheat produced. This compulsory pool was backed up by war-time needs. To a large extent it was satisfactory.

Cooperative handling of wheat in Canada dates back to 1880, with its chief development starting in 1903. This long experience was of tremendous importance in that it gave a period totalling thirty-nine years for the growth of a generation more or less habituated to cooperative methods. In addition it made available a body of trained cooperative managers. It is reasonable to suppose that these elements in the Canadian situation, previous experience with cooperation, distance from the market, lack of local market, lack of existing marketing facilities, uniform character of the product, education in the results of combined action as a result of the governmental pool, have much more to do with the success of these cooperatives than does the *longterm* contract. Another factor worthy of consideration is the difference in the character of the farmer members in Canada and in the cotton and tobacco farms of the south. Less difference in racial characteristics, color, education,<sup>42</sup> religion and training have been factors of no small importance.<sup>43</sup> The existence of farms large enough

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<sup>42</sup>The following is an extract from the testimony of the defendant in the case of *Dark Tobacco Growers v. Johnson*. (Not officially reported, see *Legal Battles in the Black Patch*, *Cooperative Marketing Journal*, Jan. 1929). "Yessuh, dat gentman com roun gitting up the pool. I axed me white folks about it, and dey sayd dat de pool was good. So I signs de contract, I didn't read it—can't do much readin' but I can write my name. Yessuh, my same is Frank Johnson, but everbody hereinabouts, inginerally calls me Saphead Johnson—so I up and sign the contract 'Sap.'"

<sup>43</sup>For the importance of these factors in different associations in the U. S. see *Legal Battles in the Black Patch*, *Cooperative Marketing Journal*, Jan., 1929, Manny, *Amer. Coop.* 1929 at 307.



to justify an enterprising and intelligent operator, instead of small holdings farmed out to tenants on shares, was undoubtedly another factor. More important than any one or several of these factors in reference to our present problem is the fact that the Saskatchewan Association, with a membership of 82,000, has never had to sue. The Manitoba Cooperative Wheat Producers with a membership of 19,109 (1927) reports a total of fifteen suits in 1928, and that "disloyalty or number of contract-breaking cases is a negligible quantity, but at the same time we keep a very careful check-up on deliveries and non-deliveries."

In other words a study of Canadian and American experience with the *longterm* contract indicates what might have been predicted in advance; punishment as a tool for changing the habits of a small number of individuals, whose acts are condemned by the great majority of their fellows, may be effective. If not effective, at least it can do little harm. It may, in addition, give a sense of solidarity to loyal members to be able to wreak vengeance on the wayward few. Punishment, however, as a tool for building new habits in a large number of individuals can seldom be effective. It is more likely to consolidate the rebel group and intensify their opposition. Encouraged by finding mutual support they raise the cry of "individual freedom" and of sacrifice for a common cause. Then if this punishment is unduly severe in the eyes of the community, it will arouse the sympathy of the neutral classes and eventually alienate the loyal members themselves.

The conclusion would seem to be: 1. Under present conditions in the United States the guarantee of performances ordinarily given by the formal signature of a contract is not operative in cooperative marketing contracts where the contract covers a long period with heavy penalties for its breach. 2. The attempt to hold members through the threat of court action defeats its purpose. 3. Where a different background of habits exists, the *longterm* contract may be valuable, but even under those circumstances its value is not capable of measurement.

II. *Other elements of value.*—The present trend of opinion seems to concede little value to the *longterm* contract for holding members in the association.<sup>44</sup> It may, however, have other values.

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<sup>44</sup>It is interesting to note that a greater dissent seems to exist among writers on cooperation than in the managers of the cooperatives themselves. "Nevertheless it seems to me as a general proposition it would be wiser to provide that an association might make its contract irrevocable

In addition, the disastrous results of most of the efforts at cooperative marketing of cotton, grain and tobacco may have produced a reaction against this contract which will not be permanent. For this reason it may be worth while to examine the arguments which are urged in favor of the *longterm* contract.

The following is a compilation of the recent arguments presented by many managers of cooperatives.<sup>45</sup>

1. That it gives a basis for a comprehensive and progressive program in that:
  - A. It enables the association to hire experienced managers.
  - B. It insures continuous volume of deliveries.
  - C. It is an aid in obtaining credit from banks.
  - D. It is of assistance in inducing other cooperatives to affiliate.
2. It gives protection, for the loyal member against injury at the hands of the disloyal member.
3. It gives protection against withdrawals of members, due to
  - A. "Onslaught" by competitors.
  - B. A temporary set-back in the association program.
  - C. Short-sighted action by the more ignorant members.
4. It offers a means of avoiding the "in-and-outer" or half-hearted member, and gives a guarantee that the membership will give the cooperative venture a fair trial.

In all of the above arguments one predominant idea is that the *longterm* contract will give stability by preventing withdrawals. This stability is expected to attract capable managers, insure deliveries, etc. This feature of the contract has already been dealt with. If we eliminate this element as far as possible, the supposed advantages would seem to classify under two main heads. 1. The contract offers a means of assurance that the members who join the association will be willing to give the cooperative venture a fair trial. 2. It gives direct financial protection to the loyal members from injury at the hands of the disloyal ones.

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during an initial period of perhaps three years." Nourse, *Legal Status of Agricultural Cooperation*, 1928, 109.

<sup>45</sup>See in particular for a general discussion of the question, First International Pool Conference (proceedings) 167, 37, 108. The arguments are presented here in the form in which they are actually made, without any attempt to make them mutually exclusive.

(a) *THE Longterm CONTRACT AS A DEVICE FOR SELECTING MEMBERS.*—The original ideal of these associations was that they should be democratic in character and open to all producers of their product. Nevertheless, the importance of selecting the membership and eliminating the half-hearted member is receiving more emphasis daily.<sup>46</sup> In the opinion of many it has become one of the most important problems. The *longterm* contract might well have some value for selecting membership. The only difficulty is that, up to date, the cooperatives operating with it have used it for quite a different purpose. In almost every case (with the possible exception of the Canadian associations) we find the greatest emphasis placed on making it as easy as possible to get in but as hard as possible to get out. The aim of these associations has been "control" of their product, which made essential as large a membership as possible. Where they have abandoned this aim, the *longterm* contract is usually abandoned with it. All that was necessary to join the association was a payment of ten dollars (about the same sum as is required to join the Book-of-the-Month Club) and the signature of the contract. Methods of soliciting membership ranged from various types of high-pressure campaigns to what, in some cases, approached the methods more commonly used in religious revivals.<sup>47</sup>

Not only was the contract used in a manner designed to get as many members as possible, regardless of their character, but it had other evils. It is inevitable that in any large organization for soliciting membership in a cooperative, certain evils will appear. Even though the heads of the movement are as guarded as possible in their statements of the results to be realized by cooperation, by the time the "sales talk" has reached the producer it will include many promises of the impossible.<sup>48</sup> During the period under discussion, the leaders of the movement were not only unguarded in their statements but were the worst possible offenders in this respect.<sup>49</sup> The contract was saved in the courts

<sup>46</sup>First International Wheat Pool Conference, 23; Management Problems of Cooperative Associations marketing Fruits and Vegetables, U. S. Dept. Agricultural Bulletin, No. 1414, page 26; Nourse, Legal Status of Agricultural Cooperation, 276; Selective Membership Campaigns, Downie, General Manager Kansas Wheat Growers, Proceedings Institute of American Cooperation.

<sup>47</sup>See *supra* note 16.

<sup>48</sup>Downie, Institute of American Cooperation 1929, page 300; also Teague, Institute of American Cooperation, 1927, Vol. 4, page 422.

<sup>49</sup>"The growers had been promised entirely too much. They had been

by the rule governing promises not made in reference "to existing states of fact."<sup>50</sup> Nevertheless, these promises formed the real inducement for signing the contract, and in the minds of many of the members the real justification for breaking it.<sup>51</sup> The same difficulty will arise to some extent in any present day effort towards organization of the majority of producers of any commodity. If this program is coupled with a *longterm* irrevocable contract, the danger of dissatisfaction will be greatly intensified.

In conclusion it is submitted that the *longterm* contract was not used to select members who would be faithful to the association. Even if it had been used for that purpose, or is used for that purpose in the future, the presence of the compulsory features of the contract will be dangerous. If the compulsory features were eliminated or reduced, the *longterm* contract might be of value. Inasmuch as the elimination of the compulsion from the *longterm* contract would eliminate its most distinctive feature, that possibility will be considered in another context.<sup>52</sup>

(b) Protection of loyal members.<sup>53</sup> The second merit urged for the contract is that it gives "protection" to the loyal member.

The supporters of the *longterm* contract who stress the "protection" of loyal members are glibly blending two distinct problems. The measures necessary for the solution of these two problems are, to a large extent, inconsistent with each other. The

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led to believe that all they had to do was to organize and sit around a table, fix the price of their products and their troubles would be over. The association (Maine Potato Growers) lasted two years. Cooperation must be built on a solid foundation than that." Teague, C. C., President, Calif. Fruit Growers and Calif. Walnut Growers, member of Federal Farm Board, Proceedings Institute of American Cooperation, 1927, Vol. 4, page 422.

<sup>50</sup>See *S. C. Cotton Growers v. English*, (1926) 135 S. C. 19, 133 S. E. 542; *Pittman v. Tobacco Growers*, (1924) 187 N. C. 340, 121 S. E. 634; *Burley Tobacco Growers v. Rogers*, (Ind. App. 1926) 150 N. E. 384; *Kansas Wheat Growers Ass'n v. Vague*, (1928) 118 Kan. 246, 234 Pac. 965.

<sup>51</sup>In a questionnaire circulated among the members of four tobacco and cotton associations, 236 out of 381 answered the question, "Why did you join the association?" "to get better prices." To the question, "What is a fair price?" most of the answers named a figure above the prevailing prices. *Membership Relations of Cooperative Associations*, U. S. Dept. Agriculture Bulletin, No. 407 Jan. 1928.

<sup>52</sup>See post page 69 and following.

<sup>53</sup>The writer wishes to acknowledge his indebtedness to his associate in the University of Wyoming, Professor Clarence Morris, for many of the ideas presented in this section, and for his careful criticism of the manner in which they are here presented. Prof. Morris in his *Rough Justice and Some Utopian Ideas*. (1930) 24 Ill. L. Rev. 730-736 has presented the irreconcilable conflict between the two purposes of compensation and punishment in tort actions.

individual requirements of each problem must be carefully considered before favorable results can be expected.

“Protection” may mean:

1. Protection against the disintegration of the association which would follow the withdrawal of a large number of members.
2. Protection of the loyal members against financial loss resulting from the failure of other members to live up to their contracts.

To re-state the problems in other terms, the contracts may be used for two purposes:

1. To provide a punishment, the threat of which will prevent breach of the contract and so hold the association together.
2. To force those who break their contracts to compensate the loyal members for any loss that may result from that action.

Any recovery given in a civil action for damages may tend to accomplish both of these purposes. Thus a judgment given a plaintiff will to some extent offset the injury he has received even though it is intended as a punishment to the defendant. Likewise, the threat of having to pay such a judgment will often deter the parties from breaking their contracts, even though that judgment is intended to be purely compensatory.

The difficulty is that a single judgment will seldom accomplish both purposes. If the compensatory damages are also efficient punishment, that result is usually fortuitous. As a general rule, if the purposes for which damages are levied are not understood, it is probable that one, the other, or both aims may be left imperfectly accomplished or totally unaccomplished.

When compensation, or the financial stability, of the loyal members is the aim, then the point of focus is on the loss to the plaintiff resulting from the breach of the contract. But when the threat of a judgment is used to prevent breach of the contract, many other factors come into play which need not be considered when the aim is simple compensation. The individual make-up and circumstances of each member is important in determining what threatened punishment will be most effective to keep him from breaking. To be most effective the circumstances *at the time of the breach* should receive the greatest emphasis. Further, a man is punished, not by a judge alone, but also by the condemnation attached to his act by the members of his community. If the

"community" applauds his act, the punishment may make little difference to him. Indeed, unless there is some support given by the community, it will be impossible to obtain the testimony to give a basis even for the action of the court. Consequently the reaction of the community should be carefully considered.

The device of liquidated damages does not lend itself to the selection of effective penalties for holding membership. Nearly all of the important elements of well designed punishment are ignored when this sort of damages is assessed. It is generally recognized that parties cannot be trusted to estimate fairly a penalty in advance. The sum selected is likely to be too high, for the reason that the parties do not usually contemplate a breach of the contract at the time they sign it. The penalty must be chosen in advance of breach, and the court has no discretion in fixing the amount. Consequently the penalty imposed can have little relation to the circumstances at the time of breach and has little chance of being the effective amount in any particular case. This is particularly true where, as is the case with the cooperative, the same penalty is to be applied to thousands of members. The danger of using liquidated damages for disciplinary purposes could not be better illustrated than by the experience of the associations we have been considering.

Nearly all of the new associations found themselves in serious difficulties soon after organization. Special trouble was experienced, due to insufficient finances,<sup>54</sup> conflicts of interest between different types of the same commodity,<sup>55</sup> differences as to proper policy,<sup>56</sup> inexperience in marketing methods,<sup>57</sup> and in one case actual looting of the association by its directors.<sup>58</sup> In addition

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<sup>54</sup>Gatlin, *Cooperative Marketing of Cotton*, U. S. Dept. Agr. Departmental Bulletin No. 392 (1926) page 38; Chapman, *Financing Cooperatives* (1924) 39 Pol. Sci. Quart. 592; Report of Federal Trade Commission, Summary, 69th Congress 1st Sess. Sen. Doc. No. 34.

<sup>55</sup>Summary, Report of Federal Trade Commission, 69th Congress 1st Sess. Sen. Doc. No. 34. *Dairymen's League v. Holmes*, (1924) 207 App. Div. 429, 202 N. Y. S. 663.

<sup>56</sup>Proceedings, Institute of American Cooperation, 1925, Vol. 1, page 382; Summary, Report of Federal Trade Commission, 69th Congress 1st Sess. Sen. Doc. No. 34; *Membership Relations of Cooperative Associations*, U. S. Dept. Agricultural Circular No. 407; *Calif. Bean Growers Ass'n v. Rindge Land & Nav. Co.*, (1926) 199 Cal. 168, 248 Pac. 658, 660; *Arkansas Cotton Growers Ass'n v. Brown*, (1925) 168 Ark. 504, 270 S. E. 947.

<sup>57</sup>Report of Federal Trade Commission, Summary, 69th Congress, 1st Sess. Sen. Doc. no. 34.

<sup>58</sup>Supra note 57.

many of the members found themselves facing real hardship if they lived up to the terms of their contracts. The most serious hardship was the inability to borrow money since their principal and often sole security was already contracted to the association.<sup>59</sup> The average farmer had had no voice in determining the amount of these damages. They had been set for him by Mr. Sapiro and the group which had organized his association. Under these circumstances the measure of damages was much too severe both in the eyes of the "community" and in the eyes of the members of the association. The result was wholesale combined action on the part of members to break their contracts and of non-members to aid them. The ensuing practical difficulties in the way of enforcement of the contracts defeated all purposes, compensatory and disciplinary alike. Attempts to enforce the penalties completed the work of dissolution already begun.<sup>60</sup>

Enough, perhaps, has been said to show that the purpose of the drafters of the *longterm* contract was not to compensate the loyal members but to provide a penalty, the threat of which would hold the association together. The situation at the time seemed to demand such action. Even, today, the focus is likely to be on punishment. In the organization of a new cooperative the compensation purposes of the contract dwindle into insignificance when compared to the more vital problem of developing some sort of cohesive force to hold the membership together. Better methods can be and should be devised for the selection of an efficient penalty.

Perhaps the reader may feel that there is too little evidence to show that the focus of these contracts was on punishment and not on compensation. The courts have upheld them as valid efforts to estimate the actual damage in advance on the grounds that actual damages are exceedingly difficult of proof and that

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<sup>59</sup>Summary, Report of Federal Trade Commission, 69th Cong. 1st Sess. Sen. Doc. no. 40; Report Federal Trade Commission on Cooperative Marketing, Sen. Doc. no. 95, 70 Cong. 1st Sess. page 73. Membership Relations of Cooperative Associations U. S. Dept. Agricultural Circular No. 94 (1929) page 14 et seq.

<sup>60</sup>See supra note 9. The net loss per acre if damages were paid for the term of the contract figured as follows: Tobacco associations \$456.10 per acre; Cotton Associations \$80.50 per acre; grain \$6.60 to \$19.50 per acre. In most cases the payment of damages when coupled with attorney's fees and cost of suit for even one year in view of the already serious difficulties of the producer meant loss of the farm. See Legal Battles in the Black Patch, Cooperative Marketing Journal, Jan. 1929.

a breach by one member may so injure the morale of the association as to defeat its purposes.<sup>61</sup> Consequently the courts have taken the position that "it cannot be said that the damages stipulated for are out of all proportion to the actual damages suffered."<sup>62</sup> This may or may not be true in fact, yet even if we grant that damages placed at 50% of the gross value of the crop are purely compensatory, the dangers in the use of the liquidated damages device still remain.

If the judgment which the defendant has to pay is greater than any advantages he may realize by breaking his contract, he will inevitably be punished by the judgment even though it does no more than compensate the plaintiff. Whenever a defendant has to pay, even by way of compensation, a sum which works unusual hardship on him, sympathy for him is aroused and the effect may well be the same as if he had been too severely punished. This effect is particularly serious in the cooperative marketing case. It is only the highly exceptional breach which will injure the morale of the association. Still more unusual is injury to the ultimate purposes of the association. Yet liquidated damages are set as if every case were the exceptional one.

On the other hand, if the liquidated damages are placed so low that the danger of too severe punishment is avoided, the punishment actually given will not be large enough to take care of the really serious cases.

The liquidated damages clause in practice has always been coupled with the absolute right to an injunction against breach or to a decree of specific performance. Under the latter procedure the court orders the delivery of the crop to the association. At first sight, specific performance would seem to be free from most of the objections urged against the use of liquidated damages.

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<sup>61</sup>See *Legal Battles in the Black Patch*, *Cooperative Marketing Journal*, Jan. 1929. It is interesting to note that the cry was raised that all law was being brought into disrepute with about the same results that the same cry has had on the prohibition question.

<sup>62</sup>*Minnesota Wheat Growers v. Huggins*, (1925) 162 Minn. 471, 203 N. W. 420; *Tobacco Growers' Cooperative Association v. Jones*, (1923) 185 N. C. 265, 117 S. E. 174; *Rowland v. Burley Tobacco Growers' Association*, (1925) 208 Ky. 300, 270 S. W. 785; *Dark Tobacco Growers' Association v. Robertson*, (1926) 84 Ind. App. 51, 150 N. E. 106, 113; *Bean Growers v. Rindge Land and Navigation Co.*, (1926) 199 Cal. 168, 248 Pac. 658, 664; *Poultry Producers of Calif. v. Murphy*, (1923) 64 Cal. App. 450, 221 Pac. 962; *Anaheim Citrus Fruit Ass'n v. Yeoman*, (1921) 51 Cal. App. 759, 197 Pac. 959.



The association gets at least part of what it bargained for, and the member is not subject to heavy damages. On the other hand, the decree may work injustice in the eyes of the members in many instances. There is usually considerable delay in payment for the crop since it must first be sold. Likewise, the grower may require money even before the crop is harvested. The association may attempt to "control" the price by holding the crop off the market. The type of the crop raised by a particular member may be discriminated against by the policies of the management. A large number of members may have lost faith in the management. It is useless to argue that the members have "consented" to all this by signing the contract. In the last analysis the "justice" of the decree in the eyes of the members is the only important consideration. Any attempt to force a large percentage of members to do what they do not want to do is likely to result in the disintegration of the association. Finally we cannot ignore the prevalent idea that a man has a "right" to break his contract. Over one-third of four hundred and sixty-two members of four cotton and tobacco associations questioned by the Cooperative Marketing Bureau believed that a breach of the contract was justifiable; one hundred and twenty-three out of four hundred and twenty-seven members did not believe that breach of the contract should be reported to association officials; only one-half of those questioned believed that members should be prosecuted for breach of the contract.<sup>63</sup>

One cannot say that the *longterm* contract should never be used. The field of cooperative marketing covers many types of producers, many localities and many types of commodities. However, it is submitted that the use of the *longterm* contract in the United States is very dangerous even for the purposes for which it is most highly recommended, i.e., that of tiding a new association over its initial difficulties.

#### THE FUNDAMENTAL ELEMENTS OF THE MEMBERSHIP PROBLEM

The problem of the organization of a cooperative is not in any real sense a legal one. As the decided cases now stand there are hardly any pitfalls to be avoided.<sup>64</sup> Cooperatives have been suc-

<sup>63</sup>U. S. Department of Agriculture Circular 407, 1928 page 16.

<sup>64</sup>"A detailed search for overt practices which have been put under the judicial ban yields scanty results." Hamilton, *Judicial Tolerance of Farmers Cooperatives*, (1929) 38 Yale L. J. 936.

cessfully organized in a multitude of ways; with capital stock<sup>65</sup> and without, under special cooperative marketing statutes or under old commercial incorporation acts.

The relation of a cooperative to its members at first sight presents two problems.

1. The cooperative must get deliveries or it cannot do business at all.

2. It must have a body of members who will maintain an active and intelligent interest in the policies and management of the cooperative, or it cannot do business efficiently.

However, it is becoming more and more apparent that the two problems are in reality the same, that of finding or developing an interested and active body of members. If the cooperative has such a membership, deliveries follow as a matter of course. If the interest of the members falls off, misunderstanding and discontent almost certainly will develop and deliveries fall off in proportion.

In addition, one of the chief advantages of the cooperative over old marketing methods is the reaction of the cooperative upon

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<sup>65</sup>In the opinion of Mr. Hamilton (*supra* noté 64) the U. S. Supreme Court in *Frost v. Commissioners*, (1929) 278 U. S. 515, 49 Sup. Ct. 235, 72 L. Ed. 483, has placed a serious check on the use of capital stock and the doing of business with non-members. It is indeed "hazardous to attempt to reduce that significance (of the decisions in the instant case) to specific terms," but the decisions can hardly be interpreted as going to the extent to which Mr. Hamilton claims. The Supreme Court held that the Oklahoma statute providing for the incorporation of cooperative cotton gins and the issuance of a permit to engage in that business was unconstitutional as a denial of equal protection of the law, in that a certificate of public necessity was required for a permit to issue to an independent ginner but not required in the case of a "cooperative enterprise." Some things in the opinion would indicate that in order to make a valid classification the distinction must be made between "stock and non-stock" cooperatives. However, the evil which existed in that case would seem fairly clear. It is one that has caused much trouble and received much attention from others than the Supreme Court. Experience has shown that loss of control by the producers of their own cooperative must be carefully guarded against. Under the types of contract and other privileges extended to these associations, if independent capital is allowed to initiate or to take over a "cooperative" for their own profit, non-producers will be in a position to exploit both the producer and the non-producer alike. The clear possibility of such a result in the Oklahoma case seems to have been the ground of the decision. To quote from the words of Justice Sutherland, "Its members need not even be cotton growers. They may be all or any of them bankers or merchants or capitalists having no interest in the business differing in any respect from that of the members of an ordinary corporation." The decision would not, therefore, seem to raise any obstacles to the use of the 'capital stock' type of organization.

the producer.<sup>66</sup> He learns his market. This knowledge induces him to fit his product to the character and quality demanded by the market, and may result in his solving his greatest difficulty, that of overproduction.

I. POSSIBLE SOLUTION OF THE PROBLEM OF CREATING A NEW COOPERATIVE.—(a) Organization with "capital stock."—Organization on the basis of the *longterm* contract is by no means the only type of organization used. The novelty of its methods, the spectacular things attempted under it, the genius for publicity of its chief exponent, Aaron Sapiro, have all combined to give it a place which it does not deserve. For many years a less spectacular form of cooperative marketing has been steadily developing. This type of organization makes use of what is called "capital stock."<sup>67</sup> This device, however, should not be confused with the capital stock of the ordinary industrial stock corporation. Ownership is limited to producer members. No matter how many "shares of stock" a member may have, he can have but one vote. Each member is required, on joining the association, to contribute a certain sum to the finances of the association. He is given a certificate of indebtedness payable after other obligations are met. Regardless of how prosperous the cooperative may become, dividends on this certificate are limited to a return approximately the usual rate of interest on simple loans.

It would seem obvious enough that no better means of selecting members and of excluding the "in-and-outer" could be found than this. Make the member pay for his membership. The fact that he has a stake in the association is a powerful influence in retaining his active interest in the association. Where the stake is of a substantial amount, little difficulty has been experienced in getting or in retaining the necessary cooperation.<sup>68</sup>

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<sup>66</sup>Nearly every careful study of specific cooperatives emphasizes this point, see for example, Management Problems of Cooperative Associations, marketing fruits and vegetables, U. S. Department of Agriculture Departmental Bulletin no. 1414, 1926, page 51.

<sup>67</sup>60% of Cooperative Marketing Associations in 1928 used the "capital stock" device. In cotton and tobacco associations the non-stock form was most popular. In tobacco 100% of the associations used the non-stock form; only two of these are operating today, however. 15% of the cotton associations used "capital stock." On the other hand, 92% of the cooperative creameries use the stock form. See Report Federal Trade Commission on Cooperative Marketing, Sen. Doc. no. 95, 70th Cong. 1st Sess. page 248.

<sup>68</sup>"The most satisfactory solution of this problem (membership loyalty) is to insist on investment in the enterprise by all the members." First International Wheat Pool Conference, page 175; also page 23; McKay and

This type of organization has many additional advantages. It excludes at the outset those willing to cooperate but financially unable to do so. The presence of members who are not their own masters financially, each with an equal vote with the other members is bound to be a source of weakness.

Under this plan the association is given a sound financial basis for its operations. For the first few years at least the association relying on the *longterm* contract operates on a hand-to-mouth basis. Its whole financial structure is built on loans made on the crops after they have been delivered. Practically all expenses must be met by deductions from the receipts of the sale of the commodity. Future deliveries are guaranteed by the contract, but the contract is of little value if not supported by the determination to cooperate. Twenty-four percent of the failures of cooperatives are laid by the Department of Agriculture at the door of inadequate financing.<sup>69</sup> In many cases, not so listed, undoubtedly the same difficulty played a major part; in still others the difficulties causing failure might have been cured if adequate finances had been available.

In addition, cooperatives and managers who enter into relations with the association are given assurance of a stability directly proportional to the capital contributed. Temporary setbacks may be weathered so long as the capital holds out. The loyal members are protected at least to the extent of the breaching members' contribution. Fines or penalties may be assessed against that contribution with little formality or expense.

The difficulty in the way of the use of the "capital stock" form of organization is the basic difficulty that lies at the root of all cooperative troubles. If the problem were merely to *select* a group of members who are ready and willing to cooperate, the "capital stock" device would probably perform that service. Up to date at least, however, there has been no widespread desire to cooperate. This difficulty is particularly serious in that the type of cooperatives fostered by the Federal Farm Board aim at control of a large percentage of the whole commodity. In addition, the greatest efforts to organize cooperatives have always come in times

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Kuhrt, Management Problems of Cooperative Associations, U. S. Dept. Agricultural Bull. No. 1414, page 26; Institute of American Cooperation 1929 page 328.

<sup>69</sup>Summary of the report of the Federal Trade Commission, *supra* note 26 at 181.

of financial depression. Consequently there has not only been a shortage of producers who were cooperatively minded, but many who had the cooperative spirit have perhaps been unable to make a contribution to the capital of the association.

Unfortunately it is of the very essence of the modern cooperative problem that organization of new cooperatives is not to be confined to situations where a body of cooperatively-minded producers already exist. Cooperative marketing is being used in an effort to relieve the producer from existing economic handicaps.<sup>70</sup> Whatever one may think of the possibilities of this program, the fact remains that if it is to be followed at all it must be applied in new fields, and new fields mean including producers who do not have either knowledge of the nature of cooperative marketing or experience with its workings. Nation-wide stabilization cooperatives are being formed. In every case producers will be included

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<sup>70</sup>If we look solely to the marketing advantages to be gained, one is convinced that while in many situations the cooperative system of marketing has great promise, in others it can accomplish little. (See for example the statement of Lampson, General Manager of the Colorado Wheat Growers, "It has often been said by economists so that it has become a platitude with us, that no cooperative should be started unless it fills a real need, consequently we should not scheme until there is a real need felt and until we have a volume of raw material and necessary supplies to take care of the plant. Probably there have been more failures in the field of cooperative marketing because of the neglect of that fact than from any other cause." Second International Wheat Pool Conference page 102; also a statement of Tundrett, President of the Manitoba Cooperative Poultry Association, International Wheat Pool Conference 174). One is driven to ask very definite questions as to just where the savings over the present system of marketing will be realized, and often must be content with very vague answers. Perhaps the lack of willingness to cooperate is not based entirely on a narrow minded reactionary attitude. Even where definite advantages do exist one may perhaps sympathize with the old ideal of independence, which more than any other factor explains the persistence of the producer in raising crops in the face of low returns for his labor.

However, it is of little avail today to urge that cooperative marketing may have a limited field of usefulness. In the minds of many, if not most of the leaders of this movement, mere reform of marketing methods is not the sole nor even the primary aim. Their dreams have extended to the political and social power that might come from an organized, active, intelligent body of producers. It is hard not to sympathize with their ideal. In part this movement comes from a large, disinterested group who sincerely believe that the producer is the backbone, morally and economically, of any civilization, and who are fighting to prevent his subjugation to other interests. Equally important in the present movement is the political motive. The producer has been insistent in his demands for help. The fact that he does not know just what measures will solve his problem has not made his demands any the less determined. In the sheer necessity of finding something to do, it has been easy to overlook the difficulties of any particular plan.

who have no background of cooperative experience. What may be done to insure that the members of such large organizations will give them a fair trial of their possibilities is indeed a difficult question. Probably no solution can be found. The most that may be hoped for is to find ways to induce the producer to give the association a fair trial. The use of capital stock would seem to commend itself as one of these.

(b) THE PROGRAM OF THE FEDERAL FARM BOARD.—Congress has authorized the expenditure of \$500,000,000 by the Federal Farm Board for the relief of agricultural conditions.<sup>71</sup> The medium chosen to work out this relief is cooperative marketing associations organized under the general plan of the Board. The Board early declared that loans of the funds at its disposal would be made only to cooperative marketing associations.<sup>72</sup> Associations already in existence have modified their organizations to take advantage of this aid, and new associations have been organized with a like purpose. Taking both classes together we find nation-wide cooperatives *prospected* or organized in cotton, corn, tobacco, beans, peanuts, fruits, milk, lambs, turkeys, potatoes, walnuts, pecans, apples, grapes, hogs, cattle, etc.

The whole of the wide-spread personnel of the Department of Agriculture, the Extension Service, county agents and even the western land grant colleges is being mobilized to aid in the organization of these associations. These groups are instructed that their duty to educate the farmer in "proper" (cooperative?) marketing methods is no less important than their duty to educate him in the preservation of the fertility of the soil. For these groups, at least, cooperative marketing has become the law of the land.

The ultimate problem is how can existing marketing and business habits of the great body of producers be changed to fit the cooperative scheme. The educational power of the many federal agencies can accomplish much. The promise of substantial federal aid which is restricted solely to cooperative marketing associations is doing much to create new organizations. Nevertheless we are drawn to the conclusion that the only solution lies in the utilization of already existing habits of a particular group to make

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<sup>71</sup>Signed by the president, June 16, 1929. Only \$100,000,000 was actually appropriated in this bill. \$150,000,000 more was appropriated in March, 1930.

<sup>72</sup>See New York Times for July 29, 1929, page 16:6.

the cooperative action as natural, as simple, as little different from the old practices as possible. Mere lecturing of the producer can achieve little. The lure of federal aid is likely to prove a boomerang. Five hundred million dollars has psychological power which far exceeds its actual power when distributed over the whole field of agricultural production. The power of this money may bring many non-cooperatively-minded producers into the associations, too many perhaps for their successful functioning. Yet both federal aid and education will be useful if too much is not expected of them. The type of organization, the use or non-use of contracts, the nature of the obligations of the producer, organization with or without "capital stock" and all other details should conform as closely as possible to the practices of the particular community. A careful study of existing habits may make the transition to cooperative practice much easier. Standardization of practice over different communities should be distrusted.

(c) UTILIZATION OF EXISTING HABITS OF THE PRODUCER TO DEVELOP THE COOPERATIVE SPIRIT.<sup>73</sup>—Some developments since 1924 show a tendency to utilize existing habits to make the change to cooperative practice as simple as possible. But so far as one can judge from the outside they evidence a reluctant yielding to specific demands by the producer rather than a careful, conscious effort on the part of the leaders to fit the organization to his practices in the first place. Attention of the leaders of the movement should be concentrated on the devices which have already been found to meet this purpose and on the discovery of others.<sup>74</sup> Some of these devices deserve attention.

1. *The withdrawal clause.*—Most of the associations originally formed with the long-term contract have now adopted an annual withdrawal privilege,<sup>75</sup> whereby the farmer is given the option of

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<sup>73</sup>The term "cooperative spirit" is used because it has come to stand for the highly complex group of habits and emotions which are necessary to give a basis for a cooperative association. No definite meaning is intended. The necessary constituents of this complex will vary as the commodity handled or the community organized varies. The analysis of "cooperative spirit" would be worth of much study.

<sup>74</sup>The only clear expression of this idea which the writer has found is the address of Manny of the Federal Bureau of Agr. Econ. "The Farmer needs to be tied to his cooperative thru a *variety* of binding elements, experiences and viewpoints in which the *emotions* play a considerable part. Then and then only will he acquire attitudes and habits which will make of him a permanent and enthusiastic cooperator." (Italics ours.) Institute of American Cooperation, 1929 page 315.

<sup>75</sup>The withdrawal clause is older than the *longterm* contract, though

withdrawing from the association and releasing himself from all obligations under the contract. This option must be exercised within a designated period, usually of two weeks duration. If he fails to exercise the option, he remains bound by the contract for another year. These contracts are drawn for even longer periods than the original ones, running as long as ten years. The strength of the change lies in the relief from compulsion and in placing the initiative on the farmer if he wishes to withdraw. Mere inertia is said to have prevented withdrawals and, further, the necessity of decision has made the farmer consider more carefully the benefits to be received from cooperation. In many cases the device has met with marked success. The weakness of the change lies in the fact that the determination to see the cooperative through its period of experimentation is not required.

2. *Use of "capital stock."*—The requirement of a financial contribution to the Association has also been used. However, since the object now is to include as many members as possible and educate them, the sum required cannot be placed high enough to be very effective in holding membership interest. Nevertheless it should be useful if used with other devices.

3. *The Optional Pool.*—One of the fundamentals of cooperative theory has been the pooling of all crops of like grade and quality. The pool is then sold without reference to the individual ownership of any part. When the whole pool has been sold, the proceeds are distributed to the contributors each receiving an average price. The time or the price at which the specific product of a pool member is sold is disregarded. After the collapse of the *longterm* contract plan, the Staple Cotton Growers led the way with the adoption of what is called the "optional pool."<sup>76</sup> Under this plan the grower may require the association to sell his crop without pooling and at such time as he directs. The reason assigned for the adoption of this plan was that the growers often could not wait for payment till the pool was liquidated.

This plan was criticized by able students of cooperation on the ground that it reduced the association to the level of a commission house, and was contrary to the "best cooperative marketing practice."<sup>77</sup> This adherence to cooperative theory in the face of failure

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not often used, prior to 1923. It is made necessary by some statutes. See Nourse, *Legal Status of Agricultural Cooperation* 88.

<sup>76</sup>Sec. 2 (b) and 6 (b) Staple Cotton Growers Contract of 1925.

<sup>77</sup>"Not in harmony with the best cooperative marketing practice."



in practice is interesting and instructive. In point of fact the element picked for criticism proved a source of real strength.<sup>78</sup> Reference has been made to the settled habit of the farmer of picking his time, buyer, price and terms of sale. The old marketing system offered a certain freedom in this respect. The fact that the freedom was largely illusory is beside the point. The real element of importance is that the average farmer thinks he has this freedom and thinks he knows when and how to sell. By fitting the cooperative structure to the existing marketing habits much discontent was allayed. This was done, however, reluctantly and for what now appears to have been a false reason.

Although the financial difficulty of waiting for payment has generally been relieved by substantial advances on the crop at the time of delivery, yet the demand for the option has continued.<sup>79</sup> The real reason for the option is that it gives the producer what he is used to and wants and yet retains him within the association. The good old American practice of telling other people what is best for them is dangerous.

Instead of emphasizing the cooperative ideal, conscious effort should be devoted to the discovery of other devices which may be used to develop cooperative habits. The particular situation must always be carefully studied by itself. The optional pool would have little place in a milk producers association. It would be essential in a cattlemen's association, where the confidence in personal judgment on marketing conditions and pride in the individual product is at a maximum.

*Other possibilities.*—Many other illustrations of the application of this idea could be referred to. It has been found that the difficulty inherent in the old use of locals for development of the cooperative spirit has in some cases been avoided by including the women in the meetings.<sup>80</sup> Apparently the appeal to the social instincts and the filling of a real need have so changed the tone of these meetings that they no longer react unfavorably. It is said that one instance of membership action overruling the policy of the directors, right or wrong, can do more toward developing loyalty than a whole year of proper management by the directors

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Swarthout, The Staple Cotton Growers Cooperative Association, U. S. Dept. of Agr. Dep. C. No. 397, page 10.

<sup>78</sup>Institute of American Cooperation 1929 page 296.

<sup>79</sup>Institute of American Cooperation 1929 page 296.

<sup>80</sup>Institute of American Cooperation 1929 page 289.

themselves. In the early days the field men of the association were chosen and sent out by the association directors. Today they are chosen by the locals without regard to their loyalty to existing policies of the directors. The operation of grading has been shifted from the central office to the local shipping point. Closer adherence to the old marketing practice and the personal contact with the grower has been beneficial.<sup>81</sup>

#### CONCLUSION

The device of liquidated damages is of little value for reforming disloyal members. It should not be forgotten, however, that punishment, if used more wisely, might be effective in developing cooperative habits. There is no reason why the state should not punish the breach of cooperative marketing contracts, if it so desires. The courts would probably approve such a program.<sup>82</sup> As already indicated, the "capital stock" plan vests in the management of the cooperative the power of punishing disloyal members at least to the extent of their capital contribution.<sup>83</sup> However, the management is often out of sympathy with the members. Under such circumstances punishment at their hands is likely to be resented by loyal and disloyal members alike and may widen the breach in the association. This power would be more properly located either in the criminal courts or in specially constituted courts composed of experts in the field of cooperative marketing.

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<sup>81</sup>Institute of American Cooperation 1929, page 289.

<sup>82</sup>The exact point was passed on in *Commonwealth v. Ruffit*, (1922) 149 Ky. 300, 148 S. W. 48, 42 L. R. A. (N.S.) 329.

In *Liberty Warehouse Co. v. Burley Tobacco Co-op.*, (1927) 276 U. S. 71, 48 Sup. Ct. 295, 72 L. Ed. 473, the validity of the Kentucky statute, penalizing by fine any person or corporation "who solicits or persuades or *permits* any member of any association—to breach his marketing contract—by accepting or receiving such member's products for sale or for auction or for display for sale," was attacked on the ground that the statute denied the defendant Warehouse Co. "equal protection of the laws" and deprived it of "liberty without due process of law." The court upheld the statute. Justice Holmes in writing the opinion of the court said: "The opinion generally accepted—and upon reasonable grounds, we think—is that the co-operative marketing statutes promote the common interest. The provisions of protecting the contracts against interference by outsiders are essential to the plan. This court has recognized as permissible some discrimination intended to encourage agriculture." On the question of deprivation of liberty the same judge said: "Undoubtedly the statute does prohibit and penalize action not theretofore so restricted and to that extent interferes with freedom. But this is done to protect certain contracts which the legislature deemed of great importance to the public and peculiarly subject to invasion."

<sup>83</sup>See *supra* page 66.

These men should be disinterested at least in the sense that they would have no personal interest in the policies adopted by any particular association and could apply the punishment vested in them for the welfare of the movement as a whole.

Where the contract is necessary and useful for the protection of the association from loss on its operating expenses the courts can give effective aid by a decree of specific performance for a single year. Other cases may be imagined which would be proper for specific performance. But if the court goes beyond specific performance for a single year it will have great difficulty in drawing the line between the use of its decree to insure the financial stability of the association and its use to hold members.<sup>84</sup> The latter is a purpose which the decree cannot accomplish. Evidence is not lacking to show that old mistakes are being repeated.<sup>85</sup> The attempt to hold members within the association is likely to injure the very association which it seeks to protect. At the same time the futility of the decree to accomplish its purpose may weaken the prestige of the court in other fields.

With these exceptions no way has yet been found for the courts to give direct aid in holding the membership of a cooperative. Further assistance can be given only through a judicious tolerance of novel cooperative efforts, a wise interpretation of the contracts under which the associations are organized, and protection of the association in its dealings with outsiders. An im-

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<sup>84</sup>The courts have as yet made no effort to draw such a line in cooperative marketing cases. They have enforced the *longterm* contract without exception. See 33 A. L. R. 247 and 47 A. L. R. 951 for a collection of the cases. It is not likely, of course, that they will change their practice without legislation on the subject.

<sup>85</sup>Cooperatives should have learned that they can hold their members only by giving satisfactory services. Yet the contract under which the National Wool Growers is being organized (1929) includes an annual withdrawal clause to be sure, but the time for withdrawal is placed between July 15 and August 1 of each year. The time would seem carefully selected so that it will deprive the producer of any real option. Wool in the Rocky Mountain region is ready for market in June. It will not be sold before the time set for withdrawal so that the producer will have no basis on which to estimate the value of the service performed by the cooperative. Also, at this time it will be impossible for the producer to make a guess as to the course of the market for the ensuing year. Producers who will sign the contract will probably not be lacking. They will be lured by the power of \$500,000,000. Such a sum, large though it is, is not large enough to have any appreciable effect when distributed over the whole range of agricultural commodities. Disappointment over the actual power of the Board to relieve the whole agricultural depression is likely to follow. Discontent with the form of the contract may aggravate the situation.

portant element in this "judicious" tolerance and "wise" interpretation would seem to be a realization of the limitations of the powers of the court. Existing decisions which, almost without exception, enforce any amount of liquidated damages and grant without reflection the decree of specific performance might well be curtailed in their effect on new cases.

The new associations must beware of including too many inexperienced producers and above all of attempting to tie such members to the association. In one field at least, that of beef production, if the organization succeeds in attracting any large number of members from the Rocky Mountain states, one can confidently predict its failure. Too short a time has elapsed since the old range days when a neighbor two miles away was resented as being too close for comfort.

The following quotation from E. R. Downie, general manager of the Kansas Cooperative Wheat Marketing Association, sums up the difficulty of the problem. Kansas has had many years of experience in cooperative wheat marketing. Yet in speaking of the necessity of carefully selecting the membership, Mr. Downie said:

"This is true partly because the people of our state, on the average, are as yet only in the A. B. C's of cooperative education. But it is true in part also for the reason that some people are so constituted that it will always be difficult for them to cooperate with their neighbors, even after they are better educated in cooperative marketing. . . . If their only shortcoming was their failure to help promote the interests of their organization, this would indeed be serious, but the more important thing is that they invariably start to do everything within their power to destroy the organization of which they are members."<sup>86</sup>

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<sup>86</sup>Proceedings Institute of American Cooperation 1929, page 300.