Cooperative Milk Marketing and Restraint of Trade

John Hanna
Columbia University

Follow this and additional works at: https://uknowledge.uky.edu/klj
Part of the Agriculture Law Commons, and the Antitrust and Trade Regulation Commons
Click here to let us know how access to this document benefits you.

Recommended Citation
Available at: https://uknowledge.uky.edu/klj/vol23/iss2/2

This Article is brought to you for free and open access by the Law Journals at UKnowledge. It has been accepted for inclusion in Kentucky Law Journal by an authorized editor of UKnowledge. For more information, please contact UKnowledge@lsv.uky.edu.
The almost uninterrupted series of legal victories for agricultural cooperative associations was interrupted recently by the Court of Appeals of Stark County, Ohio, which affirmed the judgment of the Common Pleas Court in Stark County Milk Producers' Association v. Tabeling, D. B. A., The Massillon Pure Milk Company.¹ The plaintiff is a producers' non-profit cooperative association and the defendant a milk dealer. The parties in 1928 signed a one-year contract under which the dealer agreed to buy milk solely from the Association. The contract was to run thereafter from year to year unless terminated by notice from either party during a certain period in each year. In order to give each producer a uniform price for milk of like quality, the agreement set out in some detail the method of compensating the producer.

Milk has three markets in this territory. The first involves fluid milk for home consumption. This is sold in bottles and other containers directly to the consumers. Milk sold in this class receives the highest price. The second is the market for cream and chocolate milk. The cream is used for butter and other milk products. The milk in the second class receives an intermediate price. The third class is milk for the ice cream or surplus market which receives the lowest price. The Association might have taken deliveries from the farmers, sold the milk directly to various consumers for prices determined by the Association, and distributed the proceeds, less overhead and reserves, to the producers. Such an arrangement would have eliminated the dealers entirely. In the alternative the Association might have taken deliveries from the producers, and sold the milk to dealers at prices depending upon the market supplied by the dealers. The Association in fact substantially followed the second plan, slightly modified to continue existing machinery for receipt and distribution of milk and payment of

¹No. 24,801, now pending in the Supreme Court of Ohio, on writ of certiorari. Reversed and remanded, Dec. 26, 1934.
proceeds. The price for dealers was fixed each month following a meeting of representatives of producers and dealers. Milk was purchased directly from the farmers by the dealers. Some dealers sold milk chiefly in one class, some about equally in all classes. At the end of each month the accountants for the Association determined the total volume sold by the dealers in each class. As an example it might be found that 100,000 pounds of milk had been sold during September, of which 50,000 pounds had been sold as fluid milk, 25,000 pounds in the cream market, and 25,000 pounds in the surplus market mostly for ice cream. If the dealer were charged $1.50 per hundred for milk sold in the fluid market, $1.00 for milk sold in the cream, butter and cheese market, and 50 cents for milk sold in the ice cream market, the price to be paid the farmer would work out as follows:

\[
\begin{align*}
50,000 \text{ lbs. at } & \ 1.50 \text{ per cwt.} & \ = & \ 750 \\
25,000 \text{ lbs. at } & \ 1.00 \text{ per cwt.} & \ = & \ 250 \\
25,000 \text{ lbs. at } & \ 0.50 \text{ per cwt.} & \ = & \ 125 \\
\hline
\text{Total} & & & \ 1,125
\end{align*}
\]

The result of dividing $1,125, or the total proceeds, by the total pounds sold (100,000), would give the blended price per hundred pounds. In the illustration the price is $1.121/2. That is the amount the farmer would receive irrespective of the use to which his milk was put. In other words the producer receives an average, or as it is usually termed in the milk trade, a blended price. This is the price the dealer pays the farmer. The Association does not take deliveries nor make payments.

The net account between dealer and Association remains to be settled. If the dealer has made all his sales in Class I he pays $1.50. If he has made sales in different classes he pays the class price for the amount sold in each class. Since he must in any event pay the farmer $1.121/2, he either owes the Association an equalization payment or is entitled to receive one. If he is a dealer in fluid milk selling for home consumption he owes the Association 371/2 cents per hundred more than he has paid the farmers. If he is selling to ice cream makers or buying directly for such use, the Association owes him the difference between what he has paid the farmer and the class price of 50 cents, or 621/2 cents per hundred pounds. If the dealer has sold 10,000 pounds in each class his account is stated as follows:
This means the dealer has sold his milk for an average of $1.00 a hundred. Since he has paid $1.12\frac{1}{2}$ he is entitled to a payment from the Association of 12\frac{1}{2} cents a hundred or $37.50.

In the Stark County Milk Association case the Association and the dealer operated under the contract for several years following 1928. The dealer sold most of his milk to domestic consumers, that is, in Class I, and was customarily indebted to the Association. Finally a dispute arose, the dealer refused to settle an account and the Association sued for the balance claimed to be due, or about $1,300. The defendant's answer denied generally he owed the money and attacked the contract as uncertain, lacking in mutuality, and illegal because being in unreasonable restraint of trade. The points about uncertainty and mutuality were abandoned. The defendant seems to have introduced no evidence to contradict the plaintiff's account sheets and other evidence of the sum claimed to be due. The record is extremely unsatisfactory but notwithstanding the fact that the issue of damages seems to have been left to the jury, an examination of the charge of the Common Pleas Court indicates that the real issue which the Court instructed the jury to determine was whether the contract was an unreasonable restraint of trade and hence void.

Assuming that the only issue in the case was whether the Association's contract and perhaps also its operations amounted to an unreasonable restraint of trade, the Ohio decision seems erroneous for three reasons: First, in the absence of any state law specifically forbidding recovery on such contracts as the defendant signed, the defendant was liable to pay for the milk he had received even if the Association's operations were in unreasonable restraint of trade. Second, even if any of the selling contracts by an Association whose operations amounted to an unreasonable restraint of trade were void, the question whether a particular contract, the terms of which were not in dispute, was an unreasonable restraint of trade, was for the court rather than the jury. Third, even if the defendant was
entitled to raise the restraint of trade point and even if abstractly considered the question of reasonableness of the contract was one of fact for the jury, in this particular case the contracts and operations of the Cooperative Association were so patently not an unreasonable restraint of trade that the court in any event should have directed a verdict for the plaintiff.

I.

The Ohio anti-trust statutes as they affect co-operative associations consist of the Valentine Anti-Trust law and the later Cooperative Marketing statute. The Anti-Trust law defines a trust as a combination for creating or carrying out restrictions on trade or commerce, limiting production, preventing competition and fixing prices. Besides criminal penalties the Act provides for remedies by injunctions, and quo warranto to restrain or dissolve domestic corporations. Foreign corporations violating the statute may be deprived of the privilege of doing business in the state. The only part of the act relating to contracts is § 6393 which reads as follows:

"A contract or agreement in violation of any provision of this chapter is void and not enforceable either at law or equity." The cooperative law provides that marketing contracts between an association and its members and other agreements authorized by the cooperative statute are not in restraint of trade. For the purpose of the first part of the discussion the cooperative statute may be disregarded. It may even be assumed that the general operations of the association were in restraint of trade and that it was existing in violation of the anti-trust statute. Nevertheless, if it entered into a contract for the sale of a commodity and the buyer received it, the buyer could not avoid liability by alleging that the association was in restraint of trade. When the law says that contracts in restraint of trade are void, it means contracts to combine, to restrict competition, to fix prices, to reduce production, and to do other things condemned by the Act.

3 Ibid., Sections 10186-1 to 26.
4 Ibid.
In *Jackson v. Akron Brick Association* the brick association attempted to sue an alleged buyer in the association partnership name. While the Supreme Court held that if the plaintiff was an illegal combination it could not use the name of the combination as plaintiff in an action, the Court admitted that the persons constituting the partnership could sue in their individual names. On this point the Court approved the charge of the lower court as follows:

“In our jurisprudence it is no defense to say that the contract was made with a bad man, or with persons engaged in prosecuting acts contrary to law, or the policy of the state, unless the contract grows immediately out of and in connection with an illegal or immoral act. A clear distinction exists in law, as well as ethics, between a contract entered into to do an unlawful or immoral act, or to promote a course of conduct contrary to the policy of the state, and a contract entered into for a legitimate purpose, though made with persons who commit unlawful and immoral acts or promote schemes contrary to good policy.”

In *Kinner v. Lake Shore and Michigan Southern Railway Co.* the railroad was suing in equity to enjoin trading in non-transferable return trip ticket coupons. The defense was that the railroad was a part of a combination in restraint of trade. The Court in affirming a judgment granting the injunction said in part:

“From the assumption that the companies composing the passenger association had entered into an unlawful combination in restraint of competition, it results that their conduct may be the subject of inquiry in the nature of a quo warranto, and that courts of equity will also refuse to aid in the enforcement of the contract under which such combination is formed. But a court of equity is not an avenger of wrongs committed at large by those who resort to it for relief, however careful it may be to withhold its approval from those which are involved in the subject matter of the suit and which prejudicially affect the rights of one against whom relief is sought. In the present case the railway company did not count upon the illegal contract, nor did it, in any manner, ask the court to approve the validity of that contract. The tickets against whose fraudulent use the injunction was granted were issued by the company in the usual course of the business for which it was organized; the stipulations against their transfer rested upon the consideration of a reduction of the rates of carriage; they contained no stipulation contrary to any statute either of the United States or of the state of Ohio, or in contravention of public policy, nor was there anything in the conduct of the company by which any right of the original defendants was prejudiced.”

---

53 Oh. State 303 (1895).
69 Oh. State 339 (1903).
While the precise case was in equity the real question was the enforceability of the original contracts.

These holdings received an application of the sort that should have been made in the Stark County Milk Association case, in Corn Products Refining Co. v. Roser Bunkle Co.,7 where in an action to recover for goods sold, the defendant alleged the plaintiff was a combination in restraint of trade and existing in violation of the Valentine Anti-Trust Law. The plaintiff demurred and the demurrer was sustained. The court said in part:

"The fact that the plaintiff was a member of a trust and combination in restraint of trade is not a defense at common law nor by statute to an action for goods sold by it, even though the price of those goods was fixed by the trust agreement. The plaintiff's cause of action is in no sense dependent upon or affected by the alleged trust agreement. That agreement the defendant was not a party to and it is entirely collateral to the transaction sued upon. There is no allegation in the answer tending to show that the sale in question was tainted with any illegality or was contrary to public policy, and the court is not called upon to give effect to any such transaction. If the statute made void all sales made by an unlawful trust, or authorized the purchaser of goods from a trust to plead its unlawful character as a defense, a different question would be presented. That the plaintiff is a member of an unlawful trust, etc., is no defense to an action for goods sold by it, has been decided many times."

The sort of anti-trust law under which the defendant might have asserted a defense is illustrated by the Illinois statute8 which was before the Supreme Court of the United States in Connolly v. Union Sewer Pipe Co.9 The statute was much like the Valentine Act of Ohio in its description of conduct amounting to a restraint of trade, in its provisions for injunction and quo warranto, and in its section making contracts in violation of the act void. Unlike the Ohio Act it added the following section:

"Section 10. Any purchaser of any article or commodity, from any person, from corporations, or association of persons, or of two of them, transacting business contrary to the provisions of this act shall not be liable for the price or payment of such article or commodity, and may plead this act as a defense to any suit for such price or payment."

10 Oh. State N. P. (N. S.) 596 (1910).
The Union Sewer Pipe Company sued Connolly on promissory notes given for sewer pipe he had bought. He defended on the ground, among others, that the Company could not collect the notes because they were Illinois contracts and because the plaintiff was an unlawful trust. Under the Illinois law a person who bought an article from a violator of the Anti-Trust Act could not be obliged to pay. The defendant also argued that the sales contract was void at common law and under the Sherman Law. Since the Supreme Court held the Illinois law unconstitutional because of a section exempting agricultural products or live stock the decisive question was whether, assuming the plaintiff's general operations were a violation of the common law in restraint of trade or the Federal Anti-Trust Law, that fact enabled the defendant to refuse to pay for goods he had purchased. The Supreme Court categorically rejected the defendant's contention:

"The defense cannot be maintained. Assuming, as defendants contend, that the alleged combination was illegal if tested by the principles of the common law, still it would not follow that they could, at common law, refuse to pay for pipe bought by them under special contracts with the plaintiff. The illegality of such combination did not prevent the plaintiff corporation from selling pipe that it obtained from its constituent companies or either of them. It could pass a title by a sale to any one desiring to buy, and the buyer could not justify a refusal to pay for what he bought and received by proving that the seller had previously, in the prosecution of its business, entered into an illegal combination with others in reference generally to the sale of Akron pipe."

The Court likewise rejected the same defense based on the Sherman law saying:

"Much of what has just been said in reference to the first special defense, based on the common law, is applicable to this part of the case. If the contract between the plaintiff corporation and the other named corporations, persons and companies, or the combination thereby formed, was illegal under the act of Congress, then all those, whether persons, corporations or associations, directly connected therewith, became subject to the penalties prescribed by Congress. But the act does not declare illegal or void any sale made by such combination, or by its agents, of property it acquired or which came into its possession for the purpose of being sold—such property not being at the time in the course of transportation from one state to another or to a foreign country. The buyer could not refuse to comply with his contract of purchase upon the ground that the seller was an illegal combination which might be restrained or suppressed in the mode prescribed by the act of Congress; for Congress did not declare that a
combination illegally formed under the act of 1890 should not, in the conduct of its business, become the owner of property which it might sell to whomsoever wished to buy it. So that there is no necessary legal connection here between the sale of pipe to the defendants by the plaintiff corporation and the alleged arrangement made by it with other corporations, companies and firms. The contracts under which the pipe in question was sold were, as already said, collateral to the arrangement for combination referred to, and this is not an action to enforce the terms of such arrangement. That combination may have been illegal, and yet the sale to the defendants was valid."

The Valentine Act in Section 6393\textsuperscript{10} adds nothing to the general rule that a contract made in violation of statute is void and no recovery can be had upon it. In the Cooperative Association's suit to collect for milk bought by a dealer other considerations are controlling. The Association is not suing to enforce any illegal restraint of trade. It is trying to make a milk man pay for milk he has already sold to customers. The defendant's purchases had no necessary or direct connection with the alleged oppressive operations of the Association. The contract between the Association and the dealer was proven without any reference to the arrangements between the Association and producers or other dealers, by which it is charged the association unreasonably restrained trade. The contract between the Association and the dealer was in every sense collateral to the alleged agreements by which the defendant alleged the Association violated the Valentine Act.

II.

Assuming, which was not the fact, that the Ohio law had provided that if one makes a purchase from one who contracts in unreasonable restraint of trade, he may refuse to pay for his purchase, the court should have decided what was an unreasonable restraint of trade and not left the question to the jury. Contracts between cooperative marketing associations, and their members, and other contracts in furtherance of the powers of the associations are presumptively valid under the cooperative marketing statutes. The only contracts that are invalid are those which unreasonably restrain trade. Looking at the question as a matter of common sense it is an obvious absurdity to allow each jury to pass on the question of reasonableness, i.e. the legality of the contracts. In the present Ohio milk

\textsuperscript{10} \textit{Supra}, note (2).
controversy one might find the Stark County Association suing a dozen dealers. The association in the next county might be suing an equal number who had contracted with it. Twenty-four juries might be impaneled within twenty-four miles. In some instances, as in the principal case, all sorts of irrelevant and prejudicial matter might be admitted without exception. In some cases the association might be unpopular for any of a number of reasons having nothing to do with the justice of its claims. In other cases the association might be popular. It is inevitable that there would be no unanimity in the jury verdicts. Since by hypothesis the juries are finding a question of fact, the higher courts could not review the verdicts. The result is that a single association might be a combination in restraint of trade in half the townships in the county or half the time in each township.

The discussion of principles and the examination of decisions involving a jury's province in restraint of trade cases must discriminate according to the different situations where the question arises. In a criminal prosecution where the facts are disputed there may be an ultimate fact as well as subsidiary facts to be found by the jury. And in an action for civil damages by one alleging a conspiracy in restraint of trade where the facts are disputed, the jury must find the facts. But in these agricultural cooperative association cases, as in the Stark County Milk Association case, generally the facts are undisputed. The contract is admitted. There is no substantial dispute about the operations of the association. The only issue is whether the contract taken in connection with the activities of the association is so much against public policy as to amount to an unreasonable restraint of trade. How can any jury, much less a series of juries, make any authoritative finding as to what is public policy? Thus analyzed, the conclusion is patent that such a determination is not within a jury's functions.

Baron Parke's opinion in Wallan v. May\(^\text{11}\) emphatically expresses the common law rule that the question of reasonableness of the restraint is for the court, not the jury. The case involved a contract by a surgeon not to compete in certain territory. The Court found this restraint unreasonable. The plain-

tiff framed one of his pleas to present a jury question. Baron Parke after quoting Tindal, C. J., "Contracts in restraint of trade are, in themselves, if nothing shows them to be reasonable, bad in the eye of the law" and further, "whatever restraint is larger than the necessary protection of the party with whom the contract is made, is unreasonable and void as being injurious to the interests of the public on the grounds of public policy," went on to find the restraint or the contract before him, unreasonable. He then added that the seventh plea was bad. "It attempts to leave the matter of law, viz., the reasonableness or unreasonableness of the contract, to the jury. This is clearly a question of law and was decided as such in Davis v. Mason, Horner v. Graves, Proctor v. Sargent, and Chesman v. Nainby."

The New York case of Cohen v. Berlin & Jones Envelope Company directly involved the question of submitting to the jury the question of the reasonableness of restraint of trade. In the course of his opinion Judge Parker said: "When the testimony was all in a question was presented which the Court alone could pass upon, namely, whether the contract was non-enforceable because in restraint of trade, . . . that was the course adopted by the trial court in Cummings v. Union. Blue Stone Co. (164 N. Y. 401) and it accords, not only with reason but with time-honored practice." (Italics the writer's.)

The Supreme Court of Illinois in Tarr v. Stearman, which although an equity action, involved a contract alleged to be in unreasonable restraint of trade, expressed unequivocally the true doctrine in respect to the determination of the fact of reasonableness. The Court said: "Every contract of this kind must be judged according to its special circumstances, and whether it is reasonable or contrary to public policy is a question of law." This statement was quoted with approval by the

12 Horner v. Graves, 7 Bing. 744 (1831).
13 5 T. R. 118 (1793).
14 Supra, note (12).
15 7 M. & G. 25 (1840).
16 2 Id. Raym. 1456 (1726).
17 166 N. Y. 292, 50 N. E. 906 (1901). See also Hollis v. Drew Theological Seminary, 95 N. Y. 172 (1884); Messersmith v. American Fidelity Co., 232 N. Y. 161 (1911).
18 Ibid., 299.
19 264 Ill. 110, 118, 105 N. E. 525 (1914).
same Court in the recent case of *Parish v. Schwartz*. In *Hood v. Legg*, the Georgia Supreme Court directly held that the reasonableness of a contract is a matter of law. The plaintiff sought an injunction to prevent the defendant's competing with him in violation of contract. The matter was submitted to an auditor who made a finding of law that the limits in the contract were reasonable. On the defendant's motion the Court returned the question to the auditor for a finding as a matter of fact. The Supreme Court in a strong opinion with many citations of precedents and text books, held that reasonableness is a matter of law.

The Supreme Court of the United States in *Thomsen v. Cayser* expressed the same view as to the province of the jury in restraint of trade litigation. The case involved an action for damages under the Sherman Act. The defendant's contention was substantially that, admitting it was a combination in restraint of trade, its motives were of the best. The defendant also argued that the fact of combination should have been submitted to the jury. The Court's whole discussion assumes the matter one of law for the Court. On the specific point the Court said: "The next contention is that the fact of combination should have been submitted to the jury and not decided as a matter of law by the Court. We are unable to assent. There was no conflict in the evidence, nothing, therefore, for the jury to pass upon; and the Court properly assumed the decision of what was done and its illegal effect."

The Supreme Court also in the late case of *Twin City Pipe Line Co. v. Harding Glass Co.* indicates the impossibility of a rule which would leave the issue of reasonableness to the jury in restraint of trade cases. While the case involved an injunction to enjoin a violation of and specifically to enforce a contract, the real question was whether the contract was unenforceable because contrary to the public policy of the state of Ar-
kansas. The Court in fact held the contract valid. In the course of the opinion the Court said: "In determining whether the contract . . . contravenes the public policy of Arkansas, the constitution, laws and judicial decisions of that State and as well the applicable principles of the common law are to be considered."

Imagine a trial court charging a jury in this fashion: "Gentlemen, you are to determine whether this contract is in restraint of trade and hence void. To be in restraint of trade it must be contrary to public policy. In arriving at your verdict, you are to consider the constitution of the State and of the United States, the statutory declaration of the legislature and the applicable principles of the common law."

The Common Pleas Court in the Stark County Milk Association case may have fallen into the error of submitting to the jury the question of reasonableness because of the procedure which seems to have been followed in List v. Burley Tobacco Growers' Cooperative Association.24 This was a suit against a member of the Association for liquidated damages growing out of a failure of the member to deliver tobacco in accordance with the marketing contract. The first judgment for the plaintiff seems to have been given on the pleadings. On error to the Court of Appeals the judgment was reversed and the cause remanded for a new trial upon the issue raised by a defense which stated in substance that the contracts of the defendants and others covered three-fourths of the aggregate production in the state of Ohio, and that the purpose was to fix tobacco prices and destroy competition, in violation of the Ohio Anti-Trust Law. The Court of Appeals ruled that this raised an issue of fact upon which the parties were entitled to introduce evidence. This ruling of the Court of Appeals was obviously correct. Essential facts were disputed. The Court of Appeals said nothing about a jury's determining the question of reasonableness of a restraint of trade.

Upon retrial of the issue, all the Supreme Court report shows is that the cause was submitted to a jury, and a verdict granted to the plaintiff. The report says absolutely nothing as to what issues were submitted to the jury. If the trial court submitted the question of reasonableness of the contract to the

24 114 Oh. State 361, 151 N. E. 471 (1926).
jury there is no showing that any exception was taken. No such point was considered in the long opinion of the Supreme Court. This opinion was strongly in favor of the legality of the Association's operations. The Supreme Court obviously regarded the real question as one of law. The List case in reality, instead of supporting the conception of the province of the jury in the Stark County Milk Association case, justifies precisely an opposite conclusion.

III.

Enough has been said to show that the decision of the Court of Appeals in the Stark County case is erroneous even if the Ohio Supreme Court refuses to consider the general question relating to the contracts and operations of the Milk Association. The substantial controversy back of this small case concerns of course the Association's milk marketing program particularly in respect to blended prices and equalization payments. If the Ohio Supreme Court, as it did in List v. Burley Growers' Tobacco Cooperative Association, decides to rule on the fundamental question of the legality of the Association's activities, the Association seems entitled to a judgment and a vindication of its purposes and methods. Since cooperative marketing of milk involves some novel features not passed upon in the List case, and since sporadic attacks on these methods will mean uncertainty and consequent litigation until a comprehensive decision is rendered, it is hoped that the Ohio Supreme Court will express an opinion upon the basic elements at issue.

The first thing to be noted is that the plaintiff was an agricultural cooperative milk association of producers, incorporated under an Ohio statute granting such associations special privileges and immunities. Between 1921 and 1926 about 40 states passed laws in aid of agricultural cooperation. Most of these states, including Ohio, adopted the so-called standard act. The Ohio law was enacted in 1923.25 Section 4 of this act sets out the powers of cooperative associations incorporated under it. The Section reads in part as follows:

"Section 4. Each association incorporated under this act shall have the following powers:

"(a) To engage in any activity in connection with the marketing, selling, preserving, harvesting, drying, processing, manufacturing, can-

\textsuperscript{25} Supra, note (3)."
ning, packing, grading, storing, handling or utilization of any agricultural products produced or delivered to it by its members or others, or the manufacturing or marketing of the by-products thereof.”

* * * *

“Any such association may limit its activities to the handling or the marketing products of its own members, except for storage. If it handles the products of non-members, such non-members' products handled in any fiscal year must not exceed the total of similar products handled by the association for its own members during the same period.”

* * * *

“(c) To act as the agent or representative of any member or members in any of the above mentioned activities.”

* * * *

“(e) To establish reserves and to invest the funds thereof in bonds or in such other property as may be provided in the by-laws.”

* * * *

“(h) To do each any everything necessary, suitable or proper for the accomplishment of any one of the purposes or the attainment of anyone or more of the subjects herein enumerated; or conducive to or expedient for the interest or benefit of the association; and to contract accordingly; and in addition to exercise and possess all powers, rights and privileges necessary or incidental to the purposes for which the association is organized or to the activities in which it is engaged; and in addition, any other rights, powers and privileges granted by the laws of this state to ordinary corporations, except such as are inconsistent with the express provisions of this act; and to do any such thing anywhere.” (Italics the writer's.)

Since at the time the Ohio Cooperative Marketing Association Law was passed there was on the Ohio statute books the Valentine Anti-Trust Law, a section was included in the cooperative statute attempting to make certain that the contracts and essential activities of cooperative marketing associations would not be attacked as in restraint of trade. This section is Number 26 in the law and is quoted herewith:

“No association organized hereunder and complying with the terms hereof shall be deemed to be a conspiracy or a combination in restraint of trade or an illegal monopoly; or an attempt to lessen competition or to fix prices arbitrarily nor shall the marketing contracts and agreements between the association and its members or any agreements authorized in this act be considered illegal as such or in unlawful restraint of trade or as part of a conspiracy or combination to accomplish an improper or illegal purpose.” (Italics the writer's.)

Forty-seven states have passed laws enabling farmers to act collectively in the marketing of their products. In all these the implication is implicit in the law that action in accordance with the statute is not a violation of the statutory or common law in restraint of trade prevailing in the state. In 30 or more states, particular sections have been included in their co-

* Supra, note (2).
operative statutes expressing substantially the exemption stated in Section 26 of the Ohio law.\textsuperscript{27}

The existence in so many states of laws which, although not constituting precisely a uniform act, have many identical or similar features means that the judicial decisions of one state interpreting a provision of the cooperative marketing act are directly in point in cooperative association litigation in another state. Although the cooperative statutes have been subjected to many legal attacks judicial opinion in all state and Federal courts has been substantially unanimous in upholding them.

Among these judicial opinions that of the Ohio Supreme Court in \textit{List} v. \textit{The Burley Tobacco Growers' Cooperative Association}\textsuperscript{28} is one of the most comprehensive. It has already been mentioned that this case grew out of an action by the Burley Association against a member for liquidated damages. The Burley Association was organized under the Kentucky Cooperative Marketing Act,\textsuperscript{29} a law substantially like the Ohio cooperative association statute. The Burley Association had a contract with its members by which the members agreed to sell and deliver to the association all of the tobacco grown by them or over which they had legal control, for five years beginning in 1922 and ending in 1926. The Association agreement provided that it was not to be effective unless the Association should obtain by January 16, 1922, the signatures of tobacco growers covering at least 3/4 of the Burley production in Kentucky, Indiana, Tennessee, and Ohio. The defendant attacked this agreement as being an unreasonable restraint of trade and monopolistic. To the extent that such contracts might be authorized under the Ohio cooperative marketing statute he alleged that the statute was unconstitutional. The Supreme Court, one judge dissenting and one concurring only in the judgment, upheld the validity of the membership contract in an opinion which showed a sympathetic understanding of the problems of agriculture and the principles of cooperative statutes. The

\textsuperscript{27} See Hanna, Law of Cooperative Marketing Associations (1931) 106; 1933 Handbook Commissioners on Uniform State Laws (Report on proposed Uniform Agricultural Cooperative Association Act, as drafted by the writer).
\textsuperscript{28} \textit{Supra}, note (24).
\textsuperscript{29} The Bingham Act, Ky. Laws 1922, c. 1; amended, Laws 1922, c. 109; Laws 1924, c. 1, c. 7; Baldwin's Ky. Stats., 1928, Section 883f.
Court considered the economic justification for encouraging associations of agricultural producers and said:

"We must look to the fact that persons engaged in agriculture are widely scattered and compose so numerous a class that it is a physical and economic impossibility to combine them all in any commercial enterprise, and we should further look to the fact that many of them are very small producers of such limited means that they must market their products immediately after harvesting, and are therefore at the mercy of purchasers, without any voice whatever in making prices or terms. It must be recognized on the other hand that merchants and manufacturers dealing in any single line of agricultural products are comparatively few and congregated in definite localities. While this is not true of all agricultural production, it is certainly true of the tobacco industry. Such different situations and conditions were evidently considered by the legislatures of the different states and by Congress, whose duty and province it is to consider the economic problems involved. Such legislative acts should not be held to be invalid and unconstitutional, unless clearly violative of the constitutional inhibition.

"In the last analysis this controversy turns upon a question of public policy. The earlier anti-trust legislation is being modified and certain well-defined exemptions are being created. The earlier decisions of the courts construing those acts strictly are being modified and overturned by later decisions. . . . Co-operative marketing acts have been passed by more than three-fourths of the states of the Union. These enactments have been upheld by the courts of last resort of 15 states of the Union, and, up to this time, in not a single case have any of such state laws been declared invalid."

The Kentucky statute involved in the List case came before the Supreme Court of the United States in Liberty Warehouse Company v. Burley Tobacco Growers' Cooperative Marketing Association.30 Two provisions of the Kentucky Act were at issue. Section 26 made it a misdemeanor for any person knowingly to induce a member to violate his marketing contract. The guilty party was also liable to the association in a penal sum. Section 27 declared that a warehouseman who persuaded or permitted a member to violate his contract by accepting the member's products for sale was liable to the association in a penal sum.

One Kielman signed the standard cooperative contract with the association, obliging himself to deliver to it all of his tobacco from 1922 to 1926 inclusive. He broke his contract by delivering 2,000 pounds of 1923 tobacco to the Warehouse Company, which accepted and sold it with full knowledge of the circum-

stances. The Association sued to recover the penalty fixed by
the statute. It was admitted that the warehouse company was
liable unless the provisions in question were unconstitutional.
The challenge of the company was that the sections deprived it
of its privileges, i.e., of its property, without due process of
law, and denied it the equal protection of the laws. The court
pointed out that no right guaranteed by the Constitution was
impaired by the authorization of producer corporations nor by
the declaration that such corporations were not to be deemed in
restraint of trade. Moreover, the statute did not permit anyone
to induce a member to break his contract, nor did it prescribe
more rigorous penalties against warehousemen than against
others. There was therefore no substantial basis upon which to
invoke the equal protection clause.

The Kentucky Cooperative Marketing Act does afford pecu-
liar protection to members' marketing contracts. Under Ken-
tucky law all sorts of contracts are valid. If one induces the
breach of any valid contract he has committed a tort. As to
coop erative contracts he has committed also a crime and his
offense entitles the association to a special civil remedy. The
question before the court therefore was whether the legislative
action in picking out these contracts for special protection was
without reasonable basis and arbitrary. That did bring before
the court for consideration the nature of cooperative
associations and the appropriateness of their functions. The
conclusion of the court was that the attacked sections of the law
were constitutional. "Viewing all the circumstances, it is im-
possible for us to say that the legislature of Kentucky could not
treat marketing contracts between the associations and its mem-
bers as of a separate class, provide against probable interfer-
ence therewith and to that extent limit the sometime action of
warehousemen." From the standpoint of cooperative associa-
tions the most significant part of the decision was the friendly
attitude of the Court toward the cooperative movement. Mr.
Justice McReynolds in delivering the Court's unanimous opin-
ion quoted with approval from several state Supreme Court
decisions. One quotation was from Arkansas Cotton Growers' 
Cooperative Association v. Brown:31

31 168 Ark. 504, 270 S. W. 946 (1925).

"The statute seems to be in a form which has become standard,
and has been enacted in many of the states, the enactment of such
legislation being manifestly prompted by the universal urge to promote prosperity in agricultural pursuits. There has been much discussion of the plan in the decisions of the courts of the various states where it has been adopted, and the general view expressed is that the statute should be liberally construed in order to carry out the design in its broadest scope."

Another quotation was from *Northern Wisconsin Co-Operative Tobacco Pool v. Bekkedal.*

"The reasons for promoting such legislation are generally understood. It sprang from a general, if not well-nigh universal, belief that the present system of marketing is expensive and wasteful and results in an unconscionable spread between what is paid the producer and that charged the consumer. It was for the purpose of encouraging efforts to bring about more direct marketing methods, thus benefiting both producer and consumer and thereby promoting the general interest and the public welfare, that the legislation was enacted."

The court then added:

"The opinion generally accepted—and upon reasonable grounds, we think—is that the cooperative marketing statutes promote the common interest."

One may take it as conclusively established by Federal and state statutes and by the judicial interpretation of them that public policy is strongly in favor of agricultural cooperative associations. Most, but not all, of these producer owned corporations are marketing associations. Some of the associations, including many of the large cotton, wheat, tobacco and rice associations, buy the product of their members, make an initial payment when the product is delivered, sell the product in a program of orderly marketing, and make a final payment to the member determined by the average price received for the grade and quality the member has delivered. Other associations act as agents for their members. Some of these are merely mutually owned commission houses, others obtain bids for the member's products and follow his directions as to sales and prices. Still others act as bargaining associations with almost entire discretion as to price and time of delivery, subject of course to the reserve control by the members which is inherent in the very nature of the association. Marketing methods differ widely in different parts of the United States and for different products. It is obvious that if the cooperative movement is to have any

---

2182 Wis. 571, 197 N. W. 936 (1924).
32 The court cited numerous state cases in accord.
vitality, if the public policy expressed in statutes and decisions in favor of cooperative marketing is to mean anything, associations must have complete freedom to adopt such selling programs as seem best suited to the actual situation.35

A granting of extensive powers to agricultural cooperative associations and the liberal interpretation of these authorizations do not mean that the associations are exempt from the law in respect to restraints of trade. If an association by arbitrary and oppressive measures tended to deprive the public of a reasonable supply of the product of its members at a fair price, if it attempted to compel its members to agree to unwise restrictions of production, if its selling and other policies were designed to drive competitors out of business for reasons of spite or revenge, or in general if the association acted in a highhanded manner having little relation to its fundamental purposes, the association might be enjoined from continuing its restraints, contracts essentially connected with its unfair conduct might be avoided and in extreme cases the association itself might be dissolved.36

IV.

Cooperative associations engaged in the marketing and manufacturing of milk products numbered in 1931, 2,391 associations with 725,000 members doing an aggregate business of over


36 See Barns v. Dairymen's League Co-op. Ass'n., Inc., et al., 220 App. Div. 6-24, 222 N. Y. Supp. 294 (Sup. Ct., App. Div. 4th Dept., 1927); Duplex Printing Press Co. v. Deering, 254 U. S. 443, 41 Sup. Ct. 173, 65 L. Ed. 349 (1921). In the latter case Mr. Justice Pitney, who rendered the Court's opinion, said, discussing the Clayton Act:

"As to section six, it seems to us its principal importance in this discussion is for what it does not authorize, and for the limit it sets to the immunity conferred. The section assumes the normal objects of a labor organization to be legitimate, and declares that nothing in the anti-trust laws shall be construed to forbid the existence and operation of such organizations or to forbid their members from lawfully carrying out their legitimate objects; and that such an organization shall not be held in itself—merely because of its existence and operation—to be an illegal combination or conspiracy in restraint of trade. But there is nothing in the section to exempt such an organization or its members from accountability where it or they depart from its normal and legitimate objects and engage in an actual combination or conspiracy in re-
$620,000,000. This was about $\frac{1}{4}$ of the gross business done by all cooperative associations in the United States. Fluid milk marketing associations controlled the sale of approximately $\frac{2}{5}$ of the fluid milk sold in the United States in 1931. This milk had a value of more than $318,000,000.\textsuperscript{37} The cooperative associations marketing milk in the larger metropolitan markets do not customarily sell milk directly to the consumers. To enter the milk distribution business would require the associations to obtain a large amount of capital to purchase or duplicate existing facilities. This would not only bring about warfare between the associations and the present milk dealers, but would result in an uneconomic disruption of existing business organizations, making for unemployment and other unfortunate consequences. The tendency of the larger fluid milk associations is either to confine their activities to acting as bargaining agencies for their members or to supplement this bargaining function with the operation of plants for the processing of surplus milk and the manufacture of milk by-products.\textsuperscript{38} Under this plan, the

constraint of trade. And by no fair or permissible construction can it be taken as authorizing any activity otherwise unlawful, or enabling a normally lawful organization to become a cloak for an illegal combination or conspiracy in restraint of trade as defined by the anti-trust laws.”

“All these cases (citing many) agree that a combination or agreement having for its object and purpose the restraint of or undue interference with interstate trade or commerce is not a legitimate object of a labor organization, nor a lawful means of carrying out its objects. If the members of a labor organization, either alone or in combination with others, enter into such a combination, they are as much subject to the Anti-Trust Law as any one else, notwithstanding the provisions of section six.”

In United States v. King, 250 F. 908 (D. Mass., 1916), members of a Maine potato shippers association were indicted for what amounted to a secondary boycott. They demurred to the indictment on the ground that they were exempt under Section 6 of the Clayton Act. Judge Norton said that it did not appear the defendants were producers and hence were not within the class described by Section 6. He further stated: “Even if it were so, I do not think that the coercion of outsiders by a secondary boycott . . . can be held to be a lawful carrying out of the legitimate objects of such an association. That act means, as I understand it, that organizations such as it describes, are not to be dissolved and broken up as illegal, nor held to be combinations or conspiracies in restraint of trade; but they are not privileged to adopt methods of carrying on their business which are not permitted to other lawful associations.”

\textsuperscript{37} Bulletin cit., note (35), supra, 62-66, 76, 77.

producer sells his milk to the distributor, for example a subsidiary of the National Dairy Products Company. The producer is paid by the distributor, but the price is determined as a result of bargaining between the distributor and the association. The actual price ultimately paid by the distributor, however, may depend upon a further adjustment to be made between the distributor and the association depending upon the use to which the milk is put. The producer thus receives a price for his product which is determined by the quality of the product delivered and not by the use made of it. This pooling or blending of returns among the members of the association, is merely a plan for distribution among those engaged in a common enterprise of the proceeds received from their common venture. The method used by an association in distributing sales proceeds to its producer-members and the agency which it employs to effectuate such distribution is strictly a matter of internal management and ordinarily has no relevance to a discussion of the reasonableness of the association's operations as restraints of trade. If an association in the exercise of its corporate powers adopts a scheme by which each producer is to receive his equitable proportion of the sales proceeds of the milk of all the members this cannot be subjected to collateral attack but can only be reviewed in an action by a member on the ground of fraud or bad faith in the adoption of the plan. This elementary fact is not altered because an association for purposes of economy and simplicity utilizes existing distributing agencies as the means by which the proceeds of sales are actually paid to the members.

When a court is called upon to consider the reasonableness
of the blended price, equalization payments or other business practices of cooperative associations of milk producers, it is highly relevant for the court to note the attitude toward these practices which has been expressed not only by the cooperative leaders themselves but by agricultural and marketing experts in Federal and State Departments of Agriculture and universities, and by legislatures, legislative committees and other groups representing the general public. The informed public opinion in the states most deeply concerned with the problems of the dairy industry is of course of peculiar significance.

Milk producing and milk distribution are major problems in New York. In 1931 the farm income from dairy products in New York was $150,000,000. The investment in its dairy farms amounted to a billion dollars. The prosperity of its dairy farms is of great significance to taxing authorities and investors, aside from the importance to the urban centers of having an adequate source of milk of good quality. New York farmers have had nearly 50 years of experience with various forms of cooperative handling of milk. In considering the reasonableness of the blended price and other schemes of milk distribution, public opinion in New York on these matters has a peculiar relevance. A joint legislative committee of five members was created in 1932 by the New York Legislature to investigate the milk industry. The Committee, headed by Senator Perley A. Pitcher, created a technical organization with a research director and legal counsel. Thirteen public hearings in eleven localities were held. There were 267 appearances by 254 witnesses. The testimony amounting to 2,350 pages with voluminous exhibits, was digested in a report of 473 pages. This was summarized in ten pages of conclusions and recommendations.

The summary points out the importance of the milk industry and the public interest in milk because it contains in favorable combination, chemical and other properties which are essential to human life and health and is relatively the cheapest

---

40 See op. cit. supra, note (38).

41 The members of the Committee were Messrs. Perley A. Pitcher, Frank G. Miller, Herbert A. Bartholomew, D. Mallory Stephens and William T. Byrne. Two were Senators, three Assemblymen. Dr. Leland Spencer of Cornell was Research Director and Editor, Messrs. James T. Cross and T. Paul McGannon, Counsel and Assistant Counsel.

source of these elements. The public has also a vital concern because milk is an excellent medium for the growth of bacteria and the production and handling of milk for human consumption must be safeguarded carefully to insure against contamination. If the producers fail to receive a fair return, there is grave danger that the vigilance against contamination will be relaxed. The summary also recognized that because milk is an essential food and cannot be stored, the maintenance of a continuous supply, adequate to meet the maximum demand, is of great importance to the public health. Under the best practicable adjustment of supply and demand the industry must carry a surplus of about 20 per cent. Milk must be available in the quantities demanded by consumers from day to day and demand varies from day to day. In addition to the customary surplus which must be provided to take care of peak load demands, other factors such as seasonal freshening, conditioning of pastures, and overproduction of milk-cows, tend to add to the surplus.

Surplus milk is a serious problem everywhere because the prices which can be realized for it are much less than the prices realized for milk and cream sold for consumption in fluid form. Milk and cream for manufacturing may be stored, if not in its original form, in other forms such as butter or milk powder. Because of the different conditions of handling, it need not be subjected to the details of inspection required for milk sold to the homes. In New York, surplus milk products must be sold in competition with those produced in regions where costs are lower. On this question of surplus milk the Pitcher report states:

"A satisfactory stabilization of prices for fluid milk requires (1) that the burden of surplus milk be shared equally by all producers and by all distributors in the milk shed. So long as the surplus burden is unequally distributed the pressure to market surplus milk in fluid form will be a serious disturbing factor; (2) that an united effort be made to reduce the amount of the surplus to the minimum by adjusting the supply of milk more closely to the demand. Obviously the production of surplus milk in most parts of New York state constitutes an economic loss, and is only justified to the amount necessary to guarantee a continuously adequate supply of fluid milk and cream in the available markets.

"The fact that the larger distributors find it necessary to carry large quantities of surplus milk while the smaller distributors do not, leads to price-cutting and other forms of destructive competition,

\[4\] Ibid. 14.
\[5\] Ibid. 17.
especially when the surplus is abnormally large. The small distributor can contract for his minimum requirements and depend upon emergency purchases when threatened with a shortage. The larger distributors cannot do this since the same percentage deficiency in volume would involve quantities too great to be obtained on short notice. The result of this situation is that the smaller distributors who take no responsibility for the surplus, by purchasing their milk on the basis of the blended prices paid by the larger organizations, are in a position to undersell the larger distributors in the cities. . . .

"Among the remedies which might be applied to mitigate the evil of price-cutting are: Universal application of the classified price plan with uniform prices to all milk dealers for milk utilized in each classification; the fixing of minimum prices to be charged by milk dealers for milk and cream sold to consumers and other customers; the imposition of a graduated tax to be paid by milk dealers on their sales of milk and cream in excess of the normal or average proportion of the milk supply of the entire milk shed which is sold by the dealers in fluid form."

"Universal application of the classified price plan and control of surplus milk by the producers through effective cooperative organization appears to offer the best prospect for permanent stabilization of the dairy industry in the New York milk shed." (Italics the Committee's.)

The committee went on to state that in its opinion probably one centralized producers' organization could best accomplish the recited purposes. In the meantime the committee recommended the creation of a temporary state milk control board. This recommendation was adopted by the Legislature.

---


*Laws of New York, 1933, c. 158, Agri. and Markets Law N. Y. (Consol. Laws, c. 69), Section 312. This law has now been superseded by Laws, 1934, c. 126. While the question of the constitutionality of state milk control laws is not directly involved in the present discussion, much of the opinions of the New York Court of Appeals and of the Supreme Court of the United States in sustaining the New York Milk Control Act of 1933 is worth reading for the light it throws on what methods of milk marketing are in accord with public policy. See *People v. Nebbia*, 262 N. Y. 259, 186 N. E. 694 (1933); *Nebbia v. People*, 54 Sup. Ct. 505, 78 L. Ed. 563 (1934). Of especial interest is the recognition by the Supreme Court of the desirability of methods for the control of surplus milk. In this connection, Mr. Justice Roberts, in rendering the Court's opinion said: "The fluid milk industry is affected by factors of instability peculiar to itself which call for special methods of control. Under the best practicable adjustment of supply to demand the industry must carry a surplus of about 20 per cent, because milk, an essential food, must be available as demanded by consumers every day in the year, and demand and supply vary from day to day and according to the season; but milk is perishable and cannot be stored. Close adjustment of supply to demand is hindered by several factors difficult to control. Thus surplus milk presents a serious problem, as the prices which can be realized for it are much less than those obtainable for milk sold for consumption in fluid form or as cream. A satisfactory stabilization of prices for fluid milk requires that the burden
The action of the Ohio legislature also is directly in point in determining whether the activities challenged in the Stark County Milk Association case are in unreasonable restraint of trade.\(^{47}\) While the Ohio Milk Control Act was passed after the contracts in the Stark County Milk Association case were executed, if the public policy of the State was as declared by the legislature in 1933 it was likely the same from 1928 to 1932.\(^{48}\) In the case of Brown v. Staple Cotton Cooperative Association,\(^{49}\) the contract at issue was made in 1921. The cooperative statute was not passed until 1922, but the Court said:

"Although the Cooperative Marketing Act (Chapter 179 of the Laws of 1922) does not and could not declare what the public policy of the state was before its adoption, still it ought to be persuasive on the courts as to what was inimicable to the public welfare at that time. It embodies the judgment of the legislature recently after the making of the contract involved. By it all such contracts for the future are declared legal; they are authorized in order to promote what the legislature thought was the public welfare. Was the public interest one thing in September, 1921, when this contract was made, and another thing in the early part of 1922, when this statute was passed? We think not."

The Secretary of Agriculture under the Agricultural Adjustment Act is authorized to promulgate regulations for interstate commerce in certain agricultural commodities including

of surplus milk be shared equally by all producers and all distributors in the milk shed. So long as the surplus burden is unequally distributed the pressure to market surplus milk in fluid form will be a serious disturbing factor. The fact that the larger distributors find it necessary to carry large quantities of surplus milk, while the smaller distributors do not, leads to price-cutting and other forms of destructive competition. Smaller distributors, who take no responsibility for the surplus, by purchasing their milk at the blended prices (i.e., an average between the price paid the producer for milk for sale as fluid milk, and the lower surplus milk price paid by the larger organizations) can undersell the larger distributors. Indulgence in this price-cutting often compels the larger dealer to cut the price to his own and the producer's detriment."

The opinion continued with a reference to the methods suggested for meeting this condition, including united action by producers, summarized and quoted from the New York law and upheld it, without, however, holding that the milk industry is a public utility. See also for an interesting discussion of the public utility aspects of the milk business, the opinion of Marshall, J., in Fenley's Model Dairy v. Falls Cities Coop. Milk Producers' Ass'n., Jefferson Circuit Court, Kentucky, decided June 28, 1933 (unreported).


\(^{48}\) See "20 Years of Ohio Agriculture," Bull. No. 526, Ohio Agri. Exp. Station (1931).

\(^{49}\) 132 Miss. 859, 86 So. 849 (1923).
milk. Under this authority the Secretary has issued licenses for milk in various areas. The general terms of these licenses are illustrated by the license for milk in the Chicago area. In *United States v. Shissler,* the Federal Court for the Northern District of Illinois recently granted an injunction against the distribution of milk in violation of the Federal license. The following extract from the Court's opinion shows how the Agricultural Adjustment Administration has adopted the classified price plan in a regulation approved by judicial sanction:

"The license fixes the price which shall be paid by the distributor to the producer. As the returns for fluid milk when sold to the consumer vary, depending on whether it is sold to be consumed as fluid milk, as cream, or in the form of butter, cheese, or other manufactured milk products, and as the aim of the secretary is to secure the same price to each producer, no matter what the ultimate use of his milk may be, whether sold to the consumer as whole milk or used for the production of cream, butter, cheese, or other milk product, each distributor is required by the terms of the license to report to the Market Administrator, among other things, the names of the producers from whom he has purchased milk, the quantities purchased from each, the quantities sold by him, and the uses thereof, whether as whole milk or for the production of cream, or for other purposes. By the terms of the license the milk produced is divided into three classes, according to its ultimate use. Class I is such milk as is sold by the distributors as whole milk for consumption in the Chicago Sales Area. Class II is that which is used by the distributors to produce cream for sale by the distributors as cream for consumption in the Chicago Sales Area. Class III comprises the milk purchased by the distributors in excess of Class I and Class II and is used for the production of butter, cheese, and other manufactured milk products.

"The license fixes a price for each class of milk. For Class I the price is $1.75 per hundred-weight; for Class II, a price of $1.25 per hundred-weight; and for Class III, three and one-half times the average price of ninety-two score butter at wholesale in the Chicago "market as reported daily by the United States Department of Agriculture for the calendar month during which the milk is purchased plus four cents. From the reports the Market Administrator computes the blended or average price of the milk sold by the various producers to the distributors (certain other matters being taken into consideration which need not be mentioned here) and reports the same to the distributors, who then are required to pay such average price to each producer no matter what the use to which the particular producer's milk was put. As a result of this process, each producer gets the same price for the milk sold by him as every other producer, but a distributor whose milk has been used for the production of butter, cheese, etc., has paid more for his milk than he should, while one whose milk has been used as whole milk has paid less. To equalize these differences, the Market Administrator sets up an adjustment account for each distributor. Those who have paid too little are required to pay

---

[^51]: 7 F. Supp. 123 (1934).
[^52]: Ibid., 125.
the balance to the Market Administrator and he, from the funds so furnished, reimburses those who have paid too much."

These references to the New York, Ohio and Federal adoption of the classified price plan could be supplemented by a showing of the current practices in practically every important milk shed in the United States. When one considers the manifest policy of the cooperative statutes to encourage cooperative marketing, it is clear that in the absence of clear and convincing evidence that a cooperative association is acting in unreasonable restraint of trade, a court should not refuse to enforce its contracts whether with members or others. When one adds the fact that the methods and devices under attack are in general and increasing use with the approval and even at the direction of all sorts of public authorities, for a court in a particular locality to penalize these practices by denying to a cooperative association the right to enforce its contracts, represents a signal failure of justice. Whatever the court may feel about the wisdom of a cooperative association's policies, so long as the cooperative association is merely following a program, which has received general acceptance, the court cannot find the incidental restrictions imposed by such a program to be unreasonable restraints of trade.

V.

Finally, if the classified price plan and the method of equalization payments were presented to a court without a citation of precedents, the essential fairness and reasonableness of these devices are enough to justify a court in upholding them.

Milk is an indispensible but highly perishable food. This raises a whole set of questions that do not apply to other food

---

38 The Federal approval of the classified price plan dates at least from the policies of the Food Administration under Herbert Hoover during the war. See report of the Federal Trade Commission on Milk and Milk Products, 1914-1918 (1921), c. V.


40 The annual publications of the American Institute of Cooperatives contain much valuable data on milk marketing. See especially Charles W. Holman, Progress and Status of Dairy Cooperatives in the United States, II American Cooperation (1927), 5 et seq., and the symposium on dairy marketing problems by various agricultural authorities in American Cooperation (1933), 285-345.
products. On this point Dr. H. A. Ross makes the following comment:

"Due to its high perishability milk cannot be stored in its natural form as can apples, potatoes, or wheat. It is unlike these crops also in that there is a continual supply instead of an annual harvest. If production exceeds the fluid-milk demand, the surplus is manufactured into less perishable products which find ready sale in world markets. The price obtained for this surplus milk, however, is usually less than that paid for fluid milk in city markets. This is particularly true in New York, where butter, cheese and condensed milk produced under conditions of high cost, must compete in the open market with the same products from the cheaper producing regions of the mid-west. It costs less to ship a pound of butter from Iowa to New York, than to ship sufficient corn to produce that amount of butter here. Nevertheless, the availability of extensive pasture areas in the state of New York has resulted in the development of a dairy industry which, during the greater part of the year, supplies far more milk than consumed in fluid form by the great urban population of the nearby cities. These cities have been demanding more and more milk each year, but even in 1925 only 52.1 per cent of the milk handled in New York milk plants was used as fluid milk. During the same year, however, there was a period when the New York City supply was barely adequate to meet the demand for fluid milk. That is, supply and demand are not in adjustment, and seasons of shortage alternate with seasons of surplus."

Professor G. F. Warren's observations are pertinent in the same connection:

"Since milk is essential, the public will not tolerate an excessive rise in price merely because there is a short supply. It is not feasible to have prices fluctuate from day to day as prices of butter, eggs and potatoes do. At the steady price which is ordinarily maintained week after week, consumers' demands vary with the day of the week, with holidays, with temperature, and with movements in and out of the city. The hotter the August day, the less milk the cows give and the more milk the people drink. This makes a problem that does not exist with other farm products. There must always be a necessary surplus. This is generally estimated at about 20 per cent.

"To produce and handle milk suitable for use as fluid milk is far more expensive than to produce it for manufacturing purposes. This surplus must, therefore, be sold at a loss. But the problem is still more difficult. Farmers cannot know in advance just how much milk they will produce because the weather and other factors affect the cows. To be sure to have the necessary surplus, farmers must take a chance of having still more if conditions should be favorable.

"There was a time when the requirements for producing fluid milk were so little more than the requirements for producing butter, that any milk that would run was ready on any day to be added to the fluid milk supply. Under such conditions, the price of fluid milk was determined by the price of by-products. It is now essential to recognize

57 Testimony before Joint Legislative Committee, Pitcher Report, cit. supra, note (29).
that the production of fluid milk is an entirely different industry from
the production of butter and cheese. It is an industry that has to as-
sume an obligation to provide an adequate supply at all times—some-
what like the railroads or the electrical industry.”

In the days of individual marketing the dealers usually
purchased their milk from farmers on a flat price plan; that is,
the dealer would contract with the individual farmers to take all
of their milk at a certain price regardless of whether the dealer
used the milk for sale in bottles, converted it into cream, or used
it in the manufacture of butter, cheese, evaporated or condensed
milk, ice cream, or other manufactured products. Under this
plan the dealer, naturally, for his own protection, fixed the price
in accordance with the returns which he could obtain for the
milk when sold in the cheapest form, that is, for manufactur-
ing purposes. Getting his milk then for the lowest price possi-
ble the dealer was able to obtain a larger return and greater
profit for that milk which he sold as cream, and in a like manner
that milk which he sold in bottles for fluid consumption brought
him a still greater measure of profit. At the same time the in-
dividual farmers had no way of sharing in the higher returns
which the dealer obtained from the milk sold for cream or for
fluid consumption.

The answer of the cooperatives to the problem of main-
taining an adequate supply without compelling the producer to bear
the whole burden of the surplus has been the establishment of
the classified price plan. The President of the New York Dairy-
men’s League recently explained the operations of the plan, as
follows:

“Beginning with its operations under the pooling plan in 1921, the
association adopted the policy, which is still being used, of selling its
milk to dealers with country plants under the classified price plan.
This plan, in brief, provides for four general classes of milk: Classes
1, 2, 3 and 4. Each class has subdivisions but in broad terms such
plan provides for payment by the dealer for all milk received from the
producers on the basis of the Class 1 price to the extent that dealers
are able to use the milk for sale in the fluid form.

"If more milk is received than is sold in the fluid form and part
of it is made into cream, then it pays a Class 2 price which is a lesser
price than Class 1 and is based upon the prevailing market price for
cream. If the dealer still receives an additional supply of milk from
the association’s producers, over and above its requirements for
Classes 1 and 2 and manufactures same in certain forms such as
condensed or evaporated milk or certain kinds of soft cheese, then it
pays the Class 3 price which is based upon the market price for milk

58 Testimony of F. H. Sexauer, ibid. 111-112.
sold to condensers in the West, the difference in freight rates being considered in fixing such price.

"If the dealer does not have facilities for manufacturing such milk for products mentioned under Class 3, or, does not so manufacture, and uses the additional milk for manufacture into cheeses or butter, he pays Class 4 prices which are based upon the market price for cheese or butter in accordance with the actual disposition of the milk, less a deduction to cover the cost of manufacturing.

"Under this classified price plan, the dealer does not have to bear the burden of surplus. The producers, through their association, bear the burden, and in turn, the dealer pays a fair and reasonable price for the milk which he sells as fluid milk, namely: Class 1. The dealer is assured at all times of sufficient milk to supply his market requirements and if he does not receive sufficient milk from his country plants, he is able to purchase additional supplies from the association on the regular platform and through shipment from the association’s country plants.

"Under this classification plan of sale, although the producers bore the burden of surplus, the surplus has not depressed the relative price of fluid milk as prior to 1921 when the market price for condensed milk governed the fluid milk price. An analysis of prevailing prices in the Central West and in the New York milk shed clearly discloses that from May, 1921, when the classified price plan went into effect, to April 1, 1932, the producers of the association received approximately $116,800,000 more for their milk than they would have received on the basis of prices paid by condensers."

The classified price plan has certain manifest advantages to the producer. Each producer is assured a market for his product all of the time. He knows in advance that he will enjoy full participation in the fluid milk outlets of the region. He also knows then that his share of responsibility for the surplus represents a just allocation in which he is on the same basis as other producers. A single, widely known uniform price is available to producers throughout the milk shed, subject only to differentials for butterfat and transportation costs.

The plan is fair to the distributor because under it, each distributor can buy and pay for the exact amount of milk he needs in each class to fill his market requirements. The success of the distributor thus depends upon his efficiency as an operator, and his skill as a salesman. The advantage to the consumer is that he is assured an adequate supply of high quality milk at a fair price.

If the milk cooperative associations adopt a distribution plan which accomplishes desirable ends without resulting in any of the features commonly associated with unreasonable restraints of trade, such as high prices, poor quality, insufficient output, discrimination and coercion, the plan cannot be called illegal under the statute or common law. Considering the ends in
view, there seems little doubt that the cooperative associations could go much further in their control of milk production and distribution, even involving reasonable restrictions of output, fixing of minimum and maximum prices, limitation of distributing agencies, without making their restraints unreasonable. As the Court said in *Barns v. Dairymen’s League Cooperation Association*:

"It is a question, not of technical constitutional law, but of social policy. It is true that if, under the cover of this beneficent policy, the farmers should develop an organization that absolutely controlled the price of dairy products and other farm products, and raised those prices to an unconscionable height, and indulged in the human greed which often accompanies monopoly, then it is not only probable, but quite certain that the state would withdraw the protection of these exemptions, and would require the farmers to come under the same laws as other business men."

* * * *

"I am convinced that our courts, like the United States Supreme Court since the decision in *Standard Oil of N. J. v. United States* and *Mocker v. American Tobacco Co.*, will apply the "rule of reason" to every combination or agreement brought before them. Before it will condemn, there must appear the elements of injury to the public, or monopolistic control of a particular article of commerce, or unreasonable interference with and damage to the business of an individual, or the doing of illegal or unconscionable acts, or specific intent to do injury to someone else, or, in brief, at least some of those circumstances which would lead a court in good conscience to say that a given set of defendants were overstepping the bounds of reasonable ambition and fair play, and were becoming a nuisance to their fellow men."

* * * *

Note: The Supreme Court of Ohio, on December 26, 1934 reversed the lower court’s decision in *The Stark County Milk Producers Association v. Tabeling, The Massillon Pure Milk Company* and sent the case back for a new trial. The Court stated that milk contracts, such as were before it, are not void as against public policy, or in violation of the anti-trust laws of Ohio, unless such contracts are unreasonable as to character, scope or operation. The Court recognized the necessity of blended prices in milk dealings and referred approvingly to the reports of various fact finding bodies concerned with the milk industry. The Court substantially adopted the plaintiff’s position that it was for the Court and not for the Jury to determine the reasonableness of any alleged restraint of trade, although the Court also recognized that notwithstanding the cooperative statutes contracts of an agricultural cooperative association might be invalid because of the unreasonableness of the restraint. On the facts of the particular case the Court pointed out that although the contracts of the Association, or amendments to these contracts, might be in unreasonable restraint of trade that would not necessarily excuse the defendant from paying for his milk. The case was reversed and remanded particularly for errors in the instructions by the lower court.

---

* Supra, note (36).
* 221 U. S. 1 (1911).
* 221 U. S. 106 (1911).