1947

Co-operative Marketing--Statutes Providing Penalty Against Third Persons Who Induce Breach of Marketing Contracts

Thomas F. Broden
Notre Dame Law School, thomas.f.broden.1@nd.edu

CONTRIBUTORS TO THE MAY ISSUE

Anton-Hermann Chroust, Associate Professor of Law, University of Notre Dame. J.U.D. from the University of Erlangen 1929. Ph.D. from the University of Munich 1931. S.J.D. from the Harvard Law School 1933.

Sister Mary Barbara McCarthy, S.S.J., B.A., Western Michigan College of Education; M.A., Ph.D., Catholic University of America; legal research, University of Michigan, 1934-1938. Listed in the International Blue Book of the world's notable living men and women, as the author of several works, including textual commentaries on the Constitution of the United States and on the American state constitutions. Professor of history and political science, Nazareth College, Michigan.

NOTICE TO SUBSCRIBERS

Due to increased costs of publication, relief from which is not in sight, it is necessary that the subscription price of the NOTRE DAME LAWYER be raised from $2.50 to $4.00 per volume. All subscriptions or renewals received in the future will be credited on this basis. Subscriptions with professional card will be maintained at $10.00 per volume. The price for back numbers remains at $2.00 per number in volumes 1-15, and $1.00 per number in volumes 16 *et seq.*

NOTES

CO-OPERATIVE MARKETING—STATUTES PROVIDING PENALTY AGAINST THIRD PERSONS WHO INDUCE BREACH OF MARKETING CONTRACTS.—Capitalism is most prudent in accepting into its legal system measures of governmental regulation which apply to economic relations generally and contract relations particularly. Efforts of the executive, legislative or judicial branches of either British or American governments to directly control phases of contractual relationships have generally met staunch and rigid opposition. The spirit of the sacredness and inviolability of the contract relation was a logical outgrowth of the

capitalistic system in its inception. At that time freedom was a passion, self-sufficiency a goal. From an era thus shrouded and bedecked with individualism, it is little wonder that measures affecting, even protecting, freedom of contractual relations were slow to evolve. In 1853 in England malicious interference with a contract by a third person was definitely recognized as a tort.[1] At this time, however, this form of judicial protection of the contract relation appeared to most businessmen in the United States as an interference with economic freedom; yet slowly and certainly the tort of malicious interference with contractual relations has developed in this country.[2]

Once the judicial branch of the government was able to affect contracts and to protect contractual relations from malicious third-party influence, public policy determined the boundaries of legal and illegal interference. Thus we see privileged invasions of contractual relations growing out of the demands of the public and national welfare. The most outstanding examples of privileged invasions of contractual relations are the activities in the business world of the labor unions. Likewise stemming from public policy is the privileged invasion of contract relations by co-operative marketing associations. The government, in answer to public demands, has protected the sale of goods under co-operative marketing agreements. Some states have made manifest this spirit of protection by making it a misdemeanor on the part of a third person to induce or cause the breach of a co-operative marketing agreement. The plight of the agricultural group in the United States during the period of rampant industrial progress gave rise to the present interest of government in the protection of farmers. It became increasingly apparent that a sound economy demanded a thriving agricultural group. It was also just as apparent that positive action was the only effective cure for the utterly dissipated farm element.

Such governmental aid to the farmers was opposed as an infringement upon the rights of all citizens to equality under the law. Cries of loss of freedom rose from the buyers who at the time had practically reduced the unfortunate farmer to the position of a bargaining slave. Fundamental rights were being violated when classes such as the farmer were to be afforded privileges and protection. However the concept of freedom in society and under government must inevitably be tempered with a consideration of all other members of the society or government. Thus the right to buy or sell at will in agricultural circles is tempered by regulations designed to secure economic stability

1 In Lumley v. Gye, 2 El. & Bl. 216, 118 Eng. Rep. 749 (1853), defendant was held liable by reason of his inducing an opera singer to break her contract with the plaintiff.

2 Today the great majority of jurisdictions in the United States uphold the doctrine of liability on the part of a third person for maliciously interfering with a contract between two other parties. Prosser on Torts, 978-79 (1941).

for the farming class.[3] Numerous judicial opinions have held that discrimination in favor of agriculture does not amount to a denial of the equal protection of the laws to non-agricultural groups of society. It is understood that the general welfare of these non-agricultural groups is dependent upon the well-being of the agriculturists.[4]

In the very nature of things agriculture was at the mercy of purchasers who readily ascertained the advantages of organized buying. Combinations of purchasing capital virtually regulated the return which farmers realized on their crops. The wretched condition of the

---

[3] A Colorado court held certain actions of the defendant constituted criminal inducement to breach a contract whereas other actions of the defendant against the co-operative were not of such a nature as to fall within the purview of the statute. In this case the court stated that it was a misdemeanor for a third person to induce a breach of a co-operative marketing agreement. Fort v. People ex rel. Co-operative Farmers' Exchange, Inc., 81 Col. 420, 256 P. 325 (1927). In the case of Fort et al. v. Co-operative Farmers' Exchange, Inc., 81 Col. 448, 256 P. 329 (1927) the defendant, Fort, was enjoined from inducing the members of a marketing association to break their contracts of sale to the co-operative marketing association or from interfering in any way with the business of the co-operative. The Supreme Court of Colorado held defendant guilty of contempt of the injunction when he continued to induce members to breach their marketing agreements. However at this time and while this same injunction was in effect, Fort was responsible for articles appearing in a local newspaper accusing the co-operative of "cutting" cabbage prices to the detriment of farmer members. The Colorado Supreme Court held that these acts were not such an interference with the business of the co-operative as to be considered unlawful. The court harmonized the constitutional right of every citizen to the liberty "to speak, write or publish whatever he will on any subject" with the public interest of the issue and decided that the publication would not lawfully interfere with property rights. However in its opinion the court went on record asserting that under Colorado statutes "knowingly to induce or to attempt to induce a member of a co-operative marketing association to break his marketing contract with the association is a misdemeanor." Fort v. People ex rel. Co-operative Farmers' Exchange, Inc., *supra.*

[4] American Sugar Refining Co. v. Louisiana, 179 U. S. 89, 45 L. Ed. 102, 21 S. Ct. 43 (1900); Cox v. Texas, 202 U. S. 446, 50 L. Ed. 1099, 26 S. Ct. 671 (1906); Dahnke-Walker Milling Co. v. Bondurant, 257 U. S. 282, 66 L. Ed. 239, 42 S. Ct. 106 (1921); Rifle Potato Growers' Co-op. Assn. v. Dexter Smith, 78 Col. 171, 240 P. 937 (1925); Burley Tobacco Co. v. Gillaspy, 51 Ind. App. 593, 100 N. E. 89 (1912); Potter v. Burley Tobacco Growers' Co-op. Assn., 201 Ky. 441, 257 S. W. 33 (1923); Brown v. Staple Cotton Co-op. Assn., 132 Miss. 859, 96 So. 849 (1923); State ex inf. Crow v. Continental Tobacco C., 177 Mo. 1, 755 N. W. 737 (1903); Nebraska Wheat Growers' Co-op. Assn. v. Norquest, 113 Neb. 731, 204 N. W. 798 (1925); List v. Burley Growers' Co-op. Assn., 114 Ohio 361, 151 N. E. 471 (1926); Dark Tobacco Growers' Co-op. Assn. v. Dunn, 150 Tenn. 614, 266 S. W. 308 (1924); State of Tennessee, ex rel. Atty. Gen. v. Burley Tobacco Growers' Co-op. Assn., 2 Tenn. App. 674 (1926); Northern Wisconsin Co-op. Tobacco Pool v. Bekkedal, 182 Wis. 571, 197 N. W. 936 (1924). Other examples of legislative discrimination in favor of agriculture are the Clayton Act; the Capper-Volstead Act (February 18, 1922, chap. 57) 42 Stat. at L. 388, U. S. C. title 7, sec. 291; and the Co-operative Marketing Act of July 2, 1926, chap. 725) 44 Stat. at L. 802, U. S. C. title 7, sec. 414-1.

rural populace gained widespread recognition but its needs only increased its helplessness. Efforts to attain the farmer's obvious avenue of escape — that of combining with other farmers — had not gained widespread success. It was only through unity that the farmer would realize equality in bargaining for the sale of his crops. But many factors hindered successful combination; farms and their occupants were physically dispersed; the farmer was characteristically an individualistic person and methods of combined selling had never been effectively presented to him. Also the rest of the country was in no way prompted to assist the farmer in his predicament because low food prices through competitive selling were assured by the agricultural element remaining unorganized.

To relieve this unhealthy national economic situation both the state and federal governments effected statutes providing for co-operative marketing agreements — one phase of which is special protection in contract relations between the co-operative and its members. The overall purpose of these statutes is usually set out in the introduction to the co-operative marketing act of each jurisdiction.[5]

It is well settled that the very existence of the co-operative depends upon the enforcement of its mutual contracts of purchase and resale — exclusive purchase from the members and exclusive resale to the buyer through the co-operative. If this "exclusiveness" in co-operative activity were not insisted upon, the effectiveness of the organization would be seriously hampered if not totally destroyed. There would be no easier method of destroying the co-operative than to interfere with the exclusiveness of flow of products from the member producer through the co-operative to the final purchaser. The co-operative can only insure a just return to the farmer for his products when it is the exclusive or, at least, the predominating bargaining

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

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

agent in the area for the products. Extensive competition would cause the complete dissolution of the co-operative and a return to the former open market competition where a single farmer sold to the organized purchaser. For this reason co-operative marketing statutes have provided penalties for members who breach their co-operative marketing agreements. But more important are the stringent penalties which are provided for those third persons who induce the member to breach his co-operative marketing contract. Recognizing the serious danger of possible destruction of the co-operative by third party interference in the co-operative marketing contract, legislatures have, in some cases, made it a misdemeanor on the part of the third person who induces the member to breach his marketing contract.[6] Many other states provide for heavy penalties to be assessed in a civil suit in favor of the co-operative against the third persons who bring about a breach of marketing agreement.[7]

The basic defense of a third person guilty of inducing a breach of a co-operative marketing contract has been the plea of the unconstitutionality of the statute which classifies such a breach as blameworthy. It is claimed that a statute condemning a third person for buying products impairs the freedom of contractual relations. Also equal protection under the law guaranteed by the Fourteenth Amendment to the Constitution is pointed to as being violated by such penalty statutes. This same Constitutional Amendment affords to those guilty of inducing a breach the possible argument that the statute takes property from them without due process of law. Overshadowing all these defenses is the plea that the legislature has no power to make the influencing of a member to breach a co-operative marketing contract a crime.

---

[6] The following states have statutes which render a third person guilty of a misdemeanor if he knowingly induces a member to breach a co-operative marketing agreement; Colorado, Minnesota, Oregon, Pennsylvania, South Carolina and Vermont. A typical co-operative marketing agreement penalty statute is that of Kentucky which also makes it a crime to induce a member to breach his marketing contract. Kentucky Statutes Annotated (Baldwin, 1943) § 272.990 "Penalties: (2) Any individual or any corporation whose officers or employees knowingly induce or attempt to induce any member to break his marketing contract with an association or who maliciously and knowingly spreads false reports about the finances or management of any association shall be fined not less then one hundred dollars nor more than one thousand dollars for each offense, and shall be liable to the association aggrieved in a civil suit in the penal sum of five hundred dollars for each offense."

[7] The following states have statutes which provide for the recovery of a penalty in favor of the co-operative from a third person who induces a member to breach his co-operative marketing contract. These states do not make this action a misdemeanor, however. They are: California, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Maine, Maryland, Massachusetts, Montana, Nebraska, New Jersey, New Mexico, New York, Ohio, Tennessee and Virginia. Texas provides for treble damages to go to the co-operative.

These contentions are rebutted in the majority of the courts by reference to the police power of the legislature to secure the general welfare of the community. The courts point out the dilemma in which the farm element existed prior to governmental aid. The legislative intent obviously was to remove the obstacles which stood in the path of clarification of this agricultural dilemma. It has been shown that penalty statutes prohibiting third persons from inducing members to breach their co-operative marketing contracts are essential to the potency of the acts as corrective measures. Thus the co-operative marketing acts are established as necessary tools to the maintenance of the general welfare, and the penalty statutes are considered as essential to the effective existence of the acts.

In an outstanding federal case involving this controversy the Supreme Court of the United States upheld the constitutionality of a typical marketing agreement penalty statute by a unanimous decision in 1928.[8] The defendant warehouse company purchased tobacco from a producer, who, as a member of the plaintiff co-operative, had pledged the sale of his full crop to the co-operative. The warehouse, at the time of the purchase, was fully aware of the producer's co-operative marketing agreement with the plaintiff. Mr. Justice McReynolds delivered the opinion of the undivided court in finding the warehouse guilty of inducing a breach of a co-operative marketing contract.

The defendants challenged the validity of the criminal penalty statute as offending the Fourteenth Amendment to the Constitution and thus depriving them of equal protection of the laws. The court rebutted this contention by stating:

> "The statute penalizes *all* who wittingly solicit, persuade, or induce an association member to break his marketing contract. It

---

8 Liberty Warehouse Company v. Burley Tobacco Growers' Co-operative Marketing Association, 276 U. S. 71, 72 L. Ed. 473, 48 S. Ct. 291 (1928). Tigner v. Texas, 310 U. S. 141, 84 L. Ed. 1124, 60 S. Ct. 881 (1940) pointed out that the principal case was an outstanding example of the attitude of the judiciary toward the legislative policy of aid to agriculture. In further support of the principal case is In re Wisconsin Co-operative Milk Pool, 35 F. S. 787 (1940) in which the court held that co-operative associations for the marketing of agricultural products have a favored status under federal laws and the laws of Wisconsin, and that, therefore, a co-operative thus organized was not to be amenable to adjudication as an involuntary bankrupt under the Bankruptcy Act. Compare with Shuster et al. v. Ohio Farmers' Co-operative Milk Association, 61 F. (2d) 339 (1932) which affirmed the validity of the *Liberty Warehouse* case but found co-operative marketing associations amenable to the Bankruptcy Act. The court stated that the *Liberty Warehouse* case served to illuminate brilliantly the active existence of co-operative marketing in economic fields and that with their existence thus apparent to Congress, it was the place of the legislative body to specifically exclude the co-operatives from the Bankruptcy Act. For a discussion of the principal case see (1929) Tenn. L. Rev. 7:123-7F and (1929) Texas L. Rev. 7:306-7F. Also the same problem is discussed in Note (1928) Harvard L Rev. 41:668-9.

does not prescribe more rigorous penalties for warehousemen than for other offenders. Nobody is permitted to do what is denied to warehousemen. There is no substantial basis upon which to invoke the equal protection clause." (Italics ours)

The defendants placed much reliance on the *Connolly* case of 1902, in which the United States Supreme Court decided that particular exemption of argricultural interests was a denial of the equal protection of the law. The *Connolly* case had little value in the solution of the present case, the Court held, as it distinguished the *Connolly* case from the instant proceedings on factual grounds.[9]

The Supreme Court concluded its statement in support of validity of the statute by expressing the now generally accepted policy regarding co-operative marketing statutes:

"Co-operative marketing statutes promote the common interest. The provisions for protecting the fundamental contracts against interference by outsiders are essential to the plan. This court has recognized as permissible some discrimination intended to encourage agriculture. And in many cases it has affirmed the general power of the states so to legislate as to meet a definitely threatened evil. Viewing all the circumstances, it is impossible for us to say that the legislature of Kentucky could not treat marketing contracts between association and its members as of a separate class, provide against probable interference therewith, and to that extent limit the sometime action of warehousemen.

"The liberty of contract guaranteed by the Constitution is freedom from arbitrary restraint — not immunity from reasonable regulation to safeguard the public interest. The question is whether the restrictions of a statute have reasonable relation to a proper purpose."[10] (Italics ours)

---

[9] Later, also the case of Connolly v. Union Sewer Pipe Co., 184 U. S. 540, 46 L. Ed. 679, 22 S. Ct. 431 (1902) was overruled in Tigner v. Texas, 310 U. S. 141, 84 L. Ed. 1124, 60 S. Ct. 881 (1940) cited *supra* note 8. There Mr. Justice Frankfurter delivered the eight to one majority opinion and in part stated: "And so we conclude that to write into law the differences between agriculture and other economic pursuits was within the power of the Texas legislature. Connolly's case has been worn away by the erosion of time, and we are of opinion that it is no longer controlling." The Court pointed out that an impressive legislative movement during the forty years following the Connolly case was witness to the general acceptance of the view that the differences between agriculture and industry call for differentiation in the formulation of public policy.

[10] The view of the principal case finds virtually universal judicial support. Warren v. Alabama Farm Bureau Cotton Assn., 213 Ala. 61, 104 So. 264 (1925), where the court was of the opinion that co-operatives were in no way injurious to the public interest or in any way violative of public policy. In Arkansas Cotton Growers' Co-op. Assn. v. Brown, 128 Ark. 504, 270 S. W. 946, 1119 (1925) the court sustained a Co-operative Marketing Act: "The statute seems to be in a form which has become standard and has been enacted in many of the states, the

Kentucky was one of the earliest states whose supreme court was called upon to uphold the constitutionality of a co-operative marketing statute which made it a misdemeanor to induce a member to breach a marketing contract. In 1910 the court decided that, unless such a statute were expressly or impliedly forbidden by the terms of the state or federal constitutions, it is valid. Since co-operative marketing pools are lawful, the passage of statutes necessary for the protection of those pools is within the police power of the legislature, the court said. Likewise co-operative marketing penalty statutes are not an interference with one's right to acquire property because a person has no right to acquire property from those who have no right to sell that property. The Kentucky Supreme Court also announced that the legislature, for purposes of public welfare, may set out the farm element as a group to be protected, and that as long as all persons who violate the terms of a protection statute are guilty, there is no denial of equal protection of law as guaranteed by the Fourteenth Amendment.[11]

---

enactment of such legislation being manifestly prompted by the universal urge to promote prosperity in agricultural pursuits." The court in Manchester Dairy System v. Hayward, 82 N. H. 193, 132 Atl. 12 (1926) held a co-operative marketing contract in accord with public policy. "Co-operative marketing agreements, containing the essential features of the contract here considered, have been recognized in many of our states as a legitimate means of protecting its members against oppression, of avoiding the waste incident to the dumping of produce upon the market with the consequent wide fluctuations in prices and of securing to the producer a larger share of the price paid by the consumer for his products." In accord are Tobacco Growers' Co-op. Assn. v. Jones, 185 N. C. 265, 117 S. E. 174 (1923); Northern Wisconsin Co-op. Tobacco Pool v. Bekkedal, 182 Wis. 571, 197 N. W. 936 (1924); Dark Tobacco Growers' Co-op. Assn. v. Dunn, 150 Tenn. 614, 266 S. W. 308 (1924); Tobacco Growers' Co-operative Assn. v. Danville Warehouse Co., Inc., 144 Va. 456, 132 S. E. 482 (1926); Burley Tobacco Society v. Gillaspy, 51 Ind. App. 583, 100 N. E. 89 (1912); Bullville Milk Producers' Assn., Inc. v. Armstrong, 178 N. Y. S. 612 (1919); Anaheim Citrus Fruit Assn. v. Yoeman, 51 Cal. App. 759, 197 P. 959 (1921); Washington Cranberry Growers' Assn. v. Moore, 117 Wash. 430, 201 P. 773, 204 P. 811 (1922). *Contra,* Minnesota Wheat Growers' Co-op. Marketing Assn. v. Rahke, 163 Minn. 403, 204 N. W. 314 (1925), where the court held that a statute prohibiting third parties from buying or handling products merely because they were under contract to be sold to a co-operative marketing association is an infringement of the liberty of contract guaranteed by the state and federal constitutions. This court held the statute to be unconstitutional. This view apparently stands alone in American judicial decisions.

[11] Commonwealth v. Hodges et al., 137 Ky. 233, 125 S. W. 689 (1910). Other decisions which recognize the principal case as valid authority are: Burley Tobacco Society v. Gillaspy, 51 Ind. App. 583, 100 N. E. 89 (1912); Louisville & N. R. Co. v. Burley Tobacco Society et al., 147 Ky. 22, 143 S. W. 1040 (1912); Liberty Warehouse Company v. Burley Tobacco Growers' Co-operative Marketing Association, 276 U. S. 71, 72 L. Ed. 473, 48 S. Ct. 291 (1928); Potter v. Dark Tobacco Growers' Co-op. Assn., 201 Ky. 441, 257 S. W. 33 (1923); Lee et al. v. Clearwater Growers Assn. et al., 93 Fla. 214, 111 So. 722 (1927); Tobacco Growers' Co-op. Assn. v. Jones, 185 N. C. 265, 117 S. E. 174 (1923) and Elephant Butte Alfalfa Assn. v. Rouault, 33 N. M. 136, 262 P. 185 (1928).

Co-operative marketing statutes have been enacted in virtually every state of the Union, and an examination of the cases shows that universal judicial acceptance has greeted legislative efforts to aid the plight of the farmer by these co-operative marketing agreements.[12] Likewise virtually universal judicial acceptance has greeted those penalty statutes which safeguard the existence of co-operative marketing contracts. The strongest of these penalty statutes are those which make it a misdemeanor for a third person to induce a breach of such a contract. These are forcefully indicative of the genuine wholehearted assistance government is bringing to argricultural groups in this country.

A most controversial economic question of the present day — how much personal freedom must be forfeited to the government to establish an economic system which affords security to all — finds one answer in the principles of co-operative organizations.

In a democratic system of government where the majority of the citizens exercise control of the policies of the government, it is inevitable that this majority be constantly pressing for governmental reforms aimed at the minority which possesses the means of production. Thus we see economists offering solutions to the problem of economic security for the political majority.

Since the collectivist state, placing the means of production in the hands of the government, is comparatively easy to attain, this method of attaining majority economic security seems to receive the most active and effective support.

However it has been said that a form of economy based on the principle of the co-operative organization also would bring economic security to the majority of the citizens. This system is known as the distributive state wherein the mass of citizens own the means of production. Such a system, however, is not so easily attained. It places on each citizen the burden of control and decision in relation to his private property — his share in the means of production. Property, of course, is private and for this reason alone many advocates have been found to support the distributive modification of capitalistic government. For this reason, also, an expanding future has been predicted for the co-operative marketing association.

Thomas Broden.

---

12 Liberty Warehouse Company v. Burley Tobacco Growers' Co-operative Marketing Association, 276 U. S. 71, 72 L. Ed. 473, 48 S. Ct. 291 (1928).