Indiana Law Journal

Volume 27 | Issue 3 Article 4

Spring 1952

The Cooperative Marketing Contract

Part III

The Cooperative Marketing Contract

In the preceding discussions concerning the organizational structure of the cooperative enterprise, emphasis centered primarily upon the producer as a member and owner of the association. Of equal importance is the complementary relationship of the producer as a contractual party to the marketing agreement. Executed by each producer concurrently with acquisition of membership, this agreement prescribes the terms and conditions for marketing through the cooperative facilities.[1]

Suspicious of any contractual attempt to combine economic power, some courts were reluctant initially to sanction the legality of exclusive contracts between the association and its members. Invalidation was predicated upon a lack of mutuality and consideration, illegal restraint of trade, and contravention of public policy.[2] However, federal and state legislatures, traditionally sensitive to agricultural interests, repudiated the rationale of these earlier decisions by expressly exempting member contracts from the interdictions of the antitrust laws[3] and declaring, as a matter of legislative policy, that agricultural associations and their objectives were to be considered in the public interest.[4] Cooperative marketing statutes enacted in every state further established a statutory

1. For general discussions of member cooperative marketing contracts, see HULBERT, LEGAL PHASES OF COOPERATIVE ASSOCIATIONS 115 *et seq.* (F.C.A. BULL. No. 50, 1942); PACKEL, THE LAW OF THE ORGANIZATION AND OPERATION OF COOPERATIVES 39 *et seq.* (2d ed. 1947); NOURSE, THE LEGAL STATUS OF AGRICULTURAL COOPERATION 171 *et seq.* (1927); HANNA, THE LAW OF COOPERATIVE MARKETING ASSOCIATIONS 509 *et seq.* (1931).

2. Georgia Fruit Exchange v. Turnipseed, 9 Ala. App. 123, 62 So. 542 (1913); Burns v. Wray Farmers Grain Co., 65 Colo. 425, 176 Pac. 487 (1918); Ford v. Chicago Milk Shippers' Ass'n, 155 Ill. 166, 39 N.E. 651 (1895); Reeves v. Decorah Farmers' Co-op. Society, 160 Iowa 194, 140 N.W. 844 (1913).

3. For consideration of the applicability of federal and state antitrust statutes see PART IV, *infra.* See PART V, *infra,* for a discussion of federal income tax exemptions available to cooperative associations.

4. Mr. Justice Frankfurter in Tigner v. Texas, 310 U.S. 141 (1939), in referring to the transformation in legislative and judicial attitude towards agricultural cooperatives concluded: "Since Connolly's case was decided, nearly forty years ago, an impressive legislative movement bears witness to general acceptance of the view that differences between agriculture and industry call for differentiation in the formulation of public policy. The states as well as the United States have sanctioned cooperative action by farmers; have restricted their amenability to the antitrust laws; have relieved their organizations from taxation. . . ." Such expressions of legislative policy have withstood challenge in the courts. *Id.* at 145-146. Extensive citations and excerpts from state court opinions expressing the same view are found in Liberty Warehouse Co. v. Burley Tobacco Growers' Coop. Marketing Ass'n, 276 U.S. 71 (1928).

basis for the inclusion in member contracts of terms and provisions commonly employed in association-member agreements.[5]

Drafted within the framework of this enabling legislation, the typical cooperative marketing agreement is essentially an entire output contract for the term of five to fifteen years.[6] The producer agrees to deliver to the association all crops grown or acquired during the term of the contract[7] in exchange for the association's promise to receive, process and market such produce for the best price obtainable.[8] The

5. The state cooperative marketing statutes are collected in Jensen, *The Bill of Rights of U.S. Cooperative Agriculture*, 20 ROCKY MT. L. REV. 181, 191 n.29 (1948). The Uniform Cooperative Corporation Act, drafted and approved by the American Bar Association and the National Conference of Commissioners on Uniform State Laws has been adopted in Utah and Maine with some modifications. *Id.* at 192. However, the Bingham Cooperative Act of Kentucky, first enacted in 1922, is the prototype of a majority of the state statutes. KY. REV. STAT. § 272.100 *et seq.* (1946). See, ABSTRACT OF THE LAWS PERTAINING TO COOPERATION IN THE UNITED STATES Pt. II (W.P.A. for City of New York, 1940).

With respect to the cooperative members' contract the Bingham Act provides: "The association and its members may make marketing contracts, requiring the members to sell . . . all or any specified part of their agricultural products . . . exclusively to or through the association. . . . If they contract a sale to the association, it shall be conclusively held that title to the products passes absolutely, except for recorded liens, to the association upon delivery, or at any other time expressly and definitely agreed in the contract. The contract may provide that the association may sell or resell the products delivered by its members, with or without taking title to them; and pay its members the resale price, after deducting all necessary expenses. . . ." KY. REV. STAT. § 272.220 (1946). The constitutionality of this statute was sustained in Liberty Warehouse Co. v. Burley Tobacco Growers' Co-op. Marketing Ass'n, 276 U.S. 71 (1928).

6. The Bingham Act limits the term of the agreement to ten years. KY. REV. STAT. § 272.220 (1946). Attempts to extend the effectiveness of the agreement do not necessarily invalidate the entire contract. Olympia Milk Producers' Ass'n v. Herman, 176 Wash. 338, 29 P.2d 676 (1934). However, the contract or by-laws may provide for withdrawal privileges. By the withdrawal provisions in the marketing contract of California Walnut Growers Association for 1940, the member is privileged to withdraw as of February first of each year, upon written notice to the association between Jan. 1 and Feb. 1 of the year in question.

7. The agreement quoted in Beaulaurier v. Washington State Hop Producers, 8 Wash.2d 79, 111 P.2d 559 (1941) at page 90, 111 P.2d at 563, is representative. "The grower agrees to deliver to, and market and sell through the Association . . . all hops produced, owned, controlled or possessed by him, commencing with all hops produced during the year 1938 and every year thereafter to and including the crop produced in 1947."

8. See the contract set forth in Kansas Wheat Growers' Ass'n v. Oden, 124 Kan. 179, 184, 257 Pac. 975, 978 (1927). "The association shall classify wheat by quality, grade, variety or any other commercial standard: and this classification shall be conclusive. . . . The association agrees to resell such wheat . . . at the best prices obtainable by it under marketing conditions." The court in the instant case, held the contract provision as to the conclusiveness of the association's grading and classification was controlling in the absence of a showing of fraud, mistake or injury to the grower. *But cf.* Myrold v. Northern Wisconsin Co-op. Tobacco Pool, 206 Wis. 244, 239 N.W. 422 (1931).

As to the association's duty to secure the "best price obtainable," see Arkansas Cotton Growers' Co-op. Ass'n v. Brown, 179 Ark. 338, 16 S.W.2d 177 (1929); California Prune and Apricot Growers v. Baker, 77 Cal. App. 393, 246 Pac. 1081 (1926).

contract may contemplate a purchase and sale of the producer's crops, in which case title is said to vest absolutely in the association. In the alternative, the cooperative may receive the crop merely in the capacity of marketing agent for purposes of sale. Although the agreement may require that each producer's crop be marketed individually, seasonal or periodic pooling of members' crops is a common practice.[9] The association accounts to the producer for the net proceeds realized on the final sale of his crops, after deducting the prorated operational expenses and other authorized deductions. To insure complete patronage by every producer—the primary economic objective of the contract—the association reserves the remedies of injunction, specific performance, and liquidated damages in event of the producer's failure to deliver all or a part of his crop.[10]

Liberal construction by the courts, in conformity with the legislative policy, has established the basic validity of the cooperative member contract.[11] Moreover, express statutory sanction of equitable remedies and liquidated damages forecloses most litigable questions with respect to remedies against the defaulting producer.[12] There remain, however,

9. BLANKERTZ, MARKETING COOPERATIVES c.10 (1940). For an excellent description of the operation of the various commodity associations in pooling, see FETROW & ELSWORTH, AGRICULTURAL COOPERATION IN THE UNITED STATES (F.C.A. BULL. No. 54, 1947). See Reinert v. California Almond Growers Exchange, 63 P.2d 1114 (1937); *subsequent opinion,* 9 Cal.2d 181, 70 P.2d 190 (1937); Texas Certified Cottonseed Breeders' Ass'n, 122 Tex. 464, 61 S.W.2d 79 (1933).

10. The cooperative marketing statutes specifically authorize these remedies. *"Remedies for breach of contract.—(a)* The by-laws or the marketing contract may fix, as liquidated damages, specific sums to be paid by the member to the association if he breaches any provision of the marketing contract regarding sale or delivery or withholding of products. . . . The clauses providing for liquidated damages shall be enforceable as such and shall not be regarded as penalties. *(b)* If any member breaches or threatens to breach such marketing contract, the association may have an injunction to prevent the further breach of the contract and a decree of specific performance." KY. REV. STAT. § 272.230. For decisions granting these remedies, see note 12 *infra.*

11. Anaheim Citrus Fruit Ass'n v. Yeoman, 51 Cal. App. 759, 197 Pac. 959 (1921); Rifle Potato Growers' Coop. Ass'n v. Smith, 78 Colo. 171, 240 Pac. 937 (1925); Burley Tobacco Growers' Coop. Ass'n v. Rogers, 88 Ind. App. 469, 150 N.E. 384 (1926); Clear Lake Coop. Live Stock Shippers' Ass'n v. Weir, 200 Iowa 1293, 206 N.W. 297 (1925); Kansas Wheat Growers' Ass'n v. Schulte, 113 Kan. 672, 216 Pac. 311 (1923); Potter v. Dark Tobacco Growers' Coop. Ass'n, 201 Ky. 441, 257 S.W. 33 (1923); Louisiana Farm Bureau Cotton Growers' Coop. Ass'n v. Clark, 160 La. 294, 107 So. 115 (1926); Minnesota Wheat Growers' Coop. Marketing Ass'n v. Huggins, 162 Minn. 471, 203 N.W. 420 (1925); Tobacco Growers' Coop. Ass'n v. Jones, 185 N.C. 265, 117 S.E. 174 (1923); Oregon Growers' Coop. Ass'n v. Lentz, 107 Ore. 561, 212 Pac. 811 (1923); Washington Cranberry Growers' Ass'n v. Moore, 117 Wash. 430, 201 Pac. 773 (1921); Northern Wisconsin Coop. Tobacco Pool v. Bekkedal, 182 Wis. 571, 197 N.W. 936 (1923).

12. The courts uniformly grant the association the remedies of specific performance, injunction and liquidated damages. *Specific Performance:* Colma Vegetable Ass'n v. Bonetti, 91 Cal. App. 103, 267 Pac. 172 (1928); Tobacco Growers' Coop. Ass'n v. Jones, 185 N.C. 265, 117 S.E. 174 (1923); Texas Farm Bureau Cotton Ass'n v.

several significant areas for judicial delineation in the construction and interpretation of marketing agreements. Meriting particular consideration are the defenses and recourse available to the producer resulting from irregularities in the formation of the contract; the sale of the producer's land or the mortgage of his crops; and the association's violation of the terms of the agreement. Finally, the present judicial reliance upon the concept of passage of title under the terms of the contract as determinative of risk of loss and other ownership consequences warrants specific examination.

Irregularities in the formation of the contract stemming from misleading representations at the time of execution or failure of the association to comply with conditions precedent to the producer's obligations under the agreement have been particularly productive of litigation.[13] Overzealous cooperative organizers are prone to exaggerate the benefits of cooperative marketing in an effort to increase membership. Should such statements relate to present or past material facts and the producer reasonably relies to his detriment, it is well established that he may assert such misrepresentation as a defense to a contract action or as a basis for rescission or cancellation.[14] For instance, where a cooperative

---

Stovall, 113 Tex. 273, 253 S.W. 1101 (1923). *Injunction:* Burley Tobacco Growers' Coop. Ass'n v. Devine, 217 Ky. 320, 289 S.W. 253 (1926); Kansas Wheat Growers' Ass'n v. Schulte, 113 Kan. 672, 216 Pac. 311 (1923); Minnesota Wheat Growers' Coop. Marketing Ass'n v. Huggins, 162 Minn. 471, 203 N.W. 420 (1925); Nebraska Wheat Growers' Ass'n v. Norquest, 113 Neb. 731, 204 N.W. 798 (1925); Beaulaurier v. Washington State Hop Producers, 8 Wash.2d 79, 11 P.2d 559 (1941). *Liquidated Damages:* Dark Tobacco Growers' Coop. Ass'n v. Daniels, 215 Ky. 67, 284 S.W. 399 (1926); Dark Tobacco Growers' Coop. Ass'n v. Mason, 150 Tenn. 228, 263 S.W. 60 (1924). For further citations and discussion of these remedies, see HULBERT, *op. cit. supra* note 1, at 179-194. The necessity for additional protection to the association and the development of these remedies in the courts are set forth in NOURSE, *op. cit. supra* note 1, at 195-215, 267-331.

The cooperative marketing statutes further provide that it shall be a misdemeanor for a third party to knowingly induce a breach of or interfere with the members' contract and that the association may recover a penalty of $500. See Liberty Warehouse Co. v. Burley Tobacco Growers' Coop. Marketing Ass'n, 276 U.S. 71 (1928). See also Watertown Milk Producers' Coop. Ass'n v. Van Camp Packing Co., 199 Wis. 379, 225 N.W. 209, 226 N.W. 378 (1929); Monte Vista Potato Growers' Coop. Ass'n v. Bond, 80 Colo. 516, 252 Pac. 813 (1927); HULBERT, *op. cit. supra* note 1, at 194.

13. Frequently, the contract or the by-laws condition the effectiveness of the contract upon the association's securing the specified number of producers or requisite acreage or bushelage. The association has the burden of proving compliance with such conditions in an action to recover on the contract. Kansas Wheat Growers' Ass'n v. Bridges, 133 Kan. 397, 1 P.2d 265 (1931); Washington Wheat Growers' Ass'n v. Leifer, 132 Wash. 602, 232 Pac. 339 (1925).

14. Kansas Wheat Growers' Ass'n v. Massey, 123 Kan. 183, 253 Pac. 1093 (1927); Wenatchee Dist. Coop. Ass'n v. Mohler, 135 Wash. 169, 237 Pac. 300 (1925).

Similarly, if the contract is signed under duress it is subject to rescission at the instance of the producer. Sun-Maid Raisin Growers of California v. Papazian, 74 Cal.

agent induced a producer to enter into a cooperative agreement by assurances that the association had secured an elevator in the locality[15] or would extend credit during the growing season,[16] the producer's assertion of these misrepresentations as a defense in an equitable action to compel delivery was sustained. The statements, however, must not be mere opinions or predictions and the producer must reasonably believe that the agent had authority so to represent.[17] A general prediction as to the increased price obtainable by marketing through the association will not entitle the grower to cancellation of the contract.[18]

Chief among the anti-misrepresentation weapons in the association's arsenal are the classic rules of estoppel and waiver which are doubly lethal because of the dual role of the grower as a member of the association and a contracting party. Incorporation by reference of the by-laws into the contract lends credence to the argument that the two roles are interdependent.[19] Hence, if subsequent to signing the contract and with knowledge of the fraud, the producer either performs under the contract or participates as a member of the association, he is held to

App. 231, 240 Pac. 47 (1925); Commonwealth v. Reffit, 149 Ky. 300, 148 S.W. 48 (1912).

15. Kansas Wheat Growers' Ass'n v. Vague, 118 Kan. 246, 234 Pac. 964 (1925). There were also representations as to the number of producers in the locality who had signed marketing contracts with the association.

16. Dunbar v. Tobacco Growers' Coop. Ass'n, 190 N.C. 603, 130 S.E. 505 (1925). The illiteracy of the producer as compared to the expert knowledge of the cooperative agent was stressed by the court. *But see,* Kansas Wheat Growers' Ass'n v. Rowan, 125 Kan. 710, 266 Pac. 101 (1928).

17. Kansas Wheat Growers' Ass'n v. Rowan, 125 Kan. 710, 266 Pac. 101 (1928); Natchez Pecan Marketing Ass'n v. Bramlett, 163 Miss. 596, 143 So. 429 (1932) (holding disclaimer clause in contract precluded rescission upon grounds of oral misrepresentations); Simpson v. Tobacco Growers' Coop. Ass'n, 190 N.C. 603, 130 S.E. 507 (1925). *But cf.* Placentia Coop. Orange Growers' Ass'n v. Henning, 118 Cal. App. 487, 5 P.2d 444 (1931).

18. Burley Tobacco Growers' Coop. Ass'n v. Rogers, 88 Ind. App. 469, 480, 150 N.E. 384, 388 (1926); Kansas Wheat Growers' Ass'n v. Floyd, 116 Kan. 522, 524, 227 Pac. 336, 337 (1924); South Carolina Cotton Growers' Coop. Ass'n v. English, 135 S.C. 19, 133 S.E. 542 (1926).

19. Kansas Wheat Growers' Ass'n v. Massey, 123 Kan. 183, 253 Pac. 1093 (1927). Watertown Milk Producers' Coop. Ass'n v. Van Camp Packing Co., 199 Wis. 379, 225 N.W. 209, 226 N.W. 378 (1929). In the *Massey* case *supra,* the court concluded at page 185, 253 Pac. at 1094: "The result is, membership and marketing are fused elements of the cooperative scheme. Because the bond of membership binds each member to others to sell only through the association, to affirm membership is to affirm obligation to fulfill requirements of the marketing agreement, and obligation to fulfill requirements of the marketing agreement may not be denied by one who asserts membership and exercises privileges of membership by participating in the corporate activities of the organization."

As to the incorporation of by-laws into the marketing contract, the provisions of the California Fruit Exchange Marketing Contract are illustrative: "The By-Laws of Exchange shall constitute a part of this contract, and any amendment to said by-laws, made as herein provided, shall automatically modify this contract." THE BLUE ANCHOR, HISTORY OF THE CALIFORNIA FRUIT EXCHANGE 49 (1947).

waive any previously existing grounds for avoidance.[20] No finding of specific intent to waive is necessary nor is a showing of reliance by the association required. Under similar circumstances the producer may be estopped to assert the non-compliance by the association with conditions precedent to producer's duty to perform.[21]

Reliance by the association, if required, may be implied from its assumption of contractual obligations for the future sale and delivery to commercial buyers. While the finding of waiver by further participation under the contract is in accord with settled contract principles, the alternative basis for implying such waiver, the exercise of membership privileges, may be subject to question. That the relationship of member and contracting party can be separate is demonstrated by the contracts between nonmembers and the association.[22] Further, the casting of a proxy vote, or any other exercise of membership right, may seem totally unrelated to the marketing contract. It remains true, however, that the membership rights, in a broad sense, are exercised to further the identical objectives as those of the marketing contract, an increased financial return on the marketing of the member's produce. Thus, the courts are reasonably justified in concluding that a participation in the affairs of the association is sufficiently inconsistent with an intention to deny the validity of the contract as to warrant a finding of waiver.

The producer's inability to perform under the agreement due to the acquisition by a third party of an interest in the land upon which the

---

20. Kansas Wheat Growers' Ass'n v. Rowan, 125 Kan. 654, 266 Pac. 104 (1928) (by exercise of proxy vote in association's general meetings); Kansas Wheat Growers' Ass'n v. Oden, 124 Kan. 179, 254 Pac. 975 (1927) (same); Dairy Cooperative Ass'n v. Brandes Creamery, 147 Ore. 488, 495, 30 P.2d 338, 340 (1934) (partial performance under the contract); Beaulaurier v. Washington State Hop Producers, 8 Wash.2d 79, 111 P.2d 559 (1941) (participation in meetings). The applicable principle was stated in Kansas Wheat Growers' Ass'n v. Massey, 123 Kan. 183, 253 Pac. 1093 (1927), "If defendant [producer] considered he was fraudulently induced to become a member, he was privileged to renounce membership, and renunciation would relieve him from obligation to comply with the marketing agreement. . . . He could rescind and stay out, or he could stay in. But he could not consider himself out at marketing time, and in when corporation business was to be transacted, or keep membership and withdraw from the marketing agreement. . . ." *Id.* at 186, 253 Pac. 1094.

21. Kansas Wheat Growers' Ass'n v. Windhorst, 131 Kan. 423, 292 Pac. 777 (1930) (producer's membership on preorganization committee, which had certified as to number of bushels of wheat under contract, estopped him from asserting falseness of the certification, despite his lack of actual knowledge): Wenatchee District Coop. Ass'n v. Thompson, 143 Wash. 655, 255 Pac. 918 (1927). However, usually the producer must have actual notice of the fraud or of the association's non-compliance with conditions precedent before waiver will be implied. See Wenatchee Dist. Coop. Ass'n v. Mohler, 135 Wash. 169, 237 Pac. 300 (1925).

22. Other distinctions between the producer's relationship as a member and as a contracting party have been discussed in PART II, notes 6-12 *supra*, and accompanying text.

produce is grown, or on the crops by way of a security lien is frequently asserted as a defense in an action for failure to deliver. Typically, the contract obligates the producer to deliver "all products produced by or for him or acquired by him as landlord or lessor. . . ." As to the producer's liability subsequent to a good faith sale of the land, upon which the crops subject to the contract were grown, the decisions have quite properly construed such a provision as imposing no duty on the producer to continue growing the particular crop nor to assume responsibility for the delivery of his grantee's produce.[23] Since there is no promise to produce or deliver any particular quantity, by a reasonable interpretation of the contract, the member impliedly agrees to market through the association only upon the condition that he grows or acquires the crop to which the contract has reference. Any other interpretation would effectuate a restriction on alienation and hinder the progressive utilization of land. However, the mere pretense of a sale, in an effort to evade the obligation to deliver to the association, will be considered ineffectual and the producer remains subject to the terms of the agreement.[24] Determination of whether a particular sale was bona fide or a mere subterfuge is primarily one of fact, dependent upon such factors as whether the grantee is a member of the grantor's immediate family, the presence or absence of consideration, and continuation of control over the farming operation by the grantor subsequent to the transaction.[25]

A further complication occurs in the event of a member-landowner's lease to a tenant on a sharecrop arrangement. The issue upon which

23. Phez v. Salem Fruit Union, 113 Ore. 398, 233 Pac. 547 (1925). The court concluded: ". . . it does not appear that it was the intent of any of the parties that if a grower died, or sold or conveyed his land in good faith and not for the purpose of avoiding his obligation, that such grower. or his representatives, should go into the market and purchase berries to deliver under the contract, or would be required to deliver under the contract, or would he be required to deliver berries which he did not raise, or else suffer damages." *Id.* at 437, 233 Pac. at 560. See also Layne v. Tobacco Growers' Coop. Ass'n, 147 Va. 878, 133 S.E. 358 (1926).

24. Burley Tobacco Growers' Coop. Ass'n v. Devine, 217 Ky. 320, 289 S.W. 253 (1926) (member-lessee of land had lease for year in question made out to his daughter who was absent from home and defendant continued to conduct the farming operations); Dark Tobacco Growers' Coop. Ass'n v. Alexander, 208 Ky. 572, 271 S.W. 677 (1925) (member transferred land to his wife); South Carolina Cotton Growers' Coop. Ass'n v. English, 135 S.C. 19, 133 S.E. 542 (1926) (same); Hollingsworth v. Texas Hay Ass'n, 246 S.W. 1068 (Tex. Civ. App. 1923) (same). See also Proodian v. Plymouth Citrus Growers' Ass'n, 152 Fla. 684, 13 So.2d 15 (1943).

25. Kansas Wheat Growers' Ass'n v. Lucas, 128 Kan. 350, 278 Pac. 7 (1929); Kansas Wheat Growers' Ass'n v. Garnett, 128 Kan. 337, 278 Pac. (1929). Usually, the issue of good faith would be a question for the jury. However, in Burley Tobacco Growers' Coop. Ass'n v. Devine, 217 Ky. 320, 289 S.W. 253 (1926), where the association sought to enjoin the breach of the producer's contract, the jury's finding of good faith or fraud was held to be advisory only and not binding upon the chancellor. See also Kansas Wheat Growers' Ass'n v. Leslie, 126 Kan. 694, 271 Pac. 284 (1928).

the decisions are not in accord is the responsibility of the sharecropper and landlord respectively under the latter's contract with the association. The conflict among jurisdictions is largely attributable to the enactment in some states of a conclusive presumption provision which places it beyond the power of the tenant or landlord to plead or prove the lack of control by the landlord over the disposition of the tenant's share of the crop.[26] Thus, not only must the landlord deliver his share but he must insure delivery of his tenant's share or suffer substantial liquidated damages.[27] The clause also has been construed to subject the tenant to the remedies of specific performance and injunctions at the instance of the association if he entered into the tenancy with knowledge of the landlord's contract.[28]

The Supreme Court of Louisiana, however, found this legislative presumption arbitrary and unreasonable and thus subject to federal due process constitutional objections.[29] Moreover, the court was unwilling to interpret the contract as implying such a presumption. Since existing Louisiana statutes vested the tenant with absolute title to his share and

---

26. CAL. AGRIC. CODE §1211 (1943); COLO. STAT. ANN. c. 106, 332 (1949 Repl. Vol.); KY. REV. STAT. § 270.230(3) (1946); MISS. CODE ANN. § 4510 (1942); The section provides: "*(c)* In any action upon such marketing agreements, it shall be conclusively presumed that a landowner or lessor is able to control the delivery of products produced on his land by tenants or others, whose tenancy . . . thereon were created or changed after execution by the landowner or landlord or lessor of such marketing agreement. . . ."

27. Feagain v. Dark Tobacco Growers' Coop. Ass'n, 202 Ky. 801, 261 S.W. 607 (1924), is cited as the leading case in sustaining the legislature's authority to enact such a presumption. See Dark Tobacco Growers' Coop. Ass'n v. Daniels, 215 Ky. 67, 284 S.W. 399 (1926) (landlord liable for tenant's share not delivered to the association). Where the conclusive presumption is not in effect a tenancy on a flat rental is treated as a sale by the landlord, Kansas Wheat Growers' Ass'n v. Garnett 128 Kan. 337, 278 Pac. 5 (1929); or if the tenancy is by share, the landlord is not responsible for the tenant's share, Tobacco Growers' Coop. Ass'n v. Bissett, 187 N.C. 180, 121 S.E. 446 (1924); *But cf.* Oregon Growers' Coop. Ass'n v. Lentz, 107 Ore. 561, 212 Pac. 811 (1923).

28. Wilson v. Monte Vista Potato Growers' Coop. Ass'n, 82 Colo. 428, 260 Pac. 1080 (1927); Monte Vista Potato Growers' Coop. Ass'n v. Bond, 80 Colo. 516, 252 Pac. 813 (1927). However no cases in the jurisdictions wherein the conclusive presumption provisions are in effect have arisen involving the liability of a tenant who had no knowledge of the landlord's marketing contract.

29. Louisiana Farm Bureau Cotton Growers' Coop. Ass'n v. Clark, 160 La. 294, 107 So. 115 (1926). This legislative presumption was considered violative of the once vital doctrine of "liberty to contract" and equal protection of the laws. See note 32 *infra*. See also, Louisiana Farm Bureau Cotton Growers' Coop. Ass'n v. Bannister, 161 La. 957, 109 So. 776 (1926); Louisiana Farm Bureau Cotton Growers' Coop. Ass'n v. Bacon, 164 La. 126, 113 So. 790 (1927). In Staple Cotton Coop. Ass'n v. Hemphill, 142 Miss. 298, 107 So. 24 (1926) the court expressed doubts as to the constitutionality of the presumption but found it unnecessary to decide that question since the contract involved was executed prior to the enactment of the provision. The Supreme Court of California, however, seemingly would uphold such a provision. Olson v. Biola Coop. Raisin Growers' Ass'n, 33 Cal.2d 664, 204 P.2d 16 (1948).

the landlord could in no manner control or encumber this portion of the crop, the landlord could not be responsible in damages in event the sharecropper sold on the open market.[30] And, although a contrary rule existed in those jurisdictions where the conclusive provision was upheld, the Louisiana court considered the tenant's knowledge of the landlord's contract to be immaterial. Thus, the association's remedies of specific performance were not available as against the tenant.[31]

While the reasoning of the Louisiana tribunal with respect to the constitutional issue is based on obsolete doctrines,[32] the denouncement of the conclusive presumption provision is warranted. The association's contention that the loss of patronage in permitting the tenant to dispose of his share elsewhere is to some immeasurable degree valid.[33] It is unrealistic, however, to contend that resort will be had to the share tenancy to avoid the member's obligation under the contract. The utilization of a share arrangement does not free the landowner to market elsewhere and he remains under a duty to continue the delivery of his share of the crop to the association.[34] The result of independent marketing operations on the part of the tenant does not financially benefit the landlord. On the other hand, the conclusive presumption clause imposes a considerable restriction upon the member-landowner if he is to avoid the payment of substantial liquidated damages. As previously noted, the term of marketing agreements is for a considerable number of years. Should a contingency arise which renders impossible the

30. Louisiana Farm Bureau Cotton Growers' Coop. Ass'n v. Clark, 160 La. 294, 306, 107 So. 115, 119 (1926). See Tobacco Growers' Coop. Ass'n v. Bissett, 187 N.C. 180 S.E. 446 (1924); Book, *A Note on the Legal Status of Share Tenants and Share Croppers in the South*, 4 LAW & CONTEMP. PROB. 508 (1937).

31. Louisiana Farm Bureau Cotton Growers' Coop. Ass'n v. Clark, 160 La. 294, 310, 107 So. 115, 120-21 (1926).

32. The Louisiana Court's decision of 1926 is understandable in view of the vitality of the "liberty of contract" concept at that time. However, the threat of invalidation under the Federal Constitution since Nebbia v. New York, 291 U.S. 502 (1934), is relatively insignificant. See Parker v. Brown, 317 U.S. 341 (1942); Liberty Warehouse Co. v. Burley Tobacco Growers' Coop. Marketing Ass'n, 276 U.S. 71 (1928).

However the impotency of Federal Constitution does not preclude the identical result under the corresponding clauses of the state constitutions. See Paulsen, *The Persistence of Substantive Due Process in the States*, 34 MINN. L. REV. 91 (1950).

33. See NOURSE, *op. cit. supra* note 1, at 33.

34. Main v. Texas Farm Bureau Cotton Ass'n, 271 S.W. 178 (Tex. Civ. App. 1925); Long v. Texas Farm Bureau Cotton Ass'n, 270 S.W. 261 (Tex. Civ. App. 1925). The landlord would be liable for his share regardless of the form in which such share was received. Thus, the landlord could not avoid the contract by having the tenant sell the entire crop and account for the landlord's share in cash.

The landlord is responsible for all crops "acquired" as well as grown. Thus, should the landlord receive a portion of tenant's share in satisfaction for advancements made throughout the year, he may be under a duty to deliver his crops to the association. See Lennox v. Texas Cotton Coop. Ass'n, 55 S.W.2d 543 (Comm. of App. of Texas 1932).

continued physical operation of his farm the member may be forced either to sell his land or secure a sharecropper who is willing to market exclusively through the association. The conclusive presumption as a cooperative weapon thus appears to be unnecessary to insure adequate patronage and to result only in an unreasonable burden upon the members.

Although the credit needs of many growers is most critical during the planting, growing and harvesting seasons, the majority of cooperative associations are not in a position to advance credit to the member prior to the actual delivery of the crop.[35] The producers are compelled to seek outside sources of funds resulting in the creation of security interests, usually a crop mortgage, which conflict with the association's contractual control over delivery of the crop. Accommodation of both the financial and marketing interest is essential to the welfare of the producer.[36]

Absent contractual restrictions, the member is free to mortgage his crop to obtain necessary funds for operation throughout the year.[37] Many agreements, however, require notification and approval of the association prior to the incumbering of crops and failure to secure such consent renders the producers liable in liquidated damages for any

35. See MURRAY, AGRICULTURAL FINANCE (2d ed. 1947). The short term credit for farmers as of 1947 has been approximated at 3.5 billion dollars. Of this total $2,691 million was held by private investors, and $682 million by public and semipublic agencies. *Id.* at 154. However, as of 1949, 2.8 billion dollars agricultural credit was outstanding, which was about equally divided between public and private holders. Hunt and Coates, *The Impact of the Secured Transactions Article on Commercial Practices With Respect to Agricultural Financing,* 16 LAW & CONTEMP. PROB. 165, 167 (1951). See FETROW & ELSWORTH *op. cit. supra* note 9, at 156.

36. The effect which adoption of § 9 of the Uniform Commercial Code will have on agricultural financing transactions is discussed in Hunt and Coates, *The Impact of the Secured Transactions Article on Commercial Practices With Respect to Agricultural Financing,* 16 LAW AND CONTEMP. PROB. 165 (1951). The authors point out the absence of accurate information as to actual business practices which renders difficult any meaningful attempt at codification. However, they encouragingly report a research program presently being conducted at the University of Wisconsin School of Law, under the direction of Prof. J. H. Beuscher. *Id.* at 166 n.5.

37. Bishop v. Alabama Farm Bureau Cotton Ass'n, 215 Ala. 388, 110 So. 711 (1927), the court remarking: "The contract between the parties did not deny appellant [member] the right to place a mortgage upon cotton he might raise during the year. . . . The creation of such liens is frequently necessary, no doubt, to enable the cotton grower to procure funds to carry on his farming operation and to supply his own needs during the season of growth and harvest. And since the association is not in the business of making loans, sound policy would not deny the grower the right to incumber crops for such purposes. . . . Nor is any fair vision needed to see that, if the right of members to raise money be denied, the power of the association to recruit members would be seriously impaired." *Id.* at 389, 110 So. at 712. See also Tobacco Growers' Coop. Ass'n v. Harvey & Sons, 189 N.C. 494, 127 S.E. 631 (1924); Tobacco Growers' Coop. Ass'n v. Patterson, 187 N.C. 252, 121 S.E. 631 (1924).

produce sold on the open market pursuant to a foreclosure sale.[38] Generally, the mortgagee who properly records and who is without notice of the existing contract is unaffected and may proceed to realize upon his security by applicable statutory procedures.[39] It is the consequence of knowledge on the part of the mortgagee which engenders a division of opinion among the courts. In several jurisdictions the mortgagee's knowledge of the marketing agreement does not deprive him of his foreclosure rights, since the association contract is held to create no lien upon the producer's crops.[40] The better view, however, would seem to be that a mortgagee with knowledge of the mortgagor's contract may be enjoined from interfering with the association's right to delivery.[41]

Growing or implanted crops have been excepted from the common law rule that there can be no present sale, the subject of which is not in existence, and from the rule of Section 5 of the Uniform Sales Act, which provides that an attempted present sale of future goods will be construed as a present contract to sell.[42] Therefore, if the marketing contract be construed as a present sale with title to the produce vesting in the association at the time of the sale, the subsequent mortgagee can

38. Kansas Wheat Growers' Ass'n v. Leslie, 126 Kan. 694, 271 Pac. 284 (1928); Kansas Wheat Growers' Ass'n v. Loehr, 125 Kan. 491, 264 Pac. 735 (1925); North Carolina Cotton Growers' Coop. Ass'n v. Bullock, 191 N.C. 464, 132 S.E. 154 (1926); Lennox v. Texas Farm Bureau Cotton Ass'n, 55 S.W.2d 543 (Tex. Com. App. 1932). In Kansas Wheat Growers' Ass'n v. Brooks, 125 Kan. 296, 263 Pac. 787 (1928), the producer was precluded from asserting that a mortgage was existing at time of execution of agreement since the contract contained a warranty by the member that his crops were unincumbered.

39. Kansas Wheat Growers' Ass'n v. Loehr, 125 Kan. 491, 264 Pac. 735 (1925). If, in such a case, the cooperative takes possession without consent of the holder of the superior lien or without accounting, it may be liable in conversion. Alexander Production Credit Ass'n v. Horn, 199 So. 430 (La. App. 1940); Mississippi Cooperative Cotton Ass'n v. Walker, 186 Miss. 870, 192 So. 303 (1939).

40. Bishop v. Alabama Farm Bureau Cotton Ass'n, 215 Ala. 388, 110 So. 711 (1927); Louisiana Farm Bureau Cotton Growers' Coop. Ass'n v. Clark, 160 La. 294, 107 So. 115 (1926); Tobacco Growers' Coop. Ass'n v. Harvey & Son Co., 189 N.C. 494, 127 S.E. 545 (1925).

41. Redford v. Burley Tobacco Growers' Coop. Ass'n, 205 Ky. 522, 266 S.W. 24 (1924); Kansas Wheat Growers' Ass'n v. Ast, 118 Kan. 247, 234 Pac. 963 (1925); Kansas Wheat Growers' Ass'n v. Floyd, 116 Kan. 522, 227 Pac. 336 (1924); Dark Tobacco Growers' Coop. Ass'n v. Dunn, 150 Tenn. 614, 266 S.W. 308 (1924).

42. Sun-Maid Raisin Growers of California v. Jones, 96 Cal. App. 650, 274, Pac. 557 (1929). Under this unique doctrine a seller or mortgagor of crop who holds an interest in land is considered to have potential possession of unplanted and future crops to be grown, which may be the subject of a present contract of sale as distinguished from an executory contract to sell or mortgage. Title passes and vests in the purchaser the instant such crops become capable of ownership and is paramount to intervening claimants between the date of sale and harvesting. Professor Williston criticizes the employment of this doctrine in states which have enacted the Uniform Sales Act. WILLISTON, SALES § 133-138 (Rev. ed. 1948). See Williston, *Transfers of After Acquired Personal Property*, 19 HARV. L. REV. 557 (1906); Comment, *Mortgages on Future Crops as Security for Federal Loans*, 47 YALE L.J. 98 (1937).

acquire no interest from the mortgagor grower.[43] Although no cases have applied this reasoning to deny an innocent mortgagee his foreclosure rights, it may provide the inarticulated basis for the result in those decisions where the interest of the mortgagee with notice of the marketing contract is held secondary to the contractual rights of the association.[44]

Even where the agreement imparts a present contract to sell, the mortgagee with notice would acquire a lien secondary to the association's claims. It is accepted that the cooperative's remedy for failure to deliver is inadequate at law and additional equitable remedies of injunction and specific performance are necessary.[45] Therefore, as in the case of contract to sell land, the marketing agreement confers an equitable lien which is protected against a subsequent mortgagee with notice.[46] However, prior to insistence upon the superior claim, the association may defer to the mortgagee's rights in view of future reluctance of local financiers to extend this essential credit.[47]

Failure to provide means whereby the potential security holders may readily ascertain the existence of a marketing agreement is the primary source of conflict. While reliance upon a recording system for introducing certainty into financial transactions has many shortcomings, especially as to businessmen's natural disinclination to careful inquiry, it does provide an orderly method of allocating the priority of rights and tends to eliminate the difficult factual determination as to notice. Recog-

43. The good faith mortgagee for value may prevail over the cooperative's title by virtue of Section 25 of the Uniform Sales Act, which protects subsequent bona fide purchasers where a seller remains in possession of the goods. Pacific Wool Growers v. Draper, 158 Ore. 1, 73 P.2d 1391 (1934). Similarly, under Section 26, if such retention of possession by the seller is fraudulent in fact or under any rule of law the creditors of the seller may treat the sale as void. Many states have made such retention either conclusive or presumptive evidence of fraud. However, the court in Sun-Maid Raisin Growers of California v. Jones, 96 Cal. App. 650, 274 Pac. 557 (1929) rejected the contention that these sections were applicable to the sale of growing crops. Sections 25 and 26 were considered inapplicable where by the nature of the subject of the sale, it was impossible for the seller to take possession at the time of the sale. The same result could be reached on the basis that the cooperative statutes excepted the sale of crops from the Uniform Sales Act provisions. See Goldsmith, *Passage of Title Under Cooperative Marketing Contracts,* 18 ORE. L. REV. 157 (1939).

44. See cases cited in note 41 *supra.*

45. See cases cited in note 12 *supra.*

46. WALSH, MORTGAGES § 127 (1934). See WALSH, EQUITY §§ 59, 60 (1930).

47. To encourage federal lending to farmers, through the Farm Security Administration and other agencies concerned with agricultural relief, several states have enacted preferential legislation insuring the Government adequate security interests. See discussion of these statutes in Comment, *Mortgages on Future Crops as Security for Federal Loans,* 47 YALE L.J. 98 (1937). However, such acts may be repealed by states adopting the Uniform Commercial Code, in which event the United States will be placed in an equal position with private lending institutions. See Hunt and Coates, *supra* note 35, at 170.

nizing this need several states have enacted provisions for the recording of marketing agreements.[48] Generally, the statute permits the filing of a uniform or "pilot" agreement in the county wherein the crops are grown or the member resides, with an attached affidavit of the names of the producers who have contracted with the cooperative. Although, unfortunately, the effect of recordation is not prescribed with the desired clarity, it may be reasonably construed so as to give constructive notice of such contracts to all subsequent purchasers and mortgagees.[49] With the exception of a Maine statute, since repealed,[50] no provision is included as to rights of a mortgagee who has accepted a mortgage with actual or constructive notice of the recorded contract. However, the former Maine statute had prescribed, with commendable detail, a solution which accommodated both the interests of the cooperative in securing delivery and the mortgagee in realizing upon his lien. If a mortgagee accepted a mortgage on the crop subsequent to the recordation of the marketing contract and prior to delivery to the association, there was constructive notice of such contract: The mortgage lien attached, however, and the only penalty incurred was the forfeiture of the right to possession or foreclosure. The member remained under a duty to deliver in accordance with the contract, and the association's right to receive was unimpaired. In the absence of action by the association to compel delivery, the mortgagee was permitted to realize on his lien.[51] If the crop had been delivered to the association under the contract, the mortgagee, upon notice to the cooperative of his lien, acquired by virtue

48. ARIZ. CODE ANN. § 49-714 (1947); ME. LAWS c. 294 (1945), as amended, c. 324 (1947); N.M. CODE ANN. § 48-1314 (1941); ORE. LAWS ANN. § 77-503 (1940); S.C. CODE ANN. § 8890 (1942); VA. CODE ANN. §§ 13-280 to 283 (1950); WIS. STAT. ANN. § 185.08(3) (1937).

49. ARIZ. CODE ANN. § 49-714 (1949): ". . . [recording] shall constitute full notice of such agreements"; N.M. CODE ANN. § 48-1316 (1941): ". . . [recording] shall operate as notice thereof to all subsequent purchasers and encumbrancers. . . ."; ORE. LAWS ANN. § 77-503 (1940): ". . . [recording] shall operate as constructive notice of the existence of such contract . . . and all persons contracting or dealing with any such member in relation to such products . . . shall be bound thereby, and all rights and liens acquired by any such person in such products subsequent to the date of recordation shall be subject in all respects to the rights of the association. . . ."; WIS. STAT. ANN. § 185.08(3) (1937): "From and after the date of such filing the title to all property [crops covered by the contract] is vested in the association. In case of a purchase thereafter . . . no title of any kind or nature shall pass to such other purchaser and said association may recover the possession of such property. . . ." The Wisconsin provision was construed in Spencer Co-op. v. Schultz, 209 Wis. 344, 245 N.W. 99 (1932); Watertown Milk Producers Co-op. Ass'n v. Van Camp Packing Co., 199 Wis. 379, 225 N.W. 209 (1929). See Note, *Recent Development of Wisconsin Law on Co-operative Marketing*, 23 MARQ. L. REV. 76 (1939).

50. ME. REV. STAT. §§ 32-39 (1944), repealed by Me. Laws c. 294 (1945) in adopting the Uniform Cooperative Corporation Act.

51. *Id.* § 32.

of the statute an interest in the proceeds received on the sale of the member's crop.[52] Remedies were conferred on the mortgagee to compel the cooperative to sell and account to the extent of the mortgagee's lien.[53]

When it is realized that the present conflict is not between two security holders, the practicality of the solution enacted by the Maine legislature becomes more apparent. The association's lien is not for credit advanced but solely to insure delivery of the entire crop. The purpose of taking a mortgage by the lender is to insure preference over general creditors and have definite property from which to realize proceeds for satisfaction of his debt. This interest of the mortgagee is served by his lien attaching to the proceeds of a sale by the cooperative, as the amount realized through such sale will be equal, if not more, than could be expected at a foreclosure sale. Enactment of such legislation in other jurisdictions with applicability extended to all third party security holders would do much to eliminate the conflicts in this area.

While the agreement prescribes in considerable detail the consequences of the producer's default, there is significantly absent any reference to the effects of a breach of the marketing contract by the cooperative association. While settled contract principles suggest that a sufficiently material default should relieve the member from his duty of further performance under the contract,[54] persuasive countervailing considerations, inherent in the peculiar economic objective of the agreement, indicate that a member should not be released from the contract, regardless of the seriousness of the association's default. It has been argued that since the producer's contract is not solely with the association as an entity, but is in consideration for and interdependent with the contracts of all other producers,[55] the release of one member for any breach by a cooperative officer would be to the injury of the other producers.[56] This argument concludes that, as in the case of an unin-

52. *Id.* § 33: ". . . a lienholder, who has acquired a lien subsequent to a filing and recording of the marketing agreement . . . shall no longer be entitled to any lien, interest in, or claim against such crop, but he shall instead acquire a lien on the claim of the member against the association for the net proceeds of sales by the association. . . ."

53. *Id.* §§ 35-39.

54. RESTATEMENT OF CONTRACTS § 274 (1932): "*(1)* In promises for an agreed exchange any material failure of performance by one party not justified by the conduct of the other discharges the latter's duty to give the agreed exchange even though his promise is not in terms conditional."

55. McCauley v. Arkansas Rice Growers' Co-op. Ass'n, 171 Ark. 1155, 287 S.W. 419, 423 (1926): "Appellants [producers] signed the 'marketing contract' with other members of the association. Hence appellants' agreements were made on consideration of like agreements of other members and for their mutual advantage." Kansas Wheat Growers' Ass'n v. Massey, 123 Kan. 183, 253 Pac. 1093 (1927).

56. HULBERT, LEGAL PHASES OF COOPERATIVE ASSOCIATIONS 149 (F.C.A. BULL. No. 50, 1942).

corporated association, default by the association's agent may confer a right to appropriate action for removal of the delinquent officer or other redress within the association, but does not operate to excuse the producer from further performance under the contract.[57] On the other hand, without specific reference to the interdependence of marketing contracts, a number of courts have considered material defalcations by the association to constitute a valid defense for refusal to deliver or grounds upon which to seek cancellation of the contract. Thus, where the contract was interpreted as imposing an absolute duty to receive member's crops, the failure to accept delivery was held to excuse the producer's future performance under the agreement.[58] Even where such failure is justified due to adverse marketing conditions, the association's refusal to permit the producer to market his crops elsewhere has been considered sufficient to terminate the contract at the producer's election.[59] Similarly, the conditioning of the association's performance upon the producer's installation of expensive machinery not called for in the contract,[60] or insisting upon delivery at a price below production cost,[61] or failure properly to account for produce delivered,[62] may justify a producer's release from his contractual obligations. However, frequently the statement is made that a refusal to deliver may not be predicated upon "mere mismanagement" of the cooperative officers.[63]

57. *Id.* at 151. Mr. Hulbert concludes: "Generally speaking, it is submitted that when members of an association believe that the directors they have elected to manage the association, or its officers or other agents, are not complying with its charter, by-laws, or marketing contract, they should be required to seek relief within the association through the election of new directors and officers, or the enjoining of them, or through other corrective measures."

58. Kansas Wheat Growers' Ass'n v. Toothaker, 128 Kan. 469, 278 Pac. 716 (1929); Frame v. Trenton Milk and Cream Co., 125 Misc. 86, 210 N.Y. Supp. 591 (County Ct. 1925); Central Texas Dairymen's Ass'n v. Jones, 67 S.W.2d 896 (Tex. Civ. App. 1934). But see, California Canning Peach Growers v. Harris, 91 Cal. App. 654, 267 Pac. 572 (1928), holding that member had no right to rely on agent's unauthorized refusal to accept delivery.

59. Mountain States Beet Growers' Marketing Ass'n v. Monroe, 84 Colo. 300, 269 Pac. 886 (1928); Guglielmelli v. Walla Walla Gardners' Ass'n, 157 Wash. 109, 288 Pac. 251 (1930); Wisconsin Cooperative Milk Pool v. Saylesville Cheese Mfg. Co., 219 Wis. 350, 263 N.W. 197 (1935).

60. Watertown Milk Producers' Co-op. Ass'n v. Van Camp Packing Co., 199 Wis. 379, 225 N.W. 209, 226 N.W. 378 (1929). See also Myrold v. Northern Wisconsin Co-op. Tobacco Pool, 206 Wis. 244, 239 N.W. 422 (1931) (refusal to regrade grower's tobacco unless he agreed to a modification of the marketing agreement).

61. Miami Home Milk Producers' Ass'n v. La Course, 117 Fla. 345, 158 So. 117 (1934); New Jersey Poultry Producers' Ass'n v. Tradelius, 96 N.J. Eq. 683, 126 Atl. 538 (Ct. Err. & App. 1924).

62. Brown v. Georgia Cotton Growers' Co-op. Ass'n, 164 Ga. 712, 139 S.E. 417 (1927); Tobacco Growers Co-op. Ass'n v. Bland, 187 N.C. 356, 121 S.E. 636 (1924); Dryden Local Growers v. Dormaier, 163 Wash. 648, 2 P.2d 274 (1931).

63. Nebraska Wheat Growers' Ass'n v. Smith, 115 Neb. 177, 212 N.W. 39 (1926); Pittman v. Tobacco Growers Co-op. Ass'n, 187 N.C. 340, 121 S.E. 634 (1924).

Indicative of the tendency to confuse the membership relationship with that of the producer in a contractual capacity, one court has held that a release by the association of some producers from their contracts excuses other producers from future performance.[64]

The adoption, as a rule of law, of either automatic release of a member in the event of the association's default or the opposite extreme of denying rescission despite the character of the defalcation seems an outmoded mechanical approach. A more flexible rationale is illustrated by *Nebraska Wheat Growers Ass'n v. Smith.*[65] In an action by the association for equitable relief and liquidated damages, the defendant producers alleged a prior breach by the association in the negligent marketing of their crop during the preceding year as a defense for failure to deliver in the immediate year and as basis for a cross claim for cancellation of the marketing contract and membership in the association. While the agreement was considered as an "entire" contract, it was clearly "divisible" into annual installments with a duty to deliver by the producer and a corresponding duty on the part of the cooperative to accept, market and account.[66] Prior to enactment of Section 45 of the Uniform Sales Act authority in this country held that a failure to accept or to make payment for a delivered installment constituted a material breach which entitled the seller to treat the default as "total" and rescind as to the remainder of the contract.[67] Section 45 altered the prior rule and made the "materiality", and therefore the legal consequence, of either party's defalcation dependent in each instance upon

64. Staple Cotton Co-op. Ass'n v. Borodofsky, 143 Miss. 558, 108 So. 802 (1926). *Contra,* Phez. Co. v. Salem Fruit Union, 103 Ore. 514, 201 Pac. 222 (1921). Such release may be binding upon the association without the consent of all members if the release was given in exchange for valuable consideration. Washington State Hop Producers' v. Elgin, 6 Wash.2d 585, 108 P.2d 329 (1940). However, rescission has been denied on grounds: that the member knew of the prior release and had waived objection by continued exercise of membership rights, Beaulaurier v. Wash. State Hop Producers, 8 Wash.2d 79, 111 P.2d 559 (1941); or that the association is not obligated to prosecute those allegedly released in any particular order and may still bring such an action, California Bean Growers Ass'n v. Rindge Land & Navigation Co., 199 Cal. 168, 248 Pac. 658 (1926).

65. 115 Neb. 177, 212 N.W. 39 (1924).

66. *Id.* at 41. The court accepted only for purposes of decision that the marketing agreement constituted an entire agreement. If the agreement be classified as a series of annual separate contracts, the breach by the association on one contract would have no effect upon the producers' duty to perform in subsequent years. However, the element of continuing performance and interdependency of membership would make the classification of the agreement as an "entire and divisible" contract quite reasonable. See CORBIN, CONTRACTS §§ 687-699 (1951); WILLISTON, CONTRACTS §§ 860-863 (Stud. ed. 1938); RESTATEMENT OF CONTRACTS § 266 (1932).

67. WILLISTON, CONTRACTS § 867 (Stud. ed. 1938). This view was established by the leading case of Norrington v. Wright, 115 U.S. 188 (1885).

"the terms of the contract and the circumstances of the case".[68] In applying this principle to the instant facts, the Nebraska court concluded that alleged defaults of the association were not sufficiently material to justify the defendant producers considering their obligations under the agreement as terminated.[69]

The myriad of factual situations and possible relevant considerations which may be determinative in the application of this flexible standard renders the formulation of an exact verbal rule impossible.[70] However, there are certain basic factors which will appear with sufficient uniformity to merit their enumeration. The producer, by signing the long term marketing contract, foregoes the freedom to seek the best market possible in disposing of his annual yield in exchange for a stable and assured marketing agency. Perhaps the granting of equitable relief or damages will be sufficient in the majority of cases to rectify the sporadic although serious breach by the officers of the association. However, the grower is not in a position to bear the resulting credit risk imposed

68. UNIFORM SALES ACT § 45(2): *"Delivery in Instalments.* Where there is a contract to sell goods to be delivered by stated instalments, which are to be separately paid for, and the seller makes defective deliveries in respect of one or more instalments, or the buyer neglects or refuses to take delivery of or pay for one or more instalments, it depends in each case on the terms of the contract and the circumstances of the case, whether the breach of contract is so material as to justify the injured party in refusing to proceed further and suing for damages for breach of the entire contract, or whether the breach is severable, giving rise to a claim for compensation but not to a right to treat the whole contract as broken." See Helgar Corp. v. Warner's Features, 222 N.Y. 449, 119 N.E. 113 (1918).

69. Nebraska Wheat Growers' Ass'n v. Smith, 115 Neb. 117, 212 N.W. 39 (1927). The alleged defaults consisted of failure to properly "store, mix and process" the producers wheat, marketing through unauthorized channels, and excessive deductions from the price received by the association. The Supreme Court in reversing the lower judge's dismissal of the association's complaint went on to find these violations unsupported by the evidence in the record, and at most a mere error in judgment on the part of the officers of the cooperative. *Id.*, 212 N.W. at 45.

A similar result was reached in McCauley v. Arkansas Rice Growers' Co-op. Ass'n, 171 Ark. 1155, 287 S.W. 419 (1949). The court denied the plaintiff producers' request for the appointment of a receiver and cancellation of their contracts on the grounds that the cooperative officers' retention of excess deductions from proceeds and other defaults constituted a breach of independent covenants. Thus, the producers were entitled to an accounting but were obligated to continue performance under their marketing contracts. See also California Prune and Apricot Growers, Inc. v. Baker, 77 Cal. App. 393, 246 Pac. 1081 (1926); California Bean Growers Ass'n v. Rindge Land & Navigation Co., 199 Cal. 168, 248 Pac. 658 (1926).

70. RESTATEMENT OF CONTRACTS § 275 (1932). The accompanying comment to Section 275 states: "It is impossible to lay down a rule that can be applied with mathematical exactness to answer the problem—when does a failure to perform a promise discharge the duty to perform the return promise." Of course, the very flexibility introduced by Section 45 of the Sales Act and Section 275 of the Restatement would indicate that defaults which are sufficient to constitute a "total" breach with respect to ordinary commercial contracts may be treated as only a "partial" breach, when pertaining to a cooperative marketing contract.

by consistent failure to account promptly. Cooperatives, although legislatively and judicially favored, have no claim to a sovereign immunity in their contractual relationships. Thus, if association's defaults are of such a nature as to deprive the producer of the economic certainties in the marketing of his crop which induced his execution of the contract, then the producer should be relieved of future performance. Unjustifiable refusals to accept, process or market the produce, or unreasonable delays in accounting to the producer may fully merit his release from assuming the identical risks in the future.

It is not to be implied that there are not mitigating factors supporting the cooperatives' plea for careful consideration prior to the release of a member. The primary economic objective of utilizing marketing contracts is to insure complete patronage by each member. The loss of even a fractional part of this source to the open market tends to lessen to some extent the association's control of supply and endangers its ability to stabilize prices.[71] The consequent loss of membership proportionately increases prorated expenses to the remaining producers and impairs the association's ability to fulfill existing contracts with commercial buyers. There is undoubtedly some damage to the cooperative's prestige by the discharge of recalcitrant producers.[72] Impressive to one court was the prediction that if the breach affected a sufficiently large number of producers, widespread resort to the privilege of cancellation could cripple and even destroy the cooperative association.[73]

The courts in fashioning the decree for the particular case would seem to possess broad discretion in weighing these competing interests. Whether the breach occurred as to a single or relatively few producers or affected the entire membership, while having no logical relevancy, will be influential. There are grounds for questioning the present tendency to fuse the membership and contractual aspects of the producer's position. However, liberality in permitting redress in the capacity of member or owner is likely to render, in the opinion of the courts, less acute the need for contractual remedies.

71. Minnesota Wheat Growers' Co-op. Marketing Ass'n v. Huggins, 162 Minn. 471, 203 N.W. 420 (1925); Kansas Wheat Growers' Ass'n v. Schulte, 113 Kan. 672, 216 Pac. 311 (1923).

72. See NOURSE, THE LEGAL STATUS OF AGRICULTURAL CO-OPERATION 328 (1927).

73. In McCauley v. Arkansas Rice Growers' Co-op. Ass'n, 171 Ark. 1155, 287 S.W. 419 (1927), where 118 producers sought cancellation of their contracts, the court concluded: "If appellants [producers] could be absolved from performance of the contract because the officers of the association had committed breaches of the contract in certain respects, it is certain that the other members of the association would suffer by this course. The action of the appellants in rescinding the contract would tend to cripple the association and thereby harm the other members of it." *Id.*, 287 S.W. at 423.

Frequently, the marketing contract contains language to the effect that the member sells or agrees to sell, and the association buys or agrees to buy. These terms lend themselves to a construction that the transaction is an ordinary purchase and sale vesting title in the association. However, many of the same contracts further provide that the purpose of the arrangement is to constitute the association the "selling agent" of the member.[74] This latter phrase is conducive to an interpretation that the association is not in fact a purchaser but merely an agent for purposes of marketing the member's crop. Courts have seized upon the purchase and sale phrase in some cases to hold that title is in the association,[75] and upon the agency terminology in other instances to support their conclusion that title remains in the member.[76] While it might appear that the element of certainty has thus been completely eliminated, the decisions reveal a definite tendency to recognize title in one party or the other according to the result most favorable to the cooperative.[77]

That the location of title is crucial in the outcome of many cases can be illustrated by a brief review of situations in which the courts have relied upon that concept to resolve the dispute in issue. In *Sun-Maid Raisin Growers of California v. Jones*,[78] the court, giving effect to the title-passing language of the marketing agreement, held that the association could recover in a conversion action against a sheriff who had

74. See California Grape Control Board v. Boothe Fruit Co., 220 Cal. 279, 29 P.2d 857 (1934), involving a typical marketing contract employing phraseology of both purchase and sale and of agency.

75. Calif. & Hawaiian Sugar Refining Corp. v. Commissioner, 163 F.2d 531 (9th Cir. 1947); California Grape Control Board v. Boothe Fruit Co., 220 Cal. 279, 29 P.2d 857 (1934); Sun-Maid Raisin Growers of Calif. v. Jones, 96 Cal. App. 650, 274 Pac. 557 (1929); Texas Certified Cottonseed Breeders' Association v. Aldridge, 59 S.W.2d 320 (Tex. Civ. App. 1933); Texas Farm Bureau Cotton Association v. Stovall, 113 Tex. 273, 253 S.W. 1101 (1923).

76. Poultry Producers of Southern Calif. v. Barlow, 189 Cal. 278, 208 Pac. 93 (1922); Colorado-New Mexico Wool Marketing Ass'n v. Manning, 96 Colo. 186, 40 P.2d 972 (1935); Tomlin v. Petty, 244 Ky. 542, 51 S.W.2d 663 (1932); City of Owensboro v. Dark Tobacco Growers' Ass'n, 222 Ky. 164, 300 S.W. 350 (1927); Tobacco Growers' Co-op. Ass'n v. L. Harvey & Son Co., 189 N.C. 494, 127 S.E. 545 (1925); Texas Certified Cottonseed Breeders' Ass'n v. Aldridge, 122 Tex. 464, 61 S.W.2d 79 (1933); Long v. Texas Farm Bureau Cotton Association, 270 S.W. 561 (Tex. Civ. App. 1925).

77. The relative ease of title manipulation has long been recognized as a convenient means to an end. In commenting upon this phenomenon as applied to controversies between farmers and elevatormen holding possession of grain, one writer observed: "If one were forced to make a generalization about title-passing in this field . . . one might say: if the elevator burned down, title had passed; if the elevatorman went into bankruptcy, title had not passed." Latty, *Sales and Title and the Proposed Code*, 16 LAW & CONTEMP. PROB. 3, 20 n.83 (1951). While in these cases the title concept was employed to the farmer's advantage, the opposite is generally true when a cooperative association is substituted for the independent elevatorman.

78. 96 Cal. App. 650, 274 Pac. 557 (1929).

seized, under a creditor's writ of attachment, raisins remaining in the possession of a member. However, in *Colorado-New Mexico Wool Marketing Ass'n v. Manning*,[79] a case indistinguishable on the facts, the court refused to give effect to the contractual provision that an absolute title was intended to pass to the cooperative. Consequently, the association's conversion action failed. Theorizing that if a true sale were intended, certain additional stipulations in the agreement reciting that the association should enjoy rights traditionally incident to title[80] would have been unnecessary, and further noting the expressed provision that the risk of loss remained with the member, the court concluded that title had not passed to the cooperative. Admittedly, under these circumstances, the term "absolute title" may have been an unfortunate choice of words. Nevertheless it would seem that all the provisions in the contract should, if possible, have been interpreted so as to harmonize with one another.[81] There is nothing inconsistent in the parties providing not only that one should have title, but that he should also possess certain specific rights or duties which that phrase implies. Indeed, the latter provision would appear to confirm, rather than derogate from, the import of the title-vesting language. Conversely, there would seem to be no valid reason why a seller who retains one attribute of title, such as possession, should not also agree to retain another, such as the risk of loss.

The incidence of title likewise is regarded by the courts as determinative of the result in cases where the goods under contract are destroyed or damaged. For example, in *Texas Certified Cottonseed Breeders' Ass'n v. Aldridge*,[82] certain seed in the possession of the association was destroyed by fire. The cooperative, despite the fact that it had previously received $1.75 per bushel upon an insurance policy covering the goods, was successful in its suit to recover from the member the $1.00 per bushel which he had been paid. While ostensibly complying with the intent of the parties regarding title, the court in fact, by pre-occupying itself with the welfare of the cooperative, reached a result diametrically opposed to the expressed terms of the contract, which clearly provided that title was vested in the association.[83] A finding that the

79. 96 Colo. 186, 40 P.2d 972 (1935).

80. In addition to providing that title should pass to the association, the contract further stipulated that the association could sell, borrow on, commingle, and exercise all other rights over the crop.

81. Connelly v. Beauchamp, 178 Ark. 1036, 13 S.W.2d 28 (1929); Bank of Commerce & Trust Co. v. Northwestern Nat'l Life Ins. Co., 160 Tenn. 551, 26 S.W.2d 135 (1930); Stone v. Robinson, 180 S.W. 135 (Tex. Civ. App. 1915); AM. JUR., *Contracts* § 241.

82. 122 Tex. 464, 61 S.W.2d 79 (1933), *reversing* 59 S.W.2d 320 (Tex. Civ. App. 1933).

83. The contract explicitly provided that "[u]pon delivery to warehouse, negotiable warehouse receipts shall be issued in favor of Association and promptly delivered thereto,

association had title, thought the court, would be tantamount to holding that it was not a true cooperative marketing organization.[84] In effect, it was implied that a "true cooperative association" cannot legally buy its members' produce. Such a result is neither warranted by the facts of this case, nor the necessity of encouraging cooperative agricultural marketing.[85] Indeed, being deemed the title-holder is often advantageous to the association, as indicated by the *Sun-Maid Raisin* case.

The proponents of cooperation maintain that among its aims are economic gain to agricultural producers as a class and substantial equality of treatment among members.[86] That these are worth-while objectives cannot reasonably be denied. But the courts, in their zeal to lend judicial support to the purposes and philosophy underlying cooperative endeavor, frequently appear to frustrate those objectives by viewing too narrowly the considerations involved. Thus, where a member invests time, money and effort in the production of his crops, only to have them rendered un-

---

which warehouse receipts shall *in and of themselves* pass title thereto to the association." (emphasis added). The member had complied with all the terms of the contract and the cooperative had been presented with the negotiable warehouse receipts.

84. After observing that the clear intention of the parties was to create a true cooperative marketing association, the court concluded: ". . . to hold in the face of this intention that the delivery of the seed to the association was an absolute sale would destroy it as a cooperative marketing association." *Id.* at 473-474, 61 S.W.2d at 83.

85. It is apparent that the cooperative method of activity has enlisted the aid of both the courts and the legislatures. In Calif. Canning Peach Growers v. Harris, 91 Cal. App. 654, 267 Pac. 572 (1928), the court stated that an agreement between an association and its members was entitled to "extraordinary protection." The "extraordinary protection" which the court in that case so generously afforded consisted of allowing the association to recover liquidated damages from a member who, after being told by the association's agents that his crop would not be received or accepted, proceeded to sell to another non-cooperative buyer, thus preventing an impending insolvency.

The policy section of the Indiana Agricultural Cooperative Act, IND. STAT. ANN. § 15-601 (Burns' 1933), is a typical example of the legislative solicitude bestowed upon cooperative associations. It is there stated that the "public interest demands that the farmer be encouraged" to market his crops cooperatively, rather than through the "blind, unscientific and speculative" method of merchandising to which he was subjected prior to the advent of cooperative marketing associations. The courts have given effect to the legislative determination, holding that it is the ". . . expressed public policy of this state . . . to aid and encourage the cooperative marketing of farm products." Burley Tobacco Growers Co-op. Ass'n v. Rogers, 88 Ind. App. 469, 479, 150 N.E. 384, 387 (1928). See also Burley Tobacco Society v. Gillaspy, 51 Ind. App. 583, 100 N.E. 89 (1912).

86. See HULBERT, LEGAL PHASES OF COOPERATIVE ASSOCIATIONS 1-3 (F.C.A. BULL. No. 50, 1942). Mr. Justice Brandeis, dissenting in Frost v. Corp. Commission, 278 U.S. 515, 536 (1928) stated: "The farmers seek through [cooperative associations] to secure a more efficient system of production and distribution and a more equitable allocation of benefits. But this is not their only purpose. Besides promoting the financial advantage of the participating farmers, they seek through co-operation to socialize their interests—to require an equitable assumption of responsibilities while assuring an equitable distribution of benefits. Their aim is economic democracy on lines of liberty, equality and fraternity."

marketable by some fortuitous occurrence,[87] the underlying purposes which justify the existence of his association may perhaps be better served by utilizing the association as a conduit for distributing the loss among those who have joined together for their mutual benefit. Such an approach would certainly equate the unfortunate party with his fellow-members, and would do much toward stabilizing the relative economic position of members as a group.

Judicial reluctance to recognize title in the cooperative where to do so would be detrimental to the association is also exemplified in cases involving tax liability. Thus in a leading case, *City of Owensboro v. Dark Tobacco Growers' Ass'n,*[88] the Kentucky Court of Appeals refused to give effect to the clear language of the contract that title was intended to pass to the association. By so holding, the court allowed the cooperative to escape a property tax assessment on almost half a million dollars worth of tobacco which, by the terms of the contract and Kentucky's Bingham Co-operative Marketing Act,[89] it owned. The strained contractual interpretation which the court employed[90] not only resulted

87. In Haarparinne v. Butter Hill Fruit Growers' Ass'n, 122 Me. 138, 119 Atl. 116 (1922), subsequent to the associations sorting, packing and stamping the apples, a large portion of the crop was frozen while still in the possession of the member. While no formal contract had been entered into, the organizational by-laws contained language indicative of an intent that title to all crops acquired from members was to pass to the association. Nevertheless, the court chose to disregard these provisions and held that since the association was acting as a mere selling agent and did not have title, it was not responsible for the value of the damaged crop. The reason why one acting as a selling agent should not be responsible for damage occurring after his assumption of control over the goods was not explained.

88. 222 Ky. 164, 300 S.W. 350 (1927). See also Dep't of Treasury v. Ice Service, Inc., 220 Ind. 64, 41 N.E.2d 201 (1942).

89. The court construed the statute as authorizing cooperative associations to either buy and become the absolute owner of the member's produce, or to act as a mere selling agent and enter into a contract for that purpose alone. It apparently was the considered, intelligent judgment of the parties that the former arrangement was the most adaptable to their enterprise. Hence the contract provided that the association should have an absolute title to the tobacco upon delivery.

90. "Isolated expressions in the instrument," observed the court, "are not necessarily controlling." 222 Ky. 164, 166, 300 S.W. 350, 352. Most authorities on contracts will admit the validity of this observation. Miller v. Robertson, 266 U.S. 243 (1924); Seuss v. Schubert, 358 Ill. 27, 192 N.E. 668 (1934); 12 AM. JUR., *Contracts* § 241. But one is justified in questioning its applicability to this particular contract, since *all* of the expressions in the instrument were consistent with passage of title to the association. Not content with merely disregarding what they considered as "isolated expressions" in the contract, the court went completely outside the contract and looked to the "conditions which brought about the organization" of the association and concluded: ". . . that the whole thing was nothing more nor less than the transfer by an aggregation of growers of the naked title to their product . . . to an association formed and organized by the growers themselves and which they absolutely controlled." 220 Ky. 164, 166-167, 300 S.W. 350, 352. This conclusion would seem to be a clear admission that title had vested in the association, and that the cooperative's liability for the tax in question should have been sustained.

in complete disregard for the expressed intent of the parties,[91] but also constituted an encroachment upon the domain of the legislature. Surely, that body is competent to provide, as it did here, that cooperatives are capable of holding title to their members' produce, and to prescribe the method whereby that result can be accomplished.[92] Furthermore, if cooperative associations are to be exempt from tax burdens which other forms of business enterprise must bear, that exemption should derive from a mandate of the legislative branch of government, rather than from a title-shuttling technique of the judiciary.[93]

These representative cases reveal the inadequacy of the title concept as an instrument for solving the problems arising from cooperative marketing of agricultural products.[94] Much of the confusion surrounding cooperative-title problems is attributable to the courts' failure to perceive that it is legally possible and entirely reasonable for a cooperative acting as an agent to hold legal title to the subject matter of the agency.[95] Even where the marketing agreement expressly provides for a sale, specifies the time at which title to the goods shall pass, and indicates that the intention of the parties is to pass title, the association still may retain the character of an agent.[96] Despite the fact that it has

91. The court was well aware that title manipulation would produce the desired result. That result was clearly indicated when the court formulated the issue as follows: "If the contract in question is one whereby the association became the absolute owner of the grower's tobacco, then under the terms of the . . . statute the product was . . . necessarily subject to the tax assessed. On the contrary, if the contract between the grower and the association is only a contract of agency" the association could escape the tax liability. *Ibid.*

92. See HULBERT, *op. cit. supra* note 86, at 122.

93. Another interesting tax case is that of Calif. & Hawaiian Sugar Refining Corp. v. Commissioner, 163 F.2d 531 (9th Cir. 1947). While the court recognized that title had passed to the association, it went further and euphemistically labelled the purchase and sale agreement a "trust instrument." By holding that the provision in the agreement for the deduction of expenses was not a reduction of the price paid for the commodity, but rather an expense of the "trust administration," the cooperative was permitted to escape the tax liability.

94. *Cf.* Judge Learned Hand's statement in *In re* Lake's Laundry, Inc., 79 F.2d 326, 328-9 (2d Cir. 1935): "'title' is a formal word for a purely conceptual notion; I do not know what it means and I question whether anybody else does, except perhaps legal historians."

95. Some legislatures have anticipated judicial reluctance to effectuate purchase and sale provisions in marketing contracts and have provided that "If they contract a sale to the association, it shall be conclusively held that title to the products passes absolutely and unreservedly, except for reported liens, to the association upon delivery; or at any other specified time if expressly and definitely agreed in the said contract." See CALIF. AGRIC. CODE § 1208.

96. Comment, *Interpretation of Contracts Employed by Cooperative Marketing Associations,* 43 YALE L.J. 119 (1933). The Comment discusses many of the cases interpreting cooperative marketing contracts and concludes ". . . that the marketing agreement, regardless of its express wording, is whatever the courts wish it to be in the light of the particular circumstances." *Id.* at 127.

title, the cooperative remains, in theory, a non-profit enterprise operating for the benefit of and at the control and direction of its members.[97] There is nothing anomalous in such a relationship; the courts frequently have recognized, in cases not involving cooperatives, that an agent is legally capable of holding title.[98]

A second source of difficulty is the seemingly insistent demand by some courts that there must rest with the party who is said to have title, all the legal rights, powers, duties, and obligations incident to that

97. A few well-considered opinions recognize that even though the association has title to the products held by it for the benefit of the members, it does not thereby free itself from the limitations which are inherent in the cooperative type of business activity. In Rhodes v. Little Falls Dairy Co., 230 App. Div. 571, 245 N.Y.S. 432 (1930), the contract was clearly drafted in terms of purchase and sale. In holding for the member in his action against the association for an accounting of his proportionate share of the earnings (or "savings," as the cooperatives like to call it) the court said: "We do not agree . . . that the contract is the *ordinary* one of purchase and sale. *Even though title may have passed,* still the arrangement is for co-operative marketing. The status of the parties partakes of a trust or fiduciary character, and is not the simple relation of vendor and vendee. . . ." (emphasis added.) 245 N.Y.S. at 434, 435. See also Texas Farm Bureau Cotton Ass'n v. Stovall, 113 Tex. 273, 253 S.W. 1101 (1923), where the contract was similarly couched in terms of purchase and sale. In enjoining the member from selling to others, and in decreeing specific performance in favor of the association, the court indicated an awareness that the sale there contemplated between the member and the association was not *in pari materia* with the usual commercial sale. "We do not find it necessary," said the court, "to determine whether this contract was one of ordinary sale and purchase or an agency contract . . . [since] provisions in the contract show that it was the manifest purpose of the parties that the association should take title to the cotton delivered to it. . . ." The court concluded that "in view of the statute, and the express language of the agreement declaring the instrument a contract of sale and purchase, we must regard it as such a contract in so far as the parties here are concerned." *Id.* at 288-289, 253 S.W. at 1107. *Cf.* Mountain States Beet Growers Marketing Ass'n v. Monroe, 84 Colo. 300, 269 Pac. 886 (1928). Even the most eminent of the cooperative spokesmen admits that there is some basis to the proposition that the association retains its fiduciary obligations although the member has relinquished title. HULBERT, *op. cit. supra* note 86, at 125.

98. When a holder endorses and delivers a note or other commercial paper to an agent for the purpose of collection, legal title passes to the agent. Citizens' State Bank v. E. H. Tessman & Co., 121 Minn. 34, 140 N.W. 178 (1913). In case a commercial agent becomes insolvent with agency goods on hand, the courts have been disposed in many cases to hold the transaction a sale, giving rise to a general claim merely, and have denied the principal's claim for the specific return of the goods. Miller Rubber Co. v. Citizens' Trust & Savings Bank, 233 Fed. 488 (9th Cir. 1916). In non-cooperative tax cases, Steffen states that if any trend is to be found, it is that the transaction is termed a sale or an agency depending on which will reach the result that the property is taxable. STEFFEN, CASES ON AGENCY 65 (1933). It will be noted that this observation is opposed to the trend in cooperative cases, where, as the *Sugar Refining* and *Dark Tobacco Growers'* cases indicate, the transaction will be deemed a sale or an agency depending on which will result in non-taxibility to the association.

In comparing the trust relation to that of an agency, Seavey uses language apropos to the problem under discussion: "It is true that the trustee always holds a title and usually is not subject to the control of the *cestui,* while the agent is always subject to control and *usually* has no title. Where, however, an *agent acquires a title* or a trustee submits, by agreement, to control by the *cestui,* there is a double relationship of agent-trustee created." (emphasis added.) SEAVEY, STUDIES IN AGENCY 75 (1949). This would seem to be a clear acknowledgement that an agent may, and often does, hold title.

concept. However, there is no compelling necessity for this result. It has long been recognized that possession, one of the foremost attributes of title, could be reposed in one other than the title-holder. Similarly, all of the beneficial aspects which normally attach to the ownership of goods can be severed from the legal owner and vested in another. Consequently, title alone should not be considered determinative of all the legal consequences flowing from transactions involving goods. Rather, that concept may more accurately be viewed as embodying a group of severable rights and duties, not necessarily attached to any one person or rendered static by doctrinal considerations. Thus, parties to a marketing contract may agree that certain historical aspects of title should be in one party, while the remaining aspects should be in the other. In the absence of a strong public policy demanding a contrary result, courts should give effect to the arrangement. If there are policy considerations preventing effectuation of the relationship contemplated by the parties, enforcement should be denied on that ground, rather than by resort to a questionable application of the antiquated concept of title.

If title is not to be determinative of the result in a particular controversy, it is apparent that some other, more workable, criterion must be adopted.[99] The approach of the framers of the proposed Uniform Commercial Code offers a starting point and one which should receive serious consideration.[100] The Code, apparently recognizing that to say a certain result follows because title is in a given place is only to avoid the necessity for providing a reason for a supposedly desirable result, deliberately belittles title as a universal panacea for solution of the problems involved in the transfer of goods. Instead, the issues which traditionally have been sought to be resolved by the application of the title concept are dealt with specifically. For example, in considering the risk of loss, the Code provides that where the contract requires or authorizes the seller to ship the goods, "the risk of loss passes to the buyer when the goods are duly delivered to the carrier. . . ."[101] It will be noted that

99. Professor Seavey also demonstrates that the title concept should not be the controlling criterion in determining the character of the relationship of parties to commercial transactions. "The 'power of control' test has been used in the many cases distinguishing an agent, who sells goods for a principal, from a buyer who acts on his own account. The courts also sometimes uses the passage of title as a test, finding that if the transferee acquired title to the goods, he was a buyer rather than an agent. It would appear, however, that the state of the legal title may be unimportant or that, like the power of control, it may be merely a factor in determining whether the transferee is a fiduciary with a duty primarily of protecting the interests of the transferor in the transactions it is proposed that he shall perform or whether he is a person who has a contract of purchase, the subsequent transactions to be on his own account." *Id.* at 164.

100. In the following discussion, references to the Code are to the Sales Article, Article 2 of the Spring 1950 draft, as modified by the November 1951 Final Text Edition.

101. CODE, § 2-509.

there is no reference to the evasive, intangible test of title; rather, a more tangible criterion of delivery is substituted as a method of determining upon whom a loss falls. Other specific problems are similarly dealt with without resort to the title concept. However, since all issues likely to arise cannot be foreseen in advance, the Code contains a section to be applied only when the controversy involved has not been separately treated. This section provides that "unless otherwise expressly agreed, title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods. . . ."[102] This provision manifestly strives to make a concrete, determinable physical act the title-passing test. The purpose of this approach, in the words of the draftsmen of the Code:

> . . . is to avoid making practical issues between practical men turn upon the location of an intangible something, the passing of which no man can prove by evidence and to substitute for such abstractions proof of words and actions of a tangible character.[103]

The Code approach to problems historically solved by the title concept, if applied to cooperative marketing contracts, would appear to be a workable, effective method of resolving conflicting interests between associations and their members. For example, in the event a member's crop is fortuitously damaged or destroyed and the issue of risk of loss is presented,[104] it would seem desirable for the court resolving that issue to formulate, not some broad generalization concerning title, but rather a statement which takes into consideration the real issues involved, *viz.*, whether the member is to bear the loss alone.[105] Furthermore, the rule announced should be limited by the particular facts and problems which it is designed to accommodate. Therefore, with respect to unrelated questions such as the association's liability for a tax assessment, its standing to sue for conversion, or its ability to recover amounts previously paid, the court would be free to formulate another rule of decision which would again realistically reflect the considerations involved. Such individual treatment would do much toward

102. CODE, § 2-401.

103. CODE, Comment to § 2-101.

104. See Texas Certified Cottonseed Breeders' Ass'n v. Aldridge, 59 S.W.2d 320 (Tex. Civ. App. 1933), and Haarparinne v. Butter Hill Fruit Growers' Ass'n, 122 Me. 138, 119 Atl. 116 (1922), both discussed *supra* note 14 and accompanying text.

105. In proposing such an approach, no claim is laid to originality. Professor Latty, in his excellent study, has demonstrated that many cases which have been decided on the basis of title, could have better, and with much less confusion, been decided by approaching the specific legal consequences directly instead of working through title. See Latty, *supra* note 4, at 3.

eliminating the present obvious inconsistency of holding that title has passed for some purposes but not for others.[106] In addition, some semblance of certainty upon which the parties may rely in planning their transactions could be achieved.

CONCLUSION

The present significance of the cooperative marketing contract in terms of actual use is indeterminable. Perhaps the success and maturity of cooperatives renders unnecessary a binding legal device to insure adequate patronage. The relative infrequency of present litigation suggests that the offering of an indispensable service in the marketing of farm products will be availed of regardless of a pre-existing contractual responsibility. However, the re-occurrence of a serious economic depression as witnessed in the agricultural industry during the 1920's and '30's may again bring resort to entire output contracts in preservation of the cooperative method of marketing.

In the final analysis, however, the marketing contract provides no substantial basis for insuring the success of the cooperative enterprise. Whenever the association ceases to perform the economic purpose which predicates its existence, the presence of marketing contracts cannot be relied upon to sustain its continuance. Further, prosecutions of recalcitrant producers is likely to be more harmful than beneficial with respect to public relations and internal harmony. The crucial question as to whether the agricultural cooperatives have justified the favoritism demonstrated by the courts and legislatures in the past and are in need of similar solicitude in the future is answerable in terms of political and economic factors beyond the scope of this discussion. The identical question pervades the succeeding inquiries into the antitrust laws and Federal income tax exemptions granted cooperative organizations.

106. See note 4, *supra*.