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## Regulation of Business - Antitrust Laws - Exemption of Agricultural Cooperative

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REGULATION OF BUSINESS—ANTITRUST LAWS—EXEMPTION OF AGRICULTURAL COOPERATIVES—Defendant agricultural cooperative, organized under the authority of section 6 of the Clayton Act<sup>1</sup> and section 1 of the Capper-Volstead Act,<sup>2</sup> engaged in alleged predatory practices claimed by the government to constitute an attempt to monopolize and lessen competition within the ban of the Sherman and Clayton Acts. In a civil action by the government setting forth three separate claims for relief from such activities,<sup>3</sup> held, the first cause of action, alleging monopoly, dismissed on the merits. In the absence of a combination or conspiracy with persons who are not within the purview of the Clayton and Capper-Volstead Acts, the business activities of an agricultural cooperative are exempt from action under the antitrust laws.<sup>4</sup> *United States v. Maryland and Virginia Milk Producers Assn.*, (D.C. D.C. 1958) 167 F. Supp. 45. But in a treble-damage action based on similar facts,<sup>5</sup> on defendant-cooperative's motion for summary judgment, held, motion denied. The grants of certain exemptions to agricultural cooperatives do not make predatory practices aimed at monopoly lawful, nor do they preclude a person injured by such practices from bringing a private suit. *April v. National Cranberry Assn.*, (D.C. Mass. 1958) 168 F. Supp. 919.

These decisions each make a basic assumption, supported by both dicta<sup>6</sup> and writers,<sup>7</sup> that the enjoyment of a monopoly by an agricultural cooperative is not illegal in itself. This assumption is based on the policy enunciated by the Clayton and Capper-Volstead Acts of aiding individual farmers by allowing a narrowing of competition in the marketing of agricultural

<sup>1</sup> "Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of . . . agricultural . . . organizations, instituted for the purposes of mutual help . . . or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade. . . ." 38 Stat. 731 (1914), 15 U.S.C. (1952) §17.

<sup>2</sup> "Persons engaged in the production of agricultural products . . . may act together in associations . . . in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, such products of persons so engaged. Such associations may have marketing agencies in common; and such associations and their members may make the necessary contracts and agreements to effect such purposes. . . ." 42 Stat. 388 (1922), 7 U.S.C. (1952) §291.

<sup>3</sup> Under 26 Stat. 209 (1890), as amended, 15 U.S.C. (1952) §4, giving the federal government injunctive relief against violations of the Sherman Act.

<sup>4</sup> The second and third causes of action alleged combination and other illegal activity with non-exempt organizations and were thus recognized as valid.

<sup>5</sup> Under 38 Stat. 731 (1914), 15 U.S.C. (1952) §15, allowing treble damage relief to a person ". . . injured in his business or property by reason of anything forbidden in the antitrust laws. . . ."

<sup>6</sup> See, e.g., *United States v. duPont & Co.*, 351 U.S. 377 at 388 (1956); *Cape Cod Food Products, Inc. v. National Cranberry Assn.*, (D.C. Mass. 1954) 119 F. Supp. 900 at 907.

<sup>7</sup> See, e.g., REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 311 (1955); HULBERT, LEGAL PHASES OF COOPERATIVE ASSOCIATIONS 220 (1942). See generally, note, 44 VA. L. REV. 63 at 82-84 (1958).

products.<sup>8</sup> It is only the legality of the means used to achieve these permissive monopolies that is being questioned in the principal cases. The issue, which produced conflicting results in these cases,<sup>9</sup> may be resolved into two basic questions. Are only those steps involving voluntary membership and voluntary marketing agreements exempt under the statutes?<sup>10</sup> Or are all practices carried on by a cooperative alone, even if they are predatory and illegal if engaged in by other businesses, exempt from private or governmental action?<sup>11</sup> The futility of attempting to ferret out an explicit congressional intent on the narrow issue before the courts is demonstrated by the conflicting excerpts from the records offered in both cases in support of their holdings.<sup>12</sup> A reading together of the applicable statutes, with a view to the nature of the American agricultural economy, shows the purposes of the grants of exemption. From this the proper limitations of that exemption can be deduced. To overcome the disadvantages of individual marketing, cooperative marketing was to be allowed in the face of the antitrust provisions that would make such combinations illegal. And in the absence of an undue enhancement of prices a monopoly resulting from natural economic factors was to be allowed without govern-

<sup>8</sup> See Koller, "Cooperatives in a Capitalistic Economy," *AMERICAN INSTITUTE OF COOPERATION* 27 (Dec. 1947); HULBERT, *LEGAL PHASES OF COOPERATIVE ASSOCIATIONS* 215 (1942).

<sup>9</sup> The conflict of opinion in the two principal cases is not without precedent. In *United States v. King*, (D.C. Mass. 1916) 250 F. 908, it was stated that even if the defendants in that case qualified as a Clayton Act cooperative, the alleged blacklisting and secondary boycotts would not fall within the act's exemptions. This dictum was rejected in *United States v. Dairy Cooperative Assn.*, (D.C. Ore. 1943) 49 F. Supp. 475, which held that the statutes conferred on farm cooperatives blanket exemption from antitrust restrictions.

<sup>10</sup> See *Cape Cod Food Products, Inc. v. National Cranberry Assn.*, note 6 supra, dicta at 907; *United States v. King*, note 9 supra, dicta at 910; *REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTI-TRUST LAWS* 311 (1955); Hanna, "Antitrust Immunities of Cooperative Associations," 13 *LAW & CONTEMP. PROB.* 488 at 499 (1948); Packel, *THE LAW OF THE ORGANIZATION AND OPERATION OF COOPERATIVES* 196 (1940).

<sup>11</sup> See *United States v. Maryland Cooperative Milk Producers*, (D.C. D.C. 1956) 145 F. Supp. 151 at 153-154; *United States v. Maryland and Virginia Milk Producers Assn.*, (D.C. D.C. 1950) 90 F. Supp. 681 (dicta); *United States v. Dairy Cooperative Assn.*, note 9 supra. The Supreme Court has held that the exemption does not extend to agreements in restraint of trade entered into between a cooperative and a person not a producer or cooperative. *United States v. Borden Co.*, 308 U.S. 188 (1939). Referring to that portion of the Capper-Volstead Act allowing the secretary of agriculture to seek an injunction if the restraint or monopoly results in an enhancement of prices [42 Stat. 388 (1922), 7 U.S.C. (1952) §292], the Court stated at 206: "That this provision . . . does not cover the entire field of the Sherman Act is sufficiently clear. . . . The Sherman Act hits at attempts to monopolize as well as actual monopolization." But this decision was limited to its facts by the district court in *United States v. Maryland Cooperative Milk Producers*, this note supra, which held that the exemption does extend to a conspiracy between two cooperatives for the purpose of fixing prices.

<sup>12</sup> See the principal cases: *United States v. Maryland and Virginia Milk Producers Assn.* at 51; *April v. National Cranberry Assn.* at 921-923.

mental restraint.<sup>13</sup> Since the purpose of the acts was to place farmers in a bargaining position comparable to that enjoyed by corporate industrial enterprises,<sup>14</sup> it is difficult to conceive of any public policy or economic considerations that would extend protection to cooperative activities of a predatory nature, when such activities if carried on by a corporation would be illegal. But as evidenced by the paucity of relevant cases and the usually good-faith activities of cooperatives, the problem presented does not yet appear to be a major one. Nevertheless, with the growing membership and power of these organizations<sup>15</sup> and the ensuing control of increased portions of the national food supply in fewer marketing agencies, courts should not be reluctant to take a position, based on a reasonable interpretation of the statutes, against the predatory practices of the cooperatives. If the courts are unwilling to do so, the responsibility will fall on Congress to heed the advice of experts in the field to clarify the scope of exemptions afforded the activities of farm cooperatives.<sup>16</sup>

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<sup>13</sup> See 42 Stat. 388 (1922), 7 U.S.C. (1952) §292. Areas in which natural economic factors would be most likely to allow cooperative monopoly would be in produce having only a limited growing area (e.g., cranberries) or, because of perishability, only a limited marketing area (e.g., milk).

<sup>14</sup> See *United States v. duPont & Co.*, note 6 supra, dicta at 388; *WHITNEY, ANTITRUST POLICIES* 426 (1958). Cf. *Tigner v. Texas*, 310 U.S. 141, dicta at 145-146 (1940).

<sup>15</sup> Co-ops have increased their membership from 2,700,000 in the late 1920's to 7,700,000 in 1958; *N.Y. TIMES*, May 29, 1958, p. 14:5. See also the commentary on the Maryland and Virginia case in "Spilled Milk," *NEW REPUBLIC*, Dec. 22, 1958, p. 4.

<sup>16</sup> See, e.g., *REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS* 311 (1955); Wood, "The Report of the Attorney General's Antitrust Committee Three Years After," 26 *GEO. WASH. L. REV.* 669 at 678-682 (1958); Oppenheim, "Federal Antitrust Legislation: Guideposts to a Revised National Antitrust Policy," 50 *MICH. L. REV.* 1139 at 1210-1213 (1952).