Cooperative Corporation Law on the Marketing Transaction

A. Ladru Jensen
COOPERATIVE CORPORATION LAW ON THE MARKETING TRANSACTION

By A. Ladru Jensen*

In the evolution of law, commercial transactions precede the legal rules which later develop to govern them. Men exchange goods, services, and money. They organize to facilitate business purposes. They compete for a better market. Vital differences of opinion arise. These controversies are followed by judicial decisions and legislation to define and regulate the personal, group, and property rights and relationships which earlier economic dealings have created.

Inventors, engineers, railroad manufacturers, entrepreneurs, bankers, contractors, and working men pioneered the building of railroads. Slowly but surely the lawyers, judges, and legislators came along afterwards and erected a law of common carriers. Similarly, many natural persons and private-profit corporations constructed automobiles and placed them in the hands of the public. Again the lawyers, judges, and legislators applied their techniques and established a new branch of jurisprudence called automobile law.

In our generation American agricultural leaders have pioneered a new system of marketing. They have developed and expanded a new type of business unit: an association of producers acting by and through a non-profit corporation agent which they create and control. In our day the lawyers, administrators, judges, and legislators are engaged in clarifying the legal concepts involved in the personal, corporate, and property relations which a pioneering generation of agricultural cooperators have created by their new-commercial practice called cooperative marketing.

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This new development has been aptly described by the Honorable Clinton P Anderson, Secretary of Agriculture for the United States. In substance he declared that the ingenuity and loyalty of American farmers have combined the ideas of a non-profit corporation and a voluntary marketing association to rehabilitate a depressed industry. Under generally competent leadership, he opined, the modern non-profit cooperative corporation accepts delivery of, warehouses, grades, processes, packages, finances and markets all kinds of agricultural products in an economic and efficient manner. This new method of joint selling provides its member beneficiaries with a fairer return upon their labors and invested capital than they formerly received under individual competitive marketing. This practice increases the relative purchasing power of millions of farmers. Through cooperative marketing, agricultural products flow more evenly into the channels of trade, a vital industry is stabilized, and the general welfare made more secure.

The efforts of farmers to engage in joint marketing operations have from the first incurred active opposition from the commission merchants whom cooperative selling would replace. In 1913, at the suit of a Chicago hog buyer, the cooperative farmers of Decorah, Iowa, were judicially condemned as criminal conspirators for organizing a cooperative marketing association. In that year the Supreme Court of Iowa held a group of Decorah hog raisers, who associated for collective marketing of their hogs, to be an illegal combination in restraint of trade, and enjoined them from engaging further in joint selling operations.

The right to organize for collective marketing was gained from 1914 to 1922 by the enactment of the Clayton Act, and particularly of the Capper-Volstead Act, by the Congress of the United States. The latter act, which guarantees


2 Id. at 1-6.

3 Ibid.

4 Reeves v. Decorah Farmers Cooperative Society of Iowa, 160 Ia. 194, 140 N. W. 844, 44 L. R. A. (N. S.) 1104 (1913)


6 Capper-Volstead Act, 42 Stat. 388, 7 U. S. C. A. 291 (1922) This act provided among other things, that agricultural cooperative associations might be
freedom of cooperative marketing, is properly regarded as the Magna Charta of American agriculture. This bill of rights has not precluded economic, political and legal attacks against cooperative marketing. The opposition has continued although the point of attack has shifted from time to time.

Convincing evidence of the virility of the current attack is found in the testimony before, and in report of, the Royal Commission on Cooperatives\textsuperscript{7} in Canada, published late in 1943, and in the Interim Report on Cooperative Competition, by the House Committee on Small Business,\textsuperscript{8} published in this country in April, 1946. The organization early in 1946 of a Committee on Cooperative Law within the Section on Corporations, Banking and Mercantile Law of the American Bar Association\textsuperscript{9} is indicative of the current interest in, and attention to, this new branch of jurisprudence—cooperative corporation law.

**ECONOMIC PATTERN OF A TYPICAL MARKETING COOPERATIVE**

Before analyzing the basic legal relationships between corporate agent and producer patron resulting from the creation and operation of cooperative corporations, let us briefly survey the economic pattern and practices of a typical cooperative marketing corporation-association.

A group of farmers who raise similar products associate together for the purpose of incorporating a non-profit corporation through which to market their products. They orally agree among themselves to support this newly created agent by making continuous deliveries of their agricultural products to it over a specified number of years. The written agreements made to accomplish these purposes are, strangely enough, not entered into among the producer-associates but are made between each associate and the cooperative association which they cause to be created. They are called the marketing

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organized for the mutual benefit of members provided they conform to one or both of the following requirements: first, one member, one vote; and second, dividends on stock or membership capital shall not exceed 8 per cent per annum. The act also required that the value of non-member products dealt with should not exceed the value of member products handled by the cooperative association.

\textsuperscript{7}Report, \textit{ROYAL COMMISSION ON COOPERATIVES}, Edmund Cloutier, printer, Ottawa, Canada (1945)


\textsuperscript{9}Proceedings of Section of Corporation, Banking and Mercantile Law, American Bar Association, Chicago, Ill., 1945-46, p. IX. It is also significant that the National Council of Farmer Cooperatives, Wash., D. C., appointed a legal and tax committee in 1942, and the American Institute of Cooperation, Philadelphia, Pa., an educational non-profit corporation, appointed a committee of lawyers on legal education in November of 1943.
agreements." But their economic function is to create an association of agricultural producers legally bound to market the members' products through a common marketing agent.

The marketing contracts, although intended to be coextensive with the agricultural production by the member, nevertheless usually provide for a right of withdrawal of members during a certain brief period in any year, conditioned upon prior written notice of intention to terminate the agreement.

These marketing contracts also ordinarily provide that the corporation may exercise its sole discretion and judgment in grading, processing, packaging, warehousing, financing, and marketing of the products of the members. Out of these seemingly simple economic practices have arisen a series of complex problems of cooperative corporation law.

CONFLICTING CONCEPTS OF COOPERATIVE CORPORATION LAW

We find in this new field of law a form of non-profit corporation, heretofore used for educational and charitable purposes, now uniquely adapted to commercial practices. Cooperative corporations, in the language of "The Bingham Cooperative Act," "are not organized to make a profit" (meaning economic gain, not profit in the ordinary business sense) "for themselves, as such, or for their members, as such, but only for their members as producers."

In this new field of cooperative corporation law is found a non-profit business corporation, created to serve multiple producer principals as their joint marketing agent. Here too, is found considerable confusion in the intermingling of legal concepts of agency, bailment, trust, and of sale and purchase.

A survey of the cases indicates that a cooperative marketing corporation presents four legal relationships prior to the sale of the products by the corporation which have their own distinctive incidents in business law, namely:

1. A continuing and non-revocable agency, except for a stipulated privilege of withdrawal.
2. A selling agency plus a bailment.
3. A selling agency plus trust or agency title.
4. A sale and purchase for benefit of the primary producer.

COOPERATIVE CORPORATION ASSOCIATIONS

Cooperative marketing via a corporation indicates a specialization of labor between the farmers who grow or raise the agricultural products and the

10 EVANS AND STOCKDYK, op. cit, supra note 5 at 86-158.
non-profit corporate agent which markets them. The specialization of labor between the associated producers on the one hand, and the common selling agent on the other is frequently duplicated in the specialization of economic activity of partners.

In *Duryea v. Whitcomb*¹² three of the four partners were given the exclusive right and duty to carry on the selling of potatoes for the firm in New York. The modern cooperative marketing corporation has the same economic function as did the selling partners in *Duryea v. Whitcomb*, supra. The fact that the cooperative corporation occupies an economic position similar to a selling partner in relation to the associated producers suggests the question whether this relationship resembles in its legal incidents that established in partnerships?

The Uniform Partnership Act allows a corporation to be a partner,¹⁸ whenever the corporation law governing its creation will allow that situation. The act, however, requires that the partners shall be associated to "carry on as co-owners a business for profit."¹⁴ We shall see from an analysis of the cases that the cooperative marketing corporation carries on business as an agent rather than as an associate, although the cooperative corporation statutes usually refer to the corporation as a cooperative association.¹⁶ The property relationship between the producer members and the cooperative regarding products delivered to the latter, is not that of co-owner; but, depending upon the agreement of the parties, is either that of bailor and bailee, beneficiary and trustee, or occasionally seller and purchaser. Also, as we have previously noted from the illustrative text of the Bingham Act, supra, a cooperative marketing corporation is not engaged in carrying on a business to make a profit for the corporation, but only to make economic gain for its members as producers, with the exception of the earnings that are needed to pay dividends on corporation stock.¹⁶

¹² In *Duryea v. Whitcomb*, 31 Vt. 395 (1858), the defendant was the authorized agent of the business unit to buy potatoes in Vermont and New Hampshire and A. Duryea, W. E. Duryea and Isaac B. Lewis were authorized to act as the selling agents of the association in the state of New York.

¹³ Under the Uniform Partnership Act "Person includes individuals, partnerships, corporations, and other associations," § 2.

¹⁴ The Uniform Partnership Act defines a partnership as: "An association of two or more persons to carry on as co-owners a business for profit," § 6-(1).

¹⁵ The parent Bingham Act of 1922, supra note 11, read in part: "An Act authorizing the formation of non-profit, cooperative associations." "The term 'Association' means any corporation organized under this Act," § 2 (c).

¹⁶ Although it is sometimes contended (and truly conformable to basic cooperative principle) that the payment of dividends by a cooperative is really in the nature of interest on necessary capital, it has, nevertheless, been repeatedly held under the present and past income tax acts that dividends paid on the stock
Early in the development of cooperative corporation law the Supreme Court of the State of Washington considered the question of whether the cooperative corporation was legally a joint venturer with the associated member producers who pooled their products and shipped them through the company. The court answered this question in the negative.\(^1\)

The cooperative corporation enjoys a more permanent business relationship with its producer members than exists between partners. In the situation of *Durylea v. Whitcomb*, supra, either partner could withdraw at pleasure and terminate the partnership at will. Aside from a limited contractual right of withdrawal granted to producer members they are irrevocably bound to the cooperative, and under many marketing contracts can be enjoined from refusing to deliver their products\(^8\) or compelled to pay substantial stipulated damages if they deliver their products elsewhere.\(^9\)

The idea that a cooperative corporation is a new species of business association between the producer members and their juristic marketing entity is today a dominant concept, in cooperative corporation law.\(^2\) The very terms, "cooperative corporation," imply a group of natural persons legally associated in cooperative relationship with a corporation.

We may, therefore, conclude that a cooperative marketing corporation-association is a business unit quite as unique and distinctive in its legal incidents as were the statutory co-partnership associations\(^2\) of over a half

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\(^1\) Hudnall *et al.* v. Pennington & Co. *et al.*, 136 Wash. 155, 239 Pac. 2 (1925)

\(^2\) EVANS AND STOCKDYKE, op. cit. supra note 5 at 130.

\(^9\) Id. at 129-30.

\(^2\) "The Uniform Agricultural Cooperative Association Act" was the title of the uniform act approved by the Commissioners on Uniform State Laws and the American Bar Association in 1936. 9 *UNIFORM LAWS ANN.*, Edward Thompson Co., 41-59. This act is now the Model Agricultural Cooperative Association Act. *See Handbook of the National Conference of Commissioners on Uniform State Laws and Proceedings* (1943) 66. The act is, "concerning agricultural cooperative associations; providing for the incorporation, management and dissolution thereof."

\(^2\) Concerning "partnership association," the Pennsylvania Supreme Court declared in *Lafin & Rand Co. v. Steytler*, 146 Pa. 434, 441, 23 Atl. 215, 216 (1892). "The Act of 1874, it will be seen, was not a mere amendment or supplement to anything that went before, but like the Act of 1836, a new scheme carefully and elaborately drawn, creating a new kind of artificial person, standing between a limited partnership as previously known and a corporation, and partaking of the attributes of each." *See also* for analysis of legal nature of a statutory Michigan partnership association: Staver & Abbott Mfg. Co. v. Blake, 111 Mich. 282, 69 N. W 508 (1896)
century ago and very similar to that earlier type of business unit, except that the member principals of modern cooperative corporations are absolutely insulated from personal liability on the contracts of their marketing agent, rather than being conditionally exempted from personal liability as was provided for by several statutes which authorized co-partnership associations.\textsuperscript{22}

A PRIVATE-PROFIT CORPORATION AS AN AGENT

The law of private-profit corporation places a rather strict limitation upon the privilege of a corporation to act as an agent for third party principals who would exercise control over its business policies and methods of operation.

The theory of the general corporation laws is that the sovereign state grants to the corporation the rights to be, and to act as a distinct legal entity; and in so doing, expressly provides that the Board of Directors is to have the exclusive control of corporate policies and actions.\textsuperscript{23} This carries the implication that third party principals shall not replace the directors in any degree in the control of the corporation.

In the early Massachusetts case of *Whittenton Mills v. Upton*\textsuperscript{24} it was held that a corporation could not lawfully enter into a co-partnership with natural persons to engage in the manufacture of cotton goods; because to allow control of corporate activities through the business contracts of natural persons associated with it would make it an agent of such associates as prin-

\textsuperscript{22} The acts authorizing the creation of co-partnership associations, *supra* note 21, provided that personal liability of members would result from false statements in the articles of association or failure to use the word "Limited" at the end of the association name.

The Bingham Act, *supra* note 13, provides in § 14, "No member shall be liable for the debts of the association to an amount exceeding the sum remaining unpaid on his membership fee or his subscription to the capital stock, including any unpaid balance on any promissory notes given in payment thereof."

The Model Agricultural Cooperative Association Act, *supra*, note 20, provides in § 10 (d) "No member shall be personally liable for any debt or liability of the association."

See also: 77 A.L.R. 421.


cipals, and the managing directors and officers of the company would then be deprived of part of the control of the corporation which the laws of its creation reserved exclusively to them.

A later California case indicates the line of demarcation. The California Supreme Court held in a case where a third party entered into a joint real estate operation with a corporation, that where a partnership was not contemplated, and the contracting party was not given control of the corporation as his agent, but the corporation was left free through its corporate directors and officers to control its corporate affairs and to secure a result for itself and the contractee within its authorized powers, that it might contract with a private person to enter jointly into a real estate transaction and divide the profits and share the losses when the independence of the corporation as a principal was not violated.

CORPORATIONS AUTHORIZED TO ACT AS AGENTS

While general business corporations may not ordinarily become agents of natural persons with power to act as a controlling principal, still the legislature may authorize corporations to do so, and may even provide that the member principals shall not be personally liable on the contracts made for the benefit of third party principals.

In an early Connecticut case of Butler v. American Toy Company the court held (two judges dissenting) that the charter of the corporation by necessary intendment authorized it to take the place of the firm as a member of the company partnership for the manufacture of toys and that by its contract and actions thereunder it had become such a member.

Nearly all of the states have corporation laws which provide for the incorporation of "cooperative associations" for the express purpose of encouraging "the organization of producers of agricultural products into effective associations under the control of such producers," and with the express power "(a) To act as agent, broker or attorney in fact for its members and for any subsidiary or affiliated association." Some of the early statutes merely stated in general terms that the producers and the association must do business on the cooperative plan.

26 Butler v. American Toy Co., 46 Conn. 136 (1878)
28 Id. § 9 (a)
29 The early Washington Act of 1913 authorizing the incorporation of cooperative associations (Laws 1913, p. 52) merely stated that the associations were
The very great preponderance of judicial decisions, as we shall observe, have held that by statute or contract, or both, cooperative marketing corporations are the selling agents of their producer members.

AS BARGAINING AGENT ONLY

Certain loganberry growers of Oregon made common marketing agreements in January 1918, with the Salem Fruit Union, a cooperative marketing corporation, which read in part,

"Said grower does hereby constitute and appoint the said Union as his sole and lawful agent to enter into contract for him, and on his behalf, and in his name for the sale of all the Loganberries to be grown upon his premises, for the years of 1918 to 1921, inclusive."

There was a further provision in the marketing contract requiring the delivery of said berries to the cooperative or at such place as it might designate. The cooperative elected not to take possession of the berries, but to act simply as a collective bargaining agent for the growers. It executed in its own name, a contract of sale to the Phez Company, a processing and canning corporation, which recited that the cooperative was acting for growers who had made contracts authorizing it to market their berries.

Some growers refused to deliver their berries to the Phez Company which then brought suit against them for damages and injunction and prevailed. The Oregon Supreme Court said in part,

"While the marketing agent contracted in its own name, the body of the agreement showed that it was acting for identifiable principal growers as their bargaining agent and such contract is enforceable against the principals by the third party as if the agent had signed their names."

The court also decided that the marketing contract created an irrevocable agency.

"Where a cooperative having contracts with growers had agreed to cause the delivery of said berries to a buyer corporation and to pay damages in case of default, it had a power as bargaining agent coupled with an obligation which prevented a revocation of the agency." 81

AGENCY PLUS BAILMENT

In an early case in Maine one Haarpinnen brought an action for damages to be created "for mutual welfare" and must do business on the cooperative plan. REv. REV. STAT. § 3910. See also EVANS AND StockDYK, THE LAW OF COOPERATIVE MARKETING, Rochester, N. Y., The Lawyers Coop. Pub. Co. (1937) c. IX, The Present Legislative Situation. However, the New York statutes since 1926 list the cooperative marketing act under the short title, "Cooperative Corporation Law."

81 Phez Co. v. Salem Fruit Union et al., 101 Ore. 514, 201 Pac. 222 (1921), on rehearing, 103 Ore. 514, 205 Pac. 970 (1922)
against the Butter Hill Fruit Grower's Ass'n. for refusal to buy his apples which were frozen before delivery to the association.

Section 8 of the certificate of incorporation provided in part:

"All goods produced for sale by the member shall be delivered to the association for grading, packing, and shipment."

"In case any member is offered a price in excess of the price then obtainable by the association, said member shall turn said bid over to the association for filling from said member's goods."

"All members shall contract their entire crop of fruit to the Board of Directors each year, whenever in the judgment of the board such contracts would prove of benefit to the association."

The producer contended that these provisions created a non-cancellable executory contract of purchase and that the corporation was bound to buy his apples.

The court held that there was no sale of the fruit to the association, but that the association was merely acting as a selling agent of the members; and that it had agreed to take possession but not title to the produce for that purpose, indicating, therefore, an agreement for a consignment which may be defined as a bailment coupled with an agency for purposes of sale.82

AGENCY PLUS TRUST OR AGENCY TITLE

In an early leading case of Burley Tobacco Society v. Gillaspy83 the Indiana Supreme Court disclosed an unusual comprehension of the economic and legal philosophy of agricultural cooperative marketing. Its analysis in 1912 delineated the basic nature and purposes of this new type of corporation in a manner that has rarely been surpassed.

The Burley Tobacco Society had been incorporated in Kentucky. The attorney who drew the marketing agreement was an excellent draftsman as well as a very competent lawyer. The cooperating tobacco growers including one Gillaspy, had agreed individually that they did appoint the Burley Tobacco Society, their sole agent "for the purpose of receiving, commingling, handling, warehousing, inspecting, insuring, grading, financing, and selling all of the said tobacco in such manner and on such terms as the Burley

81 Haarpardine v. Butter Hill Fruit Growers Ass'n, 122 Me. 138, 119 Atl. 116 (1922)
82 In re Taylor (D. C. Mich.) 46 F (2d) 326, 328 (1931)
83 Burley Tobacco Society v. Gillaspy, 51 Ind. App. 583, 100 N. E. 89 (1912) "Where the benefits of membership in a corporation organized to foster the interests of growers of tobacco and to act as selling agents and assist in obtaining a fair price were contingent on the willingness of all members to abide by their contracts, and damages for breach would be difficult of ascertainment and could not be measured by any exact standard, a stipulation in the contract of a sum (20% of the value of the member's crop) as liquidated damages for failure to comply with it was not a stipulation for a penalty."
Tobacco Society may prescribe pursuant to their charter and by-laws, and for such purpose hereby transfer and assign to and invest in said agents the title and right of possession to said tobacco." The growers also agreed to deliver their respective tobacco crops on demand of the cooperative at the place designated by it for delivery.

Gillaspy refused to make delivery when demanded by the cooperative and it thereupon brought action against him for liquidated damages as stipulated in his marketing agreement. The Indiana Supreme Court declared the cooperative to be an agent of its members for the dissemination to them of information and for the marketing of their tobacco crops. It decided that the member must pay liquidated damages for his breach of contract. It held that public policy favored the establishment of combinations of agricultural producers to secure a fair price for their products, because such result would insure an economically sound agriculture and enhance the general welfare.

The marketing contract was carefully drawn to indicate the passage of title to the patron's products in special trust to enable the agent to accomplish more effectively the purpose of the agency. The deliberate omission of the terms of sale and purchase were quite as significant as was the affirmative statement specifying the many special purposes for which the title was to be transferred upon delivery to the cooperative corporation.

The dicta of the Gillaspy case, to the effect that a special agency title passed to the cooperative, finds sound legal analogy in two important situations in business law, in which a trustee title passes to an agent: first, in voting trusts in private corporation law, and second, in the case of those Massachusetts business trusts, which are held to be partnerships because the contracts make the trustees also the agents of the beneficiaries due to the power of control of the business reserved to the beneficiaries. In both of these situations there is no sale, but there is a transfer of title to personal property which creates an irrevocable agency, coupled with an interest, to facilitate the agreed purposes of the agency. The transfer of a title in trust to facilitate


85 Williams v. Inhabitants of Milton, 215 Mass. 1, 102 N. E. 355 (1913), is an early and leading case holding that a business trust, in which the beneficiaries were given the right to control the business policies of the trust, created an agency as well as a trust and therefore, the beneficiaries were co-partners in the business association. See also Gold Water v. Oltman, 210 Cal. 408, 292 Pac. 624 (1930), 71 A. L. R. 971 (1931) and cases there cited.

86 Another common situation of corporation agent where there is often a transfer of title to facilitate the agency is the endorsement and delivery of negotiable paper to a bank for collection. Professor Mecham, a leading authority on agency, analyzes these cases on the principle of agency alone with hardly any discussion of the agency title which is transferred. 1 Meacham, A Treatise
the performance of the agency by the trustee might well be termed an agency title. The marketing contract in the Burley Tobacco Society case, supra, stipulated many of the purposes for which such agency title was transferred to the cooperative corporation. It appears, therefore, that the delivery by member patrons of their products to the cooperative marketing corporation frequently creates an agency plus trust, or an agency plus an agency title.

A survey of the corporation law cases involving questions of legal relationship of the patron and the cooperative shows that the by-laws and marketing agreements have almost uniformly clothed the marketing transaction in terms of sale and purchase.

The great preponderance of the same group of cases construe the sale and purchase language as being merely an erroneous legal designation of a relationship which in reality is that of multiple principal producers to their common selling agent.

A recent well-reasoned case which disregards the sale and purchase language of the marketing agreement and finds an agency (or agency plus trust) is Judge Schwellenbach's opinion in Bowles, Price Administrator of the Office of Price Administration (OPA) v. Inland Empire Dairy Association. The case arose in the State of Washington and was decided in 1943.

The marketing agreement was included in the by-laws. It provided in part as follows:

"The dairyman hereby, * * * agrees to sell and deliver to the Association or to any place designated by the Association all of the milk or cream produced by or for him in the State of Washington, Idaho, or any place tributary to Spokane, and the Association agrees to buy and receive such milk or cream and to remit to the member for the same on the basis of market prices as conclusively established by the Association from time to time."58

The Federal Government contended that this provision, supplemented by others of similar vein, created a seller-purchaser relationship between the dairyman patrons and the cooperative association, and that, under the Emergency Price Control Act of 1942 as amended, U.S.C.A. Appendix Section 925 (a), the past and proposed future payment of patronage dividends violated Maximum Price Regulation No. 329, controlling purchases of milk from

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59 Id. at 212, n. 1.
producers for resale as fluid milk. (OPA Service p. 35,851 et seq.)

The Government petitioned for an injunction to restrain defendant association from paying any further "patronage dividends" (net margins) to its member and non-member patrons and to compel defendant to charge back against its patrons certain "patronage dividends" (net margins) paid out to them on April 30, 1943. If this could be accomplished, it would in the words of the court, "make a war casualty of the Farmer Cooperative System."

The association contended that in spite of its written agreement by which the members expressly agreed to sell and the association to buy the member's milk that in fact and in law the corporation did not buy milk from its patrons, but merely accepted delivery thereof, processed the milk and sold it for its patrons as their agent, and that, therefore, the patronage payments complained about were not part of the "price paid" but merely the final payments due the patron from moneys earlier received to his account over and above the costs of operation and the accumulation of reserves allowed by state law. The association was obviously in the difficult position of having to convince the court that the contracting parties actually intended to create a continuing agency even though they had expressly stated in writing in the by-laws that they intended a series of sale and purchase transactions.

The court denied the injunction and held that the patrons had not been and were not then selling their milk to the cooperative corporation, but were delivering milk to their corporate agent for sale on their behalf. The court further held that the first sale took place when the corporation sold the patron's processed milk to the consumer and cited numerous cases supporting this view.

"Maximum price regulation No. 329, § 1351.402 provides: "(a) The maximum price for each gallon of milk shall be the highest price each purchaser of milk from a producer paid that producer for milk of the same grade received during Jan. 1943."

Sec. 1351.404 defines a purchaser as, "(d) Purchaser means any person who buys milk from a producer for resale. It refers to any branch, division, subsidiary, affiliate, or portion of a business organization, whether corporate or otherwise, purchasing milk from producers or other operations in different localities."

"Bowles v. Inland Empire Dairy Ass'n, 53 F. Supp. 210, 220 (E. D. Wash., 1943)"

"Kansas Wheat Growers v. Board, 119 Kan. 877, 241 Pac. 496 (1925); Phez Co. v. Salem Fruit Union, 101 Ore. 514, 201 Pac. 222 (1921); 25 A. L. R. 1090 (1923); Mountain State Beet Growers Ass'n v. Monroe 84 Colo. 300, 269 Pac. 886 (1928); Tobacco Growers Cooperative Ass'n v. Harvey & Son Co., 189 N. C. 494, 127 S. E. 545, 547 (1925); 47 A. L. R. 928, 938 (1927); Oregon Growers' Coop. v. Lentz, 107 Ore. 561, 212 Pac. 811 (1923); Owen County Tobacco Society v. Grumback, 128 Ky. 137, 107 S. W. 710 (1909); 32 Ky. Law. Rep. 916; Poultry Producers v. Barlow, 189 Cal. 276, 208 Pac. 93 (1922); California Raisin Growers v. Abbott, 186 Cal. 601, 117 Pac. 787 (1911); Texas Certified Cottonseed Breeders' Ass'n v. Aldrich, 128 Tex. 464, 61 S. W. (2d) 79 (1933) See also: Inland Empire
The decision does not state whether the court regarded the situation as one of bailment or of the transfer of title in trust to facilitate the agency. The quotations from other cases indicate that the court would favor the passing of an agency title if that point had been necessary for a decision. Without taking a definite position on the nature of the property interest of the cooperative the court rested its decision on the fact that there was no price agreed upon between the association and the patrons, and further observed that "the responsibility for mistakes of management and for losses in collection must be borne by him," (the patron) and that the only "price involved in the transaction occurs" in the retail sale by the cooperative corporation to the ultimate consumer at the proper ceiling price of 13c per quart.42

The court cited with favor an earlier Washington case of *Yakima Fruit Growers’ Ass’n v. Henneford et al.*43 In this case the court disregarded the sale and purchase language of the marketing agreement and held the relationship between the patrons and the cooperative to be that of multiple principals and common agent. It therefore held that the cooperative marketing corporation was not subject to an occupation tax because it was not engaged in business "with the object of gain, benefit or advantage."

The Washington Supreme Court wrote in part:

"The appellants (members of Washington State Tax Commission) say that the respondents, (the cooperative corporation) in their method of doing business, are independent contractors, and cite a number of cases which we have examined, but which, in our opinion do not sustain the contention. The respondents cite a number of cases holding the relationship between members of cooperative associations and the corporations to be that of agency and this appears to be the generally accepted rule with reference to such organizations."

"We see no reason for holding that, because a large number of producers, most of whom are not what would be called large producers, cause a corporation to be organized for the purpose of assisting them in the production, packing, warehousing, and sale, they should not be on the same basis as a producer"

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43Yakima Fruit Growers’ Ass’n v. Henneford, 182 Wash. 437, 47 P (2d) 831, 832 (1938) 100 A. L. R. 435, 439 (1938), cited with approval in Bowles v. Inland Empire Ass’n, supra note 42.
COOPERATIVE CORPORATION LAW

individually, whether large or small, or two or more persons cooperating together by joint enterprise rather than by corporate entity. The fact that they operate through a corporate entity in which they own the stock and the corporation makes no profit and distributes the proceeds after a sale and the payment of expenses on a pro rata per box basis does not put them in a materially different situation than if two or more of them cooperated simply as members of a joint undertaking without corporate existence.

"The fact that a certain percentage are not producers, owing to the fact that they had sold their orchard land, is merely incidental, and is not of controlling importance. In any reasonable sense, the respondents, as corporations, are not engaged in business for profit, and, in fact, they do not make any. They are merely the agents of their stockholders, the producers, and are not, as already indicated, independent contractors." 144

The foregoing and similar cases show the importance for lawyers who serve cooperative corporations to use language of principal and agent, bailment and trust, or terminology used in the Gillaspy case, supra, rather than the erroneous phraseology of sale and purchase.

In spite of the persistent and erroneous language of sale and purchase commonly found in marketing agreements, the courts have repeatedly overcome the presumption that the parties intended what they said and have in the great majority of cases declared the relations of patron and cooperative to be that of principal and agent. 145

SALE AND PURCHASE

There are a few courts that have bound the cooperative and the patrons by the express language of sale and purchase found in the marketing contract, or in the by-laws, or in both.

In Texas Farm Bureau Cotton Ass'n v. Stovall 146 the Texas Supreme Court indicated that a marketing agreement similar to the one construed in the Inland Empire Dairy Ass'n case, supra, created a relationship of sellers and buyers between the producer members and the cooperative corporation. The court, while stating that it was unnecessary to decide whether the contract was one of ordinary sale and purchase or of agency, did nevertheless, make the following obiter dicta:

"But when the statute is examined and the contract analyzed, it is quite plain that in its essential aspects the contract is not one of agency as that term is ordinarily understood." 147

"In general it may be said that if it is manifest from the contract that it was intended title should pass and the price be paid, the transaction constitutes a

144 Id. at 442.
145 See note 41 supra.
146 Texas Farm Bureau Cotton Ass'n v. Stovall, 113 Tex. 273, 253 S. W. 1101 (1923).
147 Id. 253 S. W. at 1107, ¶ 11.
The parties agree that this is a contract for the purchase and sale of personal property. It was the manifest purpose of the parties that the Association should take title to the cotton delivered to it, and that defendant in error (the member) should lose all dominion over it.

"The fact that the cotton is to be placed in a pool with the cotton of other growers, and the grower paid from the net proceeds of the pool, instead of from the net proceeds of his own cotton, clearly shows that the purpose was to pass title to the Association."

"We think the price to be paid under this contract is sufficiently definite and certain. The price is to be defendant in error's proportionate share of the net proceeds from the sale of the pool, or pools, in which his cotton may be placed."

The Texas court's analysis of "price" does not appear to be sound. There was neither a definite price agreed upon nor a reasonable price implied from the writing between or the conduct of the parties, but on the contrary an agreement to return the net proceeds from the sale of the pooled cotton after deducting the costs of sale and withholding reasonable marginal retails for corporation reserves. Such writings and conduct indicate a sale for the benefit of the cotton growers at such a price as may be realized in the future by a common marketing agent.

Justice Schwellenbach's analysis of the question of "price" in the Inland Empire case, supra, appears to be irrefutable when he declared that the only evidence of price was the amount paid to the cooperative by the purchaser from the cooperative. Bowles case, supra, an agreement to return to the producer net proceeds is not an agreement to pay a price as that word is understood in the law of sales. The erroneous reasoning of the Texas Supreme Court that a purchaser title instead of a trust or agency title passed to the corporation did not, however, mitigate against a proper decision of the Stovall case, supra. The court reversed the decision of both the trial and intermediate appellate courts and ordered an injunction against the producer who threatened to violate his marketing contract.

A later Texas case corrects the erroneous although non-prejudicial reasoning of the earlier Stovall case, supra. The court wrote in the later case of Texas Certified Cottonseed Breeders' Ass'n v. Aldridge.53

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50 Id. at ¶ 12, 13.
51 Id. at ¶ 14.
52 Id. at ¶ 9.
54 The Uniform Sales Act provides: "(2) A sale of goods is an agreement whereby the seller transfers the property in goods to the buyer for a consideration called the price." 1 Uniform Laws Ann. 4, Edward H. Thompson Co. See 1 Williston, The Law of Sales (1924) § 171.
55 Texas Certified Cottonseed Breeders' Ass'n v. Aldridge, 122 Tex. 464, 61 S. W. (2d) 79 (1933)
"What is the nature of the title by which an association holds property which it is marketing for its members? To what extent does it act in its own corporate right and to what extent in a fiduciary capacity? The intention of the parties to a contract will control. If necessary, to give effect to the intention of the parties courts will brush aside mere form and examine the instrument as a whole, in the light of the nature and circumstances of the transaction, with a view of ascertaining the true intention of the parties expressed in the instrument. * * * By the terms of the contract the grower has surrendered control over the sale of his product, and thereby to this extent has divested himself of an important element of ownership. The contract upon this point is clothed in the terminology of a sale. The relation of consignor and factor has been abandoned. The logical and practical object of the members, as expressed in the contract, is to clothe the transaction in the language of a sale for the purpose of permitting the exercise of all powers named in the contract rather than a consignment in order to enable the association to enter bona fide transactions free from the embarrassment arising out of an incomplete title. * * * The members of the association, in order to promote their welfare, delivered their seed to the association. They constituted the association their agent with broad and exclusive powers to handle and sell their commodity. This was necessary to accomplish the very purposes for which it was created."

A Wisconsin case of Neith Cooperative Dairy Products Ass'n v. National Cheese Producers' Federation illustrates how sale and purchase language may bind the parties by the legal incidents of that relationship even though at the end of the fiscal year there was a practice to disburse accumulated marginal retains and to charge for overpayments upon the particular state of the accounts between the each member and the joint marketing corporation.

In this case the National Cheese Producers' Federation, a cooperative, was a member of the Neith Cooperative Dairy Products Ass'n, a federated cooperative. The plaintiff brought an action for the purchase price of cheese sold, and the defendant counter-claimed for an almost identical amount claimed to be over-advances by the agent to plaintiff as a principal.

In holding the agreement to be one of sale and purchase and not agency the court said:

"The contract is denominated a 'Contract of Purchase and Sale.' The agreement on the part of any local joined to the federation under such a contract is that it will sell to the federation all cheese produced by or for such local of the styles which the federation regularly handles. The federation on its part agrees that it will "buy all the cheese produced by or for the local of the styles which the federation regularly handles; and that the purchase price which it will pay for the cheese shall be the average price which it receives upon a resale minus a uniform charge to approximately cover the expense of marketing; average price to be based upon the federation's total monthly receipts from the sale of

"4 Neith Cooperative Dairy Products Ass'n v. National Cheese Producers' Federation, — Wis. —, 257 N. W. 624 (1934)
cheese of the same type and quality; the uniform charge to be determined in amount by the board of directors of the federation." Paragraph 8 of the agreement provides that payment shall be made on the 20th day of each month for cheese shipped by the local during the month before the month which precedes the date of payment.

"Defendant contends that what the board does when it fixes the purchase price to be paid on the 20th of the month is to approximate the selling price and approximate the expenses; that at the end of the year, upon a recheck, it may modify this price in either direction. If there is a surplus, it may declare a dividend and distribute the surplus. If there is a deficit, it may reclaim the overpayments. This is not a fair construction of the contract.

"If the payments on the 20th of each month were held to be advances, the cases would be applicable and would support defendant's contentions.

"The contract clearly settles this controversy adversely to defendant. It is a contract of purchase and sale. The local, in this case the plaintiff, agrees to sell all of its product to the federation, and the federation agrees to pay for it. The dates of payment are specifically set forth in the contract, and they are dates of payment and not advances. It will be noted that the federation does not pay for the cheese until at least fifty days after delivery, and we cannot resist the conclusion that this is to enable the board of directors to safely fix a final price.

"It is true that, if the average price as set by the board of directors has been so conservative as to result in a surplus at the end of the year, it has been the practice to distribute this surplus to the members. This practice does not affect the foregoing conclusions. The distributees receive the surplus because they are members and not because they are vendors."

From the foregoing analysis of cooperative corporation law on the marketing transaction, it will be observed that the basic relationship between the cooperator-members, and the marketing corporation is that of multiple principals to a common agent to whom the former have delivered title to their products to facilitate the most efficient and profitable sale thereof.

It is of importance that lawyers engaged in the practice of cooperative law should carefully distinguish between the conflicting concepts of sale, agency, bailment, and trust and carefully draft the by-laws and marketing agreements to facilitate the desired economic results through the creation of appropriate legal relationships.