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ADDRESS BY

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FEDERAL TRADE COMMISSION

ON

AGRICULTURAL COOPERATIVES AND THE ANTITRUST LAWS

BEFORE THE

AMERICAN INSTITUTE OF COOPERATION



AGRICULTURAL COOPERATIVES AND THE ANTITRUST LAWS

One of the prerequisites of a healthy economy is a rough equality in the buying and selling sides of the market. 1/ In a sense this truism suggests the function of the cooperative in our economy, whether it is constituted of farm producers, consumers, or small businessmen, and it will serve as an introduction to the topic I would like to explore with you today -- the role of the agricultural cooperative in the context of economic concentration and antitrust. Basic to such an evaluation is an assessment of whether the concept of cooperation exemplified by the cooperative movement and the concept of competition which underlies all our antitrust thinking are mutually exclusive or complementary. In my view, the two concepts can be readily reconciled. Antitrust is good for

concerned with the question of concentration in our economy.

Obviously, this concentration with our economic structure is

by no means new, but the study and volume of comment devoted to this issue has markedly increased within the last few years. Very simply put, the issue is: Are big companies getting bigger and is their share of the market becoming so large that it will be increasingly difficult for small business to enter or maintain itself in the marketplace?

The economic data supplied by the chief economist of the Federal Trade Commission in the recent Senate hearings on economic concentration is significant. He testified that the need for understanding the implications of the accumulations of economic power created around 1900 is more compelling today than at the turn of the century. He pointed out in this connection that in 1963 the combined sales, amounting to approximately 36 billion of the three largest manufacturing corporations, were nearly as large as the gross receipts of America's several million farms in that year.

structure of entire industries, and that antitrust policy based on an improper diagnosis of the true nature of industrial organization could constitute a drag on business decision-making and economic growth. 3/ The cooperative movement,

A recognition of the practical distinction between the

in an era of growing concentration is undoubtedly prerequisite to defining the role of the producer cooperative now and in the future. In this connection, the National Advisory Committee on Cooperatives recently stressed the disparity between the individual farmer and those to whom he sells and from whom he buys. As a countervailing factor to increasing concentration in other segments of the agricultural economy,

~~the Advisory Committee emphatically recommends that the~~

economic changes to which farmers find it difficult to adjust without help, as well as concentration in the agricultural supply and marketing industries, have all been cited as forces stimulating integration in the agricultural field, including cooperatives. Apparently the increasing control which retailers exert throughout the food distribution

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and Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co. 9/ Before turning to these cases, however, a few words on the legislative antitrust exemptions might be in order.

Subsequent to the passage of the Sherman Act, considerable

~~activity has been engaged in by both unions and cooperative associations that~~

under the new statute their activities might be viewed as

agreements or exemptions for their activities. Congress

The Supreme Court first took up the question in United States v. Borden Co., 15/ where it held that Capper-Volstead does not authorize combinations or conspiracies on the part of cooperatives which restrain trade in contravention of Section 1 of the Sherman Act with persons outside the producer cooperative. In short, the decision formulated what may be described as the "other persons" rule. That decision terminated with finality the notion that Capper-Volstead cooperatives enjoyed absolute immunity from antitrust prosecution.

The second important Supreme Court opinion to give

conferred on agricultural cooperatives is Maryland and Virginia Milk Producers Association v. United States. 16/ That case is significant because among other activities it dealt with

the acquisition by a producer's cooperative of Embassy Dairy, a milk distributor in the Washington, D. C. metropolitan area. 17/ The defendant cooperative was charged with monopolization and a conspiracy to eliminate competition in violation of

Section 7 of the Clayton Act by the purchase of Embassy's assets. The complaint further alleged that the association had engaged in a wide variety of predatory and coercive activities. In answer, the defendant asserted it had complete antitrust immunity against these charges under Section 6 of the Clayton Act and Sections 1 and 2 of the Capper-Volstead Act.

involving cooperative purchasing and selling unaccompanied by predatory practices or bad faith use of otherwise legitimate devices. 19/

In the case of the Section 7 charge, the district court had rejected the contention that the acquisitions were beyond the scope of the merger statute by virtue of the Capper-Volstead proviso empowering a cooperative to make contracts and agreements necessary to effectuate the association's purpose. It held that repeal of one statute by another by implication is not favored. 20/ The Supreme Court affirmed, holding that under Section 7, contrary to the association's position, the Secretary of Agriculture had no statutory authority to approve an acquisition as a "marketing agreement". It is interesting to note, however, that the Section 3 Sherman Act and Section 7 Clayton Act charges were considered on the same evidence. A crucial element in the charge of concerted action was the purchase contract containing provisions requiring the sellers to refrain from competing in the area for a number

of years and to persuade their former suppliers to either join

Supreme Court to the Section 3 charge holding the purchasing contract "as a weapon to restrain and suppress" competition

seems equally applicable to the Section 7 count.

The Maryland and Virginia decision has been described as standing for the proposition that acquisition agreements involving non-Capper-Volstead firms are necessarily outside of the scope of the immunity provided by the statute. 21/ I am not fully persuaded the decision went that far. 22/ Obviously, this is an important question in the light of the recommendations by many authorities that cooperatives increase their bargaining position by growth through integration. Much of this might be expected to come through merger and acquisition. It may be argued that the Supreme Court, in Maryland and Virginia, implicitly applied the "other persons" rule to the Section 7 charge. It seems plain, however, that in their disposition of the claim for immunity with respect to the acquisition both the trial court and the Supreme Court were influenced by the

21/ E.g., Stark, Capper-Volstead Revisited, American Cooperation, American Institute of Cooperation (1960), 453, 464; Comment, 43 Neb. L. Rev. 73, 95 (1963); cf., Saunders, The Status of

fact that the proposed merger was inextricably involved with predatory action not calculated to further the legitimate

that the acquisition by a cooperative of a non-Capper-Volstead corporation will never come within the scope of the exemption. The Supreme Court, it should be noted, in this connection has stated, somewhat enigmatically, that the purchase of the assets of a non-Capper-Volstead corporation simply for business use,

There has also been considerable speculation as to the application of the intra-enterprise conspiracy doctrine to

federations of cooperative associations. Obviously, this, too, is a very important issue currently, at a time when the cooperatives are urged by many in and out of Government to

marketing agencies formed from a federation of agricultural cooperatives were not specifically authorized by the law but it was generally assumed that such federations were exempt. 24/ The question has now been ruled upon by the Supreme Court. Farmer cooperatives are not subject to the same antitrust restrictions as the intra-enterprise conspiracy theory as

in the Sunkist case, 26/ held the antitrust laws inapplicable to the agreements between a citrus growers' cooperative, a subsidiary nonprofit stock corporation, and another stock

and the Capper-Volstead Act allowed a cooperative to form a

The intra-enterprise conspiracy doctrine, it has been suggested, may go beyond an attack on merely conspiratorial practices and also be used as a vehicle to challenge bigness

it, therefore, is significant that the decision's refusal to apply the intra-enterprise conspiracy doctrine has been praised on the ground that this approach is simply not suited to the problem of agriculture. The problem of the farmer, it was noted, appears to be excessive dispersion rather than an over-concentration of productive forces. 30/

Considered together, the three leading Supreme Court

decisions on the subject lead to the following conclusions:

worthwhile to enumerate the policy considerations and economic facts which might influence the application of the rule.

~~Certainly pertinent to any discussion of the cooperative~~

movement in the context of antitrust is that line of comment holding that the Sherman Act and subsequent antitrust statutes had "a social purpose at least coordinate with its economic purpose." 31/ Or, as a distinguished economist has put it, the "American politico-economic philosophy is grounded in the belief that power should be diffused rather than concentrated," describing the antitrust laws as the equivalent of a system of political checks and balances in economic affairs. 32/ Such an analysis indicates that strengthening

~~the former cooperative movement may play an important complementary~~

the extent and manner of cooperative expansion which should be permitted now and in the future. This is certainly the case if the statement by a well-known economist in recent Senate

hearings on the subject of concentration in public utilities that

been built has ceased to exist and that "Policy must now deal

economy as a whole and particularly

cooperative. 35/

The publications of the Department
the speeches of its officials indicate
ment's policy to encourage cooperative

this point. For example, Stanley F. Krause of the Marketing
Division advised:

" . . . Cooperatives can no longer be passive
about merger. For many cooperatives this point
is not whether or not to merge, but how to
merge" 36/

Job K. Savage, Director, Management Services Division, was

equally direct, stating:

35/ Certainly some of the figures presented by Dr. Mueller
in the course of the Senate hearings with respect to economic
concentration should give any serious student of our economy

"Automation and a necessity to constantly increase the efficiency of operation calls for increased size. The power struggle among ~~cooperatives and between cooperatives and~~

The agencies responsible for antitrust enforcement are, of course, not bound by such expressions of policy. 38/ Nevertheless, these views of the agency primarily responsible ~~for the welfare of the agricultural sector of the economy should~~

The available data suggests that mergers have not transformed the aggregate structure of the American agricultural cooperatives in a manner comparable to the way in which mergers have transformed some American industries. 39/ As a matter of fact, the statistics relating to the dairy cooperatives

the basis of such data the conclusion has been drawn that as a whole the large cooperatives have not done as well as the large noncooperatives. 42/ The same study indicated that merging cooperatives have grown more rapidly than nonmerging coopera-

"There is substantial evidence to show that the
cooperative movement operates as a very successful