The Use of Contracts in Co-operative Horticultural Marketing

L. G. Bennett
K. J. McCready

Miscellaneous Studies No. 45
July 1968
University of Reading
Department of Agricultural Economics

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Dear Mr Morley,

During the summer of 1966 you asked us to undertake a study of the use of contracts in co-operative horticultural marketing. We accepted the opportunity to carry out the enquiry, and your Association and the Agricultural Market Development Executive Committee jointly provided the funds with which to finance the study. The Department wishes to acknowledge not only the financial aid but also the help which you and members of your staff have given. We also acknowledge the help given by all those people in horticultural co-operative marketing institutions and co-operative-type companies who made the study possible by giving up time to answer the numerous questions which were put to them and by providing documentary evidence. They are too numerous to mention individually here but their help is gratefully acknowledged; the organisations concerned are listed in an appendix.

The study was carried out under the direction of Dr L. G. Bennett and the whole of the field work was done by Mr K. J. McCready; both are responsible for the report which we now submit to you.

While many have helped in bringing the study to this point, the joint authors are alone responsible for the conclusions which are reached.

Yours sincerely,

R. H. Tuck
Professor of Agricultural Economics

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CHAPTER 1

Reasons for the Study

For many decades the situation in the organisation of co-operative marketing of horticultural produce has been that two types of 'co-operative' have existed side by side. One type has been concerned with the marketing of the produce of a relatively small number of growers, each with common interests and relatively few, or even only one or two, crops to sell. Each grower has also had a high financial stake in the joint enterprise. There has been no question of members' disloyalty in this kind of co-operative because of the high financial stake of each member.* On the other hand the co-operative selling many kinds of products and in which individual members have had a relatively low investment is believed always to have suffered to a greater or lesser degree from the disloyalty of its members.† For most members of this second type of society the co-operative has been nothing more than another outlet which could be used if it provided satisfactory prices or left to its own devices if better prices could be obtained elsewhere. For reasons to do with the limitations imposed by the Industrial and Provident Societies Acts the first type, unlike the latter, have usually, but not always, been registered as private companies under the Companies Act.

The Runciman Committee defined these types of society respectively as trading and as non-trading, and described the difference as one of the extent to which the individuality of produce from members' holdings was either lost in the trading society and the society acted as if it were selling for one grower, or retained in the non-trading society which acted solely as a selling agent.‡ The situation is rather more complex than the admittedly weak distinction made by the Runciman Committee and the most important difference has been in the extent to which members contributed to the capital needs of the co-operative. Nevertheless, whatever the reasons for loyalty or disloyalty, the matter was one wholly for the industry

*Cases in which such enterprises have broken up through the withdrawal of members are very rare, only one is known to the authors.
†There is reason to believe that the position has not materially altered since the publication of 'The co-operative marketing of Horticultural Produce'. Econ. Series No. 49, q.v. pp. 41–42.
and not one about which the Government or public policy needed to concern itself, since up to 1960 no public aid was involved in the financing of horticultural marketing co-operatives.

However, in the course of its report made in 1957 the Runciman Committee canvassed the possibility of some Government help being given for the encouragement of co-operative horticultural marketing.* The Committee stated that ‘if under conditions where marketing co-operatives had not developed spontaneously financial support to encourage them to be established were given by the Government without a requirement obliging members to use them there would be a risk—so great as to amount to a certainty—that growers would only use them when it paid them to do so’. The report went on to say that in order to serve as a useful marketing agency ‘and contribute to orderly marketing it must be assured of a steady throughput of produce of constant quantity. Unless there were such an assurance there could be no justification for special financial support from the Government’.†

The aid which the Runciman Committee considered in its report was in fact embodied in the Horticulture Bill 1959 which ultimately became the Horticulture Act of 1960. The 1960 Act made available capital grants of one-third towards the costs incurred by growers of improvements which would have the effect of facilitating marketing. As co-operatives are in effect extensions of individual grower’s businesses they ranked equally with growers in being eligible for one-third grants.

During the debate on the Bill the question of member loyalty was raised again, and much disquiet was expressed that any aid given to a society which depended entirely on the, so to speak, “will o’ the wisp” of grower support would be somewhat imprudent. Mr Richard Nugent‡ expressed a widespread feeling when he said that ‘my anxiety on this point—an anxiety which we all know—is that due to the structure of the law of the Industrial and Provident Societies Acts, the individual co-operative can levy no penalty on a member when he, having agreed to sell to the co-operative finds he can get a better temporary market somewhere else, withdraws supplies and deprives the co-operative of the supply on which it was counting. All of us knowing the trade are familiar with this problem which traditionally has completely scuppered the operations of the co-operatives in this market, because they have never been sure of supplies’.§ Mr Nugent went on to contrast the position on the Land Settlement Association which was assured of supplies from its

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*ibid. para 372.
†ibid. para 372.
‡Now Lord Nugent.
§Hansard, 613 p. 1396.
growers and continued 'I ask my hon. friends in Committee . . . to consider if it is possible to amend the Industrial and Provident Societies Act so as to make it possible for societies to have a form of contract with their members who wish to supply them—it is optional whether they do or not—which will bind them to supply for twelve months or whatever the period might be. Otherwise the smaller grower will not get the advantage out of this wise and useful development'.

In the event, the Horticulture Act 1960 contained no provision which required a co-operative to have contractual relationships, or even the power to have such relationships, with its members. In order to allay the disquiet which had been so freely expressed during the debate, however, there was set up a committee of enquiry under the chairmanship of Mr Joseph Godber (Parliamentary Secretary, Ministry of Agriculture) with the object of examining the extent to which co-operatives could usefully employ and could enforce contracts between themselves and their members. In the report* which the Committee issued it was stated that 'the main attention has been given . . . to the issue of empowering the courts to award penal damages against disloyal co-operators. But while this subject formed the starting point for the review . . . the conclusion has been reached that it is less important than it originally appeared to be. The Government have been urged to provide additional powers and sanctions for co-operatives, but what is required is not so much new powers as a changed climate of opinion among growers themselves in their relations with their co-operatives. What is wanted is the building up of greater loyalty based primarily on efficiency of operations and on the effective use of the already substantial powers which co-operatives can call to aid under existing legislation and the common law'.†

It is worth recording at this stage that the Restrictive Trade Practices Act of 1956 came to be considered as making any contract between a co-operative and its members an action in restraint of trade and therefore illegal. In order to remove this legal hurdle it was necessary to pass the Agriculture and Forestry Associations Act of 1962. Thus, the equivocal attitude to contracts was emphasised by the finding that they were undesirable on the one hand and yet on the other by a clearing of the path for their widespread use. Again, the 1960 Act had provided £100,000 as aid in grants towards the cost of employing superior managers in co-operatives with a view to

†ibid. para 64.
making them more profitable through greater efficiency and therefore, in turn, bringing greater loyalty among members.

The Godber Committee probably did little more than echo the general feeling that even if contracts between a co-operative and its members were enforced at law it might be extremely bad policy to do so because of the ill feeling which such an enforcement would engender. Enforcement might also focus attention on the reasons for breaking a contract and these reasons might not always be aired to the advantage of the co-operative. It was also thought that there were other and better means for ensuring the loyalty of members through more efficient operation of societies and that these means the Government had already provided.

The next opportunity for debating the wisdom of contracts being used between horticultural marketing co-operatives and members came with the Agriculture and Horticulture Bill of 1964. This Bill went considerably further and added the grant aiding of working capital needed by horticultural marketing co-operatives. The commitment of the Government to support co-operation was therefore greatly extended both in amount and form while at the same time there was to be the means of ensuring a corresponding commitment on the part of members of co-operative marketing societies.

During the debate on the Bill Mr James Scott-Hopkins, in explaining the clause which required co-operatives to have the power to make contracts with members if they thought that such a course were desirable, said that* ‘this clause derives from the promise I gave in Committee to consider whether a provision could be incorporated in the Bill which would have the effect of promoting a large and steadier supply of member’s produce to support the marketing facilities provided by the co-operative to which they belong. The Rt. Hon. Gentleman (Mr Darling) proposed that Ministers should be empowered to require a co-operative to bind its members to supply particular or ascertainable amounts . . . of their produce to the co-operative business on pain of action for damages in the event of failure to do so. But, . . . there are other methods of achieving exactly the same result . . .’.

‘The new clause has therefore been cast in general terms so far as concerns the sanction for securing adequate support from the members of a co-operative. . . . It lays down that an overriding qualification for elegibility for grant to a co-operative . . . shall be the existence of provisions in the co-operative’s constitution which are designed to ensure that members will give it adequate support. . . .

*Hansard 690 p. 245.
On the other hand the co-operatives are left free to choose which of the several sanctions open to them they wish to employ. He might perhaps have added that co-operatives were also free to choose none.

It is perhaps worth quoting Mr Scott-Hopkins at length as his remarks illustrate the still equivocal attitude to contracts which was held in official quarters. It may well be that an equivocal attitude was only prudent in the circumstances. Clearly there must be some circumstances under which contracts are of value to both parties. There must also be situations in which no contract is either desirable or necessary and in order to throw some light on this problem and to provide some guidance in a situation which has remained most obscure for many decades this present enquiry was undertaken. It may, perhaps, be worth while to point out that the 1964 Act only required that a co-operative should have the power to negotiate contracts with its members in order that it should be eligible for grant aid. Whether such contracts were in fact negotiated remained until 1967 at the discretion of the individual co-operative.

Between 1964 and 1967 co-operatives were in the position that by merely altering their constitutions so as to include a power to make contracts with members they became eligible for grant aid even though they made no use of that power to achieve the objectives so freely expressed in the debates on both the 1960 and 1964 Acts. A change in the situation was foreshadowed however, in a White Paper of 1965, the precursor of the Act passed two years later.*

The Agriculture and Horticulture Act of 1967 covered a number of features of farming and, in Part IV, the activities of co-operatives. It brought into being the Central Council for Agricultural and Horticultural Co-operation and this body was charged with the duty of administering schemes of grant aid for, among other types, horticultural marketing co-operatives. While the Act placed responsibility for administration on the shoulders of the industry the conditions written into the Agriculture and Horticulture Co-operation Scheme 1967 now clearly state that any applicant for aid ‘will normally have to satisfy the Council that it possesses and will use adequate powers to require its members to fulfil appropriate obligations of loyalty—this will invariably apply where proposals relate to buildings, other fixed equipment and working capital needs’.†

This condition may be thought to prejudge the issue and to run

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†Council leaflet CCCI Sept. 1967. There still remains, however, the problem of enforcement; an unenforceable contract is no contract at all. Our italics.
counter to the views expressed by the Committee under Mr Joseph Godber's chairmanship. But it will have the effect of causing members and potential members of horticultural marketing co-operatives to look at their relations with their societies, the ways in which these societies are managed, and the prices net to the producer which they are able to obtain perhaps more critically than in the past since from now onwards the involvement of a member in a grant aided society is total involvement for the period of the contract. It could also have the effect of causing societies which see some advantages in freedom of action to look at aid somewhat more critically than they have done over the past six or seven years.

Note

The Agriculture (Miscellaneous Provisions) Act 1968, given the Royal Assent on July 3rd, 1968, extends the operation of the Agriculture and Forestry Associations Act 1962 so as to exempt from the Restrictive Trade Practices Act 1956 any contracts entered into between any kind of agricultural association and its members so long as the business is of a genuinely co-operative nature. Thus, associations of co-operatives or mixed associations of co-operatives and private pack-houses will, if the Bill becomes law, rank equally for grant with other co-operative bodies.
CHAPTER 2

The Study

This study was confined to England alone for the reasons that not only is the greater part of British horticultural production to be found in England but that very few horticultural marketing co-operatives are believed to exist on any scale in other parts of Britain. A few are known to exist in Scotland but for a number of reasons they were left out of account. One of the first problems encountered was that of drawing up a list of co-operatives which would form the basis of the enquiry. The first difficulty was what did or did not constitute a co-operative because, as is well known, private companies with co-operative type constitutions can be and are regarded as co-operatives to all intents and purposes including eligibility for grant aid under a number of Acts passed from 1960 onwards. The second was to find a distinction between horticulture and agriculture. A number of bodies recently formed handle vining peas for members but these have been left out of any enumeration which follows as vining peas are regarded as part of the farm rotation. In the event, a list of organisations was drawn up which is believed to cover all those co-operatives and co-operative type companies which are concerned in marketing top and soft fruit, vegetables (except vining peas), flowers and nursery stock for members.

While this list formed the basis of the enquiry, the existence of other bodies (such as the pea groups) could not be disregarded and some of these as well as processing firms having contractual relations with suppliers or with buyers were brought within the orbit of the study for the obvious reason that they appeared likely to throw some light on the use of contracts in an agricultural context but from a different point of view.

The total number of co-operatives* actively engaged in marketing horticultural produce in England appears to be 34. Even this apparently definite statement has to be accompanied by a proviso because it includes one 'second tier' organisation which sells fruit for both co-operative and independent packhouses, and also one organisation which has the sole function of storing fruit for a non-co-operatively organised firm. Thus, only that part of the turnover of the first organisation which comes from independent pack-

*Using the word in its widest sense.
houses can be described as marketed co-operatively because the remaining will have already been included elsewhere. Whether it is right to include an organisation which was brought into being with a co-operative constitution solely to store fruit is a moot point and perhaps it would be reasonable to regard the total number as a somewhat blurred 33 by including the former and excluding the latter.

It must not be forgotten that perhaps the prime purpose of this study is to throw some light on the use of contracts not only in general but also for the specific purpose of ensuring loyalty. The problem of loyalty is one residing in the relationship between producers members on the one hand and their co-operatives on the other. Thus, no question of loyalty arises between a non-co-operative marketing group and a co-operative for storage when the co-operative is in every way subsidiary to and was created to all intents and purposes by the non-co-operative marketing group. Again, short and medium term loyalty may not come into the picture with Home Grown Fruits, Ltd, and a contract with such an organisation with the specific purpose of ensuring short term loyalty scarcely arises. Nevertheless, both individual private packhouses as well as co-operative packhouses could, if they wished, sever their connections with Home Grown Fruits, Ltd.* and for this reason it is included here whereas the wholly subsidiary storing co-operative is left out of account.

Of the total of 33 co-operatives, 21 are registered under the Industrial and Provident Societies Acts and 12 under the Companies Acts but with a co-operative type constitution. The main activities of the organisations are as follows: of the 21 societies, 2 market fruit alone; 10 vegetables alone; 6 top fruit, soft fruit and vegetables; and 3 bulbs and nursery stock. Of the 12 companies 8 market top fruit and 4 market vegetables.

The Runciman Committee distinguished trading from non-trading organisations on the basis of whether the identity of the producer with the product marketed was lost in the former and retained in the latter, when the organisation acted as an agent and not a principal. All 12 companies fell within the definition of trading and all had contracts in operation between themselves and their members. Of the 21 societies, 9 were wholly trading, 9 were wholly non-trading and 3 traded in part of the turnover. Of the 9 wholly trading societies, 8 were using contracts with members, 1 was not. Of the 9 wholly non-trading societies 6 were not using contracts at all, 1 used contracts for part of its operations and 2 for the whole.

*At least five are known to have done so.

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Three societies traded in part of their throughput and of these 2 were using contracts with members and 1 was not. There thus appear to be 25 organisations out of the total of 33 which have some form of contract for the whole or part of the produce they handle and the way in which these contracts operate will be the subject of later chapters. Meanwhile, it may be of interest to take a look at some of the characteristics of the organisations concerned and their relative importance in marketing horticultural produce.

Relative importance of contracts by value of produce covered

Only rarely is it possible to make a practically complete survey of the total turnover of co-operatively marketed horticultural produce and to assess its importance in the horticultural industry. A study made in 1946 gave the marketing turnover of horticultural societies and companies at £2\(\frac{1}{2}\)m out of a total horticultural production valued at approximately £100m. A re-examination of the figure suggests that not much more than £\(\frac{3}{4}\)m was the subject of some form of contractual tie between the co-operatives concerned and their members. The present turnover of co-operative societies in horticultural produce marketed is of the order of £12m out of a total horticultural production of approximately £180m to £188m.* Thus the relative importance of co-operatively marketed horticultural produce has risen from 2.5% to 6.7% of the total in 20 years. The value marketed under some contractual tie however has increased from £\(\frac{3}{4}\)m in 1946 to about £10m at the present time at current prices, or about 81% of the total.

Each co-operative organisation is in many ways unique and to group together those which may appear to have some common features is somewhat hazardous. Nevertheless, it would seem that the I & P societies with contracts have fewer members, a larger turnover per member and a larger turnover per £1 of members’ investment than those which do not. It would be wrong to assume that this is a consequence of having a contractual tie, it rather reflects the differing circumstances in which different co-operatives work. The question could well be asked ‘Is a contract a suitable instrument of policy where membership is large and the turnover per member small?’

The situation in the co-operative companies is quite different. Here average membership is relatively small, the turnover per member is high, for the fruit co-operatives the investment per

*The fact that one figure is for England and the other the U.K. is irrelevant as the value produced outside England would make no difference to the percentage whether included or not.
member is high and the turnover per £1 of members’ investment is low. While all the co-operative companies have contractual ties with their members they also have a strong tie in the form of heavy capital investment. Whether that capital investment is justified by the relatively low turnover which it facilitates is open to question, but the tie is there, nevertheless.

The data are set out in the following table. It should be explained that the co-operative companies selling vegetables form a heterogeneous group, some have a high investment per member (as when centralised services are provided) and some have not. An average figure should therefore be used with caution.

<table>
<thead>
<tr>
<th></th>
<th>No. of organisations</th>
<th>Average no. of members</th>
<th>Turnover per member</th>
<th>Invested capital per member</th>
<th>Turnover per £1 capital invested</th>
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<tr>
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<tr>
<td>With contracts</td>
<td>14</td>
<td>128</td>
<td>1986</td>
<td>180</td>
<td>11.0</td>
</tr>
<tr>
<td>No contracts</td>
<td>7</td>
<td>366</td>
<td>1002</td>
<td>168</td>
<td>6.0</td>
</tr>
<tr>
<td><strong>Co-operative Companies</strong>*</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(all with contracts)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Fruit</td>
<td>7</td>
<td>29</td>
<td>16287</td>
<td>4313</td>
<td>3.8</td>
</tr>
<tr>
<td>Vegetables</td>
<td>4</td>
<td>24</td>
<td>17004</td>
<td>197</td>
<td>86.5</td>
</tr>
<tr>
<td>All co-operative companies</td>
<td>11</td>
<td>28</td>
<td>16519</td>
<td>2982</td>
<td>5.5</td>
</tr>
</tbody>
</table>

*Excluding Home Grown Fruits Ltd.

The existence of a strong financial tie between fruit selling co-operative companies and their members needs no emphasis. The place for a contractual tie in these circumstances may lie not in the realm of ensuring growers’ support with crops to market but in defining the terms under which the investment is to be made and may be withdrawn. If a contract is called for with the co-operative societies its main function probably lies almost wholly in ensuring short-term loyalty in the shape of day to day business.
Co-operatives' Views on Contracts

As will have been seen, contracts are in wider use between co-operatives and their members than might at first have been supposed. Of the 33 co-operatives of one kind or another no less than 26 have contracts with members, while of the remaining seven, one has a contract in operation for a minor part of its turnover and a second is using a contract for an elite group of growers, again a small part of its turnover.

During the study the 33 co-operatives which formed the main basis of the enquiry were asked a number of questions on the reasons which had prompted them to institute a system of contracts, the extent to which they would be prepared to go in enforcement and the advantages which they believed they obtained by using them. The replies are discussed in this section.

CO-OPERATIVE COMPANIES

Reasons for using contracts

The twelve co-operative companies all subscribed to the view that the contract allowed them to restrict membership to those producers and packhouses which they regarded as desirable and that it regulated capital investment in such a way as to provide the necessary equipment and services for satisfactory working. There can be no doubt that such control is desirable in co-operatives with a relatively small number of members and where the capital investment is high. The only question which may be raised on this point is that of whether this function of, so to speak, having the right kind of selected membership could not be embodied in the company constitution. In fact, it is the capital investment which provides the tie, not the contract, as one co-operative company explained. On the other hand, two co-operative companies, one with low investment per member because costly capital equipment was not needed, still offered these two reasons for having contracts but stated that the contract was the tie in their cases.

A number of co-operative companies stated that they had contracts with members because of the high cost of equipment needed, and justifiable only if a use for it was guaranteed. Again, this is only an extension of the investment reasons discussed above.
The need to have some control over the grades and qualities supplied by members was put forward by a few co-operatives, continuity of supply by rather fewer, and easier bank loans by even fewer. As rather more than one half of the co-operatives were formed before a condition of grant aid was the existence of the power to have contracts with members, grant aid was only adduced as a reason by one of the larger older establishments, and four of the newer companies.

In general, it may be said that the main reasons lay in the field of ensuring (a) that only the right members joined—right in the sense of location, quality of produce and so on—and (b) that the necessary capital to ensure success was forthcoming. If capital needs were not heavy then there seemed to be some need of a contract to ensure continuity of supply by members; otherwise not. The co-operative companies in general gave few reasons for using contracts and it seemed that the fewer reasons given the more thought and care had they expended on the matter. Where many reasons were given then there seemed to be a post facto attempt to justify their action.

Enforcement

All co-operatives were asked about their policy on enforcement. After all, a contract is of no more than psychological value if it could not be enforced. The company co-operatives were almost unanimous in saying that they would not enforce a contract in the sense of taking legal action. Two said that they would enforce their contract is cases of default by a member, albeit with reluctance in the case of one of them. All others expressed opinions varying from extreme reluctance to a straight-forward no. It is of course impossible to say what would happen since default so infrequently occurs. Where a member appears dissatisfied then it is not unusual for terms to be arranged and the member released from his obligations. These terms may be in the nature of meeting some or all of the costs which would have fallen on him in one year had he not been released. Penal clauses in the contract would not be exacted and in general few would contemplate attempting to enforce performance of the contract.

Advantages

An examination of the benefits and advantages claimed by co-operative companies which have flowed from the use of contracts fails to disclose any direct and ascertainable or even estimable financial gain. One claimed to obtain better prices from being able
to guarantee continuity of supply. Not all the remainder would agree with the expression of some, viz. that there was ‘no evidence’ or ‘no concrete evidence’ of better prices. These companies were perhaps more concerned with the economies to be obtained from continuity and stability and less with the gains from better prices and the better exploitation of the possibilities of gain which lie in a market of some degree of imperfection. There was perhaps too ready an assumption of gain to be derived from ‘continuity of throughput’, ‘stability’, and ‘uniformity’ as ends in themselves without looking for financial evidence that this was so, or that continuity of throughput gave the best rewards to the producer.

One co-operative went so far as to say that in a year like 1967–68 when high prices were obtainable for apples the contracts which they had with their members effectively prevented these members from selling elsewhere. Even if the question as to why should members not sell elsewhere in these circumstances is inadmissable* the question as to why the co-operative was itself not able to get these higher prices can be asked with some point. Perhaps the comment of another co-operative in this group throws some light on the attitude to the material gain to be derived, or expected, from co-operatives. It was to the effect that a co-operative ‘Can’t be successful when members join for what they can get out of it’. If the question were not too obvious, one would be tempted to ask ‘if not that then for what?’

One closely knit co-operative company, where loyalty was and is not likely to be in question, gave the straightforward advantages of having a contract as ‘Grant’. At the other extreme a co-operative pointed to the size of its bank balance (which could have come about in a host of ways) as the evidence of the advantages to be gained from using contracts.

CO-OPERATIVE SOCIETIES

While the co-operative companies have problems they are normally somewhat different from those of co-operative societies which usually have a larger membership, a more dispersed membership in space and type and which usually handle a wider range of products. Nevertheless, despite these differences the answers to the questions discussed above in connection with co-operative companies are not greatly different. This is perhaps of some significance because it is with these organisations that the real problems of loyalty raise themselves.

*Because of the obvious wastage of resources in the co-operative which the growers who renege would have to bear at some other time.
Reasons for using contracts

There are fourteen co-operatives using contracts between themselves and their members for the major part or a substantial part of their throughput. Almost all subscribed to the view that the contract was needed to regulate capital investment by members. While the co-operative company can be as exclusive as it wishes, traditional opinion would take the view that something was amiss when a co-operative attempts to become an exclusive club, and, again, if this exclusiveness is needed to ensure success then the articles of association seem perhaps the place to deal with the matter.

Prudence clearly dictates the use of a contract to ensure support where high cost equipment is necessarily involved but only about one-third had given this as a reason.

A number of them gave the ability to control grade and grading of intake as a reason, while a few were concerned to ensure supplies to meet either specific orders or continuing contracts with buyers.

About one third of the co-operatives mentioned eligibility for grants as a reason for their having contracts and two of them placed great emphasis on this point. A further society used contracts with a view to facilitating the granting of loans by the Bank with which it dealt.

One relatively new co-operative stated that it used a contract in order to achieve stability in the first five years of its existence. This reason was associated with such prudent factors in the circumstances as control over membership, control over capital investment needed from members to ensure success, and control over the quality of the intake.

Enforcement

Almost all the co-operatives would be loath to enforce any contract with members. Only two of the fourteen would be prepared to take any action to enforce their contracts, both have attempted to do so and both have so far not been particularly successful.

All others expressed their views of enforcement in terms which showed their reluctance to take any action which endangered good relations with the members in general though if a member were in default he might be expected to sever his connections with his co-operative.

Advantages

As with the co-operative companies, the answers to the questions on the advantages derived from the use of contracts varied greatly and were seldom convincing. Continuity, even throughput, and
similar expressions were commonly given as advantages as if these were ends in themselves. Wholehearted support from members, the retention of the majority of members, guarantees the viability of the set up (as if the co-operative and not its members were the main consideration), were other advantages claimed. One society asserted that it obtained better prices because of having a contract with its members yet that same society was wrestling with the problems of a recalcitrant grower who was in breach of his agreement and this because he was getting better prices elsewhere. Another society asserted with more justification perhaps and more concrete evidence on which to base an opinion that it could get a better price for the one specialised product in which it dealt by having a contract not only with producers but with buyers also. If this is so, then buyers must be prepared to pay only such a better price for the certainty of having supplies that the extra is no greater than the cost of ensuring certainty of supply in any other way or the opportunity cost of not having certain supplies. Since the buyer who depends on keeping his processing plant utilised incurs costs if he fails to do so, and as a direct consequence of his failing to do so, it is understandable that he will pay a better price for a known and certain supply and a contract between producers and the supplying co-operative is therefore an essential part of the process. Even here, however, the apparently good reason for the existence of a contract is somewhat diluted by the fact that this co-operative would be very unwilling to take any steps to enforce its observance.

There may be straightforward advantages to be gained by co-operatives from using contracts and the co-operatives which stated that there was ‘no proof’ of advantage may not have been correct. Nevertheless, if this is so an examination of the advantages put forward discloses only one which could be said to be valid.

SOCETIES WITHOUT CONTRACTS

Seven co-operative societies either have no contracts at all with their members (even if their constitutions allow them to) or contracted produce is such a small part of the turnover and handled under such special conditions that it may be disregarded. Opinions about contracts which were held by these societies varied from outright disapproval to tentative consideration of their value.

Two societies each with a large membership of relatively small scale growers were opposed to contracts, one under all circumstances and the other as a general rule. The first considered that a hundred willing members were worth five hundred tied members and that the important factor which provided the best support was the price returned home to the grower. In addition it thought itself too
large in terms of membership to use contracts effectively. The second society would prefer to relinquish its right to grant aid rather than have a contract as a necessary part of the relationship with members which again were numerous. Nevertheless, this society successfully used a form of contract for a strictly limited number of growers of a specialised product sold under contract to food processors. But despite this successful use of contracts the society was opposed to their more widespread use for general produce marketing; the circumstances were different and the ways of dealing with them different.

One society which admitted to be considering the use of contracts claimed that it could offer such service to its members that a contract was unnecessary to secure loyalty. Another society is experimenting with contracts for one product and with a selected band of elite producers but sees no need of a contract in its general activities.

The last of the five societies once had contractual relations with growers but due to a combination of circumstances which are irrelevant to this discussion it abandoned the scheme. The only relevant point to mention here is that in the absence of all the circumstances which make co-operatives successful a contract which ties members to it is of no use. Is the converse true that, if the conditions are such as to make the co-operative successful in terms of return to producers, the contract is not necessary?
Chapter 4

The Contracts

Contracts drawn up between members and co-operatives have been examined in detail. Naturally, they vary according to purpose as well as content. They vary also in the order in which the subject matter is dealt with and show evidence of having been drawn up by many different bodies. It seemed on examination that fourteen types of clause were necessary to deal with the relationships which exist between the two sides concerned and that it would have been as well had they followed some logical pattern, whatever the content of each type of clause might need to have been in the circumstances for which it was designed.

The following list sets out the types of clause and their general content as well as the order which they might logically follow.

1. Clauses which identify the parties to the contract, and the area and volume or kind of crop to be handled and nullify pre-existing contracts.

2. Clauses which give the co-operative the power to lay down certain technical practices in cultivation on members’ holdings and to require only certain varieties to be grown and to give the co-operative powers of entry for inspection purposes.

3. Clauses which define the obligation of the co-operative and the circumstances under which those obligations are relaxed or suspended.

4. Clauses which limit the interference of members in the day to day operation of the co-operative and lay down a procedure for complaint by members.

5. Clauses which define the obligation of members and the circumstances under which these obligations are relaxed or suspended.

6. Clauses which lay down the damages which the co-operative may claim from members in case of non-fulfilment and the sanctions which may be imposed on members.

7. Clauses which lay down the action which members may take in case of negligent operation by the co-operative and the terms of compensation payable to members.

8. Clauses which are concerned with arbitration in cases of dispute.
9. Clauses which define the ways in which members must provide share capital or qualification loans or other capital.

10. Clauses which define how the co-operative is to be financially accountable to members, how market returns are to be divided and charges apportioned.

11. Clauses to do with assignment of members' interests.

12. Clauses which lay down the duration of the agreement and the methods by which the terms may be altered or amended.

13. Clauses concerned with the disposal of the interests of a deceased member.

14. Clauses dealing with the ways in which the agreement may be terminated.

Including Home Grown Fruits Ltd. in the enumeration of co-operatives covered by this study, the total number of such organisations is thirty-three. Of this total there are twelve co-operative companies and twenty-one co-operative societies. All except one of the companies and all fifteen of the societies using contracts provided copies of their contracts for examination. The table below which sets out the kinds of clause found in these contracts thus deals with twenty-six organisations with thirty-two contracts in operation in total.

Frequency of use of different types of clause in marketing contracts

<table>
<thead>
<tr>
<th>Type of Clause</th>
<th>Co-operative Companies</th>
<th>Co-operative Societies</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>With</td>
<td>Without</td>
<td>With</td>
</tr>
<tr>
<td>1. Identification</td>
<td>10</td>
<td>1</td>
<td>20</td>
</tr>
<tr>
<td>2. Cultivation</td>
<td>7</td>
<td>4</td>
<td>11</td>
</tr>
<tr>
<td>3. Obligations of co-operative</td>
<td>11</td>
<td>—</td>
<td>14</td>
</tr>
<tr>
<td>4. Day to day working</td>
<td>11</td>
<td>—</td>
<td>17</td>
</tr>
<tr>
<td>5. Obligation of members</td>
<td>11</td>
<td>—</td>
<td>20</td>
</tr>
<tr>
<td>6. Damages</td>
<td>11</td>
<td>—</td>
<td>22</td>
</tr>
<tr>
<td>7. Compensation to members</td>
<td>7</td>
<td>4</td>
<td>11</td>
</tr>
<tr>
<td>8. Arbitration</td>
<td>10</td>
<td>1</td>
<td>14</td>
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<tr>
<td>9. Investment</td>
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<td></td>
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</tr>
<tr>
<td>(i) shares</td>
<td>7</td>
<td>4</td>
<td>11</td>
</tr>
<tr>
<td>(ii) loans</td>
<td>8</td>
<td>3</td>
<td>11</td>
</tr>
<tr>
<td>10. Payment</td>
<td></td>
<td></td>
<td></td>
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<tr>
<td>(i) pooling</td>
<td>8</td>
<td>3</td>
<td>11</td>
</tr>
<tr>
<td>(ii) payment</td>
<td>10</td>
<td>1</td>
<td>22</td>
</tr>
<tr>
<td>11. Assignment</td>
<td>7</td>
<td>4</td>
<td>11</td>
</tr>
<tr>
<td>12. Duration and alteration</td>
<td>9</td>
<td>2</td>
<td>11</td>
</tr>
<tr>
<td>13. Death of member</td>
<td>8</td>
<td>3</td>
<td>11</td>
</tr>
<tr>
<td>14. Termination</td>
<td>11</td>
<td>—</td>
<td>22</td>
</tr>
</tbody>
</table>

Clauses of the first five kinds cover what may well be described as 'fair weather sailing', while the next three are concerned with
disputes and the way in which they may be settled. Clauses of types nine to eleven deal with financial matters related to the continuing association between grower and co-operative, while the last three types deal with altering an agreement or bringing it to an end, matters which again involve financial considerations. For the sake of convenience this chapter deals with the first eight types of clause while Chapter 5 deals with an examination of the financial clauses.

1. **Clauses which identify and define**

Naturally, every contract must state the names of the parties concerned but one of the parties, the grower, is not always the subject of a precise definition. Some contracts specifically state that the grower is to be a member while in addition some lay down that a 'grower' can be any person, company, co-operative, group of persons acting as one person, or the personal representative of a deceased grower. The clear definition of a grower stems from the need to lay down the people or groups of people which constitute one vote in order to meet the co-operative principle of one grower—one vote.

The area which is the subject of the contract is variously expressed, and terms such as 'orchard acre', and 'contracted acreage' are common together with a definition of these terms. Definitions vary from the Ordnance Survey acreage of the field or fields, when headlands would be included, to a more precise method based on the distance apart in and between rows of trees measured in feet and divided by 43,560. Fractions of an acre may be rounded up to the nearest whole number and acreage may be specified whether in bearing or not. Another contract gives an example of so many trees planted at a stated distance apart as representing a fruit acre; other planting densities are to be calculated on a proportional basis. As financial contribution is calculated generally on a basis of acreage it is clearly necessary to define acreage with some precision.

A variation of 'acreage' found is to specify an 'area unit'. This involves a conversion of actual physical area by some factor which takes account of differing physical productivity from different systems of production as glasshouses, open land market gardening, soft fruit, etc. In these cases the multiplying factor to be applied is given.

In some contracts the crop or the units in which it is to be recorded may be stated. Thus the crop may be defined as 'the whole crop of' designated fruit, and units may be specified as 'units of fruit' of 1 lb each, a 'unit' may be 1 bushel or such other quantity as the directors may determine and a 'unit of produce' may specify not only a quantity but a limited range of varieties also. Designated fruit
is fruit which is of a particular variety named in the contract, while 'fruit' may be defined as apples and pears. Chip and packet are defined in terms of either a given quantity of contents or any container which the directors may decide as a suitable container for the produce in question.

Definitions to do with prices and charges lay down the terms such as 'pool price', 'net pack-house realisation', 'charges' and so on and proceed to state how these are to be calculated or apportioned. The funds which growers are required to contribute for capital purposes are described as qualification loans, excess loan or unsecured loans though in the definition no amounts are normally stated.

Finally, this type of clause may include such statements as: that notice (presumably in either direction) must be in writing; that in cases of inconsistency between the contract and the articles of association the latter shall take precedence; that the term Society means the board of directors and the Auditor means the auditor for the time being appointed by the society or company.

2. **Clauses which control productive techniques**

One of the advantages of co-operative action, whatever organisational form it may take, must surely lie in the co-operative being able to offer a product of greater uniformity through the imposition of disciplines on grower-members than the members are able to offer in the aggregate individually. This uniformity is normally achieved by suitable grading during the time that produce is in the hands of or under the control of the co-operative. But the degree of non-uniformity to be removed by the co-operative may be minimised by some control over production techniques with a view to bringing about greater uniformity of the product at the farm gate.

It is somewhat surprising therefore to see that in contracts between horticultural marketing co-operatives and their members relatively little attempt is made to standardise their products at the production stage.

Perhaps the vegetable selling co-operatives have gone some way towards this by having the power to decide which variety of a particular crop the grower shall sow. Such phrases as that the 'seed is to be of an authorised variety', 'the variety is to be decided by the company', or the 'variety is to be agreed between the grower and the society' are common. With a view more perhaps to continuity of supply than uniformity some contracts provide for the date of sowing or planting to be decided by the co-operative, while other contracts bind the grower to accept the direction of a technical officer as to cutting, harvesting and dressing.

Fruit selling co-operatives achieve what is in effect uniformity of
intake by specifying that it will accept only specified varieties and give the producer freedom to sell other varieties in other ways. Vegetable selling co-operatives may agree to take only certain sizes and require freedom from some undesirable characteristics.

Directions as to cultivation seem always to be couched in somewhat vague terms. Thus, producers agree to cultivate 'according to the rules of good husbandry' or in a 'husbandlike manner', and to 'harvest in a dry and sound condition'. Terms such as these could perhaps be left out of any document which, in other respects, lays down matters with some degree of exactness.

One contract lays down specific rules for pest and disease control by stating that all materials used for this purpose must conform to the Ministry of Agriculture approval scheme and must be used according to the maker’s instructions. The consequences of any breach of this rule must be accepted by the grower as his sole responsibility. While this kind of provision avoids the consequences of contamination by the use of unsuitable substances it does nothing, of course, to ensure positive uniformity as between different growers’ crops.

The impression gained from the perusal of all the contracts concerned is that within the widest limits producers have the freedom to carry out the technical practice of growing as they individually think best. No attempt seems to have been made in the contracts to bring about that uniformity in production methods which would reduce the costs of selling which the members jointly bear in the operation of their co-operatives.

3. **Powers and obligations of co-operatives**

The obligation of one party to a contract may be considered as the rights of the other party and to endow that party with the automatic power of enforcement. Whether that power of enforcement can be sustained in law is a moot point but obligations and rights can, for the purposes of this study, be regarded as obverse and reverse sides of a coin.

But there are other powers which either of the parties may have and which may be included in agreements and these powers derive none of their force from being the mirror image of some obligation.

Powers of co-operatives which are written into marketing agreements may be of a benevolent nature or partake of the nature of sanctions. Thus a co-operative may be given the power to release a member from all or a part of the obligations imposed upon him and

*The term ‘good husbandry’ is defined in the Agriculture Act 1947 Section II. But see Chapter 7.*

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which he, the member, has voluntarily accepted. While it is unusual to find powers of this kind without conditions or qualifications it is not unusual to find co-operatives which are able to release a member from the obligation to deliver his produce (a) for one year at a time, (b) provided a similar area is substituted by some other approved member, and (c) without prejudice to all other obligations of the member concerned. On occasions, a substitute acreage is not a condition which the co-operative may impose.

The powers of a co-operative which partake of the nature of sanctions are to ensure the easy functioning of the co-operative in its day to day working. Thus, members may be obliged to advise their co-operatives when fruit is ready for collection and to provide reasonable facilities for collection. If such advice is not given or suitable facilities not provided then the co-operative may take such a drastic step as to reject the whole or part of a consignment, or the less onerous sanction of imposing an extra charge.

While clauses of the first two kinds are straightforward in their application and interpretation, clauses to do with the obligations of co-operatives towards their members are not always so readily interpreted. Thus, some clauses in the contracts examined are hedged about with provisos, which will be discussed below, but others so dilute the force which in part they give that their impact is all but destroyed. Some comment on these clauses is offered first.

One contract examined binds the co-operative to carry out the regulations as to methods of selling. But the clause which does this also allows the directors at their sole discretion to alter these regulations should they think circumstances make such an alteration desirable or necessary. Another lays down the obligation to market apples in a particular type of container but also allows the directors at their discretion, to vary it to meet the needs of various purchasers. Another gives the co-operative absolute discretion as to varieties and quantities handled. Clauses of this kind would seem to be of little value, the nullifying parts are so effective as to put them outside the meaning of a proviso, and make them completely negate any obligation which may be expressed in other parts.

Clauses to do with obligations, however, are fairly specific as a rule and lay on the co-operative the task of performing certain functions. Thus, it may be obliged to collect, to accept delivery, and provide containers for picking, packing, collecting and storing produce. Most contracts specify that the co-operative is to provide all the necessary facilities, or more specifically to store, grade, pack and market and take sole responsibility for doing so. Clauses of this kind may include terms which, while apparently vague, are neverthe-

*What is 'necessary'?
less useful, as for instance, requiring the co-operative to market 'to the best advantage', 'in the most advantageous manner', 'to the best of its ability', or 'properly and with due skill to prepare and grade'.* What one would regard as 'to the best advantage' another may regard as in a less than competent manner and pious expressions of this kind are no substitute for skill and experience. In any case, the question may be asked 'To whose advantage?'. Nevertheless, such terms are, as will be explained later, worth including. A clause which requires a co-operative to market 'as it thinks fit' at least defines the obligations clearly, while one which states that the co-operative will 'use its best endeavours to find a buyer for non-contracted produce among the buyers of contracted produce' shows willingness to be of general as well as of specific assistance.

Clauses which fall into the present category include those which lay on co-operatives the obligation to pay the proceeds of sale over to growers at some specified time or at stated regular intervals, usually after deduction of charges. The statement on the charge to be deducted may contain the implication of an obligation as, for instance, when the charges are to be such as are needed to maintain the facilities in full efficiency.

Clauses to do with payment may require the co-operative to reimburse the grower when he has been required to pack in some non-standard or otherwise unusual way. They may also lay on the co-operative the obligation to buy at some price (arrived at by a set procedure) any crop in excess of the standard yield which forms the basis of the agreement.

Co-operatives which deal with non-members are usually bound by a clause which obliges them to give priority to members or at least to give non-members no better terms than are given to members. They are usually precluded from offering services which might prejudice the interest of members, though one co-operative may provide services to anyone on terms which it may think fit.

Those co-operatives which store fruit are required, in deciding whether to do so and for how long, to maintain an equitable balance of rights as between members. While produce is in its hands a co-operative is normally obliged to accept the risks involved and to cover these risks by insurance. The only risk which falls outside this obligation is the risk of deterioration with the passage of time. The liability of the co-operative may be deemed to commence at some specified point such as 'over the tailboard of the co-operative lorry' or 'at delivery'.

*There is a particular advantage to the member in the inclusion of phrases such as 'to the best of its ability'. See Chapter 7.
The final obligation which appears in the contracts examined is concerned with giving information. Few co-operatives appear to accept this task. One is bound to provide such information as the directors may decide while another is required to provide members with all necessary information on market requirements, harvest prospects, particulars of contracts and prices fetched, and is further required to issue a monthly bulletin with this information.

Provisos which allow co-operatives automatically to become relieved of their obligations are usually concerned with the quality of produce offered to them. Thus, they may refuse produce below a marketable standard and charge a fee for inspecting it, may charge an extra fee for handling sub-standard fruit, and may sell sub-standard fruit without its being delivered to the packhouse.

A co-operative may, on occasion, direct in the interests of all growers, that any grade be not marketed, and another co-operative may suspend its marketing services if the state of the trade makes it uneconomic to continue providing them. A third co-operative may refuse to accept specified grades or accept those grades and deal with them independently of all others if so authorised by members.

4. Clauses which affect day to day working

As would be expected, clauses of this kind cover a multitude of things which could arise in the everyday operation of a co-operative and about which friction and dispute could easily arise. In a very real sense, co-operatives are extensions of the constituent growers' production businesses but some dividing line needs to be drawn nevertheless between what the grower and the co-operative each may or may not do.

Perhaps the most obvious provision relates to the inspection by growers of the premises and operations of the co-operative. Thus, contracts almost invariably provide that grower-members may at all reasonable times visit and inspect the activities of the co-operative.

Depending on the degree of formality it is desired to encourage, such visits may be made at any reasonable time or only by previous appointment. Of rather more importance is what the growers' reactions are to such visits and it is again almost an invariable rule that growers may not interfere in day to day operations and may not make verbal complaints or give instructions. One contract provides that growers may make verbal complaints to the manager or his deputy as well as in writing to the directors. But another expressly forbids either side from making verbal complaints. Unless provision is made otherwise (i.e. for verbal communication) all complaints must be made in writing addressed to the directors and, again according to the degree of formality in the relationship between
grower and co-operative, sometimes only via the secretary and marked confidential. One contract stipulates that in cases of complaint on day-to-day working the directors' decision shall be final.

Because of the perishable nature of most of the produce handled some arrangement has to be agreed for dealing with sub-standard produce. Thus, if for any reason more labour is needed than is normal to handle a member's produce it is usual to provide the alternatives of (a) selling ungraded or (b) charging the grower for the extra labour. The grower must be notified within 24 hours and given the opportunity to select the method he prefers, while in the absence of a decision by the grower the method is left to the manager's discretion. Other contracts stipulate the time within which a co-operative may lodge a complaint to the grower about quality while yet others provide that the manager and one director, or two directors, may condemn any sub-standard fruit delivered by a member, and that sub-standard fruit may be either (a) rejected, (b) downgraded, or (c) sold independently of the contract. A poor crop of vegetables under contract may not be ploughed under except after prior notice to the co-operative and its agreement to this course.

It is frequently the case that the co-operative supplies empty containers to members. Provisions are then incorporated in the contract that the co-operative is to supply and the grower to pay for such containers. A further provision requires unused containers to be returned, while at the discretion of the co-operative, a grower may use any empties which he himself may possess.

Usually the property in the produce remains with the grower until the co-operative has sold it on his behalf. This provision is found even in contracts of the 'trading' kind.* But one contract states that the property in the produce passes to the co-operative on delivery together with the risks of loss or damage. Another declares that the responsibility (but not ownership) passes to the co-operative at the packhouse or when loaded on lorries belonging to the co-operative.

Provisions as to the quantity or acreage to be supplied fall into this type of clause because while all produce or some stated area of stated crops form the subject of the contract, account must be taken of the possibilities of different yields of crop and times of delivery. Contracts as a rule provide either that all the produce from a stated acreage or all the crop shall be sold through the co-operative except that (a) with the permission of the directors growers may sell produce in other ways and (b) if the produce is

*Runciman Committee definition.
of too low a quality the co-operative may reject it, when the grower may sell it as he thinks fit. Contracts may provide that such crops as are not rejected shall be delivered to the co-operative at such times as the co-operative may determine and in that matter the co-operative shall have absolute discretion.

A contract may provide that the co-operative may use any mark it thinks fit, may join any association and accept the rules of any such association as binding on its own members, may deal with growers not under contract, may sue for the recovery of money owed as if acting under power of attorney given by the grower and may require a grower to be a member of some other association.

There may also be provision made for the extension of the contract to cover by agreement other species than those originally covered, to give precedence to the Articles of Association over the contract where there is inconsistency and to relieve the co-operative from the consequences of strikes, lockouts, industrial disputes and Acts of God, or to suspend the obligations of both sides under these circumstances.

Finally, in the clauses of this type there may be found provisions to ensure proper representation of sectional interests on the board of directors, to define different types of member according to the services they enjoy, and to ensure agreement on rules for the payment of members.

5. Powers and obligations of members

The definition or description of the obligation of a co-operative is a somewhat easier task than the definition of the obligations of members. After all, the co-operative has a specified task to perform and this can be defined in terms of marketing functions. But there are many more things which a member could or could not, might or might not do in order to facilitate or hinder the co-operative in the performance of its function. Thus, contracts as a rule give up more space to the obligation of members than to those of co-operatives and cover many more aspects in doing so.

Perhaps the most elementary obligation of a member is that he shall deliver (not necessarily in the physical sense of the word) either the whole of a particular kind of crop or crops grown on land in his occupation, or, if only a part of the acreage is contracted to the co-operative, a specified quantity of the crop. A grower may be obliged to market exclusively through his co-operative or may be allowed either as of right or with permission to use other outlets not of a wholesale nature.

Where a grower has an established private trade he may have to submit to the decision of the co-operative in order to carry it on
outside the terms of the contract. Normally, the permission of the
manager and one director, or of two directors, is sufficient to enable
a member to sell his produce outside the terms of the contract,
while farm-gate sales at retail are normally automatically exempt.
Where a member has an established retail trade he may be required
to declare each season the tonnage which he intends or expects to
sell and the co-operative then takes over this trade and sells the
produce at retail, the grower paying a charge which includes the
usual handling charges plus a commission of not more than 2½%.
Growers who sell in this way are obliged to accept direction as to
the percentage of a crop in total and by variety which may be sold at
retail on their behalf.

In order to bring all relevant produce within the terms of the
agreement the grower is normally obliged to identify the land on
which such produce is grown and to notify the co-operative of any
changes in occupation. Members may be required to specify the
Ordnance Survey number of the fields concerned in the original
contract and to notify the co-operative of any new land planted up
(whether in bearing or not), of any new planting, while one contract
requires the member to notify the co-operative of any land growing
apples and pears which has been relinquished. Two contracts
examined specify 'spheres of influence'. Both require members to
notify the co-operative of any new land used for growing the
contracted crop. One provides that if the new land is within 10
miles of the member's other land and within 20 miles of the co-
operative such new land becomes part of the contract on the same
terms as the old; outside these distances then on terms to be agreed.
The second contract merely obliges the member to apply for the
new land to be included if within these distances and the co-operative
must accept the application on the same terms as hitherto except that
the financial terms shall be those current at the time of inclusion; if
the new land is outside the distances specified the member may apply
to have it included and the co-operative may include it on the same
terms as noted above.

Grower members are required to allow inspection by properly
authorised officers of the co-operative of any land or crops which
form the subject of the contract. According to the degree of formality
desired in member-co-operative relationships such inspection may
or may not need to be by previous appointment.

Clauses defining the obligations of members usually lay down that
the grower must provide estimates of crop yields when requested and
also provide information on acreage, age of plantations and storage
facilities. One co-operative handling glasshouse produce requires
that members give a weekly estimate of the quantities of cucumbers
to be cut and the days on which they will be cut. One fruit marketing
coop-erative obliges its members to give the co-operative a return of
the number of bushels grown but not sold through the co-operative
(presumably because they are not of the correct varieties) and an
estimate of the expected crop in the current year which takes into
account the upward or downward trend in productivity of the
orchards but which ignores seasonal variations. Another co-
operative which merely organises the sale of members' produce
requires each to inform the co-operative of the kinds, quantities and
grades supplied and to whom.

Growers may be obliged to accept the decision of the co-operative
as to the kind of container in which fruit is to be supplied and may be
required to obtain packing materials through the agency of the
co-operative. On the other hand, while the grower may be obliged
to provide containers he may also be free to obtain them wherever
he can. Where the grower sends truck loads, as with soft fruit, he
may be obliged to arrange for a suitable supply of trucks at the
railway station concerned.

Where co-operatives provide a collection service members are
normally obliged to stack produce at the side of a hard road. They
may also be responsible for handing produce to the lorry driver,
or provide labour to assist in loading, and one contract provides
that the responsibility for handing produce to the driver rests on
the grower notwithstanding the fact that the driver may do the
loading. Members may be required to advise the co-operative
when produce is ready for collection (and on occasion to advise by a
stated time of day). Where no collection service is given the respon-
sibility for delivery to the co-operative rests with the grower.
Members may be required to use some form of identification.

Co-operatives which market vegetables require the grower to be
responsible for washing, grading and packing to standards laid
down and 'to the entire satisfaction of the co-operative'. One
obliges members to prepare for market in packages determined by
the co-operative and to dress potatoes to Potato Marketing Board
standards.

Finally, the member must agree to pay all charges of the co-
operative or agents which it employs by deduction from the pro-
ceeds of sale, to pay for containers which the co-operative has
supplied and to authorise the co-operative to act as his agents and
to enter into contracts with third parties. He may also be required
to accept direction from the co-operative in fulfilment of any such
a contract.

Provisions which have the effect of relieving members from their
obligations are few in number. It is frequently thought necessary to
place outside the terms of the contract any fruit which is given to charities, to personal friends of the grower, exhibited or consumed in the grower's household. Many co-operatives provide for the possibility of their requiring special types of pack from members in which case the members must be reimbursed. The general obligation to deliver-up all contracted produce to the co-operative may be suspended if circumstances beyond the control of the co-operative prevent sale, while if the physical state of the orchards becomes affected by the action of local or national governments then the member may present a case for the revision of his contract.

Two other examples of the powers of members may be worth mentioning. The first is that a member of a vegetable marketing co-operative may add to the acreage he has already contracted some further acreage provided it is added for the remaining duration of the agreement and may do so on the same terms as were outlined in his original contract. This appears to be a right which does not apply to an increase in area for one year only, when the consent of the co-operative is needed. A further right of a member of a co-operative appears to be to add to his contracted acreage any further area of land which he may acquire and use in some prescribed manner which is outside some radius specified in his original contract and this may be done on the same terms or on terms to be agreed.

6. *Clauses which define penalties and sanctions*

A breach of an agreement between a grower and a co-operative would almost always consist of complete or partial failure by the former to deliver up produce to the latter. Such a failure to deliver may arise from the deliberate action by a grower who may see better prospects for gain elsewhere or may be accidental through crop failure. Whatever the reason, the co-operative could be in some difficulty; rather greater when the action was deliberate and rather less when accidental since some forewarning is possible with crop failure.

Co-operatives have provided for penalties to be imposed or some other action to be taken not only if producers sell elsewhere but also if they fail to sow or plant a contracted acreage and fail to follow the rules of good husbandry in cultivating it. One co-operative provides for a penalty in the case of a grower delivering excess produce from an acreage in excess of that contracted.

The form of the penalty depends on the product concerned. With top fruit co-operatives the penalty is usually based on the number of bushels sold elsewhere, and may be a fixed sum such as one varying as between co-operatives from 2s. to £1 per bushel, or
the average costs per bushel incurred in the previous season (sometimes the current season) plus a sum varying from 6d. to 2s. per bushel. One co-operative has a penalty of 5% of the proceeds of fruit sold elsewhere, another the power to terminate the agreement forthwith. One co-operative may sell a contracted tonnage of fruit and contract in turn with suppliers for given quantities to make up the total sold. If through faulty estimates by suppliers they are unable in the event to deliver the agreed quantity then if a loss is suffered by the co-operative and it can be specifically attributed to the incorrectness of the estimate the co-operative may apportion such a loss and debit suppliers with such a proportion as may be reasonable. Another co-operative may meet claims from third parties due to its failure to deliver agreed quantities by sharing the responsibility among those individual growers who have failed to deliver the agreed quantities pro rata with their shortfall.

Clauses which are concerned with penalties rarely lay down any procedure for fixing the penalty except where average costs may be one of the factors. Here, the decision of the auditor is final both as to the amount and the method of calculating it. The vegetable selling co-operatives use either quantity sold elsewhere, the acreage sold elsewhere, or not planted as the case may be as the bases for sanctions. The usual penalty is a sum not exceeding £100 per acre either alone or together with or in substitution for any other penalty which may be imposed. The additional or alternative penalty is normally the cancellation of the contract forthwith by notice in writing to the grower. Some vegetable selling co-operatives lay down a penalty of a fixed sum such as 10s. per package sold elsewhere, though one co-operative puts the penalty as high as £1 per package or such lesser figure as the society may decide.

Some half dozen co-operatives make provision in agreements for dealing with breaches by either side. All couch the arrangements in much the same terms which are to the effect that if either of the two parties regards the other as in breach of the terms of the agreement the aggrieved party may in addition to any other remedies (really only open to the co-operative in the form of a penalty) give notice in writing to the other to remedy the breach. If the breach is not remedied forthwith then the aggrieved party may give notice in writing terminating the agreement.

Clauses concerned with breaches of an agreement and with penalties and sanctions which may be imposed appear, on examination, to raise some problems. The first problem is one which inevitably arises when penalties are imposed and to this general problem there is added the further complication of one side (the co-operative) being able to determine the amount of the penalty and the way in which
it is calculated without the grower having any say in the matter. Though no doubt the auditor whose say is final would not, it may be supposed, be unmindful of the merits of the case, costs in the previous or current year could be calculated on two bases neither of which can be claimed to be ‘right’. Thus if the penalty is based on what are known as escapable costs and inescapable costs the grower may be aggrieved, whereas he may accept a penalty based on inescapable costs alone.* Once a procedure is laid down then it is essential that it be defined in the most minute detail.

A second problem arises on the interpretation of terms such as ‘good husbandry’. What many would regard as bad husbandry others would regard as accidental or due to circumstances beyond their control. The point of view adopted depends on the enlightenment of the parties concerned on the degree to which cultivation processes are not only under the control of a grower skilled in the most advanced techniques but also under the control of the particular grower concerned, his assortment of skills and abilities or lack of them.

A third problem is concerned with the extent to which the enforcement of a penalty would so destroy good relations between the co-operative and its membership in general that merely to part company would be in the best interests of the co-operative. Cases are known to have occurred in which a member on the one hand wished to terminate his agreement for good and sufficient reason. On the other hand the co-operative could impose a penalty as the price of the withdrawal. In the event both parties have agreed on some compromise under which the immediate and inescapable costs of the co-operative have been met and the two sides have each gone their own ways. It may well be asked whether any barrier to separation should be imposed if that separation is desired on one side because better prices are obtainable elsewhere.

7. Clauses concerned with compensation to members

It has been shown that co-operatives may impose penalties and sanctions on members in the event of non-fulfilment by them of the terms of the contract. But there are circumstances in which it is not the grower-member but the co-operative who may be responsible. This section therefore reviews the circumstances in which loss may arise, the compensation which may be paid to members and the way in which such compensation is to be borne by the co-operative.

Provision for some kind of compensation is usually made to cover negligence or gross negligence on the part of the co-operative and

*In the one case which has come to our notice, the aggrieved grower would not—but for various reasons.
which results in loss to the member through the deterioration of produce. Thus, whilst produce is in the hands of the co-operative, in its stores or in its lorries, the co-operative normally recognises its responsibility to deal with such produce carefully and to avoid damage. Some co-operatives divide this responsibility into two parts so that loss or damage through negligence is dealt with differently from excessive deterioration whilst under the control of the co-operative whether through negligence or not. Others make provision for dealing with loss due to physiological causes, and one with deterioration of soft fruit whilst awaiting collection.

It seems that where loss is due to physiological causes the co-operative accepts no liability whatsoever. Where deterioration is due to delay in collection the co-operative rejects all liability unless the delay is due solely to negligence on its part. Excessive deterioration is dealt with in a number of ways. For instance, if a co-operative, at its sole discretion, considers it equitable to do so it may pay compensation, leaving the amount or the method of calculating it unstated. Much less frequently, the co-operative may compensate at a rate not exceeding the average pool price for the produce pool into which the produce would have gone had it not deteriorated. Compensation may be charged against a particular produce pool (when all other members whose produce is in it bear the cost) or may be included in the annual charges made to all growers.

When loss or damage arises through negligence then the terms of compensation are more precise. For instance, it is common to find that a co-operative 'undertakes to pay' compensation or 'shall pay' compensation up to but not exceeding the average net pool price of the product concerned.

Some contracts make provision for compensation to the members where the co-operative, in the interests of other growers, directs a grower not to market a crop. No contract of this kind goes any further than to say that the co-operative may pay compensation, and make this a charge on a particular produce pool or on the general costs of the co-operatives as it thinks fit. The method of calculation is left entirely open.

Scrutiny of all the clauses to do with compensating growers for something which the co-operative has done or has failed to do gives rise to all sorts of questions in the mind of the reader. What is negligence and in what way does gross negligence differ from mere negligence? Where the term gross negligence is used does simple negligence go unpunished? How gross must gross negligence be before the grower may claim compensation for it? If responsibility for damage due to delay in collection is to be placed squarely on the shoulders of the co-operative how is the phrase 'due solely to the
negligence' of the co-operative to be interpreted?

Again, the co-operative seems to take on the position of judge of its own defections in some cases. Phrases such as 'if the co-operative considers it equitable to do so' it may 'at its sole discretion' pay compensation seem to give the grower little protection. Granted that deterioration in store or whilst under the control of the co-operative is hard to pin down to some particular cause or causes. Nevertheless, these are the very circumstances when both sides should have a say in the matter. In this connection it may be asked how is it possible to differentiate the kind of excessive deterioration due to physiological causes from the kind due to other causes. It may also be asked how 'excessive' is to be interpreted.

It seems impossible to avoid the conclusion that while attempting to deal with what is admittedly a difficult problem the contracts examined do nothing more than shroud it in ambiguities which could be the source of much dispute while doing nothing towards its solution.

8. Clauses concerned with arbitration

Whatever may be the terms in which all other clauses are couched, whether they be clear or ambiguous, those clauses which are concerned with arbitration need to be expressed in the plainest possible terms. In the last resort, the arbitration clauses have the task of laying down the procedure by which disputes of both fact and interpretation are settled and unless the arbitration clauses are clear the settlement of disputes may be indefinitely delayed. The urgency and importance of clear arbitration clauses have led to a widespread use of a simple statement in agreements that 'all disputes will be referred to a single arbitrator under the Arbitration Acts for the time being in force'.

Nevertheless many co-operatives appear to be of the opinion that the use of such an all embracing statement could lead to excessive wrangling over small matters in dispute and they have therefore stipulated that major disputes go to arbitration, less important disputes are settled by the board of directors, with the auditor deciding the issue on financial matters. Unfortunately, the respective fields of activity are not defined or indeed definable and this kind of clause scarcely advances the matter at all. However well intentioned it may be it could lead to disputes as to what kind of dispute was to be settled.

Disputes about the nature, the terms and the operations of the contract would seem best dealt with by some suitably qualified person not only independent but also seen to be independent by the two parties concerned. Some clauses to do with arbitration state
that the arbitrator must be someone appointed by the Minister of Agriculture or the President of the Law Society. One co-operative nominates the president of the local branch of the National Farmers’ Union as arbitrator. While such a person could have the advantage of full knowledge of all the circumstances and without doubt would in fact be scrupulously fair in his task he would be in the unenviable position of not necessarily and automatically being seen to be impartial.

While the nomination of an arbitrator is by far the most common practice it is not by any means straightforward if one of the parties to the dispute disagrees with the choice of arbitrator. A few co-operatives have avoided this state of affairs by having a clause in their marketing agreements which gives the decision first to the board of directors and, secondly, allows an appeal against the decision of the board to a general meeting where a 75% majority decision is necessary. This arrangement, while cumbersome, appears to provide some rough justice as it means in effect that, on the one hand, if the board does not find sympathy with 75% of the membership it is time it altered its views and, on the other hand, that a member whose case cannot get sympathy from one-quarter of the membership is unlikely to continue as a satisfactory member whatever the intrinsic merits of his case.

Two things to be avoided at all costs in the wording of arbitration clauses are ambiguity and any implication of lack of impartiality. Thus, one co-operative sets up a Disciplinary Committee to which the marketing agreement makes it necessary to refer all disputes. The implication of such a clause is that the member is being tried by the organisation with which he is in dispute and terms such as ‘discipline’ are best avoided. Again, another co-operative uses a contract which requires financial disputes to be dealt with first by the board of directors. If the directors cannot agree then the auditor intervenes and his decision is to be final. But later in the same contract there is the statement that a member may appeal in cases of dispute to a general meeting. It may be asked when finality becomes final and what happens if the auditor and the general meeting disagree? Arbitration clauses in the rules of a co-operative and arbitration clauses in any marketing agreement which it has in operation are not always couched in the same terms. Where this is so then there needs to be a statement as to which takes precedence.

Only one co-operative seems to have fully recognised the difficulties which surround the settlement of disputes and attempted to come to terms with them in a practical way. It has a contract which provides that if no agreement is reached after going through all the stages of arbitration laid down then the grower is free to dispose of the crop as he pleases!
CHAPTER 5

The Contracts (continued)

The clauses in a contract of the type in use in co-operative horticultural marketing fall into two categories. Those concerned with rights and obligations, with disputes and their settlement have been dealt with in Chapter 4. This chapter deals with an examination of the sections which are concerned with financing. It also deals with methods of altering, amending and ending the contracts because anything of this nature (ending a contract prematurely, in particular) is intimately linked with financing.

9. Clauses to do with financing

(a) Shares in the co-operative

Membership of the co-operative is normally a condition to be met before a contract is arranged. The fact that only eighteen of the co-operatives with contracts specifically mention the requirement of a shareholding in the organisation, presumably means that for the others this is dealt with in their Rules or Articles of Association.

Of the eighteen that do mention the necessity of having a shareholding the majority require the member to purchase a minimum of only one share which is not transferable during the continuance of the contract. If the grower does not purchase this share the whole contract is null and void. Only one of the contracts with this requirement fails to stipulate that the shares are non-transferable. Another contract mentions that the co-operative must issue the share when asked to do so but this statement is, perhaps, unnecessary when the co-operative has already expressed its willingness to enter into a contract with the grower.

Amounts laid down as the required shareholding vary from £5 to £50. One contract stipulates that its £5 membership fee is non-returnable and another imposes the same amount as an annual acreage charge on any area in excess of that covered by the qualification loan. Two co-operatives require a shareholding of no more than £1 per acre.

This is one of the sections, incidentally, the exact wording of which is vital if a co-operative is to obtain a 'mutual company' status under the present laws.
(b) Qualification loans

The whole of the finance necessary to operate a co-operative need not, indeed it may be undesirable that it should, come to it in the form of shares. It may be unduly restrictive on members to require them to hold a given minimum number of shares if, for instance, the co-operative carried out functions some of which required a lot of capital while others did not, and not all members wished to use all functions or all functions to the same extent. It is in these circumstances that the qualification loan or some variant on such a means of financing has come into use. Moreover, while share capital normally bears interest, capital in the form of qualification loans usually does not.

Such loans which may be described in some contracts as debentures are linked with the extent to which a member will use services which a co-operative can provide only at considerable capital cost. While general with fruit selling co-operatives they are also found with vegetable selling co-operatives if services costly in capital are provided. On occasion, as with an orchard just planted, the qualification loan may be built up by instalments so that by the time the services are used the full amount of capital needed to furnish them has been provided. One contract examined gives a schedule showing the amounts to be contributed each year from the year of application, for different lengths of time between planting and application, in order that in fourteen years the full amount per acre of fruit should have been provided as capital by the member. Clearly the amount per acre depends on the extent of capital works needed to carry out the intended functions. On occasion the basis for calculating the appropriate amount of loan may be the number of containers which the co-operative handles for a member.

Loans of this kind, if they happen through changing circumstances to be in excess of the amount per acre multiplied by the fruit acreage, may be assigned to an existing or a new member or be retained. If the member wishes to assign his interest in such an excess then the co-operative normally binds itself to issue no further qualification loans itself until the excess has been disposed of. If, on the contrary, a member fails to make his qualification loan contribution by the due date the co-operative may terminate the agreement by one month's notice in writing. Co-operatives will sometimes assist a member to dispose of qualification loans, which he may hold, if the agreement is terminated by either side.

Clauses concerned with qualification loans normally provide for repayment or redemption under normal circumstances as well as in cases of winding-up or default by the co-operative. They also provide
for keeping a register of such loans, the notification to members of
the amount of their loans and for relieving any qualification loan
from any set-off or counter claim by the co-operative. While nor-
mally a qualification loan bears no interest one co-operative builds
up its capital by retentions (scaled according to fruit prices) which
go first to bring a member's share holding to £1,000 or to £40 per
fruit acre (whichever is the less) and then are credited to a revolving
loan fund. This fund bears interest at 5% and is repayable to
the members concerned either after ten years or earlier at the discretion
of the co-operative. The requirement of up to £40 per acre of fruit
is the part of this scheme which makes it resemble the qualification
loan in all practical aspects.

One co-operative which bases its qualification loans on a three
year average throughput in bushels provides that if in any year the
amount of a grower's qualification loan is less than the loan per
bushel multiplied by the number of bushels of his throughput,
then he makes up the difference. On the other hand, if a member's
loan is in excess then the co-operative pays interest on the excess
at 1% over the current rate for bank loan, or it may be repaid.

Another co-operative which bases its qualification loans on
throughput lays down the limits of variation in throughput before
either the member can claim a reduction in his qualification loans
or the co-operative demand an increase. It lays down the time
within which a member must provide that increase in loan.

Finally, it may be stated that the amount of the qualification
loan which members must provide varies from as low as £2 an
acre for vegetable selling co-operatives where relatively little
capital equipment is needed up to as much as £200 an acre for fruit
selling co-operatives where a great deal of capital equipment is
needed.

10. **Clauses to do with 'pooling' and payment**

(a) Pooling

Generally where produce, more especially fruit, but sometimes
vegetables also, is marketed under contract the contributions of the
member growers are combined, and the produce is then marketed as
if it were owned by the co-operative rather than by the individual
growers.

Usually the arrangements for the 'pooling' of produce are dealt
with in a single clause which enables the directors, at their own
discretion, to establish for each kind of produce, one or more
produce pools to which are credited the amounts realised for all the
produce in that particular pool. The co-operative is also free to
make arrangements as it thinks fit for the sub-division of each produce pool into 'grades, sizes, periods or on any other basis which it may consider just'. Instead of mentioning specific charges which can be made against produce pools this clause normally allows the co-operative to make 'such charges against any produce pool as are in the opinion of the Auditor reasonable'. A clause which occurs in only one contract states merely that 'pools be calculated periodically and that members be paid the proceeds after deduction of charges'.

These extremely permissive clauses occur in the majority of cases and the imposition of extra restrictions on the co-operative or its management is comparatively rare. The most common restriction is where a majority of members must first authorise the directors to establish specific pools, details of which had been given in the notice calling the relevant general meeting. This presumably allows members to veto any particularly undesirable pool arrangements.

Other restrictions tend to occur only in individual instances and include the stipulation as to which expenses are to be included in the pools and a definition of the stage at which produce is entered into the pool. Only one contract stipulates the specific grades of each pool.

One contract which defines the costs to be included in the pools affects this restriction by ending the list with the item ‘any expenses incurred by the company (other than managerial expenses) which in the opinion of the auditor can be reasonably related to a particular pool account’.

The main impression to be gained from this section is that the directors look upon the arrangement of pools as part of their freedom of marketing and that restrictions of this freedom are unusual and concerned mainly with the working of the pools rather than their composition. This freedom of marketing is certainly worth retaining but it is reasonable for growers to expect greater safeguards than generally exist at the moment. Only one co-operative guarantees to reimburse a member for any expenses he may incur and which would normally form part of the expenses of a pool. Prior definition of the duration and contents of any pool safeguards the grower against even the remote possibility that discrimination may occur, and in any case safeguards the co-operative against charges of favouritism. Definition of the expenses to be charged against a pool similarly prevents ill-feeling without unduly restricting the operation of the co-operative.

In general, perhaps, greater care could well be given to the construction of this section and rather more safeguards for the member be included.
(b) Payment

Clauses of this kind are extremely diverse. To comment on all the kinds encountered in the examination of all the contracts concerned would be tedious. Nevertheless, some general comment is possible as well as some direct comment on some of the clauses.

Only very rarely do contracts include a specific charge for the services which they provide as for instance so much per bushel, or container or ton. Usually the clause which is concerned with charges allows them ‘to be determined from time to time by the directors (with the prior approval of the auditor) having regard to the financial position of the co-operative generally and in accordance with the relevant clauses in the contract’. The virtual impossibility of fixing charges for some years in advance is obvious with relatively long term contracts, but given that the member is tied for some years he in fact gives the management a very great degree of freedom in a contract of this kind. This is especially so as few contracts lay down the bases on which charges are calculated and how the total charge (whatever it may be) is made up.

Only rarely is it possible for a contract between a co-operative and its members to be on a basis of a fixed and pre-determined price for the produce concerned. Nevertheless, two co-operatives have such contracts in operation where a fixed price can be negotiated with the buyer and no question of charges thus arises. Otherwise, contracts may specify a date by which a co-operative must have estimated its charges for the ensuing season and stated the unit of produce on which those charges are to be based. Where a pooling system is not operated, the contract normally lays down that the proceeds of sale less the charges must be paid to the grower ‘as soon as possible’. Where there are arrangements for pooling then usually the co-operative is required ‘to make advance payments to the grower as soon as possible after marketing of the produce in that pool has commenced’. Final payment taking the estimated charges into account may have to be ‘within six weeks of the co-operative having received the total proceeds of that pool’.

Some few contracts include clauses to do with direct sales by a member and sales which involve only some of the services which the co-operative provides. Again, a few contracts place an upper limit on the amount of charges which may be refunded to growers if the estimated charge had in fact been set at too high a level. Others give the directors power to cover their underestimating of charges by raising them retrospectively and the power to demand payment forthwith of the extra charges from those members whose produce account has already been settled.
Clauses concerned with payment vary perhaps more than those of any other kind. They vary as to content and vary greatly as to length. The contract with the shortest treatment of payment does so in one short paragraph while on the other hand that with the longest treatment takes up three pages in dealing with the matter in great detail.

11. **Clauses to do with assigning members' interests to third parties**

Members have a very considerable financial stake in some of the marketing co-operatives. This stake consists partly of share capital which normally does not bear any relationship to the acreage of land which a grower may occupy or the volume of produce which a grower may put through the co-operative. It consists also of so-called 'qualification loans' which are related to the use which a member will make of the facilities of the co-operative and which are often a prerequisite of the operation of any marketing agreement. The result of a member making these two forms of investment in a co-operative is that a relatively large sum of money is tied up but which in certain circumstances, he may wish to transfer to third parties.

Contracts, therefore, make provision for contingencies of this kind. But because of the peculiar nature of a co-operative it must be possible to guard against the transfer of shares and loans to anyone regardless of their interests. Thus, if a member sells or lets his holding the crops from which are the subject of a marketing agreement, then, with due notice and with the approval of the co-operative, he may assign to the new owner or tenant the rights and obligations of the agreement and at the same time transfer to the same person the shares he may hold. A number of contracts examined also provide for the simple assignment of assets from one member to another and to this procedure the co-operative appears to have no rights of objection whatever provided that the assignee is a producer of the kind and variety of the crops approved by the co-operative.

As a qualification loan is often an inseparable and essential part of a marketing agreement a number of contracts examined provide that where the rights and obligations are transferred to a third party then the qualification loan must be transferred also, and vice versa. Thus, a member may, on giving notice to his co-operative (but not subject to its approval) assign the burden and benefit of an agreement and transfer the qualification loan. But if the new member takes over only one without the other the agreement ceases to have effect without the need for notice being served. Moreover, if a part of the burden and benefit of an agreement is taken over then the
appropriate part of the qualification loan must be taken over also, otherwise the agreement becomes null and void as to that part transferred.

Examination of the clauses of this kind seems to indicate that they are very strictly binding on members. Thus, provided that the co-operative continues to be successful in the sense of giving satisfaction to each of its actual and potential members, then clauses concerned with the assignment of members' interests provide a perfectly adequate means by which those interests may be transferred. The whole question of assignment rests on the acceptance of the view that an interest in the co-operative concerned is something to be sought after and that such an interest is part of the lock, stock and barrel of a producer's trading assets.

12. *Clauses concerned with duration and alteration*

This is one of the more straightforward and mechanical parts of a contract. It is not surprising therefore that clauses of this kind tend to follow a similar general pattern in most of the contracts examined. Nevertheless, in matters of detail such clauses were found to vary widely. For instance, some contracts examined were seasonal, while at the other extreme some were designed to endure for twenty years. Contracts other than those for a season, normally are binding for a minimum of from three to five years and thereafter may be terminated along agreed lines. Long-term contracts usually stipulate the intervals at which they may be revised or terminated after the initial completely binding period. It might be expected that the total length of time for which a contract is negotiated would be related to the magnitude of the qualification loan per unit of production; the greater, the longer. In fact, this is not so.

Clauses concerned with the alteration of the terms of an agreement usually do two things. First to recognise that in a long-term contract the need for alteration may well arise. Secondly, to lay down the procedure for alteration. As the long-term contracts examined are common to all the members to which each applies and no alteration in terms as between members of any one organisation is possible, then any alteration or amendment must be on the initiative of the co-operative.

On a co-operative deciding that some change is needed then the usual procedure laid down is that all members and the auditor must be informed of the proposals in writing. Members are given a period, usually fourteen days or one month, in which objections may be made. From this point onwards there is a divergence in the procedures which follow. A minority of co-operatives bind themselves to call a general meeting if an objection to the proposed
alteration is made and to allow the general meeting to decide the issue. The majority, however, requires that all members reply, either for or against, and that these replies are regarded as votes. Most co-operatives which adopt this procedure require a favourable vote from two-thirds of members holding in aggregate three-quarters of the total qualification loan. Only one such co-operative lays down a procedure necessitating only a bare majority for the proposal.

Where no qualification loans are involved then amendments normally need a majority of two-thirds or three-quarters of members to be in favour. One co-operative, however, limits the power of new members to influence voting by stipulating in the contract that a vote for an alteration must cover two-thirds of members and that this number must control one half of the aggregate throughput of the previous three years.

In all contracts examined and to which these procedures apply the next stage laid down is that all members be notified and that they accept the result of the majority vote. Objection may be made within a specified time and normally such objections have the effect of terminating the agreement forthwith, or in one month from the date of the objection. One contract examined, and one moreover with a high investment per member, stipulates a period of eighteen months from objection to termination. One contract mentions arbitration procedures in the case of objections to alterations imposed by a majority on a minority.

Despite the apparent clarity of clauses concerned with alteration which results from this method of describing them, in practice they tend to be somewhat less clear especially in respect of the time lapse between objection and termination. There may well be good reasons for this. Over-precipitate action by an aggrieved member may be most undesirable, and on reflection, not in the best interests of the member himself. If a degree of vagueness is intentional, for this or any other reason, well and good but if it is not then it should perhaps be removed.

13. **Clauses concerned with the disposal of members' interests on death**

Approximately two-thirds of the contracts examined lay down a procedure to be followed on the death of a member or the compulsory liquidation of a member's assets during the time the contract is in force. One of the contracts stipulates that on the death of a member all obligations cease to have effect; in all other contracts the obligations pass to the representatives of the deceased member so long as those representatives remain in occupation of the land concerned or of such an acreage as is above the minimum laid down by the co-
operative as a requirement for membership. Normally, where a partnership constitutes a single membership the obligations pass to the remaining partners.

It is usual for both the personal representatives of a deceased member and the co-operative also to be bound by marketing agreements but while one co-operative specifically binds the personal representatives of a deceased member it appears not to bind itself. This may well be deliberate or equally well be due to a drafting error. If the former, then why? If the latter then the need for better drafting is still further emphasised.

All the contracts which make a reference to qualification loans use the same terms in providing for their transfer on the death of a member. They pass without exception to the legal personal representatives of the deceased who may either themselves transfer such loans (subject to the provision as to transfer) or if they propose to carry on the same kind of business and satisfy the co-operative on this point, be themselves registered as the holders. If they do not carry on the same kind of business then new or existing members may take over a deceased member's qualification loan. If none has done so within twelve months then his personal representatives may require the co-operative to repay it within a further twelve months.

14. **Clauses concerned with bringing the operation of the contract to an end**

Clauses of this kind lay down the procedure by which and the times at which the contract can be terminated. As one of the important reasons for having a contract is to ensure its continuity of operation and in consequence, the continuity of a supply and an adequate utilisation of investment, there is generally some delay mechanism built into the contract to prevent either side withdrawing without warning. Twelve co-operatives make no mention of any advance notice of withdrawal being necessary, but of those which do, most require a year's notice to be given ending on a specified date. Many increase the effectiveness of this by stating that the contract can only be terminated at 3, or sometimes 5, year intervals. This long tie which cannot be broken may, however, raise problems between a member and the co-operative and in some cases it may be better to part company after due notice rather than enforce co-operation on an unwilling member.

Almost all contracts state that the contract terminates if the co-operative is 'wound up' or if the grower is declared bankrupt, but only two specifically mention that it terminates if the grower ceases to grow any produce. One contract allows the co-operative to
end the contract if the member's output is reduced by 25% or more, by giving him two months' notice. It is difficult to see the reason for this as neither side appears to benefit from it.

Failure on the part of a member to pay bills is rarely mentioned as a possible reason for ending a contract presumably because there are other and more effective remedies to be found either in the courts or merely by deduction from the proceeds of the sale of a grower's produce. Failure to make the appropriate contribution of a qualification loan is a valid reason for terminating an agreement but this provision is normally dealt with in the terms under which such loans are arranged.

Another common situation is that the contract is terminated if the grower is expelled from the co-operative under the Articles of Association. This is a logical condition but one which is covered also by the existence of a clause stating that only members of the co-operative can have a contract.

Where the various conditions for the early ending of the contract have been mentioned it is important that all possible circumstances should be provided for. Only three mention for instance, that all sums outstanding must be paid and only one that if a member's contract is ended this does not affect the rights of the other growers. There is more commonly a statement of the terms on which qualification loans are to be repaid to unwilling members. The general theme of these clauses ensures that the co-operative can retain the qualification loan until it is taken up by other members, the majority of co-operatives phrasing this in such terms as 'the directors will endeavour to assist in the disposal of the qualification loan'. If the co-operative has a 'mutual company' status, or is a company issuing its qualification loans as shares then it would be illegal for them to repay the member's qualification loans as this would mean a reduction in their nominal share capital. In this type of organisation it is important that the new member be made aware that his investment will not be recoverable from the co-operative and that he can only transfer it to other members.

It is likely that the ultimate deterrent available to the co-operative is the expulsion of the member. It is important, therefore, that the conditions meriting expulsion, and equally the conditions under which a member can withdraw should be clearly drawn up and the consequences for both parties defined.
CHAPTER 6

Contracts Between Growers and Other Types of Organisation

The examination of contracts which was made in the previous chapters was one which took to pieces, so to speak, those contracts which existed between horticultural marketing co-operatives and their members. During this study a small number of contracts was examined which were in use between pea vining and selling co-operatives (which for this purpose are regarded as agricultural) and between growers and non-co-operative marketing agencies. In all, perhaps a dozen or so cases were examined. The different views expressed in discussion, the different attitudes to contracts and the kinds of contract in use are dealt with below in the context of the particular circumstances of the organisation concerned.

Pea vining and selling co-operatives

The contracts in use by pea vining and selling co-operatives tend to follow the pattern of those in use by horticultural marketing co-operatives, mainly, perhaps, because they are drawn up by the same people or organisations or because, with modification, the horticultural marketing type of contract appeared appropriate. The examination therefore disclosed little that was novel. Two points, however, which arose might be mentioned.

The first is somewhat negative and shows that ambiguity is not confined to those contracts discussed in the previous chapters. An obligation mentioned in one of the pea contracts is that the co-operative should 'sell to the best of its ability'. While this sort of phrase may be used as an excuse for almost any shortcomings and in itself appears to be extremely vague it nevertheless provides useful protection for the member.*

The second point is embodied in a clause which appeared in five contracts and which seems to indicate a belief that damages in case of non-observance are well nigh impossible to calculate equitably. It is perhaps worth quoting the relevant portion of the clause which runs as follows: "Inasmuch as the remedy at law would be inadequate and inasmuch as it would be impracticable and extremely difficult to determine the actual damage resulting to the society should the grower fail to deliver the products hereby covered regardless of the

*See Chapter 7.
cause of such failure . . . the grower hereby agrees to pay . . . for all products . . . disposed of . . . other than in accordance with the terms hereof" a stated sum per acre.

Two comments may be made on this sort of clause. The first is that a statement that the remedy at law would be inadequate pre-judges the issue, it may or may not be, but inadequacy is by no means a foregone conclusion. The second is that as the statement admits the difficulty of determining the actual loss or damage to the society then it is conceivable that that loss or those damages may well be nil. If the damage or loss is difficult to determine or its determination impracticable then to assume that there is any loss at all is something which rests on very shaky foundations. No less than five contracts each had a clause couched in words of this kind so that a fair number of producers must have accepted these terms without question. If the implication of a clause such as this is followed to its logical conclusion then the case for any penalty or award of damages of any kind is a very weak one indeed.

Other organisations

One contract with which many producers must be familiar is that made with a soft fruit processor. In many ways it seems to be clear and unambiguous, to cover all the matters on which agreement is needed but nevertheless to leave open one aspect of price which could well be important and to make use of the questionable phrase 'good husbandry' in respect of cultivation.

Thus this contract defines the parties and the subject matter. It defines the obligations of the producer concisely as to the acceptance of advice from the field officer on the state of ripeness for picking, to pick, weigh and pack, to notify the agent to collect, to control pests and disease at the direction of the processor’s officer, and not to intercrop. It defines the obligation of the purchaser to purchase, to supply containers, to collect by an agent and to pay a stated price per ton. The change of ownership of the product concerned is to be at the factory and the purchaser has the right to reject fermenting or mouldy fruit. Arbitration in the case of dispute is provided for by the parties agreeing to appoint a single arbitrator or in the case of their failing to agree then someone nominated by the Ministry of Agriculture and the decision of the arbitrator to be final and binding. The contract has a life of 8 years, extendable by the producer by six months notice in writing before the 8 years have elapsed, by a further two years. The contract period may be terminated by six months’ notice in writing earlier than at the end of the 8th year only if the producer ceases to occupy the land concerned. If either party is in breach of the terms then the other side may terminate the
contract by one month’s notice in writing.

The price stipulated holds for the whole 8 year period except in two special circumstances. Thus if the minimum agricultural wage increases in stages, the first beyond £12, and the second beyond £15, a week, the purchaser may *at his sole discretion* increase the price. The second circumstance is that if taking one year with another the free market price is appreciably higher than the contract price the purchaser *will consider* paying a bonus. Perhaps no more precise way than this could be devised since the free market price of the product concerned depends very much on keeping produce off the open market by the very agreement which provides that the bonus is linked to that free market price. It may be said in this case that the arrangement works well and to the satisfaction of all concerned and one of the conspicuous features of this contract and others between processors and producers is the absence of any clause which lays down penalties or damages of any kind. It may well be that if a threat of a penalty has to be incorporated to ensure the compliance of one side or the other then the substance of the contract is unfair or unjust in the way it operates.

Five firms were interviewed which, while they might well have been expected to place great reliance on contracts either did so to a small extent or not at all. These firms consisted of three processors, one wholesaler and one large retail organisation.

The wholesaler was attempting to introduce a contract with growers but recognised it as unenforceable. Nevertheless, as it contained threats of penal action a majority of producers conformed to its terms which were mainly concerned with a fixed quantity of produce and a fixed price. The firm concerned had no interest in a variable price or a variable or uncertain quantity and were attempting to stabilise both by a device lacking any legal basis.

All other firms interviewed made no use of contracts for a number of reasons. The retail organisation exchanged letters with its suppliers and came to an amicable agreement as to quantity, quality and price, both sides finding this arrangement to their advantage. Clearly this arrangement would not continue without there being some advantage to both sides, if there were no advantage then no contract would, by its existence, confer any.

The three processors were parts of large scale groups with wide interests in the food trade. All preferred what they described as “gentlemens’ agreements” with growers, mainly because fruit and vegetables supplies were unpredictable, prices were unpredictable and contracts were thought to be one sided in these circumstances. All were prepared to buy from British growers at the going price and were apparently satisfied with this arrangement.
CHAPTER 7

The Legal Aspect of Contracts

Chapters 4 and 5 have been devoted to a clause by clause examination of contracts and some criticisms have been made of the terms in which some of the clauses have been couched. But lay criticism is no substitute for legal opinion. While it is understandable that the legal profession must be guarded in its expressions of opinion, it has nevertheless been possible to distil from consultations with legal advisers what may be found useful guidance in contract construction and interpretation in this particular field of commerce.

Few co-operatives would be prepared to go to the length of taking a case of breach of contract to the courts and most depend, wisely it is thought, on the implied discipline of a contract to secure the observance of its terms. Thus, the existence of a contract prevents minor defections even though few co-operatives would consider involving the courts in cases of major dispute. There have, however, been a few cases in this field which, when taken with the legal advice we have received, allow some comment to be made on the legal aspect of contracts. The first case decided in court, is that of English Hop Growers Ltd. v. Dering, and the second, Sykes v. Fine Fare Ltd. The third, a dispute which centered around non-observance of the obligation of a member of a co-operative to deliver his fruit for marketing, was settled out of court. It is one, therefore, about which little, if anything, can be said, but which has nevertheless provided useful material for study.

In English Hop Growers Ltd. v. Dering (1928) there was a breach of a contract to deliver the produce of 65 acres of hops to English Hop Growers and the liquidated damages of £100 per acre were awarded to the co-operative. Retrospectively, it can be seen that English Hop Growers was one of the less successful attempts at co-operation and one which was not only doomed to failure from its inception but one which did, in fact, fail before the first five-year contract with its members had run its course.* Nevertheless, even though the least farseeing could have predicted the early end of the

*English Hop Growers went into liquidation after the 1929 crop. For a brief note on the activities of English Hop Growers see Report of the Committee appointed to review the working of the Agricultural Marketing Acts. (Lucas Cttee.) Econ. Ser. No. 48, H.M.S.O. 1947. See also Jenkins, Two legal problems of agricultural co-operation.
co-operative, its case was upheld though, it may be observed, only to the extent of being awarded damages; there was no question of enforcing performance. In the light of hindsight the case should probably never have been brought.

In Sykes v. Fine Fare Ltd.* the defendants had broken a contract to take delivery of a supply of broiler chickens which the plaintiff had produced for them at the cost of some considerable capital investment. In an appeal, the plaintiff’s case was confirmed though with some change in the formula for assessing damages. Again it may be observed that performance of the principle acts of the contract was not enforced.

Legal opinion seems to be fairly unanimous that any court would be unlikely to enforce performance of a contract except in the case of real estate transactions. There is just the possibility that it would do so in the case of a contract of service, or where the defecting member, through extreme poverty, was unable to meet a bill for damages and could only discharge his obligation by performance.

The discussion of the legal aspect of contracts which we have had with legal and other advisers can be dealt with under two headings, (i) construction and (ii) interpretation.

**Construction**

In general the contracts examined seem biased heavily in favour of the co-operatives and to contain insufficient protection for the member. In particular, they do not provide for any independent determination of prices and charges but leave those matters entirely in the hands of the co-operative. It would be desirable that there should be some machinery for determining prices and charges independently since these are two matters which are fundamental to the operation of the contract. In practice, the independent determination of current prices would be next to impossible to organise, but legal opinion is to the effect that something of this kind would be most desirable even retrospectively, otherwise the member is in a weak position in any objection he may raise.

A contract must contain sufficient detail to give efficacy to an agreement and so the minimum requirement for horticultural co-operatives would probably be a document containing the basic terms—an agreement by the grower to market his products through the co-operative and by the co-operative to sell them, together with some defined independant machinery for judging the reasonableness of prices and charges† when these are in dispute. In order to enjoy

†i.e. not the auditor who has a voice in the fixing of charges.
the exemption from the Restrictive Trade Practices Act 1956 given by the 1962 Agricultural and Forestry Associations Act, (which is intended to assist co-operatives in achieving continuity of throughput) these contracts may need to cover a reasonable period of time, the minimum probably being a season.

It has been suggested that there are advantages in covering every aspect of the relationships between a co-operative and a member by a contract; to provide, in fact, for all eventualities. Nevertheless, the more detailed the contract the more likely it is that its terms will be broken by one side or the other. The transgressions may be relatively unimportant but it is undesirable that transgressions of any kind be seen to occur and to pass without being disputed.

Some of the contracts examined contain phrases which oblige the co-operative 'to sell to the best of its ability'. Although vague, such a phrase in a contract is thought to give the member a degree of protection which he would not have in its absence and to go some way to overcome the difficulty raised by the virtual impossibility of any independent determination of prices. If a co-operative were to realise for the member prices which were substantially below those obtainable elsewhere and for any substantial period then the co-operative would be in breach and the grower would be justified in withdrawing. Just how substantial the difference in price and the length of time would have to be is a point which cannot be resolved but in the absence of an obligation 'to sell to the best of its ability' a co-operative would have to be guilty of fraud to allow a member to withdraw with impunity.

Another phrase found in contracts obliges the member to follow the rules of good husbandry. This term is, of course, defined in the Agriculture Act 1947, Section II, but its vagueness is not avoided by definition. The difficulties which surrounded proof of bad husbandry when this was the principle point at issue (as in cases of dispossession of tenants of agricultural land) make its use in marketing contracts somewhat undesirable.

Several contracts provide that the articles of association shall have precedence over any rules contained in the contract. Co-operatives may well have a minority of members tied by contract for some special project. Suppose under these circumstances that the majority approve a change in the articles which are thought by the minority to be against their interests. The contracts provide that the members who are tied can withdraw but this they may not want to do. The only redress in these circumstances seems to lie in the minority appealing to the Registrar of Friendly Societies (or Companies, as the case may be) that the change be not approved. The very existence of the proviso giving precedence to one set of
rules which are changeable over others which are not could lead to dispute. The rules of an association are not necessarily drawn up for a specific purpose but the terms of a contract are and there could on this account be some conflict between them.

Several contracts examined contained clauses which were either mutually in conflict or which were in themselves ambiguous. We are advised that in such cases if there is a dispute between the parties to the contract then, because the co-operative has presented the contract to the member without the possibility of any alteration in its terms a court would be likely to construe any conflict of terms or any ambiguity of expression so as to give protection to the member.

A number of contracts are known to be signed unstamped by the two sides concerned and advice has been sought on the legal aspect of such a procedure. It seems that an unstamped contract may be used as evidence in any action which may arise if the side producing it undertakes to stamp it and pay any penalty which is incurred by not having already done so.

**Interpretation**

There seems to be no clear cut distinction between the words 'agreement' and 'contract'. The legal interpretation of a contract is that it is an agreement which is legally enforceable. Acts, including the Agriculture and Forestry Associations Act 1962, refer to agreements. The question of enforcement is one about which it would be virtually impossible to express an opinion except that it is extremely unlikely that any court would force a producer to resume supplying or to continue to supply if he were aggrieved for some reason or other. Indeed, this may well be the place to suggest that contracts in this context were never intended to do more than to avoid the situation in which for short term and minor gain a member would sell outside his co-operative and then resume trading with the co-operative when the chance of gain elsewhere had passed. Unfortunately, the contracts themselves have been drawn up so as to make not only temporary sale elsewhere punishable but to make withdrawal on good grounds extremely difficult.

Advice has been taken on the question of damages and the way in which damages are provided for in contracts. It would seem that damages based on ascertained costs is a method much more to be desired than damages based on acreage. A flat rate per acre as a penalty for non-delivery for sale provides no evidence that the co-operative had made a serious attempt to assess the damages it has suffered and this would seriously weaken its claim as a consequence. Clauses which contain statements to the effect that any damages a
court would award would be insufficient* and which are found in association with a flat rate penalty per acre are regarded as undesirable and to do nothing but prejudge the issue.

Where a contract provides break points at intervals, damages only up to the break point would be recoverable by a co-operative were it to fight a successful action against a member.

The last point on which comment if offered is on arbitration. It seems that some ambiguity exists in some contracts as to whose decision is final in some disputes, and as to what kind of dispute may be settled within the organisation and what sort of dispute may be referred to arbitration. Clearly, this sort of ambiguity needs to be avoided and better drafting would serve to do so. But there still remains some uncertainty about arbitration. We are advised that all disputes of this kind fall under the provisions of the Arbitration Act, that any person who is nominated as arbitrator has no obligation to act and can refuse to do so, that the two parties to a dispute can do no more than agree to put the case to arbitration and certainly cannot fetter the arbitrator in any way such as agreeing beforehand as to who is to pay his fees. An arbitrator must be completely free to decide the merits of each case, to award such damages as he thinks fit (if any) and to apportion the costs of the arbitration as seems to him just and fair.

The comments offered here must be accompanied by some reservations. The first is that comment has been made only on those points which have been encountered during the course of the study and on which misunderstanding has occurred or has seemed likely to occur. The comments purport to do nothing more, but are offered in the hope that they will clear up some matters on which disagreement may occur through misunderstanding. The second proviso is that although legal advice has been taken, legal advice is always given in most guarded terms and the same reservations as were given to us must be deemed to accompany these remarks. The third reservation to be made is that it must be clearly understood that no amount of better drafting and the removal of ambiguities in a contract will have any effect on the degree to which a contract is enforceable as to specific performance. Lastly, whatever may be the legal position, anything which has been said with a view to clarifying it in this chapter has no connection with or influence on the conclusions which are offered in the following chapter.

*p. 45, supra.
Discussion and Conclusions

This study has been concerned to examine in general terms the development of official policy in relation to co-operative horticultural marketing organisations. It may be worth restating that one of the primary reasons for official concern has been to ensure such a steady and regular support from members that the co-operatives would function with greater ease, more certainty and fewer resources than without it. There has also been some discussion of the problem of making any government subvention to co-operatives a more prudent investment of public funds.

In particular, this study has attempted to do two things. First and foremost, to examine the place of a contract of some sort, in bringing about what is perhaps too readily assumed to be a desirable end, and secondly to examine the extent to which co-operation in the marketing of horticultural produce has made headway since the last relatively complete study was made in this field some twenty years ago.* The two parts are by no means unrelated.

Chapter I was concerned to outline the stages by which the present rules of the Central Council for Agricultural and Horticultural Co-operation on grants to co-operatives were reached. It is understood that before approving an application for grant the Council needs to be satisfied that a contract exists between a co-operative and its members in respect of the project for which aid is sought, and which binds members to supply their produce for at least three years and preferably for five.

All the official pre-occupation with contracts has centered around the belief that the absence of a tie with members placed co-operatives not infrequently in an embarrassing position and that this has 'completely scuppered the operations of co-operatives'. It may be as well to ask at this stage whether all the agitation has been justified by events. Many co-operatives have had but an ephemeral existence and admittedly have not been adequately supported by producers. But there is no evidence to suggest that they would have continued in existence had there been some contractual tie with their members. They have gone out of existence through inefficiency, through the absence of or the disappearance of a need for their

services, through their being unable to obtain satisfactory prices, or for some other similar reason. Indeed one co-operative with a contractual tie with all its fruit growing members has been near to the point of breaking-up in recent years. It has since abandoned all marketing of fruit under contract, though it still operates on a voluntary basis in this field. The scale of operation has, however, been greatly reduced. The contracts are believed to have been broken by members mainly because of the inability of the co-operative to give as good a net home price as members could obtain elsewhere. Under these circumstances it was only prudent to break the contract. But whatever the reason for the failure may have been, and this is irrelevant, the important point to note is that the existence of a contract with members did nothing to save the organisation. There is some point in asking once more the question posed at the end of Chapter 3. It was to the effect that if the co-operative is successful in terms of the ratio of cost to benefit, is a contract necessary? The answer may not be negative in all circumstances but the evidence points to the need for some condition or quality in member co-operative relationships other than a contractual tie in order to ensure success and loyalty. The evidence also suggests that official pre-occupation with contracts is but a poor substitute for pre-occupation with the reasons for success and failure in co-operative horticultural marketing.

Loyalty cannot be enforced by law, it is something not to be defined as the mere observance of the terms of a contract but as the willing observance of those terms. Indeed, the statement which one co-operative made to the effect that 'you don't join a co-operative for what you get out of it' at least substituted as a basis for loyalty some sociological rather than an economic reason. Unwilling observance of the terms of a contract is not loyalty and sooner or later strains the relationship between member and co-operative to breaking point. The situation is, in fact, something of a paradox. On the one hand, where a contract is not needed to ensure loyalty, either because the co-operative is able to give such satisfactory prices that the members' investment is economically justified or because of some financial tie not easily severed, then it is a workable instrument. On the other hand, where it is needed to ensure loyalty it becomes an unworkable instrument either because it is legally unenforceable as to performance, or because the aggrieved member will get out at the earliest possible moment.

A co-operative marketing organisation can be justified for two reasons. The first is what is loosely known as economies of scale. This means that by performing services jointly the cost to individual members is less than the aggregate of their individual costs if these
same services were performed separately by each member. There is no doubt that in some circumstances and so far as costs are concerned, there are savings to be made by acting jointly. Nevertheless, this reason of lower cost does not always apply and instances are known of lower costs being enjoyed by individual rather than co-operative action merely by the exploitation of a near market by an individual producer, with consequent savings in transport and packing costs. One grower has been known to terminate a contract for these very reasons. While it is wrong to assume that economies always follow larger scale operations there are usually savings to be made by providing services co-operatively rather than individually.

It has been shown that the proportion of the total horticultural output which is marketed co-operatively has increased over the last twenty years. It has risen from about 21% in 1946 to about 63% at present.* But the advantages of co-operation in this field cannot be self-evident to those producers to whom they could be expected to make the widest and most insistent appeal. Indeed, there are such things as diseconomies of scale also and it could be that co-operatives assume functions which, given their present size, could be performed more cheaply by other firms and institutions nearer the market place. It could also be that the absence of opportunity to sell in the best market as a result of a somewhat rigid marketing policy adopted by some co-operatives (and a necessary counterpart of scale of working) limits the chance of gain by members despite possible savings in cost.

This is no place to argue the pros and cons of co-operative horticultural marketing. But it is the place to point out that, even now, no more than one fifteenth of production is marketed co-operatively and this in spite of the last six or eight years of not ungenerous official subvention. It would seem justifiable to conclude that the advantages to growers in general are by no means clear cut and obvious.

The second basis on which a co-operative may be justified is that if any market is characterised by a degree of imperfection in the competition between buyers or between those firms and institutions providing marketing services at a later stage in the process then, by introducing an element of competition the co-operative either obtains a better price for its members or obtains the services it needs at a cheaper rate. To enjoy the benefit of this justification a co-operative must be seen to be as effectively run as those firms or organisations which hitherto maintained the state of imperfect competition, and must provide its services either on a cost-price basis or must return to producers the whole financial benefit which

*See p. 9, supra.
arises from its operations. Co-operatives meet the second condition in some way or another as an invariable practice but it is open to question whether they meet the first as effectively.

Again, a look at the relatively small proportion of horticultural produce which is marketed co-operatively seems to indicate a number of possible situations. The first is that imperfect competition in horticultural marketing is of no importance or almost non-existent. To those who do not take this view the conclusion is inescapable that co-operatives are relatively powerless to remedy the situation with their present methods of working. The second conclusion is that the management of co-operatives falls short of that of the organisations whose market-dominating position the co-operative seeks to break. There may well be some support for this possibility especially as government policy has been concerned with providing generous aid to co-operatives which appoint managers of superior calibre* in the hope that their advantages would ensure their subsequent continuous employment.

Whatever may be the pros and cons of the two points raised above, and it is suggested that both are relevant to any consideration of a contractual tie between a co-operative and its members, there is a third point which flows from the first two. This third point is concerned with the possible simultaneous existence of imperfect competition in marketing and the existence of contracts between co-operatives and members, and also with the rôle of the contract in preventing the development of desirable competition.

It may be assumed that co-operatives could (even if they do not) introduce an element of competition in an imperfectly competitive market which was hitherto supplied by producers individually. A co-operative could do this in a number of ways but two will serve to illustrate the point. The first way would be in opening up new outlets which an individual producer could not himself supply, the second would be to act as and in place of an intermediary who was hitherto in a position to exact an exceptionally large reward for his services through lack of competition.† Suppose, then, that a relatively small proportion of produce is bound to the co-operative by a contract, and that a contract must form the basis on which the

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*Horticulture Act 1960. Provision of a grant towards a manager’s salary on a scale decreasing from 75% in the first year to 25% in the third. Now, up to 33⅓% of the cost of salaries and expenses of managerial and key staff during the initial period of up to 3 years of their employment.

†Though these co-operatives are outside the sphere of marketing it will be remembered that both Swanwick and District Growers Ltd. and the Tamar Valley Basket Factory Ltd. were set up to provide containers to strawberry growers in the face of hitherto monopolistic supply.
co-operative deals with its members. Then the very absence of freedom to use or not to use the co-operative at will must surely destroy for the majority of producers the very oligopsony-breaking function which it was designed to perform and which it could perform given complete freedom in the producer-co-operative relationship. If all producers were free to use the co-operative at will then all producers would benefit from its existence whether they used it or not. Agreed, that all producers could become members and be tied by contract and achieve the same end, but the advantages of doing so, in lower costs, for instance, are not so obvious to all growers that this could be expected of them.

The point needs to be made here that it could well be that the very looseness of the tie between producers and a co-operative, the very fact that a co-operative exists and could be used even as an outlet of last resort has a salutary effect on other forms of outlet and provides that competition hitherto lacking. For this to be effective, however, a system of working at least as efficient as that of other outlets is needed—but perhaps no more efficient, certainly there should be no contract which ties some producers as rigidly as it excludes those others who are not prepared for total commitment.

Perhaps no clear cut answer is possible in the matter. For one reason there is the question of maintaining the viability of a co-operative and this may be done only by relatively consistent support. The very act of becoming a member with a view to material gain must involve a member in some degree of obligation to his co-operative. But it is seriously suggested to those concerned with the administration of aid to co-operatives and to those who lay down the rules under which those administrators work that it would not be an imprudent use of public funds to aid co-operative marketing societies without requiring the existence of a contractual tie with members if the existence of an efficient co-operative could be shown to reduce costs or to increase returns to producers and to increase those returns, moreover, because of the introduction of competition in a hitherto imperfectly competitive market. This is no narrow question of investing public funds in a business and taking steps to ensure that the investment pays its way. It is a question of investing public funds in institutions for the good which the very existence of those institutions can do to members and to producers in general. This view, Parliamentary discussion has signally failed to take into consideration.

There is another aspect to contracts between co-operatives and their members which has up to now been discussed rather too lightly even if it has been considered at all. In 1956 the Restrictive Trade Practices Act was passed, presumably with the public interest in
mind. As was pointed out in Chapter 1, contracts between agricultural and horticultural co-operatives and their members were considered before long to be in contravention of the 1956 Act because they limited the freedom of producers to sell where they thought best and thus increased the degree of imperfection in the competition in the market. The consequence was the Agricultural and Forestry Associations Act of 1962 which specifically exempted contracts made by such co-operatives from the operation of the 1956 Act.

If a contract between a co-operative and a member is an affront to the principles enshrined in the Restrictive Trade Practices Act then that affront is not removed or remedied merely by passing a second Act to set such a contract outside the orbit of the first. Contracts of the nature of those used in horticultural co-operative marketing either are or are not actions in restraint of trade. Little or no economic evidence can be found to justify restraint in horticultural or agricultural marketing activities because they may be different or distinct in some way or other. There is, of course, one political reason; one based on the assumption that a contract is an effective means of achieving success in a co-operative enterprise. It is the fact that the Government is committed to support agriculture and horticulture and it may be argued that removing a contract from the orbit of the Restrictive Trade Practices Act therefore assists in the working out of the general policy towards the agricultural sector.

Nevertheless, the public good may be achieved by public investment in co-operatives without a contractual tie being made a condition of that aid. This is especially so as the law provides no likelihood of enforcing the performance of such contracts, more especially as public aid is at least matched by an equivalent investment of members' funds, and even more especially as any aid to co-operatives may well be nullified by attaching such conditions to it that the market is rendered more imperfect than hitherto.

To suggest that nevertheless there may be some useful purpose to be served by the existence of a contract is not by any means to take an equivocal standpoint. There are situations in which the relationship between a co-operative and its members is very complex. Such a situation exists, for instance, in a number of apple marketing co-operatives. In these circumstances some document which lays down what is expected of each of the two parties to the agreement can be very useful. Such a document could also lay down the procedures to be followed where these are complex or where they have an empirical basis. It could also lay down rules to be followed both for its continuance in operation and in the event of its termination—without in any way making it into or pretending that it could ever
be, something from which the grower could not withdraw without incurring obloquy. Heed may well be taken of the circumstances in one very successful co-operative with a heavy member investment but which has contracts which are renewable annually. Because the co-operative is financially successful and the ratio of cost to benefit is satisfactory the contractual tie can be and is of the lightest kind.

Another circumstance where some kind of an agreement would seem to have a place is with a newly formed organisation which has yet to prove its capabilities. The development of these capabilities could well depend on regular support and if willing members see the possibility of gain then there may well be some value in tying the wavering member during the period of development. Even if performance of the terms of an agreement is not likely to be enforceable there is no doubt that the signing of a contract has a psychological disciplinary effect.

A wavering member would be disinclined to put himself to the trouble which could arise by breaking an agreement without good reason and by the time he has sufficient evidence on which to judge the case, the need for doing so could well have passed.

The final reason which can be put forward for using a contract in co-operative horticultural marketing is that where a producer is more concerned with the certainty of having a market than with the price he receives; generally a contract gives him that certainty. Normally, of course, the cost of certainty in marketing is a lower price but this need not and indeed should not arise with a co-operative organisation. But if it does, then that lower price must be balanced against the advantages of a certain market.

It may well be that the whole question of contracts has got out of proportion. If Parliamentary concern that contracts should exist between co-operatives and members arose with a view to preventing a member from selling outside the co-operative in order to enjoy a short term and minor advantage, well and good. A contract which lays down some penalty per package sold elsewhere prevents infringements of this kind. But the contracts normally drawn up are much more comprehensive documents which have the effect of making it difficult for a member to withdraw even for good reason. This could never have been intended and the present study has shown that we believe this to be undesirable.

If the results of this study can be summed up in a short paragraph it may be said that contracts have uses in defining the organisational relationship between a co-operative and its members, and may be useful to those members who are more concerned with certainty of selling then with price paid. But they are extremely blunt instruments for ensuring loyalty where members rightly
expect certain markets as well as prices at least as good as are obtainable elsewhere. The bluntness of the instrument arises from the fact that loyalty cannot be enforced by way of a contract, that a contract which ties members also relieves, for a time at least, any pressure on a co-operative to exact the last penny the market will yield and because, by making a contract a basis for trading, the introduction of competition into a market characterised by a degree of imperfect competition either in the provision of services or in the buying of produce is prevented, and prevented to the dis-advantage of the producer.
Bibliography


MEHREN, G. L. Agricultural co-operation in Great Britain. Report to the Minister of Agriculture and Fisheries and the Secretary of State for Scotland. 1953. (Unpublished).


In addition to a number of issues of Farming Business (now no longer published) and Parliamentary Debates (Hansard) the following Acts of Parliament are relevant and have been consulted.

Agriculture Act, 1947.
Agriculture and Forestry Association Act, 1962.
Agriculture and Horticulture Act, 1964.
Agriculture Act, 1967.
List of Co-operatives and Other Firms Consulted

During the enquiry all the co-operative horticultural marketing institutions were visited and each of them gave unstinted help both by providing documentary evidence and by giving up time for discussion. Equally generous help was given by other firms and institutions and the assistance of all is gratefully acknowledged. The organisations are listed below.

1. THE HORTICULTURAL MARKETING CO-OPERATIVES AS DEFINED IN THE TEXT

**Industrial and Provident Societies**

British Onion Growers Ltd., Orchardleigh, Wereham, King's Lynn, Norfolk.
Bedfordshire Growers Ltd., Potton Road, Biggleswade, Beds.
Cambridgeshire Growers Ltd., Longstanton, Cambridge.
East Sussex Growers Ltd., Polegate, Sussex.
Farmers' and Growers' Industries Ltd., Canterbury Road, West Worthing, Sussex.
Fylde Growers Ltd., Moorhead Nurseries, Harbour Lane, Warton, Preston, Lancs.
Gloucestershire Marketing Society Ltd., Alstone Lane, Cheltenham, Glos.
Hampshire Growers Ltd., Culverlands, Shedfield, Nr. Southampton, Hants.
Humber Growers Marketing Organisation Ltd., Welton, Brough, E. Yorks.
Littleton and Badsey Growers Ltd., Badsey, Nr. Evesham, Worcs.
Mid-Suffolk Growers Ltd., The Chestnuts, Forward Green, Stowmarket, Suffolk.
New Forest Growers (Marketing) Ltd., Ferndene, Bashley Cross, New Milton, Hants.
Norfolk Fruit Growers Ltd., Wroxham, Norfolk.
Norfolk Bulb Producers Ltd., Wroxham, Norfolk.
Nursery Trades (Lea Valley) Ltd., Turner's Hill, Cheshunt, Herts.
Old Leake Growers Association, Benington, Boston, Lincs.
Pershore Growers Ltd., Delford Road, Pershore, Worcs.
Sandwich and District Growers Ltd., Grove Ferry Road, Preston, Kent.
Selected Growers Ltd., Springfields, Spalding, Lincs.
West Herts Watercress Growers Ltd., 12 Queensway, Hemel Hempstead, Herts.

**Co-operative Companies**

Ace Fruit Ltd., Chelmsford, Essex.
Adhams (Lawford) Ltd., Colchester, Essex.
Apple Growers Association (West Kent) Ltd., Horsmonden, Tonbridge, Kent.
East Kent Packers Ltd., Faversham, Kent.
East Lincolnshire Growers Ltd., 'The Firs', Kirton, Boston, Lincs.
Home Grown Fruits Ltd., 12 Burgate Lane, Canterbury, Kent.
Kirdford Growers Ltd., Kirdford, Billingshurst, Sussex.
Romney Marsh Growers Ltd., Bowdell Farm, Brenzett, Romney Marsh, Kent.
Vegetable Growers (Kent) Ltd., The Old Malt House, Minnis Road, Birchington, Kent.
Waveney Apple Growers Ltd., Aldeby, Beccles, Suffolk.
Western Growers Ltd., St. Erth Station, Hayle, Cornwall.
Wye Fruit Ltd., Bromyard Road, Ledbury, Herefordshire.

2. THE FOLLOWING CO-OPERATIVES HAVE ALSO ASSISTED IN THE ENQUIRY:

*Industrial and Provident Societies*
Anglia Apple Growers Ltd., High Street, Earith, Hunts.
Framlingham Farmers Ltd., 4 Market Hill, Framlingham, Suffolk.
Lincolnshire Co-operative Marketing Association, Bradley Manor, Grimsby, Lincs.
Midland Shires Farmers Ltd., Hylton Road, Worcester.
New Forest Growers Ltd., Gulliver's Cottage, Warborne Lane, Portmore, Lymington, Hants.
Scottish Growers Federation, 221 West George Street, Glasgow, C2.
Wold Growers Ltd., N. Wold Farm, Thoresway, Market Rasen, Lincs.

*Co-operative Companies*
Checkers Ltd., Horsmonden, Tonbridge, Kent.
Kent Mushroom Farmers Ltd., Scudders Hill, Longfield, Kent.
Poddled Peas Ltd., The Grange, Leverton, Boston, Lincs.
Wrentham Growers, Surrey Chambers, Surrey Street, Lowestoft.

3. NON-CO-OPERATIVE FIRMS
Beecham Group Ltd., Beecham Foods Division.
Brown and Polson, Ltd.
Co-operative Wholesale Society Ltd., Greengrocery Division.
Co-operative Wholesale Society Ltd., Preserve Factory.
Geest Industries Ltd.
Mac Fisheries Ltd.
Marks and Spencer Ltd.
Smedley's Ltd.

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