

BEFORE THE CALIFORNIA LAW REVISION COMMISSION

In the Matter of the Hearing
of July 21, 1966 Upon a
Proposal for the Recodification
of Section 651 of the
Agricultural Code

STATEMENT OF DAIRY INSTITUTE OF CALIFORNIA

TO THE MEMBERS OF THE COMMISSION:

I am Emil Steck, counsel for Dairy Institute of California, a nonprofit organization, the members of which are engaged in the processing and distribution of fluid milk in the State of California. Members of Dairy Institute process and distribute approximately 60% of all fluid milk distributed in California. This statement is presented on behalf of Dairy Institute and under authorization derived from Mr. R. J. Beckus, manager of Dairy Institute.

Dairy Institute certainly has no opposition to an orderly recodification of the codes. However, it urges upon the Commission great care in this regard in respect to those sections of the Agricultural Code which have been the product of litigation in many cases and in any event the product of reconciliation of a number of divergent competitive views expressed to the Legislature. Seemingly minor and innocuous changes in legislation of this type will almost inevitably produce

further controversy and contentions from one or another of the groups interested in the legislation to the effect that the recodification was not merely a clarification of an existing statute but affected a substantive change. For this reason Dairy Institute will urge great caution upon the Legislature in any amendments of the provisions of present Chapters 16 and 17 of the Agricultural Code, other than the renumbering of sections, even though such amendments may be offered in the interest of recodification.

Present Chapters 16 and 17 of the Agricultural Code relate to unfair practices in connection with the production and distribution of milk and dairy products and to the establishment by the Director of Agriculture of minimum prices payable for fluid milk to producers and minimum wholesale and minimum retail prices for fluid milk sold by distributors and retail stores. Although Section 651 of the Agricultural Code does not fall within either Chapter 16 or Chapter 17, its controversial history causes the section to be subject to the same comments in connection with recodification as the provisions of Chapters 16 and 17. For years the Director has been attempting to protect the consuming public by an enforcement of those provisions in the Agricultural Code which classify as an "imitation milk product" certain products which are not easily distinguishable by the consuming public from milk products but which for various reasons do not measure up to code

standards developed over many years for such milk products. The Director's enforcement program has not met with much success in the courts due largely to ambiguities in the statutes sought to be enforced. The present language of Section 651 represents a considerable legislative effort in 1961 to place into law a statutory provision which would give the Director a sounder basis for enforcing the "imitation milk product" provisions of the statute than had theretofore been the case. When Section 651 was enacted in its present form it was the subject of a great deal of study by the Department, by the industry, and by members of the Legislature itself, and notably Senator James A. Cobey who is a member of your Commission and who was at the time as he is now a member of the Senate Agriculture Committee. At the same time that Section 651 was amended there was added to the Code for the first time a definition of "milk products" as contained in Agricultural Code Section 527.1.

As I understand it, the Commission which is meeting today primarily for the purpose of recodifying other codes so as to reconcile the wording of such codes with that of the newly enacted Evidence Code, is concerned with the language in Agricultural Code Section 651 that proof by the Director of certain facts applicable to products combining milk products with fat or oil other than milk fat "shall be prima facie proof that such substance, mixture, or compound is an 'imitation milk product.'" The Commission has proposed to delete from Section 651 the words

"shall be prima facie proof" and to substitute therefor the words, "establishes a rebuttable presumption," thus to conform Section 651 to the provisions of Section 601 of the Evidence Code which defines presumptions as either conclusive or rebuttable and the provisions of Evidence Code Section 602 which provide:

"A statute providing that a fact or group of facts is prima facie evidence of another fact establishes a rebuttable presumption."

If the Commission believes that its function calls for the elimination of the words "prima facie proof" wherever they appear in the codes and the substitution therefor of the words "rebuttable presumption," Dairy Institute will not stand in the way of such statutory amendments in the interests of recodification. Stated more simply, Dairy Institute does not object to amendment of Section 651 as proposed by the Commission to substitute in Section 651 the words "establishes a rebuttable presumption" for the words "shall be prima facie proof."

Dairy Institute, however, does object to the second proposed recodification amendment of Section 651 which amendment would add to the section the following sentence:

"This presumption is a presumption affecting the burden of producing evidence."

Applicable sections of the Evidence Code (Sections 600 through 607) provide that a rebuttable presumption either affects the burden of producing evidence or affects the burden of proof.

It may well be that in a criminal proceeding initiated by the Department for enforcement of Section 651 constitutional doubts would arise as to any presumption which casts upon the defendant the burden of proof on the point of determining whether or not the product which the defendant is selling is in fact an "imitation milk product." Criminal proceedings, however, could easily be eliminated from the effect of presumption by the addition of the language:

"Such presumption does not apply in a criminal action." The Commission has proposed this very format in respect to the recodification of other Agricultural Code sections, as, for example, Sections 751, 768, 772, 782, 892.5, 893, 920, 1040, 1272 and 1300.5.

With any criminal proceeding thus set aside Dairy Institute submits the indicated amendment to Section 651 by way of recodification, if the Commission believes that it must define as to each rebuttable presumption the point whether such presumption affects the burden of producing evidence or the burden of proof, is a sentence to the effect that "this presumption is a presumption affecting the burden of proof." The Commission must bear in mind that many years of legislative effort in defining code standards for milk and milk products for the protection of the public will be dissipated if there is not an adequate control of "imitation milk products" which either seek to trade upon the reputation of milk products, or confuse the public, or both, by

the resemblance of such imitations to the real thing but without compliance with the code standards for milk products. Section 651 does not establish a rebuttable presumption until the State establishes (1) that the product in question combines oil or fat other than milk fat with a milk product, (2) that the resulting substance, mixture or compound has the outward appearance and semblance in taste and otherwise of a milk product, and (3) is sold for use without further processing. Certainly public policy would dictate that after all these facts are proved the defendant should not merely have the burden of going forward with the evidence but should have the burden of proof of convincing the court that his product was not an "imitation milk product."

The Commission's attention is directed to the fact that in its attention to other sections of the Code, as, for example, Section 751, it has established a rebuttable presumption as a presumption affecting the burden of proof "in order to provide stability in the marketing of agricultural products." It is submitted that there is a public policy issue involved in the background, language and enforcement of Section 651 as to imitation milk products and that such public policy requires the Commission in its recodification of Section 651 to classify the presumption now contained therein as affecting the burden of proof rather than as affecting the burden of going forward with the evidence especially when, as Dairy Institute has suggested, criminal actions can be exempted from the ambit of the presumption.

In addition, shifting the burden of proof under the circumstances stated in Section 651 would find support in another reason advanced by the Commission in such situations, namely, any proof by the defendant to overcome the presumption would be peculiarly within his knowledge and ability to obtain. The Commission will observe this approach for example in its notes to Section 763.5.

In short summary, therefore, Dairy Institute requests that the recodification of Section 651 contain:

(1) The language proposed by the Commission substituting the words "establishes a rebuttable presumption" for the present statutory words "shall be prima facie proof."

(2) The addition of the language:

"This presumption is a presumption affecting the burden of proof. Such presumption does not apply in a criminal action."

Dated: July 21, 1966.

Respectfully submitted,

DAIRY INSTITUTE OF CALIFORNIA

By EMIL STECK