

#63(L)

6/3/66

First Supplement to Memorandum 66-29

Subject: Study 63(L) - The Evidence Code (Revisions of the Agricultural Code)

Exhibit III (green pages) is a letter from the California Department of Agriculture commenting on the proposed revisions of the Agricultural Code (attached to Memorandum 66-29 as Exhibit I). In this supplement, we propose to discuss the letter from the California Department of Agriculture on a section by section basis. Exhibits I, II, IV, and V all concern Agricultural Code Section 651 which obviously presents some practical political problems.

General Comment - effect of official certificates)

We changed to hearsay exceptions all of the Agricultural Code provisions that provide that a certificate covering classification, condition, grade or quality of an agricultural commodity is prima facie evidence of the truth of the matters contained therein. The Department of Agriculture believes these should be classified as presumptions affecting the burden of proof. See Exhibit III (green page 1).

We had intended to rely on Commercial Code Section 1202 (which makes such certificates prima facie evidence) to give the certificates issued under the Agricultural Code a presumptive effect. See Exhibit VI (attached) for text of Section 1202. However, we have not yet determined what to do with Section 1202 and will give you a suggested classification of this section for consideration at the July meeting.

We agree with the Department of Agriculture that the provisions that give inspection certificates a prima facie effect should be classified as presumptions affecting the burden of proof insofar as they relate to transactions

between private parties and in proceedings involving inspection activities of the department. We do not, however, believe that such certificates should have any presumptive effect in criminal proceedings. Accordingly, we recommend that the various Agricultural Code sections be revised along the lines of the revision of Section 768 set out below:

768. The inspection certificate issued pursuant to the provisions of this chapter shall be prima facie evidence of the percentage of defects according to the definition of such defects as defined in this chapter. The presumption established by this section is a presumption affecting the burden of proof. Such presumption does not apply in any criminal action.

This suggestion is pertinent to Agricultural Code Sections 751, 768, 772, 892.5, 893, 920, 1040, 1272, and 1300.5.

Now please turn to Exhibit III. We will take up each section, noting the comment of the Department of Agriculture. If a particular section is not listed below, the staff's suggestion concerning the section was approved by the department.

#### Section 18.

We have phrased this section as a burden of proof section, not as a presumption. Because of the constitutional questions raised when a presumption is used to shift the burden of proof to the defendant in a criminal action, we have allocated the burden of proof directly. We believe that the Department of Agriculture would approve the revision if it considered this reason for the suggested revision of Section 18.

#### Section 340.4

We have phrased this section as a burden of proof section, not as a presumption. Because of the constitutional questions raised when a presumption is used to shift the burden of proof to the defendant in a criminal action, we have allocated the burden of proof directly.

### Section 651

This section is a controversial one and is the result of much give and take over a period of years. Please read Exhibits I and II for background and the views of the Dairy Industry. From a drafting viewpoint, we believe that the amendment set out in Exhibit IV would best meet the problem this section presents. However, this form of revision is considered unsatisfactory to the Dairy Industry. Hence, we suggest approval by the Commission of the revision set out in Exhibit V. Time did not permit us to determine whether Exhibit V is satisfactory to the Dairy Industry, but the revision is drafted along the lines suggested by the Dairy Industry representative.

### Sections 751, 768, and 772

See general comment on effect of certificate.

### Section 782

We recommend the revision of the last portion of this section to provide that the notice of violation establishes a presumption affecting the burden of proof, but that such presumption does not apply in a criminal action. This would permit the presumption to apply in a case where the destruction of a substandard commodity is ordered.

### Section 796

The language deleted is deleted in Preprint Senate Bill No. 1, prepared by the Senate Interim Committee on Agriculture.

### Sections 892.5, 893, 920, 1040

See general comment on effect of certificate.

Section 1105

This section is deleted in Senate Preprint Bill No. 1, prepared by the Senate Interim Committee on Agriculture.

Section 1272, 1300.5

See general comment on effect of certificate.

Coordination with recodification program

We suggest that the Commission advise the Senate Interim Committee on Agriculture of all changes that are nonsubstantive and suggest that they be included in the recodification of the Agricultural Code.

Respectfully submitted,

John H. DeMouilly  
Executive Secretary

STECK & MARSTON

ATTORNEYS AT LAW

234 EAST COLORADO BOULEVARD  
PASADENA, CALIFORNIA 91101

PAUL H. MARSTON  
EMIL STECK, JR.

TELEPHONES  
681-8829  
796-3169

May 24, 1966

Mr. John H. DeMouilly  
Executive Secretary  
California Law Revision Commission  
Room 30, Crothers Hall  
Stanford University  
Stanford, California 94305

Re: Agricultural Code Section 651

Dear Mr. DeMouilly:

Thank you for your letter of May 23, 1966 which implements Mr. Cohen's letter to you of May 20, 1966.

Dairy Institute of California has for some time taken an active role in attempting to curtail the use of products which are imitations of milk and milk products and which seek to trade upon the reputation of the latter. The dangers of such imitations do not stem from any desire of the dairy industry to confine the tastes of the consuming public to milk and milk products, if there are other wholesome, edible competing products available. However, many years of effort have gone into the proper standardization of milk and dairy products so that (a) the public would always have dairy products in California of uniformly high quality and (b) the public would not be deceived or defrauded into believing that it was consuming such high quality products when in fact it was consuming only an imitation.

With these background thoughts in mind I should tell you that Section 651 was enacted after a good deal of legislative history and after a tremendous amount of thought and study not only on the part of Dairy Institute but on the part of Department officials, and perhaps most important of all, on the part of a number of interested legislators, including Senator James A. Cobey who has not only an extensive legislative background but is himself a knowledgeable and capable lawyer in the agricultural field.

Mr. John H. DeMouilly  
May 24, 1966  
Page Two

In my opinion the "prima facie" proof evidentiary test set out in Section 651 was never intended to establish anything beyond a rebuttable presumption such as that specified in the new Evidence Code. In other words, if the Department proved (1) that any fat or oil other than milk fat has been combined with a milk product and (2) that the resulting substance has the outward appearance and semblance in taste and otherwise of a milk product and (3) is sold for use without further processing (thus to be distinguished from a product, for example, which would be used by a baker in ultimately baking a cake or a pie), these facts would establish, prima facie, that the substance in question is an "imitation milk product." At this point the burden of going forward with the evidence would shift to the defendant, and unless the defendant came up with evidence persuasive to the trier of fact that his product was not an imitation product, the Department's proof would prevail.

Further, it was our thought, exactly as specified in Evidence Code Section 606, that if the Department proved the facts described above, the defendant would have to assume the burden of proof as to the non-existence of the presumed fact. Under these circumstances I believe that Dairy Institute would not object to some modification of the language of Section 651 to tie the "prima facie" proof test more precisely to the exact wording of the new Evidence Code. However, in view of the importance of the section and the many hours and weeks of time that have gone into its present wording I am quite sure that I voice the sentiments of Dairy Institute's manager (to whom I have sent a copy of this letter) as well as my own in suggesting that we move very cautiously in any change of the language of the section.

I am presently engaged in a series of depositions and will not have time to consider this matter until next week at which time I may wish to write you again on the subject of exact language. In the meanwhile I will probably call you on May 31 in accordance with your suggestion.

Mr. John H. DeMouilly  
May 24, 1966  
Page Three

Answering your second question as to the effect of the last sentence of Section 651 on the second sentence it seems to me this is a rather simple proposition. There are substances now expressly defined in the Code in which the presence of oil and fat other than milk fat have been expressly provided for. Here again we have standards which have been the subject of a great deal of thought and study and eventual legislation. Such products, for example, are oleomargarine (Sections 640, et seq.) and imitation cheese. These products have become sufficiently standardized over the years as to be the subject of legislative standardization. They are accordingly under Section 651 taken out of the category of "imitation milk products."

Very truly yours,

*Amil Steck, Jr.*

ES:pms

cc: R. J. Beckus  
Herbert L. Cohen

STECK & MARSTON

ATTORNEYS AT LAW

234 EAST COLORADO BOULEVARD  
PASADENA, CALIFORNIA 91101

PAUL H. MARSTON  
EMIL STECK, JR.

TELEPHONES  
681-9629  
786-3169

May 31, 1966

Mr. John H. DeMouilly  
Executive Secretary  
California Law Revision Commission  
Room 30, Crothers Hall  
Stanford University  
Stanford, California 94305

Re: Agricultural Code Section 651

Dear Mr. DeMouilly:

Receipt is acknowledged of your letter of May 26, 1966 and its enclosure.

In a preliminary way I should like to observe that while a number of sections of the Agricultural Code affecting milk may properly be described as somewhat routine in nature and hence safely subject to some clarification for Code revision purposes, there are other sections which have been the subject of a long and complicated legislative struggle. Since I have been counsel for Dairy Institute for almost fifteen years and ultimately have been the draftsman of most of these controversial sections I confess to you at the outset great reluctance to see any changes in such statutory provisions. It may be granted that if you had been drafting the section in the first place or if some other person had been drafting the section, the ultimate wording could have differed from that which I utilized. The wording which I did utilize, however, almost invariably compromised a number of conflicting views in a manner satisfactory to all such segments of opinion. It is not, therefore, out of any sense of pride of authorship that I defend the language of these sections but more practically out of an obligation to preserve in the statute the wording which the various segments of industry were willing to abide by when the controversy to which the section was addressed originally arose.

Section 651 is just such a section and was the product of literally years of controversy and litigation, some of which is still in progress. I note that Senator Cobey is a member of your Commission and I am quite sure

Mr. John H. DeMouilly  
May 31, 1966  
Page Two

he will have no difficulty in remembering this section since some of the final wording was the product of a hearing before the Senate Agriculture Committee in which he suggested changes during the progress of the hearing.

One great difficulty which I find with the exhibit attached to your letter is the invitation it appears to give to the defendant in any imitation milk product proceeding under Section 651 to win the case by proving certain things. I can assure you this invitation was definitely not the intent of the draftsman of this section at the outset. Rather the intent was to salvage something from the section out of a rather poor litigation history so that the State would be left with a rather clear avenue of attack in future litigation and so that the case from a proof standpoint would be made subject to the most favorable rules of evidence under which the State could operate.

I doubt very much that the section could constitutionally provide, especially in a criminal proceeding, that the ultimate burden of proof in an imitation milk proceeding would rest upon the defendant. However, the section clearly, in my opinion, may constitutionally provide, as it does, that proof of certain facts by the State shall establish a prima facie case which, as I pointed out in my prior letter, would then shift to the defendant the burden of going forward with the evidence to the extent that if the defendant could not rebut the facts established by the statute as prima facie proof, the State would prevail.

Under these circumstances I therefore seriously request that your Commission work on some other section besides Section 651, but if nevertheless your Commission is determined to make some change in the section, then the only change which I can see which could truly be called a "recodification" so as to preserve the meaning of the original section would be a change merely to conform the language of the section to the language of the new Evidence Code. This change would alter the words "shall be prima facie proof" to the following:

". . . shall establish a rebuttable presumption."

Mr. John H. DeMouilly  
May 31, 1966  
Page Three

So far as the last sentence of Section 651 is concerned it seems to me this section is quite clear and I fail to see any wording in the nature of recodification which would add anything to the sentence. If here again your Commission feels that it simply must make a change in wording in the section, then I make this suggestion as to the concluding portion of the second sentence:

" . . . is expressly permitted and provided for in product standards established in this division."

Beyond the two wording suggestions made I am sure that Dairy Institute will oppose any further changes in the interests of recodification. Again I must point out that I do not write the letter to sound argumentative or dogmatic. On the contrary anyone who has the slightest familiarity with the legislative process, and certainly the members of your Commission as listed on your letterhead are well acquainted with this process, will realize the accuracy of what I have said, namely, that when a highly controversial section like Section 651 finally makes its appearance in law you may be assured that any tinkering with words beyond the barest minimum clarification required for conformity to other codes will simply start anew the controversy which led to the enactment of the section in the first place and perhaps worst of all will entitle those who seek to avoid the impact of the section to argue that the wording change shows a legislative intent to weaken the meaning of the original section.

I consider this section of sufficient importance that I must request your continuing advice as to your reaction to my present letter and as to the Commission's intended action in respect to recodification of the section.

Very truly yours,

*Paul Steck, T.*

ES:pms

cc: R. J. Beckus  
Herbert L. Cohen

CALIFORNIA DEPARTMENT OF AGRICULTURE



1220 N Street  
Sacramento 95814

May 27, 1966

Mr. John DeMouly, Executive Secretary  
Law Revision Commission  
Stanford University  
Stanford, California

Dear Mr. DeMouly

This is in response to your letter of April 25, 1966 concerning proposed amendments to the Agricultural Code which you have drafted for the purpose of conforming certain provisions in the Code to the new Evidence Code.

Herb Cohen and I and others in the Department have studied these proposals, and we should like to compliment you on the good work you have done.

We are in agreement with many of the proposed revisions. However, before discussing each proposal separately, we have one general comment which relates to a number of the code sections. This is with regard to the handling of the various provisions which declare that a certificate covering classification, condition, grade or quality of an agricultural commodity is prima facie evidence of the truth of the matters contained therein. The intent of these provisions is to establish a presumption and not merely to provide a hearsay exemption. There is a sound reason for such certificates forming the basis for a presumption of the facts stated in them. These certificates are issued only by trained, qualified personnel, who examine each lot for which a certificate is issued. Millions of dollars worth of commodities are bought and sold in reliance upon these certificates. They provide a recognized trading base. The certificates are important and necessary to provide stability in the marketing of agricultural products, as well as to provide consumer protection against defective or substandard products. The sections concerned with these certificates are: 751, 768, 772, 892.5, 893, 920, 1040, 1272 and 1300.5.

In the following paragraphs we are stating briefly our views with regard to each of the sections of the Agricultural Code for which you have drafted proposed changes.

Mr. DeMouilly  
Page Two  
May 27, 1966

Section 18.--We agree that this section should be handled in the terms of the burden of proof. However, the proposed revision strikes the declaration that possession is prima facie evidence of possession for the purpose of sale and restates the matter in terms of burden of proof. Since the proposed new language has the same effect as a presumption affecting the burden of proof, we think for clarity and uniformity throughout the Code it would be better to leave the existing language and add a sentence stating that the presumption is a presumption affecting the burden of proof. This is the way you have handled other sections concerning the matter of burden of proof.

Section 108.--We agree with your proposal.

Section 115.--We agree with your proposal.

Section 124.--We agree with your proposal.

Section 152.--We agree with your proposal.

Section 160.97.--We agree with your proposal.

Section 332.3.--We agree with your proposal.

Section 340.4.--Our comment with regard to section 18 is also applicable here. For clarity and uniformity we also recommend leaving the present language as is, with the addition of a new sentence stating that the presumption is one affecting the burden of proof.

Section 423.--We agree with your proposal.

Section 438.--We agree with your proposal.

Section 651.--We believe the statement regarding prima facie proof in this section is intended to establish a presumption. We think it is the intent of the provision that proof of the fact that fat other than milk fat is combined with any milk product (if the end product also "has the outward appearance and semblance in taste and otherwise of a milk product and is sold for use without further processing") gives the burden of proof to the defendant to show that the product is not an imitation milk product. I believe this is generally in agreement with the views expressed by Mr. Emil Steck in his letter of May 24, 1966.

Section 695.--We agree with your proposal.

Section 746.4.--We agree with your proposal.

Mr. DeMouilly  
Page Three  
May 27, 1966

Section 751.--The intent of the second paragraph of this section is to establish a presumption. We suggest that the language not be changed and that a sentence be added stating that the presumption is a presumption affecting the burden of proof.

Section 763.5.--We agree with your proposal.

Section 768.--The intent of this section is to establish a presumption. We suggest that the language not be changed and that a sentence be added stating that the presumption is a presumption affecting the burden of proof.

Section 772.--The intent of this section is to establish a presumption. We suggest that the language not be changed and that a sentence be added stating that the presumption is a presumption affecting the burden of proof.

Section 782.--We agree with your recommendation on the first presumption in the section as covered in your proposed revision of section 782. However, we make the same suggestion for the last sentence of the paragraph as made above for other sections relating to certificates, although this particular provision involves a written notice of violation. The intent of the provision is to establish a presumption. The Notice of Violation is issued in the same manner as a certificate; and as you have suggested in your comment, it should be given the same effect as a certificate of condition, grade or quality.

Section 796.--We agree with your draft regarding the presumption. However, with regard to deleting the language which you have termed as unnecessary, it is suggested that this be referred to Mr. Paul Huff, Consultant to the Senate Interim Committee on Agriculture. This committee is working on recodification of the Agricultural Code.

Section 841.--We agree with your proposal.

Section 892.5.--The intent of this section is to establish a presumption. We suggest that the language not be changed and that a sentence be added stating that the presumption is a presumption affecting the burden of proof.

Section 893.--The intent of this section is to establish a presumption. We suggest that the language not be changed and that a sentence be added stating that the presumption is a presumption affecting the burden of proof.

Mr. DeMouilly  
Page Four  
May 27, 1966

Section 920.--We agree with your proposal with regard to the first presumption. However, the last sentence is also intended to establish a presumption. The seed laboratory report is similar in nature to the Certificate of Condition, Grade or Quality upon which we have commented above, and the intent of the law is the same for these reports as for such certificates. Thus we suggest the existing language be retained and a sentence be added stating that the presumption is a presumption affecting the burden of proof.

Section 1040.00.--The intent of this section is to establish a presumption. We suggest that the language not be changed and that a sentence be added stating that the presumption is a presumption affecting the burden of proof.

Section 1105.--We agree that this section is unnecessary. However, we question the advisability of repealing it. We think egg producers and dealers may oppose having it repealed.

Section 1106.1.--We agree with your proposal.

Section 1211.--We agree with your proposal.

Section 1267.--We agree with your proposal.

Section 1268.2.--We agree with your proposal.

Section 1272.--The intent of this section is to establish a presumption. We suggest that the language not be changed and that a sentence be added stating that the presumption is a presumption affecting the burden of proof.

Section 1272.5.--We agree with your proposal.

Section 1300.3-2.--We agree with your proposal.

Section 1300.5.--The intent of this section is to establish a presumption. We suggest that the language not be changed and that a sentence be added stating that the presumption is a presumption affecting the burden of proof.

Section 4135.--We agree with your proposal.

Section 4148.--We agree with your proposal.

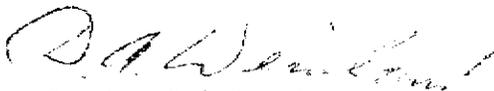
Section 4355.--We agree with your proposal.

Mr. DeMouilly  
Page Five  
May 27, 1966

Section 5551.--We agree with your proposal.

We appreciate the opportunity you have given us to make our views known to the California Law Revision Commission. If it is your desire, we shall be pleased to meet with you to discuss these proposals. Also as indicated above, the Senate Interim Committee on Agriculture is working on a recodification of the Agricultural Code. It is the intent of the Committee to have this work completed and to introduce the recodification bill as SB-1 at the 1967 session. Therefore, it is suggested that your final drafting be coordinated with the recodification revisions.

Sincerely



D. A. Weinland  
Assistant to the Director

EXHIBIT IV

SEC. . Section 651 of the Agricultural Code is amended to read:

651. (a) As used in this division, "imitation milk product" means any substance, mixture or compound, other than milk or milk products, intended for human food, made in imitation of milk or any milk product.

(b) For the purposes of this division, proof when the fact that any fat or oil other than milk fat has been combined with any milk product and that the resulting substance, mixture, or compound has the outward appearance and semblance in taste and otherwise of a milk product and is sold for use without further processing shall be prima facie proof that is proved, such substance, mixture, or compound is deemed to be an "imitation milk product" unless it is proved that ~~This section does not apply to any~~ the substance, mixture, or compound :

(1) Is not intended for human food; or

(2) Is not made in imitation of milk or any milk product; or

(3) Is one in which the presence of oil or fat other than milk fat is expressly permitted and provided for in this division.

Comment. The meaning of Section 651 is not entirely clear, but the section has been amended to state more clearly what appears to be its effect.

Under Section 651, as amended, a product is deemed to be an imitation milk product if it is established that (1) any fat or oil other than milk fat has been combined with a milk product and (2) the resulting substance

has the outward appearance and semblance in taste and otherwise of a milk product and is sold for use without further processing. But it is a matter of defense to show that the product (1) is one in which the presence of oil or fat other than milk fat is expressly permitted and provided for in this division or (2) is not intended for human food or (3) is not made in imitation of milk or any milk product. Section 651 has been rephrased in terms of burden of proof so that it will be clear that the section has this effect.

When subdivision (b) applies in a criminal case, the defendant can establish his defense by merely raising a reasonable doubt as to his guilt. See Evidence Code Section 501 and the Comment thereto. In a civil case, the defendant would have to establish the existence of a fact which he is required to prove by a preponderance of the evidence unless the applicable statute requires a different burden. See Evidence Code Section 115.

EXHIBIT V

SEC. . Section 651 of the Agricultural Code is amended to read:

651. As used in this division, "imitation milk product" means any substance, mixture or compound, other than milk or milk products, intended for human food, made in imitation of milk or any milk product. Proof that any fat or oil other than milk fat has been combined with any milk product and that the resulting substance, mixture, or compound has the outward appearance and semblance in taste and otherwise of a milk product and is sold for use without further processing ~~shall-be-prima-facie-proof~~ establishes a rebuttable presumption that such substance, mixture, or compound is an "imitation milk product." This presumption is a presumption affecting the burden of proof. This section shall not apply to any substance, mixture, or compound in which the presence of oil or fat other than milk fat is expressly permitted and provided for in this division.

COMMENT

Section 651 is amended to indicate more clearly that it creates a rebuttable presumption. Evidence Code Section 602 ("A statute providing that a fact or group of facts is prima facie evidence of another fact establishes a rebuttable presumption."). The presumption is classified as a presumption affecting the burden of proof. Evidence Code Section 606 ("The effect of a presumption affecting the burden of proof is to impose upon the party against whom it operates the burden of proof as to the nonexistence of the presumed fact."). On the effect of the presumption in a criminal action, see Evidence Code Section 607.

EXHIBIT VI

SEC. . Section 1202 of the Commercial Code is amended  
to read;

1202. A document in due form purporting to be a bill of lading, policy or certificate of insurance, official weigher's or inspector's certificate, consular invoice, or any other document authorized or required by the contract to be issued by a third party shall be prima facie evidence of its own authenticity and genuineness and of the facts stated in the document by the third party. The presumption established by this section is a presumption affecting the burden of producing evidence.

COMMENT

Section 1202 creates a hearsay exception and establishes a rebuttable presumption. See Evidence Code Section 602 ("A statute providing that a fact or group of facts is prima facie evidence of another fact establishes a rebuttable presumption") This presumption is classified as a presumption affecting the burden of producing evidence. This carries out the intent of the drafters of the Uniform Commercial Code. See Uniform Commercial Code Section 1-201(31)(defining "presumption" or "presumed"). See also the Uniform Commercial Code Comment to Section 1-202 (Section 1202 of California Commercial Code)("The provisions of this section go no further than establishing the documents in question as prima facie evidence and leave to the court the ultimate determination of the facts where the accuracy or authenticity of the documents is questioned. In this connection the section calls for a commercially reasonable interpretation.")