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LEGISLATIVE CONTROL OF IMITATION DAIRY PRODUCTS IN WISCONSIN

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NATURE has endowed Wisconsin as a great dairy state. Here are found everywhere streams of clear, cool water, a climate and soil in intimate partnership to produce a ration for the dairy cow, and a thrifty, industrious people with a peculiar gift for the business of dairying. Such a combination seems well-nigh the product of a great design. Looking almost anywhere throughout the state one finds dotted here and there creameries, condenseries, and cheese factories, monuments of an extremely important and promising industry. In Wisconsin a traveler upon the highways looks to the skyline for a silo, to the landscape for a cow. And what kind of cow? No longer the scrub, no-purpose animal with filthy flanks and hedgehog hair, but, in ever increasing numbers, pure-bred, special-purpose cows, in which pride and a sense of beauty, labor and intelligence, have been combined in exquisite expression.

But this home of the cow has also been one of the battle grounds where the natural product of the dairy has found a relentless competitor in the artificial product of the factory. About a decade after the invention of margarine,¹ a serious problem arose, to be dealt with in legislative and judicial contests of the state:

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¹The product was invented by Hippolyte Mege in 1869 as a result of a prize offered by Napoleon III for a butter substitute. *The New International Encyclopedia*.

the legislative halls of this and other states. It was H. C. Thom, the first dairy and food commissioner of Wisconsin, who, in 1890, put into language that has become a local classic, the reason for the great legislative and judicial contests of the state:

"Butter has worked all these years to make for itself a market and a demand. Now that they are established it should not be robbed by an imitation. The attack has just begun. No corner of the state is too remote for its presence. No table so humble, no dining room so grand, no lumber camp so rough, that oleomargarine, with its mellow name, will not walk upon and into, with a deceitful bow and brazen smile, with the claim that its name is butter."²

This struggle has been never-ceasing. In fact, it has become more acute with advancing time. There have been periodical legislative advances into new ground; but in many instances much of this territory has had to be surrendered because of constitutional limitations, or because of the new drives under the power of inventive genius.³ It will be the purpose of this discussion to describe the legislative attempts to control the manufacture and sale of imitation dairy products in Wisconsin. It is a local story, but it is not unlike that of other dairying states. It is a story that throws light on a trial and error procedure covering a period of more than fifty years. One must be daring, indeed, who would venture to say that now the end is in sight.

OLEOMARGARINE *Label Legislation*

While Wisconsin cannot claim the distinction of being the first state to pass regulatory legislation covering oleomargarine,⁴ action was taken at a comparatively early date owing to the fact that manufacturers were coloring their product to resemble butter, thus making it easy for sellers to engage in fraudulent practices. In 1881,⁵ following

² First Annual Report of the State Dairy and Food Commissioner, 1890, p. 31.

³ This interesting report of an attempt to keep up with invention was made in 1886: "The manufacturers of these deceptive imitations of dairy butter have made great progress in the art of producing an article designed and well calculated to deceive consumers, and we have been compelled to do a considerable amount of experimental work in order to be able to detect their counterfeits." *Second Annual Report of the New York State Dairy Commission*, page 14.

⁴ The commissioner of dairy and food products states in his report for 1908 (page 27) that Wisconsin was one of the first states, if not the first state, to initiate regulatory legislation. A bolder statement to the effect that Wisconsin was the first state appears in the report for 1926 (page 39). As a matter of fact, legislation of this character appeared before 1880. Label laws were passed in New York in 1877 (chapter 415), in Maryland in 1878 (chapter 493), and in Delaware in 1879 (chapter 154).

⁵ Chapter 40.

the precedents established by Eastern states, a label law⁶ was passed providing in substance that tallow compounds in imitation of butter must be marked "oleomargarine," and lard compounds, "butterine," according to certain letter specifications. Although there was never any real question as to the constitutionality of this legislation,⁷ it was powerless with any degree of success to combat alone,⁸ and without a special enforcing officer,⁹ the evil to which it was directed.¹⁰

⁶ It appears that there was a feeling, at least in some quarters, that legislation could not be drastic. This statement appears at the time in an editorial entitled "Bogus Butter," *The Wisconsin State Journal*, February 1, 1881: "It is perhaps as far as the law can go to compel manufacturers to label these compounds with names which shall be descriptive of their compositions." There are references to the "deleterious" effects of the "vile compounds," with this conclusion as to additional extra-legislative control: "Their hurtful character should be exposed, and the public warned against their use."

⁷ A label law was held constitutional in *Palmer v. State* (1883) 39 Ohio State 236. It was stated that "those who buy food have a right to know what they buy, and to have the means of judging for themselves as to its quality and value." Page 239. For a further statement on this point, see *Ernst Freund*, "The Police Power," 1904, Section 284.

⁸ "This statute (1881) proved weak and ineffective in preventing the sale of a slaughterhouse compound for genuine dairy butter, and so the fraud continued." *Biennial Report* of the Wisconsin Dairy and Food Commissioner, 1908, page 27.

⁹ A substantial reason for the ineffectiveness of this law was the fact that no officer was charged with its enforcement, the office of dairy and food commissioner not being created until 1889 (chapter 452). On this matter of legislation without enforcement, see an address of *H. C. Adams*, President of the Wisconsin Dairymen's Association, *Sixteenth Annual Report*, (1888), page 7.

¹⁰ Although many other controls have been adopted in Wisconsin, control through label legislation has been maintained, with progressive elaboration. The law of 1887 (chapter 185) simply required sellers and public users of imitation butter to post notices to such effect, with no size or letter requirements. The law of 1891 (chapter 165) was a distinct improvement. Not only must dealers and public users post notices, now of a designated type, but each vessel, package or parcel of imitation butter must carry its true name in letters of an indicated size. In 1895 (chapter 30), it was additionally provided that peddlers from carts or wagons must carry notices on the outside of their vehicles. The provision with respect to public users was modified, the requirement being that they must notify their guests, with no mention of the method of notification. In 1923 (chapter 147), the control was extended to the prohibition of the use of the words "butter," "creamery," or "dairy," "or the name or representation of any breed of dairy cattle, or any combination of such word or words and representation, or any other words or symbols or combination thereof commonly used in the sale of butter."

Absolute Prohibitory Legislation

The state had had four years of experience with an unenforced label law when the legislature met in 1885. It is apparent that there were certain forces in existence which would logically lead to some drastic method of control. There was a growing desire to protect the dairy industry, which was largely carried on in the home, from the ruthless methods of highly centralized and organized packers;¹¹ and there was a distrust of the manufactured product as a wholesome article of food;¹² and certain states, notably New York, having dealt with the situation in no uncompromising way, furnished a precedent for the Wisconsin legislature.¹³ Hence, the next legislative step, embodied in the act of 1885,¹⁴ quite understandably took the form of

¹¹ "* * * almost from the beginning oleomargarine was a packing house product—and the packers had the reputation of being among the most ruthless business organizations of the period—while butter remained in large part a household industry until well into the present century. The sympathy of the public was entirely with the dairy farmer in his struggle against the intrusion of the packer-made product." *Katherine Snodgrass*, "Margarine as a Butter Substitute," Stanford University, 1930, p. 18.

¹² The following is an excerpt from an address by W. H. Morrison, President, before the Wisconsin Dairywomen's Association in February, 1885: "What are the most serious difficulties in the way of our future prosperity? Here is an extract I noticed in a paper only a few days ago:

'Consumers of oleomargarine will be astonished to know that many of the hogs dying of cholera and other diseases are sold to soap boilers. Soap grease, scientifically deodorized, is considered a palatable fat by the manufacturers of adulterated butter.'

"One would naturally think that the amount consumed of this nauseous compound would be small, but the production is enormous and is largely on the increase.

"Live cows cannot compete with dead hogs. It is a contemptible business, and all who feel an interest in our dairy industry are compelled to admit that there is a way, and we have a right to demand of our legislature that if men devoid of soul and conscience will palm off cholera hogs' lard for butter, that stringent laws whose penalties cannot be escaped, will compel them to sell the filthy product for what it is." *Thirteenth Annual Report* of the Wisconsin Dairywomen's Association, 1885, page 10.

See also *Henry C. Bannard*, "The Oleomargarine Law," "Political Science Quarterly," II, 546, 548, who points out that the Commissioner of Agriculture in 1886 was a firm believer in the impurity of oleomargarine."

¹³ Seven states passed prohibitory legislation. In chronological order they are: New York in the latter part of 1884 (chapter 202), Maine, March 3, 1885 (chapter 297), Minnesota, March 5, 1885 (chapter 149), Wisconsin, April 13, 1885 (chapter 361), Ohio (with an exception), April 27, 1885 (House Bill No. 705), Pennsylvania, May 21, 1885 (Act No. 25), Michigan, June 12, 1885 (Public Acts No. 186).

¹⁴ Chapter 361.

absolute prohibition.¹⁵ In substance, this law provided a heavy penalty¹⁶ for the act of manufacturing the product to take the place of butter, or knowingly¹⁷ selling it or offering it for sale as an article of food.

As in the case of New York, there was a resort to a type of trickery in an attempt to insure the constitutionality of the law. The title states that the act was passed to prevent the manufacture and sale of oleaginous substances in imitation of butter, while the body of the act, as has already been indicated, provided for prohibition. The distinction between these two ideas is clearly brought out in *People v. Marx*,¹⁸ where it is said: "The prohibition is not of the manufacture or sale of an article designed as an imitation of dairy butter * * * or intended to be passed off as such, but as an article designed to take the place of dairy butter. * * * The artificial product might be green, red, or white instead of yellow, and totally dissimilar in appearance to ordinary butter * * * Simulation of butter is not the act prohibited."

The constitutionality of prohibitory legislation has had a very eventful history. A prohibitory law of New York was held unconstitutional in 1885 in the case of *People v. Marx*, to which reference has just been made. The court, satisfied as to the wholesomeness of the oleaginous substitute for butter, could not see in such a statute merely a protection against fraud and deceit, but the absolute elimination of the substitute article from the market *for the protection of the dairy interests*. As the court was interested in applying the principle that liberty includes the right to follow any pursuit non-productive of injury to others, the necessary effect was a declaration that the law was invalid.

This doctrine of liberty in the pursuit of a business enterprise is so fundamental in the American system that any controversy over the general principle is out of the question. When, therefore, a statute of

¹⁵ The other point of view was taken by *The Milwaukee Sentinel*, January 21, 1885, in which it was said, with special reference to the New York prohibitory law: "The prosecutors of these measures seem to forget that the public has a right to eat oleomargarine. * * * The state does well to interfere to prevent the sale of oleomargarine as butter, but it is absurd to permit boarding-house keepers to use dirty or rancid genuine butter and to prevent them from using clean and sweet oleomargarine. * * * We shall have a law, at this rate, empowering a policeman to invade the American home and wrest the deadly mince pie from the table; to collar the modest but disturbing doughnut. * * * It looks as though we will soon set up a statutory bill of fare. We are always forgetting that the expansion of the race depends upon the largest measure of individual liberty, and that more injury is inflicted by prohibitory laws than good is accomplished."

¹⁶ One year in jail or a thousand dollars fine or both for each offense.

¹⁷ This protection for innocent possessors became a weakness in the law.

¹⁸ (1885) 99 N. Y. 377.

Pennsylvania, similar to the one in New York, was upheld as constitutional regulation, not only in the supreme court of the state,¹⁹ but also in the supreme court of the United States in the well-known decision of *Powell v. Pennsylvania*,²⁰ the reason must be sought elsewhere. Specifically, the federal supreme court decided the issue on two grounds: that there was fraud, and that oleomargarine was deleterious to the health. On both of these issues the legislature of Pennsylvania had made a finding, which was taken by the court to be conclusive.²¹ Thus, upon this un rebuttable legislative conclusion, prohibitory legislation was enthroned: the dairy interests had emerged victorious.

But an important question still remained. Suppose the time should come when it could no longer be assumed that manufactured oleaginous compounds are unwholesome and deleterious—when, as a matter of fact, the court would take judicial notice of the wholesomeness of the product? The question on this assumption arose in 1897 in the case of *Schollenberger v. Pennsylvania*,²² and involved the same Pennsylvania law that had been passed upon in the *Powell* case. But, unlike this latter case, which related to matters of purely internal regulation, this case was concerned with the right of a dealer in Pennsylvania to sell in the original package oleomargarine which had been received through the channels of interstate commerce. The court pointed to the fact that Congress by an act of 1886²³ had recognized oleomargarine as a proper subject of interstate commerce, took judicial notice of the fact that it is a healthful and nutritious article of food, and decided that the state police power did not extend to its exclusion from interstate commerce.

While this case, on account of the nature of the question involved, did not directly overrule the *Powell* case, and while the fraud issue remained, the effectiveness of the *Powell* case was gone. In 1917 Professor Freund made this comment:

“* * * most of the reasoning of the earlier (*Powell*) decision has lost its force and it is more than doubtful whether that decision would

¹⁹ *Powell v. Commonwealth* (1886) 114 Pa. St. 265.

²⁰ (1887) 127 U. S. 678.

²¹ “The legislature of Pennsylvania, upon the fullest investigation, as we must conclusively presume, and upon reasonable grounds, as must be assumed from the record, has determined that the prohibition of the sale, or offering for sale, or having in possession to sell, for purposes of food, of any article manufactured out of oleaginous substances or compounds other than those produced from unadulterated milk or cream, to take the place of butter . . . will promote the public health and prevent fraud * * *” Page 686.

²² 171 U. S. 1.

²³ Chapter 840, U. S. Statutes at Large.

stand at the present day. As a matter of fact the decision has become substanceless."²⁴

Although as a result of the *Powell* decision in 1887 there was no question as to the constitutionality of the Wisconsin prohibitory law of 1885, it was repealed when the legislature met in 1889. There were apparently several reasons for this. In the first place, the Congressional enactment of 1886, recognizing oleomargarine as a commercial product gave it a standing it did not have before; second, there was a changing attitude in Wisconsin regarding the product as a healthful article of food;²⁵ third, the philosophy of regulation rather than prohibition was a better basis upon which to predicate business enterprise;²⁶ and, fourth, there existed a general clamor for cheaper foods,²⁷ resulting in a popular demand for an inexpensive butter substitute.

²⁴ "Standards of American Legislation," 1917, page 94. Ten years after these words were written, the issue in the *Powell* case was again raised in *Jelke v. Emery* (1927) 193 Wis. 311, 214 N.W. 369 as a result of some anti-flavor legislation passed in Wisconsin in 1925 (chapter 279), which was construed as being in effect prohibitory. The supreme court, speaking through Chief Justice Rosenberry, stated that the whole basis of fact in the *Powell* case, viz., that there was a presumption that oleomargarine was unwholesome, had been "entirely wiped out." In other words, "the decision had become substanceless."

²⁵ "It is not clear that we should prohibit the manufacture of any mixture that is not injurious to health, but we should strip oleomargarine of its power, and that can be done by obliging manufacturers to make it look like itself and not like butter." *First Annual Report* of the State Dairy and Food Commissioner, 1890, page 31.

²⁶ "First, the question is, has bogus butter come to stay? The impression seems to be gaining ground that it has. * * * The day of puny appeals for prohibition has passed. The dairyman is no child, and can fight an equal battle. If he can have the market sale of bogus butter regulated, the matter of supply and demand must, I think, govern the rest. The day of hard words and extreme criminal charges will no longer protect us as dairymen. The butterine men are entrenched." Excerpt from an address of W. H. Morrison, President, before the Wisconsin Dairymen's Association, *Fourteenth Annual Report*, 1886, pp. 20-22.

This same philosophy was being expressed by the dairy and food commissioner: "An honest manufacturer should be protected . . . but a man who sails under false colors should be condemned * * *" *First Annual Report* of the State Dairy and Food Commissioner, 1890, page 7.

²⁷ "The clamor of our people for cheaper food, for cheaper wear and for cheaper everything has had a pernicious result upon the purity of articles offered for sale." *First Annual Report* of the State Dairy and Food Commissioner, 1890, page 67.

Distinctive Color Legislation

Wisconsin has never attempted any form of distinctive color legislation. As a matter of fact, only three states, New Hampshire,²⁸ Minnesota,²⁹ and West Virginia,³⁰ ever resorted to this method of control. This type of law, providing specifically that oleomargarine should be colored pink, was held to be a valid exercise of the police power as a protection against fraud in *State v. Marshall*³¹ and in *State v. Horgan*.³² However, the United States supreme court in *Collins v. New Hampshire*,³³ in a case involving interstate commerce, held that the effect of such legislation was prohibitory, and therefore unconstitutional. It was also pointed out that if such legislation were upheld, odor as well as color might well be the basis of a distinction:

"If this provision for coloring the article were a legal condition, a legislature could not be limited to pink in its choice of colors. * * * It might equally as well provide that it should be colored blue or red or black. * * * If the legislature have the power to direct that the article shall be colored pink, which can only be accomplished by the use of some foreign substance that will have that effect, we do not know upon what principle it should be confined to discoloration, or why a provision for an offensive odor would not be just as valid as one prescribing the particular color."

Before this decision had been made in the *Collins* case, New Hampshire had repealed this law, with Minnesota and West Virginia following shortly thereafter.

"As" and "for" Butter Legislation

With the arguments definitely in favor of the repeal of prohibitory legislation, the legislature which met in 1889 had before it a rather recent judicial expression of a new philosophy of regulation in the case of *People v. Arensberg*:³⁴

"If it (butter made from animal fat or oil) possess the merits which are claimed for it, and is innocuous, those making and dealing in it should be protected in the enjoyment of liberty in those respects, but they may legally be required to sell it *for and as* what it actually is, and upon its own merits, and are not entitled to the benefit of any

²⁸ Chapter 68, Laws of 1885.

²⁹ Chapter 11, Laws of 1891.

³⁰ Chapter 8, Laws of 1891.

³¹ (1888) 64 N. H. 549.

³² (1893) 55 Minn. 183.

³³ (1898) 171 U. S. 30.

³⁴ (1887) 105 N. Y. 123, 129. This decision dealt with a prohibition of oleaginous compounds "in imitation or semblance of butter." The Wisconsin law was not so objective in its standard of measurement.

additional market value which may be imparted to it by resorting to artificial means to make it resemble dairy butter in appearance. It may be butter, but it is not butter made from cream, and the difference in cost or market value, if no other, would make it a fraud to pass off one article for the other." (*Italics ours.*)

The law of 1889,³⁵ which was enacted to take the place of the legislation of 1885 was still prohibitory; but the stamp of this new philosophy led only to the prohibition upon the manufacture of the imitation product "with intent to sell the same for butter," and a prohibition upon its sale "as and for butter." The act, which is an exact copy, with the exception of the penalty, of section 8, chapter 183, Laws of New York for 1885, reads, so far as is material for this discussion, as follows:

"No person shall manufacture * * * any oleaginous substance * * * with intent to sell the same *for butter* * * * or have the same in his possession or offer the same for sale with such intent, nor shall any article or substance * * * so made * * * be sold intentionally or otherwise *as and for butter* * * * the product of the dairy." (*Italics ours.*)

Compared with later legislation which uses a color standard, this method of control is not entitled to a high rank. It is further weakened in practice by basing illegality upon proof of intent.³⁶

Evidently the attempt to find a satisfactory method of regulation was challenging legislative ingenuity. At the next session of the legislature the matter was taken up again, but this time in a more detailed manner.

The material part of the legislation enacted in 1891³⁷ is as follows:

Section 1. No person shall sell . . . any substance . . . purporting appearing, or represented to be butter . . . or having the semblance of butter . . . unless it is done under its true name. . . .

Section 2. No person . . . shall manufacture out of any oleaginous substance . . . any article in imitation of or designed to be sold *as butter*.

Section 3. No person . . . shall manufacture . . . any oleaginous . . . substance . . . or have the same in his possession with intent to offer or expose the same for sale, or sell . . . the same *as and for butter*. (*Italics ours.*)

³⁵ Chapter 424.

³⁶ "Whatever merits the law of 1889 may have possessed otherwise, it failed utterly of its purpose by providing that *intent* must be proven in order to establish the unlawful character of the sale. *Biennial Report* of the Dairy and Food Commissioner, 1908, page 28.

³⁷ Chapter 165.

It will be observed that there is an adherence to the *rationale* of the previous legislation, supplemented by label and color control, but the latter applying only to the manufacture.

This law was probably an earnest but misguided attempt to deal with a knotty problem. The seller and the manufacturer, it will be noticed, were placed in two separate categories. The seller might dispose of the properly labeled artificial product "under its true name," even though it had the semblance of butter. After permitting such sale, the statute rather inconsistently, it appears, prohibited the manufacture of any article out of any substance other than milk or cream "in imitation of or designed to be sold as butter * * *"

Several shortcomings are apparent. It was not simple enough to be successful; there might be a serious question as to the true name of the artificial product; and a prosecutor would always be confronted with the question as to whether an article in its manufacture was designed to be sold as butter, and whether there was an "intent" to sell or offer or expose it for sale "as and for butter." About this law, which produced no convictions,³⁸ the dairy and food commissioner of 1896 had this to say:

"It was the judgment of the dairymen of the state and of the men familiar with the traffic in imitation dairy goods, that the law was ineffective and that oleomargarine was being sold as butter. The law was not only violated by the sale of unlabeled packages by grocerymen to customers ignorant of their character, but it was also violated when the purchasers of butterine bought the article for what it was and then placed it upon the tables of restaurants, boarding houses and hotels for the consumption of guests who supposed they were eating butter."³⁹

However well designed in theory was the "as" and "for" butter legislation, it failed utterly in practice.

Anti-color Legislation

Fourteen years of experience resulting only in a succession of failures,⁴⁰ coupled with an apparent success in many other states with a

³⁸ Regarding this law, it was said: "You will search the records of the courts of the state in vain for prosecutions or convictions under it." *Brief of the State of Wisconsin in Meyer v. State*, Vol. 874, page 59, Wisconsin State Library.

³⁹ *Report*, pp. 47-48.

⁴⁰ "The legislature having learned by fourteen years of experience that the manufacturers of and dealers in oleomargarine could not be depended upon to label it and sell it for what it actually was, determined to make the color of oleomargarine its own declaration as to its lawful or unlawful character, and thus prevent by law oleomargarine from stealing the legitimate color of genuine butter." *Report of the Wisconsin Dairy and Food Commissioner, 1908*, p. 29.

different system of control, produced a legislative move in Wisconsin in which the yellow color of butter was to be the standard of prohibition.⁴¹ The law,⁴² which was practically an exact copy of the Massachusetts enactment on the subject,⁴³ forbade, in effect, the manufacture or sale of any oleaginous compound "in imitation of yellow butter."

The Massachusetts statute had been passed upon by the supreme judicial court of that state in *Commonwealth v. Huntley*,⁴⁴ and its validity sustained both as to the question of state and interstate commerce. The validity of the statute, so far as state control over interstate commerce was concerned, was passed upon favorably by the supreme court of the United States in *Phimley v. Massachusetts*.⁴⁵ But in order to understand the determination of the question of state power over an article in the original package in interstate commerce, it is necessary to consider the case of *Leisy v. Hardin*,⁴⁶ which was decided in 1890. An Iowa official, relying upon a prohibitory statute of that state, had seized a consignment of beer that was being transported into Iowa from Illinois. The court decided that there could be no state interference with the transportation of the beer in the original package, as it was a legitimate article of commerce recognized by Congress. What distinction could be made between beer and oleomargarine colored yellow in imitation of butter? The court pointed out that the beer was genuine, while the simulated artificial product was not what it purported to be. Upon this distinction the state prohibition in interstate commerce of oleomargarine in imitation of butter could be sustained.

The law of 1895 was construed in the two cases of *Meyer v. State*⁴⁷ and *Essex v. State*.⁴⁸ Just what did the legislature mean by prohibiting the manufacture and sale of oleomargarine compounds "in imitation of yellow butter?" It was held in the former case that "imitation" meant "conscious imitation," but that an imitation can be produced either by a proper selection of the ingredients or by the use of a dye, with the

⁴¹ The first color-standard legislation was passed in New Jersey in March 1886 (chapter lxxxiv), and by 1902 had been adopted by more than thirty states. See *Katherine Snodgrass*, "Margarine as a Butter Substitute," pages 93-95 for a complete list of states with their different types of legislation. It will be seen that by the time of the adoption of this method of control in the manufacture and sale of oleomargarine, the highly experimental stage had been passed.

⁴² Chapter 30, Laws of 1895.

⁴³ Chapter 58, Laws of 1891.

⁴⁴ (1892) 156 Mass. 236.

⁴⁵ (1894) 155 U. S. 461.

⁴⁶ 135 U. S. 100.

⁴⁷ (1908) 134 Wis. 156, 114 N.W. 501.

⁴⁸ (1920) 170 Wis. 512, 175 N.W. 795.

difference that the use of a dye indicates a conscious imitation while imitation through a selection of ingredients, there being a choice, is a question of fact for the jury. As for "yellow" butter, it was argued that it could not mean the color of butter, as the word "yellow" would then be surplusage; and, furthermore, that there was no statutory standard or test for "yellow."⁴⁹ The court replied that "yellow was meant in its popular sense," and that a producer of whitish butter could escape oleomargarine competition by resort to a yellow dye. This statement did not clear up the situation, but left considerable uncertainty as to the meaning of yellow, which was made more definite in *Essex v. State*, where it is stated that "the term *yellow butter* . . . meant that shade . . . as distinguished from pale straw, light yellow, or any other shade of yellow lighter than that usually and commonly referred to as yellow butter . . . which . . . is sometimes known as 'June butter'." There is of course a certain amount of indefiniteness yet as to the shade of yellow; but this definition is as probably as close as it is possible to come without provision for a mechanical color test.⁵⁰

Anti-flavor Legislation

Whatever the motive of the legislature in the enactment of the anti-color law,—whether merely to prevent fraud or to reach in the direction of the practical prohibition of the manufacture and sale of oleomargarine,—at any rate, when judged by the test of prohibition, it was not a success. But as a measure to prevent fraud, it was efficient, and was allowed to stand. Color, flavor, and consistency are the three qualities of butter. If color could be substantially controlled, why not the flavor, with a resultant damper on the use of the artificial product? An attempted advance into this new territory or regulation was made by the states of Washington⁵¹ and Oregon⁵² in 1923. The laws of these two states, which were identical in their wording, prohibited the manufacture and sale of butter substitutes from a combination of milk products and vegetable fats. They both failed of ratification, however, when submitted to the people in 1924. The Wisconsin law,⁵³ passed in

⁴⁹ See Brief of the Plaintiff-in-Error, *Meyer v. State*, Vol. 874, pages 32-34, Wisconsin State Library.

⁵⁰ "One of the real difficulties in enforcing color laws is the difficulty of accurately defining a color in words in the statute. * * * The proposed national law seeks to adopt a new mechanical color test devised . . . to set a standard of shade beyond which the color of oleomargarine may not go. It is believed that this standard will be as easy to apply as a standard of weight or length * * *" *The Wisconsin Agriculturist*, February 6, 1913.

⁵¹ Chapter 22, section 2. Session Laws, 1923.

⁵² Chapter 168, General Laws of 1923.

⁵³ Chapter 279.

1925, provided that purely oleaginous compounds might be manufactured and sold, while those which were combined with milk or milk fats were prohibited. Inasmuch as the flavor required to assure marketability was a result of a proper combination of extraneous fats and milk, this statute was, for all practical purposes, prohibitory. When the constitutionality of this legislation was being tested in the supreme court of Wisconsin,⁵⁴ the theoretical camouflage was quickly torn away by Chief Justice Rosenberry, with the statement that the contention that there was no prohibition was "little more than a quibble."

As brought out in this case of *Jelke v. Emery*, there have been developed three possible arguments for the prohibition of the manufacture and sale of oleomargarine: that its consumption is deleterious to health, that the possibilities of fraud in connection with its manufacture and sale are very great, and that its existence is a great detriment to the dairy interests because of unfair competition. But no evidence was presented that there was any longer any question as to unhealthfulness⁵⁵ or fraud⁵⁶ so far as the manufacture and sale of the product were concerned in Wisconsin; and in answer to the argument that prohibition was necessary to protect the dairy industry from unfair competition, the court has this to say:

"The legislature has no more power to prohibit the manufacture and sale of oleomargarine in aid of the dairy industry than it would have to prohibit the raising of sheep in the aid of the beef-cattle industry or to prohibit the manufacture and sale of cement for the benefit of the lumber industry."

The anti-flavor law of 1925 was therefore invalid. It had been construed as prohibition; and it was only too evident to the court that prohibition could not be constitutional regulation.⁵⁷ Thus the case of

⁵⁴ *Jelke v. Emery* (1927) 193 Wis. 311, 214 N.W. 369.

⁵⁵ "It . . . appears without dispute that oleomargarine is a nutritious, wholesome, healthful food." Page 317.

⁵⁶ "It . . . appears that while it (oleomargarine) is in fact a substitute for butter, it is sold upon its own merits and under such circumstances that every purchaser and every user is fully aware that he is purchasing or using, as the case may be, oleomargarine and not butter." Page 317.

⁵⁷ The court could not resist the temptation to chide the legislature for its apparent disregard of constitutional principles: "* * * we are moved to observe that the mandates of the constitution are just as binding upon the conscience of the legislator as upon the conscience of the judge. The constitution is the mandate of a sovereign people to its servants and representatives and no one of them has a right to ignore its plain commands. Every officer . . . is required by the constitution, as a condition of holding his office, to take a solemn oath to support it. *It was not intended that the whole burden of that support should fall upon the judicial department.*" (Italics ours.)

Powell v. Pennsylvania, which gave rise to the case of *Jelke v. Emery*⁵⁸ was without content in the light of developments since it was written by the supreme court of the United States. It is reasonable to suppose that the supreme court itself would take the same position as the Wisconsin court were the matter again presented to it.

License Legislation

The decision in *Jelke v. Emery* was a severe blow to a legislature that was desirous of seeing the artificial article put out of existence. But an examination of legislative controls revealed that there yet remained some that had not been used. There was the licensing system. Would it be possible to place the license fees high enough to prevent advantageous competition of the artificial with the natural product, or even to prohibit the substitute entirely? A law was passed in 1931,⁵⁹ providing for high license fees.⁶⁰

A license law, which had had the advantage of a court review, was passed in Idaho in 1929.⁶¹ License fees were required of wholesalers and retailers, but were much lower than those provided in Wisconsin. The constitutionality of this legislation was passed upon by the United States district court in *The Best Foods, Inc. v. Welch*,⁶² where the court took judicial notice of the dependence of the state upon agricultural pursuits, and upheld a policy of taxation designed for the welfare of the inhabitants of the state, "many of whom are engaged in one of the basic, if not the basic industry of the state and nation."

The court found that the license fees were for the purpose of raising revenue rather than for regulation, and that as a revenue measure the question as to the reasonableness of the amount of the tax was beyond its jurisdiction. It was further stated that there was

"no interest in the policy of the state revenue laws so long as equal protection is not denied, and is reasonable and not purely arbitrary

⁵⁸ See page 88.

⁵⁹ Chapter 96.

⁶⁰ Fees to be paid according to the unamended law (chapter 96) were as follows: manufactures, one thousand dollars; wholesale dealers, five hundred dollars; retail dealers, one hundred to four hundred dollars, graduated according to the amount of sales; hotel and restaurant keepers, one hundred dollars; proprietors of boarding houses, fifty dollars.

⁶¹ Chapter 70. A law was passed in Montana (chapter 93) and a local license and tax law by Utah (chapter 91), also in 1929. A Pennsylvania license law was passed as early as 1901 (Act No. 208, section 2). The similarity of the fees to those in Wisconsin makes it appear that the former was possibly used as a model. A conflict of the Utah law with a technical provision of the state constitution was passed upon in *The Best Foods v. Christensen* (1930) 285 p. 1001.

⁶² (1929) 34 Fed. (2nd) 682.

* * * There is no equality between the cow on the farm . . . and butter, and the manufacturing plant and . . . oleomargarine."⁶³

The constitutionality of the Wisconsin law was contested in the circuit court of Dane county.⁶⁴ The court was of the opinion⁶⁵ that the purpose of the law was "to whip the devil around the stump," that is, to prohibit indirectly the manufacture and sale of oleomargarine,⁶⁶ a matter that had been passed upon by the supreme court of the state in *Jelke v. Emery*; and that its provisions indicated that it was a "license regulatory act"⁶⁷ rather than an act to raise revenue. This conclusion was further supported by the fact that it produced more revenue than was necessary for regulation, and if considered as a revenue measure it had the effect of causing a precipitous drop in the number of those in any way concerned with the manufacture, sale or use of the product.

Tax Legislation

As a result of this circuit court decision, the law was modified at the special session of 1931.⁶⁸ It is now definitely declared to be the legislative objective to levy an occupational tax for the purpose of

⁶³ "Placing in competition 151,722 cows in the state with a butter production on the farms alone of 3,661,728 pounds, with factories selling in the state more than a million pounds of oleomargarine per annum, which can be produced at a cost of from 35 to 55 per cent. of the cost of butter, and requiring the cow and the farm which supports her to contribute to the maintenance of the state and local government by taxation, and affording protection to the dealers in the state in oleomargarine, advertised by expenditure of large sums of money . . . challenges the state's power to keep alive.'" P. 687.

⁶⁴ *Jelke v. Beck, et al.*

⁶⁵ The opinion is printed in *The Wisconsin State Journal*, September 27, 1931.

⁶⁶ This editorial from *The Wisconsin State Journal*, April 1, 1932, throws some additional light on the situation: "It (the license law) was passed with the admitted objective of preventing the manufacture and sale of oleomargarine in Wisconsin. Everyone who is at all familiar with the arguments before the committee knows that it was openly stated that that was its purpose. It was known by those who passed the law that there was serious question as to its constitutionality. No opinion was asked from the office of the attorney general as to its constitutionality."

⁶⁷ Some of the provisions so indicative are that a license is granted on condition that the "name and style" of the business is not "calculated to deceive and mislead the public;" that the licensee's premises may be inspected at any time; and that a failure to make certain reports will lead to a revocation of the license. At the special legislative session of 1931 (chapter 3) this interesting additional provision was added: "For the purpose of securing information as to any violation . . . the department of agriculture and markets shall give as wide publicity as possible to the names of licensees . . . and taxes paid by them. * * *" This is another species of control through indirection.

⁶⁸ Chapter 3.

raising revenue; and that the regulations found as a part of the act are "imposed for the purpose of securing a full collection of such revenue." As the decision of the court affected only the fees to be paid by retail dealers and public users,⁶⁹ these fees were reduced substantially to nominal levels, but dealers and users must pay a tax of six cents a pound.

FILLED MILK

There is no filled milk⁷⁰ produced or sold in Wisconsin, nor has there been any for a decade. In response to a wide-spread and earnest demand,⁷¹ a law was passed in 1921,⁷² making it impossible to manufacture or sell the product.

The constitutionality of this law was passed upon by the supreme court of the state in *State ex rel. Carnation Milk Products Company v. Emery*.⁷³ Fraud, unhealthfulness, and impairment of the dairy interests, used unsuccessfully in the war on oleomargarine, were the three

⁶⁹ The court did not pass upon the provisions relating to the license fees to be paid by manufacturers and wholesalers, as these provisions were not in issue at the trial, but it is stated that there may be doubt as to their constitutionality. They were saved from the effect of the decision by a provision that the constitutionality of one provision should have no effect on any other provision. It appears that the argument of the court would have as direct an application to these provisions as to those that were held invalid.

⁷⁰ The expression "filled milk," as it is defined by federal statute, is "any milk, cream, or skimmed milk, whether or not condensed, evaporated, concentrated, powdered, dried, or desiccated, to which has been added, or which has been blended or compounded with, any fat or oil other than milk fat, so that the resulting product is in imitation or semblance of milk, cream, or skimmed milk, whether or not condensed, evaporated, concentrated, powdered, dried or desiccated." Chapter 262, section 1 (c) U. S. Statutes at Large, 1923.

⁷¹ See *Annual Report* of the Dairy and Food Commissioner, 1921-22, page 27. This is a statement made by J. Q. Emery, *The Wisconsin State Journal*, August 16, 1922: "The preparation of that (filled milk bill) was the earnest collaboration of a group of people who took the initiative in securing legislation to throttle the menace of the filled milk business * * *. That group * * *, reinforced by an intensely aroused public all over the state, aided by a portion of the press of the state, numerous organizations, clubs, individuals and members of the Legislature, through their combined efforts effected the enactment of that bill into law * * * to promote the political fortunes of any party, faction, or individual, formed no part of their program or effort."

⁷² Chapter 409.

⁷³ (1922) 178 Wis. 147, 189 N.W. 564. The conflict of an Ohio statute prohibiting the manufacture and sale of condensed skimmed milk was passed upon in *Hebe Company v. Shaw* (1918) 248 U. S. 297. In a decision written by Justice Holmes it was held that filled milk was of such a nature that a legislative policy of prohibition could be supported. Three justices thought that a statute dealing with condensed skimmed milk did not cover a compound of such skimmed milk and vegetable fat.

engines of onslaught to be used in the judicial contest over the right to produce and sell filled milk. But in this case the results were different. On the assumption that the legislative findings were reasonable, the court declared that filled milk was a product which could and did easily lend itself to the perpetration of a fraud. Advertising matter had been used which gave the impression "that the compounds are equal to if not better than the genuine dairy product;" that the profit motive furnished a temptation to the dealer to sell the imitation for the genuine article; and that the compound could easily lead to deception as it was in *exact* imitation of evaporated milk. On the other two issues of health and protection to the dairy interests, it was declared that the article was deleterious to health in that it did not possess certain necessary food elements, and that the reputation and vitality of the dairy industry were menaced by "cheap and deceptive substitutes."⁷⁴

Even while this case was being considered by the court, arguments were being made for and against a federal bill⁷⁵ to prohibit the manufacture of filled milk in the territories of the United States or to transport it through the channels of interstate commerce. The arguments for the bill having prevailed, it became a law on March 4, 1923.⁷⁶

⁷⁴ Justice Rosenberry did not agree with the majority of the court that prohibition was necessary to protect the dairy interests.

⁷⁵ *Edward Voigt*, of Wisconsin, who introduced this bill, used about the same arguments in its favor as were presented to the supreme court of Wisconsin. The pungency of his remarks, however, make them worthy of quotation: "I guarantee that any infant that is fed for a few weeks on one of these milk substitutes will develop rickets. * * * My suggestion is that we do everything that is in our power to maintain at its full tide an industry so important as the dairy industry, and to bring the American cow into competition with a cocoanut grove is an injustice." Quoted in *The Capital Times*, June 20, 1922.

The Chicago Tribune, (August 24, 1922) in arguing against the bill, makes no reference to the fraud issue, and says that "the plain truth is there is no injury to health." It is further indicated that the "argument of those who advocate this bill do not smell of carbolic acid, but, on the contrary, it is possible to detect a stable odor."

In connection with this bill, Leonard S. Echols had this to say regarding general governmental policies with respect to business: "There is nothing new in the fallacies and the 'isms' proposed by the paternalist. * * * Our country is drifting into a realm of paternalism where the Government proposes to stand guardian for the individual. * * * I am just as willing to force the individual to use 'filled milk' as I am to deprive him of the privilege of using it. * * * If this sort of legislation is to be enthroned, then no concern can safely engage in the manufacture of any new product whatever." *Congressional Record*, May 24, 1922.

⁷⁶ Chapter 262, section 2, U. S. Statutes at Large. It was declared illegal on the grounds that it is "injurious to the public health, and its sale constitutes a fraud upon the public."

SUMMARY

Such is the history of the control of the Wisconsin legislature over the manufacture and sale of imitation dairy products.⁷⁷ The great struggle has been with oleomargarine, and represents an interesting, but not especially praiseworthy, chapter in American legislative history.

Label legislation, in connection with proper administrative machinery, and anti-color legislation have not been ineffective in reducing fraud. "As" and "for" butter legislation has been found to be ineffective. Distinctive color legislation, found by the courts to be unconstitutional, was never tried. Anti-flavor legislation was attempted, but like distinctive color legislation, was found to be unconstitutional, because it was, in effect, prohibitory. License legislation, designed for or having the effect of prohibition, has likewise met defeat in the courts. Tax legislation is still too recent to give rise to comment.

Wisconsin today exercises three controls over oleomargarine: label, color, and tax. If the ideal is regulation, then it has been achieved.

⁷⁷ This discussion has not dealt with filled cheese, as little difficulty was experienced with its control. The product long ago disappeared from the market.