BETWEEN:

1951

Jan. 23, 24 & 25

Dec. 18

HIS MAJESTY THE KING .... PLAINTIFF;

AND

PLANTERS NUT & CHOCOLATE CO. LTD. .... DEFENDANT.

Revenue—Sales tax—Excise Tax Act, R.S.C. 1927, c. 179, s. 86(1), s. 89—Schedule III—"Foodstuffs"—"Shortening"—Words of a statute not applied to any particular art or science are to be construed as they are understood in common language—Peanut oil not "shortening" within the meaning of Schedule III.

Defendant manufactures and sells peanut oil in liquid form advertising it as liquid shortening and as an all-purpose cooking and salad oil. It claims exemption from sales tax under the exemption provided for by s. 89 and Schedule III of the Excise Tax Act which under the heading "Foodstuffs" exempts "peanut butter and shortening and materials for use exclusively in the manufacture thereof".

Held: That the peanut oil sold by the defendant being in liquid form and therefore lacking the quality of plasticity to be found in lard, is not "shortening" within the meaning of that word as found in Schedule III of the Excise Tax Act.

2. That the words of the Excise Tax Act and Schedule III are not applied to any particular science or art and are to be construed as they are understood in common language.

INFORMATION exhibited by the Attorney General of Canada to recover sales tax from the defendant.

The action was tried before the Honourable Mr. Justice Cameron at Toronto.

J. W. Pickup, K.C. for plaintiff.

The Honourable S. A. Hayden, K.C. and *J. W. Blain* for defendant.

The facts and questions of law raised are stated in the reasons for judgment.

CAMERON J. now (December 18, 1951) delivered the following judgment:

In this Information the plaintiff, under section 86(1) of the Excise Tax Act, R.S.C. 1927, c. 179, as amended, claims from the defendant the sum of $1,603.14 for consumption or sales tax said to be payable in respect of the admitted manufacture and sale by the defendant of peanut oil in the period August 23, 1949, to September 30, 1949, together

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with certain penalties and interest for non-payment thereof within the time limited by the Act. The proceedings are in the nature of a test case, for I was informed at the trial that the defendant had then paid the full amount of the tax under protest and without admitting any liability therefor. Moreover, there is no dispute between the parties as to the amount of the claim if, in fact, the respondent be liable to tax.

Section 89 of the Act provides that the tax imposed by section 86 shall not apply to the sale or importation of the articles mentioned in Schedule III thereto, and included in that schedule under the heading of "Foodstuffs," the following are exempted:

> Peanut butter and *shortening* and materials for use exclusively in the manufacture thereof.

The sole contest between the parties is whether the peanut oil so sold and manufactured by the defendant is "shortening" within the meaning to be given to that word in the Schedule. If the defendant's product is found to be "shortening," it is exempt from the tax.

The Excise Tax Act contains no definition of "shortening" or of the other articles mentioned in Schedule III. The words of the Act and of the Schedule are not applied to any particular science or art, and in my opinion are therefore to be construed as they are understood in common language. In the case of *The King* v. *Planter's Nut and Chocolate Co. Ltd.* (1), I had to consider the meaning of the words "fruit" and "vegetable," also found in Schedule III, and reached the conclusion that while from a botanist's point of view the peanut and cashew nut might be included in "vegetable" or "fruit," neither was so included in the common understanding of the words "peanut" or "cashew nut." That judgment was recently affirmed in the Supreme Court of Canada.

The cases which I there cited on this point are of equal application here.

In Craies on Statute Law, 4th Ed., p. 151, reference is made to the judgment of Lord Tenterden in *Att.-Gen.* v. *Winstanley* (2), in which at p. 310 he said that "the words of an Act of Parliament which are not applied to any particular science or art" are to be construed "as they are

(1) (1951) Ex. C.R. 122. (2) (1831) 2 D. & Cl. 302.

understood in common language." The author referred also to *Grenfell* v. *I.R.C.* (1), in which Pollock, B. stated that if a statute contains language which is capable of being construed in a popular sense such a "statute is not to be construed according to the strict or technical meaning of the language contained in it, but is to be construed in its popular sense, meaning of course, by the words 'popular sense,' that sense which people conversant with the subject-matter with which the statute is dealing would attribute it."

In *Cargo ex. Schiller* (2), James, L.J. expressed the same ideas in these words: "I base my decision on the words of the statute as they would be understood by plain men who know nothing of the technical rule of the Court of Admiralty, or of flotsam, lagan and jetsam."

Reference may also be made to *Milne-Bingham Printing Co. Ltd.* v. *The King* (3), in which Duff J. (as he then was), when considering the meaning of the word "magazines" as contained in the Special War Revenue Act, 1915, said: "The word 'magazine' in the exception under consideration is used in its ordinary sense, and must be construed and applied in that sense." In *The King* v. *Montreal Stock Exchange* (4), a case involving the interpretation of the word "newspapers" as used in Schedule III of the Special War Revenue Act, Kerwin, J. said: "In the instant case, the word under discussion is not defined in any statute in *pari materia* and it remains only to give to it the ordinary meaning that it usually bears." He then referred to the definition of the word as contained in Webster's New International Dictionary.

Again, in *Att.-Gen.* v. *Bailey* (5), it was held that the word "spirits," being "a word of known import . . . is used in the Excise Acts in the sense in which it is ordinarily understood." In that case the Court said at p. 292: "We do not think that, in common parlance, the word 'spirits' would be considered as comprehending a liquid like 'sweet spirits of nitre' which is itself a known article of commerce not ordinarily passing under the name of 'spirit.' "

It is of some interest, also, to note the rule of interpretation adopted in the United States in construing Excise Acts.

(1) (1876) 1 Ex. D. 242, 248.
(2) (1877) 2 P.D. 145, 161.
(3) (1930) S.C.R. 282, 283.
(4) (1935) S.C.R. 614, 616.
(5) (1847) 1 Ex. 281.

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As stated in Craies on Statute Law, p. 152, the rule is that the particular words used by the Legislature in the denomination of articles are to be understood according to the common commercial understanding of the terms used, and not in their scientific or technical sense, "for the Legislature does not suppose our merchants to be naturalists, or geologists, or botanists." (*200 Chests of Tea* (1), per Story, J.).

The defendant company carries on business at Toronto. The parent company is located at Suffolk, Va., and since 1928 has there manufactured peanut oil. The defendant began the commercial production of peanut oil in Canada on or about August 23, 1949. It is advertised and sold under the name "Planter's Hi-Hat Peanut Oil" and is a liquid sold only in cans. It is described in the advertisement as "the all-purpose cooking and salad oil."

It is not sold or advertised under the name "shortening," but it is described as a new, modern, all-purpose *liquid* shortening. It is advertised as suitable for use in pan frying, deep fat frying, cooking and baking, in which cases it performs the function of shortening. It is also advertised as suitable for use in salads, soups and sauces and in these cases it is used as an oil and not as shortening. It is therefore referred to as an "all-purpose cooking and salad oil."

The evidence establishes that since August, 1949, the peanut oil sold by the defendant has been used effectively in Canada as a shortening agent in deep fat frying and in the making of pies, cakes, doughnuts and the like. It is therefore submitted by the defendant that as it has been and is being used as a shortening it is, in fact, "shortening" within the meaning of that word in Schedule III, and is therefore exempt from tax. For the plaintiff it is contended that "shortening" in its popular sense and as used in the trade and by the public has a well defined meaning, namely, a manufactured *plastic* fat of the consistency of lard and used for "shortening" purposes in cooking, frying and baking. It is submitted, therefore, that the defendant's product, being in liquid form and not in plastic form and not having been manufactured or processed, but rather being a single refined vegetable oil, is not "shortening."

(1) (1824) 9 Wheaton (U.S.) 435.

The defendant's case, apart from the evidence of those witnesses who testified as to the successful use of peanut oil as a shortening agent in cooking, baking and frying, rested mainly on the evidence of Arthur C. Eaton and Dr. F. A. J. Zeidler. The former is senior chemical engineer of the defendant's parent corporation at Suffolk, Va. He said that the function of shortening is to lubricate and weaken the cell structure of the gluten and starch to make the product tender and easily eaten. He defined shortening as "a material which will lubricate," and stated from his experience and as a chemist that peanut oil fell within that definition.

Dr. Zeidler is President of Zeidler-Bennett Limited, a research and testing laboratory in Toronto. He is a scientist of wide experience and for many years has specialized in applied and organic chemistry. His practical definition of shortening was "a substance that produces a certain velvety crumb in baking and acts as a lubricant in cooking, provided it is palatable and non-toxic." In his opinion, peanut oil fell within that definition.

A very helpful—and I think a very important—summary of the history of "shortening" was given by Dr. N. H. Grace, the head of the Oils and Fats Section in the Division of Applied Biology, National Research Council at Ottawa. He is the holder of several degrees in chemistry, a member of the American Chemical Society, the American Oil Chemists Society, and a Fellow of the Royal Society of Canada. From 1931 to 1937 he was in the Chemical Division of the National Research Council and since then has been in the Division of Applied Biology. For the last seven or eight years he has been engaged in research work, particularly in the adaptation of Canadian oils for edible purposes as oils and as shortenings. He is very familiar with peanut oil. He states that in Great Britain and in America the first substances used in cooking to "shorten," were animal fats such as lard and tallow. "Shortening" as such was invented in the United States in the latter half of the last century. During the great expansion of the cotton industry, it was found that the cottonseed oil—a cheap by-product of the cotton industry—could be mixed with high-melting lard and the whole sold as lard. Then cottonseed oil was blended with tallow. Up to 1910, therefore, cottonseed oil was blended with harder animal

fats and the result was that lard compounds—called "shortenings"—were designed and sold to simulate the properties of lard.

In 1910 there was a new and important development—the discovery of catalytic hydrogenation of unsaturated fats and oils. By that process, vegetable oils could be made plastic or hardened. The next class of shortening, therefore, was an all-vegetable shortening consisting entirely of vegetable oils hardened to a plastic consistency simulating that of lard. In addition, there were numerous other crosses, such as the blending of peanut oil with a heavily hydrogenated peanut oil which also simulated the properties of lard. No doubt basing his opinion on the knowledge of the history of shortening and on his experience in research work in connection therewith, Dr. Grace defined shortening as "a manufactured plastic fat of the consistency of lard". In his opinion, peanut oil did not fall within that definition in that (1) it was an oil lacking the consistency of lard, and (2) it was a single oil which had been merely refined from the crude peanut oil and therefore was not a manufactured plastic fat. As I have said above, peanut oil is a liquid and is so sold, and it is admitted that it had not been subjected to the hydrogenation process in any degree. Now there is a very considerable amount of evidence to support the view of Dr. Grace and of all the other witnesses for the plaintiff, that in Canada "shortening" as understood and used in the trade and by the general public does not include liquids, but must be a substance simulating and having the plasticity of lard. The defence did not produce any samples of any oils which at any time had been sold in Canada under the name "shortening," or establish that any such oils had been sold under that name. On the other hand, there were produced on behalf of the plaintiff Exhibits 1, 2, 4, 5, 6 and 7, all being cardboard containers used in the sale of six different types of shortenings (all of a plastic nature). Each bears the brand name as well as the name "shortening" prominently displayed on the labels.

Dr. Zeidler in cross-examination admitted that he had never known a substance which was sold as shortening which was not, in fact, plastic like lard or butter; nor had he any knowledge of any liquid oil ever being sold as "shortening." Mrs. Elwood, another witness for the

defendant, is Food Editor of the Toronto Star Weekly and was formerly Food Editor of the Daily Star. She is also a graduate in Home Economics of the University of Toronto, has taught Home Economics, has managed lunch rooms, and has demonstrated food products. She has used both liquid and other shortenings and admitted that in purchasing peanut oil or any other oil to be used for shortening purposes, she had never found it labelled as "shortening" on the package or container by the person who sold it. Mrs. Graham, another witness for the defendant, also used both liquid and other shortenings and admitted that when she did not use one in liquid form, she used a solid shortening like butter or lard—"one of the brands that are sold as shortening." Dr. Elworthy, a witness for the plaintiff, is a graduate of the University of London, a Fellow of the Royal Institute of Chemistry of Great Britain, and of the Canadian Institute of Chemistry. At the time of the trial he was the Commodity Officer of the Oils and Fats Administration of the Dept. of Trade and Commerce, and for about two years was with the Oils and Fats Administration of the Wartime Prices and Trade Board. He has had considerable experience with the baking industry. Speaking as one who was very familiar with that industry, he expressed the opinion that " 'shortening' is a mixture of fats and oils in plastic form" and that that definition was one accepted by the baking industry.

Another witness for the plaintiff was Dr. R. A. Chapman, B.S.A., M.Sc., Ph.D., who is in charge of the food section of the Food and Drugs Division, Dept. of National Health and Welfare, Ottawa. He states in the course of his duties he has examined a large number of materials which were labelled "shortening" and added, "I have not encountered any which were liquid in form—and by that I mean that the main name, its principal name, the common name, on the package was shortening." He expressed the opinion that "shortening" as generally understood was a plastic substance.

But even in the advertisements and publications of the defendant there are to be found indications that "shortening" was ordinarily considered to be a solid or plastic. Throughout, they stress the difference between the new liquid shortening and solid shortening, although solid or plastic shortenings were never sold under the designation

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of "solid shortenings," but merely as shortening. The following extract from p. 2 of Ex. A—a pamphlet of the defendant entitled "Key to Good Health," will serve to illustrate the point. The same extract also appears on p. 35 of Ex. H—a pamphlet entitled "Cooking the Modern Way."

FOR RECIPES THAT CALL FOR SOLID SHORTENING . . . If you have some favorite recipe that calls for a solid shortening, try it with Planters Peanut Oil. See how much better your results can be. But note this important difference: Because Planters Peanut Oil is richer than *ordinary shortening,* be sure to use less of it—usually about one-third less. If a recipe, for example, calls for a full cup of *solid shortening,* two-thirds of a cup of Planters Peanut Oil should be about right. That means economy too, you see, with Planters.

Special Note: If you are more accustomed to working with solid shortening, just put the Planters Peanut Oil in the freezing compartment of your refrigerator over night. Then you can handle it as you would any solid shortening. But remember—*use about one-third less.*

In that extract the defendant company refers to "*ordinary* shortening" and from what immediately follows there can be little doubt but that in the mind of the author, ordinary shortening meant solid shortening. Mr. Eaton stated that the purpose of hydrogenation is to raise the melting point of the product, and that following hydrogenation "the product *is then commonly called "shortening"*; the peanut oil which is not hydrogenated, he called "a liquid shortening."

Many dictionary definitions of shortening were cited, some of which suggested that any material which performed the function of shortening was, in fact, shortening. I prefer, however, the description given in an authoritative text book, "The Chemistry and Technology of Food and Food Products," by Morris B. Jacobs, where in Vol. I, p. 586, he states: "Shortening agents are distinguished by their plasticity, which enables them to form with milk, flour, etc., the peculiar dough structure which is essential for the production of good baked products." The evidence as to the generally accepted meaning in Canada is in accord with that description.

In the light of this evidence, therefore, I have reached the conclusion that the peanut oil sold by the defendant, being in liquid form and therefore lacking the quality of plasticity to be found in lard, was not "shortening" within the meaning of that word as found in Schedule III. In so

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finding I am not unmindful of the other arguments advanced by counsel for the defendant to the effect that the plastic or solid shortenings when melted would still be "shortening," although in liquid form; that the shortening process takes place after the plastic shortenings have been subjected to heat, and that by reducing the temperature the liquid peanut oil would become a solid. I accept the evidence of Dr. Grace and the other witnesses to whom I have referred as indicating beyond question that in the trade and among the public generally, shortening meant a manufactured or processed fat (which from the chemical point of view includes oil) having a plasticity similar to that of lard. In view of the evidence of Dr. Grace (and without taking into consideration the definition of "shortening" as found in the Regulations established under the Food and Drugs Act), I would have been inclined to the view that if the peanut oil had been processed by hydrogenation (even without the addition of any other fat or oil) and sold as shortening, it would have been "shortening" within Schedule III. I am of the opinion that shortening which has the consistency of lard would not be used in any practical sense except as "shortening." The defendant, however, desired to produce an oil—an all-purpose oil—which could be used not only as a shortening agent but also for many other purposes and it is no doubt for that reason that it has not subjected its product to hydrogenation. In so doing the defendant, in my opinion, has not produced shortening. All that may "shorten" is not necessarily shortening. Butter no doubt could be an excellent shortening and may frequently be used for that purpose, but it is not manufactured, sold or purchased as "shortening." Any palatable and non-toxic vegetable oil could possibly be used to perform some or all of the functions of "shortening," but that does not necessarily bring them within the general accepted meaning of "shortening." In my view, peanut oil is itself a known article of commerce not ordinarily passing under the name of "shortening," and that view is amply supported by the evidence.

The opinion which I have just expressed is sufficient to dispose of the case. But inasmuch as much of the evidence and argument was directed to the contention of the defendant that its product was within the definition of "shortening" as contained in the regulations under the

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Food and Drugs Act, R.S.C. 1927, c. 76, as amended, I think I should refer to that argument briefly. That definition was as follows:

Sec. B.09. 010. Shortening, other than butter or lard shall be a combination of fats and oils, processed by hydrogenation or otherwise, with or without Class IV preservative, and shall not contain more than one per cent of substances other than fatty acids and fat.

I may say that I doubt very much whether that Act or the regulations thereunder should be considered. It is not a taxing Act and its purpose is to suitably control the sale and use of food and drugs. It is not, therefore, an Act in *pari materia* with the Excise Tax Act. In argument, counsel for the defendant contended that it should not be considered, but his witness Dr. Zeidler adopted the definition therein as one definition of "shortening" and much of his evidence was based thereon. It was also referred to by witnesses for the plaintiff.

Dr. Zeidler, being familiar with the process used by the defendant in producing peanut oil and with the chemical ingredients of the product, was of the opinion that from a chemical point of view peanut oil was "a combination of fats and oils," and that while it was not processed by hydrogenation, the process used was an "otherwise processing" as required by the definition. *From the chemist's point of view* he considered fats and oils to be the same. While admitting that in the product sold by the defendant the peanut oil was not combined with any other fat or oil, his view was that as the peanut oil itself consisted of a number of fats or oils, there was within "peanut oil" itself, a combination of fats and oils. The peanut oil consists of six different substances, four of which are glycerides or esters of saturated fatty acids, and two of which are glycerides or esters of unsaturated fatty acids.

The process used by the defendant may be described briefly as follows: The peanuts are broken into small pieces and heat and pressure are applied; the crude peanut oil is drained off; then by a refining method the soap is removed; the resulting neutral oil is washed to produce a neutral washed oil which is then bleached and the bleached neutral oil is then deodorized, the resulting product being peanut oil as it is marketed. These operations, Dr. Zeidler said, constituted "processing."

I do not consider it necessary to review all the evidence on this point. I have read it carefully and have reached the conclusion that the defendant's product does not fall within that definition. I accept the evidence that as ordinarily understood, there is a distinction between fats and oils. Dr. Zeidler, after stating that chemically fats and oils were the same, added: "*We call commonly* a fat a substance of this type, glyceride or ester, which is at ordinary temperatures solid or semi-solid; and we call an oil, a glyceride ester which at ordinary temperatures—I mean the geographical part of the world—is liquid." That view of the distinction between fats and oils is supported by other evidence as well and is, I think, in accordance with the common understanding. That being so, the "peanut oil" is not a combination of fats. It contains no fat in that sense.

Nor do I think it is a combination of oils. It is rather a single oil composed of a number of combined glycerides. In using the words "combination of oils," I think the regulation was intended to apply to those things which were ordinarily considered as oils and not to the combination of the component parts of an oil. Dr. Zeidler was of the opinion that the glycerides so combined to form peanut oil were "fats or oils," but as I have said above, from the chemical point of view he made no distinction between the two words. Dr. Chapman, on the other hand, was of the opinion that the glycerides were neither fats nor oils. In the sense in which they are used in the regulations, I am satisfied that "fats and oils" refers to those things which in ordinary language are considered to be fats or oils and not to the constituent parts of such fats or oils, even although in the view of some chemists such constituent parts are themselves fats or oils.

As I have said, the peanut oil was not combined with any other oil. There was therefore no "combination of fats and oils" as required by the regulations. Peanut oil, therefore, does not fall within the definition of "shortening" as contained in the regulations.

The plaintiff is therefore entitled to succeed. There will therefore be judgment that the plaintiff is entitled to be paid by the defendant the sum of $1,603.14, being the sales tax payable on the sale price of peanut oil sold by it

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between August 23, 1949, and September 30, 1949, together with the further sum of $22.03, being penalties payable in respect thereof up to December 31, 1949. The plaintiff is also entitled to be paid such additional penalties as may have accrued thereon from December 31, 1949, to this date and computed in accordance with the provisions of section 106(4) of the Excise Tax Act.

The plaintiff is also entitled to costs after taxation.

Judgment accordingly.