WESSELS & CURLEWIS, JJ. Sept. 9th, 1912. } R. *vs.* L. AND M. JOSEPH.

Criminal Law—Statutory offence—Indictment—Carry on trade or business—Exposing goods for sale—Exceptions—Essential allegations in indictment—Act 13 *of* 1910, *sec.* 2 (1).

Sec. 2 (1) *of Act* 13 *of* 1910 *prohibits the carrying on of any trade or business upon ground held under mining title except upon certain stands or sites. An indictment under the section alleged that the accused "sold or exposed goods for sale on ground held under mining title."* Held, *that exposing goods for sale implied the carrying on of a trade or business and that the indictment was good inasmuch as its language was sufficiently close to that of the section.*

Where a statute prohibits the doing of a certain act and then enumerates exceptions, such exceptions are in the nature of special defences which need not be negatived in an indictment. But where the exceptions are woven into the language creating the offence they must be negatived in the indictment.

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Appeal against a conviction by the A.R.M., Johannesburg.

The accused were charged with contravening sec. 2 (1), Act 13 of 1910* (Trading on Mining Ground Regulation Act) in that at a place at or near the Ferreira Deep Gold Mine they sold or exposed goods for sale, the aforementioned place being proclaimed ground or held under mining title. They were convicted and sentenced, in the case of L. Joseph to pay a fine of £7 10s., or in default one month's imprisonment, and in the case of M. Joseph, to a fine of £20, or to two months' imprisonment.

* Sec. 2 (1) of Act 13 of 1910 reads as follows: "No person shall, upon ground held under mining title, carry on any trade or business except
(*a*) Upon a stand mentioned in section *seventy-seven* or *seventy-nine* of Act No. 35 of 1908; or
(*b*) Upon a trade stand; or
(*c*) Upon a trading site.
and no person shall, upon a trading stand or trading site, carry on any business except that of general dealer or keeper of a kafir eating house."

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Against these convictions they appealed, on the grounds that the charge disclosed no offence, and was vague, embarrassing and bad in law, that the evidence did not support the convictions and that the sentences were excessive.

B. A. Tindall, for the accused: The charge-sheet discloses no offence. The charge alleges that the place on which the goods were exposed for sale was either "proclaimed ground or held under mining title." If it is proclaimed ground no offence is committed under the section. The charge-sheet is, therefore, consistent with the innocence of the accused. The section, moreover, only refers to carrying on business, whereas the charge-sheet says, "sold or exposed for sale." A mere isolated sale would not amount to carrying on business. Ord. 35 of 1905 was passed to regulate trading on ground held under mining title. This Ordinance only dealt with carrying on business as a general dealer. That Ordinance was amended by Act 35 of 1907, sec. 5 of which provided penalties for wrongfully carrying on a trade or business on proclaimed stands or ground held under mining title. This Act, however, was repealed by the Gold Law (Act 35 of 1908, sec. 2), which dealt with the case in sec. 82. See also sec. 96. It is clear from all these enactments that the legislature only intended to regulate the carrying on of the business of a general dealer on ground held under mining title. If a wide construction is given to the words, "carrying on business" then a pedlar or hawker cannot sell on ground held under mining title. As to the meaning of trade or business, see *Schein* vs. *Germiston Municipality* (1910, T.P. 829). The exception contained in the section should have been negatived in the charge-sheet, see *Dada Gia* vs. *Rex* (1906, T.S. 23); *Ho Yong* vs. *Rex* (1906, T.S. 540); *Brummer and Another* vs. *Rex* (1910, T.P. 364); *R.* vs. *Glynn* (1911, T.P.D. 500). He then argued on the merits, to show that the convictions were against the weight of evidence. There was no proper proof that the ground in question was held under mining title.

J. van Heerden, for the Crown: The charge-sheet alleges that the offence took place on ground held under mining title, and that was sufficiently proved to shift the onus on the accused. Selling or exposing goods for sale is carrying on a trade or business. The section contains a general prohibition against trading on ground held under mining title, and if the accused falls under an exception to the general prohibition he must set it up as a defence, see *Liebman* vs. *Rex* (1906, T.S. 473). The charge-sheet is not consistent with the innocence of the accused. There is sufficient evidence to support the magistrate's finding that the sale took place on ground held under mining title.

B. A. Tindall, in reply: The words of the section alleged to have been contravened should have been followed.

WESSELS, J.: The appellants were charged with contravening sec. 2 (1) of the Trading on Mining Ground Regulation Act (Transvaal), 13 of 1910, "in that, at or near Ferreira Deep Gold Mine, they one or each or both of them, did sell or expose goods for sale, the aforementioned place being proclaimed ground or held under mining title." Mr. *Tindall*, on behalf of the appellants, has urged a number of grounds of appeal against the magistrate's decision. First, he contends that the charge discloses no offence. He has referred us to the section of the statute under which the charge is framed, which says: "No person shall, upon ground held under mining title, carry on any trade or business." His contention is that the charge-sheet or indictment should set out the very words of the section, and that the words which have been used in the charge-sheet in the present case are not equivalent to those contained in the section. Now, I do not know why, when prosecutors are framing a charge, they do not adhere rigorously to the language of the statute. Why they will attempt to improve upon that language and use language of their own is a mystery which it is very difficult for me to solve. It seems to me so much easier to copy what you have in front of you than to

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launch out into original work, which in nine cases out of ten is sure to be wrong. Mr. *van Heerden* has urged us to say that the words "sell or expose goods for sale" sufficiently embrace the language of the section to cover it, and I think that he is right. I think that the words "expose goods for sale" must mean "carry on the trade or business of selling goods." A person who casually sells an article which he happens to have with him need not be carrying on a trade or business in the sale of that particular article. But a person who exposes goods for sale is one who invites others to come and buy the goods which he has exposed; and a person who invites others to buy his goods is carrying on a trade or business. Therefore, in the present case, although the language of the charge-sheet is not the exact language of the section, I think it is sufficiently close to the language of the section to prevent the accused from taking advantage of the difference.

The next ground is that the words "sell or expose goods for sale" do not necessarily mean a carrying on of trade or business. What I have already said covers this ground of appeal. I think that the words "sell or expose goods for sale" show that the accused were charged with having carried on trade or business. For instance, a man who carries about a box containing jewellery, and sits upon a particular piece of ground in order to carry on the sale of jewellery there is carrying on a trade or business at the place where he is exposing his wares. He does not necessarily carry on his trade or business only at that spot. He may carry on a trade or business at many places, but the particular spot where he exposes his goods is one of them.

The next ground which has been urged is that it was the duty of the Crown to have negatived the exceptions which are contained in sec. 2. In order to substantiate his argument upon this point Mr. *Tindall* has referred us to a number of cases, amongst others *Dada Gia* vs. *Rex* (1906, T.S. 23), *Liebman* vs. *Rex* (1906, T.S. 473), and *Brummer* vs. *Rex* (1910, T.P. 364). Those cases deal with the question when an exception is to be regarded as part of the language which constitutes the crime, and

when not. I think the whole learning with regard to this point extremely technical, and, if I may say so, useless. However, I think the law as drawn from those cases can be laid down in the following terms. If the language of the statute provides that to do an act is a crime, and enumerates a number of exceptions, these exceptions are special cases in which the act is allowed, and the accused must then set up these exceptions as a special defence. If, however, there is an exception woven into the language by which the crime is constituted, it must be negatived in the charge. In such a case the language which constitutes the crime embraces the exception, and therefore the one part of the section cannot be separated from the other. Thus in Ordinance 36 of 1905, sec. 3, the wording is as follows: "No person shall be in possession of any such substance as is mentioned in sec. 1 hereof, except for medicinal purposes, unless he be a person to whom a permit has been issued under that section." There the words "except for medicinal purposes" are woven into the language by which the crime is constituted. This is not so in the present instance. Sec. 2 (1) says: "No person shall, upon ground held under mining title, carry on any trade or business." Here there is a distinct prohibition which is complete and final. The section continues: "Except (*a*) upon a stand mentioned in secs. 77 or 79 of Act No. 35 of 1908; or (*b*) upon a trading stand; or (*c*) upon a trading site." Here the exceptions cannot in any way be said to be woven into the language which constitutes the crime. They stand apart from the language which constitutes the crime. When we take the words, "No person shall, upon ground held under mining title, carry on any trade or business," we have a complete statement, and that complete statement constitutes a crime. Then, after that, we have certain exceptions which would exonerate the accused person. It has been already shown by Lord ALVERSTONE in an English case (*R.* vs. *James*, 1902, 1 K.B. 540), which was quoted in *Liebman's* case and *Brummer's* case, that it makes no difference whether the exception is stated in the same or in another

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section. Naturally if it appears in a separate section it is so much stronger than if it appears in the same section, because if it appears in the same section it may more easily be said to be woven into the language which constitutes the crime. But the fact that the exception appears in the same section makes no real difference whatever. I do not think, therefore, that the appellant ought to succeed upon this ground of appeal.

The last ground is that there is no sufficient proof that the act complained of took place on ground held under mining title. It is true that when the Crown alleges that the goods were exposed on ground held under mining title, it is incumbent upon it to prove that the ground is held under mining title. There are various ways in which this can be done, and I should think the best way of doing it is to produce either a map, or some official from the Mines Department, who can say, "The ground has been pointed out to me, I know it, it is held under mining title." But I do not say that is the only way in which it can be done. In the present case we have, first, the evidence of Police-constable McCauley, who says that he "saw the two accused at 1.30 p.m. on mining ground on the Ferreira Deep . . . exposing goods for sale." Then Walles, one of the mine officials, who was with the policeman at the time, says he saw the two accused "on our mining property yesterday"; in other words, he saw the accused on the mining property of the Ferreira Deep mine. If goods are shown to have been exposed for sale on the mining property of a mine, I think that that is sufficient proof that they were exposed on ground held under mining title. If it happens, by some peculiar coincidence, that the goods were exposed on a portion of the mining property not held under mining title, it is for the accused to show this. *Prima facie*, I think that the evidence given by McCauley and Walles is sufficient to establish the fact that the goods were exposed on ground held under mining title. That being the case, I think all the grounds of appeal fail. Mr. *Tindall* has also urged us to take into consideration the severity of the sentences, and to reduce the fines which were imposed by the magistrate. I do not think

that in a case of this kind we ought to interfere with the discretion of the magistrate. The appeal is, therefore dismissed, and the convictions and sentences confirmed.

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CURLEWIS, J.: I concur.

[Attorney for Accused, H. WILFORD.]

[Reported by ADOLF DAVIS, Esq., Advocate.]

DE VILLIERS, J.P. & WESSELS, J. Sept. 2nd & 10th, 1912.

VILLAGE DEEP GOLD MINING CO., LTD., vs. O'BRIEN.

Workmen's Compensation. — Injury. — Workman.— Agreement with employer. — Agreement not registered.—Weekly payments.—Receipt in full settlement.—Subsequent action for balance.—Action under the Act.—Validity of agreement and receipt.— Act 36 *of* 1907, *secs.* 7 (2) *and* 31.

A workman entitled to compensation under Act 36 *of* 1907 *entered into an agreement in terms of sec.* 7 (2) *of the Act with his employer by which he was to receive a certain weekly allowance, but the agreement was not registered as it might have been under the section. After being certified as fit for work the workman signed a receipt for the amounts already received "in full satisfaction and discharge of all claims under the Workmen's Compensation Act." Thereafter on again becoming unfit for work owing to the original injury he sued for the balance due under the agreement*:—Held, *that both the agreement and the receipt were valid and did not amount to a contracting out of liability under sec.* 31 *of the Act, and the fact that the agreement had not been registered was immaterial*:—Held, *further, that the action was one under Act* 36 *of* 1907 *and that the workman being bound by the receipt was not entitled to succeed.*