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for the purposes of the employer's trade or business" in s. 2 (*1*) (*n*) of the Act. It follows, therefore, in the present case that inasmuch as it is common ground that the appellant was not employed otherwise than for the purposes of the employer's trade or business, and suffered injury as the result of an accident arising out of and in the course of an employment to which the Act applies, the decision of the Commissioner for Workmen's Compensation cannot be upheld.

The result is that the appeal is allowed, the order of the Commissioner for Workmen's Compensation, Minbu, is set aside, and the proceedings will be returned to the Commissioner for the assessment of compensation to be determined. The appellant is entitled to costs, four gold mohurs.

DAS, J.—I agree.

CRIMINAL REVISION.

Before Sir Arthur Page, Kt., Chief Justice, and Mr. Justice Das.

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June 13.

KING-EMPEROR *v.* AH KIM.*

Opium preparations—Possession of beinsi *and* beinchi—*Opium Act* (*I of* 1878), ss. 3, 5, 9—*Conviction under s.* 9—*Dangerous Drugs Act* (*II of* 1930), *s.* 40, *second schedule—Amendments—Rule* 11, *second proviso, under s.* 5 *of Opium Act,* ultra vires—*Prepared opium—Illegal possession under s.* 10 (*b*) *of Act II of* 1930.

Under the Opium Act of 1878, the definition of opium in s. 3 included such preparations of opium as *beinsi* and *beinchi*. Under the second proviso to Rule 11, made pursuant to s. 5 of the Act, it was an offence punishable under s. 9 for a person who was not a registered smoker to possess such preparations. Under s. 40 and the second schedule to the Dangerous Drugs Act opium, as now defined in s. 3 of the Opium Act, does not include these preparations, and clauses (*a*) and (*b*) of s. 5 and clauses (*a*) and (*b*) of s. 9 have been deleted. The result is that the second proviso to Rule 11 is now *ultra vires* as not being

* Criminal Revision No. 158A of 1933 from the order of the Second Additional Magistrate of Mergui in Criminal Regular No. 69 of 1932.

within the rule-making power of the Local Government under s. 5 of the Act of 1878. The conviction therefore of a person under s. 9 for the offence of being in possession of *beinsi* or *beinchi* cannot be sustained.

Beinsi and *beinchi*, however, come under the definition of "prepared opium" under the Dangerous Drugs Act, and a person can be convicted of an offence under s. 10 (*b*) of the Act for being in possession thereof in contravention of s. 4 of the Act.

A. Eggar (Government Advocate) for the Crown. The definitions of *beinsi* and *beinchi* or *pyaungchi* given in Rule 1 (*b*) and (*c*) of the Burma Opium Rules have no longer any validity in view of the amendment of the Opium Act by the Dangerous Drugs Act, 1930. These forms of opium come under the definition of "prepared opium" in s. 2 (*f*) (ii) of the Dangerous Drugs Act, and if a person is in possession of prepared opium otherwise than as prescribed by s. 4 (*b*) he is liable to punishment under s. 10 (*b*), and not under any of the provisions of the Opium Act.

The accused in this case was in possession of *beinsi* and *beinchi*. He had an opium "eater's" ticket but was not a registered smoker, and he was convicted under proviso 2 to Rule 11 of the Burma Opium Rules. But Rule 11 is now *ultra vires*, being concerned with something to which the Opium Act does not apply, and the conviction of the accused under that Rule cannot stand. The conviction may, however, be altered to one under s. 10 (*b*) read with s. 4 (*b*) of the Dangerous Drugs Act.

S. 4 (*b*) of the Dangerous Drugs Act has not been drafted so as to provide for any rules to be made thereunder; nor are the rules made under the Opium Act saved by its provisions. S. 39 refers only to local enactments and rules thereunder and not to the Opium Act, 1878. S. 41 could save the old rules if there were any provision to which the rules could be appended; but there is nothing in the

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new Act or the old Act to support rules relating to prepared opium.

Another effect of the amendment of the Opium Act by the Dangerous Drugs Act is that the presumption in s. 10 of the Opium Act that opium in the possession of an accused for which he is unable to account satisfactorily is opium in respect of which an offence has been committed no longer applies to prepared opium. But the ordinary rule of evidence applies, and the burden rests upon the accused to prove that he comes within the exception to s. 4 (*b*). If he is lawfully in possession as a consumer it should be easy for him to prove that the prepared opium in his possession comes within the exception ; but, in this case, he has called evidence to show that he received the *beinchi* from another person.

No one appeared for the respondent.

PAGE, C.J.—The order under revision must be set aside.

On the 14th December 1932, the respondent was convicted by the Second Additional Special Power Magistrate of Mergui under s. 9 (*a*) of the Opium Act (I of 1878) of being in possession of one tola of *beinchi* and ten annas of *beinsi*, and was sentenced to pay a fine of Rs. 10, or in default to undergo one month's rigorous imprisonment.

Under s. 9 ;

"any person who, in contravention of this Act, or of rules made and notified under s. 5 or s. 8,—

(*c*) possesses opium," . . . .

commits an offence punishable by fine and/or imprisonment.

Under the second proviso to Rule 11 made pursuant to s. 5 of the Act ;

"except in excluded areas, no person other than a registered smoker shall possess *beinsi*, *beinchi* or *pyaungchi* or any preparation of either."

It is established—and not disputed—that the respondent was in possession of both *beinsi* and *beinchi*, and was not a registered smoker.

It follows, therefore, that if this proviso to Rule 11 is in force the respondent was rightly convicted.

Now, under Rule 1 (iv), (*b*) and (*c*), made under the Act of 1878, *beinsi* is defined as

"crude opium clarified with water for smoking purposes, whether prepared or in course of preparation,"

and *beinchi* or *pyaungchi* as

"the refuse remaining in the opium pipe after the smoking of *beinsi*,"

and under s. 3 of the Act of 1878 opium

"includes also poppy heads, preparations or admixtures of opium and intoxicating drugs prepared from the poppy."

Under the Opium Act of 1878, therefore, as the definition of opium included such preparations of opium as *beinsi* and *beinchi* the conviction of the respondent would hold good.

Under s. 40 and the second schedule of the Dangerous Drugs Act (II of 1930), however, clauses (*a*) and (*b*) of s. 5 and clauses (*a*) and (*b*) of s. 9 of the Act of 1878 were deleted, and

"in s. 3,—

(*a*) for the definition of 'opium' the following definition shall be substituted, namely :—

'opium' means —

(i) the capsules of the poppy (*Papaver somniferum* L.) ;

(ii) the spontaneously coagulated juice of such capsules which has not been submitted to any manipulations other than those necessary for packing and transport ; and

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(iii) any mixture, with or without neutral materials, of any of the above forms of opium, but does not include any preparation containing not more than 0·2 per cent. of morphine, or a manufactured drug as defined in s. 2 of the Dangerous Drugs Act, 1930."

It follows, therefore, that opium as now defined in s. 3 of the Act of 1878 does not include opium prepared or in course of preparation such as *beinsi* and *beinchi*; that the second proviso to Rule 11 which purports to prohibit the possession of *beinsi* and *beinchi* is now *ultra vires* as not being within the rule-making power of the Local Government under s. 5 of the Act of 1878; and that the conviction of the respondent under s. 9 for the offence of being in possession of *beinsi* or *beinchi* in contravention of Rule 11 cannot be maintained.

It is necessary that some reference should be made in this connection to s. 41 of Act II of 1930 which runs as follows:

"When anything done under any enactment specified in the first three columns of Schedule II is in force immediately prior to the commencement of this Act, it shall be deemed, as from the commencement of this Act, to have been done under this Act or under that enactment as hereby amended, as the case may require."

It would be an euphemism to say that this section is open to criticism on the ground of ill draftsmanship. The section is not set in a legal mould, and I confess that I do not understand what is meant by the expressions "anything done" and "as the case may require" in this section. It may be that by using the words "anything done" the Legislature intended to validate any proceedings or acts duly taken or done under the specified enactments, but if that be so it is not easy to appreciate the sense

in which the words "in force" are used in the section; while if it was intended that the words "anything done" should include any Rule made under the enactment, it is a strangely infelicitous mode of enacting that Rules relating to the possession of prepared opium under an enactment in which the definition of opium included prepared opium should remain in operation notwithstanding that under the amendment prepared opium no longer is included in the definition of opium.

I cannot construe s. 41 in this sense, and as neither in the Act of 1878 as amended nor in Act II of 1930 is any provision to be found authorizing the making of a Rule such as that contained in the second proviso of Rule 11, in my opinion the conviction of the respondent and the sentence passed upon him cannot be sustained.

It is manifest, however, from the evidence adduced at the trial that the respondent is guilty of an offence under s. 10 (*b*) of Act II of 1930.

Accordingly, it is ordered that the conviction of the respondent under revision be set aside, and in lieu thereof the respondent be convicted of an offence under s. 10 (*b*) of Act II of 1930, and the sentence passed upon him be maintained.

DAS, J.—I agree.