[HIGH COURT OF AUSTRALIA.]

DAY . . . . . APPLICANT;
DEFENDANT,

AND

YATES . . . . . RESPONDENT.
INFORMANT,

H. C. OF A. 1931.

SYDNEY, *Mar.* 31.

Gavan Duffy C.J., Rich, Starke, Dixon and McTiernan JJ.

Shipping—Attempting to take vessel to sea with insufficient crew—Unsatisfactory members of crew not re-engaged—"Calls" made at recognized "pick-up" place—Only discharged members offer services—Not accepted—Embargo by union—Reasonable efforts to obtain full complement—Engine-room staff—Firemen and trimmers—Conviction—Prohibition—Navigation Act 1912-1926 (*No.* 4 *of* 1913—*No.* 8 *of* 1926), *secs.* 43, 44.

Sec. 44 of the *Navigation Act* 1912-1926 provides, by sub-sec. 1, that "The owner of a ship to which the last preceding section applies shall not suffer her to go to sea and the master shall not take her to sea without carrying the crew prescribed or specified in the last preceding section. Penalty: one hundred pounds"; and, by sub-sec. 2, that "If a ship proceeds to sea being short in her crew of not more than one-fifth of her engine-room staff, or one-fifth of her deck complement, the master or owner shall not be liable under this section if it is proved that the breach was not occasioned through any fault of his own."

Held, (1) that the excuse contained in sub-sec. 2 is established when it is proved that the defendant honestly endeavoured to obtain a full crew and that his failure to do so did not arise from his omission to do something which he reasonably ought to have done, and (2) that firemen and trimmers form part of a ship's engine-room staff within the meaning of the sub-section.

ORDER NISI for prohibition.

An information was laid by Robert Walter Yates against Percival Henning Day under the provisions of the Commonwealth *Crimes Act* 1914-1926, sec. 7, and the *Navigation Act* 1912-1926, sec. 44 (1). The information alleged that Day, on 8th November 1930, at Sydney

being then the master of the s.s. *Mackarra*, a vessel to which the provisions of the *Navigation Act* 1912-1926 applied, attempted to take that vessel to sea without carrying the crew specified in sec. 43 of the *Navigation Act* contrary to the provisions of the said Act.

At the hearing of the information before a Stipendiary Magistrate, it was admitted on behalf of the informant that at the relevant time the crew prescribed for the *Mackarra* under the provisions of Sched. II. of the Act included nine firemen or trimmers. The evidence showed that on returning to Sydney on Friday, 7th November 1930, from a voyage—during which the crew included the prescribed number of firemen and trimmers, and also four engineers, one donkeyman greaser and one greaser—the services of all the members of the crew were retained for the next voyage, except those of a fireman and a trimmer, who, having been found unsatisfactory, were given the prescribed notice of the termination of their employment and were paid off. Entries made in the ship's log by the defendant at the conclusion of the voyage showed that the efficiency, ability and conduct of both men were "very good." The departure of the vessel upon the next voyage had been fixed for 12 o'clock noon on the following day, Saturday, 8th November 1930. During the morning of that day four separate "calls" for a fireman and a trimmer were made between the hours of 9.30 o'clock a.m. and 11 o'clock a.m. at the shipping office, the recognized "picking-up" place, and, although on each occasion approximately from 200 to 300 men were present, none offered their services except the two men who had been discharged, but the defendant refused to re-engage them. When the defendant asked a union official why two men could not be obtained to make up the complement, the latter replied that the matter was easily adjustable by re-engaging the two men who had been discharged, and that if this were done the trouble would be over. Evidence was given that two men who had previously agreed to "sign on" informed the 2nd engineer of the *Mackarra*, before the "calls" were made, that "the Union would not allow them to stand for the job"; also that it was permissible during certain hours of the day to engage men at places other than the shipping office, although no attempt to do so was made by the defendant. Having received a clearance for the vessel

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from the Deputy Superintendent, Mercantile Marine Office, to the effect that the requirements of Part II. of the *Navigation Act* with regard to, *inter alia*, the crew had been complied with, the defendant, having failed to obtain either a fireman or a trimmer as required, some time after the time scheduled for departure gave the usual necessary orders with the view of taking the vessel to sea; whereupon the seven firemen and trimmers engaged for the voyage then about to commence left the vessel, which was subsequently put out of commission. It was stated in evidence on behalf of the defendant that firemen and trimmers, although engaged in work in the stokehold of a vessel, formed part of the engine-room staff, but this was not agreed to by the witness called on behalf of the informant. The Magistrate held (1) that the defendant was not relieved from liability for the penalty provided by sec. 44 of the Act because at the time he attempted to take the vessel to sea he knew that the crew was deficient in numbers, and (2) that the engine-room staff referred to in sub-sec. 2 of sec. 44 did not include firemen or trimmers.

The defendant was convicted, and, the case being a test case, was fined £2 and costs.

The defendant obtained, under sec. 112 (1) of the *Justices Act* 1902-1918 (N.S.W.), an order nisi for a writ of prohibition directed to the Magistrate and the informant, which now came on for hearing before the High Court.

E. M. Mitchell K.C. (with him *F. P. Evans*), for the applicant. There is no justification for restricting the operation of sub-sec. 2 of sec. 44 of the *Navigation Act* to cases where the master or owner is ignorant of the deficiency. The word "fault" as appearing in the sub-section means "default," and, having made reasonable efforts to obtain a complete crew, the master is not in "fault" within the meaning of the sub-section (*Asiatic Petroleum Co.* v. *Lennard's Carrying Co.* (1)). The master was not bound to accept unreasonable conditions in the engaging of additional men. The reason why he attempted to take the vessel to sea without a full crew was because of the embargo placed upon the men by the union. At the time of the attempt to take the vessel to sea there was not

(1) (1914) 1 K.B. 419, at pp. 437, 438.

a shortage of more than one-fifth of the engine-room staff. The engine-room staff includes not only donkeymen and greasers but also firemen and trimmers. It is immaterial that some members of such staff are employed in the stokehold, because the stokehold is part of the engine-room space. [He was stopped on this point.]

H. E. Manning K.C. (with him *C. Evatt*), for the respondent. As to the principles which should guide the Court when dealing with an appeal of this kind, see *Peck* v. *Adelaide Steamship Co.* (1).

[*E. M. Mitchell* K.C. referred to *Bell* v. *Stewart* (2).]

The only power the Court has is to deal with the matter in accordance with the provisions of sec. 115 of the *Justices Act* 1902-1918, that is, as to whether the conviction can be supported. The reason given for the dismissal of the two men was that they were unsatisfactory, which is inconsistent with the fact that they were given "very good" discharges from the ship. "Calls" for men could have been made at the ship's side or elsewhere outside the hours prescribed for "picking up" at the shipping office, but this was not done. Even if it were the position, the master was not entitled to conclude that an instruction had been issued by the Union forbidding members from accepting employment on the vessel. If the master knew of a shortage in the crew he was not entitled to take the vessel to sea (*Peck* v. *Adelaide Steamship Co.* (1)).

[DIXON J. referred to *Munday* v. *Gill* (3).]

The conviction is supported by the evidence. The evidence shows that the master did not explore all the avenues open to him for the engaging of members of a crew. On the evidence the dismissal of the two men was not justified. The master has been unable to show that the position arose through no fault of his own within the meaning of sec. 44 (2) of the Act. The Court will not disturb the conviction if there is any evidence to justify it.

E. M. Mitchell K.C., in reply. The evidence shows that many "calls" were made without satisfactory results. All the circumstances

(1) (1914) 18 C.L.R. 167. (2) (1920) 28 C.L.R. 419.
(3) (1930) 44 C.L.R. 38.

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of the case must be considered, and in the circumstances present in this case the master was entitled to take the vessel to sea. Sec. 44 (2) of the Act operates in favour of the master if he shows that he made reasonable efforts to obtain a full complement.

[DIXON J. referred to secs. 197 and 208 of the *Navigation Act* 1912-1926.]

As to the functions of the Court, see *Peck* v. *Adelaide Steamship Co.* (1).

THE COURT delivered the following judgment:—

We think that the conviction cannot be supported.

The Magistrate appears to have adopted one or other or both of two contentions of the informant's counsel, namely, (1) that because the master knew that the engine-room staff was deficient when he attempted to go to sea, the breach of sec. 44 (1) of the *Navigation Act* 1912-1926 was necessarily occasioned by the master's own fault, and (2) that firemen and trimmers are not part of the engine-room staff within the meaning of sec. 44 (2). We think both these contentions are wrong. The proviso expressed in sec. 44 (2), in our opinion, refers to fault in allowing the crew to be insufficient in number when the vessel sails. By conceding a deficiency of one-fifth of the full complement, the provision assumes that the vessel sails, and concerns itself with the question how it comes about that the crew is deficient in number. If the deficiency does not arise from the fault of the master or of the owner, as the case may be, the defendant is absolved. We think the excuse contained in sec. 44 (2) is established when it is proved that the defendant honestly endeavoured to obtain a full crew and that his failure to do so did not arise from his omission to do something which he reasonably ought to have done.

Upon the facts of this case, we think the master honestly desired to obtain a full complement and took every reasonable step to do so. He did not act unreasonably in refusing to reinstate two men whose services he had found unsatisfactory and dispensed with. In the circumstances of the case he was not, in our opinion, compelled

(1) (1914) 18 C.L.R., at p. 174.

to respond to the pressure put upon him to take them back upon the ship's articles.

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Appeal allowed. Rule nisi for prohibition made absolute with costs.

Solicitors for the applicant, *Ebsworth & Ebsworth.*

Solicitor for the respondent, *W. H. Sharwood,* Commonwealth Crown Solicitor.

J. B.

[HIGH COURT OF AUSTRALIA.]

BYRON HALL LIMITED . . . . . APPELLANT;
PLAINTIFF,

AND

HAMILTON AND OTHERS . . . . RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1930.

SYDNEY, *April* 8, 9, 14.

Gavan Duffy C.J., Rich, Starke and Dixon JJ.

Agreement—Joint venture by defendants to acquire land and to build thereon—Subsequent formation of company for purpose of venture—Defendants directors of and substantially only shareholders in company—No agreement as to terms upon which land to be transferred to company—Knowledge of defendants as coadventurers and as directors of company—Representation by conduct—Inducement—Claim for relief grounded on findings of lower Court—Inconsistent with pleadings.

Three persons arranged as coadventurers to buy land and erect a building upon it, contributing services and capital unequally. After acquiring the land and commencing operations upon it, they registered a company of which two of them were to be the first directors. No shares were allotted beyond single shares subscribed for in the memorandum of association, and they did not qualify as directors. No express contract to transfer the land to the