

HIGH COURT. Apia. 1958. 17, 24, October. ROTHWELL J.

"Home-trade ship" - certificate of survey to be issued therefor - whether Harbourmaster entitled to restrict activities of vessel by alteration of form of certificate - whether alteration estops Harbourmaster or invalidates certificate - Port Control Ordinance 1932.

A vessel is a "home-trade ship" if in fact it operates in accordance with section 2 of the Port Control Ordinance 1932, that is, if it plies for hire for the carriage of cargo or passengers or both between ports or places within Samoa; and the Harbourmaster is competent, by virtue of section 23 of the Ordinance, to further restrict the operations of the vessel if the capabilities of the vessel surveyed by him and for which a certificate of survey is issued by him, require such restrictions.

A minor deviation from the form of a certificate of survey (no form being prescribed by the Ordinance) issued, as was in this case, does not invalidate the certificate by virtue of section 5 of the Acts Interpretation Act 1924 (New Zealand); nor does it operate by way of estoppel.

Defendant convicted.

PROSECUTION under the Port Control Ordinance 1932 for overloading a motor-launch owned by the defendant.

Sergeant Schuster, for Police.
Metcalf, for defendant.

Cur. adv. vult.

ROTHWELL J.: This was a prosecution for overloading of a motor-launch belonging to the defendant Company and was laid under the Port Control Ordinance 1932. The relevant portions of that Ordinance are as follows:

Section 2 ... "Home-trade ship" means any ship (other than a rowing boat or a lighter and other than an inter-island trade ship) which plies for hire for the carriage of cargo or passengers or both between ports or places within Samoa...

Section 19(1) ... Every person being the owner of

- (a) an inter-island trade ship
- (b) a home-trade ship
- (c) a rowing boat
- (d) a lighter

plying for hire for the carriage of either passengers or cargo or both shall procure annually from the Collector of Customs a licence to ply such vessel.

- (2) No such licence shall be granted in respect of any vessel which has not been duly surveyed...

Section 23(1) ... Upon the Harbourmaster being satisfied as to the seaworthiness of the vessel and the sufficiency and efficacy of its equipment he shall issue in duplicate a certificate of survey (written in the English and Samoan languages) setting out

- (a) the limits (if any) within which the vessel may ply;
- (b) the number of passengers which the vessel may carry distinguishing if necessary the numbers to be carried on the deck or in the cabins and in different parts of the deck and cabins...

No form for the certificate of survey under section 23 is prescribed by the Ordinance. The form which is in fact used has a printed heading including the words "Inter-Island Ship or Home-trade Ship" the intention apparently being that one or other of these classifications should be deleted. Any minor deviation from the form, however, clearly cannot have the effect of invalidating it: see section 5 of the Acts Interpretation Act 1924 (New Zealand).

The triplicate copy of the certificate of survey issued in respect of the defendant Company's vessel and admitted in evidence by consent had the entire heading "Inter-Island Ship or Home-trade Ship" deleted. There was however a heading written in by the Harbourmaster at the time of the issue of the certificate "Lefatu and Manono". The Harbourmaster in evidence said that he had altered the certificate in this way because he thought that a certificate headed 'Home-trade ship' would authorise the vessel to travel anywhere within the group of islands which constitute the Territory of Western Samoa. His certificate of survey was limited to fitness only for the Lefatu/Manono run which lies wholly within the reef. No evidence was offered as to the terms of any licence issued to the defendant Company and it is assumed therefore that there was a licence duly issued in accordance with the terms of the certificate of survey.

Mr Metcalfe contended that the certificate as issued took the vessel in question out of the category of a home-trade ship and therefore out of the operation of the Ordinance insofar as overloading was concerned. I do not agree with this contention. A vessel is a home-trade ship if in fact it carries out the operations specified in the definition contained in section 2. The Harbourmaster cannot create an estoppel by any alteration such as was made in the certificate. The adoption of either of the description of classes of vessel printed in the heading automatically defines the limitation within which the vessel may ply, but it is competent for the Harbourmaster to create a more restricted limitation if the capabilities of the vessel being surveyed appear to him to require that he should do so.

The vessel therefore I hold to be a home-trade ship restricted to the carriage of passengers, not more than 20 in number, between Lefatu and Manono. The prosecution alleged 76 passengers and the defence admitted 57 passengers on the trip in question.

As an extenuating circumstance Mr Metcalfe called the evidence of the Captain to say that he had been alarmed at the large number of passengers offering, and tried to persuade them to divide their party into two and have the vessel make two trips instead of one. Witnesses for the prosecution said that the suggestion of two trips had come from the leader of their party but that the Captain had declined to make two trips. Both sides alleged that the discussion took place before passengers embarked. An independent witness gives no help in resolving this conflict because he arrived when the passengers were mostly on board the vessel and heard no discussion.

In resolving this conflict of evidence I have given consideration to the evidence that the party of 76 people was from a single village making a trip to Manono for the purpose of a cricket match, and its members would normally wish to travel together. The Captain said that the passage time would be one hour each way and accordingly, if two trips had been made, half of the party would have had two hours to wait until the launch returned for its second trip. I think the passengers would have been reluctant to accept this arrangement. On the other hand I find that

it would be normal for the Captain of this vessel to be alarmed at the prospect of gross overloading, and that he would be likely therefore to suggest that two trips should be made instead of one. I find therefore that the insistence on a single trip came from the passengers, and I accept the evidence of the Captain that he feared some degree of violence and trouble if he did not accede.

The overloading however was undoubtedly gross. On the prosecution evidence four trips would have been required, and on the defence evidence three trips would have required, if the limitations of the certificate of survey were to be complied with. The legislation is important, and compliance must be enforced for the protection of the travelling public. The penalty provided by the Ordinance is not excessive, and the defendant Company must be fined \$10. In view of the pressure brought to bear on the Captain his fine will be \$5.