[HIGH COURT OF AUSTRALIA.]

MULLER . . . . . APPELLANT;
COMPLAINANT,

AND

DALGETY & CO. LIMITED AND ANOTHER RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

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PERTH, *Oct.* 20, 21, 29.

Griffith C.J., Barton and O'Connor JJ.

Immigration Restriction Act 1901-1908, *secs.* 9A, 9B, 9C, 9D—*Prohibited Immigrant —Stowaway—Deemed to be—Port of Fremantle.*

Sec. 9D of the *Immigration Restriction Act* 1901-1908 does not exhaustively define the term stowaway as used in sec. 9A, but must be construed as an extension of that term, and as indicating that persons belonging to the class mentioned, though not in fact, apart from the section, stowaways, *shall be deemed to be* stowaways for the purposes of the Act.

The offence created by sec. 9A is complete at the coming of the ship into port, and cannot be purged by subsequent notice, even if that notice be given at the earliest possible moment after knowledge of the fact.

The word *port* as used in the *Immigration Restriction Act* 1901-1908 is, in the absence of any definition in the Act itself, to be regarded in the ordinary sense of a shipping or commercial port, and as such includes, in the case of the Port of Fremantle, Gage Roads, Carnac, and Owen's Anchorage.

Judgment of *Burnside* J., reversed.

APPEAL from the decision of *Burnside* J.

The facts are set out in the judgments hereunder.

Barker, Crown Solicitor, for the appellant. All that the complainant had to prove was that the vessel came into port with

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stowaways on board. Sec. 9D. is not to be read as part of sec. 9A and as defining "stowaway" in that section. The section is framed so as to make masters of ships very vigilant in searching for stowaways. It is *malum prohibitum*, in which *mens rea* is not necessary, and it is immaterial whether the master knows of the presence of stowaways on board or not. That Gage Roads, Carnac, and Owen's Anchorage are within the port of Freemantle is shown by the following Statutes and Ordinances:—*Customs Act*, No. 6 of 1901, sec. 18; *Fremantle Harbour Trust Act* 1902, 2nd Ed., No. 17; *An Act for the Regulation of Customs in Western Australia*, 4 & 5 Vict. No. 2; 14 Vict. No. 20; 18 Vict. No. 10; 18 Vict. No. 15 (which authorized the Harbour Master to collect charges for the removal of ships from Gage's Roads into Owen's Anchorage); 47 Vict. No. 17. In the case of *Asshetton Smith* v. *Owen* (1) the word "port" was construed widely. *Hunter* v. *Northern Marine Insurance Co.* (2) dealt with the meaning of "port" in reference to a policy of an insurance, and *Sailing Ship "Garston" Co.* v. *Hickie & Co.* (3) in reference to the case of a charter party.

Moss K.C. and *Dwyer*, for the respondents. The proper meaning of a "stowaway" is a person who conceals himself on board a ship in order to evade payment of passage money. The Chinese in this case had not this object, so they were not stowaways in the ordinary acceptation of the term. But even if they were statutory stowaways the master did what was required of him by the *Immigration Restriction Act* 1901-1908 when he informed an officer of their presence on board his ship, there being no time specified by the Act within which the notice is to be given. He was thus exempted from punishment by the provisions of sec. 9D. The s.s. *Paroo* cannot be said to have come into the port of Fremantle until she entered the artificial harbour situated at the mouth of the Swan River and generally recognized as the port of Fremantle: *Hunter* v. *Northern Marine Insurance Co.* (2); *Sailing Ship "Garston" Co.* v. *Hickie & Co.* (3).

(1) (1907) A.C., 124.
(2) 13 App. Cas., 717.
(3) 15 Q.B.D., 580.

Barker, in reply. There being no time within which notice is to be given specified by sec. 9D, an officer must be informed within a reasonable time. The real object of sec. 9D is to meet cases where people are carried on from a port by mistake and with no idea of hiding themselves away or evading the immigration restrictions.

Cur. adv. vult.

October 29.

GRIFFITH C.J. The s.s. *Paroo* came into the Customs port of Fremantle from Singapore on 28th February 1909, having on board six Chinese stowaways of whose presence the master was not aware. She had a case of small-pox on board, and was ordered into quarantine at an anchorage still within the Customs port, where she remained till 12th March, when, in consequence of information given to the master by the immigration authorities, a rigorous search was made which resulted in the discovery of the stowaways, whose presence was then formally reported by the master. The ship came into the inner harbour on the following day. The stowaways were never landed, but were taken back in the ship to Singapore, where they were prosecuted and convicted under the *Merchant Shipping Act.*

The respondents, the master and agents of the ship, were thereupon proceeded against for, and convicted of, the offence created by sec. 9A of the *Immigration Restriction Act* 1901, as amended by the Act of 1908, which is as follows:—

"(1) If any vessel, having on board any stowaway, who is a prohibited immigrant, comes into any port in Australia, the master, owners, agents, and charterers of the vessel shall be jointly and severally liable on summary conviction to a penalty of One hundred pounds for each stowaway.

"(2) Every stowaway brought into any port on board a vessel shall be deemed to be a prohibited immigrant for the purposes of this section unless it is proved that he has passed the dictation test or that an officer has given him permission to land without restriction."

Sec. 9B authorizes an officer to search any vessel in any port or in any territorial waters of the Commonwealth for stowaways,

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and section 9C authorizes the detention of a vessel for the purpose of making such search.

Sec. 9D is as follows :—

"Any person on board a vessel at the time of her arrival from any place outside Australia at any port in Australia who is not—

"(*a*) a *bonâ fide* passenger on the vessel, or

"(*b*) a member of the crew of the vessel whose name is on the articles,

shall be deemed to be a stowaway, unless the master of the vessel gives notice to an officer that the person is on board the vessel, and does not permit him to land until the officer has had an opportunity of satisfying himself that the person is not a prohibited immigrant."

The marginal note to this section is "Definition of a Stowaway."

The first question for determination in this appeal is whether sec. 9D is to be read as an interpretation clause in the sense of an exhaustive definition, as suggested by the marginal note, or it is to be read as extending *sub modo* the sense which would otherwise be given to that word as used in sec. 9A.

The word "deemed" may be used in either sense, but it is more commonly used for the purpose of creating what *James* L.J. and Lord *Cairns* L.C. called a "statutory fiction" (see *Hill* v. *East and West India Dock Co.*) (1), that is, for the purpose of extending the meaning of some term to a subject matter which it does not properly designate. When used in that sense it becomes very important to consider the purpose for which the statutory fiction is introduced. An instance of the use of the word in the other sense is to be found in the case *R.* v. *Norfolk County Council* (2), where it was held that in a clause beginning, "The following . . . shall be deemed to be," the word imported an exclusive definition and not an extension of meaning.

The meaning of sec. 9A standing alone is plain enough. If sec. 9D does not qualify it, the offence is complete on the coming of the ship into port with a stowaway on board, and the know-

(1) 9 App. Cas., 448, at p. 456. (2) 60 L.J.Q.B., 379.

ledge of the master, owners and agents is not material. I doubt, indeed, whether, if the presence of the man were known at the time of arrival he could be properly called a stowaway within the meaning of the section. The object of the provision is equally clear. It is to prevent prohibited immigrants from being brought surreptitiously into the Commonwealth under circumstances which would render their landing without detection extremely easy. It was suggested that the word "stowaway" is not a word which bears any definite legal meaning, and that so far as it has one it imports an intention to avoid payment of passage money. No doubt the word is often used in that sense. I do not know whether it is also used in Great Britain to denote persons secreting themselves on board a ship in order to escape from justice, but I do not see any reason why it should not be so used. I think, however, that in the use of the word in the *Immigration Restriction Act* the element of an intent to avoid payment of passage money is not necessarily involved. Secs. 9B and 9C show that the essential quality of a stowaway is concealment of his presence on board the ship. If the concealment continued until landing the stowaway would in fact avoid payment of passage money, and might therefore be properly regarded as having intended to do so.

What then was the purpose for which sec. 9D was enacted?

Bearing in mind the object of the legislation and the provisions of sec. 9A dealing with the case of persons actually concealed on board at the time of arrival, there was still another class of persons who might surreptitiously obtain entrance into the Commonwealth, namely, persons who were not members of the crew of a ship or entered on the passenger list, but who had, somehow or other, found their way on board the ship before sailing, and were not discovered to be on board until it was too late to put them ashore. I do not think that such persons could properly be regarded as stowaways within the meaning of sec. 9A. Yet, if their presence were not disclosed to the immigration officers, they would be just as likely to be able to land without detection as persons in actual concealment. But it would be unjust to punish the master and owners in such a case, if they did all in their power to prevent this consequence. If sec. 9D

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is regarded from this point of view, it falls naturally into place as part of the scheme of the Act. It is, perhaps, not a very fortunate instance of the modern method of legislation by reference, but in substance it provides that, if a ship comes into port having on board a person who is not a member of the crew nor a passenger, the master shall be liable to a penalty unless he gives notice of the presence of such person.

This construction gives full effect to sec. 9D.

On the other hand, although the words of that section: "Any person on board a vessel at the time of her arrival from any place outside Australia at any port in Australia who is not (*a*) a *bonâ fide* passenger on the vessel, or (*b*) a member of the crew of the vessel whose name is on the articles" are affirmative in form, the declaration that all persons who fall within the definition shall be deemed to be stowaways unless the master gives notice of their presence, suggests *primâ facie* that if he does give notice of the presence of a person falling within the definition, that person is not to be deemed a stowaway. *Expressio unius est exclusio alterius.* If this view be accepted, the question arises, when is the notice to be given and has it a retrospective effect? Considering that the offence created by sec. 9A is complete at the moment of the ship's coming into port, I feel a difficulty in coming to any conclusion other than that the notice must be as far as possible contemporaneous with coming into port, *i.e.*, that it must be given at the earliest possible moment, the possibility being determined, not with regard to the master's knowledge, which is immaterial, but with regard to the presence of an officer to whom notice can be given.

It is, however, pointed out that no time is limited by sec. 9D for giving the notice, and it is contended that the master may give it at any time provided that he has prevented the person in question from landing, and I do not at present see any satisfactory answer to this argument as applied to cases falling within sec. 9D. Then it is said that if the same construction is not applied to stowaways whose presence is unknown on arrival, the consequence will be that a master who knows of a person who is a stowaway within sec. 9D, and omits to give immediate notice of his presence on board, has a *locus penitentiæ*, while a master

who fails to give notice of the fact because he does not know it has none, which would be a strange anomaly. I agree that it would be an anomaly, for which I can see no reason except an intention to impose on the master and owners the absolute duty of exercising such vigilance as will effectually secure the discovery of stowaways before the ship comes into port. But the legislature, when dealing with the case of stowaways discovered before the arrival of the ship, were entitled to deal with it in any way they thought fit, and, if they so chose, to allow certain facts to be an excuse in that case which they did not allow in the case of undiscovered stowaways, and it is not for this Court to discuss the wisdom or justice of their action.

On the whole I am compelled (very reluctantly, I confess) to the conclusion that sec. 9D cannot be regarded as an exhaustive definition of the term "stowaway" as used in sec. 9A, but must be considered as an extension of the meaning of that term. It follows that the offence created by sec. 9A is complete at the coming of the ship into port, and cannot be purged by subsequent notice, even if that notice be given, as in this case, at the earliest possible moment after knowledge of the facts.

It remains to consider whether on 28th February the *Paroo* had come into port within the meaning of sec. 9A. *Burnside* J., thought that the places at which she lay until 13th March, although within the Customs port of Fremantle, were not within a port in the sense in which the word is used in that section.

It appears upon the evidence that these places, which are outside the artificial port recently constructed, are in sheltered waters, and had for very many years before the construction of the moles been used as anchorages for vessels trading to Fremantle.

They were also within the limits of the jurisdiction of the Fremantle Harbour Board, and pilotage and harbour dues were by law payable by ships using the anchorages. It is, I think, clear upon this evidence that until the construction of the artificial harbour these waters formed part of the port of Fremantle, in whatever sense that term was used. The learned Judge thought that the word "port" in sec. 9A should be limited to "those havens or harbours of safety where ships arrive for

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the purpose of discharging their cargo or landing their passengers," and where officers of immigration or Customs officers may be found to supervise those operations, and he thought that the *Paroo* could not be said to have "come into port" until she had come to a place where it was reasonably practicable to discharge the cargo and land the passengers—an event which had not happened on 28th February, the day on which the offence is charged to have been committed. He referred to sec. 9 of the Act, under which the gravamen of the offence is the landing of a prohibited immigrant, and pointed out that sec. 9B draws a distinction between ports and territorial waters. I think, however, that the term "territorial waters" means waters outside of ports, and throws no light on the meaning of the term "port." I think further that a comparison of secs. 9 and 9A shows that the intention of the legislature in passing the latter section was to deal with a time antecedent to that at which actual landing was probable or practicable. On the whole I am unable to accept the learned Judge's view. I do not say, nor do I think, that the fact that certain waters have been proclaimed a port under the *Customs Regulation Act* is conclusive as to what is a port within the meaning of sec. 9A, but I think that upon the evidence in this case I am bound to hold that the *Paroo* came into the port of Fremantle on 28th February.

The appeal must therefore be allowed and the conviction restored, although under the special circumstances of the case one would not be surprised if the whole or part of the penalty should be remitted by the Crown.

BARTON J. The complaint, laid under the *Immigration Restriction Act* 1901-1908, sec. 9A (1), alleged that on 28th February 1909 the steamship *Paroo*, whereof it was also alleged that the respondent James Rodger was then the master and the respondents Dalgety & Co. Ltd. were then the agents, came into the port of Fremantle having on board six stowaways who were prohibited immigrants. The complainant, now the appellant, a police officer, claimed against the respondents jointly and severally, as such master and agents, an order for the payment of the penalty of £100 for each stowaway.

Under this complaint the respondents were convicted by the Police Magistrate at Fremantle, and ordered jointly and severally to forfeit and pay £600, being a penalty of £100 in respect of each of the six stowaways. They appealed to a Judge of the Supreme Court under the *Justices Act* 1902, secs. 183-190. The Police Magistrate had, of course, heard and determined the case on oral evidence. On the appeal the parties agreed that the notes of the evidence taken before him should be accepted as the evidence for the purposes of the appeal. *Burnside* J., who heard the appeal, reversed the conviction, and the complainant appeals to this Court.

The facts are not now in dispute. The persons in respect of whom the proceedings arose, who were Chinese, were admittedly stowaways. The ship's log, signed by the respondent Rodger, sets out that they are from Singapore, and it is not seriously suggested that they came aboard anywhere else. The *Paroo* had left Singapore on the 10th February, and after calling at Sourabaya on the 13th, had arrived at Broome on the 17th. She had left Broome on the 21st, and arrived in Gage Roads on the 28th, where she anchored under quarantine orders. It is common ground that the stowaways remained concealed until the master, the respondent Rodger, and some of his officers found them in an engine room tank. That was on 12th March, at Owen's Anchorage, whither the ship had moved from Gage Roads, still in quarantine. As soon as the stowaways had been discovered, the master notified the fact to an officer under the *Immigration Restriction Act*. The vessel came into the river on the 13th March, but remained under quarantine until her departure. The master kept all the stowaways on board. They were taken back to Singapore on 15th March in the *Paroo*.

On these facts the appellant contends that the conviction by the Police Magistrate was right, and ought not to have been reversed. The respondents contend (1) that Gage Roads and Owen's Anchorage are not within the port of Fremantle, and that the Police Magistrate was wrong in so finding; (2) that as the master gave notice to the officer of the presence of the men on board, and did not permit any of them to land, they could not, within the meaning of section 9D, be deemed to be stowaways, though neither

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bonâ fide passengers nor members of the crew. If the places named are within the port of Fremantle, it is conceded that the conviction must stand, unless a defence can be founded on sec. 9D. I may mention here that no proof was given as to any of the men that he had passed the dictation test, or that an officer had given him permission to land without restriction. The stowaways must, therefore, be deemed to be prohibited immigrants, if they were brought into port: sec. 9A (2).

First then as to the question of the port of Fremantle. The *Immigration Restriction Act* gives no interpretation of the term "port." The places in question are within the lines of the port as defined by Proclamation under the *Customs Act* 1901, sec. 15 (*b*). The Police Magistrate thought this definition sufficient proof of the limits of the port for the purposes of the complaint. I do not think it is, though I think that his finding that the *Paroo* came into port on 28th February must stand. We were referred to several Western Australian Statutes, among them to the *Port Regulation Act* (14 Vict. No. 20), which fixes a radius of 15 miles from Arthur's Head as the limit of the port, and Gage Roads and Owen's Anchorage are within that radius. Again, they are within the limits of the area vested in the Fremantle Harbour Trust Commissioners by the Act of 1902, No. 17. But it is more worthy of remark that the Act 18 Vict. No. 15, relating to "Shipping and Pilotage within the Harbours of Western Australia," includes both the anchorages within the limits of this port, and its provisions in that respect have remained unaltered for over fifty years, and since the construction of the two moles at the mouth of the Swan River, though the Act itself has been amended by 37 Vict. No. 14, and 47 Vict. No. 17. The five Acts last mentioned are all State Acts, and the *Immigration Restriction Act* is a Federal Statute. But if the latter Act contemplated any class of statutory definition of the limits of the ports of Australia, limits as to which it does not speak, I should think that it looked rather to those established by shipping Acts and the usage consequent thereon, than to those defined for fiscal purposes. I do not say that it looked to either. We have not to determine what are the precise limits of the port of Fremantle, but to decide whether or not these anchorages

are within the port. The sense in which the *Immigration Restriction Act* speaks of a port is, I think, in the absence of definition by the Act itself, the sense of a shipping or commercial port. That is the natural, or ordinary, or business sense, whichever term one prefers to use. The Boarding Inspector of the Customs, Mr. Smith, who is also an officer under the *Immigration Restriction Act*, says that both Gage Roads and Owen's Anchorage are within the limits of the port. The Inspector of Quarantine, Mr. Chambers, says that from her arrival on 28th February until she left Fremantle the ship was within the limits of the port. For the defence Mr. King, the shipping manager of Dalgety & Co., said that those who speak of the port of Fremantle mean the waters enclosed by the two moles up to the railway bridge, including the wharves. This view seems to have been adopted by the learned Judge, who found that the two anchorages were not within the port, and rested his reversal of the conviction on that ground. In cross-examination Mr. King said this :—" The definition of 'port' I give is since the mole was opened seven years ago. I came to Fremantle about 21 years ago. The port of Fremantle was then an open roadstead, Gage Roads and Owen's Anchorage. We had ships in those days up to 2,000 tons, and large cargoes were discharged into lighters and wharfages were exacted, and the ships paid tonnage dues, &c." If Mr. King is right, the anchorages which were part of the port up to seven years ago have ceased since then to be so by reason of the construction of the works and wharves at the entrance of the river. I do not think a narrowing effect of this kind can be attributed to those operations, nor do I think that the extra facilities for shipping so provided have contracted the port. The evidence on this part of the case seems to me to be all one way, as Mr. King agrees with Mr. Smith and Mr. Chambers as to the inclusion of the anchorages up to seven years ago, and nothing that has happened since can have excluded them. It is not a light matter to disturb the finding as to facts of the Police Magistrate who alone heard the evidence, and I feel myself the more bound to give effect to his views by the consideration that there is really nothing to countervail the evidence in support of the complaint on this point, which evidence, *primâ*

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facie, satisfies the onus of proof. *Burnside* J. had not the witnesses before him, but only the notes of their evidence, and it cannot be said that there is any document tending to bring the finding of the Police Magistrate into doubt.

The *Paroo* then having come into the port of Fremantle on the date named in the complaint, having on board stowaways whom we must deem to be prohibited immigrants, the case is made out unless sec. 9D affords a defence. It was pressed upon us for the respondents that the section defines the term "stowaway." I do not think it does. Secs. 9A, 9B, and 9C seem clearly to speak of stowaways in the common acceptation of the word, namely, as persons who, not being passengers or members of the crew of a vessel, stow themselves away, that is, hide themselves on a vessel at her departure from a port. The object of stowing away may be, and often is, the reaching of the port of destination without having to pay for a passage; but the avoidance of detection may be for other or added reasons, and in the case of a country which evinces particular care as to the class of persons whom it admits into its community, the eluding of the vigilance of the captain and officers is prompted partly by the fact that they will not knowingly accept even as passengers those whose landing will probably be prevented; and partly by the desire to gain a chance of slipping ashore unobserved on the ship's arrival in port, either after the passengers have left the ship, or, if possible, before the berthing of the ship, and at some spot where the chances of detection and exclusion are not so great as they are at the wharves or other recognized landing places. It is obvious that stowaways of the class first mentioned may not be so careful to keep themselves secreted after the possibility of the ship returning to land them has passed, while the stowaways who wish to evade the execution of immigration laws necessarily desire to maintain secrecy until the opportunity of landing has presented itself and been seized.

The stowaway, then, who is likely to be prohibited as an immigrant will hide himself from the master as closely as he hopes to conceal himself from the immigration officer. The policy of sec. 9A, as disclosed by its terms, is to take no excuse from the master or anyone having control of the ship as owner,

agent or charterer, for her arrival at an Australian port with any stowaway on board who does not answer to the prescribed conditions. It casts on them the duty of discovering every such stowaway. If they wish to avoid the risk of penalty, they can do so by taking precautions at the oversea ports the ship leaves on her voyage to Australia. If such precautions as are taken are insufficient, and the ship comes into an Australian port with a stowaway on board, then, on failure of proof that he has passed the dictation test or has received an officer's permission to land, there is no escape from the penalty. The law is plain, and it is not for us to criticize it. It applies, however, only to persons who have actually stowed away, and to no others unless others are brought within it by virtue of sec. 9D. That section does not provide for any restriction or definition of the term "stowaway," but is superadded to sec. 9A for the purpose of enlarging the class. Accordingly it includes, of course only for the purposes of the Act, those who, apart from sec. 9D, are not or are not shown to be actual stowaways. This it does by saying that they "shall be deemed to be" stowaways unless the master notifies their presence and does not allow them to land. As *Cave* J. said in *The Queen* v. *County Council of Norfolk* (1):—"Generally speaking, when you talk of a thing being deemed to be something, you do not mean to say that it is that which it is to be deemed to be. It is rather an admission that it is not what it is to be deemed to be, and that, notwithstanding it is not that particular thing, nevertheless, for the purposes of the Act, it is to be deemed to be that thing." So here, the provision is not framed for and does not apply to actual stowaways, such as the six men in question are proved to be. As therefore they are not such persons as are dealt with by sec. 9D, the question of notice by the master to an officer does not arise and need not be considered, for such a notice, whenever given, will not serve to exonerate any of the respondents from liability in the case of these six actual stowaways.

I am of opinion, therefore, that the conviction by Mr. Dowley, Police Magistrate, was right and should be restored, and that the appeal must be allowed.

(1) 60 L.J.Q.B., 379, at 380.

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As the case seems to be one of some hardship, the circumstances may possibly receive favourable consideration at the hands of the Executive.

O'CONNOR J. The defendants were charged before the Police Court with an infringment of sec. 9A. of the *Immigration Restriction Act* 1901-8. The establishment of three facts was essential for a conviction:—First, that the ship came into the port of Fremantle; secondly, that when she did so she had on board one or more stowaways who were prohibited immigrants; thirdly, that at the time when she so came into the port the defendants were respectively her agents and her master. The Police Magistrate, finding all three facts proved, convicted the defendants. Mr. Justice *Burnside*, on review, set aside the conviction, on the ground that Gage Roads, Karnac and Owen's Anchorage, the *Paroo's* successive anchorages on arrival, are not for the purposes of the *Immigration Restriction Acts* within the port of Fremantle, expressing at the same time the opinion that the port of Fremantle within the meaning of those Statutes does not extend beyond the waters of the artificial harbour formed at the mouth of the Swan River. As it was conceded that before the vessel entered those waters the master had discovered the stowaways and had notified their presence to the immigration officer in accordance with sec. 9D, it followed on that finding that when the ship entered the port of Fremantle there were no stowaways on board within the meaning of sec. 9A. The prosecution, on the other hand, contend that Gage Roads is within the port of Fremantle, that the offence was complete when the ship anchored there, and that the discovery of the stowaways by the master twelve days afterwards and his notification of their presence following thereon could not purge that offence. The defendants reply that even under those circumstances the provisions of sec. 9D protect them. With that contention I shall deal later on. At present I shall confine myself to the inquiry whether the finding upon which the learned Judge in the Court below based his decision can be supported, that is to say, whether he was right in holding that for the purposes of the *Immigration Restriction Acts* the port of Fremantle does not extend beyond the artificial

harbour at the entrance to the Swan River. In sec. 9A the word "port" is used in its general popular signification. Taken in that sense the word would include any waters adjoining Fremantle where ships are accustomed to lie while loading or unloading cargo, or waiting to go to the wharfs or docks at which cargo for that place is usually loaded or taken on board. Port limits for all purposes are sometimes defined by Statute. In such cases no difficulty can arise. But a Statute which defines the port limits for a special purpose does not thereby determine its limits for other purposes, and I agree with Mr. Justice *Burnside* that the proclamation issued under the *Customs Act* fixing the port boundaries for Customs purposes cannot be taken as necessarily laying down its limits for the purpose of the *Immigration Restriction Acts*. Having regard to the objects of those Acts and the vigilance required for their effective administration, one would suppose it to be at least as necessary to vest in the Executive Government a power of exact definition of port limits for purposes of immigration as for Customs purposes. The Commonwealth legislature, however, has not thought fit to make any statutory provision in that respect. Under these circumstances the only way in which the limits of the port can be determined is by inquiring what is in fact the space of water which the shipping and trading community and the port authorities concur in using and describing as the port of Fremantle. In such an inquiry the conformation of the land with regard to the sea at that part of the coast is of first importance. It is common knowledge that there is a well defined triangular space of water opposite Fremantle well sheltered on the East by the coast from Winding Sheet to Cape Perron, and more or less protected on the West and South by Rottnest Island, Garden Island and the shoals and sand-banks connecting them with each other and with the mainland at Cape Perron. Within that space is included Gage Roads, Karnac and Owen's Anchorage as well as the artificial harbour at the mouth of the Swan River. Every statutory description of the port of Fremantle to which the Court has been referred includes this space, and the evidence is conclusive that before the construction of the new harbour seven years ago it had been always recog-

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nized as the area of shelter within which all ships trading to Fremantle anchored while waiting for wharfage or working cargo into or out of lighters. With reference to that period, Dalgety & Co.'s shipping manager, King, admits that the port of Fremantle was then an open roadstead, and included Gage Roads and Owen's Anchorage. The statute law of Western Australia also affords strong evidence of the early recognition of this open roadstead as the port of Fremantle. In 1855 an Act was passed (18 Vict. No. 15) for consolidating and amending the laws for the regulation of shipping and of pilotage and other dues in the ports or harbours of Western Australia. Amongst the dues which it authorizes harbour masters to collect are charges for the removal of ships from Gage Roads into Owen's Anchorage or Cockburn Sound and from Cockburn Sound into Gage Roads or Owen's Anchorage. It authorizes also the collection of pilotage rates in respect of ships brought into Gage Roads or Owen's Anchorage. By virtue of that and later Acts amending its provisions these port dues and pilotage rates have ever since been paid by shipmasters and shipowners using these anchorages as being port dues and pilotage charges of the port of Fremantle. After the construction of the harbour at the mouth of the Swan River the *Fremantle Harbour Trust Act* 1902 was passed. It rests in a Commission, the control and management of what is therein described as the "Harbour of Fremantle." The waters so placed under the jurisdiction of the Commission are defined in a Schedule. They include Gage Roads, Owen's Anchorage and Karnac, as well as the new harbour, and cover substantially the triangular space of sheltered water to which I have referred, which has been known and used as the port of Fremantle for over fifty years. That was the enactment in force in 1908 for the regulation of shipping in the port of Fremantle. There is, in my opinion, good ground for contending that the harbour of Fremantle as so delimited by the *Harbour Trust Act* must be taken as the port of Fremantle for all shipping purposes. But I do not wish to carry its effect so far, and I shall treat the enactment as evidence only of legislative recognition of what had always been known and used as the port of Fremantle. Putting all these facts together, I find it impossible to escape from the

conclusion that for the last fifty years the Government and the shipping and the mercantile community of Western Australia have concurred in regarding and describing the waters in which the *Paroo* came to an anchor on 28th February last as being within the port of Fremantle. No doubt the object of a Statute must be taken into consideration in interpreting ambiguous expressions in its provisions. By the application of that rule the learned Judge in the Court below seems to have been led into narrowing the expression "Port of Fremantle" as covering only the artificial harbour in which the wharves are situated. If it were necessary in this case, which I think it is not, to apply that rule of interpretation, a consideration of the objects of the Statutes ought, in my opinion, to lead to the adoption of the widest possible, rather than of the narrowest possible, meaning of the word. The real danger of evasions of the immigration laws of the Commonwealth by stowaways does not arise so much at wharves and landing places, where immigration officers are consequently on duty, but rather at those anchorages remote from wharves and landing places where a ship may lie in comparative safety and yet be free from constant and vigilant supervision. For these reasons I am of opinion that the learned Judge, in holding that the place of anchorage at which the *Paroo* arrived on 28th February was not within the port of Fremantle, drew an inference from the evidence before him which was manifestly erroneous, and that his decision founded on that view cannot be upheld. It follows that, in my opinion, the Police Magistrate rightly came to the conclusion that the *Paroo* entered the port of Fremantle on the date alleged in the information, having stowaways on board, in contravention of sec. 9A.

In the course of the argument before this Court the respondents endeavoured to support Mr. Justice *Burnside's* decision upon another ground, which may be very shortly stated. Assuming that the *Paroo* did come into port having stowaways on board, yet, as they were afterwards discovered by the master and their presence was duly notified to the immigration officer in accordance with sec. 9D, no offence was committed. The plain answer to that contention is to be found in the words of sec. 9D

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itself. On the face of it, the language used can have no application to actual stowaways; it deals only with what may be described as fictional stowaways, persons who were not in fact concealed or stowed away when the vessel came into port, but whom the legislature declares shall be regarded as if they were so concealed for the purpose of imposing on the master the same responsibility for their being on board as if they were actual stowaways. But it provides that, in respect to such persons, he may relieve himself of responsibility by notifying their presence to the immigration authorities and preventing them from landing. It is, I think, obvious from an examination of sec. 9D, in connection with the other sections of the Act relating to the same subject matter, that no other interpretation is possible consistently with the language used in the other sections of the group of provisions dealing with the same subject. "Stowaway" is an expression having a well recognized definite meaning. Any person who conceals himself on shipboard in order to be carried on a voyage without the knowledge of the ship's authorities comes, I think, fairly within the term, whatever his object in voyaging without the knowledge of the ship's authorities may be. There can be no valid reason for restricting the expression to those who conceal themselves in order to avoid payment of passage money. To place so restricted a meaning on the word as used in these Acts would be to render the group of sections under consideration practically meaningless. I take it, therefore, that a person who conceals himself in a ship voyaging to Australia for the purpose of evading the provisions of the *Immigration Restriction Acts* is a stowaway within the meaning of sec. 9A. The original Act of 1901 contained no such provisions. This group of sections was added in the amending Act of 1908 in order to stop the carrying of stowaways in ships trading to Australia. The method adopted was to impose on the master the obligation of taking care that when he entered an Australian port there were no stowaways on board. The offence was therefore created in a form which makes the master's knowledge or want of knowledge of the stowaway's presence in the ship at the time of her coming into port immaterial. Thus the strongest motives of self-interest are in operation to secure a thorough

search of the ship by the master before leaving her last port of clearance for Australia. Sec. 9A, however, applies only to actual stowaways, that is, to persons concealed in the ship when she enters port. If before that they have been discovered, they are, when the vessel enters, not stowaways but persons who are on board with the knowledge of the master, but who are neither passengers or members of the crew. But it is obviously essential for the proper administration of the Act that the immigration officer should be made aware of their presence on board, and that they should not be allowed to leave the ship until he has had an opportunity of inspecting them. A consideration of the provisions dealing with stowaways would seem to show that it was principally to meet that gap in the Act that sec. 9D was inserted. But it was necessary also to deal with the cases in which persons might be on board who never had been actual stowaways but who were nevertheless neither *bonâ fide* passengers nor members of the crew. The immigration officer's principal and most definite and reliable source of information as to the inmates of a ship are the passenger list and the ship's articles. Neither of these documents would give him information either as to the stowaways discovered before the ship's entry into port or as to persons I have last described. Sec. 9D refers to both those classes of persons, and to those only. It imposes on the master the obligation to notify their presence to the immigration officer and to prevent their leaving the ship until the latter has had an opportunity of satisfying himself that none of them are prohibited immigrants. The performance of these obligations by the master is secured by the form of the last paragraph of the section. The persons of the two classes mentioned are deemed to be, though they were not in fact, stowaways at the time of the ship's arrival in port. The master is therefore *primâ facie* liable under sec. 9A for the ship entering port with them on board, but that liability ceases as soon as he has notified the immigration officer of their presence on board in accordance with section 9D, provided that in the meantime he prevents them from landing until that officer has had the opportunity of satisfying himself that they are not prohibited immigrants. Mr. *Moss*, in support of his contention, endeavoured to uphold the view that

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sec. 9D was to be taken as defining the expression "stowaway." That it certainly does not do. On the contrary, it declares that persons described in such a way as to indicate that they are not stowaways shall nevertheless be deemed to be stowaways. It is true that the words used to describe the classes mentioned are capable of being read as including persons who are actual stowaways as well as those who are not. But actual stowaways have been already dealt with under sec. 9A. To hold that sec. 9D has again dealt with them, and in a contradictory way, is to hold that the legislature has enacted in regard to the same subject-matter two wholly inconsistent provisions. The intention therefore fairly to be gathered from a comparison of the sections is that the legislature intended sec. 9D to apply only to persons who were not actual stowaways. It follows, therefore, in my opinion, that the judgment of Mr. Justice *Burnside* must be set aside, the decision of the Police Magistrate upheld, and the conviction restored. Taking the view of the facts which he did take, the Police Magistrate could not do otherwise than impose on both defendants the very heavy fine which stands against them. But I agree with my learned colleagues that the conduct of the master from the time when the suspicions of the immigration officer were communicated to him has been such as to render the case against both defendants a proper one for the consideration of the Executive.

Appeal allowed.

Solicitor, for appellant, *Barker,* Crown Solicitor for Western Australia.

Solicitors, for respondents, *Moss & Dwyer.*

H. V. J.