

The nine hundred and fifty acres granted to James Mitchell is described in the Crown grant of the 6th January 1836 as bounded on the west by a southerly line of one hundred and thirty three chains to a creek at the meeting of the salt and fresh water, on the south by that creek or salt water lake east to the sea beach.

The question at issue is whether the Crown is entitled to a reserve of one hundred feet measured from the southern shore of the lake or lagoon. This depends on the true meaning and effect of the grant. This is partly a question of fact and partly of law.

It will be noticed that the reservation is of "all land within one hundred feet of high water mark on the sea Coast, and on every creek, harbour and inlet"; this means high water mark on the sea coast and high water mark on every creek, harbour, and inlet.

The evidence given on either side appears at first to be conflicting, but any apparent discrepancy is, I think, almost entirely removed by noticing the date to which the witness's evidence refers. Without going minutely into the evidence, I find as follows: (1) That the state of the lagoon was continually varying, according to the conditions of wind and weather; (2) that the lagoon was more or less permanently separated from the sea by a sand-bar which rose some feet above the ordinary level of the lagoon and above high water mark, whether at spring or neap tide; (3) that after a heavy rainfall the creek or stream running into the lagoon from the west filled up the lagoon until the water was nearly on a level with the top of the sand-bar; (4) that when this was the case a channel was often made artificially across the bar, and the water allowed to run into the sea; (5) that occasionally the water of the lagoon made a channel by its own pressure across the bar; (6) that the water running through the channel widened and deepened it; (7) that, when the water in the lagoon had run out, the channel was soon closed by the action of the sea and wind banking up the sand-bar; (8) that in recent years, when a channel in the bar was open, the sea water flowed into the lagoon on some occasions at high water—the depth of the sea water so flowing in, in the channel, varying from one foot to two or three inches; (9) that previously to 1880 there was rarely or never any inflow from the sea, except by waves sometimes lapping over the bar; (10) that at high spring tides, with a south easterly gale blowing, the waves of the sea ran up the outer slope of the sand-bar, and the end of the waves ran over into the lagoon; (11) that the water in the lagoon was salt, at any rate at the eastern end, from the access of sea water; (12) that in 1840 the lagoon was less exposed to the entrance of the sea than in recent years; and (13) that the lagoon was not subject to the ordinary ebb and flow of the tide.

Alexander Patrick, one of the defendants witnesses, whose evidence I see no reason to doubt, says that in the nineties the bar was closed for a period of one year and nine months at a time, and that it would often remain closed for six months or three months; and that from 1870 to the present time he should say the lagoon was not open more than thirty days in the year.

With reference to (9), only one of the witnesses for the Crown knew the lagoon before 1900. Hicks knew the Lagoon from 1887 to 1891, and he says he has seen the tide running in occasionally. On the other hand, many of the defendants witnesses have known the lagoon in earlier years. H. Smith from 1869 to 1871; Donaldson, from 1847 to 1849; Croaker (who was borne in 1840) from his earliest years to the present time. All these witnesses say they never saw the sea flowing in; only the waves breaking on the bar, and part of them going over.

As regards the law, the earliest authority referred to was the Year Book (22 Edw. III 93): "*Nota quesquacun earu que flowe et reflowe est appel' bras de mer, si tant avant come el' flowe.*" This is cited as an authority by Sir Matthew Hale in his *De Jure Maris et Brachiorum Ejusdem* (Cap. IV, II. 2) "That is called an arm of the sea where the sea flows and reflows, and so far only as the sea so flows and reflows."

Hall in his *Treatise on the Seashore*, edited by Moore (3rd ed.), at p. 669, says: "This dominion (of the King) not only extends over the open seas, but also over all creeks, arms of the sea, havens, ports, and tide rivers, as far as the reach of the tide, around the coasts of the kingdom. All waters, in short, which communicate with the sea, and are within the flux and reflux of its tides, are part and parcel of the sea itself, and subject in all respect, to the like ownership."

In applying the principles of law to the facts of any case, the Court, in my opinion, must have regard to the general character of the lake or lagoon in question at the date of the grant. For instance if a lagoon were subject to the ebb and flow of the tide for three hundred and sixty four days in the year, I apprehend that it would be an inlet of the sea, although it was closed to the sea by a sand-bar on one day of the year. Taking the opposite extreme, if the lagoon were closed to the sea three hundred and sixty four days in the year, and open one day only, I apprehend it would not be an inlet of the sea. The Court in my opinion, must look at all the facts in each case, and therefore, every case must stand on its own circumstances. It is really a question of fact, just as in cases of alluvion; it is for the jury to say whether the accretion has been so slow and gradual as to be imperceptible.

On the facts of this particular case, I come to the conclusion that in 1840 the Glenrock Lagoon was not an inlet of the sea within the meaning of the grant, and consequently, there was no reservation of one hundred feet along the southern shore of the lagoon. This was the only point in dispute. Subject therefore to a declaration that the Crown is entitled to a reservation of one hundred feet along the sea coast as shown in the plan annexed to the information, the information is dismissed with costs.