

109. A further case bearing upon the points at issue in this inquiry is that of *Attorney-General v. Swan*, N.S.W.S.R., Vol. 21 (1921), p. 408. At page 414 Mr. Justice Street (then Chief Judge in Equity of the Supreme Court of New South Wales) says :—

In the year 1840 a grant of two thousand acres of land was made by the Crown to one Andrew Lang. The land was described as bounded partly by Illawarra Lake and by Mullet Creek, but amongst a number of other reservations contained in the grant was a reservation “ of all land within one hundred feet of highwater mark on the sea coast and every creek, harbour, and inlet.” In the course of time the land was subdivided into smaller areas, and the defendant became the owner of two adjoining lots situated on a tongue of land bounded on one side by the waters of the lake and on the other by the waters of Mullet Creek. In the conveyances these lots were described as bounded by the shore of the lake on one side and by Mullet Creek on the other. It is claimed on behalf of the Crown that Mullet Creek is a creek or inlet of the sea, and that Illawarra Lake is a harbour or inlet of the sea, within the meaning of the grant, and the Crown claims to be entitled to the land within one hundred feet of highwater mark on the creek and on the lake. The defendant denies that the creek and the lake are inlets of the sea, and he asserts alternatively that, if he is wrong in this, and if the grant did not operate to divest the Crown of the land which it now claims, he has acquired a title by the fact that he and his predecessors in title have had continuous and undisturbed possession adversely to the Crown for upwards of sixty years.

Illawarra Lake is one of a series of lagoons on the coast of New South Wales all of which are more or less similar in character, and all of which were probably formed much in the same way. As it exists at the present day it is a sheet of water intermittently open to the sea, and with a number of streams of varying sizes emptying themselves into it on its landward shores. The effect of the sea's action is to close its mouth or entrance by heaping up sand in the form of a bank or bar, and when closed in this way it remains closed until it is artificially opened by fishermen, or is forced open by the pressure of the accumulation of water within it. This state of things has been going on in all probability for many hundreds of years, and it may safely be assumed that it represents the state of affairs existing at the date of the grant as well as at the present time. From such information as has been put before me it appears that for a period of thirty-four years, or thereabouts, prior to the institution of these proceedings, that is to say from February, 1887, to February of this year, it has been open for approximately twenty-six years and closed for approximately eight years, and that on every occasion except two artificial means were resorted to to open it. The information is not complete, and fuller and more exact information, if it could be obtained, would probably show that it was closed for a longer period than appears. The fact too that on each occasion except two it was opened artificially, goes to show that, if it had been left to open itself naturally, it would have remained closed for some additional but unascertainable period. Taking the period of thirty-four years, however, to which I have referred, it is probably a fairly accurate assumption that it has been open to the sea for about two-thirds of the time and closed for about one-third. All the witnesses who have been familiar with the locality for any length of time agree in saying that it is more often open than closed.

His Honour here discussed in detail the evidence as to tidal influence in the lake and in Mullet creek, and then continued :—

I do not think that it is necessary to discuss the evidence further. It establishes that the lake is only intermittently open to the sea ; that when open the ordinary neap tides do not enter it ; and that the movements which Mr. Halligan recorded in Mullet Creek and its entrance are not visible to the ordinary observer, and do not synchronise with or correspond in periodicity with, the movements of the ocean tides. These things are all established by the evidence of the Crown witnesses, and they are in my opinion sufficient to determine the case. The facts that the waters of the lake are salt, and that when the channel is open there is a certain degree of communication with the ocean are not sufficient to make the lake an inlet of the sea within the meaning of the law. “ That is called an arm of the sea,” says Sir Matthew Hale (*De Jure Maris et Brachiorum Ejusdem*, Cap. IV), “ where the sea flows and reflows and so far only as the sea so flows and reflows.” That is the test, and in applying that principle to the facts of any case the Court must, as was pointed out by Simpson, C.J., in Eq., in *Attorney-General v. Merewether* (*supra*) have regard to the character of the waters in question. In that case as in this, he was dealing with a lagoon or lake intermittently open to the sea, and he said : “ 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 held to be an inlet of the sea, although it was closed to the sea by a sandbar on one day of the year. Taking the opposite extreme, if the lagoon was 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 to all the facts in each case, and, therefore, every case must stand on its own circumstances.” He came to the conclusion in that case that the lagoon in question was not an inlet of the sea within the meaning of the grant, and that consequently a reservation of one hundred feet above high water mark did not apply. In *Booth v. Williams*, 9 N.S.W.S.R. 592, I held that Deewhy Lagoon, which is similar in character to Illawarra lake, and is intermittently open and closed to the sea, could not be said to be with the influence of the ebb and flow of the tides in the ordinary course of things, and was, therefore, not an arm or inlet of the sea. My decision in that case