

was reversed by the High Court (*Williams v. Booth*), upon other grounds, but no dissent from this view was expressed, and in point of fact O'Connor, J., expressed his concurrence in it. He said (at p. 354): "In examining the subject matter and the surrounding circumstances it is important to consider the nature of Deewhy Lagoon. I agree with the learned Judge that it is not an arm of the sea according to the test laid down by Sir Matthew Hale in his treatise *De Jure Mari et Brachiorum Ejusdem*."

For similar reasons I am of opinion that Illawarra Lake is not an arm or inlet of the sea. It is impossible to measure exactly the periods during which it has been open or closed to the sea since the date of grant, but the evidence shown, as I have pointed out, that it has been open and closed at intervals from time immemorial, and that when closed by the action of the sea it would remain closed permanently but for the pressure of the accumulation of fresh water from within. It is more often open than closed, no doubt, but it is periodically closed for long periods at a time, and I do not think that in these circumstances it could fairly be said that it was within the ebb and flow of the tides in the ordinary course of things, even if, when open it were subject to the daily flow of the tides. I do not think, however, in point of fact that it is subject to the daily flow and reflow of the sea tides when open.

110. The judgment here goes on to a discussion of the tests to be applied in determining whether waters are tidal or not, and concludes this section as follows:—

I think that in such cases what is intended by high-water mark is the mark of limit of high water based on observation of the actual visible rise and fall of the tide, and ascertained in the manner pointed out in *Attorney General v. Chambers*. It is plain upon the facts of this case that on the Western shores of the lake and in Mullet Creek there is no daily visible rise and fall corresponding in any way with the movements of the sea tides. Even, therefore, if the fact that the lake is only intermittently open to the sea were not sufficient to decide the case it could not, in my opinion, be successfully contended that when open the ordinary sea tides flow and reflow within it. I am clearly of opinion therefore, that the lake and the creek are not inlets of the sea, and that the reservation in the grant of one hundred feet above highwater mark has no applicability.

111. A further New South Wales case which deals with the question of title to these lagoons is that of *Booth v. Williams Deewhy Case*, N.S.W.S.R., Vol. IX (1909), p. 592, but as it does not contribute anything which is not already covered in the two cases quoted it can be passed over.

112. We now leave for a while the case for the Crown and consider that of the Napier Harbour Board.

113. The Board claims that—

In addition to the statutory title conferred by the Napier Harbour Board Act, 1874, and the amending Act of 1887 it holds Certificate of Title H.B. Volume 18 folio 259 for the Whanganui-o-Rotu.

114. The certificate of title referred to, which, *prima facie*, is evidence of an indefeasible title, reads as follows:—

New Zealand

Act of Parliament 1875 No. 65

Act of Parliament 1887 No. 51

H.B. VOL. 18 Fol. 259

Register Book, Volume 115, Folio 193.

Reference: { Land Transfer Compulsory Registration of Title Act, 1924.
Deeds Index Vol. 15 fol. 183.
Application No. C—5893.

CERTIFICATE OF TITLE UNDER LAND TRANSFER ACT

Limited as to Parcels and Title

Corrected 14/1/1935.

R. F. Baird D.L.R.

THIS CERTIFICATE, dated the nineteenth day of April One thousand nine hundred and twenty-nine under the hand and seal of the District Land Registrar of the Land Registration District of HAWKE'S BAY WITNESSETH that THE NAPIER HARBOUR BOARD is seized of an estate in fee simple upon trust for the use benefit and endowment of the said Board under the "Harbours Act 1923" (subject to such reservations, restrictions, encumbrances, liens, and interests as are notified by memorial under written or endorsed hereon, subject also to any existing right of the Crown to take and lay off roads under the provisions of any Act of the General Assembly of New Zealand) in the land hereinafter described, as the same is delineated by the plan hereon bordered green,