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HISTORY OF THE SOURCE OF THE TITLE

TO REAL PROPERTY IN NEW YORK.

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By

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1894.
The subject that I have chosen to write upon dates back to the early discoveries and settlements on the American Continent. I will not attempt to touch upon the early English history of the laws of real property however much I appreciate the importance of its bearing upon the subject before me for it had only been my intention in the space of time allotted to discuss the source of title to land in this State and its transfer from the Colonial and State governments.

The original title to land on this continent as between the different nations of Europe was founded on the international right of discovery and conquests; this principle was recognized and followed by all civilized nations at an early day. The title in order to be a perfect one had to be consummated by possession and the discovery had to be made by persons sent out under by those recognizing the government claimed. The discovery of North America was made under commission from the English Crown and their first settlement was made under a public declaration that they claimed by virtue of their discovery and settlement possession from the thirty-ninth to
the forty-fifth degrees of latitude.

The invasion of the Dutch of the Island of Manhattan and other territory of the present state of New York was considered by the English an usurpation of their right and in opposition to their superior title, founded on prior conquests and discovery of the coast in general, yet the Dutch patents and grants were granted and confirmed by the English authorities. By letters patent issued in March, 1664, by Charles II. to his brother the Duke of York his heirs and assigns a large territory was granted including the most of the present states of New York and New Jersey with all the rights, royalties, profits and all the royal estate, right, title and interest in free and common socage with the power to the Duke to govern according to such laws as the Duke himself might establish or in some cases according to the discretion of his deputies. These laws were not to be inconsistent with the laws of England and the right to appeal to the Crown was reserved. In August, 1673, the Dutch by conquest resumed possession of the province under the name of Niew Nederland, a year later Holland and England by the treaty of Westminster made peace
with each other and all the possessions of the Dutch on this continent were ceded to the English. The territory having been thus claimed and set up as a British colony the common law of England became the fundamental law of the province; but it has been maintained by some jurists that this province known by the name of New Netherlands as it was held by right of conquest the common law of England was not immediately introduced but the former laws and customs of the Dutch continued in force until they were actually changed and new laws were imposed. Just what part of the common law of England was in force here before the American Revolution has been a subject of considerable doubt and difficulty.

Grants from the Dutch government while they were in possession are held indisputable sources of title. These grants were mostly confirmed by new grants or charters from the English government but they have been considered good whether confirmed by the English or not. The discovery and actual settlement of the Dutch has been deemed to have given them full ownership and sovereignty in spite of the English claim of discovery. The colony under the Dutch was governed by a
Director General and Council, the former being appointed by the States General in Holland, and in 1623, the States General made a grant to the Dutch West India Company of all the land situated on Manhattan Island. The Dutch West India Company who upon this grant had control of the settlement under the sanction and dominion of the home government, in the year 1626, extinguished the Indian title to Manhattan Island (now the City and County of New York) by purchase from a tribe of aboriginal Indians called the Manhattoes for the sum of sixteen guilders. The titles under the Dutch dominion generally emanated from the above company which was possessed of most of the powers and functions of a distinct and separate government, having authority to enact laws, to establish courts, to adopt forms for administering justice, to make treaties with the Indians and to establish a form of municipal government. Their grants or "Ground Briefs" as they were also called ran in the name of the Director General and Counsellors on behalf of the States General, the Prince of Orange, and the Managers of the incorporated West India Company in New Netherlands residing. They were signed by the
Director General and contained conditions of allegiance to the Dutch government, submission to imposts etc.,. In the confirmation of the Dutch grants by the English the condition of allegiance to the Dutch government was of course abrogated, as submission to the English government was one of the conditions of the surrender of the Dutch in 1664. Upon the second surrender to the English by the Dutch, Governor Andros, in his proclamation in 1675 confirmed all prior grants, concessions and estates. In 1691, under William & Mary by an Act of the legislative Assembly of the colony of New York, for the purpose among other things, of quieting titles, all charters theretofore granted to cities, municipalities and others with all royalties and other franchises were confirmed in very broad terms. This act was valid and was so held in Brookhaven v. Strong, 60 N.Y., 56,. As to its validity Mr. Angell says inasmuch as the King by virtue of his prerogative was authorized to create political power in this as in all countries newly discovered and possessed by his subjects, the colonies on receiving the Royal Charters were invested with a political character by which they succeeded to all the
territorial interests which had previously belonged to the Sovereign power of the parent country,. The charters were in the nature of grants and conferred by the King on the idea that he was proprietor. For all purposes of domestic and internal regulation the colonial legislatures deem themselves possessed of entire and exclusive authority. Story on the Constitution, sec. 168. Thus it is seen that by the English law the King was the feudal proprietor and source of title to all land, and in this country before the Revolution the title to land was derived from the crown of England directly or through colonial governments.

The Act of the State Convention of July 16, 1776, affirmed that all persons residing within this state, and deriving protection from its laws, owed allegiance to the said laws and were members of the State.

"A principle is laid down which is believed to be undeniable, that the several States which composed this Union, so far at least as regarded their municipal regulations, became entitled, from the time when they declared themselves independent, to all the rights and powers of sovereign States,
and that they did not derive them from concessions made by the English King. The treaty of peace contains a recognition of their independence, not a grant of it. From hence it results that the laws of the several state governments were the laws of sovereign States and as such were obligatory upon the people of such state from the time they were enacted." McIlvaine v. Coxe, 4 Cranch, 211.

On October 22, 1779, the legislature of New York passed an act declaring all lands, properties, rights, etc. held by the Crown prior to July 9, 1776 were vested in the People of the State; and by subsequent treaties between the United States and Great Britain in 1782-3 and in November 1794, which followed the Revolution, the right to the soil which had been previously in Great Britain passed definitely to these states. Therefore the actual paramount ownership of land in this State was vested in the Crown of England previous to the Revolution and in the People of the State afterwards. Whatever may have been sometimes practiced towards the unfortunate aborigines, either from humanity or policy, yet the territory they occupied was disposed of by the governments of Europe at their pleasure as if the country had been
found without inhabitants. After the Revolution the right of Indian occupancy in this State and in the various other States has been in general protected by the political powers and respected by the courts until extinguished by treaty or otherwise. There is a fundamental principle of international law which prevents titles to land belonging to individuals from being interfered with upon the establishment of a new political sovereignty. It is to this effect that the dismemberment or change of the sovereignty of a nation works no forfeiture of previously vested rights of property, and that the cession of a territory by its government passes the sovereignty only and does not interfere with the rights of individuals in property.

Any person claiming title under the new government at this period however had to show his allegiance by some act at least of residence otherwise the rights of citizenship were not acquired. The rule of citizenship is that if parties were resident here at the time of the Declaration of Independence although born elsewhere and they freely yielded express or implied sanction and allegiance to the new government,
they became citizens. This right of election has been held to exist as to all inhabitants of the State and a reasonable time for its exercise was conceded. It was even held at first that if a person was born here and left the country before the Declaration of Independence and never returned he had a right of citizenship. Ainslee v. Martin, 9 Mass., 454. This principle however was overruled and the more reasonable principle maintained that/antenatus (born before the Union) never owed allegiance to the United States if he had removed prior to the Declaration of Independence and had not become redomiciled here prior to the treaty of peace. Mc.Ilvaine v. Coxe, 2 Cranch, 280. The correct doctrine of inheritance in the English law as laid down is that the right to inherit depends upon the existing state of allegiance at the time of the descent cast. Hence it follows that the antenati of America may continue to inherit in Great Britain because we once owed allegiance to that Crown but the same reason does not apply to the antenati of Great Britain because they never owed allegiance to our government, Dawson v. Godfrey, 4 Cranch, 321. In Blight v. Rochester, 7 Wheaton, 535, it has
been held that persons born out of the United States before July 4, 1776, or born here and who left this country before that date and who continued to reside out of it are aliens and incapable of taking by descent.

In the Constitution of 1777, and also in the subsequent Constitutions of 1822 and 1846, it was enacted that all grants of land in this State granted by the Crown subsequent to October 14, 1775, are declared null. This impliedly confirms those grants prior to that date. In the sixth article of the Treaty of 1783 with Great Britain it was provided that there should be no further confiscations or prosecutions by reason of the part taken by any person in the war; and that no person should on that account suffer any future loss or damage either in his person, liberty or property. "This treaty only embraces future confiscations and had no retroactive effect". McGregor v. Comstock, 16 Barbour, 427. The case of Brown v. Sprague, 5 Denio, 545, holds that the above section of the Treaty not only barred the escheat of land held by British subjects in this State but gave them capacity to transmit them by descent, but the descent must be to a
citizen. It also holds that if a British subject holding lands here died previous to the treaty of 1794, leaving no citizen heirs his lands escheated; and the provisions of the Treaty did not pass his lands to alien heirs. By article nine of the Treaty of November 19, 1794 with Great Britain, it was mutually agreed that British or American subjects holding land in each other's countries shall continue to hold them according to the tenure of their respective estates and titles therein; and may grant, sell, or devise the same to whom they please as if natives; and that neither they or their heirs or assigns as respects said lands and the legal remedies incident thereto should be regarded as aliens. The parties must show that the titles to the land was in them or their ancestors at the time the Treaty was made." Harden v. Fisher, 1 Wheaton, 300. "The title of the alien heir would not prevail if the ancestor died before the Treaty was signed! Orser v. Hoag, 3 Hill, 79. And the case of Orr v. Hodgson, 4 Wheat. 453, holds that the benefits of the treaty would not be extended to persons who were aliens to both Great Britain and the United States.
After the Revolution when the people of this State took under their control the powers of sovereignty all estates, prerogatives, powers and royalties, which before belonged either to the Crown or Parliament became immediately vested in the State. The rights and powers of the States are considered established as sovereign and their colonial dependence and legal action as colonies terminated from the time they declared themselves independent and not from the date of the Treaty recognizing their independence. So it is held that the laws or grants of the several State governments passed or executed after the Declaration of Independence were the acts of sovereign States and as such binding. McIlvain v. Coxe, 4 Cranch, 209. The government of this State was organized and legally begun on the 20th. of April, 1777. As to the lands that before October 14, 1775, had been legally granted to individuals by the Crown or to which the title had been legally acquired by individuals in any other way neither the Revolution nor the change of the form of the government nor the Declaration of the sovereignty of the people worked any change or forfeiture in the ownership of such property.
"Grants made by the Crown subsequent to October 14, 1775, are declared void." Constitution of 1777, Title III.

It was declared by act of the State in October, 1779, that the absolute property of all lands, and hereditaments and of all rents, royalties, franchises, prerogatives, escheats, forfeitures, debts, dues, duties and services and all right and title to the same which next and immediately before the 9th. of July 1776, did vest in or belong or was or were due to the Crown of Great Britain be the same and each and every of them are hereby declared to be and ever since the said 9th. of July, 1776, to have been and forever hereafter shall be vested in the people of this State in whom the sovereignty and seigniority thereof are and were united and vested on and from said 9th. day of July, 1776.

By early enactment and constitutional declaration in this state, the people of this State in their right of sovereignty are deemed to possess the original and ultimate property in and to all land within the jurisdiction of the State and all lands the title to which may fail from defect of heirs revert or escheat to the people, 1 R.S., of 1813.p.380.
The entire property of all lands within the state is vested in the owner and are declared to be allodial subject to the liability to escheat to the people and all feudal tenures and their incidents are abolished such abolition however not to discharge rent, or services certain imposed. 1 R.S.p. 718. Thus it has been seen from the above references that the title of all lands in this State must have originally emanated from the existing sovereign power in the State whether through grants, from the Dutch or English agents by authority from their home government, by charters or letters patent directly from those governments, or by grant from the people of this State after the establishment of their sovereignty.

The colony during the colonial rule of the English as a part of the King's dominions was subject to the control of the British Parliament; but its more immediate government was vested in the Governor and Council appointed by the Crown and a General Assembly. The laws of the colony passed by the provincial legislature under the English sovereignty were passed through the houses of Council and the Assembly subject
to the Governor's veto and approval by the King. The commissions to the different governors gave them power to make laws and ordinances for the peace and good government of the province, by and with the consent of the Council and Assembly; said laws were not to be repugnant to the laws or statutes of Great Britain. Within three months after making they were to be transmitted to the King for approval. If the laws were disapproved by the King and the disapproval was signified to the Governor then and from thenceforth the law was to be void. The colonial statutes therefore had the force of laws without the expressed approval of the home government, and until they were anulled and disapproved. The power of assenting to or withholding assent to colonial statutes were conferred on the Governors. If approved by them they were to be transmitted to the home government for examination with the proviso however that they were to be valid and binding until disapproved and rejected by the Crown, Smith History of New York, pp. 102,353. By the royal commissions to Governors the Governor with the advice of his Council was authorized to make grants of the public lands on
such terms as might be demed proper, which grants on being
scaled with the colonial seal and recorded were to be effect-
ual. The grants of colonial Governors before the Revolu-
tion have always been taken as conclusive evidence of author-
ity to dispose of public lands. Where the authority is exer-
cised without any evidence of disavowal, revocation or denial
by the Crown its consequent acquiescence and presumed ratifi-
cation are proof in the absence of any proof to the contrary
of the Crown's assent to the acts of the Governors. Proof
is never required to show that there exists authority in the
officers who exercise it in making grants for it is considered
that it is fully evidenced by occupation, enjoyment and trans-
fer of property had and made under the grants without distur-
bance by any superior power and respected by all officers
where it lies. And it was laid down in the case of the
People v. Trinity Church, 22 N.Y., 144, that where a grant was
made/an action done and titles have vested under any act ad
interim and before it was annulled by the Crown they would
not be void or become divested in consequence of the subse-
quent disapproval of the Crown. An act was passed in May,
1691, by the Governor and Assembly confirming all prior patents, charters and grants to bodies and individuals in the Colonies under prior Kings and notwithstanding deficiencies of form and nonfeasance. Saving rights to be asserted in five years and rights of infants, lunatics, and married women.

"A State has the right to dispose of unappropriated land within its own limits and when a grant has been made the title becomes vested, without any power in the state to rescind the grant for fraud or otherwise, when the land granted has passed into the hands of the bonafide purchaser for value without notice; nor without fraud can it be revoked at all if its conditions are performed;" Fletcher v. Peck, 6 Cranch, 87. The land or property of the State is usually transferred by charter or by letters patent; a grant however may be made by a law and a confirmation by a law is as fully a grant as if it contained a grant in terms. 2 Wheat., 196.

"The lack of the Governor's signature on a patent does not invalidate the instrument. It is the great seal which authenticates the patent, and the fact of the seal being attached
is prima facie evidence that the patent was approved by the Governor and issued by his direction." People v. Livingstone, 8 Barbour, 253. "A patent takes effect from the time it is approved by the land office and passes the office of the Secretary of State. Its date is not conclusive." Jackson v. Douglass, 5 Cowen, 458. "Where the State makes a grant of property to which it has no title the grant is void. State grants are not considered as warranties and no estate would pass to the grantee except what was at the time in the State. Nor can a State constitutionally affirm a void patent so as to divest the title legally acquired before the attempted confirmation." 10 Peters, 662. "A patent issued by the State conveying its own lands, will be presumed to have been issued regularly and that all preliminary requisites have been complied with; and if it be not void on its face cannot be avoided collaterally in a suit between individuals." Brady v. Begun, 36 Barbour, 533. Objections showing that the patent was issued without authority, or was absolutely void from the beginning or prohibited by law would be considered. In a collateral action it cannot be assailed for any
other cause. The Constitution in stating that the people are deemed to possess the original and ultimate property in all lands does not set up the legal presumption of title in favor of the people against the actual occupant of the land until it is shown that the possession has been vacant within forty years. If the premises are vacant the legal presumption is that the people are owners. The possession itself presumes a grant from the sovereign power of what was once the State's. Wendall v. Jackson, 8 Wendall, 183. By the Code of Civil Procedure of New York, section 362, "The people of the State will not sue any person with respect to real property unless their right has accrued within forty years, nor unless they or those under whom they claim, shall have received some rents thereof within forty years." If there be an omission or failure to comply with the conditions of a grant from the State no one but the State can take advantage of it." Williams v. Sheldon, 10 Wend., 654. The Code of Civil Procedure section 1957, provides that an action may be brought by the Attorney General to vacate letters patent from the State where there has been fraud or
concealment or mistake or ignorance of facts; or where there has been a forfeiture of the patentee's interest by non-compliance with the terms or conditions thereof or otherwise.

"These proceedings brought to forfeit and vacate letters patent are held to be applicable only to letters patent granted by the People of the State and do not extend to letters patent granted by the English Crown before the Revolution." The People v. Clark, 10 Barber, 120. The deeds and instruments of the State are made out by a public officer in behalf of the State although the officer is merely a nominal party. The letters patent from the State granting lands may be recorded in the county where the lands are situated in the same manner and with like effect as are deeds when duly acknowledged. The Constitution of 1846, Article I. section 9, requires the assent of two-thirds of the members elected to each branch of the legislature to every bill appropriating public property for local or private purposes.

Under the consideration of grants from the State we may look for a moment at the subject of franchises. Franchises are privileges or immunities of a public nature conferred
generally by grant or action of the legislature; these
rights it is held cannot be extended by implication and are
not the subjects of assignment or transfer. The general
understanding of the grant of a franchise is that there is
an implied covenant on the part of a government not to dis-
turb or invade the rights vested; and on the part of the
grantees to carry out the conditions and duties prescribed
in the grant. It has been held that the government cannot
resume them at pleasure or interfere with a franchise so as
to impair its value materially or grant a competing franchise
without a breach of contract. Thus where the legislature
by act grants a franchise no right of repeal is reserved and
a subsequent act repealing the first has been held unconsti-
tutional as impairing the obligation of a contract. Dartmouth
College v. Woodward, 4 Wheat., 518. The remedy would be by
injunction in equity. The general rule however has under-
gone modifications as has been required from time to time to
suit
\public demands or necessity as in the cases of roads, ferrys
and bridges, particularly those in the vicinity of large
towns. And by more recent decisions in this State it has been
held that the legislature by the grant of one franchise is not restrained by any implication from the creation of another where public convenience or necessity so requires. A still later decision extended this doctrine further and held nothing passes under a franchise against the State by implication and that franchises must be construed according to their terms. Auburn etc. R.R. Co. v. Douglass, 5 Seldon, 444. The courts have held however that if a company receive an exclusive privilege within a locality specified for the exercise of its franchise, it is a contract on the part of the State and inviolable. It is otherwise if the privilege is not specified as exclusive. Binghampton Bridge, 5 Wallace, 51. But the doctrine as held in the above case has been made void.

In New York by a Constitutional amendment passed in 1874, in which the legislature is prohibited from granting to any private corporation association or individual any exclusive privilege, immunity or franchise whatever. Where a contract has been made by a State it is laid down as a rule that if the contract when made is valid by the Constitution and laws of the State as there expounded by the highest authorities whose
duty it was to administer them, no subsequent act by the legislature or judiciary can impair its obligation." Gelpcke v. The City of Dubuque, 1 Wallace, 175.

The rights of the public are considered superior to those of the State where an encroachment is authorized or a nuisance takes place, for example where there is an abridgment of the common right of navigation. Under the Constitution of the United States the proprietary right of the State and its grantees is subject to the authority of Congress over navigation and navigable waters and in a case where the State authorizes encroachments, on the common water highway there would be a remedy in the United States Courts in behalf of the public against the official bodies or others and for abatement of an undue encroachment as a nuisance. This is in the nature of a restriction on the State power. But in the absence of legislation by Congress a State statute which authorizes the erection of a dam in a navigable river which is wholly within the State limits is not unconstitutional. People v. N.Y.etc. Co., 68 N.Y., 71. The legislature of the State may also in the absence of restraint by a Con-
ressional legislation authorize the erection of a bridge over its navigable waters, subject to any prohibition by Congress or direction as to what facilities may be afforded for the navigation of the river. "Offending bridges or other obstructions over navigable waters may be enjoined or removed by judicial action." People v. Tibbetts, 19 N.Y., 523. But an act of Congress that declares a bridge a lawful structure legalizes it and it cannot be removed as obstructing navigation. Gray v. Chicago R.R. 2 Woolw. 62. By the Constitution of the United States Congress is invested with the power of disposing of the public lands belonging to the United States and of making such rules as may be required as regarding their regulation, and a State has no power over such public lands within its limits. Title passes from the United States under authority of an act of Congress by means of letters patent accompanied with sufficient description or survey.

Thus the general features of the history of the source of title to land in this State and its transfer from colonial to State authorities, I believe, in the main have been presented.
With a history of this nature wherein so many matters of importance are reviewed it has been almost impossible to treat them exhaustively and if I have discussed the most important matters that might arise under this subject with some degree of clearness and historical order, I have at least partially accomplished what I set out to do.