NEW LIGHT

ON

FAMOUS CONTROVERSY

IN THE

HISTORY OF ELIZABETHTOWN

BY THE LATE

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The controversy between the Associates of Elizabethtown and the Proprietors of New Jersey over the title to the land on which the town was settled may be said to have begun in 1670, when the Associates refused to pay the quit-rents demanded by the Proprietors, and the last trace of it was seen when the Answer of the Associates to the Elizabethtown Bill in Chancery was filed in 1751.

Since both of the parties to this long-pending controversy based their claims in whole or in part upon the right of the English King, it will be well to consider primarily what right the English King had to the soil of New Jersey, for no greater title could be acquired under his grant or letters patent than such as he rightfully had. It has been generally assumed by those who have written on this subject that the King had absolute dominion over the soil of New Jersey, with the power to vest a complete title in his grantees or patentees. During the latter part of the controversy the Proprietors made such claim. On the other hand many of those who settled in New Jersey asserted claims to titles based on titles procured from Indians, which they insisted were superior to the Proprietors' rights. Such a claim, however, was repudiated by the Associates. They insisted that a perfect title could only be created by a grant from the Indians under license from the King, confirmed by the grant of the King.

After the feudal system was introduced in England, it became a maxim of the law that all lands in England were held mediately or immediately from the King. When lands were acquired outside of England the doctrine was deemed to be applicable but with some limitations. If the foreign land had been acquired by conquest, the early view seems to have been that the King became possessed of an absolute title to all the lands of the conquered nation, upon the ground that by his right of

conquest he might take the lives of the conquered or banish them. This barbarous rule lasted for years, and, after the conquest of Canada, the Acadians were despoiled of the lands which they had occupied for a generation, and were driven into exile with only such property as they could carry with them.

Lands were, however, deemed to be acquired by what was called the right of discovery. If the discovered land was uninhabited the complete dominion was recognized as being in the King. But if the discovered lands were inhabited, a more limited right was recognized.

Discovery under which title could be claimed was of lands before unknown to the civilized world and inhabited only by uncivilized tribes or heathen. When such discovery was made by one of a nation, the reigning potentate of that nation claimed the right to forbid and prevent any other nation from trading there or from acquiring rights therein, and this although it incidentally deprived the inhabitants of liberty of action in respect to trade and intercourse. In like manner and with as little reason, the King claimed the right to license his subjects and others to acquire title to lands from the inhabitants and owners. But no such potentate ever claimed any such power to convey the soil of an inhabited country under the right of discovery, so as to deprive the owners of their right. It necessarily resulted that a complete title under these circumstances could be acquired only by the union of the title of the owner and the title of the King by license or grant.

This was the view taken by the Supreme Court of the United States in a case involving title under Indian grants.

Chief Justice Marshall, in delivering the opinion, used the following language:

"On the discovery of this immense continent the great nations of Europe were eager to appropriate to themselves so much of it as they could respectively acquire. Its vast extent offered an ample field to the ambition and enterprise of all; and the character and religion of its inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendency. The potentates of the Old World found no difficulty in convincing

themselves that they made ample compensation to the inhabitants of the New, by bestowing on them civilization and Christianity in exchange for unlimited independence. But, as they were all in pursuit of nearly the same object, it was necessary, in order to avoid conflicting settlements and consequent war with each other, to establish a principle which all should acknowledge as the law by which the right of acquisition, which they all asserted, should be regulated as between themselves. This principle was that discovery gave title to the governments by whose subjects or by whose authority it was made, against all other European governments, which title might be consummated by possession.

"The exclusion of all other Europeans necessarily gave to the nation making the discovery the sole right of acquiring the soil from the natives and establishing settlements upon it. It was a right with which no Europeans could interfere. It was a right which all asserted for themselves, and to the assertion of which, by others, all assented.

"Those relations which were to exist between the discoverer and the natives were to be regulated by themselves. The rights thus acquired being exclusive, no other power could interpose between them.

"In the establishment of these relations the rights of the original inhabitants were, in no instance, entirely disregarded, but were necessarily, to a considerable extent, impaired. They were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty as independent nations were necessarily diminished, and their power to dispose of the soil at their own will to whomsoever they pleased was denied by the original fundamental principle that discovery gave exclusive title to those who made it.

"While the different nations of Europe respected the right of the natives as occupants, they asserted the ultimate dominion to be in themselves, and claimed and exercised as consequence of this ultimate dominion a power to grant the soil while yet in possession of the natives. These grants have been understood by all to convey a title to the grantees, subject only to the Indian right of occupancy." Johnson v. McIntosh, 8 Wheaton 543.

In the New York Court of Appeals in a case involving an Indian title this language was used:

"It was a necessary sequence to the claim that the sovereign had the ultimate title to the soil, that the right to extinguish the Indian occupation was exclusively vested in the sovereign. The Indians were held to be incapable of alienating their lands except to the Crown, and all purchases made from them without its consent were regarded and treated as absolutely void. A grant from the Crown only conveyed the fee, subject to the right of Indian occupation, and when that was extinguished under the sanction of the Crown the possession then attached to the fee, and the title of the grantee was thereby perfected." Seneca Nation v. Christie, 126 N. Y. Reports 122.

There was reason, therefore, in the assertion of the Associates that the right of the King was largely the right of preemption.

History leaves no room for doubt that the sole claim of the Crown of England upon lands in North America was based upon the right of discovery. The discovery was claimed to have been effected by Sebastian Cabot (in the reign of Henry the Seventh) who sailed along the coast from Florida to latitude 67°.5′ north. No conquest had been made from the Indian possessors of the lands thus claimed by discovery. If the Dutch, who were in possession of parts of New York and New Jersey, had any valid claim, they had not been conquered or dispossessed in March, 1664. But England never admitted a rightful possession of the Dutch. They made protests and objections to the States General of Holland against such possession. The reply of Holland was that the enterprise was not that of the Dutch Government, but only that of the Dutch West India Company. It is obvious that under the prevailing rule the Dutch inhabitants were intruders in a land discovered by another power, and, if their intrusion was not supported by a license from the King, they were subject to expulsion.

On March 12, 1664, Charles the Second, then King of Great Britain, by letters patent, granted to his brother James, then Duke of York, great tracts of land in North America, one of which included the whole of New Jersey. The grant was in the nature of an ordinary conveyance of land described in fee simple, to be holden of the King "as of our manor of East

Greenwich, in the County of Kent, in free and common socage." By the same letters patent there was granted to the Duke of York and his heirs, deputies, agents, commissioners and assigns absolute power to govern all the King's subjects who should adventure themselves in the said lands or should thereafter inhabit the same. The Duke was also empowered to constitute and confirm Governors and officers within said lands, and to ordain and establish orders, laws, directions, instructions, forms and ceremonies of government and magistracy for the government of said lands. Such Governors and officers were to have power to exercise martial law in as ample a manner as the lieutenants of counties in England had. The Duke was also granted power to admit persons to trade within said lands and to have and possess any lands therein according to the laws made and established by virtue of the letters patent and under such conditions as the Duke should appoint. It was further made lawful for the Duke, his heirs and assigns, to transport to the said lands any of the King's subjects, or any other strangers not prohibited, that would become the King's loving subjects, with such things as were necessary for the use and defense of the inhabitants and the carrying on of trade with the people there. There was further granted to the Duke and every Governor or officer appointed by him authority of government over the inhabitants of the said lands, the right to repel or expel therefrom every person who should attempt to inhabit them without a special license of the Duke, his heirs and assigns.

It is obvious that such rights as the King had by virtue of discovery in the soil of America were transferred to the Duke of York in fee. It is also obvious that the King intended to endow the Duke and his heirs with some of the Royal prerogatives of government. When a similar grant by James the First was under consideration in the English House of Lords, Lord Westbury declared that such a grant was surprising and unheard of. He said:

"There is delegated in terms (whether good or not in law is another question), but in terms there is delegated to a sub-

ject the right of exercising Royal prerogatives, the right of dealing out grants of immense territory, and I presume the corresponding right of exercising all the powers and duties of government over an extent of land equal in dimensions to some Kingdoms." Alexander v. Officers of State for Scotland, L. R., 1 Sc. and Div. App. Cas. 276, 286.

Notwithstanding such a criticism upon such a grant by so eminent a Judge, I suppose that it must be conceded in the examination of the matter that the Duke of York acquired not only a right to the soil, such as the prevailing doctrine permitted the King to have, but also the right that the King had to select and license such persons as he chose to acquire an Indian title, which, with a grant from the Duke, would make a complete title to the lands in New Jersey.

The Duke of York, having acquired such rights and powers as were conferred upon him by the letters patent of March the 12th, 1664, commissioned Richard Nicolls, Esquire, to be his Deputy Governor within the lands granted, to perform all the powers that were granted by the letters patent, to be executed by the Duke's deputy, agent or assigns. His commission was dated April 2nd, 1664. At that time parts of New York and New Jersey were occupied by the Dutch settlers under the Dutch West India Company. Those settlers did not pretend to have made their settlement under the authority of the States General of Holland, nor under any license under the King of England. It is clear that under the right of discovery they were trespassers that the King of England might eject. The Duke of York, being at that time the Lord High Admiral of England, sent out four vessels of the King's fleet and with them went Nicolls (who was a Colonel in the army) and four hundred and fifty soldiers. It is somewhat doubtful who was in command of the fleet, but it was either Sir Robert Carr or Col. Nicolls. A commission consisting of Sir Robert Carr, Col. Nicolls, Sir George Cartwright and Samuel Maverick went along, who were empowered to settle boundaries and consider the general welfare of the Colonies.

The fleet sailed from Portsmouth in May following and arrived in the harbor of New York on the 30th of August.

The Dutch Government submitted to the force and on September 8th Col. Nicolls and Sir Robert Carr landed their force of soldiers and took possession. The Dutch settlers were not ejected from the lands they occupied or deprived of their liberties. They apparently submitted at once to the government established by Col. Nicolls.

After Col. Nicolls established the English power, he issued a proclamation publishing the terms, upon observing which the inhabitants of the Provinces of New York and New Jersey might acquire property in lands in either Province. The proclamation was under his commission from the Duke of York and by virtue of the powers and authority vested in him by the Duke. It was entitled thus: "The conditions for new planters in the territories of His Royal Highness, the Duke of York."

The first condition shows that the necessity of acquiring an Indian title by purchase from them was recognized, for it declares that purchases were to be made from the Indian Sachems and recorded before the Governor. Purchasers were not to pay the Governor for the liberty of purchasing. They were to set out a town and inhabit together, and no purchaser should at any time contract for himself with any Sachem without the consent of his Associates or special warrant from the Governor. Purchasers were to be free from all manner of assessments or rates for five years after the town plot was set out. Thereafter they were only to be liable to public rates according to the customs of the inhabitants, both English and Dutch. Lands thus purchased and possessed should remain to the purchasers and their heirs as free lands to dispose of at their pleasure. Liberty of conscience was thereby allowed in all the territories of the Duke, provided such liberty was not converted to licentiousness, or the disturbance of others in the exercise of the Protestant religion. The several townships were to have liberty to make their particular laws and decide all small cases within themselves. After other matters, the proclamation ended by providing that every township should have the free choice of their officers, both civil and military, and all men that should take the oath of allegiance, who were not servants or day laborers, but permitted to enjoy a town

lot, were to be esteemed free men of the jurisdiction, who could not forfeit that character without due process of law.

It may be noted in passing how succinctly the main features of the Grants and Concessions of the Proprietors afterward promulgated are expressed in this proclamation. There is the right to acquire an absolute title in land; the right to enjoy liberty of conscience; the right to legislate and adjudicate and to choose their own officers and not to be deprived of any such privilege except by due process of law.

The date at which this proclamation was published does not clearly appear, but, on the 16th of September, 1664, six men from Jamaica, Long Island, petitioned Col. Nicolls to grant them liberty to purchase and settle a parcel of land upon the river "called Cull River." This, no doubt, was what was then otherwise called Achtercull, and which is now called Newark Bay.

On the 30th of September, 1664, Col. Nicolls, in writing, consented to the proposals of the petition and promised to give the "undertakers" all due encouragement in so good a work. These "undertakers" were John Bailies (Baily), Daniel Denton, Thomas Benydick, John Foster, Nathaniel Denton and Luke Watson.

Pursuant to the authority and license thus given, John Baily, Daniel Denton and Luke Watson purchased a tract of land and procured a conveyance thereof, dated October 28, 1664. The grantors named in the deed were Matano, Manamowane and Cowescomen, of Staten Island. Of these grantors Matano alone executed the deed. There were two others who signed the deed by making a mark, but who were not apparently the grantors. The lands thereby conveyed were described as follows: "Bounded on the south by a river commonly called the Raritons River and on the east by the river that parts Staten Island and the Main and to run northward up After Cull Bay till we come to the first river that sets westward up After Cull Bay aforesaid, and to run west into the country twice the length as it is broad from the north to the south of the aforementioned bounds." The grant was to Baily, Denton and Watson with their Associates and the habendum to the same per-

sons, their associates, executors and assigns. The consideration was twenty fathoms of trading cloth, two made coats, two guns, two kettles, ten bars of lead and twenty handfuls of powder. The grantees covenanted, however, to pay therefor 400 fathoms of white wampum after a year from the day of entry of the grantees upon the land.

By a deed dated December 1st, 1664, Col. Nicolls, as Governor under the Duke of York, after reciting the purchase of Baily, Denton and Watson by the Indian deed, confirmed and granted to John Baker, John Ogden, John Baily and Luke Watson, their associates, heirs, executors, administrators and assigns, the same tract of land, by the description contained in the Indian deed. The habendum was to the four parties named, subject to the payment to the Duke or his assigns, a certain rent "according to the customary rate of the country for new plantations." It was therein provided that the grantees should settle plantations on the lands granted with all convenient speed and that no other person should have liberty to do so, except the grantees should neglect the planting agreed on. It was further recited that the persons planting said lands should have equal freedom, immunities and privileges with any of His Majesty's subjects in any of his colonies in America. The grantees and their associates were given liberty to purchase of the natives or others who have the propriety thereof as far as Snake Hill. The confirming grant by Col. Nicholls recites the Indian deed to Baily, Denton and Watson, but confirms the title to Baily and Watson, and John Baker and John Ogden. It is a conceded fact that Baker and Ogden had bought from Denton his title.

According to the recognized doctrine with respect to the acquisition of title to lands in countries that had been discovered by English subjects, it seems clear that the title of Baker and the other Associates was complete. Under a license from the representative and deputy of the Duke of York, empowered by him to execute the authority conferred upon the Duke in determining who should be admitted to settle within the Duke's dominions, they had purchased the Indian title to the Elizabethtown tract, they had recorded the deed before the

Governor, and he had granted and confirmed to them the tract in fee for themselves and their Associates. Unless there was some flaw in some of the various steps taken, or unless the Duke of York's deputy had been deprived in whole or in part of his authority to act, the title seems to be unassailable.

In June, 1664, the Duke of York conveyed New Jersey to John, Lord Berkeley, and Sir George Carteret. The conveyance purported to be by lease and release under the Statute of Uses. The lease was dated June 23rd, the release June 24th, 1664. This was two months after the commission given to Col. Richard Nicolls and after his departure with the squadron destined to bring New York into subjection. The confirmatory release was of that sort then used for the conveyance of lands. It recited the grant to the Duke by the King's letters patent, so far as that transmitted to the Duke the title to lands. No specific consideration was named therein, but it was declared to be in consideration of a competent sum of good and lawful money. The granting clause granted, bargained, released and confirmed to Berkeley and Carteret the whole of New Jersey, declaring that the tract was thereafter to be called New Cæsarea, or New Jersey, with all the rivers, mines, minerals, woods, fishings, hawking, hunting and fowling and all other royalties, profits, commodities and hereditaments appertaining to said lands, in as full and ample manner as the same had been granted to the Duke of York. The habendum was of the said tract with its appurtenances to Berkeley and Carteret, their heirs and assigns forever, yielding therefor to the Duke yearly twenty nobles of royal money of England, if the same should be lawfully demanded at or in the Inner Temple Hall, London, at the feast of St. Michael the Archangel.

Carteret Commissioned Governor.

On the 10th day of February, 1664-'65, Berkeley and Carteret commissioned Philip Carteret as Governor over the lands thus conveyed to them, with power to nominate a Council, consisting of not more than twelve or less than six, unless the con-

stituents should choose all or any of such Council. On the same day Berkeley and Carteret issued what they called the Concessions and Agreements of the Lords Proprietors of New Cæsarea, or New Jersey, to and with all and every the adventurers and all such as shall settle or plant there.

As such title to lands thus conveyed was all the title that the King originally had by right of discovery, that was the title alone which Berkeley and Carteret acquired.

It is obvious that it would have been impracticable to confer title upon purchasers coming to plant or settle in New Jersey by actual conveyances from Berkeley and Carteret. The long distance and the slow transmission of letters and papers seemed to forbid such an attempt. It is true that they might have constituted their new Governor their attorney in fact to make the necessary conveyances. But they did not do so. On the contrary they devised a very ingenious scheme which, if their title to the lands in New Jersey be considered by itself, lacked legal correctness. The scheme which they set out for the general planters and purchasers was this: The Governor and Council, with the General Assembly (if there was any) were to divide all lands and the Governor was to issue a warrant, directing the Surveyor-General to lay out such a number of acres as the person applying for was entitled to; the Surveyor-General should then certify to the Chief Secretary or Register the location and number of acres laid out, and thereon a warrant should issue directing the Chief Secretary to prepare a grant of such land to the purchaser in fee, yielding, however, and paying yearly, on March 25, one-half penny of legal money of England for every acre. To this grant the Governor was given power to put the seal of said Province and to subscribe his name; the major part of the Council were to subscribe their names; the grant was then to be recorded and was declared to be effectual in law for the enjoyment of the lands on payment of the rents aforesaid. It is to be noted that the first payment of rent was fixed by the terms of the concession for March 25, 1670.

Opportunity for Litigation.

A comparison of the dates above stated discloses the opportunity for serious litigation over the title to the lands contained in the Indian deed and Nicolls grant. The Duke of York had commissioned Col. Nicolls on April 2, 1664, and given him authority to settle the tracts which the King had granted the Duke. On the 24th day of the succeeding June, while Nicolls must have been upon the ocean, the Duke executed the lease and release to Berkeley and Carteret; and Nicolls, undoubtedly without any knowledge of that grant, in September, 1664, licensed the Indian purchase, and after the purchase had been made, confirmed it by his grant on December 1, 1664.

Apparently no effort was made by the Duke to protect the interest of any who by virtue of his commission to Col. Nicolls had dealt with him and expended money in the purchase and settlement of lands in New Jersey; nor does the Duke seem to have made any strenuous effort to give notice of his transfer of title to Berkeley and Carteret as, by a letter from him to Col. Lovelace, afterward Governor of New York, dated Nov. 25th, 1672, he stated that he wrote to Col. Nicolls signifying his transfer of New Jersey on the 28th of November, 1664, which was two days before Col. Nicolls confirmed the grant to the Associates.

Although the Duke of York seemed to ignore the possibility that purchases might be made under his instructions to Colonel Nicolls, before the latter was notified of the conveyance of New Jersey to Carteret and Berkeley, there is strong reason to suppose that the Proprietors considered that possibility and provided for it. When the contest between them and the Associates was at its height, the Duke wrote a letter to Col. Lovelace, then his Deputy in America. The latter was dated November 25, 1672, and will be hereafter again noticed. For present purposes it is sufficient to say that the Duke commanded Lovelace to aid the Proprietors in the contest. On the 15th of May, 1673, Governor Lovelace produced the letter before his Executive Council and the following entry was made:

"The Duke's letter dated November 25th read relating to New Jersey.

"A letter from the Lord Berkeley and Sir George Carteret to recommend the affayers of New Jersey to the Governor.

"Coll. Nicolls Patents to Elizabeth Town and Nevisans now made void by the Duke.

"A letter from the Lords Proprietors to Coll. Nicolls confirming his Patents before Captain Philip Carterets Arrival being objected the state of the case to be returned to His Royal Highness."

Col. Lovelace and his Letter.

Colonel Lovelace was a man of intelligence and honor. It is evident that he had produced a letter from the Proprietors to Nicolls before Carteret's arrival, which he construed as confirming the Associates' title. A thorough search has been made in the archives of New York, but the letter has not been found. It may be conjectured plausibly that it was returned to the Duke as part of the "State of the Case." It never appeared in any part of the contest and the Associates were doubtless ignorant of it.

As the primary purpose of my investigation is to discover if possible the grounds upon which Baker and his Associates resisted for so long a period the claims asserted by persons high in authority and strong in influence, both with the King and the Duke of York, who soon after became the King, I refrain at the present from expressing any opinion upon the legal aspect of the controversy. To determine the motives of the Associates we must discover what they did in settling their tract and laying out the foundation of Elizabethtown on the banks of the Kill von Kull and the Elizabeth River. The sources of information are meagre. There can be no doubt that the Associates made records of the organization and of their successive acts in books kept for that purpose.

If these books were accessible doubtless they would give a vivid picture of the birth and growth of the new settlement. But, unfortunately, those books have disappeared, and in all probability have been destroyed. We are driven to other sources

from which inferences may be drawn, as to what was done by the Associates in organizing and settling the town.

In 1745, more than eighty years after the Indian Grant and Nicolls deed, the Proprietors filed in the Court of Chancery of New Jersey the Bill which has obtained the name of the Elizabethtown Bill in Chancery. Some four or five years afterwards the Associates filed an Answer to the Bill which seems to have been put in by all those who represented the original purchasers and who claimed rights in Elizabethtown under them. Facts stated in the Bill and admitted in the Answer may fairly be inferred to be true, and to justify reliance on what is there stated and admitted as to the conduct of the Associates.

Another Source of Information.

There is another source from which valuable information may be obtained. It seems to have escaped the attention of some of the local historians who have dealt with the subject, and not to have received from others who knew of its existence the attention it deserves.

After much litigation in the Courts of New Jersey over the title and after the discovery of the loss of the books of record, a meeting of the Associates, calling themselves Freeholders of Elizabethtown, was held on the 2nd of August, 1720, and it was unanimously agreed to open a new book, "to be improved to be a book of records for the use and behoof of the freeholders of Elizabethtown." At the same meeting Samuel Whitehead was chosen as town clerk and a committee of seven men was selected, to whom the freeholders assembled granted full power to act for them in matters touching the settlement of their rights and properties claimed by force of grants and purchase under Governor Richard Nicolls. There was entered in the said book afterwards records of meetings and transactions and a pretty full narrative is contained in an affidavit made by Samuel Whitehead (who is recited therein as having been more than thirty years the clerk of Elizabethtown) of all the matters concerning the purchase, the admis-

sion of Associates with Baker, Ogden, Baily and Watson, the original purchasers and the nature of the divisions arranged for by the Associates.

It may be fairly inferred that the Associates were advised that something more was necessary for the protection of their titles as Associates. There is entered at the other end of the book a valuable document dated November 18, 1729, signed by 113 (of whom only 12 made their mark) claiming Associate rights. This document was the work undoubtedly of a sound legal mind. It recites the commission of Nicolls, his conditions on which purchases of lands could be made, his license and the confirmatory deed of Nicolls. It names those who became Associates with the original grantees and those that were admitted afterward in 1699. It sets out that the Associates had, at diverse times, met and agreed upon divisions of the lands in question among themselves, the surveys of which were entered in books kept for that purpose by the town clerk, and that the surveys were intended to convey to the persons who had obtained them an estate in severalty in fee simple.

It then avers the loss of those books, so that the benefit to be derived from the record was frustrated, but that, as the original surveys were existing, it was thereby agreed that such divisions and surveys, and also such as might thereafter be agreed upon, should be perpetuated, and should be also entered in this book, and it was declared that such entry should be as effectual at law for transferring an estate in severalty to the persons who had previously or might thereafter obtain surveys as if a partition had been made by indenture under the hands and seals of all the parties interested, or as if the same had been done in other authentic or legal manner.

It is noteworthy that this document was actually signed in the book by many of the original Associates, and by the descendants of such. One of the signers was the Rev. Jonathan Dickinson. There were wax seals to each of the signers except five. As the impressions on the seals differ, it is a fair inference that they were signed at different times.

After the document the book contains records of the meetings of the Associates, and of the appointment of com-

mittees to protect their interests, particularly to inspect and determine the validity of the surveys that should be offered for record. Thereafter follow the entry of many surveys, and the last record is dated January 25, 1788, and is of a survey dated December 3, 1764.

It seems incontestable that this book furnishes important and decisive evidence of the acts of the Associates. The book is now in the Library of Princeton University.

From these sources there may be derived, in my judgment, a fair picture of the acts of the antagonistic parties after the execution of Nicolls' confirmatory grant. It is conceded on the part of the Proprietors that, very shortly after obtaining that grant, the grantees entered upon the lands and founded the settlement. Before the summer of 1665 at least four houses were erected by them, and, it may be assumed, were occupied by them and their families. These houses, according to tradition, were built along the river, probably all on the north side of it and east of the present Broad street. Possibly one or more of them might have been on the south side of the river.

Governor Carteret and the Town Settlers.

About the first of August, 1665, there appeared to these settlers Philip Carteret, holding the commission of Lord Berkeley and Sir George Carteret, as Governor of New Jersey. He had arrived in New York on the ship Philip, on July 29th, 1665, and there, no doubt, received information from Col. Nicolls of the grant that had been made by him and of the settlement begun under that grant. It is unlikely that he had previously known of Nicolls' grant. At all events he proceeded to Elizabethtown Point with his ship. He had brought on that ship a number of proposed settlers, some thirty in all, together with provisions and implements suitable for use in forming a settlement.

According to tradition he was met at the landing by settlers already there. As the ship was of considerable tonnage it

is probable that the landing was at the point. From the landing he went, accompanied by the previous settlers, to the place where the houses had been located. Whether the story is mythical or not is uncertain, but it is improbable that he marched from the Point carrying a hoe on his shoulder to indicate that he intended to be a planter in the new land.

It is most likely that the Associate Settlers for the first time ascertained at the landing of Governor Carteret that the Duke of York had conveyed New Jersey to Berkeley and Carteret. Yet it does not appear that the new Governor asserted any right to dispossess the settlers already there and claiming to possess the land under the Indian deed and Nicolls' grant. On the contrary the Governor settled among them and purchased the rights of John Baily in the lands. In order to be able to make such purchase, he had to obtain the consent and approbation of the other Associates. By Nicolls' grant it was provided that none should have liberty to settle thereon without such consent and approbation. Doubtless he was duly admitted as an Associate, and his name now appears as such in the book in the Library at Princeton.

At some subsequent period the original Associates and other new settlers who had been admitted as Associates, including Governor Carteret, met and determined to admit in the settlement 80 families, with the privilege of extending the number to 100 if it afterwards seemed proper. The inhabitants took the oath of allegiance, and included therein was a stipulation that they were to be true and faithful to the Lords Proprietors and the Government of this Province of New Jersey. It is to be noted that the government of the Province was then claimed to be in the Lords Proprietors.

The terms for settling the town were these: Each inhabitant was to have a home lot in the town of four acres and a "pittle," or additional two acres, more or less. Thereafter divisions of the common property were to be made from time to time among the Associates. The plan devised for such divisions was the surveying, under the direction of the Associates, of lots within the purchase and the division of the same to individual settlers in proportion to their contribution to the cost

of the purchase and the settlement. Those who contributed the least had what is called a First Lot Right. Others who contributed more had a Second Lot Right, or a Third Lot Right; the Second Lot Right being twice as much, and the Third Lot Right being three times as much as a First Lot Right. When surveys had been made by the direction of the Associates, a First Lot Right man acquired a title in severalty to one lot, a Second Lot Right man acquired a title to two lots, and a Third Lot Right man acquired a title in severalty to three lots. The surveys were returned to the Associates and entered in the books of record.

As the legal title was in the original grantees, this scheme for severance of title could only be effective with the consent of the original grantees, given by a satisfactory instrument. It is possible that such a consent was entered in their books of record and signed and sealed by the original grantees. It is interesting to notice that this mode of providing for a severance of title resembles that adopted by the Lords Proprietors themselves, and provided for in the Concessions. But there was this marked difference. The Associates' plan provided for a severance among all the purchasers from time to time and in different proportions.

Before 1670 two such divisions were made. By the first six acres were set off to First Lot Right men and twelve acres and eighteen acres to Second and Third Lot Right men, respectively. By the second division twelve acres were set off to First Lot Right men and twenty-four acres and thirty-six acres to Second and Third Lot Right men, respectively. Governor Carteret took part in these divisions and accepted the lots thereby allotted to him, and he was a Third Lot Right man. No divisions were afterward made until 1699, which was about the time the controversy began.

After the arrival of Philip Carteret and those with him and their union with the settlers who were already established, the new settlement grew with a rapidity quite unusual in those times. Settlers came from Long Island and the east and the number allotted by the agreement of the Associates was made up. Houses were built and a church was erected. None of

the settlers appear to have been requested to take title under the Proprietors' Concessions for some years. Titles were taken by Philip Carteret under his Third Lot Right and by several of his friends who had become Associates.

The town was made the capital of the government, and, on the 30th of May, 1668, the first Legislature met here, and, having read an act relating to crimes, which it seems had been presented by the Governor and Council, they referred the matter to the next session, to be held on the third of November of the same year. That meeting was held at Elizabethtown and passed several acts. It is probable that other meetings were held afterward, but none are contained in the collection of Leaming and Spicer, the next meeting reported by them having taken place on the 5th of November, 1675.

The amicable relations between the Governor and the settlers were maintained until about the year 1669. The Governor and his friends were admitted as Associates, and acquired rights according to the Associates' agreements. The conduct of the Governor during that time was probably the ground upon which, after the death of Sir George Carteret, his widow and others interested charged him with having connived at the purchase from Indians. The Governor issued a declaration just before he left for England, denying reports tending to indicate that he had been unfaithful to the Lords Proprietors of the country.

The Public Becomes Inflamed

The period of good feeling was brought to a close in 1670. By the concession of the Lords Proprietors, all settlers were entitled to hold their lands free from rent until 1670. When that period arrived the Elizabethtown Associates were astonished to have the rent of one halfpenny an acre demanded of them, as if they had acquired title under the Concessions. It was then perceived, probably for the first time, that they were to be called on to submit to the title of the Proprietors.

About this time Governor Carteret conveyed to Richard Mitchell a tract of land in the town for a house lot. Mitchell

had not been admitted as an Associate. The Associates at a meeting on June 19th, 1671, determined that Richard Mitchell should not enjoy his lot given him by the Governor and that some one should go the next morning and pull up his fence. This summary mode of enforcing the rights of the Associates resulted in a riot, for which several persons were afterward indicted and fined. The public became so inflamed that courts were resisted, jails were broken open and the authority of the Governor contemned. The affairs of the Province were in a state of confusion and the Governor and some of his friends went to England in 1672.

In May, 1673, his friends returned, bringing the letter of the Duke of York to Lovelace, of November 25, 1672, and a letter from Charles the Second, bearing date December 9th, 1672, to Berry, the Deputy Governor and the Council. The Duke's letter is printed on page 31 of Leaming and Spicer. It declared that his letter to Col. Nicolls, of November 25, 1664, required him to aid Berkley and Carteret in the possession of New Jersey. It went on to recite that under pretended grants from Col. Nicolls some contentious persons claimed lands, which claims the Duke asserted were posterior to his grant to Berkeley and Carteret; and then directed Governor Lovelace to assist the Proprietors in maintaining the possession of New Jersey. The King's letter commanded all persons to submit and be obedient to the laws and government established by the Proprietors under pain of his high displeasure.

The pressure upon the Associates was so great that they yielded so far as to take out warrants for surveys. This act, however, did not bind them to the payment of rent. Under the Concessions when the surveys were returned a grant was made, subject to the payment of rent. When that was accepted the acceptor became bound. Of those who applied for surveys many declined to proceed further and never took out the grants, and still resisted the payment of rent.

It was evident to both sides that the question could not be settled by any violence short of a revolution. Recourse was therefore had, after some years, to the courts.

In 1693, one Fullerton, claiming under the Proprietors,

brought an action of ejectment against one Jeoffrey Jones, who was one of the Associates and claimed title under them. The cause was tried at Perth Amboy in May, 1695, and a special verdict was rendered upon which the court entered judgment against Jones.

Under a provision of the Concessions, Jones took an appeal to the King in Council and the appeal was heard before a committee, one of whom was Chief Justice Holt. After hearing argument the judgment was reversed. Unfortunately the ground of reversal does not appear, for no reports of the Privy Council were at that time printed. The counsel for the Associates was William Nicolls, who made an affidavit, a copy of which appears in the Answer in Chancery. He asserts that the whole dispute was whether Col. Nicolls might not grant license to any subjects of England to purchase lands from the native pagans, and if, upon such license and purchase, they should gain a property in the lands, and that those questions were decided in the affirmative and the judgment was reversed for that reason.

It may perhaps be doubtful whether the Privy Council had declared such a reason for their reversal, because the Proprietors began to harass the Associates by a large number of actions questioning the title to the Elizabethtown grant.

It would serve no useful purpose to follow the course of litigation. In general the decisions were adverse to the Associates. The Judges were appointed by the Proprietors and some of them were Proprietors. This seemed to the Associates to explain the continual adverse decisions. It excited their feeling and induced them to unite in a petition to the King. The petition is in Leaming and Spicer, page 689, and was signed by sixty-five of the Associates. It is not dated, but shows that it was made after the death of Charles II, and after the reversal of Fullerton v. Jones. They boldly attack the courts and their right to take jurisdiction, and prayed that the King would either place the petitioners under the government of New York and grant to the New York courts power to act in East Jersey, or appoint indifferent judges to administer justice between the Associates and the Proprietors.

The Home Government Takes Part

The unsatisfactory condition of affairs in both East and West Jersey began to attract the attention of the home government in the closing years of the Seventeenth century. Complaints had been strenuously made that the Proprietary government had been inefficient in providing for the defense of the Province against foreign enemies or of the settlers against the Indians; that it had failed to repress the disorders which had broken out into lawless violence and might thereafter endanger the very existence of the Colony. Naturally such complaints led to questioning the wisdom and expediency of Proprietary governments, whose officers, executive and judicial, were appointed by the owners of the Proprietary rights, many of whom were non-residents, and all of whom were interested pecuniarily in the exploitation of these vast tracts of land yet unoccupied. These questions led to an examination of the rights of the Proprietors to set up and maintain a Government. In April, 1699, the Board of Trade and Plantations represented to the King (William III) that a trial be had upon a feigned issue in Westminster Hall whereby the Proprietors' claim to the right of Government might be determined.

Whether the Proprietors, before that time, had begun to have doubts as to their right to the Government of New Jersey or not, may be questioned. At all events, they had made propositions to the English authorities in which, while protesting that they had acquired such right, they offered to surrender the right to the Crown, retaining their property in the land.

Board of Trade and Plantations' Report

These propositions, and others, relating to the state of the Provinces were referred to the Board of Trade and Plantations, which body (one of whom was Matthew Prior, the poet) on Oct. 2, 1701, made a detailed report. For my present purpose it is sufficient to quote the following:

"Upon all which we humbly represent to your Excellencies. That not being satisfied that the forementioned grants

from the Duke of York (the only title upon which the said Proprietors claim a right to Government) without any direct and immediate authority from the Crown, were or could be of any validity to convey that right (which we have been informed is a power inalienable from the Person to whom it is granted and not to be assigned by him unto any other, much less divided, subdivided and conveyed from one to another, as has been done in the present case) we did thereupon humbly represent to His Majesty, the 18th of April, 1699, that a trial might be had in Westminster Hall upon a feigned issue whereby their claim to the Right of Government might receive a determination."

The report then proceeded to recommend that the King should appoint a Governor over the Provinces and instruct him to establish a Government therein.

Nothing was done upon this recommendation during the lifetime of William III, but on April 15, 1702, the Proprietors of both Provinces surrendered all rights of the Government of New Jersey to Queen Anne, who had come to the Throne on the 8th of the preceding March. On April 17th, 1702, Queen Anne accepted the surrender. On the 5th of December following she commissioned Edward Hyde, known as Lord Cornbury, to be Governor of New Jersey, and sent him out with the well-known "Instructions," under which he established the Royal Government of New Jersey.

New Actions Brought and Judgments

The change in the government did not diminish the litigation between those claiming under the Proprietors and those claiming under the Associates. Many actions were brought resulting in judgments sustaining the Proprietors' title. One of these is deserving of notice, for it is evident from contemporaneous accounts that the Associates hoped to be able to carry it before the King in Council and so to obtain a judicial settlement of the vexed question which would determine whether the reversal of the judgment in Fullerton v. Jones was upon the merits of the respective claims.

In 1714 an action of ejectment was brought in the Supreme Court by Edward Vaughn, claiming in the right of

his wife under a Proprietary title against Joseph Woodruff, claiming under the Associates. The issue was tried in 1716 at the Bar of the Supreme Court and a special verdict was returned. Arguments thereon were had at least at two subsequent terms. In May, 1718, the Court directed judgment to be entered in favor of Vaughn, the plaintiff. Woodruff promptly brought a writ of error thereon to the Governor and Council. The cause was there argued at length in 1719, and a rehearing was had in August, 1725, but no judgment was ever entered thereon. In consequence, Woodruff was unable to appeal to the King in Council as he had intended to do. I find no explanation of this action. The Associates naturally asserted that the Proprietors (some of whom were members of the Court) were unwilling to have their claim reviewed by a Court which would have settled the question forever. It may be inferred that this indication of the purposes of the Proprietors induced the Associates to make up the Book before mentioned to preserve a record of the various surveys and divisions previously made and recorded in the lost Books.

It seems that the judgments supporting the Proprietors' claims were generally entered upon special verdicts. But as time passed some juries rendered general verdicts. Thus, in the action of Patrick Lithgow, claiming under the Proprietors against John Robinson, et als, claiming under the Associates, division of 1699, which was commenced in 1731 and brought to trial in 1734, a general verdict was reached for the defendants. And in another action commenced in 1738, in which James Jackson, on the demise of Joseph Halsey, claiming under the Associates, was plaintiff, and John Vail, one of the Proprietors was defendant, and which was brought to trial in March, 1741-'2 (the trial lasting forty hours) a general verdict was rendered for the plaintiff.

These judgments doubtless encouraged the Associates and probably induced the Proprietors to resort to a Court of Equity to enjoin the setting up of the Associates' title in the then-pending suits and in other suits which might be brought on the ground that the Proprietors' title was not only good, but had been settled at law.

The Elizabethtown Bill in Chancery

This resulted in the filing by the Proprietors of the celebrated Elizabethtown Bill in Chancery, which long ago disappeared from the files, and which we only know from a copy printed in New York by James Parker in 1747. It appears therefrom that the Bill was filed on April 13, 1745, and that it was addressed to the Governor, Lewis Morris, who held lands under the Proprietors. If the Proprietors hoped that the interest of the Governor might render him favorable to their claims they must have been disappointed by the death of Governor Morris in May, 1746, and the subsequent appointment of Jonathan Belcher, who had no Proprietary interest, but was a friend and intimate of the people of Elizabethtown where he fixed his residence.

This celebrated document was evidently the work of intelligent and experienced lawyers. It was of prodigious length and perhaps was amenable to some criticism in respect to some of its allegations, but it must be presumed that it made the strongest case possible for the Proprietors.

The Associates were thus attacked in a novel way. Heretofore the Proprietors had attacked individuals and challenged their title under the Associates. In the early litigation it would seem that the individual defendants stood upon their defense with their own means. Gradually it came to be perceived that each attack upon individual titles affected the titles of all the Associates, and committees were formed to aid the defense. Money was raised by sales of parts of the original tract which had not been divided and contributed for the expenses, probably in violation of the laws against champerty and maintenance if those laws were in force in the Provinces. Now the whole body of the Associates was attacked, and if the attack should prove successful, the title of every individual would be invalidated.

The situation was critical. The risk was great, because if successful each of the defendants would have been defenseless against actions of ejectment, resulting in his ouster from the house and lands, built and improved by the toil and priva-

tion of his ancestor or predecessor in title. It may well be conceived that they deliberated long and anxiously. The original eighty Associates had all died or removed. The feelings which stirred them to violence, when in 1670 they discovered that they had been permitted and encouraged to build up the town under their purchase, but were now required to pay perpetual tribute to the Proprietors by way of quit-rents, must have largely subsided if not totally disappeared. The question could be considered dispassionately. If prudence required submission it seems clear that the Associates could have cleared their lands from the Proprietors' claim by paying the quit-rents in arrears and undertaking their future payment. The quit-rents were not large, although the arrears were rather formidable.

Some circumstances seemed to encourage submission. The Proprietors were people of wealth, title and station. While the Associates and other sympathizers could generally elect a majority of the Lower House, the Council, the Courts and the Governorship were usually filled by Proprietors and their sympathizers. Moreover, the Associates had been long practically deprived of competent legal advisers. Many years before, when negotiations were going on looking to the making up a case for judicial decision, they had bitterly complained that every lawyer of reputation and standing at the Bar of the Provinces was under retainer by the Proprietors, and had even asked the release of one of them so as to enable them to be represented.

Answer to the Bill

The deliberations of the Associates resulted in a determination to resist the new attack upon their title. They were able to secure the services of two young lawyers who had been practicing but a few years. As solicitors and counsel they drafted an "Answer to the Bill," which was sworn to by over 400 claimants under the original Associates. This document was probably filed shortly after August, 1751. It has also disappeared from the files, but is believed to be still in existence. Our knowledge of it is obtained from the publication

in 1752 of a copy, which, although rare, may be found in several public and private libraries. It does not betray any lack of ability or experience by its youthful draughtsmen. It takes up, one by one, the charges of the Bill, and in concise and vigorous terms presents the defenses of the Associates.

So far as known, no replication—then a necessity under the rules of Chancery pleading—was ever filed, and no attempt was ever made to bring the cause to hearing before Governor Belcher or any succeeding Governor. The counsel for the Proprietors died shortly after the Answer was filed. The stirring scenes of the French War, in which many of the sons of Elizabethtown took an honorable part; the excitement occasioned by the passage of the Stamp Act in 1765, and not allayed by its repeal in 1766 because of the accompanying assertion of a right in Parliament to tax colonies; the outburst of resistance to the duty imposed on tea, followed by armed resistance and assertion of independence of Great Britain and the forming of a new nation, attracted all the attention of the people; *inter arma silent leges*. So this contest, first raised in 1670, continued to the filing of the Answer in 1752, was never judicially settled.

This *résumé* of historical facts affords the only ground on which we can form some estimate of the motives that actuated the Associates in pertinaciously maintaining the contest, which, in view of the wealth and influence of the Proprietary party, may well be called unequal.

It is not difficult to conceive the astonishment of the Associates, on being informed about 1670, that the Proprietors claimed that they should take title under the Proprietors for the tract which they had bought from the Indians under the license and with the approval of Col. Nicolls, the deputy of the Duke of York; and doing so, should bind themselves to pay a perpetual quit-rent (which, though small in detail, amounted to a large sum in the whole) to the Proprietors. They were probably incredulous that the Duke of York, heir to the Crown, who had commissioned Col. Nicolls as his deputy, and instructed him to take steps to settle the territory of the Duke, would have done anything to interfere with those who, in ig-

norance, had relied on Governor Nicolls' authority, without providing for their protection. When the demands of the Proprietors were persisted in, and when the Associates reflected that the Governor and Agent of the Proprietors had not warned the actual settlers he found there in 1665 that they had no title against the Proprietors, but had joined the Association, contributed to their common fund, had taken part in the divisions of their tract and accepted the shares allotted to him in such division, the indignation and resentment of the old settlers may be easily understood. It doubtless accounts for the violence which occurred and the unpopularity of Governor Carteret.

Governor Carteret's Conduct

It is not easy to satisfactorily account for the conduct of Governor Carteret in this respect. When he arrived here he was only 26 years of age. He was charged with the responsible duty of settling New Jersey in the interests of the Proprietors and on the basis of their Concessions. He found a settlement already begun. It may well be that he judged it wise to unite with the settlers and build up the town, relying on the Proprietors ratifying his action in case of success. This is the motive usually attributed to him. A more perfect explanation would appear if we knew that he was cognizant of the letter of the Proprietors to Col. Nicolls, before his arrival here, which Governor Lovelace produced before his Council in New York, and which Lovelace thought had confirmed Nicolls' grants in Elizabeth Town and the Navesinks. Even then it would be difficult to understand his failure to acquaint the Associates of such an important fact.

However honest were the intentions of Governor Carteret, it was inevitable that the Associates should be unable to find his conduct consistent with fair dealing. From their point of view they had been led, not only by his reticence as to Proprietors' claims, but by his active co-operation with them, to devote some six years to the hard life and labor of pioneers in a new land. They had been induced thereby to take their divisions under the Associates, they had felled the woods, built

their houses, prepared the soil for tillage and contributed to the erection of a church. To be told at the end of six years' work and struggle that they had no title to the lands they had reclaimed, but must take title from the Proprietors, and agree to pay annual tribute to them, seemed to be so grossly unfair as to arouse a resistance that never wholly disappeared. When under pressure of threats from the Duke of York and Charles II they yielded and applied for surveys, the larger number of them still refused to take the titles which would have fastened on them the perpetual burden of annual quit-rents.

Reversal of Fullerton v. Jones

Then followed the reversal by the King in Council of the judgment of the Proprietary Courts in Fullerton v. Jones. The Associates were informed by the Agent who prosecuted the appeal of Jones that the judgment of reversal was upon the validity of the Indian deed and Nicholls' grant and therefore felt assured of their titles.

This assurance of validity of title doubtless induced the individual Associates to defend the many actions of ejectment. When it was found that the Provincial Courts continually ruled in favor of the title of the Proprietors, the same sentiment induced the holders of the lands to band together for a mutual defense; to endeavor to supply the place of their lost records, and to make the impassioned appeal to the King against the injustice of being compelled to submit the issues involving the validity of the Proprietors' title to the decision of those Judges who held their position by appointment of the Proprietors whose title would be affected by their decision.

The same influence no doubt stimulated the desire of the Associates to present a case to the King in Council on appeal when it could be settled whether the decision in Fullerton v. Jones was upon the merits of the controversy or not. When their desire was defeated by the failure of the Governor and Council to decide the issue presented by the writ of error taken in Vaughn v. Woodruff, and when they were further encouraged by two verdicts of juries in favor of the Associates' title,

it seems apparent that the like motive brought about their union in answering the Elizabethtown Bill.

Claims and Evidence of Title

It is now my purpose to discover, if possible, whether the Associates or the Proprietors had any title to the tract of land which was described in the Indian grant to the licensees of Colonel Nicolls and, if so, which of the parties had such title.

The first question to be determined respects the rights which the King of England had acquired upon the continent of North America.

The claim of the King is set forth very fully in the Bill in Chancery filed in 1745. The title thus set forth was a title by discovery and not a title by conquest. It was based upon the discovery by Sebastian Cabot, who, in the time of Henry VII (1497) reached the eastern coast of North America, about the latitude of Florida, and sailed along the coast to the latitude 67½ degrees north.

The King of England possessed no rights in the soil of the vast country along which Sebastian Cabot sailed, except such as the recognized international rule of law gave him. The country was inhabited, but the inhabitants were uncivilized savages, and, to use the language of the day, pagans. If the King had landed troops, made war upon the ignorant natives and subdued them, a barbarous rule might have been applied. The King might have destroyed the inhabitants and taken the land and granted it to whomsoever he should select. But when no war had been waged and no conquest had been made, a right was recognized by international law in the potentate presiding over the nation of the original discoverer almost equally barbarous. The King or other potentate by such a discovery was recognized as having a right to exclude from settling upon the discovered territory all other nations and peoples. He had a right to license his own subjects or others to enter upon the discovered land and to acquire from the inhabitants, by negotiation and purchase, a title. A purchase by any other than one licensed by the King or other potentate of the discoverer was deemed to be of no value. The poor natives were thus, with-

out any fault of their own, deprived of the right to dispose of their lands to whomsoever they should select; in fact it may be said that they were compelled by their ignorance to dispose of their lands to the licensees of the King; yet the theory was that they were to be satisfied by a fair purchase. Of course there was no standard of value that could fairly be used between the native owners and the proposed settlers in the new country. Glittering toys, gaudy coats, and, worst of all, intoxicating spirits, were, as a rule, the price offered. They cost the proposed purchasers little, but satisfied the untrained and untaught savage.

This was the view taken by Chief Justice Marshall in the case to which attention has been already called. The quotation made from his opinion establishes, in my judgment, the requisites of a title under the discovery of Sebastian Cabot to be: A license from the King, or from some other whom the King had deputed to grant licenses, and a purchase under the license from the native inhabitants.

To aid in the investigation I have undertaken it will be well to fix in mind the claims of each of the parties to this contest.

The claim of the Proprietors was based upon the deed of the Duke of York to Berkeley and Carteret. No other conveyance to them was relied upon, and it was not pretended that they or their successors had ever acquired the right, interest or title of the Indian possessors of the land included in the Elizabethtown tract.

It may be here observed that the Answer to the Bill in Chancery attacks the deed from the Duke of York to Berkeley and Carteret. That deed was a familiar form of conveyance of title to land in England which grew up after the enactment of the Statute of Uses. The old common-law lawyers adhered to the notion that no title could be conveyed except by an owner in possession and capable of making livery of seisin. The Statute of Uses was conceived to recognize a possession of a constructive nature, and the cunning of the profession then discovered that, by making a lease, an owner of land out of possession might confer upon the lessee a constructive posses-

sion, so that the owner might by a release pass an absolute title to the lessee.

The criticism of the Answer upon the deed in question was that at the date of the lease and release the Duke of York was not in possession of the land conveyed. That must be admitted; such possession as existed was in the Dutch and it was adverse to the English title. The argument then was that the Duke's lease and release passed no title, because the Statute of Uses did not extend to or operate upon titles to lands to which the King's right had been obtained only by discovery thereof by one of his subjects.

Looking at the title supposed to be conveyed by the lease and release as a title to land, this argument was perhaps not without effect, but, in my judgment, it erred because the Duke of York had acquired by his letters patent from the King no right in the soil of New Jersey: for the King had no such right, and therefore could not convey to the Duke any such right. The right which the letters patent transferred to the Duke was a right to settle the pagan lands, to select such persons as the Duke should choose, to make such settlement, and to govern them when the settlement was made.

The power of government involved the selection of the settlers, and it was a power pertaining to the Royal prerogative and not at all a title to land.

The claim of the Associates was to a title conferred by the Indian possessors under the license by the Duke or his deputy authorized for that purpose.

It is clear, by the way, that upon the doctrine of Chief Justice Marshall the Proprietors could not have succeeded as plaintiffs in any litigation respecting the title to the Elizabethtown tract even if Col. Nicoll's authority did not exist, and the title of the Associates were thus shown to be defective. For no doctrine is better settled than that a plaintiff in an action involving the title to land must succeed entirely upon showing a good title in himself. The weakness or non-existence of title in the defendant would not entitle the plaintiff to recover unless he established such a title in himself.

If it be assumed that the Indians' deed to the Associates

was void because made to persons not duly licensed to acquire such a title, it remained true that the Indians or the Associates had possession and title and that the Proprietors had never acquired both, either from the Indians or from the Associates.

The claim of the Associates was primarily based upon the license of the English Crown to purchase the Elizabethtown tract from the Indians and the subsequent purchase, the deed for which was duly recorded in the manner directed in the instructions to Colonel Richard Nicolls. It must be conceded that if Col. Richard Nicolls, at the time of giving the license to purchase, had authority to do so, the Indians' deed established in the grantees an estate in fee which could be sustained in an action of ejectment and could afford a complete defense to the alleged title of the Proprietors.

In dealing with this question it is important to ascertain the nature of the licensing power claimed by the King in lands of uncivilized heathen discovered by one of his subjects. It was manifestly either from a branch of the King's power to govern his settlements in such lands when they had been made or from a power of an analogous nature. Such powers were branches of the King's prerogative, which he could exercise by himself or by persons appointed for that purpose by him. When the King made to the Duke of York the letters patent, he placed in his brother's hands the selection of persons to make settlements in the tract over which the Duke was given complete powers of government, and he further authorized the Duke to exercise these powers either by himself or by deputy appointed by him.

That Colonel Richard Nicolls was such a deputy there can be no question, and that his exercise of the power of selecting settlers and authorizing purchases from the Indians was an exercise by a deputy of the prerogative power conferred upon the principal must be admitted.

If the power of the deputy had not been superseded on the 30th day of September, 1664, when his license was signed by him, and on the first day of December, 1664, when his confirmatory grant was made, his acts were final and conclusive.

The claim of the Proprietors on this subject was that as

to the whole of the lands in New Jersey Colonel Nicolls was deprived of the power to license purchases from the Indians on the 22nd and 23rd day of June, 1664, when the Duke of York made the deed to Berkeley and Carteret in England.

The appeal is to the known doctrine that when a principal who has given an agent power over the principal's land divests himself of property in the land by a conveyance to another, the power of the agent is thereby revoked. In my judgment this principle is inapplicable according to the doctrines above stated respecting title in discovered lands. Neither the King nor the Duke of York had any title of any kind and no right beyond that of excluding every other nation from settlement in the discovered property and of selecting such persons as the King desired to settle therein. Consequently the conveyance to the Proprietors did not produce the effect contended for.

A critical examination of the release also indicates, in my judgment, that there was no direct conveyance of the Royal Prerogatives which the Duke had been empowered to use by the letters patent. It was a mere grant of land with its appurtenances, "in as full and ample manner as the same is granted to the said Duke of York by the before-recited letters patent." It seems that this language cannot be construed as conveying powers of the Royal prerogative, such as the powers of government, and the included or collateral power of determining who should make a settlement and form the community to be governed.

This conclusion, so far as the powers of government are concerned, will perhaps seem strange to those who remember that under the Proprietors a government was set up and actually in operation for 37 years and until, upon a threat of a proceeding to test the Proprietors' right to govern, the powers of government were surrendered to Queen Anne. The government so set up was undoubtedly a *de facto* government. All those who came over with Philip Carteret were bound to accept that government by the terms of the "Grants and Concessions." The Associates who were already settled here were not thus bound but undoubtedly became bound by the oath they took recognizing the Proprietors' government. Yet such

recognition did not, in any respect, affect the title to lands claimed by the Indian deed.

While the conveyance from the Duke of York to Berkeley and Carteret lacked the legal efficiency that its terms indicated, because the Duke of York had no title to the lands conveyed, yet it may be argued that it could be construed as creating in Berkeley and Carteret a power of government and incidentally a power to select who should be admitted to settle and be governed, and that thereby, as to the whole of New Jersey, the powers of Col. Richard Nicolls were, inferentially at least, revoked.

The Board of Trade and Plantations in the recommendation to the Council to test the right of the Proprietors to a government took the position that the Royal Prerogative of government over a discovered country, when intrusted to the Duke, was incapable of being passed over by him for any part of the vast dominion which the King's letters patent had conferred upon him.

There can be no doubt that, when an agency is created involving the exercise of discretion in the person selected, such person has no power to transfer to another that exercise of discretion which had been conferred upon him as a personal duty. The letters patent did, indeed, authorize the Duke to select and appoint a deputy who should represent him and govern the new territory and the whole of it. Such deputy would govern absolutely in the name of the Duke as representing the sovereign who had conferred upon him the power of government. It seemed to the Board of Trade and Plantations not to be capable of being construed as authorizing the Duke to subdivide his grant and confer upon each division a power of government. As their report said: "To admit that construction would permit the Duke to subdivide it in innumerable quantities and to grant to each the Royal Prerogative of government, by which he would thus evade the responsibility which the letters patent had imposed upon him."

Powers of Berkeley and Carteret, and Nicolls

But if this be considered rather hypercritical, and if there can be discovered from the transaction an intent to confer upon Berkeley and Carteret the power of government inclusive of the power of selecting the community to be governed, a further question is at once raised. It must be conceded that on the 24th day of June, 1664, when the Duke's release was executed, Colonel Richard Nicolls was the Governor and Deputy of the Duke of York for the whole of the territory, a right which the Duke acquired under the letters patent. Did the conveyance to Berkeley and Carteret, construed as conferring upon them powers of government (part of the Royal Prerogative) *ipso facto* deprive Colonel Nicolls, on whom these powers had been conferred by the Duke, of any power so conferred, before the new Governors had appeared in this country in person or by duly appointed agents, and had made public their accession to the authority conferred upon them?

To assert the affirmative to this proposition at the time when the source of power was 3000 miles distant and the time required to transmit intelligence was never less than months, would require us to acknowledge that every act done by a Governor in the Colony might be found afterward to have been nullified and made of no avail by the action of the Duke in England. It is incredible that such was the contemplation of the parties. As a matter of fact, in the change of Governors the previous incumbent in practice retained his power until his successor appeared in the Colony armed with his commission and required the officer he superseded to recognize his authority.

It results that on this construction of the Duke's release the powers of Colonel Nicolls were retained by him until Philip Carteret arrived with his commission under the Proprietors: then, upon the theory above stated, the powers of Colonel Nicolls, so far as they affected New Jersey, ceased to exist. But this conclusion renders it clear that when Colonel Nicolls licensed the Associates to purchase of the Indians, and when he confirmed their purchase, he was without knowledge of the

conveyance by the Duke in the previous June, and the purchasers were equally ignorant.

It seems manifest from all the accounts of the occurrences that the knowledge of the Duke's conveyance to Berkeley and Carteret did not reach Colonel Nicolls or the public here until the summer of 1665, when Philip Carteret's ship arrived.

Upon this situation I have reached the conclusion, after much consideration, that the license from Colonel Nicolls was effective and the Indian deed was good, and the power of Nicolls had not, at the time it was exerted, been, in fact, taken away from him. This conclusion relates to the situation at the time of Carteret's arrival, but this does not settle all the questions that were raised in the long controversy.

Doctrine of Sovereignty over Conquered Territory

The additional circumstances that must be considered before a definite opinion can be pronounced upon the legal situation are as follows:

In March, 1671-'72, England declared war against the Dutch; and the existence of war between these nations, it is asserted in the Bill in Chancery, was proclaimed in New Jersey on the 16th of July, 1672. In the following year a Dutch fleet cruising along the coast of America was informed of the defenseless condition of New York. The Dutch commander made sail for New York and, about the 30th of July, 1673, took possession of the City of New York and gradually extended the Dutch authority over both the Provinces of New York and New Jersey.

The war came to an end with the Dutch in possession, but by the treaty of peace made in February, 1673-'74, it was expressly stipulated that the country taken from the English was to be "restored to its former owners in the same condition as it shall be at the time of publishing this peace."

Upon these circumstances it seems apparent that Charles II, then King of England, conceived that he had acquired a new right in the country, and that the acquisition was rather in the nature of a conquest from the Dutch which gave him the

power acquired by such conquest. So he made, on June 29, 1674, a second grant to the Duke of York of the whole tract which he had granted to him by the letters patent of March 12, 1664. Thereupon the Duke of York by lease and release made the grant of East Jersey to Sir George Carteret. The lease and release were dated the 28th and 29th of July, 1674.

This arbitrary division of the lands of New Jersey was afterwards adopted and made effective by what is called the Quintipartite deed, which was dated July 1st, 1676, and was made by Sir George Carteret and the assigns of Lord Berkeley who, with Sir George Carteret, had been the grantees in the Duke's original conveyance in 1664.

The dividing line between East and West Jersey was left in some doubt by the language used in the Duke's grant and the Quintipartite deed. It may be possible that the Elizabethtown tract extended so far to the west that portions of it were included in West Jersey; but this is doubtful and it is plain that the main and valuable portion was within the boundaries of East Jersey.

The doctrine that the sovereign of a country gained rights in the soil of a conquered country because of his right to slay and destroy all its inhabitants was not universally admitted among the laws of nations.

Grotius and other writers on the laws of Nations admitted some sovereign rights in the conqueror but limited those rights to destruction of life and denied them as to the acquisition of the property of the conquered, except as it was seized in or after a conflict. Whether the rights of a conqueror were limited or not it seems to me manifest that the rule did not at all apply to the situation of the Colonists in New York and New Jersey when the treaty which terminated the war between England and Holland was signed and restored to the King those colonies.

The colonies in question were built up and inhabited by loyal subjects of the English crown. The English sovereign or his *alter ego,* the Duke of York, owed the colonists protection from foreign invasion. That protection was manifestly not given them. The result was that they were unable to repel

the invasion of the Dutch and were forced to yield to them. The King did not procure the restoration of these colonies by a conquest of the territory, but by means of a treaty which put a period to the state of war between England and Holland. So the colonies returned to the King by peaceful means.

But if the King's troops had invaded the colonies and driven out the Dutch, it is impossible to conceive that the King could have thereby obtained authority to slay all the inhabitants who had been his loyal subjects, and who, by reason of his failure to protect them, had been compelled to submit to the Dutch invasion.

Lacking that power the most arbitrary and extensive of claimed rights of the conqueror, he did not by the transfer acquire any right over the soil of the colonies, and the deed to the Duke of York was of no avail to pass to him any right over such lands.

If it were otherwise all colonies would have been at the mercy of their King. If they became valuable and populous, by withdrawing his protection he might permit them to be invaded and taken by another nation, and then, having conquered the other nation, he might restore himself and withdraw from the colonists whom he had neglected the rights which they had acquired under him. This is so contrary to reason that no such doctrine is discoverable in any of the writers on the subject. If the power of destruction of the conquered did not exist, the appended power ceased to exist. *Cessante ratione cessat lex.*

For these reasons, in my judgment, the Proprietors were unable to rely upon the second conveyance from the Duke of York, and the Associates' title acquired under the Indian deed was not thereby affected.

The first of the questions which I have undertaken to decide is, I think, to be thus answered: The persistent resistance of the Associates to the demands of the Proprietors was due to an honest belief in the validity of their title, and that belief arose naturally from the circumstances.

Other Questions Affecting Title

There are two other questions affecting the Proprietors' title which ought to be considered. It is asserted that the original Associates upon the arrival of Governor Carteret took the oath of allegiance including a stipulation that they were to be true and faithful to the Lords Proprietors and the government of the Province. As the Proprietors claimed the government and had established it, that oath was a natural sequence of their union with Carteret in setting up the new town: but it is impossible to conceive that it in any way recognized the right of the Proprietors to the soil which was afterward asserted. The right of government and the right to the soil were distinct rights and the recognition of the one did not involve the recognition of the other.

It is also asserted that the protesting Associates admitted the rights of the Proprietors when many or most of them consented to take out surveys of their land.

As has been stated, this was no recognition of the necessity of a title from the Proprietors and did not bind any of them to the payment of the quit-rents demanded by the Proprietors.

Extent of Territory Granted

Among other questions raised by the Bill and Answer in Chancery was one affecting the extent of the territory granted by the Indians and claimed by the Associates. By the Indian deed the line dividing the tract ran up After Cull Bay "till we come to the first river which sets westwards up After Cull Bay aforesaid," and then to run west into the country.

The northern boundary of the tract, therefore, depends upon the location of the river intended by the description above quoted. On the part of the Proprietors it was contended that the river intended was what was then called and is yet called Bound Creek. On the part of the Associates it was contended that the river intended was the Passaic. It is obvious that this contention involved the title to a considerable tract as the

mouth of Bound Creek and the mouth of the Passaic are separated by several miles.

I have reached the conclusion that the Proprietors were correct in their contention, and that Bound Creek satisfied the description of the Indian deed.

At the time the Bill in Chancery was filed, it is probable that Bound Creek had been somewhat diminished in size by the destruction of the forests around its headwaters and the consequent erosion from the cultivated land carried into the stream.

The Associates' answer does not deny that at that time it was navigable for small vessels. The Bill had asserted that it was so much of a water-way as to be frequently used and, indeed, that a small vessel had been built thereon for the navigation of the adjoining waters. The Associates further contended that it was not a river but a mere tidal stream, the head of which was in a cove, the location of which is still to be observed. Perhaps it was not, strictly speaking, a river, but a stream capable of being used and which was used for driving a mill ran into this cove, and from that point to the Bay it was rather a tidal river.

Bound Creek has been so contracted by deposits from the adjoining country and by being closed by causeways and railroads that it is not at this day easily discoverable, but at my earliest recollection it was no inconsiderable stream.

Once, when driving to Newark, I was in company with an old man who was born in that neighborhood and lived there until he grew up, when he came to Elizabethtown and resided there till his death. The road on which we were passing, and which was then called the lower road to Newark, deviated from the road called the upper road to Newark just south of what is now Evergreen Cemetery, and by a circuitous route running near what was formerly a station on the Pennsylvania railroad called Waverly, it avoided the hills of the upper road, which were then quite formidable to heavy traffic. The upper road crossed the stream which ran into the cove, but did not strike Bound Creek. The lower road crossed Bound Creek by a stone

bridge and joined the upper road at a spot near the present station of the Lehigh Valley Railroad.

As we were crossing the stone bridge, my old companion pointed out to me the decayed and broken down timbers of what had formerly been a bulkhead or wharf along Bound Creek, and told me that in his youth the farmers used to send their produce from that wharf by sloops to New York and obtained by the return of the vessel what they needed from the city. So that even in the close of the Eighteenth century, which was about the time when my old companion was a boy, the stream was navigable and of some importance.

It would seem by the use of the word "first" in the description of the stream, the grantors intended to indicate one river out of more rivers setting westward. The only other river that could be claimed to be thus designated was the Passaic. It is true that the first course of the Passaic from the Bay is not in a westward direction, but a little east of north. It maintains that course, however, only for a short distance and then turns west. But as Bound Creek was a river in the sense naturally to be applied to the word as used, the Passaic was not the first river setting west.

As I have mentioned, the location of the boundary between Elizabethtown and Newark was always a matter of question and doubt. A meeting of the notable people of both settlements for the purpose of agreeing upon a dividing line was undoubtedly held upon a hill, since called Dividend Hill, which was near the head of the cove. It is quite true that the purpose of the meeting may have been to determine not the line of division between lands in respect to their ownership, but rather a division with respect to the jurisdiction of each settlement; but I think that inference cannot be fairly drawn.

The Associates of Elizabethtown claimed the power of government over the whole tract purchased by them, and to the extent of municipal affairs; this seems to have been conceded to them during the government of Philip Carteret, at least up to about 1670; so that in my judgment the selection of Dividend Hill as a place from which to start the line of division is a strong indication that the original purchasers and their con-

temporaries recognized that as in the line of division, and such recognition could not have been if they understood that the "river setting westward from the Bay" was the Passaic, and could only be applicable if they believed that river was Bound Creek.

The Herman Tract Purchase

There was another point made in the Bill of Chancery which it may be proper to notice. It was contended that while the Dutch were in possession, one Augustine Herman purchased from the Indians a large tract of land which the Proprietors claimed included some, if not the whole, of the lands claimed by the Associates.

It is difficult to understand the purpose of the Proprietors in making this claim. If Herman's grant was effective it was impossible to maintain that the Proprietors had acquired any right from the Indians. But, on the doctrine laid down by Chief Justice Marshall, it is obvious that the conveyance made by the Indians to Herman conveyed no title because he had no license from the King of Great Britain to settle upon lands within the territory granted to the Duke of York. His title could not have been set up against a purchase from the Indians made under a valid license from the King of England or his deputies.

The Answer in Chancery contends that Herman, who remained in the Provinces after the Dutch had been expelled from power, never made any claim under the alleged title, although he and his children had, for many years, owned and possessed other tracts of land within the Provinces.

But a more effectual objection was made to the effect that the alleged conveyance had none of the form or purpose of a conveyance of land in that it was not sealed, nor did it contain words indicating a conveyance of land in fee, but was merely a license to settle given by the Indians. As the Answer asserts that the Herman deed was accessible at that time, if this description of its purport was correct, it is certain that it could play no part in the controversy between the Associates and the Proprietors.