

embraced within it, and consequently not subject to its operation.

In that case it was decided that land which had been granted by the state could not be taken up and included in a patent as vacancy; that if it had become escheatable, it must be taken up by a warrant of escheat, and if under such a warrant it was included as vacancy, the title did not pass to the patentee, but remained in the state. Such being the case, it follows that the lots included in the grants to the caveators, which lots had been previously granted, and which, it is supposed, had become escheat, but which, nevertheless, they took up as vacancy, were improperly included, and the title did not pass. It remained in the state, and liable to be granted under an escheat warrant, the pre-existing patent to the contrary notwithstanding. It is no answer to say, that in these cases the state received as much or more for composition, treating the land as vacant, as if two-thirds of the value had been paid, as is required when land liable to escheat is taken up; because if such an inquiry must be instituted, and the legality of the proceedings in each case is made to depend upon the value of the land, the distinction between escheat and other warrants would be broken up, and the question would always turn upon the amount paid the state. The principle is understood to be this, that the state having once granted the land, will not grant it a second time, unless the title has reverted to her by escheat. It can, under such circumstances, no longer be regarded as vacant in the sense in which that term is understood in the land office.

The argument of the counsel for the caveators, that as they hold grants issued to them by the state, it is, so far as they are concerned, of no importance by what title the state held, cannot avail them. It rests upon the idea that these grants passed to them the title of the grantor, however that title may have been acquired, whether by the failure of the heirs of the former owner, or because the property never had been granted, and was consequently vacant. The fallacy of the argument is in supposing the title did pass, when, according to the judgment of the Court of Appeals, in *Lee vs. Hoye*, it did not pass, but