THE BATTURE QUESTION.

There are probably few persons, in the United States, who have not heard of the disputes, to which the ownership of the alluvial deposits in front of the city of New Orleans, have given rise during the last thirty-six or thirty-seven years. This controversy, of which the late Mr. Jefferson and Mr. Edward Livingston were the most distinguished champions, has, owing to the celebrity of the combatants, and the talents and erudition displayed in their writings, as well as in those of their coadjutors, acquired a renown, which, we have no hesitation to declare, neither the intrinsic importance of the subject, nor the difficulty of the legal questions, involved in its solution, justified.

In reviewing, calmly and attentively, the pretensions of Mr. Jefferson and Mr. Livingston, at this distant period, when the excitement, which gave rise to the contest, has subsided, and when the passions, which animated the disputants, sleep with them in the tomb; an impartial posterity must, without questioning the purity of their motives, feel itself constrained to declare, that both pushed the doctrines for which they contended, further than was warranted, either by correct deductions of reason, or by any legitimate inference of law.

Posterity has done justice to Mr. Jefferson’s ability as a statesman, and his fame will be cherished by his country, as long as virtue, talents and patriotism, constantly exerted
to promote the best interests of his fellow men, shall afford a claim to respect. Mr. Livingston also, in going to "that bourne whence no traveller returns," has left behind him monuments, which proclaim his worth to this and future generations, and rank him among the most distinguished jurists of the age. It can, therefore, not detract from the fame of either, if we should succeed in shewing that in the ardor of discussion, they have maintained doctrines, which we are persuaded, that both, on a more deliberate examination would have been willing to modify.

It is not our intention to conjure up the ghost of a departed controversy; but as the batture question, which more than thirty years ago excited so much discussion, has again arisen, and has again given rise to a host of learned arguments, in which the laws, languages and judicial decisions of various countries have been laid under contribution; a brief review of the whole field of controversy is indispensable to enable our readers to understand the subject.

This we shall consequently attempt, divesting our account as far as practicable, of useless technicalities.

The city of New Orleans, which now bids fair to become one day the largest commercial city in the world, was established about the year 1718. (1) Louisiana was at that time a French colony, under the control and government of the Western Company, created by the celebrated John Law. Chevalier Bienville, to whose intelligence, courage, activity and perseverance, Louisiana is, in a great degree, indebted for her prosperity, was then Governor of the colony. He had soon discovered, that as long as the principal establishment of the territory was confined to the sandy

and unproductive soil of Biloxi, the colony must necessarily languish, and that a more fertile and more central position was requisite to enable him to provide for the wants of the settlers, and to extend and protect the infant settlements. He had already in the year 1717, in a journey, which he undertook from Natchez to Mobile, selected the site of New Orleans as a suitable position for a post, and he had obtained the consent of Mr. De L’Epinai, then governor, to appropriate it for that purpose. (2) As soon as he was himself promoted to the highest office in the colony, he hastened to carry his intentions into execution, and removed in the year 1722 (3) his head quarters to New Orleans, which has ever since continued to be the capital of Louisiana.

Mr. De la Tour, the chief engineer of the province, who was charged with the duty of laying out the city, had, after clearing a space sufficient for the purpose, laid off the land into squares of 300 feet each. These squares, which were separated by streets, were subdivided into twelve building lots, of which ten had 60 feet front by 120 feet in depth, and the two central or key lots had 60 feet front by 150 feet in depth. But in as much as the city was laid out on a river, subject to periodical overflows, the squares were surrounded by drains, and an embankment or levee was constructed near the river bank, to protect the inhabitants against inundation. When all this had been completed, the council of the colony distributed the lots gratuitously to such as applied for them, giving one to each, on condition that it should be enclosed with pickets. (4)

Such was the origin of New Orleans, which according

to Father Charlevoix, who visited it in the month of January, 1722, the same year in which it became the seat of government, presented the aspect of a spot, whither two hundred individuals had been sent for the purpose of building a city, and who had encamped on the banks of a great river, where they endeavored to shelter themselves against the inclemency of the weather, while waiting for a plan, and until they could procure materials wherewith to construct houses. (5)

The advantages of the position of the site, chosen by Bienville, were soon felt and appreciated, and the city continued to increase in population and commercial importance, notwithstanding the restrictions and impediments of the colonial governments of France and Spain, until the transfer of Louisiana to the United States in 1803. It is from this latter period, that the dawn of a great and permanent prosperity commences, and with it begins also the struggles which the city has had to maintain against the cupidity of individuals, who have endeavored, but too successfully, to enrich themselves at her expense.

New Orleans is situated on an alluvial plain, evidently formed, like the surrounding country for a great distance, by the transporting and creating power of the Mississippi in the course of centuries. This plain, which constitutes a portion of the Delta of the Mississippi, contains a soil of incomparable fertility, through which the current of the majestic river winds its way with resistless impetuosity, sweeping along in large, graceful and singularly regular curves, which mould its channel, and make the shores, which limit and restrain its waters, conform to their meanderings. Hence the shores of the Mississippi present every where bends or points, of which, the bends, or curves,

being exposed to the more immediate and direct action of
the current, are constantly excavated or abraded, while the
points, under the influence of the countercurrent generally
increase in extent by the alluvial accretions formed around
them. These alluvial depositions, which are often of great
extent and value, are called battures.

New Orleans, as we have seen, was laid out in 1718, and
it continued to increase within the limits, originally assign-
ed it by La Tour, until 1788. In the meantime, planta-
tions had been established on the river by different indi-
viduals, both above and below it. Among these, was a
plantation, originally granted to Bienville, and by him sold
to the Jesuits, which upon the expulsion of that order, and
the confiscation of its property in Louisiana, in 1763, was
laid off into tracts of various dimensions, and sold to differ-
ent individuals. Bertrand Gravier, who found himself the
owner of that portion of the Jesuits' plantation, imme-
diately adjoining the commons of the upper part of the City,
divided the same into squares and lots, and annexed it as a
suburb to the city of New Orleans, about the year 1788.
A plan was made of said suburb, which was deposited in
the archives of the Cabildo, and it appears, that the sanction
of the Baron de Carondelet, who then governed Louisiana
for the King of Spain, was also obtained, to the establish-
ment of the Suburb.

In 1805, or about two years after the cession of Louisiana
to the United States, the city of New Orleans was incor-
porated. Within the limits of this incorporation were in-
cluded not only the City proper, and the suburb St. Mary,
(Gravier's plantation,) but several other plantations, situated
both above and below the city.

Bertrand Gravier died about the year 1797, and John
Gravier acquired, by purchase of the succession, his interest
in the suburb, which was already partially inhabited.
From the period, that Gravier had converted his plantation into a suburb, up to the year 1803 or 1804, it appears, that the inhabitants of the city and suburb had been in the habit of resorting to the batture in front of the latter, for the purpose of taking earth to fill up their lots, and for other purposes, and that this practice had been not only tolerated, but expressly sanctioned, both by Bertrand and John Gravier. The latter however, about the year 1803 or 1804, having been advised, that he owned the batture, by virtue of his purchase of the interests of Bertrand, attempted to take possession of it, and did actually enclose a small part. (See Map annexed to Livingston’s answer to Mr. Jefferson, Hall’s Law Journal, Vol. 5.)

This attempt of John Gravier met with a determined resistance on the part of the inhabitants of the city and suburb. The corporation also interfered, and claimed to be entitled to the batture. Gravier, in order to vindicate his rights, filed a petition in the Superior Court of the Territory, setting forth his title, alleging that he had been disturbed in the enjoyment of his property by the digging of his soil, and by publications, tending to discredit his title, &c. To this petition the Corporation answered, first, by denying that Gravier was owner of the batture; secondly, by insisting that Bertrand Gravier had abandoned it to the public, which had kept the levee in repair, and used it as a landing place for the piling of wood, unloading of flat-boats, &c.

This suit was argued three different times, and on the 23d of May, 1807, the Court, being unanimous, gave a decision, by which it was determined: 1o, that the plantation of Bertrand Gravier was bounded by the Mississippi. 2o. That it was, by the civil and Spanish law, which must give the rule of decision, entitled to alluvion. 3o. That
the right of J. Gravier to the batture depended on the fact, whether there was any alluvion of sufficient height, to be susceptible of private ownership, at the time B. Gravier sold the lots fronting the public road, which fact the Court decided in the affirmative; and 4o. That the only proof of an abandonment was mere conversation, which had taken place a long time ago, and which was not very explicit, and that it would be dangerous to divest a man of his property upon such evidence, especially without proof of any consideration. *

An application was made to the Court for a new trial in the cause, on the ground, that the ownership of the batture belonged to the United States; which motion was overruled.

In the meantime, John Gravier had sold the greater part of the batture to Edward Livingston and Peter de la Bigarre, who took possession of the same. Mr. Livingston immediately began to improve his portion, and was engaged actively in so doing, when the Marshal of the United States took possession of the same, under instructions from the President, directing him, "to go to the place, called "the batture, in front of the suburb St. Mary, and drive off "all persons, whom he might find thereon, and who have "taken possession since the 3d March, 1807." This order was executed on the 25th of January, 1808, and on the same day, Mr. Livingston applied for and obtained an injunction to stay the execution of the President's order, which injunction the Marshal disregarded, and caused Mr. Livingston's workmen to be driven off, by calling to his aid the militia. These proceedings were had under color of the act of Congress, of the 3d March, 1807, "to prevent

settlements being made on land ceded to the United States, until authorized by law,” and were prompted by letters of Governor Claiborne, a presentment of the Grand Jury of the Parish of New Orleans, representing Livingston's work as a nuisance, dangerous to the city, and were in conformity with the opinion of the Attorney General of the United States. The Legislative Council and the Representatives of Orleans voted thanks to the President, who laid the subject before Congress, where Mr. Livingston also presented himself, to obtain redress, for five successive sessions, but without success.

Mr. Jefferson, having retired from office on the 4th of January, 1809, Mr. Livingston brought an action of trespass, *quare clausum fregit*, against him, in the county of Albemarle, Va.; (the place of Mr. J.'s residence,) in which he claimed damages for the unlawful entry on the batture, made by him, through the Marshal, his agent. This suit was defeated on the ground, that the action was local and could only be brought where the disturbance occurred, viz: in New Orleans.

Mr. Livingston, although baffled in every effort, to recover his property from the grasp of a power, which had thus unceremoniously, and without deigning to show respect even for the forms of law, deprived him of it, and although in spite of his earnest and repeated entreaties, he could never induce his adversaries to submit his claim to the investigation of any legal tribunal, was not discouraged; but he appealed again and again to the public in a tone equally manly and persuasive, and he supported his rights by facts and arguments, which appeared incontestable, and which did not fail to make a strong impression on the public.

Mr. Jefferson, who was now enjoying *otium cum dignitate* in his retirement at Monticello, seemed at last sensible,
that it required something more than a *plea in abatement* to convince the people of the United States, that he had been actuated by nothing but a sense of duty in his proceedings against Mr. Livingston, and that the pleasure of annoying a political opponent had not had some share in influencing his conduct, and he consequently drew up his celebrated defence, entitled: "The proceedings of the "Government of the United States, in maintaining the "public right to the beach of the Mississippi, adjacent to "New Orleans, against the intrusion of Edward Living-"ston," published in the 5th Volume of Hall's "American Law Journal,"

This pamphlet, which is extremely ingenious, and which is written with great spirit and perspicuity, is replete with learning, and contains in the main a fair and just exposition of the facts and principles of law, on which the writer relied, to justify his official acts in taking possession of the batture.

The positions taken by Mr. Jefferson, are:

1. First. That the rights of the parties are to be determined, according to the laws of France.

In support of this opinion, he maintains:

10. That these laws were in force in Louisiana, when the Jesuits' plantation was sold in 1763, and when the question was *generated*, and that, although by a secret clause of the treaty, between France and Spain in 1762, the colony was ceded to the latter, yet inasmuch as this transfer was not announced to the inhabitants until 1764, and Spain did not take possession of the country till 1769; the laws of France were certainly in force until the last named period; and the Jesuits plantation was sold subject to all the rights which the law then in force recognized, and no other.
20. That the proclamation of O'Reilly in Nov., 1769, introduced only a specific and not a general change in the jurisprudence of the colony, as is evident from the inspection of his ordinances which only substitute a cabildo for the council, introduce Spanish offices and Spanish officers, such as Alferes, Alcaldes, Alguazils, &c., for analogous French functions and functionaries, which had previously existed. It is true that O'Reilly also changed the modes of proceedings in civil and criminal cases, according to the Digest of Urrustia & Rey, which was to be used until the inhabitants had acquired a more perfect acquaintance with the laws and language of Spain. But while admitting that the ordinances of O'Reilly are obligatory, so far as they introduce specific changes, he denies that they either have abolished or intended to abolish the whole system of the jurisprudence of France then in force; and he insists, that the introduction of specific changes in the law, proves that no general change was intended. He admits, however, that there are certain loose expressions in the ordinance, which would lead you to conjecture, that more extensive changes were contemplated at some future period; but as it does not appear that they were ever made, there is no pretext for saying that the entire French law was abrogated.

Second. That the alluvion formed on the borders of navigable streams and rivers, belong to the King.

In support of this position, he quotes Pothier, who says so in express terms, in his "Traité du Droit de Domaine de Propriété." Part. 1, Chap. 2, Art. 2, No 159; Répertoire universel de Jurisprudence," by Guyot Verbo "Ile;" also, Le Rasle and Ferrière, and the Edict of Louis XIV, of the 15th December, 1695, which declares, that "Le droit de propriété que nous avons sur tous les fleuves et rivières navigables de notre royaume, et conséquemment
"de toutes les îles, moulins, bacs, &c., atterissemens et 
"accroissemens formés par les dits fleuves et rivières, 
"étant incontestablement établi par les lois de l'état 
"comme une suite et une dépendance nécessaire de notre 
"souveraineté," &c., which edict, he maintains; formed a 
part of the law of Louisiana.

These two positions constitute the basis of the arguments 
of Mr. Jefferson, as to the rights of the United States, be-
cause his researches into the laws of other countries and 
their commentators, and his Latin and Greek quotations, 
whatever tendency they may have to give us a high opinion 
of his erudition, do not strengthen his argument, which 
when reduced to its simplest expression, amounts to this: 
*The rights of the United States depend on the laws of France.* These laws gave the alluvions formed on naviga-
ble rivers to the sovereign. *The Mississippi is a navigable 
river, and the United States have acquired all the right, 
which the French sovereign possessed: they are consequently 
the lawful owners of the batture, which is alluvion formed 
in a navigable river.*

But this vindication of Mr. Jefferson's conduct came too 
late; he and his friends had too long disregarded the just 
complaints of Mr. Livingston, who only asked to be per-
mitted to submit his claim to the examination of the tri-
bunals of the country, and Mr. J. had defeated the suit 
brought against him personally, upon a mere technicality.

All this gave his antagonist a dangerous advantage over 
him, which he did not fail to improve. But independent of 
this, Mr. Jefferson's defence was illtimed. He had observed 
a profound silence during the time he was in office, and 
when surrounded by devoted friends and adherents, who 
would have supported the views of the President, right or 
wrong. Not having attempted to explain and to justify
himself, when the prestiges of power and the dignity of place would have given weight to arguments, even feebleer than those he did actually produce, and would have caused them to be received as conclusive; it was, to say the least, imprudent to do so afterwards. He had allowed his adversary time to enlist the sympathies of the public, and to persuade the world, that he was persecuted and oppressed, a belief, which in a free country never fails to make a strong impression, and which, we are persuaded, aided the cause of Mr. Livingston even more effectually, than the acknowledged ability of his reply.

Mr. Jefferson, entertaining an unlimited confidence in the discernment of the public, seemed to forget that the scene had changed, and that that portion of it which were his friends, felt comparatively little interest in the controversy, while his political enemies, as well as those who were discontented with his administration, would avail themselves, with avidity, of the occasion to make him feel their resentment.

It appears to us, likewise, that Mr. Jefferson underrated the ability of his opponent. Mr. J. was a man of most extensive acquirements, and as an elegant and general scholar, had few equals, either in this or any other country. He was, also, an able lawyer, and he communicated his views with facility and elegance in writing. As a general scholar, Mr. Livingston was probably not equal to Mr. Jefferson; but in every other respect he was, at least, on an equality, and he possessed the advantage of defending his own cause which he had studied in all its bearings for years; which he had argued repeatedly at the bar in opposition to the ablest civilians of Louisiana, and of which he knew the strength and weakness thoroughly.

The appearance of Mr. Jefferson’s appeal to the public
at this juncture, was, therefore, a boon which he ardently desired, and he attacked it with a vigor that was irresistible, and which must have made its author regret more than once his imprudence in exposing himself to the assaults of so potent a gladiator.

But when you analyze this production, critically, without permitting yourself to be dazzled by its wit, led astray by its glowing declaration and elegant invective, and especially without suffering yourself to be misled by the many ingenious sophisms and fallacies, which the author has scattered throughout it, with a profusion and a skill that is truly extraordinary; you are at a loss to conceive by what illusion it could possibly have acquired the name of a "replique sans reponse," to which it certainly is not entitled.

The argument of Mr. Livingston is simply this: Mr. Jefferson is mistaken in supposing that the laws of France govern this controversy, which must be decided by the laws of Spain. But the laws of Spain, following in this respect the Roman law, gives the alluvion to the riparious owner of the land; Gravier was such riparius owner, and I have acquired his rights; I am, therefore, entitled to the batture. And even if mistaken in my supposition, that the laws of Spain govern the controversy, still my rights are not affected by it, because the laws of France are the same as the Roman law on the subject of alluvions.

Mr. Livingston, in order to shew that the controversy should be determined by the laws of Spain, contends:

10. That, though the transfer of a country does not, in general, change its laws; yet this is not to be understood in relation to those fundamental laws, which affect the prerogative of the sovereign, which are, of necessity, changed by the cession; because the transfer releases the inhabitants from the allegiance due to the former sovereign, and
makes them the subjects of another, towards whom it places them in the same relation as all his other subjects.

20. That O'Reilly's proclamation changed not only the form of Government, but the administration of justice, and with it all the laws of the province.

30. That Spain had promulgated a Code for the government of all her colonies (Recopilacion de las Leyes de las Indias); and this code declares, that the laws it contains shall govern not only all the present colonies of Spain, but such as it may acquire hereafter.

That the doctrine of the Spanish law was like that of Rome, and that both gave the alluvion to the riparius owners of rural estates, was not seriously disputed. Mr. Jefferson made, however, an ineffectual effort to prove, that the batture was not alluvion, and Mr. Livingston attempted to show, that the French law was like the Roman.

Here we have the gist of this celebrated controversy, which, with its adjuncts of explanations, quotations, commentaries, sarcasms, &c., occupies three hundred closely printed pages in Hall's Law Journal, upwards of two hundred of which are allotted to Mr. Livingston's reply.

It must appear strange to the uninitiated, that a dispute, in which one party contends, that the laws of France governed Louisiana, and that by those laws he was entitled to the batture; and the other, that the laws of Spain governed the same country, and that those laws, as well as those of France, gave it to him; should have required so much elaborate research, and such an array of musty and often questionable authorities. We imagine, it cannot be doubted, that if the authors of the controversial pamphlets, which we have noticed, had made a less ostentatious display of their learning, their productions would have gained much, both in brevity, clearness, and attraction.
If we examine the question, whether the laws of France or Spain were in force in Louisiana, and place the arguments of Jefferson and Livingston in juxtaposition, we shall find, that the former have at least as much in their favor as the latter. The position of Mr. L., that the subjects of one country, when transferred to another, stand in the same relation to the new sovereign as all his other subjects, is evidently erroneous. The reverse of this is usually the case, because the subjects, even of a conquered country, generally retain their laws, and the privileges they enjoyed under their former sovereign, while the new one acquires those he enjoyed; that is, the status ante bellum, or ante cessionem remains unchanged as to the laws and prerogatives of the inhabitants of the new territory. Nay, the ablest and most approved writers on the law of nations go still further, and contend, that a sovereign has not the right to dismember his territory, and dispose of his subjects like so many cattle; (7) at least not without their consent. (8) Nay, the prerogatives of the king of Spain himself will be found to be very different in Castille, Catalonia, Asturia, Biscay, Navarre, Gallicia, &c.

The second position, that the laws of France were abrogated by the ordinances of O'Reilly, seems to us likewise untenable. What were the powers of O'Reilly, who says he acted by virtue of a patent, issued at Aranjuez, on the 16th April, 1769, (see the Ordinance in the present No.) is still a mystery, which we are unable to solve, because the United States, in spite of repeated efforts and applications to the Court of Spain, have not been able to procure a copy

of his commission, which, if we are to believe a Royal order, addressed to Don Pedro Garcia Mayoral, dated at Prado, January 28, 1771, issued on the 29th October, 1768, and not in April, 1769, as the ordinance declares. (Land Laws, Vol. 2, p. 530.) That O'Reilly’s power extended to a total change of the laws of the country, cannot be believed without proof, and it is negatived by the ordinances, published by him, in which he refers to the future sanction of his measures by the King of Spain. It is also disproved by the Report of the Council of the Indies on the measures of O'Reilly, made by order of the King, the 27th February, 1772, in which they say; that O'Reilly was appointed to take formal possession of Louisiana, and to “establish such form of government, as would be most compatible with the condition of the country, its climate, and the character of the inhabitants.” (Ib. 531.) They also say, that O'Reilly “considers it necessary, that the province should be subject to the same laws as the other dominions in America,” (ib. p. 533,) and they recommend, that Cedulas be issued to that effect. These documents, which were not procured until 1833, seem to support fully the position of Mr. Jefferson, that O'Reilly introduced only a partial change in the legislation of the colony, and left it to the King of Spain to determine, after advising with his Council of the Indies, whether it would be advisable, to subject Louisiana to the same laws as all the other Spanish colonies in America. This advice appears to have been given, although we have no evidence, that it was ever followed.

In looking to the letter of the King of France, to Mr. D’Abbadie, dated Versailles 21st April, 1764, and which announces the cession of the colony to Spain, we find that it is said, “que les juges continuent, ainsi que le Conseil supérieur, à rendre la justice, suivant les loix, formes et usages
There seems, however, to be no provision made for the preservation of the laws of France in the secret treaty of cession, which was published for the first time in the Documents of the Senate of the United States, for the year 1837.

The third position of Mr. Livingston, that the laws of the Indies became the law of Louisiana, *proprio vigore*, cannot therefore be true; unless we suppose that the King of Spain, and his Council of the Indies, knew nothing of the subject, which will hardly be contended.

Mr. Livingston also attempts to shew that Pothier did not mean to assert, that the alluvions formed on navigable rivers belonged to the King, although he admits, that this is the most obvious meaning of his language. He then examines the doctrines of Guyot, Ferrière Denizart, &c., for the purpose of shewing that the Roman and French laws were similar; he also quotes various decisions of the tribunals of France, which seem to support his opinion. This part of his argument is very elaborate, and displays extraordinary industry and research, as well as great familiarity with the jurisprudence of France; and at the time it appeared, did most probably appear conclusive in favor of his pretensions, even to the legal profession. Since then, however, French writers of celebrity have examined critically both the ancient and modern jurisprudence of France in relation to water courses and alluvions; not with a view to support a question in which, they were interested, or even with an intention to build up a system; but simply for the purpose of comparing the jurisprudence of one period with that of another, and to exhibit the progress of legislation. Among this number is Mr. Charles Comte,
late professor of law, and one of the most profound and philosophical jurists of the age, who in his "Traité de la Propriété," asserts that the royal ordinance of April, 1683, considers the alluvions of all navigable rivers (rivères portant batteux de leur fond) as forming a part of the domain of the crown. (10) The same author, in instituting a comparison between the jurisprudence of Rome and France, on this subject, reiterates the same doctrine, which he considers as undoubted, and his opinion is entitled to the more confidence as he is a decided advocate of the dispositions of the Roman law, and the modern Code of France, in relation to alluvions.

Whatever respect, therefore, we may be willing to accede to the opinion of Mr. Livingston, it cannot outweigh that due to a modern French jurist, treating the subject ex professo in his own country and before a host of distinguished lawyers, capable of detecting the least error and ready to correct it. Indeed Portalis, who has also been relied on, in speaking of alluvions, admits; that "les principes de la féodalité avaient obscurci cette matière." Now, this obscurity has been dispelled by Comte, who exposes, in a most lucid and satisfactory manner, the history of the jurisprudence of France, in relation to water courses, from the earliest period to the present time, and contrasts it with the laws of Rome, England and the United States in pari materia. (11)

In thus shewing that Mr. Livingston's arguments, which have been viewed as unanswerable, are at least questionable, we are not disposed to admit that the inferences of Mr. Jefferson, as to the rights of the United States, are tenable; our present object is simply to establish the position, to

(11) Ibid, ps. 95-117.
which we have already adverted, viz: that both the disputants contended for more than they were entitled to, and in the progress of our examination we will endeavor to exhibit what we regard as the true principles applicable to the solution of the controversy.

Mr. Livingston at length succeeded to recover possession of the batture; but he was not destined to enjoy it peaceably; being first compelled to abandon a large portion to the heirs of Bertrand Gravier, who proved that John Gravier, in buying the suburb, had not bought the batture, and finally to enter into a compromise for another valuable portion with the corporation and the front proprietors. So that if we sum up the profit reaped by him, from this acquisition, it will probably be found less than zero. Neither did Gravier derive any advantage from this fancied Eldorado, which seemed to turn to dross in the hands of those who attempted to wrest it from the City.

After the final termination of the controversy, between Mr. Livingston and the United States, other disputes arose at different periods, and gave rise to litigations involving questions of ownership of certain portions of the batture.

We shall briefly enumerate these cases, with the points decided in each.


"The words 'front to the river,' designate *prima facie* a riparian estate."

"The vendee of a riparian estate acquires a qualified property in the bank of the river, and consequently the batture, which may thereafter arise."

"Nor does an intervening highway prevent this, when
the owner of the estate is bound to repair it and the soil of it is at his risk."

2o. Livingston vs. Heerman; 9 Martin 656.
"The expression in defendant's deed 'Fronte a la levée,' does not give a boundary on the river."

3o. Packwood vs. Walden; 7 Martin N. S. 81.
"By the formation of the batture, of the faubourg St. Mary, the place it had occupied ceased to be part of the Port of New Orleans, but did not become public property; that is, property the use of which belonged to all, the right of soil to none."

4o. Cochran et al. vs. Fort et al.; 7 Martin N. S. 622.
"In sales of property, if the batture be not expressly conveyed, the question is, whether at the time of sale it was sufficiently formed to be susceptible of ownership, if so it remains the property of the vendor, and does not pass."

"The doctrine of implication of alluvion, when the sale is of the whole of a plantation, does not apply to the sale of a certain limited part taken from a whole tract, when at the time of sale, the vendor held another part between that sold and the river."

"Every owner of front property has a right to the batture in front of his property, so soon as it is high enough to be susceptible of private ownership, and may enclose, with leave of a jury of riparious proprietors."

Note. In this case it was admitted, that the plaintiffs were front proprietors.
In the year 1836, the city of New Orleans was divided into three separate Municipalities, all united under one Mayor, and all subject to certain regulations of a General Council; but in other respects distinct and independent corporations, each governed by a Recorder and board of Aldermen, and each having the control of the property appertaining to the city, within its respective limits, with the right of taxation, regulation of the police, &c.

Within the Second Municipality, there exists an extensive Cotton Press, appertaining to the Orleans Cotton Press Company. This Press is built on a batture, or alluvial deposit, formed in front of the suburbs Delord and Saulet.

The authorities of the Second Municipality, having been advised, that the batture, on which the Orleans Cotton Press was constructed, as well as the unimproved space lying between it and the river, was public property, of which they were entitled to the administration, instituted a suit against the Cotton Press Company for the same, about the 1st of November, 1838.


1o. That the Cotton Press Company has unlawfully, wrongfully, and without any just right or title, taken possession of a certain parcel of land, situate in the suburbs Delord and Saulet, of the city of New Orleans, which lot or parcel of land was formed by alluvion of the river Mississippi, in front of the said suburbs, long after they were laid out as suburbs of the city of New Orleans, and long after the said suburbs were actually incorporated into and made part and portions of said city; and that if any alluvion
existed, at the aforesaid epochs, it was not susceptible of private ownership, inasmuch as it was not perceptible at the lowest stage of the waters of the river.

20. That by reason of the incorporation of said suburbs with the city, and the laying out and dividing the land, of which they are composed, into town lots, streets, &c., as a part of said city, the title to all the batture or alluvion, then so imperfectly formed, or which might thereafter be formed, became by law vested in the corporation of the city of New Orleans, for the sole and exclusive use and benefit of the public; and is now by law vested in Municipality Number Two, within whose limits the land is situated.

30. That the Cotton Press Company have appropriated said batture to their own use, constructed buildings on it, and thereby subverted and changed the natural and lawful destination of said land, to the injury of the public and of Municipality Number Two.

40. That long since the laying out of the suburb Delord into streets and lots, and its incorporation with the city of New Orleans, and long since the sale of said lots by the original proprietors, and within the last ten or twelve years, there has been formed, by the gradual deposit of the river Mississippi, a considerable space of batture, accretion or alluvion, now vacant and unoccupied, except for public purposes, and which is by law vested in the said Municipality for public use; and that the said Cotton Press Company claim the same as part of the land, they occupy; have menaced to take possession of, and to occupy the same, and to convert it to their own private use, to the exclusion of the public, and to the great damage and injury of the petitioners.

The petition concludes with the prayer, that the Cotton
Press Company be cited, and that it be decreed, that the title to the land, occupied by the Cotton Press, as well as the batture or alluvion, recently formed in front of said Cotton Press, belong to the Second Municipality, for the use of the public; that the petitioners be put in possession of the same, and that the defendants be enjoined from any occupation, use or possession thereof. They also pray for fifty thousand dollars damages, on account of the unlawful occupation of the land by defendants, and for general relief.

To this petition the defendants, by their counsel Isaac T. Preston, P. Soulé, C. Roselius, H. Lockett, Wm. C. Micou, and Randell Hunt, filed their answer on the 14th November, 1838, by which they plead:—

10. As a peremptory exception, that in the suit of Stephen Henderson, John Nicholson, and others, against the Mayor, Aldermen and inhabitants of the city of New Orleans, all the matters and things now attempted to be put in controversy by plaintiffs, were passed upon and determined by the District Court of the First Judicial District, and by the Supreme Court of the State of Louisiana; and that that suit, being res judicata, forms a bar to the present action.

20. They deny, that plaintiffs have any title whatever to the lot, on which the Cotton Press is built, or to the batture, accretion or alluvion already formed, or which may hereafter form in front of the same.

30. They insist, that they are riparian proprietors of the property claimed by plaintiffs, and by law entitled to all the accretion, alluvion or batture, which has been deposited or may be deposited by the river in front of their property; that they own said property with all its rights and privileges, by virtue of a sale, or concession by the King of France, and that they cannot be divested of it, without their con-
sent, and without just and previous indemnity; that if the act of incorporation of the city divests them of the alluvion or any portion of their property, such act is contrary to the act of Congress, creating the Legislative Council of the Territory of Orleans; to the treaty of cession from France to the United States, and repugnant to the Constitution of the United States, and therefore null and void.

4o. That their rights to the property and the alluvion have been repeatedly recognized and admitted by the Mayor, Aldermen and inhabitants of New Orleans, and by plaintiffs, who have successively put them in possession of portions of the batture, and charged them with the burdens of riparian proprietors, &c., whereby they are estopped from denying their rights.

5o. And finally they plead the prescriptions of ten, twenty and thirty years, and they deny, that they have ever refused the public the use of such part of the property as it was by law entitled to use.

Thus began anew the celebrated controversy in relation to the batture, and from the number, reputation, and ability of the advocates, employed on each side, it was to be expected, that the contest would be arduous; that the pretensions of the parties would be sifted with care; and that much ingenuity, as well as learning would be expended in the attack and defence of property, valued at millions.

The exception of res judicata, having been argued before the Parish Court, was maintained as to the lot, on which the Cotton Press was built, and overruled as to the batture in front of said lot, on the 15th of April, 1839.

The trial of this cause, on the merits, was begun in the Parish Court, on the 26th November, 1839, and occupied the court that day, the 27th of same month, the 10th, 11th, 12th, 23d, 24th, 26th, 27th, and 30th of December, when
the plaintiffs concluded their reply and submitted the cause to the court, who took it under advisement. The parish judge, believing that the whole controversy resolved itself into the solution of the two following questions of law, viz:

1o. "Do alluvions, formed in front of cities, accrue to the front proprietors?"

2o. "If not, do they belong to the cities in front of which they are formed?"

And having determined the first question in the negative and the second in the affirmative, he decided the cause in favor of the plaintiffs, on the following considerations, viz:

1o. "That the property claimed by the plaintiffs from the defendants, in this case, is an alluvion, or batture, entirely formed in front of the suburb Delord, long after the same was laid out as a suburb of the City of New Orleans, and after the same was actually attached to, and incorporated into, and made part of the said City of New Orleans."

2o. "That by reason of said incorporation with the said city, and the laying out and dividing the land, of which the said suburb is composed, into town lots, streets, &c., as a part of said city, the title to any batture or alluvion, thereafter to be formed, became vested in the corporation of the City of New Orleans, and is now, by law, vested in the plaintiffs, to wit: Municipality No. 2, within whose limits the property claimed is situated."

The reasoning by which the Court arrived at this conclusion is elaborate, and on the first point rests chiefly on a supposed distinction between rural and urban property. The judge being of opinion that the doctrine of the Roman law, "Praeterea quod per alluvionem agro tuo flumen adjectit, jure gentium tibi adquiritur, J. 2, 1, §20,"
meant only to declare that the right of alluvion profited rural estates. This construction was based upon the supposed signification of the word *ager*, which was said to mean a *field, farm, arable* or *tillable land* in the country, and differed essentially from the term *area*, which signified town lot, or land in a city, according to Calvin, who says in his Law Dictionary, verbo, *Ager*; "Quod in urbe est *area* id ruri est *ager,*" &c., and many other authors who were cited.

The second point was determined in favor of the plaintiffs, upon the provisions of Law 9, title 28, Part. 3, which is as follows: "Apartadamente son del commun, de cada "una cibdad, o villa, las fuentes, e las plazas o faze en las "ferias e los mercados, e los lugares o se ayuntan a conse-
"jo, e los *arenales* que son en las riberas de los rios, e los "otros exidos, e los carreras o corren los cavallos, e los "montes, e las dehesas, e todos los otros lugares semejan-
tes, destos, que son establecidos, e osorgados para pro "communal de cada cibdad, o villa, o castillo o otro lugar," 
&c., which was supposed to contain a formal declaration that alluvions formed in front of a city belong to such city. The word *arenales*, in the above passage, was translated *alluvions*, the correctness of which was strenuously disputed, and we think it extremely doubtful, to say the least, whether this translation can be supported when critically examined. The judge also reviewed the decisions of the supreme court, from which he inferred that the city was the owner of the batture, and he overruled the pleas of prescription, and thought the implied assent, on the part of the city, entitled to no weight.

The defendants, dissatisfied with the decision, appealed to the supreme court; where the cause was most laboriously and elaborately argued, at first *viva voce*, and subsequently in writing.
The printed briefs of the counsel for the plaintiffs and the defendants, occupy upwards of nine hundred closely printed octavo pages. To analyze them minutely would therefore be impossible; but our duty as reviewers requires that we should bestow on them at least a passing notice.

We begin with those in behalf of plaintiffs; and

I. Etienne Mazureau. Mr. M. having been at the head of the legal profession in the City of New Orleans for many years, and being familiar with the batture question in all its various aspects, it was to be expected that he would treat the subject with great ability, and bring to bear on it all the erudition which an experience acquired during nearly forty years spent in the study and practice of the law, had enabled him to accumulate.

His written argument, which is published both in English and French, occupies 240 pages in the former, and 239 in the latter language. Mr. M.'s manner appears to us far from being either happy or attractive; he seems to think too much of himself in all he says, and he treats those, who have the misfortune to differ from him, with little deference or courtesy. He is, it is true, exceedingly zealous in the defence of his cause, but this zeal seems rather prompted by a desire to display his own ability, than by sympathy for his client. He has also the propensity of leaving nothing an opponent may say, no matter how trivial, unanswered, and by this means his discourses often swell into most unreasonable dimensions. But apart from this, his matter is usually admirable, and when he puts forth his whole strength, it is that of a giant, and overcomes all resistance. His reasoning is acute, his learning accurate, and his sarcasm biting; unfortunately he occasionally seasons his discourses with a little too much of the latter. He is capable of taking the most comprehensive and accurate
view of a legal question, and to develop it in a manner, which leaves nothing to add to its illustration.

The published argument in the batture case furnishes a striking exemplification of the defects and excellencies of Mr. M.'s mode of argumentation.

He sets out with declaring, that if he had to decide the question, the task would neither be long nor difficult, but inasmuch as "five lawyers, as diffuse as they are learned, and as eloquent as they are diffuse, have fully occupied, I know not how many of your sittings, to reply to an argument of about three hours duration, which I had the honor to address to you, &c., he is compelled to overstep the natural limits of the cause, &c.; his exordium, of which this is the beginning, occupies four pages. He then examines the plea of res judicata, to which he devotes 104 pages, and it is but just to admit, that he treats the subject with much learning and ability.

On the merits, he states the question to be, "Whether the alluvion, which was covered by the river, at the highest state of its waters, lying outside the levee street, known by the name of New Levee street, at the time when the plantations Delord and Saulet were erected into faubourgs, belongs to the public or the Cotton Press Company?" (p. 109.)

In investigating this subject, he exposes first the facts, (p. 109-115,) and then he lays down the general proposition, that "alluvions belong to the riparian proprietors," which is founded on the rule, that "qui sentit onus sentire debet commodum et e contra."

In applying this rule, he maintains, that the city is the front or riparian proprietor, because it owns the levee and road, which are exposed to be first injured by the action of the river, and that the Cotton Press Company had in fact conceded this point, by deny-
ing the City the \textit{via} and \textit{iter}, claimed in 1831, which is a right due from all riparian estates, and that the judgment which intervened, and required the City to pay for the road, virtually decided, that the Company had no riparian rights. He also contended for the two following propositions, viz:

1o. That by law the alluvion only accrues to the owner of a \textit{rural estate} bordering on a river.

2o. That alluvions formed on the shores in front of, and united to cities and their suburbs, \textit{belong to those cities}.

In support of the first proposition, he relied on the 501st art. of the C. C. of Louisiana, which declares, that “alluvion belongs to the owner of the soil situated on the edge of the water,” and that such owner is bound to leave a road (\textit{chemin de halage}) for the \textit{use} of the public; and he argued, that inasmuch as a city lot, which is a measured piece of ground, never approached the edge of the river, and was not bound to furnish a \textit{chemin de halage}, it could not be riparian proprietor.

He also examined the law Praeterea, &c., D. lib. 41, t. 1, l. 7, and insisted that \textit{agro nostro} applied only to a rural estate, and in support of this, he examines numerous authorities, and relies on the Roman and Spanish law; but it would lead us too far, were we to follow him in this part of his argument.

To establish his second proposition, he relies,—

1o. On the law in \textit{agris limitatis}, D. lib. 41, t. 1, l. 16, which declares, that “\textit{in agris limitatis jus alluvionem locum non habere, constat. Idque et Divus Pius constituit.} \textit{Et Trebatius ait, agrum qui, hostibus devictis, ea conditione concessus sit, ut in civitatem veniret, habere alluvionem, neque esse limitatum: agrum autem manu- captum limitatum fuisse, ut sciretur, quid cuique datum esset, quid venisset, quid in publico relictum esset.”}

In translating the above passage, the words \textit{ut in civitatem}
veniret, were rendered, "under the condition of belonging to a city," which, as we shall see hereafter, was denied to be the true meaning.

2o. On the law, "Apartadamente son del comun," &c., Partida 3, tit. 28, law 9, already quoted, and on the meaning of the word arenales, which he translates, alluvions, battures.

All these various positions are supported with ability, learning and ingenuity; but the numerous digressions, and the want of a rigid method and exact subordination in the classification of the arguments, weary the attention of the reader, and weaken the force of this very able dissertation.

In summing up the argument of Mr. Mazureau, it seems to us to amount to this:

The land on which the City is laid out, belongs to the City in its corporate capacity; no individual owner of lots within its limits can be considered riparious proprietor, because all lots are limited fields, circumscribed by measured boundaries, and none is bounded by the river, from which, even the lots, nearest to it, are separated by the highway and levee, which are public property, kept in repair at the common expense of all the inhabitants, who would have to support the loss, if they were destroyed by the action of the river; and who would, in such event, at their common expense, have to provide a new road and levee. The city is therefore riparious proprietor, and entitled to the alluvion, because it owns the land at the edge of the water, and being the only one exposed to loss, is alone entitled to profit by the batture.

Mr. Mazureau has besides, incidentally, exposed the inconvenience of a different doctrine, and shown, that in a town, like New Orleans, with a port, such port, together with its shores, must necessarily belong to the public.
He also maintains arguendo, though, as it appears to us, without sufficient development, that the owner of a rural estate, who voluntarily converts it into a suburb, and thereby makes it urban, subjects his property to all the servitudes and rights, which attach to city property; and that he thereby abandons to the community, which he is about to form, the exclusive ownership of the rural estate, with its incidental rights, so far as necessary for public purposes, retaining only such an interest in it, as is consistent with that thus ceded to the public.

This doctrine which flows from the maxim, that he who grants a thing for a given purpose, grants also the means by which such purpose is to be effected, has a predominant influence on the questions in the cause, and appears to have been entirely overlooked by his opponents.

II. Mr. Pierce has also developed some of the preceding grounds, maintained by Mr. Mazureau, and supported them by additional authorities and reasonings. But, besides relying on the law of Rome, Spain and Louisiana, he calls to his aid the law of nature and nations, and he cites Grotius, Puffendorf, and Barbeyrac, for the purpose of showing, that whether you look to the nature of alluvion, or the sources whence it is derived, the right to it belongs to the people. From all which he concludes, that the batture "belongs to the public from 1805, with or without the consent of Madame Delord; and from 1806 with and without her consent." Mr. Pierce's brief, which occupies 116 pages, is written in a careless style, which detracts from its merits in a literary point of view, and which we are at a loss whether to attribute to negligence or to affectation; for surely, if Mr. P. had chosen, he could have written something more intelligible than the following sentence, which occurs on the first page of his brief.
"In answer we have witnessed a wide range, and many old discussions brought again forward, but keeping steadily our case in view, we have refused to be led away into a pleasant but useless disquisition on their several merits; or how each, or all of them might be well replied to; and with our now additional stock of civil law books, overthrown." In other respects this argument is highly creditable to the author, and evinces much erudition, industry and research. The method is unexceptionable, and we are regaled with many a curious quotation from rare authors, among which, those from Arthurus Duck *de auctoritate Juris Civilis Romanorum*, are not the least interesting. Mr. P. has also exposed many of the mangled quotations of Mr. Livingston, and proved, by giving the whole text, that instead of supporting, they usually destroyed the principles for which he contended.

To a person desirous to study the various questions, to which the batture controversy has given rise, we know of no source more instructive or accurate than the brief of Mr. Pierce.

III. Mr. Carter contented himself with examining the decisions of the Supreme Court, for the purpose of shewing; that he had relied on them in advising the plaintiffs to bring the present suit; and that a fair and reasonable construction of the published opinions of the court, had satisfied him that the Municipality was the owner of the batture. To this brief, which occupies 29 pages, and which is written with clearness and perspicuity, is appended some extracts from "A defence of the right of the public to the batture of New Orleans," by Julien Poydras, which shews, that at the time Bertrand Gravier established his suburb, there was no batture in existence, and that Bertrand never even pretended to claim any right to the batture.
Mr. Grymes also argued the cause for the plaintiffs in the Supreme Court; but as his argument has not been published we have no means of analyzing it.

Having thus exposed the means of attack, we now proceed to develop the system of defence presented by the defendants, who in addition to the counsel, who signed their answer, had also engaged the professional services of M. W. Hoffman and George Eustis, Esqrs.

In doing this, we must be brief, though we shall endeavor, at the same time, to give a just exposition of the means of defence presented by each counsel, with the impartiality of a reviewer whose motto is: "nothing extenuate nor ought set down in malice."

DEFENCE.

I. C. Roselius. His printed argument occupies 72 pages of which 27 are devoted to the examination of the plea of res judicata, and the rest to the merits of the cause.

He considers the whole foundation of the plaintiffs' claim as resting on the act of incorporation of New Orleans in 1805, and that they contend; that, all the alluvion or batture formed in front of the defendants' property, since that period, belongs to them.

He regards the arguments of plaintiffs as an attempt to revive the doctrines of ex-President Jefferson, already annihilated by the reply of Mr. Livingston, and that their system is only the old theory of Mr. J. reinforced by a few additional quotations from lexicographers. He then proceeds,

10. To examine the terms ager and heredad, which he concludes, mean land in general and not land situated in the country, or rural property, and he inveighs with vehemence against a reasoning which would make important
rights, like those in controversy, depend on mere verbal criticism.

2o. He next inquires into the application of the maxim, "qui sentit onus, sentire debet et commodum," and shows, that the riparian owner of urban property is as much exposed to injury from the action of the river, nay usually even more so, than the proprietor of rural estate, owing to the greater value of town property, and that being thus situated, he is entitled to the benefit of the alluvion; because the loss would fall entirely on him, if his land were carried away, and no portion of it would be borne by the public.

3o. He reviews the argument which supposes that the land (fonds;) on which the city has been laid out, (fondée,) belongs to the city, which he considers as a mere play upon words which are untranslatable into English, and which could not have been seriously intended as an argument.

4o. He examines the Spanish law, "apartadamente son," &c., and translates the word arenal, beach, or strand, and he determines that it is impossible by any rational mode of construction to arrive at the conclusion that this law intended to give alluvions to cities.

In support of this position, he examines generally how cities acquire property and on what terms they hold it both under the Roman and Spanish law, and he thinks that cities, like individuals, in order to be entitled to claim property, must shew some other title, than a doubtful interpretation of an obscure law.

5o. He investigates the bearing of the law in agris limitatis on the right of the defendants, and he insists 1st. That that law was no part of the Spanish law, and has never been in force in Louisiana, and that it was so decided in the case of Morgan vs. Livingston. And 2d. That even
if it were otherwise, it does not apply to defendants, who are riparious owners.

To support this last position, he examines the expressions in the conveyance of Madame Delord to Larche, which he thinks sufficient to transfer all the rights of the former to the batture, and he quotes the case of the commune of Roques vs. C. Guittart et al, in Sirey Reports for 1829, part. 2, p. 191, to show that in France the law of alluvion applies to urban as well as rural property, and that even the intervention of a public road does not prevent the front proprietor from enjoying this right.

60. And finally he examines the doctrine of dedication, and in connection with it, all the decisions of the Supreme Court touching the batture question, and the ordinances of the City Council relative to the suburbs Delord and Saulet; but it is impossible for us to do justice to this part of the argument without extending this analysis much beyond its proper limits.

Mr. Roselius' argument possesses the advantage of being written in a clear and methodical manner. The writer understands not only the subject of which he treats, but his views are classed with order, and you have no difficulty in following and understanding either the chain of reasoning by which he arrives at his conclusions, or the conclusions themselves, which is no small advantage to the reader. For our part, although not assenting to all the propositions for which Mr. R. contends, we regard his brief as the most satisfactory exposition of the defendants' rights, which has been published in this controversy.

II. Isaac T. Preston's argument, which occupies 118 pages.

Mr. Preston lays down twelve distinct propositions, which he promises to prove. These propositions are:
10. The plea of res judicata.
20. That the laws of Spain give plaintiffs no title.
30. That the Roman law was never in force in Louisiana.
40. That the act of incorporation of 1805 could not give away defendants' property.
50. That by the old and new Civil Code defendants are riparian proprietors.
60. That the points involved in the present controversy, were decided more than thirty years ago by the Supreme Court.
70. That the principles thus decided, have been followed ever since, and have settled the titles of property to an incalculable amount.
8. That the law of alluvion neither gives nor takes away the title to property.
9. That the property in controversy was never dedicated to public use.
10. That, though the property owes the servitude of a levee and landing to the public, yet this does not take away the right of the defendants to the soil, as well as the alluvion.
110. That plaintiffs have no title to the property by judgment or expropriation, and if they have, it is not pleaded.
120. And finally, that the United States, the Legislature of Louisiana, its courts, police juries, &c., have unanimously recognized the rights of defendants, and repudiated the pretensions of the plaintiffs.

Mr. P. informs us, that he has thus made twelve points in the case, "which are all that custom allows, especially "as we are defendants in possession." This is certainly something new. We were aware, that there are twelve apostles, twelve signs of the zodiac, twelve months in the
year, twelve jurors to try a cause, &c., nay, we even knew, that the astrologer divides the heaven into twelve houses, and we have heard, that twelve was a magic number, and that its efficacy in cabalistic operations was almost equal to that of the number seven; but we have never yet heard of any rule or custom, which restricted the counsel in a cause to make but twelve points, and we should be pleased to see some authority for so novel a doctrine.

In the meantime it is quite certain, that Mr. P. has made but twelve points, and that he supports them all with much ingenuity and vigor; but as many of these topics have already been discussed by Mr. Roselius, we shall not again advert to them; but content ourselves with exhibiting those of his positions, which are new.

Mr. P. relies on the case of Henderson et al. vs. the Mayor et al., as evidence only, that the matter in controversy has already been decided, and not as supporting strictly and technically the plea of res judicata, and he thinks, that when a question has once been decided, the interests of the whole community require, that it should not be disturbed.

He also relies on Partida 1, tit. 1, law 15, and Partida 3, tit. 4, law 6, which prohibit the use of foreign laws in Spain, and require the judges to decide according to the Partidas, to show, that the Roman law was not in force in Spain, and consequently not in Louisiana.

Mr. P., notwithstanding he thus cites the Partidas, entertains little respect for Alphonso the Wise, and his laws, which he pronounces "a medley of kingcraft, priestcraft, witchcraft, and every other kind of craft," written in that "dark, gloomy and barbarous age," when "not a ray of light had shed its lustre on the benighted kingdom, except the little learning brought by the Moors from Africa,
"when they invaded Spain." The only part of it, which he finds "at all worthy of a demi-civilization, is a miserable translation, by priests, of the Pandects of Justinian." This portion, Mr. P. tells us, "his jurisconsults persuaded Alfonso, was their own production, in order to get a higher reward for their supposed work, and in return they surnamed him Alonzo el Sabio (Alphonso the Wise)."

Where Mr. P. acquired his knowledge of this curious fact, we know not, but inasmuch as it is in direct opposition to all authors of respectability, who have given any account of the life and reign of Alphonso, we must regard it as more than apocryphal.

Mr. P. thinks, that an English judge hit upon an axiom or legal saw, which applies more aptly to the formation of alluvion, than any quoted by plaintiffs; it is, "de non appar-entibus et non existentibus eadem est lex;" to prove which he reasons thus: "the increase of any soil by alluvion is imperceptible, and as that which is added at each particular moment, cannot be seen, the law treats it as if it did not exist, yielding the imperceptible addition to the owner of the land, to which it is added." (p. 69.) All this is urged with such apparent gravity, that it is difficult to say, whether it was intended as a serious argument.

He examines the question of dedication with much care, (p. 76–95) and among other authorities, relied on to show, that no dedication of the property to public use exists, he quotes the Ordinance of Governor Unzaga, the successor of O'Reilly, which declares, that "alienations of real estate could not be made or accepted in the province (Louisiana), except in writing made before a notary public, and that all alienations, made in any other form, are null." 3 Har. Cond. Rep. p. 427.

Finally he compares, what he calls "an obscure law of
"the thirteenth century, which may mean any thing, but "certainly does not mean, what they (plaintiffs) pretend," with the legislation of Louisiana, which he holds "as far "higher authority, because it is the legislative and con- "temporaneous exposition of the law;" and he concludes, that the latter is favorable to the pretensions of his client, whose property is safe from injury and depredation.

He rejoices exceedingly in this reflection, and, compared with the substantial good it affords, he says:—

"'The cloud-capp'd towers, the gorgeous palaces,  
Are but the baseless fabric of a vision.'"

And he concludes that, if after all the sanctions and authorities, which he has invoked in behalf of the rights of the defendants, they were to lose their cause, they would be compelled, "with the despair, but not the wickedness of "Macbeth, to say of the laws, tribunals, and institutions of "our country:"

"Then, be these juggling fiends no more believed,  
That palter with us in a double sense;  
That keep the word of promise to our ear,  
And break it to our hope."

This brief of Mr. Preston is in many respects a remark- able production, characterized by much quaintness, originality, learning and depth of thought. It wants the comprehensiveness, compact and logical form, which ought to distinguish an important legal argument, in which you ought to perceive at one glance the proportions of the whole structure, and the fitness and harmonious adaptation and subordination of all its parts. Mr. P.'s disquisition can be compared to nothing but an Arabesque, of which the outline is not very definite or distinct; but which, upon more minute examination, exhibits detached portions, executed with exquisite art, and proclaiming the hand of a
master. It embodies some legal heresies, and many apocryphal facts, interwoven with considerable skill among acknowledged legal principles and admitted truths; and the whole is pressed upon you with such earnestness and apparent sincerity, that you find it difficult, not to adopt his conclusions.

III. Randall Hunt.

Mr. Hunt has published two briefs; the first, of 35 pages, devoted to the examination of the plea of res judicata; the second, of 175 pages, in which he reviews the merits of the cause.

The first we will not examine, because the plea was not considered by the Supreme Court as tenable, and it involves a mere technical point of law; but we must say, en passant, that this argument is rich in research and legal learning, and contains a very complete exposition of the law applicable to this department of jurisprudence.

In relation to Mr. H.'s argument on the merits, we must content ourselves with simply stating the principles, for which he contends; they are:

1o. That the suit is a petitory action, and that plaintiffs must recover on the strength of their own title, and not on the weakness of the defendants.

2o. That defendants bought the land of the riparius owner, and that they, and those under whom they hold, have supported all the burthens of riparian proprietors since 1763.

3o. That by the laws of Rome, Spain, and Louisiana, the alluvion belongs to the owner of the soil, situated at the edge of the water.

4o. That the attempt to prove, that the laws of Rome and Spain excepted city property from the operation of this rule, had signally failed.
50. That the general rule in relation to alluvions was in force, not only in Louisiana, but in Austria, Prussia, Bavaria, Holland, the Two Sicilies; and was the law of France, Scotland, England, and the United States.

60. That neither the defendants, nor those under whom they claim, have ever divested themselves of the ownership of the batture, and that the act of incorporation of 1805, did not do so.

70. That Madame Delord never abandoned or dedicated the alluvion to the city, whose pretensions are equally unfounded in law and reason.

The dissertation of Mr. Hunt evinces much industry, research and learning, and there is no argument, advanced by his opponents, which he has not examined with minute attention, and on which he has not brought to bear, and often with effect, a host of authorities, and cogent arguments. His method is good, and his style occasionally seasoned by a glowing declamation, or a sharp repartee, takes off much of the tedium, which usually attends the reading of a dry legal controversy. But nevertheless it wants condensation, and it appears to us, that the author might, without detriment to his cause, have omitted many a quotation and statement, which serve to swell it into its present dimensions; and which distract the readers attention, without giving the argument any additional force.

In comparing the arguments of Messrs. Roselius, Preston and Hunt, which are certainly the most complete of those presented on the part of the defendants, it is to be recollected, that they are contemporaneous; that each occupies the whole ground, and that each relies, to a certain extent, on the same facts and authorities; and that the principal difference between them consists in the classification of the materials, and the mode of presenting and en-
forcing their views. The opinion as to their relative merit, will consequently vary with the taste of each individual; thus; he who is fond of seeing all the authorities on a given point collected under one head, will give the preference to Mr. Hunt; he who delights in originality, and quaintness of illustration, united with subtlety, will prefer Mr. Preston, while he, who likes to see an argument leaving no important opinion of his adversary unanswered, methodically arranged, and so happily explained, that he can always follow and comprehend it, without being ever compelled to fatigue himself to search for the meaning of the author, will give the preference to Mr. Roselius.

IV. P. Soulé. His brief, of which about one half is devoted to the plea of res judicata and the rest to the merits of the cause; occupies 42 pages.

Mr. S. after laying down the proposition that Madame Delord was riparius proprietor, in 1805, and that it is necessary to shew that she has been legally divested of this right, examines,

1o. The act of incorporation of the city and its effects; and

2o. The provisions of the Roman and Spanish law, so far as they had been brought to support the rights of the plaintiffs.

Small as the space is, allotted to this examination, Mr. Soulé has, by condensation, and by a judicious distribution of his arguments and authorities, said every thing necessary to support his positions, which are; that neither the act of incorporation, nor the laws of Rome or Spain lend any countenance to the plaintiffs' pretensions. He has further shewn; that at Verona, Parma, and Mariagiano Vecchio, all cities situated in countries governed by the
Roman law, urban estates enjoyed the right of alluvion; according to Caepolla and Chardon.

The brief published purports to be; "Quelques Notes Prises pendant la plaidoirie de Mr. Soulé," and from the specimen these notes afford of the talent, with which he defended his cause, it is to be regretted that he has not taken the trouble to lay the whole of his argument before the public.

V. George Eustis.

Mr. Eustis, at the solicitation of his clients, also prepared a brief, but as it did not make its appearance until after those we have already noticed, and he sought to avoid, as much as possible, the points previously discussed, his brief, which occupies 24 pages, presents little that is either novel or interesting. There are, no doubt, some good things in it, and he cites the case of Marguet vs. the Commune of Blagnac, (22 Sirey, 2, 34,) which had not been previously cited, to shew the interpretation of the tribunals of France, of the law, in agris limitatis; but it seems to us, that with this exception, there is little else, which deserves notice, or which had not been previously better explained and more amply developed.

VI. M. W. Hoffman has written an essay of 13 pages on the text; "Nor shall private property be taken for public use, without just compensation," found in the amendments to the Constitution of the United States. It is written with spirit; and most of the principles, he contends for, are correct; the only objection, that we can perceive, is, that they have really little or no connection with the controversy.

Messrs. Lockett & Micou, although likewise counsel for defendants, have not published their opinions, and we have no means of ascertaining their views.
This cause was argued in the summer of 1840, and the Supreme Court having adjourned without coming to any decision on it, the counsel in the cause availed themselves of the leisure, afforded during the summer months, to embody their views, and reduce them to writing. These arguments were afterwards published, by the plaintiffs and defendants respectively; thus the public was favored with the perusal of a second batture controversy, which as to the importance of the amount in dispute, and the talent, learning and research displayed by the contending parties, is not inferior to the first.

In order to omit nothing we must also notice a pamphlet, containing 52 pages, entitled, "The Batture Question examined, by a member of the Louisiana bar," which appeared about this time, and which endeavors to establish; that Municipality No. 2 is entitled to the land in controversy. The author maintains that there is but a single question to be settled, viz: who is riparian proprietor of the suburb Delord? because that being determined, it follows as a necessary corollary that such proprietor is owner of the batture.

In developing his system, the writer first gives an account of the manner, in which the city of New Orleans was established, and the rights it acquired under the government of France, and then he traces the mode, by which it was augmented, and the rights it obtained in the affiliated suburbs St. Mary and Delord. He contends, that the city proper was the owner of the landing place or quai in front of it, and that this fact results, not only from the acts of the French government, but from a distinct admission of Governor O'Reilly, in his report to the King of Spain, (2. Vol. Land Laws, p. 533,) and an examination of the laws of France and Spain, &c. He relies on the plan of
Madame Delord, and other circumstances, to show, that she meant to appropriate the batture in front of her suburb as a landing place or quai, for the use of the public, and he insists, that by annexing said suburb to the old city, she necessarily must have intended to make an association or contract, of which the terms were equal. That is, she meant to place the purchasers of lots in her suburb on the same footing, as owners of similar property in the old city, and inasmuch as the front in the latter was granted for a quai or landing, she also meant to grant in the former the front land, which was the batture, for the same purpose.

As we were the author of this production, which we should not have noticed, had it not been referred to in the opinions of Judges Martin and Bullard, we assign the task of criticising it to others. We are however ready to admit, that, though still persuaded of the correctness of the doctrines, for which we then contended, we think, that more care and research, on our part, would have been necessary, to exhibit our positions to advantage.

The Supreme Court, being thus called upon to read nearly one thousand pages of printed arguments, referring to nearly as many different authorities in Latin, French, Spanish, and English, had no easy task to perform, and required much time, to arrive at a conclusion. It was soon ascertained, that the judges did not coincide in their opinions, and this led to conferences, the final result of which was, that Judges Bullard, Morphy, Simon, and Garland were for deciding the cause in favor of defendants, and Judge Martin held, that the judgment of the Parish Court ought to be confirmed. The opinion of the majority became of course the judgment of the Court, and as the law requires, that in cases of difference of opinion among the judges, they should give separate opinions, they delivered their views seriatim.
OPINIONS OF THE COURT.

In reviewing these opinions, we shall begin with that of Judge Bullard, which embodies, in extenso, the reasons, upon which the majority of the Court base their conclusions.

The judge, after a brief exordium, states the nature of the cause, and dismisses the plea of res judicata, with the declaration, that the arguments and authorities have failed to satisfy him, that the plea ought to have been sustained in the lower court.

On the merits, he assumes as undisputed facts:—

10. That the Jesuits' plantation, of which the land in dispute forms a part, was a riparious estate, entitled to alluvion, and that such was the state of things, when New Orleans was incorporated in 1805.

20. That in 1806 or 1807 a part of the land was laid out as the faubourg Delord, and lots sold in conformity to the plan.

From these facts he infers, that if the owners of the part of this same land, which fronts on the river, have lost their right to the alluvial accretions, such an event must either have resulted from the operation of law, or from the consent of the former or the present proprietors. He concludes from this, that the inquiry of the Court is two-fold, and that it must ascertain:—

First. The effect of the act incorporating the City, and embracing the property in dispute, which now forms a part of the suburbs Delord and Saulet, within its limits; and

Secondly. Whether the laying out the faubourg, according to a plan, and disposing of lots in conformity thereto, or any other acts of Madame Delord and her successors, taken in connection with the ordinances of the City Council, furnish sufficient legal evidence of a dedication of the property claimed to public uses, so as to make it a locus publicus.
On the first point, he concludes, and no doubt justly, that the act of incorporation of itself would not take away the right of alluvion, which is a vested right; and that, if the property was entitled to the alluvial accretions before the act of incorporation, it remained so afterwards. He also maintains, that the change of the property from rural to urban effected no change in this respect, because a right to property, once acquired, cannot be taken away either by direct legislation, or by indirectly placing the owner, without his consent, in a situation, by which he must be deprived of it. This last argument presupposes, that urban property is not entitled to alluvion, which the judge asserts is not true, and to establish this position, he examines the law of alluvion.

In the course of this examination, the law Præterea, &c. comes under consideration, and we are treated to a learned philological dissertation on the meaning of the word ager, in which the authorities of Horace and Virgil are arrayed in opposition to that of Don Alphonso el Sabio, and wherein Niebuhr and the Pandects are also invoked; all for the purpose of showing, that ager meant land in general, and not rural property exclusively. Although it may be doubted, whether the poets can be considered as entitled to much weight in questions of this nature; yet we confess, that we are pleased to find the rugged path of legal controversy occasionally embellished by dissertations of this kind, which tend to relieve the mind, and to strew, what would otherwise appear an arid waste, with flowers.

The judge next examines the law in agris limitatis with much philological acumen, and proves very conclusively, that the expression, ut in civitatem veniret, cannot be translated, "under condition of belonging to a city," as has been done by Hulot in his translation of the Pandects, with-
out a manifest violation of all rules of construction, applicable to the Latin language. The result of this examination brings him to the conclusion, that the right of alluvion depends on the fact, whether the land be bounded by a water course, and not on its being called, *ager, prædium, or fundus*, and that there is no law, which excepts lands found in cities from the operation of this general rule.

An examination of the laws of Spain leads him to the same conclusion, and he cannot be persuaded that the word *arenales* means alluvions, although the court said so *arguendo* in the case of Packwood vs. Walden; 7 Martin N. S., p. 90.

He next examines the doctrine of Mr. Mazureau, that a *rural* estate by being converted into *urban* becomes the property of the mass of the inhabitants of the city, so far at least as is necessary for the public purposes, for which it was created, and he thinks it not easy to conceive how a city becomes the proprietor even of a *port* so as to profit by the alluvion. Nay, he contends that even if a batture was formed in front of the square of the city, the city could not be called the proprietor, because being an addition to a *locus publicus*, such a batture would likewise be a thing *hors de commerce* and as much the property of a citizen of Ohio, as of New Orleans. But besides this, he thinks the argument takes for granted, what ought to have been proved, viz: that the Cotton Press Company is not front proprietor.

He also deems the fact that the city has to keep up the levee, entitled to no consideration, because the levee is intended to save as well the front proprietors as the adjacent owners of land from inundation and is a civil, and not a natural *onus*.

The danger to the public, because the river bank is owned
by private individuals, does not alarm him, since the public through the agency of the corporation, has the sole use of the river bank.

He afterwards examines the decisions of the supreme court of Louisiana, and comes to the conclusion, that there is no direct adjudication which establishes the fact, that the alluvion, formed since the incorporation in 1805, belongs to the city; and thinks the opinion of judge Porter to that effect, in the case of Cochran vs. Fort et al., merely speculative.

He then enters on

The second branch of the inquiry, viz: if Madame De
lord, or her successors, either by the laying out of lots and selling them according to a plan, or by any other act, has dedicated the batture to public uses.

He finds no express allegation of dedication in the petition and he says; "the idea is, if I understand it, that the annexation to the city successively of the different faubourgs, formed but a continuation of the square of the city, and imprinted upon the land in front of the street, or road nearest the levee, the same character, which the corresponding part of the squares of the city possesses, that of a quai." This position he thinks is that of the author of the "Batture question Examined," whose doctrines he examines, but to which he does not assent; because it appears to him clear, that "the right of alluvion in front of each faubourg must stand upon its own peculiar grounds." The reasoning by which he arrives at this conclusion is simply this; the square of the city was laid out by the sovereign, who indicated his intention to consecrate the land in front of the city as a locus publicus by causing the word quai to be written on various parts of the plan, and by leaving the land thus designated for the use of the public; and if the
ancient proprietors of the faubourgs had done the same, or something equivalent, it would have amounted to a dedication, if accepted by the public; but as there is no evidence of their having written the word quai or something equivalent on their plans, ergo, there is no proof of dedication, and the public has no claim to the batture. To support this position he relies on the case of Morgan vs. Livingston.

He next examines, whether there existed any express contract between Madame Delord and the city in relation to the batture, but he finds none, and up to 1831 he has not discovered any sanction even of the plan of Madame Delord, and the uniform legislation of the city council repels such an idea. To maintain this proposition he examines various ordinances of the city council. Madame Delord's acts, which are next scrutinized, also confirm him in the belief that there was no dedication. We are then informed, that Lafon's plan of the 6th February, 1806, was before the judge while drawing up his opinion, and that "the front lots are represented as bounded on New Levee Street, and the levee is marked along the side of the street and between it and the river, at a distance of about fifteen toises from it." And that "there is no mark indicating any intention on the part of Madame Delord, to give up her claim or title to the land forming the levee, and on the outside of it."

He then examines the principles of dedication, as laid down in the cases of the City of Cincinnati vs. Whites' Lessee and of De Armas et al. vs. the Corporation, and tests the plaintiffs' pretensions by them; and finally decides that the intervention of a public road, does not cut off the right of alluvion, upon the authority of the case of Morgan vs. Livingston and the authorities there cited.

His opinion therefore is;
1o. That the incorporation of 1805 did not affect the right of alluvion, which belonged to the original tract of land that afterwards composed the faubourgs Saulet and Delord, and that each part of it fronting on the river was still entitled to the right of accretion notwithstanding the act of incorporation.

2o. That the laying out of the faubourg in 1806, according to the plan in the record, viewed in connexion with other acts of Madame Lelord and the City Council do not furnish legal evidence of a dedication to public uses, and that the purchasers of front lots still remained riparious owners.

3o. That urban property fronting on a water-course is entitled to alluvion as well as rural estates; and that cities can acquire jure alluvionis only in virtue of a title which would constitute it front proprietors.

The judgment of the Parish Court is therefore reversed, and that of the Supreme Court is for the defendants; "reserving however to the public the use of the levee, and of all the alluvion, which existed at the inception of this suit, or which now exists, or may hereafter be formed between the levee and the river, to be administered exclusively, and its use regulated by the City Council of the Second Municipality."

Judges Morphy and Simon concurred in the foregoing decision, and declared themselves satisfied with the reasonings and conclusions of Judge Bullard. Judge Garland also concurred, and assigned his reasons for so doing, which we shall examine more particularly hereafter.

Much as we respect the learned judges, from whom the above decision emanated, we regret to say, that it appears to us not only erroneous, but that the reasoning, which led to its adoption, is feeble and inconclusive, and that without
departing one iota from the facts, therein admitted as true, the very reverse of the doctrine, which was sanctioned by the majority of the Court, can easily be established.

We cheerfully acknowledge, that in a mere literary point of view, the opinion of Judge B. possesses considerable merit, and that it is drawn up with much care, as far as the style is concerned. Nay, many of his arguments appear to us incontrovertible, and among others his dissertations on the word _ager_, and the law _in agris limitatis_; although it may be questionable, whether they deserved the pains he has bestowed on them. Mere verbal criticisms of that kind are sufficiently answered by the maxim of my Lord Coke, "qui haeret in litterâ, haeret in cortice, et apices juris non sunt jura."

The facts, which even Judge B. seems to admit as proved, are; that the city of New Orleans was incorporated in 1805, that at that time Madame Delord possessed within the limits of the City a rural estate, bounded by the river, and entitled to alluvion; that in 1806 she divided this estate into lots, separated by streets, and annexed it to the city as a suburb; that this division was made agreeably to a plan, which corresponded to the general plan of the city, and in conformity to which she sold out the lots; that subsequent to this division, she sold a batture lot, separated from the river by the public road and levee, and bounded by the former, to one Larche; in front of which lot the batture, now in controversy, has been gradually formed; and that the Cotton Press Company derive their title from said Larche.

The above facts, as well as the only legal questions, to which they can give rise, appear to us so simple, and so easy of solution, that we are amazed, that men of so much experience and acumen, as the Judges of the Supreme Court,
should have required not only so much time in making up their opinion; but that this opinion, when formed, should be so diametrically opposed, to what appears to us, the obvious dictates of reason, and the best settled principles of law.

The first question, which naturally presents itself, is, what did Madame Delord intend to do, when she converted her plantation into a suburb, laid it out into lots and streets, according to a plan, and sold such lots?

Because the intention once known, we must presume, that she carried her intention into effect. This once admitted, we have no difficulty to ascertain what she meant to do, because both from her declarations and her acts we perceive, that she meant to enlarge the City, by annexing to it her rural estate, divided into squares, streets, &c., in conformity to the plan of said City. But in doing this, can she be presumed to be ignorant of the fact, that the City was a seaport, and that the bank of the river, in front of the new suburb, would be required for a landing place or *quai*, in the same manner as the bank of the river was used in the old city. Nay, was it not her interest, that it should be thus used? since thereby she must have considerably increased the value of lots in the new suburb.

A reasonable construction of her acts and declarations, joined to the consideration of what was manifestly her interest, show, that she meant to provide a landing place for the suburb; but this landing place was no other than the batture, ergo, she intended to appropriate the batture for that purpose.

So far, it may be said, that the argument rests only on a presumed intention, which, however reasonable, is still only a presumption, and does not amount to full proof. Let us therefore continue the investigation. After Madame De-
lord had thus laid out her suburb, she sold lots in conformity to the plan of the same; but each sale was a contract, and this contract amounted to an express stipulation on her part, that the purchaser should enjoy, in common with all, who had already acquired, or might thereafter acquire lots in said suburb, the streets, public squares, commons, landing places, &c., appertaining to said suburb. If authorities are wanted for this position, they will be found in 4 Cowen, 542; 1 Wendell, 262.

It is an acknowledged maxim of law, that the grantor of lands grants by implication, as incident thereto, every thing which is necessary to its enjoyment for the purposes contemplated by the parties, at the time of the grant; vid. Co. Litt. 56; 2 Black. Rep. 36; 3 Mason, 250; and a dedication thus made, is not extinguished by unity of seizin; 5 Taunton, 311; 1 Saund. Rep. 323, a. According to this principle, if Madame D. had been the founder of an independent town on the Mississippi, and left a space in front of it, without expressly reserving it for her own use, she would be presumed to have intended it for the use of the town, because it was necessary for the purposes contemplated by the parties, which were to afford the town a convenient place for landing merchandise, and carrying on its commerce.

And it has been held, that the sale of a single lot, according to a plan, adopted the whole, and appropriated the ground to streets, &c. 11 Wendell, 487.

But if such would be the case, had Madame D. established an independent town or city, are not the facts of the present case infinitely stronger? And when we consider, that she only intended to enlarge a city, already formed, and possessing a landing place or quai, and that she made the plan of her suburb studiously conform to that of the old city,
can it be doubted, that she also intended to give her suburb a landing place? We think not; because such doubt would presuppose, that neither she nor those, to whom she sold her lots, understood their interest, which is not supposable.

The majority of the Court take it for granted, that if Madame D. had written the word *quai* or something equivalent on her plan, it might have amounted to a dedication, and not otherwise. The Supreme Court of the U. States think differently; see *City of Cincinnati vs. Lessee of White*, 6 Pet. 431; where the Court declare, "That there "is no particular form or ceremony necessary in the dedication of land to public use." It only requires "the assent of the owner of the land, and the fact of its being used "for the public purposes, intended by the appropriation." (p. 440.) In the same case, the decision of Rex vs. Lloyd, 1 Campb. 262, is cited with approbation; and in that case Lord Ellenborough says, that, "if the owner of the soil "throws open a passage, and *neither marks by any visible "distinction, that he means to preserve all his rights over "it, nor *excludes persons from passing through by positive "prohibition, he shall be presumed to have dedicated it to "the public."

In the case of *Barclay and others vs. Howell's Lessee*, 6 Pet. 498, Judge McLean, who delivered the opinion of the Court, declares, that "if the ground dedicated for public "use, *was essentially connected with the town lots, and must "have enhanced their value at the sale*, the increased value thus "realized, and a long acquiescence would estop the original "owner of the fee from asserting his claim, *though the "ground dedicated had not been so designated on the map.*" (p. 504.)

Besides, the general rule, that a grantor must explain himself fully as to what he gives and withholds, and that all
ambiguities will be construed against him and in favor of
the grantee, repudiates the doctrine contended for by the
majority of the Court. Suppose, that the plan of Madame
D. exhibited two squares, separated by a vacant space,
evidently intended for a street, but that nothing was written
on the plan to designate it as such; would not the Court,
in such a case, relying on the universal maxim, *forma et
essentia rei est potius spectanda, quam verborum cortex,*
declare, that it was destined for a street, and that the public
was entitled to its use?

We have thus far limited our remarks to the doctrine of
dedication to public uses, and endeavored to show, by refer-
ence to authorities derived from the Common Law of Eng-
land and our Sister States, that the principles applicable
to this subject, have been misunderstood, and that, if they
had been properly appreciated, the decision must have been
in favor of the plaintiffs.

We shall next inquire, what this doctrine of dedication
has to do with the present controversy.

It appears to us, that in their zeal to display a praise
worthy, but on the present occasion a useless erudition, a
portion of the advocates of this cause, and the majority of
the court have examined the law in relation to *dedication
to public uses,* which, in our humble estimation, has no more
to do with the subject in dispute than the laws of *Manou
Zoroaster* or *Confucius.*

The doctrine of dedication is a scion of the common law
of England, engrafted on the jurisprudence of our sister
states, where it has grown and flourished, although as ap-
ppears from the declarations of a learned court in a neigh-
boring state, the soil of the United States does not seem as
well adapted to it, as that of Albion. Vid 1, Howards
Rep., p. 429.
Now the common law of England has never up to the present period been in force in Louisiana, at least in reference to the acquisition of real property, and the rights and interests growing out of land, and therefore can have no possible influence on the decision of the present case.

If any traces of this doctrine are to be found in the laws of Rome, France or Spain, we trust, some of the learned gentlemen of the bench or bar will do us and the public the favor to point them out; but until then, seeing that whenever it is relied on, the common law is invariably invoked, and having been unsuccessful in our researches to find it elsewhere, we entrench ourselves behind the doctrine, de non apparentibus, &c.

Even in the Common Law it exhibits itself for a long time under such faint and shadowy forms, that it is difficult to ascertain its birth and to whose fostering hand it owes its growth and present vigorous and healthy existence. It seems however, from what we have been able to learn, to be an entity invested partly with real and partly with fictitious attributes.

Dedications at common law are either express or implied.

Dedications for religious and charitable purposes are of very ancient origin in England, and they are probably coeval with the introduction of christianity; express dedications of property to public uses, by deed, grant or charter are also to be met with at an early period; but the doctrine of implied dedications to public use seems to us to be a modern invention.

Coke on Littleton is the earliest author we have seen quoted in support of implied dedications, and he affords no information on the subject. In Thomas’ edition of Coke, vol. 1, p. 234, the English authorities on the subject appear
to be carefully collected, and they are all of modern date, and apply only to roads. So in Blackstone's Commentaries you must look to his exposition of the right of way to find any thing in relation to it, and although the doctrine both in England and the United States has assumed not only a definite, but an imposing form, and the decisions are exceedingly numerous, you look in vain into any elementary legal writer for a satisfactory exposition of the subject.

The sum and substance of the doctrine seems to be; that where the public has used a highway, &c., courts will presume that the owner has dedicated, that is, appropriated it to public use, but whether time be a necessary ingredient in this fiction, and in the latter event, what length of time, are vexed questions. Vid. Mathews on presumptive Evidence, p. 317, et seq.

We do not pretend that the doctrine of dedication is not a useful invention; but we insist, that it does not apply to Louisiana. Our legislation is based upon positive, plain and intelligible legal enactments, which, are certainly sufficient to solve the present question, which depends upon the construction of a contract, which is to be governed by the intentions of the parties.

Judge Garland's argument does not, in our estimation, strengthen the arguments of Judge Bullard, and we have been unable to discover either in the manner or the matter of it any thing new, except that, he asserts that the case of the City of Cincinnati vs. the Lessee of White is not "understood either as to the facts or the real points decided," which is very possible.

The admissions, made by the attorney of the corporation in the case of Henderson vs. the Mayor et al., are also much insisted on, and the learned judge argues that an at-
torney of a corporation has just as much a right to make admissions as the attorney of an individual, and until his want of authority is shewn such admissions are binding on the principal. Admit this reasoning to be true, and it proves just nothing. Judge G. is too well acquainted with the mode of conducting a lawsuit, not to know, that all admissions made by counsel must be construed with reference to the nature of the controversy, and are only available in the cause in which they are made. Now in the case of Henderson the only point in dispute was whether the city was entitled to a road without paying for it. In order to present this question to the court unincumbered of extraneous facts, Mr. Moreau Lislet, no doubt, thought it unimportant, whether the plaintiffs were or were not riparian proprietors, and he therefore admitted it, as he would have admitted, that plaintiffs were the descendants of Tamerlane, if they had asked it. But that such an admission is entitled to any weight or can even be invoked in another suit where the plaintiffs claim the right of property, we presume has never hitherto been authoritatively asserted by any court in the Union. The conclusions of Judge G. on this subject appear to us consequently erroneous, and he might have saved himself the tirade about "imperial Rome," and the "benighted days of France and Spain," &c., which appears to us better suited to the Houstings, or a maiden speech in Congress, than to a grave and dignified argument from a member of the highest court of judicature of the sovereign state of Louisiana, on an important legal question.

Judge Garland is a very able and efficient judge, who being recently disengaged from the turmoils and excitement of political life, has, as it seems to us, yet to learn that declamation and appeals to the passions, although per-
mitted and often effectual in legal or parliamentary debates, are unbecoming the grave and imposing dignity of the ermine.

We shall, in the next place, examine the opinion of Judge Martin, and then close our observations, by summing up the result of the whole controversy.

Judge Martin begins by stating the facts of the case, and then he lays down the general proposition, "that on the extension and continuation of the city over a contiguous estate, with the authority of the State, and the consent of the owner, there is a like extension of all the rights and burdens, enjoyed and borne in the city before the extension."

In support of this position, he inquires:—

First, into the rights and privileges of the city as originally founded; and

Secondly, into the consequences of the annexation of the suburbs St. Mary and Delord.

On the first point, he finds, by examining the original plan of the city of New Orleans, ample proofs, that the founders intended only to retain what they had expressly reserved; such as lots intended to be granted to individuals, the Place d'Armes, appropriated for military purposes, &c., and that all the rest of the land, contained within the limits of the city, was abandoned to the public. He also thinks, that the public acquired the absolute ownership, and not the use only of the property thus abandoned. In support of this, he relies on 6 Pet. 432; De Armas et al. vs. the Mayor et al., 5 La. Rep. 152; and the Mayor et al. vs. the United States, in error., 10 Pet. 662.

In connection with this subject, he also inquires into the effect of the plan on the Port of New Orleans, and he relies on the Digest, Sir Mathew Hale's treatise, "De Portibus Maris," &c., to show that a quai or landing place was indispensable, and therefore ceded to the public.
The controversy, and the principles of law by which they ought to be governed.

The questions arising under the pleadings involved several points of Scottish law, and the cause was elaborately and ably argued by Mr. Eustis, for plaintiffs, and Messrs. Hoffman and Canon, for defendants. Mr. L. C. Duncan who represented the Orphan Assylums, also defendants, had instructions to submit the cause; said institutions, having profited largely by the liberality of Mr. Milne, deemed it their duty not to oppose the will of their benefactor; but being eleemosynary corporations they did not think themselves authorized to give any express consent to the legacy.

The principal point involved was one of international law, and arose under the 1477th article of the Louisiana Code, which declares: "Donations inter vivos and mortis causa may be made in favor of a stranger, when the laws of his country do not prohibit similar dispositions from being made in favor of a citizen of this State."

This branch of the case was argued elaborately and with great ability by Mr. Eustis, who examined the successive changes, which the law, in relation to the rights of foreigners to hold and inherit property, had undergone in Europe, where the Droit D'aubaine has long since been abolished, and where a liberal and enlightened policy, has supplied the place of the narrow and injurious doctrines, which formerly prevailed.

The opinion of the Court sustained the views of the plaintiffs counsel, and the decision, we think, is in harmony with the broad maxims of international law, which should govern all civilized countries; and it is creditable to Louisiana.
latter case, that the batture formed since the incorporation belonged to the city, was an *obiter dictum*, yet it resulted clearly from the consideration of the case, and was correct in point of law.

20. As to Madame Delord, he has no hesitation in declaring, that the act of incorporation of 1805 could not change the nature of her property, or deprive her of her riparian rights, without her consent. He is however firmly persuaded, that when in 1806 she published her plan, by which she consented to the extension of the city, so as to include her estate, which for that purpose had been laid out into lots and streets, she abandoned the batture in front for the purpose of a landing place or *quai*. This results as well from her plan, as from the extension of the port of New Orleans, and the subsequent acts of the municipal authorities; and even their express consent to abandon the property, could not avail the defendants, because the law recognizes but one mode of alienating the property of corporations, viz: a sale at public auction, preceded by certain prescribed formalities.

Judge M. then examines and refutes the argument of defendants, that there is no necessary connection between the levee and a riparious estate, and he shows, as we think, conclusively, that on the Mississippi, where the levee constitutes the bank of the river, and where the constructing and repairing the levee is a charge on the riparian estate, the owner cannot be permitted to alienate the latter, except in connection with the former. That public policy and express law concur in inhibiting the severance; and if it be almost certain, that an express reservation of the levee, by the owner, who sold the estate, on which it depended, would not be tolerated, it cannot be doubted, that an implied reservation would never be sanctioned.

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The learned judge deplores the fatality, which seems to have attended every attempt on the part of the city to assert its claim on the object in litigation. He attributes the loss of the suit of Gravier vs. the Mayor, &c., to the non-production of the plan of Gravier; the defeat of the corporation in the suit of Cucullu and De Armas, to the neglect of the former to produce the record of the proceedings in the suit of Gonzales vs. the Mayor et al., although it was pleaded as res judicata; and the loss of the case of Henderson vs. the Mayor, &c., to admissions made by counsel, prejudicial to the interests of the city.

Here we have an appalling "budget of blunders," by which the City has been deprived of property, which, on a very moderate calculation, would now be worth at least ten millions of dollars.

In conclusion the judge thinks, that the whole controversy is narrowed down to one single inquiry, viz: "who is the owner of the bank of the river in the city of New Orleans and its faubourgs?" and for the reasons assigned, he entertains no doubt, that the river bank belongs to the corporation.

He is therefore in favor of affirming the judgment of the Parish Court.

There is a manliness and directness of purpose displayed in the opinion we have just analysed, which pleases us exceedingly. The author, instead of amusing himself with learned disquisitions on topics, which have little or no connection with the inquiry, grapples with the subject at once, without stopping to round off his phrases; because he seems much less desirous to display learning or elegance, than to arrive at the truth. There is also a certain raciness, as well as straight forwardness about the whole, which persuades the reader, that the writer is master of the subject;
that he is moved neither by favor nor affection; that the
days are passed, when he might have sacrificed something
to the love of display; and that his sole and only aim is to
settle the rights of the parties in conformity to the inflexible
principles of law.

That the conclusions of Judge Martin are correct, we
entertain no doubt; and we are likewise persuaded of the
truth of the maxim, "opinionum commenta delet dies; na-
turæ judicia confirmat;" and that posterity will confirm
his decision as based on the immutable principles of truth
and natural justice.

It appears to us, that the conclusions of Judge Martin
have likewise some advantage over those of the majority of
the Court, in their conformity to the premises, on which
they are founded,—and we think it difficult to reconcile the
judgment of the majority of the Court with the reasoning
that led to its adoption.

The argument of the Court is, that the batture in front
of suburb Delord was not dedicated to public uses, and the
judgment is for the defendants; reserving however to the
public the use of the levee and the alluvion, &c., to be ad-
ministered exclusively, &c., by the City Council of the
Second Municipality. Now, if the Court had decided, that
there was a dedication, its judgment could not have been
more favorable to the plaintiffs, since it decrees to them
the exclusive control of the property, which is all, that they
would have been entitled to, had they proved the dedication
by charter, grant, or deed;—because a dedication only
grants the use of property for some object of public utility,
and on condition, that when it ceases to be so used, it shall
revert to the grantor.
CONCLUSION.

In summing up the Batture Controversy our opinion is; that Mr. Jefferson's pretensions, that the batture belonged to the United States, were unfounded, not so much on account of any error in the legal doctrines for which he contended, as on account of his overlooking an element essential to the solution of the question. This element was the acquiescence of the Spanish Government in the continuation of the city, and the appropriation of the batture for public use. For suppose, that the sovereign of France was the owner of the alluvion formed on navigable rivers, and that the Spanish Monarch, as his successor, enjoyed the same right; the latter had the power to dispose of it and did so, the moment he permitted Gravier to annex his rural estate as a suburb to the city, and allowed the inhabitants of such city to use the batture as public property. Writers on the public law of Spain, hold; that whatever is included within the limits of a city belongs to it. (Valiente Jus Pub. Hisp., Vol. 2, p. 246, Madrid 1751.) And such property is presumed to be either expressly or tacitly granted to the city. (Ibid, 252). So that by extending the limits of the city, so as to include this batture, the King of Spain, if owner, gave the batture to the city of New Orleans, a fact which is further proved by the undisputed use, which the city enjoyed of the batture, during the whole time that Spain remained in possession of Louisiana, after the annexation of the suburb St. Mary.

But suppose that Mr. Jefferson's doctrine in relation to alluvions was erroneous, and that Mr. Livingston's positions were correct, and it is obvious that the only result to which it could lead, would be; that Bertrand Gravier was, as riparious proprietor, owner of the batture in 1788, and
then we have the plan of Gravier, coupled with his declarations, and the use of it enjoyed by the inhabitants of the city, which furnish conclusive proof of an abandonment to the public.

In whatever aspect therefore the subject be regarded, the city was the owner of the batture, a fact, which even Mr. Jefferson seems willing to admit; for he says; that "common sense and common honesty proclaim that the establishment of his (Gravier's) town, and sale of the lots implied a relinquishment to the inhabitants of the communications of streets and shores adjacent, as a common, which are the necessary and constant appendages of every town." (Hall's Law Jour., Vol. 5, p. 5.)

Nay; even Mr. Livingston has advocated this doctrine, with uncommon ability in the case of the Corporation of New Orleans vs. the United States.

It is unfortunate for the country, that it was not so decided in the case of Gravier vs. the Mayor et al., in 1807, since to the error committed on that occasion must be attributed the protracted and ruinous litigation, which has attended the batture controversy, and which, we fear, the decision on the present occasion is not calculated to arrest.

We are convinced that the annals of jurisprudence can exhibit few examples so instructive in the fatal consequences to which a single judicial error may lead as the question of the ownership of the batture; and that it ought to be held up as a warning to future generations, and serve as a beacon to the judiciary, whenever it may be tempted to settle an important principle of law without due deliberation, or without considering the consequences, which may probably result from the decision. For it is evident that if the case of Gravier had been settled correctly in 1807, there would have been no excitement in the city of New
Orleans; no application to the President of the United States to interfere; no controversy between Messrs. Jefferson and Livingston; none of the numerous lawsuits to which the batture question has given rise up to the present period, to the great annoyance of many respectable and useful individuals, and to the immense injury of the public. If it were possible to calculate the expense attending this controversy in the course of the last thirty-six years, it would be found to amount to millions, especially if we take into consideration the value of the time wasted by parties, witnesses, &c. If you add to this; the mental anxiety to which those interested must have been exposed, the ruinous speculations to which it has given rise, and its injurious influence on the community in a moral point of view, you have a sum total of evils, of which the baneful effects can be compared to nothing short of the withering influence of a pestilence.

This controversy teaches also the useful and memorable lesson, that the mass of mankind possess a strong and instinctive good sense which no sophistry can pervert, and that though it may acquiesce for a time in error propagated by those who enjoy its confidence, such illusion is of short duration, and it soon returns to its earlier persuasions. This has at least been the case with the people of Louisiana, who, in spite of judicial dicta, in spite of the ingenious arguments which have been urged to captivate and to deceive them, have still clung, with the tenacity of a conviction, which nothing could shake, to the belief that the batture in front of the city was the common property of all the inhabitants of New Orleans. This is consoling, because it assures us, that truth must ultimately triumph, that its elements are a part of our very existence, and essential to human happiness; and that in short it is enthroned in the
sanctuary of the human heart, from which it cannot be expelled, until the last link is severed, which connects the present with the future.

EDITOR.

DECISIONS OF THE SUPREME COURT.

MONTH OF MAY, 1841.

Heirs of Thomas L. Harman vs. Owen O'Moran and others.

A Sheriff's sale will be held valid, whenever a judgment, execution and sale is shown, and it conveys the property, unless such error or fraud is proved, as would vitiate an ordinary sale.—[S. P. 16 La. Rep. p. 433. Ibid. 547.

A sale *per averationem* includes all the land within the boundaries designated, without regard to the quantity.


Benoit & Blanchard vs. their Creditors.

When the drawers of a Bill of Exchange have every reason to expect, that it will not be accepted, and they stipulate with the drawee, that in such an event no costs shall be incurred; and they afterwards promise to pay the bill, when it is returned unprotested, they are bound to pay such bill, and the drawee is a creditor, entitled to share in the distribution of the property of the drawers, if they become insolvent.