EXAMINATION
OF THE
TITLE OF THE UNITED STATES
TO THE LAND CALLED
THE BATTURE.

BY EDWARD LIVINGSTON, ESQ.

This title is supported—

First. By an incorrect and imperfect statement of facts.

Second. By an assumption, that the question is to be de-
cided according to the principles of the French, not those of
the Imperial or Spanish law.

Third. By an erroneous statement of that law.

The whole fabrick of this imaginary title is founded upon
the statement which supposes that in the year 1763, the sales
of the Jesuit's property were made only to the road, and that
they were bounded by a front line running on the inside of
the levee and road. It will be clearly demonstrated that
this position is totally unsupported; but that the contrary,
to wit, that the sale of the Jesuits property under which we
claim, were bounded on the river.

In order to understand fully this point, it is necessary to
remark, that all the grants made by the French or Spanish
governments, without, as it is believed, any exception were
bounded by the river, but all expressed under the general
terms face au fleuve, or face sur le fleuve, or sometimes under
the more general terms face alone, which according to the
testimony of all the surveyors, related to the place on which
the lands were laid out, as the river, bayou, &c. So that if
the lands lay on a river or bayou, the word face alone would,
according to the general construction of the country, give a
front on the river or bayou, unless there were some restrictive words which expressed the intention of the parties to be different.

It appears as well by testimony as by the express admission of the parties* in this cause, that the soil of this road was not reserved to the king, but merely the use of it vested in the publick, since the proprietor made and changed it at his pleasure, as the encroachment or alluvion of the river, or as his own convenience required. There is every reason to believe that the grant to the Jesuits was in the usual form and was bounded by the river, but we are not left to presumption on this point. Though the original grants to the Jesuits be lost, yet in the proceedings which took place in the year 1763, preparatory to their division and sale, we find a certificate of the proper officer to the following effect:

"In the year 1763, on the 14th day of July, we the undersigned, counsellor of the king, inspector of the roads, and surveyor general of the province of Louisiana, certify that by virtue of the orders of Mr. Dobadie, commissary-general of the navy, &c. dated this 13th instant, by which we were directed to transport ourselves to the habitations of the persons calling themselves Jesuits, &c. there to examine the titles and papers relative to the possessions of the aforesaid persons, which we found ought to contain thirty-two arpents of front on the river St. Louis." And in the same proceedings, is a lease made by the Jesuits of a part of their land, in which the lessee binds himself to make the levee and the road.

The original grant then was like all others bounded by the river, and the defendants in their case have taken pains to state that the batture or alluvion then existed. This perhaps

* Vide Derbigny's opinion, 3d point, page 300. "The grantee made this road at a reasonable distance from the river, nearer or further off as he thought proper, and sometimes stopped up the old road and opened a new one, for, provided there were a road convenient to the river, he fulfilled his promise."
was the fact,* but to a very inconsiderable extent. But this
will make no difference in the case; for if there was an al-
luvion in the year 1763, whether it had prior to that belong-
ed to the king or to the Jesuits, at that period the whole
plantation with its batture became the property of the crown
by the forfeiture of the Jesuits' estate, and the king at that
time ordered the estate to be divided and sold....Did he
grant the whole? or did he reserve the batture and the
road?

Let us examine this point—

By the proceedings before referred to, it appears to have
been the intention to divide and sell "all the said lands."†

By the adjudication, it is granted with "all its members
and appurtenances without reserving any thing." by the ad-
judication of the sixth lot (the farthest extremity of the
land and not now in dispute) one † acre was reserved to the
king, so that it appears whenever the king wished to retain
any part, his officers took care to insert the reservation in the
deed.

Besides this, it is stated in the case, and proved on the
trial, that governor Carondelet had at three several times di-
rected Gravier to make the road and the levee, once by a let-
ter which not only ordered him to repair the levee, but car-
rries some evidence of his having done it before, because he
speaks of his "known exactitude."‡ Now if the road and
levee were reserved to the king, what had Gravier to do with
working it? or if the road and levee were not comprehended
in the sale of the Jesuits' property, and as they allege in
this case, had been constantly considered as part of the de-

* Recent discoveries have made it probable that a great part of
the land lying outside the levee, which was called alluvion by the
witnesses, was really as much original soil as any other part of the
country, since in digging a canal since the judgment, the stumps
of a grove of cotton trees have been discovered in their natural
position about three feet under ground, and measuring two feet in
diameter.

†‡‡ See Note A. ‡ See Note B.
mesne, how is it that *Baron de Carondelet* was ignorant of this circumstance?

It was therefore clearly the intention of the king not to reserve any thing, but on the contrary to sell the whole plantation, of which the alluvion formed a part. What motive could he have had for such reservation? The defendants and their counsel say, for the use of the city*—but a reservation to the crown would have been of no use to the city, and if this had been the intent the reservation would have been accompanied by a grant to their use. Let it also be remembered that the *Jesuits' plantation* consisted of thirty-two arpents in front, of which *Gravier* possessed only thirteen; the residue was sold to different persons at *the same time*, under *the same circumstances* and by *the same words* with those employed with respect to Gravier's part; yet the batture on the nineteen remaining acres, infinitely more extensive than that now in question, has been uninterruptedly held by the proprietors of the original soil; the publick have never that I have heard pretended to it; nay the very persons most clamorous against my title, now hold property to a very large amount on those very battures. If, therefore, my title be defective and theirs good, we must look for the difference in something subsequent to *the sale of the Jesuits' property* under which we all hold.

The error (and when made by persons who so well know the customs of the country as the defendants it deserves an harsher name;) the error, lies in representing the line always drawn in front, generally within the levee, as a front boundary; when they know, and their own witness (one of the defendants, the surveyor-general of the province) stated that such front line was drawn not to mark a boundary be-

* The Jesuits possessed a tract of land one league and a half above the town on the other side of the river. Unfortunately for this argument it happens that this land is sold precisely in the same terms with those used with respect to the plantation near the city. See Note C. *Did the king reserve this also for the use of the city?*
between the plantation and the river, but to measure the extent of its front; which was always done on a direct line, and never followed the windings of the river; and that the stakes placed on the side lines were not intended to mark their extent towards the river, but to show the direction of those lines, whether they opened, closed or were perpendicular to the river.

The certificates in note D, show this to have been the universal practice, in all the surveys under the French, Spanish and American governments.

But even if this line, contrary to the universal and uninterrupted usages of the country, to the whole course of evidence in the case, and finally, to the dictates of common sense; if contrary to all these, the line of admeasurement is to be turned into a line of boundary; yet it will avail them nothing, for it so happens that in this case the line of admeasurement crosses the levee a few toises from its commencement and continues on the batture outside of the levee during the whole of its course through the part now constituting the suburb St. Mary.* So that even if this notable discovery made by the corporation and their counsel be true, they will not derive from it the pleasure of disturbing Gravier's possession by a claim from the United States; for their great argument of an intervening road and levee, totally fails them in this instance. But they will have the gratification of disturbing almost all the other titles in the country; for most of those lines of admeasurement are in other instances drawn within the levee and road: so that if this principle be admitted, scarcely a single plantation will be bounded by the river; and congress may make it inaccessible whenever they please to most of the inhabitants, for not one in an hundred have any exclusive possession between the road and the river.

* This appears from a map which has been carefully protracted by Mr. Laloin from the proces verbal of the Jesuit's survey; a copy of the map and proces verbal are filed for the inspection of those who may desire it in the office of Mr. Pedesclaux.
A conclusive proof however, that the river was the front boundary of the Jesuit's plantation, as well since as before the division and sale of 1763, has been discovered since the trial.

Under the French government a general plan was kept by the surveyor general, on which the lines of each concession were distinctly and accurately laid down. This was called the Plan Terrier, and the original or a copy was delivered to the Spanish surveyor general on the transfer of possession. He delivered copies of this plan to his deputies, and it was always considered by the Spanish government as an authentic record. On an extract of this map, which was thus delivered in 1795, the plantations above the town for the distance of about four leagues, are all delineated; in all of them the side lines extend to the river, which is laid down in every instance as the front boundary.

Among these plantations is that of the Jesuits—On the plan are marked the names of the persons who then held under the sales of 1763. But no such front line as Mr. Derbigny has imagined is found on this plan—no road as the boundary—nothing to distinguish it in this respect from the neighbouring plantations, which as I have said, are all bounded on the river.

Yet this plan was given in 1795, at a time when the alluvion was considerable in extent, seven years after the suburb was laid out, and long after the time at which, as is now pretended, Gravier had abandoned his right.

This plan too, completely disproves the idea of a reservation of the front part by the sales of 1763. For it delineates with great care and precision, the reservation of a small part near the town—designating minutely the difference between the old limits of the Jesuits' plantation on the side next the town, from those established in the sale of 1763. If then any reservation had been made by the king of the alluvion or land in front, would it not have been noticed with the same care as has been shown as to the lateral lines?
This document is alone so convincing that if an engraving can be prepared in time it shall be annexed to this work.

It is then I think proved—

FIRST. That the ancient habitation of the Jesuits bordered on the river. And this fact is further proved by their having repeatedly changed the levee beyond Madame De lar’s, in order to take in the alluvion.*

SECOND. That the sale of their property was made without any reservation.

THIRD. That by the sale of 1763, no new boundary was fixed between the front of the habitation and the river; in other words, that the several subdivisions as well as the original grant extended to the river.

It is therefore of no consequence whether there were or were not an alluvion formed at the time of the sale of the Jesuits’ property. On either supposition, the grant going to the river gives us all within its lines, whether alluvion or original soil.

Second error in fact—

In the defendant’s case, it is stated, that the batture called “the Jesuits” after the transfer of possession in 1767, continued to be considered as a part of the “royal demesne;” and as such was of publick utility in supplying earth, without any claim being made to it by the proprietors or purchasers of the Jesuits’ plantation, either before or after the cession.—

And in the counsel’s opinion, he says that it “never ceased to be part of the sovereign’s demesne,” and strangely asserts that “it is a fact incontestably proved, that neither Jean nor Bertrand Gravier, nor any of those through whom this claim is derived, ever possessed a single inch of the batture in question. It is further remarkable, that they never set up any title to that effect.” p. 305.

It is somewhat extraordinary that this statement should be made by that very corporation, which for three years had

* The existence of the old levee as well as the map above referred to, prove this fact.
been contending in a court of justice, that the premises belonged to the city of New Orleans, and that the same counsel who during the whole of that period asserted in three several arguments, the unequivocal right of the corporation, should now as boldly pronounce that they never had any title, but that it always belonged to the United States.

Did the learned counsel give his true opinion to the corporation, when he was first called on to defend their cause?

If he did, how can the corporation justify the thousands of dollars they have expended in defence of a claim which their counsel must have told them was unjust?

Did the learned counsel suppress his true opinion, and flatter the city with the hope of gaining what he knew did not belong to them but to the United States? A case not to be supposed.

Or has the learned counsel after three years study of the cause changed his opinion of its merits?

A revolution then, of three other years, may perhaps prove that his second opinion was as erroneous as his first, and if the United States have the same confidence as the corporation in the advice which is so kindly offered them, they may be induced to spend as many thousands as the city have done, and with equal success.

The error of this statement of facts appears—

First. By the allegation of the persons themselves who make the statement, and those allegations, too, on record.

On the 16th of March, 1805, the mayor in behalf of the city, filed a bill to perpetuate testimony in this case, in which they state, "that Bertrand Gravier was the owner of the plantation; that he had laid out the front part into lots, in 1788; that after the said lots had been sold he considered himself as no longer bound to preserve the levee; that on being called on by the governor to repair the road, he declared that having converted his plantation into a fauxbourg, and sold the line of the lots on the side of the river, whatever intervened between those lots and the river belonged to the publick, and was no longer his concern; that in conse-
quence of this formal relinquishment, the Spanish government immediately caused the necessary repairs to be made, and the inhabitants of New-Orleans have ever since, without hindrance, &c. possessed and enjoyed the same premises, &c."

In their answer to the petition of Jean Gravier, the mayor, aldermen and inhabitants, repeat the same idea. After denying the right of Jean Gravier, they say, "that the truth is that sometime before the death of Bertrand Gravier, the first owner of the plantation on the front of which the suburb St. Mary was established, he the said Bertrand Gravier had abandoned and himself acknowledged in an unequivocal manner to have abandoned all the above mentioned parcel of land; that in consequence of such abandonment, the high way and levee have been maintained and repaired then and afterwards, till this moment, either by the corvees publique, or at the expense of the city; that since that time till now, the inhabitants of this city never ceased to have a peaceful enjoyment of the said parcel, either to place different wood-yards or for unloading flat bottomed boats and other rafts, with permission of the corporation." And their answer concludes by avowing, that "the city council had erected a cabin on the land to lodge a guardian, and that they had caused the earth to be digged and carried away to repair the levee."

Yet with these allegations on record, in which they derive a title under Bertrand Gravier by virtue of an abandonment, in 1788; in which they say the land belongs to and is possessed by the city; the corporation in their statement do not blush to assert, that the same land had continued ever since the year 1767, to be considered as part of the royal demesne, and that too, as they say, under the name of the "Jesuits' batture."

If it was royal demesne, how could the inhabitants of the city have enjoyed it? Was it not as strictly forbidden under the Spanish as under the American government, to intrude on the publick property? If it was royal demesne, how did it acquire the name of "Jesuits' batture?" If it was royal demesne how could the corporation have the right
to give permission to the rafts and boats to unload, or for the dealers in lumber to deposit their wood there? Thus we see the allegation contained in the case, is not only at war with the truth, but is also expressly contradicted by the declarations of the defendants themselves upon record. Let us now examine the residue of this sentence, viz. "that no claim was made to the premises by the proprietors or purchasers of the Jesuits' property, either before or after the cession;" and the still stronger assertion of the counsel in his opinion, that it was "a fact incontestable proved that neither Jean nor Bertrand Gravier, nor any of those under whom this claim is derived, ever possessed a single inch of the bat-ture in question. It is further remarkable that they never set up any title to that effect." I cannot comment upon the subject of this statement as it deserves, without departing from that rule of moderation which I have imposed upon myself in pursuing this enquiry: I will, therefore simply state the proofs by which the reader will be enabled to appreciate the value of these allegations—allegations which ought to have been maturely weighed before they were hazarded by the corporation, or re-echoed by their counsel. They should have considered, not only from the regard always due to truth; but from the reflection that this case was to become the ground-work of an application to the United States, to prosecute their claim at a great expense to them and with great inconvenience to the individuals concerned; that the doctrines contained in it, give rise to a most important and serious question, which, if resolved in the manner they seem to desire, will not only forever deprive the town of this species of property in the very city itself, but also ravish from the inhabitants all the alluvions that have been formed since the establishment of the country. It ought also perhaps to have occurred to the counsel, if not to his clients, that after the Superior Court had given an unanimous opinion in this important cause, it was hardly treating the judges with proper candour not to state with more care the evidence upon which they pronounced. The corporation
say that the purchasers of the Jesuits' plantation never claimed the batture in front of the suburb St. Mary; and their counsel asseverates the same thing as having been incontestably proved. Why then in the passages I have quoted, did the corporation claim under Gravier, by virtue of his abandonment? Abandonment supposes right, possession, or at least claim of right. If Gravier never claimed, then Gravier never could abandon. Are the allegations of the corporation in their pleadings, or in their case to be believed? Gravier "never claimed," say the defendants and their counsel; yet he sold a lot on the batture on the 12th of April, 1794, to C. F. Girod, on the same day another to Wiltz, on the same day a third to John Scott, on the 12th day of January, 1795, two others to Mr. Pierre Foucher: reserving in the three first the right to dig earth for his brick-kiln. These deeds were all on record, were all produced on the trial, and could not have been forgotten. "The batture was royal demesne, and Gravier never set up any claim to it." Yet governor Carondelet, in a letter dated the 10th of March, 1794,* commands him to make the levee and compliments him on his former punctuality. He repeats this order at two different times; once by Mr. Livaudais and once by Mr. Mentzinger, and according to the uncontradicted testimony of Mr. Segur and Mr. Larochet, he thought it necessary to ask Mr. Bertrand Gravier's permission, and, after his death, that of Jean Gravier, to lay the rafts of royal masts on the batture.

What then becomes of this "fact so incontestably proved?" But I might have contented myself with the consultation itself, to show the error of its statements on this point. At page 300 of the opinion, the third position of the counsel, is, that between the alluvion and the land sold (viz. the sale in 1763) "lay a royal road, the same that still exists, and a

* See note B.  
† See note C.
levee, both which were then and have still remained publick property."

Here we find a broad assertion that the levee and the road were then, viz. 1763, and still are, publick property; yet at page 305, of the same opinion, we find the old ground of Gravier's abandonment resorted to, and the date of the publick title fixed to the laying out the fauxbourg, (1788.)

But a circumstance of "still more weight" (says the counsel) "is, that Bertrand Gravier himself, when he converted the front of his plantation into a suburb, declared that he considered himself discharged from the duty of repairing the roads and the levee" [what duty if the road and levee had ever since 1763 been publick property? or how could he be discharged from a duty which according to the counsel's third position must have been always that of the publick] because the front of the land was now become publick property: so that since that period, the government and the city have been at the expense of keeping the road and the levee.

How difficult is the support of error! since even the acknowledged abilities of the learned counsel have not enabled him to write ten pages, without contradicting the witnesses, contradicting the records, and contradicting himself.

Third error in fact—

In the case stated, page 288, the defendants alledge "that when the sales were made" (24th November, 1763) "Louisiana still belonged to France, and was under the dominion of the French laws." On the 3d day of November, how-

* Yet Mr. Laveau Trudeau declared on oath that he thought Gravier had a right to sell the batture: and that when called on to ascertain his upper limits, he had began the survey from the middle of the levee, and not from the inside of the road as he would have done if the road had been publick property or the boundary of the land.—Did the counsel forget this testimony? or was the Surveyor-General as well at the Governor ignorant of this notorious fact? See his examination, note E.
ever, in the preceding year, *Louisiana* had been ceded by *France* to *Spain*; and although possession was not immediately taken, yet it will not be pretended that the king of *Spain* could acquire any rights by virtue of the *French* laws, supposing them to be as they are stated by the defendants.

The whole then of the title in the *United States* so lately discovered, so contradictory to that which the parties who now support it, have alleged, must fall with the discovery, that at the time our title commenced, the king of *France* had abandoned the sovereignty, and of course could by virtue of this pretended prerogative claim no right to seize the alluvion, and shut out his subjects from the river on which he had bounded their grants.

Having pointed out some of the errors in fact in the defendants statement, and shown that this cause is to be determined according to the *Spanish* laws; I ought, perhaps, from an examination of those laws to prove that they give the alluvion in all cases to the proprietor of the adjacent soil; but that point seems to be conceded not only by implication in attempting to substitute the *French* for the *Spanish* laws, but expressly in page 303 of the opinion, where it is said that the alluvions formed since the cession, are the property of the front proprietors, by the *Spanish* laws; but to remove all

*If it should be objected that this argument injures the title of Gravier by showing that the king of *France* had no right to sell to those under whom he claims; there are four answers, all of them conclusive:*

**First**—That the king of *France* may be considered, during the interval between the cession and the delivery of possession of the country, as only the trustee for the king of *Spain*; and that, therefore, all his acts permitted and not revoked by the latter power on taking possession, are valid.

**Second**—That though not *de jure* yet *de facto*, *France* was sovereign of the country: therefore, all sales made by the actual possessor to a *bona fide* purchaser, are valid.

**Third**—That we are now in possession, and that the *United States* cannot prevail by the weakness of our title, but must show a conclusive one in themselves.

**Fourth**—That by the fundamental laws of *Spain*, the king could not acquire this species of property.
doubt upon this point, I refer to the authorities cited in note F. post.

But although I have clearly shown, that this question is not to be decided by the French but the Spanish law, I can with ease deprive my opponents of even the semblance of an argument by showing, thirdly, that both by the general laws of France and by special grants, the alluvions of the Mississippi belong to the proprietors of the adjacent soil, and not to the king.

The right of the adjacent proprietor is so consonant to the principles of natural law that it would require strong arguments to prove that any laws could permit a sovereign, after having bounded his grantee on the river, to cut him off from its use by seizing on the alluvion which might be formed on its banks. Let us examine carefully before we pronounce, that the French jurisprudence is liable to this reproach.

The laws relied on by the defendants, are the edicts of 1683, 1693 and 1710, and the opinion of Pothier. Of the edicts, the counsel has selected that of 1693, as the most favourable to his position. Let us examine this edict, without, however, subscribing to the doctrine, that any of the king's edicts could without further formality, change the general civil law of the kingdom, and with the observation that many of the provinces had their particular privileges, which they always preserved and which were enforced by the tribunals. In the very instance now before us, long after this edict, it is held by Denizart, by the authors of the jurisprudence of the Encyclopaedia, and other authorities which I shall cite, that the law of the land is the reverse of that said to be enacted by the edict.

The ideas I had formed on this subject are confirmed and strongly expressed by Portalis, in his preliminary discourse to the civil code:

"Sous l’ancien régime, la loi étoit une volonté du prince—cette volonté étoit adressée aux cours souveraines qui étoient chargées de la vérification et du dépôt des lois—la loi n’étoit point exécutoire sans un report avant d’y avoir été
La vérification étoit un examen, une discussion de la loi nouvelle. Elle représentait la délibération qui est l'essence de toutes les lois—l'enregistrement étoit la transcription sur le registre de la loi vérifiée—les cours pouvaient suspendre l'enregistrement d'une loi, ou même la refuser—elles pouvaient modifier la loi en l'enregistrant, et dès lors ces modifications faisaient partie de la loi même. Une loi pouvait être refusée par une cour souveraine et acceptée par une autre—elle pouvait être diversement modifiée par les diverses cours.

"Under the former government the law was the will of the prince—the expression of this will was addressed to the Superior Courts, which were charged with the verification and deposit of the laws. No law could be executed in any jurisdiction until it had been verified and registered therein. The verification was an examination or discussion of the new law—it represented that deliberation which is essential to all laws—The registry was the act of transcribing the law thus verified on the records. The courts might suspend the registry or even refuse it—they might modify the law when they enregistered it, and from that moment those modifications became part of the law itself. A law might be refused by one Superior Court and received by another—and it might be differently modified by different courts."

The edict declares that the king has an incontestable right upon (sur) all the navigable rivers, and that he and his predecessors, have caused researches to be made of isles and accretions (crements qui s'y sont fait) which had been made therein, and not thereon, as is translated in the opinion; and he confirms the ancient possessors of all islands, atterissements, alluvions, &c. in their possessions on paying certain dues to the crown. Now, in this edict I can find no declaration of any thing but that the king had an incontestable right upon the navigable rivers of his kingdom,* and that he

* Probably because the grants on those rivers, were not bounded by the river, as we have shown ours, in common with all the others in the country, to have been.
and his predecessors had claimed the islands and accretions or banks found therein, that is, in their channels or beds; but because the word alluvion is introduced in the list of property that is confirmed to the proprietors, I do not perceive that the king arrogates to himself a right to the alluvions which shall be formed upon the land which bounded on the river, and I can account for the word being introduced into this part of the edict, by supposing that it was the intent of the king to confirm to possessors of the islands not only original soil of these islands, but also the increase which they had gained or might afterwards gain by alluvion. This is a very natural construction, not only from the omission of this word in the declaratory part of the edict, but also because islands more frequently are increased by alluvions than even the banks of the rivers themselves. And thus the words of the edict will be satisfied without making it at war with the fundamental laws of the kingdom.

The only remaining authority is that of Pothier. I confess that the part cited would lead the reader to suppose that this writer meant to decide the question in all cases of navigable rivers; but a closer attention will perhaps discover an inaccuracy of expression, or an error unavoidable in some instances, even by the most correct writer whose attention is turned to so many points as are embraced by the valuable work of Pothier.

I apprehend that what is laid down here as a general proposition, applicable to all navigable rivers in France, is true as to those only; (and this may be the case, perhaps, with the greater number) where the grants have not been bounded by the river but by a fixed front boundary. I believe so, because if the doctrine of Pothier were understood in the unqualified sense in which it is quoted, the other writers whom I shall cite, and who all without exception, give a contrary opinion, would at least notice that of so celebrated a writer, if they supposed it differed from theirs on so important a point.

I am also inclined to this solution from the passage which follows in the 160th article, where he gives the reason why,
by the Roman law, the alluvion belonged to the adjoining proprietor?

"It was (says he) by a kind of right of accession, that according to the Roman law the riparius proprietors, had, each one in his own right, the property of the islands which were formed in the river, and even in its bed, when the river abandoned it to take another course.

"The inheritances of these proprietors having towards the river an unlimited extent, and having no other bounds but the river and which comprehended even the shores and all which was not occupied by the river, the bed which had been covered when it ceased to occupy it was deemed to have made a part of those inheritances, and to be an accession to them.—It was the same thing with respect to the islands which were formed in the river; these islands being nothing else but a part of the bed of the river which it had ceased to occupy."

"By the French laws the navigable rivers belong to the king; the islands which are formed within as well as the bed when it is abandoned to take a new course, belong to the king; the proprietors of inheritances on the bank cannot at all pretend to it, unless they show titles of concession from the king."

From these citations I think it appears that Pothier makes the right of alluvion to depend on the fact of the concession or grant being bounded by the river, since he gives the existence of such boundary as a reason why, under the Roman law, the proprietor was entitled to the alluvion, and declares that unless he has a similar concession he is not entitled to it by the French law. I have endeavoured, I know not with what success, to reconcile Pothier with the other French writers, some prior, and others subsequent to his work: every one of which, at least all that I have been able to consult, agree in the doctrine that the proprietor of land bounded by a river, whether navigable or not, is entitled to all the increase that may be produced by alluvion, but that atterissement, a word peculiar to the French jurisprudence, belongs in navigable rivers, to the king.
Alluvion is defined in the French, precisely as it is in the Roman and Spanish laws, to be an "increase of land, which is made by degrees (peu à peu) on the shores of the sea, of navigable and other rivers, by the earth which the water brings there." This definition is taken from Guyot's Repertoire Universelle, a work of great merit, compiled by upwards of forty counsellors, from different parts of the kingdom, and published in 1784. The whole article is transcribed in the margin,* and I deduce from it these important consequences:

* "Alluvion. Accroissement de terrien qui se fait peu à peu sur les bords de la mer, des fleuves et des rivières par les terres que l'eau y apporte.
  "Le droit Romain met l'alluvion au nombre des moyens d'acquérir par le droit des gens, comme étant une espèce d'acccession; en sorte que l'accroissement fait imperceptiblement demeure à l'héritage auquel il se trouve réuni. Cela est fondé sur la maxime qui veut que le profit appartienne à celui qui est exposé à souffrir le dommage.
  "Cette disposition du droit Romain est suivie dans le royaume, excepté neanmoins en Frenche-Compte ou'on tient pour maxime que la rivière de Doux qui arrose cette province, n'ôte ni ne baille; c'est-à-dire, qui celui dont cette rivière dominoit l'héritage en l'inondant peut prendre son indemnité dans le terrain qu'elle laisse à découvert.
  "Il faut aussi excepter les héritages voisins de la rivière de la Fère qui suivant une coutume locale d'Auverge, n'ôte ni ne baille.
  "L'article 195 de la coutume de Normandie porte que les terres d'alluvion accroissent aux propriétaires des héritages contigus à la charge de les bailler par aveu au seigneur du fief et d'en payer les droits seigneuriaux comme des autres héritages adjacens.
  "Les coutumes de Sens, d'Auxerre et de Metz ont des dispositions semblable et sont admises pour de règle dans le droit François.
  "L'accroissement fait par alluvion prend les qualités de fief, de roture, de propre ou d'acquet que peut avoir l'héritage accru, et il est sujet aux mêmes charges.
  "Il n'en serait pas de même d'une augmentation arrivée subitement à un héritage par un débordement ou par quelqu'autres cas fortuit. Cette augmentation appartient au roi dans les rivières navigables et aux seigneurs haut justiciers dans les rivières non navigables." Guyot's Repertoire Universelle, page 118.
FIRST—That the doctrine of Pothier is here shown, not to be the general law of France, but an exception to that law in the particular provinces, which are enumerated.

SECOND—From the part of these articles, which states the custom of Normandy to be, that the proprietors of the adjacent land shall have the alluvion, "a lacharge des les bailler par aven au signeur du fief et d'en payer les droits, seigneuriaux," &c. that is, on condition that he shall make an acknowledgement (which is in the nature of homage in the English law) to the feudal lord, and pay his seignorial dues, &c. "The customs of Sens, Auxerre nad Metz, have similar dispositions, and are admitted to serve as a rule in the French jurisprudence."

Here then I think we may plainly discover, that if the king of France has any right to alluvions, he has them as feudal lord,* that even in lands held under this tenure, the proprietor would have a right to the property, paying the usual rents, and rendering the accustomed homage, but that in land not held under a feudal tenure, the king could have no pretensions to this accession of property, which would belong to the proprietor by the law of nature, to which this right is expressly referred by the Justinian code.

Should this reasoning be well founded, the dispute is at an end with respect to this property, which is expressly granted in franc aleu,† or allodial tenure, as we should express it in the language of English jurisprudence. "Franc aleu," as appears from the following definition taken from the "Coutume de Paris," page 144 "is an inheritance which is subject to no seignorial rights or duties, either honorary as fealty and homage, or pecuniary as rent, fifth relief, or others that may

* Since the first publication of this work I have found my reasoning on this subject confirmed by the highest authority—Portalis in his preliminary discourse to the second book of the French code, expressly refers this claim of the crown to a feudal origin—and moreover positively declares the whole law of alluvion to have been settled in favour of the adjacent proprietors long before the revolution.
† See note A.
be due as acknowledgements of the tenure from the superior lord; it is therefore that it is thus called \textit{quasi liberum et solatum ab omnibus juribus}.

The authority of the \textit{Encyclopædia} is also cited to show a difference between the Spanish and French laws on this point. A very cursory examination of the article will show its misapplication to the defendant's case. The whole text, (for the defendants have only quoted as much as they think suits their purpose) reads thus:

"Alluvion is an increase of the ground which takes place by slow degrees, on the shores of the sea, on the borders of \textit{fluvoes} and rivers; occasioned by the earth which the water conveys to it, and which becomes so consolidated with the contiguous land that it forms a \textit{whole with it—an identity}. The name of alluvion is also given to those lands which are slowly and imperceptibly left uncovered by the water.

"The \textit{Roman} law places alluvions in the number of the means of acquiring according to the laws of nations, as being a kind of accession: that augmentation, being operated in a slow and imperceptible manner, remains to the inheritance to which it is found united.

"The portion which is thus added insensibly is not considered as a new land, it is a part of the old which becomes possessed of the same qualities, and it belongs to the same master—\textit{in the same manner as the growth of a tree from parts of the tree}—and is the property of the proprietor of the tree. That right of increase by alluvion is grounded in the maxim of right, which bestows the profits and the advantages of a thing, to him who is exposed to suffer its damages and its losses.

"The regulations of the \textit{Roman law} on alluvion are generally followed in France—the usages of \textit{Metz}, of \textit{Sens}, and of \textit{Auxerre}, have on that subject precise regulations, which form their common law.

"But the province of \textit{Frenche-Compte} must be excepted, where it is established as a maxim that the river \textit{de Doux},
neither gives nor takes away—that is to say, that the person whose inheritance is diminished by the inundation of the river, may indemnify himself by possessing himself of the land which it has abandoned.

"The same thing takes place on the inheritances bordering on the river de la Fère in Auvergne, where the local coutume establishes the same right.

"The alluvions which the sea produces on the lands which it bathes, also belong, as a right of increase, to the proprietor of those inheritances, who may also make levees or dykes to secure them.

"We must observe, however, that to acquire by right of alluvion, two conditions are necessary....

"First. That the increase should be made slowly and imperceptibly, in such a manner that it cannot be discovered in what time each part of the alluvion has been formed to and consolidated with the inheritance.

Second. That the inheritance by virtue of which the right of acquiring by alluvion is claimed, be contiguous to the river, in such a manner that the bed on which it flows, seems as it were, to be a part of the same inheritance; for in case it did not bound exactly to the river, and that it was bounded by a cause-way or by a road, the parts left uncovered by the river between its bed and the road, cannot belong to the proprietor of the inheritance situated on the other side of the road. Those lands belong to the king in navigable rivers, and to the feudal lords in those that are not so."

Here we find the Roman law expressly recognized, as being generally followed in France, with the exception of the districts enumerated in the former authority, and then follow the passages selected by the defendants, which in no sort whatever, weaken the effect of the prior passages of this authority.

They are—

First. That the alluvion must be formed slowly and imperceptibly, so that the time of the incorporation of each part with the original soil, cannot be discovered. When the
ingenious counsel can analyze the different deposits, separate the sands of the Red river, the rich mould of the Missouri, from the clay and other various soils which the Mississippi receives from a thousand tributary streams; when he can dive into its turbid eddies, watch the moment of the precious deposit, and date the existence of each stratum of its increase; then this first branch of the authority he has cited may be applicable to his cause.

The second point, viz. that no proprietor can claim any alluvion, unless his lands are bounded on the river is true, not only in the French, but in the Roman and Spanish jurisprudence; and therefore it ought certainly not to have been cited in an argument to prove that they differed. As my adversary, however, can make no use of this part of his authority, it is a pity that it should be cited for nothing: I will therefore use it as a strong corroborative proof of the argument I used to show the reason why, on certain navigable rivers in France, the alluvion belonged to the king, to wit: that the grants there were bounded by the road, not by the river. The concluding lines may also serve to strengthen my reasoning, and to prove the feudal origin of the local variations which the French have made from the imperial law.

The opinion on this point concludes "that the existence of a publick road or causeway, forms an exception in favour of which all opinions may be reconciled;" but the authority says no such thing: the authority says, that the exception is formed by the road or cause-way being the boundary; not by its existence—an hundred roads and as many cause-ways might exist, yet if they were not the boundaries of the land, the alluvion would belong to the owner of the original soil.

Yet this is a fair specimen of the reasoning by which the government of the United States is gratuitously invited to harrass individuals with suits, and snatch their only support from the widow and the orphan.*

* A large proportion of the batture was purchased by Mr. Delabigarre, and is now the property of his widow and infant children.
I might perhaps be excused from producing further authorities to show how untenable the ground is, on which the defendants have sheltered themselves under the French laws, even supposing them the guide of our decision. Take, however, in addition, the following respectable authorities:—

DENISART, title ALLUVION, vol. 1, page 74.—"1. L’ALLUVION est une accroisement qui se fait insensiblement, et peu-à-peu sur les rivages de la mer, des fleuves et des rivières par les terres que l’eau y apporte.

2. Lorsque par alluvion, un héritage se trouve insensiblement accru, et plus étendu qu’il ne l’était, l’accroissement appartient au propriétaire, et celui dont l’héritage est diminué par cette voie, ne peut pas revendiquer ce qui s’en manque.

Cette maxime qui est puisée dans le droit Romain, à LIEU DANS TOUTE LA FRANCE, excepté en Franche-Comté. On y dit communément au contraire, que la rivière du Doux n’ôte ni ne baille. Ainsi l’alluvion n’est point dans le cours de cette rivière, un moyen d’acquérir. Voyez la remarque de Dumoulin.

Il faut encore excepter la rivière de Feère, qui, suivant une coutume locale d’Auvergne, n’ôte ni ne baille, c’est-à-dire, que lorsqu’elle prend d’anciennes possessions par inondations on autrement, petit-a-petit, de-ca on de-la l’eau, il est permis a celui qui perd, de suivre sa possession et de la revendiquer.

3. L’augmentation qui arrive dans un héritage par alluvion, est une seule et même chose avec l’héritage accru: [fundus fundo accrescit, sicut portio portioni;] il en prend toutes les qualités accidentelles de fief et de roture, de propre et d’acquêt; il est sujet aux mêmes charges, fussentelles d’usufruit et de substitution.

4. Il n’en est pas de même d’un accroissement subit, occasionné par un débordement, ou par quelqu’autre cas fortuit: la portion de ce terrien pourrait en ce cas être réclamée par le propriétaire. Voyez le coutume de Bar.

5. La maxime est d’ailleurs affermee par l’arrêt rendu au rapport de M. l’abbé de Vienne, en la quatrième chambre.
des enquêtes, le 15 Avril 1744, entre le marquis de Bouzols et M. de Chamflour, conseiller en la cour des aides de Clermont, rapporté par Guyot, traité des feffs, tom. 6, chapitre des rivières, page 673, n. 10 ; [et par arrêt du Mercredi 22 Février 1769, rendu en la grande-chambre, conformément aux conclusions de M. Seguir, avocat-général, la même chose a été jugée. La sentence qui avait ordonné une visite des lieux, a été infirmée ; et il a été ordonné qui par enquête respective, il serait vérifié si le changement du cours de l'eau, sur la rivages de la mer, avait été subit ou insensible. M. Lochard plaidit pour le chapitre de Lucon, et Me. Caillou pour le sieur de Champagné.]

"6. Bourjon prétend que ce qui accroit par alluvion appartient au seigneur haut justicier; mais ni son opinion, ni l'avis des auteurs qu'il cité ne sont suivis dans l'usage. Voyez la coutume de Normandie, art. 195, l'article 268 de celle d'Auverre, l'article 155 de celle de Sens, et celle de Metz tit. 12, art. 28.

"7. Les attérissements formés subitement dans la mer ou dans les fleuves et rivières navigables, appartiennent au roi par le seul droit de sa souveraineté. Voyez la déclaration du mois d'Avril 1683, et M. le Bret, de la souveraineté, liv. 2. chapitre 16 ; et les édits des mois de Décembre 1693, et Février 1710, concernant les attérissements, isles et islots. On trouve ce doux édits dans le recueil de Néron, tome 2."

RENUSSON 'TRAITE' DES PROPRES, p. 39.

"It often happens that an inheritance which is bounded by a stream or navigable river, is augmented or diminished by the stream which forsakes its ancient bed, and makes for itself another. This augmentation or diminution, is a profit or loss to him who has the adjoining inheritance. The increase is an accessory, which belongs of common right, to the proprietors of the soil which is contiguous to it." Ins. lib. 2, de rerum div. &c. &c.

"This increase can have no quality different from that of the principal inheritance, according to Argentée on the custom of Bretagne, and Dumoulin on the ancient custom of
Paris, who says the increase of alluvion is acquired to us, in the same right by which the original soil belonged to us; nor is this increase considered as a new field, but as a part of the first.

"But what shall we say of an island formed in a river, opposite to our soil, which is separate property. It would seem that an island being a thing separate from the inheritance which borders on the river, there would be no right of accession, and that the island ought not to be considered as of the same quality: nevertheless we may pronounce that it is of the same nature with the inheritance, quia eodem jure alluviones accedit. Common right requires that an island which arises in a river, should belong to the proprietor of the adjacent soil; or if it arises in the midst of a river, that it should belong in common to those who own the soil on the opposite sides, &c. 1 Domat, 268.

"The proprietor of an estate acquires the possession of whatever may be added to it by nature, which augments the land, and becomes as it were an accession thereto. Thus the insensible increase which may be gained by an estate joining to a river, by the operation of the water, is an acquisition gained by the proprietor of the estate.

"But if an inundation or the sudden change of the bed of the river, divides an inheritance, and joins it to another, the property of this part remains in its ancient owner."

Ferriere's Commentaries on the Institutes, Book 2, Title 1.

TEXT.

§ 20. De Alluvione—"Moreover, whatever a navigable river (fleuve) adds by alluvion to our estate, is by the law of nature our own. By alluvion we mean an increase so imperceptible, that it is impossible to know how great an augmentation has been received at each instant of time."

FRENCH LAW.

"The disposition of this section is observed among us."
§ 21—"But if by the impetuosity of its current, a river has carried off a part of your land, and joined it to that of your neighbour, this part does not cease to belong to you: however, if it has remained a long time joined to the inheritance of your neighbour, and the trees which it has carried with it have taken root, the soil shall belong to him."

**French Law.**

"The provisions of this section take place in France, with this difference, nevertheless, that when the accessions which are thus suddenly made, are very considerable, and that they have remained joined to an inheritance for a long period of time without being claimed, it is said they ought to belong to the kings, or to the superiour lords, as a kind of vacant possession, or a derelict which appears conformable to the royal ordinances by which the islands and atterissements which are formed in great rivers belong to the king."

A most persuasive, if not a conclusive argument that the law of France is as I have stated, may be drawn from the following circumstances and opinions. When the first consul undertook the great task of giving a general system of jurisprudence to France, he caused his digest or projet de code to be prepared by the first lawyers in the country—this was printed, and a copy sent to every superiour tribunal in the republick for their consideration; and after a proper period it was returned with such remarks and amendments as had occurred to the different judges, that the legislature might, prior to its final adoption, have the benefit of the best legal advice on its different provisions.

The articles in this projet relating to the subject under discussion, are contained in the 2d sect. 2d title of the 2d book, and are as follows:

"15.* The collection of earth (atterissements) and accessions which are annexed successively and imperceptibly to

* "Les atterissements et accroissements qui se forment succes-
the land bordering on a river or navigable stream, are called
alluvion. Alluvion belongs to the riparious proprietor,
when it takes place on a river, whether it be navigable or ca-
pable of carrying rafts or not—under the condition in the
first case leaving the path prescribed by the regulations.

"16. The rule is the same with respect to the running
water, which retires insensibly from one of its banks, and
encroaches on the other; the proprietor of the shore which
is left dry, shall benefit by the alluvion—and the proprietor
of the opposite shore shall not be permitted to reclaim the
land which he has lost."

If this part of the project had made any change in the an-
cient laws of the country, some of the learned men to whom
it was submitted, would have taken notice of the novelty,
with marks either of censure or approbation—but we find
them all either passing over the articles as merely declarato-
ry of the old law, or else expressly acknowledging them as
such, and stigmatizing the doctrine now contended for by
Mr. Derbigny as an oppressive and ineffectual attempt to
pervert the laws of the kingdom.

To begin with the tribunal of Paris, they set out with this
general observation on the part of the code containing the
provisions—"The rules proposed" (they say) "on the sub-
ject, are in general conformable to what has always been
practised, and give occasion to but very few observations,"
and among those few are none on the subject of alluvion.

sivement et imperceptiblement aux fonds riverains d'une rivière,
s'appellant alluvion.

"L'alluvion profite au propriétaire riverain, soit qu'il s'agisse
d'un fleuve, ou d'une rivière navigable, flottable ou non; à la
charge, dans le premier cas, de laisser le marchepyéd prescrit par
les règlements.

"16. Il en est de même des relais que forme l'eau courante qui
se retire insensiblement de l'une de ses rives en se portant sur
l'autre; le propriétaire de la rive découverte profite de l'alluvion,
sans que le riverain du coté opposé y puisse venir reclamer le
terrain qu'il a perdu.

Ce droit n'a pas lieu à l'égard des relais de la mer."
The tribunals of Nancy, Nimes, Orleans, Rions, Liege, Metz, Montpelier, Agen, Aix, Grenoble, Poictiers, Rennes, and others, pass over these provisions as matters of course, or recommend a slight alteration, to prevent disputes between the proprietors of lakes and the adjoining land.

The tribunal of Rouen has these strong expressions, speaking of the 19th article in the project of code, which declares islands in the middle of navigable rivers to belong to the nation, they say:

"The Roman law gave to the adjoining proprietors the islands which were formed in navigable rivers, a disposition which appears more equitable than this article of the code, and more worthy of a great nation, whose true interest is not to acquire property to the injury of individuals."

The edicts and declarations of the former kings which claimed for the domain the islands of navigable rivers and fleuves (primary rivers) were only exchequer laws; these laws were founded on the false pretext that the inlands were an appendage of the river, which they considered as belonging to the king. But,

"1. The river itself is not a national domain, but a thing of which the publick have the use, it belongs to the nation, not in full property, but as an appendage of its sovereignty.

"2. The islands are not appendages to the waters of the river, but to the bed of the river: the right of individuals to which is acknowledged when the river abandons it.

"An island cannot be formed without increasing the width of the river at the expense of the adjoining land—and the damages to which the proprietors of these lands are exposed, should entitle them to the islands, as an indemnity for the risks and losses they incur.

"The principle which we propose would not at all invade the publick right to the islands, which the nation possesses, or for which they have positive titles—but it would tranquillize those individuals, who for ages have possessed islands in the rivers, as the true owners—and whom the agents of the-
domain have always vexed without having ever succeeded in despoiling them of their estates."*

Here we have the positive declaration of a learned tribunal speaking to the collective legal wisdom of the nation, and in the performance of a solemn and disinterested office, deciding that the edicts did not extend to alluvions, but only to islands in navigable rivers.

That even in that strong case, the edicts were considered as **Exchequer Laws**, (lois bursales) founded on **false pretexts**, which were **never executed**, served only for the purposes of vexation, and that the proprietors have in spite of them, kept possession of their islands for ages.

The tribunal of Toulouse recommends the same provisions in favour of isles and islands—And that of Lyons expressly

* "La loi Romaine au digeste de acquirendo rerum dominio, attribuait aux propriétaires voisins, les îles qui se formaient dans les fleuves—disposition qui parait plus equitable que cet article du code, et plus digne d'une grande nation, dont le véritable intérêt n'est point d'acquérir des propriétés nouvelles par préférence aux particuliers.

   "Les edicts et déclarations des ci-devant rois qu'attribuaient au domaine les îles des fleuves et rivières navigables, n'étoient que des loix bursales. Ces lois se fondaient sur le faux prétexte que ces îles étoient un accessoire du fleuve qu'on regardoit comme appartenant au roi.

   "1. Le fleuve lui même n'est point un domaine national, mais une chose publique ; il appartient à la nation non a titre de propriété, mais à titre de souveraineté.

   2. L'île n'est pas un accession des eaux du fleuve, mais bien du lit du fleuve, sur le quel les droits des particuliers ne sont pas me connus lorsqu le fleuve l'abandonne.

   3. Il ne peut guère se former une île sans que le fleuve s'olargesse aux Dépens des terrain voisins ; et le ravage aux quels sont exposés les propriétaires de ces terrains, doivent leur faire obtenir les îles qui se forment dans le fleuve, comme une juste indemnité, des risque qu'ils courent et des pertes qu'ils éprouvent.

Le principe que nous proposons ne porterait aucune atteinte à la propriété dominiale des îles que la nation possède ou sur les quelles elle à des titres d'engagement ; mais il servirait à tranquilliser les particuliers qui depuis des siècles possèdent des îles dans les fleuves comme véritables propriétaires, et que les agents du domaine ont toujours vexés, sans pourtant parvenir à les dépouiller de leur fonds.—Observations du tribunal d'Appel de Rouen, p. 18.

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declares that the claims of the crown to the "Islands in navigable Rivers," never considering the edicts as even claiming alluvions, was founded on no other law than that of force, (le droit du plus fort.)

Portalis, in his preliminary discourse to this part of the Code, repeats the same ideas; asserts that the language of the Code on the subject of alluvion, is that of the ancient law, as settled long prior to the Revolution; refers the claims of the crown to obsolete feudal principles, and finally declares that the edicts were only fiscal attempts to oppress the subject.

.......... 

I should not have multiplied these authorities, had it not have been for the respect I bear to that of Pothier. None of those I have cited, at all accord with the doctrine the defendants suppose him to maintain. Many of them are posterior to his work, and of those none mention his opinion as differing from their own. This notice his acknowledged respectability would have required, had they thought this difference existed. I think, therefore, I may fairly infer from their silence, that they have construed the passage cited in the way that I have done: of course that there is a perfect coincidence between these eminent writers on this point, and that the laws of France, except in the particular enumerated districts, is conformable to the Roman and the Spanish codes.

But as I am determined not to leave my adversaries a single recess in which they can hide a doubt, or from which they can bring out an argument, I will suppose that I have wholly failed in this division of my cause; that the laws of France are to govern, and that they are as laid down by the defendants; yet the alluvions of the Mississippi have not since the first settlement, belonged to the crown of France.

**First.** Because, as I have shown, we hold the lands in franc aleu or alodial tenure.

**Second.** Because if the king of France had this right, he
has expressly renounced it, and the authority in Pothier, as well as the edicts, admit that a grant of alluvion shall be good against the crown.

In September, 1712, Louisiana was first granted, by the crown, to Mr. Crozat. I have never seen a copy of this grant, but there is reason to believe from a subsequent recital, that it was extremely liberal. This however is inmaterial, for having surrendered his grant, the same country was conceded to the West-India company, by letters patent, dated in August, 1717, the Vth article whereof is in the following words: "In order to provide the said West-India company with the means of making a permanent establishment, and to execute all the plans they may form, we have given, granted and conceded, and by these presents do give, grant and concede to them, forever, all the lands, coasts, ports, havens and islands which form our province of Louisiana, as well, and with the same extent as we had granted it to Mr. Crozat, by our letters patent, dated 14th September, 1712, to enjoy the same in full property, lordship and justice, reserving to ourselves, but only fealty and homage, which the said company shall render to us and the kings our successors, with a crown of gold of the weight of twenty marks."

By the 8th article the company are expressly authorized to grant lands in franc aleu or allodial tenure.

Under this ample grant, all the titles of the Jesuits were derived,* and after reading it, I fancy nothing more will be said of the royal right to the alluvions of the Mississippi, under the West-India company.

Again; by the fifteenth article of the charter, the custom of Paris is expressly introduced and established unchangeably as the fundamental law of the territory. Whatever then may the laws of the other part of the French dominions be, unless alluvions can be shown to be the property of the crown by the Custom of Paris, the argument with respect to

* The title to the Jesuits is dated in 1726 near six years before the patent to the company was resumed by the crown
this property is at an end. This has not been attempted; for it was known that it could not have been done with success. As however, I have not the same reasons to shrink from this research, I will refer to Ferriere's folio edition of the custom of Paris, and its commentary, 4 vol. p. 917, nos. 37, 38, 32. "Alluvion is an imperceptible increase to an inheritance, produced insensibly diminishing the neighboring lands; for the augmentation cannot otherwise take place. This increase is so intimately united to the inheritance, that it assumes all its qualities, and consequently becomes separate property, if the inheritance were so. According to Demoulin, on the first article of this custom, gloss. 5, nos. 115, 116, where he says, incrementum alluvionis nobis adquiretur, eo jure quo ager augmentatus primum ad nos pertinebat, nec illud incrementum sentitur novus ager sed pars primi."

"It would not be the same case, if the river should add to the inheritance of an individual, an island or an entire parcel of soil, although it should be united to the inheritance, this would be considered as a part of this inheritance; but not with the quality of separate property." See also the same work, vol. 1, p. 886.

These authorities prove much more than is necessary for my purpose, not only that alluvions strictly so called, which are made imperceptibly, belong to the proprietor of the soil to which it is attached; but that the Custom of Paris, in conformity with the Roman and the Spanish laws, give to him the islands and portions of land formed in a river or on its banks, by a change of its course, or other sudden accident.

But the custom of Paris, as I have shown, was declared by the charter, and I might have added by an express edict of "Louis the fourteenth," to be the law of this colony.

So that I think I have fully demonstrated that even if the general law of France would have given this kind of property to the king, yet on the Mississippi, it belonged to the adjoining proprietor, as well by the laws of the province as by the actual grant of the king.

Before I conclude I ought perhaps to make some observations on the relinquishment, alleged to have been made by
Mr. Gravier, of his title, and the notorious acts of ownership which are stated to have been done by the Spanish government. Let it be remembered that proof of these very acts was produced by the corporation of the city as evidence of their Title and that it has not been until after they despair of making any title in themselves, that they now appropriate the same evidence to make out one for the United States.—What reliance can the United States have on such accommodating proof, that will fit any claim and serve any occasion? That first used to establish the interests of the corporation is now set to work as the engine of their malice and resentment. But it is not from its general character that I would stigmatize it. Let us do justice and examine it fairly.—What are these proofs?

1. Gravier abandoned his right to the publick.
2. Governor Carondelet ordered the sheds on the batture to be pulled down.
3. The cabildo refused permission to erect any buildings thereon.
4. The inhabitants of the town dug earth there, and the publick used the batture as a landing.
5. The auditor gave it as his opinion that the ground between high and low water mark belonged to the publick.

1. Gravier abandoned the batture to the publick.

A point materially relied on both in the case and in Mr. Derbigny's opinion, to show this relinquishment of Gravier is, that by depositing a plan, in which this part of his farm was not laid out into lots, he had virtually declared that it was a common for the publick—the case indeed goes further, and says that in this plan the batture was marked as a space which is to remain free and not subject to be built on. This in the literal acceptation of the terms is untrue, for there is no such mark on the plan, and therefore I presume Mr. Moreau, who drew the case, meant that it should be understood with the qualification that follows, that it was marked as free only because it was not divided into lots, that is to say, because it was not marked at all. The same wise reasoning would vest all
the rear as well as the front part of Gravier's farm in the publick, because the line of lots occupied but a small part of the farm fronting on the road. But it is said Mr. Gravier declared that he had abandoned his right to the publick—If the evidence of these declarations had been as full as certain and circumstantial as it is contradictory, vague, and frivolous, yet without writing and recording it would give no title to the United States, according to the laws of the country at the time it was said to have been made, [see the discussion of this point in the report of the case.] But the proof itself is wholly uncertain—one witness says it was to the publick, another to the inhabitants of the town, and a third to those of the suburb—none of them pretend to relate with precision the time, conditions or consideration of the supposed abandonment. But can it possibly escape the attention of the most superficial reasoner, that this branch of the argument is directly at war with all the others, and that the very allegation of it is an express admission of our title? The same may be said of the Baron de Carondelet's and governor Gayosa's orders to repair the roads by the publick convicts—for it was in both instances said to be founded on this supposed abandonment, of which both the governors know so little that they always considered Gravier as the owner of the land, and sent the order for repairs in the first place to him. These very facts too stated and relied on by those who advocate the title of the United States—completely contradict the unblushing assertion that "the batture never ceased to be part of the sovereign's domain." If this was the case, why did Carondelet and Gayosa both send to Gravier to repair the roads, and why according to Mr. Derbigny's showing, did they undertake the task only when informed that Gravier had abandoned his right.

2, 3, 4, and 5. Governor Carondelet ordered the sheds built on the batture to be pulled down—The cabildo refused permission to build others—the auditor gave it as his opinion that the publick had a right to the land, and they actually used it for a publick landing.
There is proof that the demolition of the buildings arose from their being in the range of the fort guns. *See the deposition of Mr. Pedesciaux.*—but admitting these facts to be proved in the fullest manner, no other inference can be drawn from them, than one incident to the nature of the property.—By the civil law, the publick have a right to the use of the banks of navigable rivers, though the property remains in the owner of the adjacent soil; on the Mississippi, by usage and the nature of the ground, the bank comprehended the levee, and all the space between it and the river. When the river encroaches, the levee is brought nearer in; when it retires, or forms an alluvion, the proprietor extends his levee, encloses the new made ground, and leaves the publick the enjoyment of the new bank and that part lying outside of it, for the purposes of navigation.—On this space it is unlawful for the proprietor to erect any thing that may interfere with the use secured to the publick.—The governor therefore would have had a right to order the sheds to be demolished, because they must have interfered with the publick use—The cabildo, who were the governor's council, were right in refusing permission to erect any buildings—the auditor was perfectly correct in the opinion he is said to have given, and the publick had a right to the free use of the property for the purposes of navigation. They were all right then, because Gravier had not enclosed the alluvion land, and by making a new levee and tow path on the bank of the new made ground, given the publick the accommodation the law required—But they would have been perfectly wrong if Gravier had at that time offered as the proprietors do now, to reclaim the land from the inundation of the river, and by erecting a tow path, a levee, and commodious wharves, give the publick ten-fold the convenience to which they were entitled by law. Thus we see, that all the material facts proved by the advocates for the title of the United States, confirm and strengthen that which I assert to be in Gravier and those who claim under him, and I may, without flattering myself, believe that I have fully established the following points:
I. That the 'Jesuits' plantation was like all the others on the river, bounded in front by the river itself.

II. That no alteration took place in the front boundary of any of the subdivisions of that plantation by the sales of 1763.

III. That the alluvion formed in front of that plantation, belongs to the proprietors of the several subdivisions:
   1. By the general law of France.
   2. By that of Spain.
   3. By the particular laws of this province while under the French government.
   4. By virtue of the allodial tenure by which they were held.

IV. That the alleged relinquishment by Gravier, is too uncertain to give title: and if proved, only serves to destroy the other arguments used by the advocates of the United States.

V. That the acts relied on as possessory by the government, are perfectly consistent with my title, and rather serve to strengthen than destroy it.

The view I proposed to take of the arguments urged in favour of the claim of the United States to this property is now finished. Let it be read with attention. Let those whose duty or inclination calls them to decide on these pretensions, examine carefully the principles and study the authorities cited to show that this was never of right a part of the sovereign's demesne. Let this be done without prejudice or partiality, and though all my prospects of fortune are involved in the decision, I shall await it without anxiety. I have hesitated long before I resolved on its publication; but the unwearied pains which are daily taken to slander my title, and render my property useless, require that I should take some steps to counteract them.

This must be my apology for discussing a legal question before the publick.

EDWARD LIVINGSTON.

December 10, 1807.
NOTE A.

L'AN mil sept cent soixante trois, le jour du mois de Juillet, huit heures du matin, en vertu d l'arrêt du conseil supérieur de la province de la Louisiane, en date du neuf du présent mois, rendu sur la requête de Monsieur La Frénière procureur général du roi, portant et ordonnant que tous les biens meubles et immeubles appartenant aux ci-devant soi-disant Jesuites, seront judiciairement vendus par devant Monsieur Foucault, contrôle de la marine et second juge au conseil supérieur de cette province, commissaire nommé en cette partie, et en présence de mon dit seigneur le procureur général du roi, pour les reniers en provenants être mis sous la main du roi. En conséquence de quoi, nous Denis Nicolas Foucault, contrôleur de la marine et second juge au conseil supérieur de la province de la Louisiane, commissaire nommé en cette partie, en présence de Monsieur le procureur général du roi, et accompagné du greffier et de l'huissier dudit conseil, nous sommes transportés à la barre de la cour à l'effet de procéder pour le premier fois à recevoir les criés et enchères pour parvenir à la vente et adjudication au plus offrant et dernier enchérisseur, d'une terre et habitation située près de cette ville, appartenant aux ci-devant soi-disant Jesuites, où étant, vu le procès-verbal des publications et affiches publiées et apposées en conséquence dans tous les lieux et endroits ordinaires et accoutumés de cette ville de la Nouvelle-Orléans, par Marin Lenormand, huissier, en date de dix-sept dudit présent mois, et s'y étant trouvé nombre d'enchérisseurs, nous avons fait publier et proclamer à haute et intelligible voix par l'huissier crieur que l'on allait tout présentement procéder pour la première fois à recevoir les criées et enchères pour parvenir à la vente et adjudication au plus offrant et dernier enchérisseur d'une terre et habitation No. 1er. ayant sept arpents de face joignant aux fortifications de cette ville, couvrante de soixante-deux degrés du nord à l'ouest, la limite au-dessus des dits sept arpents, courant soixante-quatre degrés quarante huit minutes trente-neuf secondes, vingt-deux toises et demi du nord à l'ouest, sur cinquante arpents de profonder, ensemble avec tous les bâtiments qui sont dessus, consistant en deux maisons principales, cuisine, magasins colombiers, briqueterie, indigoterie, cabanes à nègres et clôtures, circonstances et dependances, sans en rien reserver ni retenir, tel que le tout se consiste et comporte, appartenant aux ci-devant soi-disant Jesuites; aux clauses et conditions par l'adjudicataire de payer le prix de son
In the year 1763, the day of the month of July, at eight in the morning, by virtue of a decree of the Superior Council of the Province of Louisiana, dated the ninth of the present month, pronounced at the instance of Mr. La Freniere, Procureur General of the King, declaring and ordering that all the estate real and personal, of the persons heretofore calling themselves Jesuits, should be judicially sold before Mr. Foucault, Comptroller of the Marine and Second Judge of the Superior Council of this Province, Commissioner named in this respect, and also in the presence of the said Procureur General, in order that the proceeds may be placed at the disposition of the king.—

In consequence whereof we, Dennis Nicholas Foucault, comptroller, &c. in the presence of, &c. and accompanied by, &c. went to the bar of the court, for the purpose of proceeding, for the first time, to the sale at auction of a parcel of land and plantation, situated near this city, heretofore belonging to the said persons calling themselves Jesuits, where being arrived, and having seen the advertisements, &c. we caused to be published and proclaimed with a loud and intelligible voice, by the cryer, that we were about to proceed, for the first time, to receive the bids and offers, in order to make sale, to the highest bidders, of a tract of land and plantation, No. 1, having seven acres in front, adjoining the fortifications of this city, running sixty-nine degrees from the north to the west, the upper line running north sixty-
four degrees forty minutes and thirty-nine seconds west, by fifty
acres in depth, together with all the buildings which are thereon,
consisting of two principal houses, a kitchen, store, pigeon-house,
brick-kiln, indigo-works, negro huts and enclosures, with all its
circumstances and dependencies, without reserving or retaining
any part thereof of whatever parts the whole may be composed,
and as it now is, [tel que le tout se consiste et comporte] bounded
on one side by the city and on the other by the lot No. 2, being a
part of the estate belonging to the persons calling themselves Je-
suits, &c.

TRANSLATION.

PROCEEDING OF SALE OF THE JESUITS.

In the year 1763, on the 14th day of July in the same year,
we, the undersigned councillor of the king, inspector of the
roads, and surveyor general of the province of Louisiana, do de-
clare to all whom it may concern, that by virtue of the orders of
Mr. Dabbadie, commissary general of the navy, Ordonnateur of
the said province, rendered the thirteenth of the present month,
by which we were directed to transport ourselves on the habitation
of the persons entitling themselves Jesuits, situated above and
bordering on the glacis of the fortifications of the city of New-
Orleans, there to examine the titles and papers relative to the
possessions of the aforesaid persons and to survey the lands, which
we found ought to contain thirty two arpents of front on the ri-
ver, "de face sur la fleuve St. Louis," according to the said titles,
papers, plans and minutes, "proces verbeau" of survey, herein
after mentioned, made by the late Mr. Broutin, the former engi-
neer, then charged with the surveys of the colony. To wit, twen-
ty arpents of front, measured on the perpendicular of fifty-four
degrees from north to west, running to the depth of fifty arpents,
which shall, however, be reduced to forty arpents in case it should
anticipate on the lands not yet conceded or to be conceded—
which lands M. de Bienville, the former commandant and gover-
nor of the said province, has sold on those conditions and in allo-
dium, [franc alen] to the persons calling themselves Jesuits, by
an act passed on the 11th April, 1726, in the presence of André
Chavre, notary, au Chatelet de Paris.

Also, five arpents in front, "en face" measured on a straight
and oblique line, running along the said river, and above and bor-
dering on the twenty mentioned above, sold to them with the
same depth, with the same rights and privileges as the preceding,
by the att Mr. de Noyau, lieutenant in the service of the king,
attorney in fact for the said Mr. de Bienville, by a private act,
dated January the 22d, 1728.
Also, seven arpents of front, seven arpents measured, as adjoining, and above, the five preceding arpents and with the same depth, which the said Jesuits had purchased from Mr. Breton, comptroller of the navy, and first councillor of the superior council of this province, by an act passed on the 13th of December, 1743, forming together with the preceding acquisition the totality of thirty-two arpents of front, mentioned by the said Broutin, in the proces verbal of the 30th December, 1728, of the 19th January, 1736, and of the 18th and 23rd December 1745.

Conformably to the different operations delineated on the plan made by him on the 19th of June, 1736, and the 23rd December, 1745, &c.

P. 148—In the year one thousand seven hundred and sixty-three, the 24th November last, we, councillor of the king, inspector of roads, and surveyor of the province of Louisiana, do declare, that in virtue of orders given by the commander general of the said province, we went with Mr. Pigeor, L. L. on the lands which had belonged to the Jesuits, situated above and bordering on the fortifications—for the purpose, at the request of Mr. La Tussiere, to divide the thirty-two arpents of land mentioned in our proces verbal of the 22d of July last, the judicial sale of which took place on the following, at the greffe of this city, to wit:

1. Seven arpents of front on fifty of depth for the first lot, bordering on the glacis of the said fortification, adjudged the aforesaid day to Mr. Pradel, lieutenant in the navy, commanding the king's ship La Solomon, then in this harbour.

2. Five arpents of front, with the same depth, for the second lot, situated above the first, and bordering on the same, adjudged the same day to Mr. Larrivée, merchant.

3. Five arpents of front, with the same depth, for the third lot above, and bordering the second, adjudged the same day to Mr. Grenier, merchant.

4. Five arpents in front, by the same depth, for the fourth lot, adjoining to and above the third, adjudged the same day to Mr. Bonrepos, an ancient officer of infantry.

5. Five arpents in front, on the same depth, for the fifth lot, adjoining to and above the fourth, adjudged to Mr. Sollet, citizen of this town.

6. Five arpents in front, by the same depth, for the sixth and last lot, adjoining to and above the fifth, adjudged to Messrs. Durand, Brothers, merchants. All purchasers summoned to be present, at the operation of surveying, distribution and delivery of the said parcels of land—at which they were all present either in person or by their attorneys, viz. Mr. Amlet, knight of St. Louis, engineer in chief of the king, acting for Mr. Pradel the son, purchaser of the second lot, late belonging to Mr. Larrivée, after the said adjudication, as appears by the act passed between.
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them dated the Mr. Lamotte, acting for Mr. Grinier, absent."

[Then follows the proces verbal of the placing of the posts to show the direction of the literal line next the city, and the record then proceeds.]

"On which line, and at the point D. we have, on the 28th of the present month, replaced our instrument six toises above the said point A, to ascertain with precision the extent of front of those lands on the river St. Louis, the distribution of which at right angles could not take place, according to the dispositions of the first plan, which circumstance compelled us to make new ones, still relative, however, to those mentioned in our proces verbal of the 22d July last, by two straight lines running along the river, the first of which DE, formed an angle of 111 degrees with that of the said boundary of sixty degrees."

The record then sets forth the geometrical operations for dividing the six several lots, and that after having measured off the first and second lots, which then both belonged to Mr. Pradel, "they opened an angle of 117 deg. with the said line of conduct" (ligne de conduite) to direct the limits between this habitation (now that of Gravier) and No. 3."

After describing minutely the operation of division, it concludes thus, "And as there remains on the upper end of the land late belonging to the Jesuits, according to the plan of our operations, a tongue of land forming the figure of an isosceles triangle, comprehended between the line of boundary GLL. and the dotted line G. K. it shall remain between these limits to be used as need may require hereafter.

"In testimony whereof we have agreed to and signed the present proces verbal with the said sr. Pigeon, and the said purchasers or their attorneys afore named in the former part of this record, to have the proper effect, and serve as a field book [papier terrier] annexed to the plan of survey, and of the distribution of the said land into the six lots above mentioned. Done at New-Orleans, the 22d of the month of December, in the year 1763.

"Signed,


"I require in the name of the king, that the present proces verbal should be homologated; that it may have its full and entire effect; that the decree which may be pronounced may serve as letters of possession irrevocable and incontestible to the purchasers of the six lots of the land belonging to the former company of Jesuits. New-Orleans, 24th April, 1764.

"Signed LA FRENIERE."

"The Superior Council of the province of Louisiana having seen the proces verbal of the division of the lands of the ci-devant
company calling themselves Jesuits, made out by Mr. Oliver Devezin, and the conclusions of the procureur general of the king, the council hath ordered, and hereby doth order, that the said proces verbal shall be executed according to its form and tenor, and shall remain homologated as is above stated.

"Signed,

"D'Abbadie, Zuchel, De Kernion Aubry, Faucault, Marrenel, Murhuise, and De Amney."

NOTE B.

Monsieur,

ETANT de la dernier consequence que la levée de vos terres soit dans le meilleur état, vous prendrez des mesures avec Monsieur de la Barre, régidor perpétuelle, alguazil mayor, pour ré-commoder la dite levée, à commencer de l'endroit où mon dit Sr. de la Barre vous indiquera. Votre exactitude reconnu ne me laisse pas la moindre doute du zèle avec lequel vous remplirez cette ordre.

Je suis, Monsieur,

Votre serviteur,

LE BARON DE CARONDELET.

Nîle-Orléans, 10 Mars, 1794.

A Mons. Gravier.

.......... Translation.

Sir,

IT being of the greatest consequence that the levee of your land should be in the best condition, you will please to take measures with M. de la Barre, perpetual register and alguazil mayor, to repair the said levee, beginning at the place which the said Mr. de la Barre will point out to you.

Your known punctuality leaves me no doubt of the zeal with which you will obey this order.

I am, sir, your servant,

THE BARON DE CARONDELET.

New-Orleans, 10th March, 1794.

To Mr. Gravier.
Adjudication de six arpents de terre appartenante aux ci-devant soi-disant J suites.

A dix heures du matin.

L'AN mil sept cent soixante trois, le quatrième jour du mois d'Aout, dix heures du matin, en vertu de l'arrêt du conseil supérieur de la province de la Louisiane, en date de neuf Juillet dernier, rendu sur la requête de M. La Frenière, procureur général du roï, portant et ordonnant que tous les biens, meubles et immeubles, appartenant aux ci-devant soi-disant Jésuites, seront judiciairement vendus par devant Monsieur Foucault, contrôleur de la marine, et second juge au conseil supérieur de cette province, commissaire nommé en cette partie, et en présence de mon dit sieur le procureur général du roï, pour les deniers en provenance être mis sous la mains du roï: en conséquence de quoi, nous Denis Nicolas Foucault, contrôleur de la marine et second juge au conseil supérieur de la province de la Louisiane, commissaire nommé en cette partie, en présence de M. le procureur général du roï, et avec le greffier et l'huissier du dit conseil, nous sommes transportés à la barre de la cour, à l'effet de procéder pour la première fois à recevoir les criées et enchères pour parvenir à la vente et adjudication au plus offrant et dernier enchérisseur, d'une terre située de l'autre bord du fleuve, en remontant, distante de ce lieu d'une lieue et demie, appartenante aux dits ci-devant soi-disant Jésuites, où étant, vu le procès verbal des publications et affiches publiées et apposées en conséquence dans tous les lieux et endroits ordinaires et accoutumés de cette ville de la Nouvelle-Orléans, par Marin Lenormand, huissier, en date du vingt-quatre Juillet dernier, et s'y étant trouvé nombre d'enchérisseurs, nous avons fait publier et proclamer à haute et intelligible voix, par l'huissier crieur, que l'on allait tout présumentement procéder pour la première fois à recevoir les criées et enchères pour parvenir à la vente et adjudication au plus offrant et dernier enchérisseur, d'une terre ayant six arpents du terre de face sur la profondeur ordinaire de quarante arpents, la limite courant au nord et sud pliens, situés à une lieue et demie de cette ville, d'autre bord du fleuve, en remontant, circonstances et dépendances, sans en rien reserver ni retenir de fond en comble, tel et ainsi que toute sa poursuite et comporte, attestée d'un côté à l'habitation de la dame veuve Dauphin, et de l'autre côté attenante à une pareille terre appartenante aux dits ci-devant Jésuites, où toute personnes seront reçues à y enchérir aux clauses et conditions par l'adjudicataire, de payer le prix de son adjudication dans huit mois du jour d'icelle, en donnant bonne et suffisante caution, et de payer comptant tous les frais faits pour parvenir à la dite adjudication, entre les mains du greffier avant d'être mis en possession. Et après avoir attendu
jusqu'à midi sonné, sans que personne se soit présenté pour faire leur dite enchère, nous commissaire sous dit et soussigné, du con- rentement de mon dit sieur le procureur général du roi, avons ordonné et ordonnons que nouvelles affiches seront publiées et apposées dans tous les lieux ordinaires et accoutumés de cette ville, le Dimanche quatorzième présent mois d'Aôut, pour en ve nir au Vendredi dix-neuf dudit mois à dix heures du matin, au quel jour il sera procédé à la deuxième criée et en chère, et où toute personnes seront reçues à y faire leurs dites enchères aux susdites clauses et conditions ; et ont signé les jour, mois et an que dessus.

(Signé)   LA FRENIERE.

FOUCAULT.

Certifie conforme à la minutes, folio 213, d'une liaise intitulée Proces des Jesuites, et déposée en ce moment au greffe du conseil de ville.

Nîle.-Orléans, le 10 Octobre, 1807.

Mee. BOURGEOISE, Sec.-Greffier.

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NOTE D.

Je soussigné, arpenteur député pour le comté d’Orléans, certifie n’avoir jamais vu aucune concession depuis plusieurs années que j’exerce dans le comté, aucune concession dis-je, soit Française ou Espagnole, située sur le fleuve, qui ne fut bornée par le fleuve, et que toutes ces concessions disent pour exprimer leur étendue “tant d’arpens de face,” ou “tant d’arpens de face au fleuve,” et tant de profondeur ; que la manière de mesurer cette étendue se fait en tirant une parallèle au fleuve, (autant qu’il est possible) ou par une perpendiculaire à l’un des côtés, mais que cette ligne ne designe jamais la limite de la face des habitations ; que les bornes que l’on planté ne sont jamais au commencement de la ligne de côté que pour désigner la direction que doit avoir cette ligne ou l’air de vent qu’elle doit courir et que jamais on n’a planté des bornes pour marquer la ligne de face. En foi de quoi j’ai délivré le présent certificat.

Nîle.-Orléans, le 10 Décembre, 1807.


.............

I, the subscriber, deputy surveyor of the United States for the county of Orleans, certify that during many years that I have pursued my profession in this country, I have never seen any concession or grant, either French or Spanish, of any lands on the
Mississippi, which was not bounded by the river itself; and that all those concessions or grants, to designate such boundary, use these expressions, "so many acres in front," [de face] or "so many acres of front to the river," [face au fleuve] by so many in depth; that the manner of measuring this extent is done by drawing a parallel as nearly as possible to the river, or by a perpendicular one of the sides, but that this line never designates the front limit of the plantation; that the land marks which are placed in the beginnings of the said lines are intended only to show the directions which those lines ought to have—but that boundaries are never placed to mark the extent of the land towards the river. In witness whereof I have given this certificate. New Orleans, 12th December, 1807.

(Signed) LAFON, Dep. Sur.

Nous soussigné, ci-devant capteur grade des armés, arpenteur royal et particulier de la province de la Louisine pour S. M. Cath. certifions et declarons, que pendant vingt huit années, que nous avons exercé l'emploi d'arpenteur général de cette province, qu'il a toujours été en notre connaissance, que les concessions des terres sur les rives du Mississippi, prennent leurs faces sur la bord du fleuve même, et ou viennent batture les eaux lorsqu'elles sont dans leurs plus grande croissance. Quant aux bornes fixées pour limiter les terains, n'étant uniquement destines qu'à marquer la direction des limites ou airs de vent, elles ont toujours été plantées à une distance arbitraire, pourvu neanmoins que la voie public qui doit regner sur les rives du Mississippi ne fût point obstruée.

En foi de quoi, j'ai délivre la presente, a la Nll.-Orléans.

CHARLES TRUDEAU.

Le 17 Mars, 1808.

TRANSLATION.

I, the subscriber, heretofore captain by brevet in the royal army, royal surveyor for the province of Louisiana for his Catholic Majesty, do certify and declare, that during twenty-eight years that I have performed the functions of surveyor general of this province, it has always been in my knowledge, that the concessions of lands on the borders of the Mississippi, have their fronts on the edge of the river itself, and when its waters are at their greatest height. As to the boundaries placed to limit the lots, being only destined to mark the direction of the limits, or
the point of the compass, they have always been placed at an arbitrary distance, taking care that the publick road which ought to go along the bank of the Mississippi, should not be obstructed thereby.

In testimony whereof I have delivered these presents, at New Orleans, 17th March, 1808.

(Signed)

CHARLES TRUDEAU.

NOTE E.

TESTIMONY OF LAVEAU TRUDEAU,
Recorder of the City of New Orleans, and formerly Surveyor General of the Province.

THAT governor Bienville ceded to the Jesuits the property now in controversy, upon a perpetual rent—that after the confiscation of the property of the Jesuits, by the king, the lands were divided into smaller divisions, and two lots were sold by the officers of government to Madame Pradel, two to Mr. Duplessis, and the sixth to Mr. Durand—has seen the plan of the ground, with the divisions, made by Mr. Olivier, surveyor general at that time, which were delivered to him at the time of the conquest of the Spaniards—that he believes all the surveys and plans were destroyed by the fire which took place in 1788—has never seen the concessions to the Jesuits, but has seen the original plan of the grant—That since his earliest recollection the road ran as it now does, as far as Madame Delor's—is now seventy-three years of age, and is a native of this country—that the concessions or grants at that time were always face au fleuve—that since the purchase of Madame Pradel and of Bertrand Gravier, he stated to him that he had fifty acres in depth—that he remembers that at the time of the sale of the Jesuit's property, vessels came to the levee opposite to Madame Delor's—that there was then no bat- terie from thence to the city—speaks of some time in 1762 or 1763—that the concession to the Jesuits, he believes was like all the others, that is, from the river at its greatest height, according to the instructions given to the surveyors—Knows the plan produced signed by him the 1st April 1788—the first sketch or draft which he made at the request of Bertrand Gravier—the Fauxbourg has since been extended by Bertrand Gravier in depth—that the lots in front marked as sold, and the square since added are in the hand writing of Bertrand Gravier—that a batture then existed and was considerable in the upper part of the Fauxbourg—that he measured it at that time at the upper end, and laid it down accordingly, but that towards town he laid it down accord-
ing to his judgment—that at the extremity of the line marked on
the map he came to the water—the descent was toward the river
and gradual—the batture was formed as all others are, by the
natural deposit of the river—in high waters it was covered to the
levee—that surveys were always regulated according to his in-
structions, by which he understood the royal road or publick
highway—the batture he always considered as an alluvion, and al-
though it did not form any part of the depth, yet he always con-
sidered it as much the property of the proprietor as the rest.
That he knows also the plan produced being the second one,
which he made immediately after the other, which was nearly a
sketch, with the additions made by Bertrand Gravier—that he
made it by order of Bertrand Gravier—has frequently spoken to
Bertrand Gravier on the subject of the alluvion, and particularly
at the time of making the last plan—always answered that by sel-
lng the front lots he considered himself as freed from the expense
of the road and levee, and that he had no right to sell the alluvion
—that he, the witness, always thought differently. That there
were many disputes about the reparations of the levee, in the time
of the Baron de Carondelet—that he recollects three facts—that
Mr. Poeyfarré was put in possession of a lot marked No. 7, on
the last plan, marked No. 2, with initials—that he discovered that
he had advanced 28 feet, nearly up to the road, when he told
Poeyfarré that Gravier would take as much in the rear—that
Poeyfarré told him that Gravier had abandoned the batture [de-
vanture] to him, and afterwards seeing Gravier, he said it was
true, and if he wished it he would go to the publick office—that
the witness understood by devanture, not only the space between
the lot and the road, but the whole extension of the batture in
front. That his mother-in-law had purchased the lots numbered
28, 29, and 30, at the corner of the street now called Girod—that
a small angle being left between her lots and the street Girod,
the witness applied to Mr. Gravier for its purchase, and at the
same time requested that he would sell Madame Trudeau the de-
vanture opposite those lots, to which Bertrand replied that
would not sell it, as he had abandoned it to the proprietors of the
lots fronting the river.—Being called upon to establish the lines
of the lots No. 66 and 69, on the borders of Mr. Faucher's land
—Mr. P. Fauchet also solicited B. Gravier to sell the batture in
front, when Gravier answered that he would not sell, as he had
abandoned it, but he would permit Fauchet to enjoy it—Witness
told Gravier that he thought he had a right to sell that property,
to which he answered that he would have nothing to do with it,
that he, however, might measure it off for Mr. Fauchet—That
when Mr. Gravier answered that he had abandoned it, his impr
ession was that it was to the Fauxbourg generally. That the latter
circumstance took place in 1792, 1793, or 1794, does not particu-
larly recollect.
IN Spain the Justinian code is declared to be the common law of the kingdom, which is to decide in all cases where the edicts are silent. This appears not only from the practice of citing from that code, but among a number of other authorities, by the following: Gom. in leges tauri, page 4, No. 1. "In this kingdom in the decision of cases, first and above all we are to be ruled by the laws of Toro, afterwards in their order by the ordinances and edicts of this kingdom, and the laws of the Partidas, although usages and customs are not prohibited, but afterwards, where these are deficient, we must determine according to the common law of the Roman jurisconsults and the emperors.”

By referring therefore to these sources we discover the law of Spain on the subject of alluvion, and I believe, without the slightest ambiguity, establish the following positions:

1. That the bank of a navigable river is, to the water’s edge, the private property of the owner of the adjacent soil, though the public are entitled to its use for the purpose of navigation.

2. That the bank comprehends all the land down to the usual summer channel of a river, but is not affected by a periodical or accidental swell of the river.

3. That when the land shall encroach either by alluvion or the retiring of the water, that the space thus gained becomes the property of the proprietor of the original soil, but that the public retain their use of the new bank for the purposes of navigation.

4. That the interposition of a public road does not form any impediment to the acquisition of this right.

5. That when an alluvion is once formed its future encroachment belongs to the proprietor of the first alluvion.

I. POINT—ROMAN LAW.

Dig. lib. 41, tit. 1. 30. § 1.—"Celsus the son, says, if a tree grows on the bank of a river which is opposite to my land, the tree is mine, because the soil itself is my private property, though the use of it is understood to be in the public, and therefore when the river is dried up, it shall belong to the adjoining proprietors, because the public has no longer the use of it.

2. Inst. tit. 1, § 5.—"The use of banks as well as of rivers, by the law of nations, is public, and any one has a right to moor vessels to them, by ropes to the trees growing thereon—to deposit their lading there—as well as to navigate the river; but the property thereof belongs to those to whose land they join, for which cause the trees growing thereon belong to them."
SPANISH LAW—I. POINT.

3 Partidas, law 6, tit. 28—"The rivers and ports and publick ways, belong to all men in common, so that strangers may use them as well as inhabitants. And although the banks of rivers belong as to the dominion, to those to whose estates they are joined, yet notwithstanding this every man may use them, tying their vessels to the trees which grow thereon; mooring their ships, and depositing their sails and merchandize thereon, and the fishermen may also place their fish there, and sell them, and dry their nets and use the shores for all such things as belong to their trade."

Ibid, law 7.—"All the trees which are on the banks of the rivers belong to those who have the ground adjoining to the banks, and they may cut them or cause them to be cut, or do with them what they please."

II. POINT.

 Dig. lib. 43. tit. 12, § 5.—"A bank properly defined, is that which contains the river in the natural course of its waters; but it does not change its banks when it is at times swelled, either by showers or by the sea, or by any other cause, for no one has ever yet said that the Nile, which covers Egypt by its encrease, has thereby changed its banks, but when it is reduced to its usual height, the banks of its channel may be dyked in. But if it shall have naturally risen as to obtain a permanent encrease by the confluence of another river, or by any other means, without doubt in that case, we should say it had changed its banks, in like manner as if, having changed its bed, it should begin to run in another course."

Ib. §.—"If a river shall overflow, but not make to itself a new bed, then that is not publick which is thus overflowed."

III. POINT.

C. lib. 7, tit. 41.—"Although it may be not lawful to change the course of a river by making another by manual labour, yet it is not prohibited to guard its bank against the force of a rapid river—and when having left its former bed, it shall make another for itself, the land which it surrounds shall belong to the first proprietor; but if this take place by degrees and is thus applied to the other part, that by the law of alluvion shall belong to him whose land is thus encreased."
By this law, which we sanction as perpetual, we order that whatever is acquired to the proprietor by alluvion (either in Egypt by the Nile, or in the other provinces by other rivers) shall neither be sold by the treasury, nor demanded by any other, nor separately estimated nor burdened with duties.

Dig. lib. 41. tit. 1. 7. § 1. & Inst. lib. 2. tit. 1. § 20—
Whatever the river adds to our land is ours by natural law; that shall be considered as added by alluvion, which has increased by such slow degrees that we do not know how much, and what particular time it was added—but if the force of the river shall detach a part of thy field and add it to mine, it shall remain thy property.

SPANISH AUTHORITIES—III POINT.

3 Partidas, law 26—Rivers (a) swell sometimes so that they take away and diminish the inheritances that are situate on their banks, and they give to and increase others that are on the opposite side.—Therefore we say that whatever is carried off by a river by little and little so that the quantity cannot be perceived because it is not taken off in a body, this shall be gained by the owner of that inheritance to which it is added.

Ib. law 31—Rivers sometimes change the places in which they used to run, making to themselves a new course, and leaving dry the place where they formerly flowed.—And whereas contesitations may arise who ought to have the part that is thus left dry, we say that it belongs to those whose inheritances adjoin, each one taking a part according to his front on the river, and those through whose land it begins to run anew, shall lose the ownership thereof, for the space which it covers, which from that time shall be of the same nature with the other place over which it used to flow, and shall be changed into publick property like the river.

IV. POINT.

Dig. lib. 41. tit. 1. § 38.—Attius had a field on the publick road—Beyond the road was the river and the land of Lucius Titus; the river by little and little encroached and took away the land which lay between the road and the river, and afterwards the road itself—afterwards by degress it receded, and by means of

(a) This is to be understood of a public river. Com. Greq. Lopes.
Alluvion again occupied its former bed—On this case he answers, when the river took away the land and the publick way, the en-
crease on the other side the river belonged to him whose lands
were there; afterwards when by little and little it retired, it took
it away again from him whose lands had been encreased, and ad-
ded to him whose lands were beyond the road, because his land
was nearest the river; that however which belonged to the pub-
lick [the road] was not acquired by any one. Nor was the road
(he says) any impediment to prevent the land which was made
beyond the road from becoming the property of Attius.

§ 3...

Alluvion restores that land which the force of the
river hath taken away; therefore if the land which was between
the publick way and the river be occupied
by
the river, (whether
this happen by little and little or not) and it be restored at once
by the retiring of the river, it belongs to the former proprietor.

For rivers perform the office of publick assessors, they adjudge pri-
vate property to the publick, and publick property to private per-
sons."

V. POINT.

Dig. 41. 1. 56....An island arose in the river opposite the front
of my land so that its length did not exceed the front of my pro-
erty; afterwards by degrees it encreased and extended itself
opposite the fronts of my upper and lower neighbours—I ask whe-
ther the encrease is mine, because it is added to my property, or
whether it is the right of him to whom it
would have belonged
if
it had first arisen at the extremity of its present length?

Proculus answers: The river in which you state the island to
have arisen in such manner that it does not exceed the extent of
your front, if it has the right of alluvion, and the island in the
beginning was nearer your land than the other shore, the whole is
yours—although it hath so happened that the island hath extend-
ed opposite the part of your upper and lower neighbours, or even
though it should extend so as to be nearer the land of him who
possesses the opposite shore.

NOTE G.

AFFIDAVITS OF LA ROCHE AND SEGUR.

LA Roche, being duly sworn, doth depose and say, that in the
year seventeen hundred and ninety-five, and for some time previ-
ous thereto, Laurent Segur, the father-in law of this deponent,
had a contract for supplying the royal navy of Spain with masts.
That in the spring of the said year, a very large raft of masts
having come down the river, and that part of the shore below the city where they had been usually placed, being very much encumbered, the said Segur desired the deponent to go to the governor (then the baron de Carondelet) to get his directions where he should deposit the said masts.

That the deponent accordingly went to the Baron de Carondelet, with Mr. Lovio, the minister of marine, who, after hearing the statement of the case, directed the deponent to go to Bertrand Gravier, and request him in his (the governor's) name, to give permission to lay said masts on the batture in front of the faubourg—adding that if Gravier refused, he would endeavour to find some means of making him consent.

That the deponent accordingly went to Gravier, with the governor's message, who readily consented, and the masts were accordingly placed on the batture, where they remained for a long time, at least eighteen months.

And this deponent further saith, that some time after the period above spoken of, and as he thinks in the year seventeen hundred and ninety-eight, Bertrand Gravier being then dead, he was again sent on a similar message to governor Gayosa, then governor of the province, who directed the deponent to go to John Gravier, the present proprietor, and ask his permission to lay up the masts on his batture, which the deponent did. Gravier consented, and the masts were accordingly placed on the batture opposite to Mr. Eva's the captain of the port, and from thence upwards.

And the deponent further saith, that Bertrand Gravier had for a number of years, a very large brick-kiln and that he always took the earth for the same, from the said batture, and from no other place.

Sworn to and signed before me, March 21st, 1808.

ROCHE.

LAURENT SEGUR, being duly sworn, deposes and saith, that he sent the above deponent La Roche to the governors Gayosa and Carondelet, at the several periods and for the purposes mentioned in the preceding deposition, and that the answers then reported to him by the said La Roche, as coming from the Baron de Carondelet, governor Gayosa, Bertrand Gravier and John Gravier, perfectly accord with the statement in the above deposition.

Sworn to and signed before me, March 21st, 1808.

B. VAN PRADELLES,
Justice of Peace.

L. SEGUR.

B. VAN PRADELLES,
Justice of the Peace.