IN the month of August, 1717, the king of France made a grant to the West-India company, the fifth article of which 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 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 M. Crozat, by our letters patent, dated 14th September, 1712, to enjoy the same in full property, lordship and justice, reserving to ourselves no other rights but fealty and liege 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 they are empowered to grant lands in *franc-aleu* or *allodium*.

In the year 1726, M. De Bienville, governor of the province of Louisiana under this charter, grants to the company of the Jesuits twenty arpents in front, on the river Mississippi, by fifty in depth, to be held in "*franc-aleu*."

The order of the Jesuits being suppressed, and their property annexed to the crown, the plantation was divided into six lots, each fronting the river, and in the year 1763, sold to different persons. Two of these lots, by sundry descents and mesne conveyances were vested in John Gravier, the present party.

By the 15th article of the charter to the West-India company, the custom of Paris is established as the law of the province,
In the year 1762, before the sale of the Jesuits' property, the province of Louisiana was ceded by France to Spain, but possession was not taken until 1769.

The purchasers under the sale of 1763, have never been disquieted in their possession by the Spanish government after the transfer of possession.

Along the whole course of the Mississippi, a dyke or levee is thrown up, in order to restrain the water at the time of the annual inundation, which usually continues six months in the year, and by which the whole country would otherwise be covered, as the land on each side is lower as it recedes from the river until it reaches the sea.

Within the dyke is a highway, which, as well as the dyke or levee, is made and repaired by each inhabitant, as far as it extends along his land. The publick have always used the land between the dyke and the river for tracking boats, and other purposes of navigation. But as alluvions are frequent in that country, the inhabitants have always exercised the right of enclosing such alluvion lands by a new levee nearer the river, whenever the alluvion was of sufficient importance to bear the expense, giving to the publick a new road, and always leaving them the same right of using the ground between the new dyke or levee and the river, which they had before.

Between the dyke and the river, opposite the twenty acres sold by governor Bienville to the Jesuits, a considerable alluvion has been formed at different periods, since the year 1763, and possibly in some slight degree prior to that time.

The alluvion was not of sufficient value until the year 1803, to indemnify the proprietor for making a new levee, and of course the publick enjoyed it in common with the other lands between the dyke and the river, for tracking their boats, and other purposes of navigation, during the season in which it was not covered with water, that is to say, about six months in the year.

In the year 1788, the proprietor of this land laid out that part which lies within the road, into lots, and formed a
suburb: at that time a considerable alluvion had been formed. In selling the line of lots which fronts the road, he sells them by certain fixed boundaries, and according to a map on which the lots were delineated, but none of them are bounded on the river or go beyond the road.

In two or three instances he conveys besides the lots, the alluvion land in front thereof, reserving a servitude of digging earth on the alluvion.

There is evidence that at the time this suburb was laid out, the proprietor, being called on to make the road and levee, verbally declared that he conceived himself discharged from this duty, and that as he had sold the front lots he had abandoned the alluvion, but there is an uncertainty as to the nature of this abandonment: one witness says he declared it was to the city; another to the inhabitants of the suburb; and a third that it was to the publick. Since that time, from 1793 to 1803, the roads have been kept in repair once or twice by the publick criminals, the rest of the time by the inhabitants whose lots fronted the road. It is also in evidence that some short time after the establishment of the suburb, the governor directed all the buildings which had been erected (a few temporary sheds) to be demolished; but this is accounted for in two ways without considering it as an act of ownership. 1st—Because the publick had a right to use the land between the dyke and the river, for the purposes of navigation, although the property remained in the proprietor of the adjacent soil: the governor therefore (who was also judge) had a right to remove all buildings which obstructed this use, until the proprietor should by erecting a new levee, and making a new road nearer the river, give the publick the same facility of navigation which they had before. 2nd—It was proved by the clerk of the cabildo, or governor's council, that he had officially made the proclamation for demolishing the buildings, and that it was because they stood in the range of the fort guns.

All the proprietors of land on the Mississippi, without any exception (unless the present case may be considered as
one) have uniformly occupied and enjoyed the alluvion formed in front of their respective farms, without any claim being set up, either by the French, Spanish or American governments—and it is also to be remarked, that the proprietors of the other divisions of the Jesuits' farm, have always, without interruption, enjoyed their alluvion, although they hold under grants made at the same time, and in the same words with those in question. By treaty, dated 30th April, 1803, the province of Louisiana was ceded to the United States, and by the third article the inhabitants are to be secured in the possession of their property.

In the year 1804, John Gravier, the proprietor of the land, finding the alluvion of sufficient value and extent to justify the expense, threw up a dyke, enclosing a portion of about 500 feet square.

The inhabitants of the city of New-Orleans, had, prior to this period, 1804, as far back as the oldest witnesses could remember, been in the practice of digging sand from this alluvion, or making mortar, and filling the streets. This seems to have been permitted on account of the trifling value of the land, but about the time last mentioned Gravier opposed this practice; the corporation then claimed it as a right, and Gravier filed a petition to the Superior Court of the territory, stating his right to the alluvion, and that the inhabitants of this city, disturbed him in the enjoyment of it, by digging the soil, and by publications tending to discredit his title, and praying that the corporation might set forth under what title they claim, and that he might be quieted in his possession, and they be perpetually enjoined from troubling him therein.

To this petition the mayor, aldermen and inhabitants, answer by first denying that Gravier is the owner.

2. By stating that B. Gravier, the ancestor of the plaintiff, had abandoned the alluvion to the publick, since which the levees have been repaired by the publick or by the city, that since that abandonment the inhabitants had never ceased to enjoy the use of the alluvion, for piling wood, unloading:
boats, &c. That some individuals under the Spanish government had built houses thereon, which by order of government were destroyed.

The case being at issue on these pleadings, was heard at three several periods, and at length decided on the 23d May, 1807, by the decree, a copy whereof is annexed, in which the bench was unanimous.

After this decree a motion was made for a new trial; the ground relied on was that the alluvion belonged to the United States, and therefore the plaintiff could not recover. The court however rejected the motion, declaring that there was no colour of title in the United States. The judgment was confirmed and in the month of June following, carried into execution by the sheriff, who served the injunction on the defendants, and put the plaintiff in possession of that part of which he had been deprived.

Gravier having sold to Edward Livingston and Peter De La Bigarre the greater part of this alluvion; after the decree, they took possession, and having made a partition, Mr. Livingston began to make improvements on his portion, and upon the 25th of January, 1808, had expended about 13,000 dollars thereon—On that day a letter was received by the marshal of the district, from the secretary of state, telling him that it was the direction of the president that he should “go to the place called the batture, in front of the suburb St. Mary, and drive off all persons whom he may find thereon, who have taken possession since the 3d March, 1807.” But neither Mr. Livingston, nor any other person under whom they claimed, had received any intimation or notice whatever, that any such proceedings were intended, or any citation to shew or defend their title. On the 25th of January, Mr. Livingston presented a petition, a copy of which is annexed, praying an injunction against executing the president’s order. This injunction was granted and served, but disregarded by the marshal, who called out three regiments of militia, and drove off Mr. Livingston’s workmen. These proceedings are understood to have had been

And it is stated by the president, that he acted under an official opinion of the attorney general, that the land belonged to the United States.

Mr. Livingston can prove actual damage, in consequence of these proceedings, exclusive of the value of the property, to more than 40,000 dollars, for this year alone.

The Superior Court of the territory of Orleans is a court in the last resort, from whose decrees there is no appeal.

On these facts the answer of counsel is required to the following questions:

I.—By what law is the claim of the proprietor of the twenty arpents front of the alluvion land, to be determined? By the law of Spain, to whom the country was conveyed prior to the sale in 1763? Or by the laws of France who actually held the country until 1769? If by the law of France is it not incumbent on the party contending for that law as the rule of decision, to shew that there was an alluvion formed between the year 1763, and the year 1769?

II.—There being no dispute as to the Spanish law, in case that is resorted to, it is required to know what is the law of the late kingdom of France, on the subject of alluvion on navigable rivers; does it belong to the king or the proprietor of the adjoining soil?

III.—What is the law on this subject, by the custom of Paris?

IV.—What is on this subject the law of the French colonies generally, and of Louisiana in particular, as it stood before the Spanish laws were introduced there?

V.—Did not the royal right of alluvions in those provinces of France, where it formerly prevailed, depend on the principles of feudal tenure; and will the king have it when it is granted in franc-aleu?
VI.—Does under the law of the late kingdom of France or of Louisiana as one of its colonies, or under the custom of Paris, the right of the publick to use a road along a navigable river, debar the proprietor whose lands are bounded on the river, of the right of alluvion?

VII.—Will the verbal declaration of the proprietor, that he had abandoned, deprive him of his property, without any evidence in writing, or any proof of the precise terms, time, and conditions of abandonment, or will it operate when the evidence is of the uncertain nature stated in the facts?

VIII.—Have the United States under the circumstances of the case now stated, any title to the land called the batture in front of the suburb St. Mary?

IX.—Was the order to dispossess the occupants of the batture, a legal exercise of the power vested in the president by the law of the 3d March, 1807?

X.—Was not the judgment of the court such a prima facie evidence of title, as should have entitled Gravier, and those claiming under him, to the right of a trial before he could be dispossessed?

XI.—If the law of the 3d March, 1807, should, in terms, authorise the proceedings that have taken place, is not the law itself unconstitutional and void?

XII.—Was it lawful in the president to issue his warrant before the commissioners had reported according to the proviso in the latter clause of the first section of the law?

XIII.—Has Mr. Livingston any action, and against whom for his damages?
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No. I.

\[ \text{John Gravier,} \]
\[ \text{vs.} \]
\[ \text{The Mayor, Aldermen,} \]
\[ \text{and Inhabitants of the} \]
\[ \text{City of New-Orleans.} \]

On a suit to quiet the plaintiff in the possession of the alluvion land, or batture fronting the suburb St. Mary.

JUDGMENT OF THE SUPERIOR COURT

OF THE TERRITORY OF ORLEANS.

1st.—The title of Bertrand Gravier, the ancestor of the plaintiff to the tract of land on which the fauxbourg St. Mary is situated, has not been disputed; but it has been contended that this tract was bounded by the highway; the court however are of opinion, that according to the evidence exhibited, and the general usage of the country, this tract of land was bounded by the river Mississippi.

2d.—From the examination of the authorities, the court are of opinion, that according to the civil and Spanish laws, the right of alluvion is incident to land which is bounded by a navigable river, and that these laws must form the rule of decision in the present case.

3d.—If Bertrand Gravier therefore had continued proprietor of the whole tract on which the fauxbourg has been established, there would be no difficulty in determining his title to the alluvion; but Bertrand Gravier had devested himself of all title to that part of his tract on which the fauxbourg is established, by selling the lots fronting and adjoining the highway. It is therefore important to enquire what was the situation of the batture or alluvion in question, at the time the fauxbourg was established; or at least when the front lots were sold, for if no alluvion existed at that time, when Bertrand Gravier ceased to be the owner of the land adjoining the high road, then it is the opinion of the
court, that an alluvion subsequently formed, would not become the property of Bertrand Gravier. The reason of this opinion is, that if Bertrand could be considered as proprietor of the road, after selling the adjacent land, or of the levee lying between this road and a publick river, he would nevertheless not possess that title of property which gives the right of alluvion, for the destruction of this property, by the encroachment of the river, would be a publick and not a private loss, since it could not be appropriated to the use of any individual, and the said road and levee would have become necessarily liable to be kept in repair at the publick expense.

It is however the opinion of the court, from the evidence adduced in this cause, that antecedent to the time when Bertrand Gravier ceased to be the proprietor of the land adjacent to the high road, that a batture or alluvion had been formed adjoining the levee, in front of the fauxbourg, upon the river; and that this alluvion was then of sufficient height to be considered as private property, and had consequently become annexed to, and incorporated with the inheritance of Bertrand Gravier.

4th.—Bertrand Gravier having then acquired by alluvion, the property now in dispute, it is to be considered, whether he has devested himself of his title to the same? the court are of opinion that he has not. The evidence of abandonment is merely conversation, which past a long time ago; it is not very explicit and is much impaired by the circumstance of Bertrand Gravier having sold a part of his batture to one of the front proprietors. It would be dangerous to divest a man of his property upon evidence of such declarations, without any proof of a consideration.

With respect to the claim of prescription, it is sufficient to observe, that there has been no exclusive possession on the part of the defendants, and consequently they have no title on this ground. There are indeed other strong objections to a prescriptive title in this case, but the one we have stated is considered as sufficient.
5th.—With respect to the title of John Gravier, as found-ed on the inventory, appraisement and adjudication, which have been adduced in evidence in this cause, it is the opinion of this court, that they are not bound to determine the va-lidity or invalidity of this title. First, whether John Gravier has purchased the whole, or only inherited an undivided part, his claim to be quieted in the lawful enjoyment of the pro-perty in question, against the adverse pretensions of the city, to the property of the soil, or the right of carrying it away, is sufficiently strong to enable the court to form a decision of the present case.

It is therefore ordered, adjudged and decreed by the court, that the petitioner be quieted in his lawful enjoyment of the batture or alluvion, described in his petition, against the claims and pretensions of the defendants, and that the in-junction heretofore granted in this case be made perpetual.

No. II.

To the Honourable the Superiour Court of the First District of the Territory of Orleans:

THE PETITION OF EDWARD LIVINGSTON, OF THE CITY OF NEW-ORLEANS, COUNSELLOR AT LAW,

Humbly Showeth:

That John Gravier by virtue of sundry grants from the crown of France, and divers mesne conveyances under them, in the month of November, in the year of our Lord, 1805, was possessed of and entitled to a certain farm, or parcel of land, part of which had been previously laid out into streets and lots, and was and is known by the name of the suburb St. Mary: That the said farm had, for sundry years past, increased by an alluvion formed by the river Mississippi, which is the front boundary of the said plantation, and which
by the laws of the land, became (in proportion as the same was formed) the property of the said John Gravier, and of the several proprietors of the said plantation under which he held, and was incorporated into the body of the said plantation, and by the laws aforesaid was so held as part of the same.——But the said John Gravier, and those under whom he claims, have uninterruptedly held the said plantation, of which the said alluvion so formed a part, for upwards of eighty years, until some short time previous to the month of November, 1805, when the mayor, aldermen and inhabitants of the city of New-Orleans, having disturbed him in the enjoyment of the said alluvion, he presented his petition to the Superior Court, to be quieted in his possession, and relieved against the said disturbance, and that such proceedings were thereupon had, that the said Superior Court on the 23d of May, 1807, pronounced the decree, a copy whereof is hereunto annexed, in pursuance of which decree the said John Gravier was put in peaceable possession of the said alluvion, and the said mayor, aldermen and inhabitants, were perpetually enjoined from disturbing him therein; and your petitioner shows that since the rendering the said judgment, he hath purchased from Nicholas Girod, and the trustees of Peter De Labigarre, under the title of the said John Gravier, and from the said John Gravier himself, in all, for the sum of eighty thousand dollars and upwards, all that part of the said plantation and alluvion, which is bounded on one side by the road and on the other by the Mississippi river, and extends from the limits of the city to the street called rue Jullié, of which your petitioner was put in possession, and on which he has expended very large sums in improvements, and particularly in making a canal and levee, which are nearly complete: That your petitioner is informed, and verily believes, that the president of the United States, being ignorant of the true circumstances of your petitioner's title, but instigated as he believes by some malicious misrepresentations of your petitioner's enemies, has given directions to F. L. B. Dorgenoy, the marshal of the district, to remove your
petitioner by force from the said piece of land, so purchased by him as aforesaid; and that under colour of an act entitled, “An act to prevent settlements being made on lands ceded to the United States, until authorised by law,” which law, as your petitioner is advised and believes, cannot apply to your petitioner’s case, as by a reference to the said law will more fully and at large appear.

That if your petitioner is dispossessed at this season of the year, the greatest injury will result to him not only by the destruction of the unfinished works, by the annual inundation which may now in a few weeks be expected, but also by the failure of many contracts he has formed, and by the loss of the revenue arising from his canal and basin, for the next year.

And your petitioner shows, that the navigation of the river will be greatly impeded by the half finished works, and that the greatest danger is to be dreaded to the health of the city from the existence of a temporary dyke which it was your petitioner’s intention to have removed prior to the rising of the waters.—Wherefore, and inasmuch as the said order must have unadvisedly issued, as the same is contrary to the treaty by which this country is ceded to the United States, to the laws thereof, and to the constitution, and particularly to that article which declares that no private property shall be taken for publick use without just compensation; and also in direct violation of that part of the ordinance for the government of this territory, which directs that no man shall be deprived of his liberty or property, but by the judgment of his peers or the law of the land:

May it please your honours to enjoin the said F. L. B. Dorgenoy, marshal, from executing the said order, and to grant to your petitioner such other relief as the nature of his case may require.

EDW: LIVINGSTON.

Signed and sworn to in open Court, 25th January, 1808.

J. W. SMITH, Clk.
Let an injunction issue agreeable to the prayer of the petition. 25th January, 1808.

GEO. MATHEWS, Jun.
JOSHUA LEWIS.

I hereby certify that the foregoing is a true copy of the original petition and order on file in this office.

J. W. SMITH, Clk. S. C.

March 28, 1809.

Answers to Mr. Livingston's Questions,
by Mr. Ingersoll and Mr. Rawle.

1.—The law of that kingdom to which the country belonged when the title of the individual commenced, whether the present proprietor, or those under whom he claims, must govern. Whatever was expressed in the contract at the time of the first grant or conveyance from the crown or sovereign proprietor, is of course binding; and whatever from the then existing law of the country was implied, in relation to the subject of the contract, is equally binding. Whether the alluvion then existed or not, is consequently immaterial. It is a part of the contract that if at a future day it shall be formed, it shall go to the grantor or grantee, as the case may be.

The 2d, 3d, 4th, 5th, and 6th, questions turn on this general and important point. The law of France on the subject of titles to land, has not been a part of our regular studies. To hazard an opinion from an occasional view of it in the present instance, cannot be expected from us. We deem ourselves at liberty only to go so far as to say, that having attentively perused the opinions given by M. Derbigny, of
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New-Orleans, on the one side, and M. Du Ponceau on the other, the weight of argument and authority appears to us clearly and amply in favour of the latter.

7.—This question is in a degree connected with the five preceding ones....It must depend on the laws of a foreign country, with which we are not conversant. As the facts are stated to have taken place while the country belonged to the Spanish crown, the question must be determined by the laws of Spain. We can only say, that if by the laws of that country the consequences supposed by M. Derbigny would flow from what is stated to have taken place on the part of M. Gravier, it must be a very singular and a very dangerous code, and that such consequences would not ensue by the laws of the United States.

8.—If John Gravier at the time of the cession of Louisiana to the United States, possessed a right to the alluvion in question, we are perfectly satisfied that the cession did not deprive him of it. The third article of the treaty of April 30th, 1803, expressly guarantees to the inhabitants of the ceded territory, their property as well as their liberty and religion.

The second article indeed professes to transfer only the publick property, and it would be injustice to suppose that any thing less was intended.

If at the time of the transfer, 1803, the alluvion did not exist, and if by the laws of the United States alluvions were publick property, a question might be raised, which, even under these circumstances, we should have little difficulty in deciding in favour of M. Gravier....But neither the fact nor the law occasions any doubt in this case; not the fact, because the alluvion was then very considerable; nor the law, because with us it is perfectly settled, that as to lands gained from the sea, either by alluvion, by the washing up of sand and earth, so as in time to make terra firma, or by dereliction, as when the sea shrinks back below the usual water marks, if the gain be by little and little, it shall go to the owner of the land adjoining; but if sudden and considerable, it goes to the state.
The 9th, 10th and 12th, may be considered together. It appears to us impossible to consider the proceedings of the executive, as authorised by any existing acts of Congress. The fourth section of the act of March 3d, 1807, authorises the marshal, under the instructions of the president, to remove from the "lands aforesaid," every person who shall be found on the same, and who shall not have obtained permission to remain thereon as aforesaid.

To ascertain what is meant by the "lands aforesaid," we recur to the first and second sections, where it appears to refer to lands ceded or secured to the United States by a treaty with a foreign nation, or a cession of any particular state, which shall be taken possession of after the passing the act, and which lands have not been previously sold, ceded, or leased by the United States, or the claim to which lands by such person has not been previously recognised and confirmed by the United States....The provisions extend to all the lands of the United States. In respect to the territory of Orleans, there is a special proviso, that nothing therein contained shall be construed to affect the right, title or claim of any person to lands, before the board of commissioners shall have made their reports, and the decision of Congress be had thereon.

Three commissioners were appointed by virtue of two acts of Congress (see dates and titles, vol. 7, 288, and vol. 8, 118) and the first of these laws sets out with a full and express confirmation of French and Spanish titles, if accompanied with actual possession, as therein mentioned.

The nature of the several rights or claims to lands, the mode of proceeding and reporting to the executive, in order that the matter may be laid before Congress, are described at large.

According to the case laid before us, M. Gravier, or those under whom he claims were in possession of the batture or alluvion at the time the act of March 2d, 1805, was passed. The possession as a matter of fact is established by the judgment of the Superior Court.
This possession as a matter of right, against the mayor, aldermen, and inhabitants is established by the same judgment. This document then of itself, shows that he is not one of those lawless intruders against whom alone the president is authorised to direct the summary and resistless powers given to him by the law.

We confess ourselves at a loss to discover by what chain of reasoning the executive administration of the United States have been able to bring such a case within the purview of these acts.

11.—In answer to the 11th question we can only say, that an act of Congress intended to authorise such proceedings as have been adopted in the present instance; forcibly and without a judicial hearing to dispossess those who for so many years have held a possession sanctioned by the laws of the foreign government under which title was originally acquired, solemnly promised by treaty to be secured to the individuals; recognised and confirmed to the full extent of the whole controversy before the court, by that portion of the powers of government which the constitution and laws of our country had invested in the highest judicial tribunal existing in the country....That such a law would not only be unconstitutional and void, but meet the severe reprobation of every thoughtful man, of every lover of his country, of every citizen of the United States.

13.—Mr. Livingston can maintain an action against the marshal and all who assisted him for his damages.

JARED INGERSOLL,
W. RAWLE.

Philadelphia, 3d Aug. 1808.
Answers, &c. by Mr. Edw. Tilghman and Mr. Lewis.

The case stated by Mr. Livingston for the opinion of counsel, respecting his right to a part of the batture in front of the suburb St. Mary, at New-Orleans, seems to rest on grounds, and depend on principles, on which a satisfactory opinion may be given, so far as is necessary, without taking particular notice of the several questions proposed.

It is stated that the order of the Jesuits (to whom 20 arpents in front on the river Mississippi, by 50 in depth, had been granted, in allodium in 1726) being suppressed, their property was annexed to the crown of France; that this plantation was divided into six lots, each fronting the river, and sold in 1763, to different people, under some of whom M. Gravier, or rather Mr. Livingston derives title. It is therefore unnecessary to enquire, what the law of France respecting alluvions, was before or at this period, or whether any alluvion had then taken place, and equally so to consider, whether alluvion can in any case belong to the crown or state, in the case of allodial land; or where a whole province with all the lands, coasts, ports, havens and islands, within which the alluvion takes place is granted to one or more subjects, since the grant by the crown in 1763, to the person under whom Mr. Livingston claims, is stated to be fronting the river Mississippi, and it is therefore immaterial whether the crown held the alluvion, if any there was, by one title or the other.

It is also stated, that in 1762, before the sale of the Jesuits' property, the province of Louisiana was ceded by France to Spain, although possession was not taken by the latter till 1769. We have not the treaty containing this act, nor can it (we believe) be easily procured, but it is reasonable to presume, that when the cession was rendered complete by a change of the possession, Spain became entitled to all the rights, and no more, which France had at the date of it, except so far as the same was prevented by intermediate
grants from the crown of France, while she continued to exercise acts of sovereignty therein, and hence it follows that France had no right to any alluvion after 1762, the date of the cession, or at most after 1763, when she made grants of the Jesuits' tract, bounded on the river.

Nor could Spain have the right of alluvion after either of these periods, since it is admitted, that by the laws of that nation, alluvion is incident to land which is bounded by a navigable river, and belongs not to the crown, but to the owner of such land.

This being the case, we can see no room to doubt, but that all the increase by alluvion, from 1762 or 1763, to October 1, 1800, when Louisiana was retroceded by Spain to France, clearly belonged to the owner of the land, which gained it, and if it did, France acquired no right to it by the act of retrocession.

It is hardly necessary to consider, on what law the right of alluvion, in the legal sense and meaning of the word, between the 1st of October, 1800, when Louisiana was ceded by Spain to France, and the 30th of April, 1803, when it was ceded by the latter to the United States, depends; since the accumulation or recovery of soil from the river, between these periods, could not have been of sufficient height, to be capable of separate appropriation, and the object of distinct property from that of the first land.

The account given of a supposed abandonment of the bateau, or alluvion, by Bertrand Gravier, is so vague and uncertain, and is in itself of such a nature, that it would not be regarded by our law, and it is strange indeed if it would be by any law: but as this depends on that of Spain, of which we have but very little knowledge, we shall leave it for the consideration of others. If he did not devest himself of it, the conclusion is, in our opinion, irresistible, that the United States have not the smallest colour of right to it. But unfounded as the title of the United States is, it seems to us, that the means used by them, or rather by the executive authority, to possess themselves of it, are not built on a more substantial basis.
The act entitled "An act to prevent settlements being made on lands ceded to the United States, until authorised by law," passed the 3d of March, 1807, under which the president is understood to have acted, provides among other things:

1.—That if any person shall, after the passing of it, take possession of, or make a settlement on any lands ceded or secured to the United States, by any treaty or cession, until thereunto duly authorised by law, he shall forfeit, &c. and moreover it shall be lawful for the president of the United States, to direct the marshal, or other person acting as such, in the manner therein after directed, and to take such other measures, and employ such military force as he might judge necessary, to remove from lands so ceded or secured to the United States, any person who should thereafter take possession of the same.

2.—That it should be lawful for the marshal after the first of January then next, under such instructions as might be given by the president, to remove from the land aforesaid any persons who should be found on the same, provided that three months notice should be previously given to such persons, as were settled on the same, prior to the passing of the act.

From the nature of alluvion, and especially of that gained from the Mississippi, there can be, during its accretion, hardly any other possession of it, than that which attaches to the possession of the land which gains it, or which remains in the proprietor thereof, after he may have parted with the land to which it had incorporated itself, and this we think a sufficient possession for all legal and reasonable purposes, so as to take the case out of the act. In addition to this, it is stated that the alluvion was of not sufficient value until the year 1803, to indemnify the proprietor for making a new levee, but that “in 1804, John Gravier, the proprietor, thinking it of sufficient value and extent to justify the expense, threw up a dyke of five hundred feet square of the alluvion,” and if it belonged to him, and if there was no ex-
And miscellaneous repertory. 456

Elusive adverse possession, this undoubtedly gave him complete possession of the whole of it, as fully as the act could by any fair or reasonable construction require. But what seems to remove all doubts on this head, is that about this time, Gravier opposed a practice, which had occasionally prevailed, for the inhabitants of the city to take sand from the alluvion, for the purposes of making mortar and filling the streets, on which they claimed it as a right, and he thereupon presented a petition to the Superior Court of the territory, stating his right to the alluvion, complaining of the disturbance, and praying that the corporation might set forth under what title they claimed it—that he might be quieted in his possession, and that they should be perpetually enjoined from troubling him therein; and it was so proceeded, that after a full hearing, the court declared on the 23d of May, 1807, that the alluvion belonged to Gravier, and ordered, that he be quieted in his lawful enjoyment thereof, and that the injunction which had been formerly granted, be made perpetual; and in June following the decree was carried into execution, by the sheriff's serving the injunction on the defendants, and putting the plaintiff into possession of that part of which he had been deprived. These proceedings, together with the previous statement, seem most incontestibly to prove that John Gravier could with no propriety be considered as a person taking possession after the passing of the said act, of lands ceded to the United States, and before he was thereunto authorised by law; and if so, it necessarily follows, that this case is not within the provisions of the act, and that the president had no authority to dispossess him under it.

It is however stated, that M. Gravier having after the decree, sold a considerable part of the alluvion to M. De Labigarre and Mr. Livingston, they took possession—made partition thereof between them; that the latter expended considerable sums of money in the improvement of his part; that on the 25th of January, 1808, the marshal of the district received a letter from the secretary of state, telling him
that it was the direction of the president, that he should go to the place called the batture, in front of the suburb St. Mary, and drive off all persons whom he might find thereon, who had taken possession since the 3d of March, 1807; and that in violation of an injunction granted by the same court to prevent it, the marshal executed this order by taking three regiments of militia, and driving off Mr. Livingston's workmen. It is added that it was stated by the president that he had acted under the official opinion of the attorney general, that the land belonged to the United States, and it is also added that neither Mr. Livingston, nor any other proprietor or person under whom they claimed, had received any intimation or notice of any such proceeding being intended, nor were they called upon to show or defend their title.

The third article of the treaty of April 30th, 1803, by which France ceded Louisiana to the United States, expressly guarantees to the inhabitants of the ceded territory, their property, as well as their liberty and religion, and no act of congress, if it were possible to suppose them capable of intending it, could constitutionally authorise the president to deprive them of either. *That, under which he is supposed to have acted, does not direct the mode by which he shall ascertain whether the lands on which individuals may be settled are secured to them by treaty, or whether they belong to the United States, under the general words of the cession, nor whether they were taken possession of before or after the passing of the act—Nor whether it was by intrusion or by regular process and judgment of the law, but it very properly leaves him to pursue the legal means of enquiry, and when this is done, to cause the removal of any lawless intruders.*

A due regard for the rights of property, the security of individuals and the laws and constitution of the country, therefore required, that before force, and especially military force was resorted to, a legal inquest of these several matters, which were all essential to his jurisdiction, should have taken place under a special writ of enquiry, framed according
to the spirit of the act, and adapted to the case, or in a prosecution for the penalties incurred by intruders against it, or in some other legal manner, where the party might be heard, and have an opportunity of showing and vindicating his rights, whatever they might be; but instead of this, the president appears to have referred an *ex parte statement* to the attorney general, and on his *ex parte opinion*, to have determined in an *ex parte manner*, that the alluvion or batture in front of the suburb St. Mary, was not the property of individuals, guaranteed to them under the solemnity of the treaty—that the possession thereof was not "authorized by law," although the record of the highest legal tribunal in the territory showed that it was, and that M. Gravier, after having been disturbed, was not such an intruder as the law contemplates, but was legally put into possession by the sheriff, under the judgment and process of law; and what is still more extraordinary the president appears to have left it to the marshal, a mere ministerial officer, altogether unauthorised to judge in the case, to determine who had taken possession before or after the passing of the act, and without regarding whether it was by the judgment of a court or not; for the orders to him are stated to be "to go to the batture and drive off all persons whom he might find thereon, who had taken possession since the 3d of March, 1807." This order is not only as general in its nature but as illegal in its principles, if not as dangerous in its consequences, as any general warrant ever was; for it sets at nought a law of the United States—a solemn treaty, and the decision of a legal tribunal of the last resort; and we are therefore of opinion, that those who issued it, the marshal who obeyed it, and all who aided and assisted in its execution, are joint trespassers and answerable in damages to Mr. Livingston, for the wrong and injury which he has thereby sustained.

EDWD. TILGHMAN.

W. LEWIS.

Philadelphia, Aug. 16th, 1808.