No. 11444

Supreme Court of Illinois

Pres.& Trustses of the Commons of Kaskaskia

vs.

McClure

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DOCKET NO.	AGENDA NO.
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SUPREME COURT.

SOUTHERN GRAND DIVISION.

MAY TERM, 1896.

Pro Trustee

vs

McClure

IN THE

Supreme Court of Illinois,

SOUTHERN GRAND DIVISION.

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MAY TERM, A. D. 1896.

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The President and Trustees of the Commons of Kaskaskia,
Plaintiff in Error,

vs.

WILLIAM McCLURE, Defendant in Error.

—o—

ERROR TO RANDOLPH COUNTY.

—o—

Statement Brief and Argument,

—BY—

H. CLAY HORNER,
T. B. WHITLEDGE,
Attorneys for Defendant in Error.

—o—

CHESTER, ILL.:
CHESTER TRIBUNE STEAM PRINT
1896.

IN THE

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vs.

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STATEMENT.

The very lengthy brief and argument of appellant does not shed much light on the points really in issue. In 1743, the French Governor of Louisiana granted the *inhabitants of the Parish* of the Immaculate Conception of Kaskaskia certain lands. In due course of events, familiar to this Court, this French territory became a part of the State of Virginia, and in 1783 Virginia ceded all

her rights to the Government of the United States, one of the conditions of the act of cession being that "The French and Canadian inhabitants and other settlers of the Kaskaskias * * * shall have their possessions confirmed to them."—Act of Congress, Dec. 20. 1783. In 1809, Commissioners of the United States reported on the claim for this Common, speaking of it as a tract of land which "*seems* to have been bounded" by the two rivers, as shown by the plat.—2 Am. State Papers, 148. Congress "confirmed" the "decisions" of these Commissioners.—U. S. Stat., vol. 2, 607.

Now, many years ago, *an Island* formed in the Mississippi River in front of this land. It has always been an Island, though in late years, since the remarkable change of the main channel which has put Kaskaskia and all the land in controversy *west* of the main channel of the Mississippi, at time of low water there is dry land between the Island and the shore. On this state of facts, the Trustees of these Commons (created by the act of 1851 with authority to subdivide and lease) bring ejectment for the Island, claiming it *in fee*. Appellee denies that the French grant includes *Islands in the river*, and insist on twenty years' adverse possession also. Judge G. W. Wall, who tried this case, sustained appellee's position that under the French law governing this grant the appellant cannot claim Islands, and also held that there had been twenty years' adverse possession by appellee. In argument, we will consider these two points separately, and while so considering them, will incidentally reply to the various arguments of counsel.

BRIEF.

1.—Every grant of land must be governed by the law in force in the country at the date of the grant. O'Fallon, Ex'r, v. Daggett, 4 Mo., 346; Morgan v. Reading, 3 Smede & M., 404; Canal Appraisers v. The People. 17 Wend., 588. These cases are selected because they are like this case.

2.—The Law of "Las Siete Partidas" (the seven parts) so frequently cited by counsel is the code of Spain promulgated in 1343, and was not in force in Louisiana until 1769—a quarter of a century after our grant in 1743. See Moreau & Carleton's preface to their "Las Siete Partidas," XVIII–XXIII; Canal Appraisers v. People, 17 Wend., at page 588.

3.—The ancient French law in force in 1743 gave the riparian owner to the water's edge, but excluded all Islands in the river. Canal Appraisers v. People, 17 Wend., at page 592; Mackenzie's Roman Law, 178; Livingstone's article, Am. State Papers, vol. II, 39.

4.—The confirmation of this grant by the United States Government simply admitted its validity and added nothing to its force. The grants in point 1 *supra* were so confirmed. Langdeau v. Hanes, 21 Wal., 521; Richart v. Felps, 33 Ill., 433.

ARGUMENT.

The grant must be governed by the ancient French law. The confirmation of the grant is not a new grant to be construed according to the common law rules. In O'Fallon's case, 4 Mo., 346, the grant was made by the Governor of Louisiana after the Spanish law "Las Siete Partidas" had become the law of Louisiana; the grant so made was confirmed by our Government. The Court said, "The Spanish Government granted the land to the water's edge; this grant must be interpreted, understood, limited and restrained according to the law of the country in force at the time the grant was made." In the Canal case, from 17 Wend., *supra*, Chancellor Walworth assumed that the confirmation simply recognized the grant, and entered into an extended discussion of the law in force at the date of the grant. Our own Court says a confirmation is a declaration of the United States that "they had no claim to the land."—33 Ill., at page 439. And the Supreme Court of the United States declares the Virginia act of cession only required titles to be confirmed—no new title was to pass.—Langdeau v. Hanes, 21 Wal., 521. Then what was the law of France in 1743? Counsel have based their entire argument on the Spanish code which was never in force east of the Mississippi River, and which was not in force in Louisiana until 1769, when it was established by Count O'Reiley's proclamation who represented Spain.—17 Wend., 588, point 2 brief, *supra*. Nearly every enlightened nation, excepting England, reserved actually navigable rivers to the public. The Spanish code mentioned did

so.—2 M. & C., "Las Siete Partidas," 348, § 31. So did the French code Napoleon.—McKenzie's Roman Law, 178. So did the civil law, which was followed by most of these codes. The common law rule that the riparian owner owned the *soil under the water* to the thread of the stream is peculiar to England, and is in force in Illinois. The writer of this brief, in the case of Griffin v. Johnson, just decided by this Court, presented that phase of the common law for the consideration of this Court. There is no difference between counsel and ourselves on the common law rule. Nor do we contend that the accretions or alluvion, *i. e.*, imperceptible additions to the *shore* or *bank*, do not pass by the grant involved in this case. The common and codified law of every country and time seems to have agreed on this point. But the land in controversy is *an Island*, and the *real question is*, what was the French law in 1743 as to Islands arising in the river? Chancellor Walworth, in 17 Wend., at page 592, says, "By the French law, *even before* the adoption of the Napoleon code, Islands which were newly formed in the bed of a navigable river belonged to the Crown as the lord paramount, according to the principles of the Feudal system." Lord McKenzie's Roman Law, 178, declares that the Roman law giving Islands to adjoining owners "has been adopted in the modern French code so far as regards *private* rivers not navigable for vessels or rafts; but where an Island springs up in a public river, it is held to belong to the State if there is no title or prescription to the contrary." As noted above, this was the law *before* the code was adopted. By reference to 2 American State Papers, 39,

it will be seen that in adopting this code Napoleon, it was admitted, by the French Jurists to whom the code was submitted, that the law had always been as stated by Chancellor Walworth above quoted. There then is the law governing this grant as to the Island—it belongs to the Government—the public.

We do not mean to be understood as meaning that counsel *intentionally* present an unfair abstract. We do say that it *is* very unfair, one-sided, and incomplete. A voluminous record is thus thrust upon us with but a short time to straighten it out. In their *Statement*, at page 21, they seem to question the fact that this is an Island, and call it an accretion. It is an *Island*, so designated by all the witnesses and so expressly held by Judge Wall. Appellant's *Abstract* shows all of plaintiff's witnesses so called it, and so did plaintiff's counsel. No one questioned this below—not even the Surveyor.

Appellee also claims by virtue of twenty years' adverse possession. This chain of adverse possession is perfect, but appellant's abstract might as well not have been made for it shows nothing. In '70, Vince Panel owned part of the Island and Brewer had the other part. —these are mentioned by witnesses as the middle and lower parts. The upper part is no longer in existence. These men sold to McCauley, who sold in writing to Strong, in 1873, the whole Island, and Strong sold it back to McCauley, who sold by deed to Sides in 1881, who sold by deed in 1884 to McClure, Sr., who sold by deed of October 1, 1889, to appellee, his son. Here is what our witnesses say:

Joseph Panel, (Rec. 52–57), the first witness offered by the defendant, testified: I know Brewer's Island, between here (Chester) and St. Mary's; have known it all my life. I first lived on there about '69 or '70. A. J. Panel and Vincent Panel were in possession of it when I first went there; they had possession of the upper part of the Island, part of which is washed away, and part is there yet. They (A. J. Panel and Vince Panel) were the first persons on the Island. The next year George Layton and Bill Tucker settled the middle part of the Island, in '70. The next person on the Island was McCauley. Vince Panel bought out Hagan, and then he sold the middle Island to McCauley; that was about 1871. The middle part is what is called McClure's Island now. Brewer also had possession of the lower part; he went there about '71. He sold to McCauley and McCauley took possession. I staid on the Island until '73; then I left and was gone two years, and then I was on there until '81, off and on, made a crop or two, lived there backwards and forwards. There was as much water on the Illinois side as on the other side in 1881; I never saw it go dry while I was there. I fished through there in 1881; that was my fishing ground all the time. I found six feet of water at common stage of water, in July and August.

Q.—State whether the cattle from Kaskaskia Commons, when you first went there, ranged on that Island?
A.—No, sir, never seen no cattle from Kaskaskia Commons; never was bothered with them from Kaskaskia. All the cattle I seen there was boated across from Missouri there; we boated them from the Missouri shore,

but never from the Illinois shore. McCauley and others who owned the Island took cattle for the purpose of pasturing, and got pay for it; they ferried the cattle over every fall.

Q.—State about the fences on that Island? A.—They had a little lot to turn milk cows into, and a lot of horses—that was about all the stock they had on the Island—just to keep them from running over the Island.

Q.—No occasion for a fence? A.—Only for their own purposes; no cattle could get to it from either shore.

Q.—Did you ever measure the distance between that Island from the Missouri shore to the Illinois shore? A.—Yes, sir.

Q.—State what it was, what shore was the Island closest to when you measured, the Illinois shore or the Missouri shore? A.—Well, it was a fraction under a quarter of a mile nearer to Missouri shore than to the Illinois shore.

Q.—Well, to the best of your recollection, when did the water first begin to get low enough so they could ford it during low water between the Illinois shore and this Island? A.—I never saw it that way until now. I left there in '81, and wasn't back there till a couple of years ago, and it never got that way until this "cut-off" came through. It isn't dry now, because we caught fish out of there not more than a week ago; there is a slough in there and fish in it.

Q.—Is it a fact that in an ordinary stage of water, the water runs all around it now, isn't that a fact? A.—Yes, sir.

Cross-examination: Q.—Didn't you hear these men testify awhile ago that that was a sand bar there, no timber on it, and cattle went out there to keep the mosquitos from eating them up? A.—I don't care what they testified; I never seen none. I heard them; yes, sir. If I had seen the cattle there I might have believed it, but I never saw any but what was boarded there.

A. Layton, (Rec. 64–69), next witness for the defendant, testified: I went on the Island in '69; I guess I was the first man that was on there; I was on the upper Island.

The Court—You mean the west end? A.—Yes, sir. Vince Panel was the next man; he settled on the middle Island. The Island was distinguished in three parts then; there was sloughs dividing them, and he took the middle Island. He staid there about a year, and then sold to Josiah McCauley. Vince Brewer owned the lower portion, just below that. He went there about '71; positively in '71 or '72; he was there when I left there.

Q.—Then I understand you to say the Island was divided by sloughs into three portions; you settled the upper portion, Mr. Panel the middle portion and afterwards sold to McCauley, and the lower portion Brewer owned when you were there? A.—Yes, sir.

Q.—State what was the depth of water between that Island and the Illinois shore about the time you were there? A.—I couldn't say anything as to the depth; there was plenty of water on both sides when I was there.

Q.—State if at any time during the year the water went dry between that and the Illinois shore when you was there? A.—No, sir.

Q.—When did you leave there? A.—About the year '72 or '73; I believe probably '73; I won't be positive as to date; not later than '73. I think I was there four crops, as near as I can remember.

Q.—Did any cattle range there from the Commons when you were there? A.—No, sir; no cattle.

Q.—Couldn't get there unless they would swim, could they? A.—No, sir.

Q.—Do you know what has become of the portion of the Island you claimed there? A.—I don't know; I have not been on the Island since I have been back here, but I don't think that any portion that I was on is there now. I think it has all washed away.

Fred. Easters, (Rec. 69–74), the next witness for the defendant, testified: I am eighty-three years old; I was born about two miles from this Brewer's Island, in Perry County, and have lived there all my life.

Q.—Just tell the Judge now, all about the Island, when it first made, and how it was made, in your own way? A.—It first formed by a boat sinking. This Brewer's Island used to be the land of Missouri, and the boats ran right up to the Okaw River; and the boat sunk and the Missouri bank kept caving in, and the water became the channel on this side altogether. There was no water on the other side, and there was the Missouri shore.

Q.—State how you know that was the Missouri shore? A.—I was born there and remained there until this time. That was Missouri, because there was no water on this side. There was a big wood yard there, and

there was no water there, and I hauled many a cord of wood across over to the main bank.

Q.—Where the Island is now, you say you hauled wood there? A.—Yes, sir. The Island commenced by a boat sinking in about '51 or '52; somewhere there, after the overflow; that was the first indication of this Island's forming. It was sunk right close to the bank on the Missouri shore, and then it kept washing around and caving in. The Island was first settled in '68 or '69. McCauley, Brewer, Panel, Layton and Tucker were the first three families there. McCauley and Brewer claimed the lower, and Panel and Tucker claimed the upper. That was in about '68 or '69.

Q.—Have you seen the Island every year since? A.—Nothing to hold me; I have to go right up and down by St. Mary's and can see it by looking right over.

Q.—State whether or not it was known in the neighborhood in which you lived, that McCauley and Brewer owned and claimed that Island? A.—Claimed the lower part. There was two Islands, with the division running east and west—run across that way (indicating). McCauley and him had the lower part, and Panel and Tucker the upper end.

Q.—State whether or not you know, whether stock was taken from the Missouri shore over there and pastured on that Island while Brewer and McCauley owned it? A.—Yes, sir; men took off stock every winter.

Q.—Charged for it? A.—I don't know.

Q.—Now please state about how the water was when first settled, how was the water between that and

the Illinois shore? A.—Well, the boats could go either way, either that side or this side.

Q.—State which shore it, the Island is nearest to? A.—The Missouri; from the main shore it is nearest to Missouri.

Cross-examination: Q.—Now when you first knew it, you say, where this Island now is, how far was that from you? A.—Within two miles from my house, in Missouri.

Q.—And this is now right across from St. Mary's? A.—No, way down below St. Mary's, way down on this side.

Q.—Now that boat sunk right by the Missouri shore? A,—Yes, sir.

Q.—After that boat sunk it began to form a little Island there around the wreck, and the river started out from the Missouri shore and kept running out? A.—Yes, sir; kept coming around the soft Missouri land and it kept slipping.

Q.—You was about two miles from there? A.—Just about two miles from the Island.

Q.—How far are you now from the river? A.—I suppose a little over a mile.

Q.—How far from St. Mary's? A.—I live five miles down this way.

Q.—Have you been on this Island lately? A.—No, I have not.

Q.—You don't know whether any cattle ever grazed there or not, do you? A.—Yes, seen many and many.

Q.—All over during the time these men owned it,

they boated them over from the Missouri shore? A.—No, they would swim them over; didn't have boats and things they have now.

Louis Hagan, (Rec. 73–76), the next witness for the defendant, testified:

Q.—Now do you know this Island in controversy? A.—Yes, sir; slightly acquainted with it.

Q.—How long have you known it? A.—Ever since '68.

Q.—Who was in possession of this Island and claiming it when you first knew it? A.—Well, Vince Panel was the first man I knowed anything about was in possession of it. He had the middle part. I, judge, Brewer had the lower part. I knowed the Island since '68, but in '70 Vince Panel was on the Island. Can't testify who he traded it to, but think McCauley was the man who went there next. Don't know what year Brewer moved on the lower portion.

Q.—State whether or not you know that he (Brewer) did claim to own and did live on the lower part? A.—Yes, sir; I know he squatted, or owned it. I know he lived there and cultivated it.

Q.—He lived on the lower part? A.—Yes, sir.

Q.—And McCauley upon the middle part? A.—Yes, sir.

Q.—State whether or not it was known in the neighborhood that these men claimed and owned that Island, that portion they settled upon? A.—Well, yes, it was well known in the neighborhood; yes.

Q.—How did they use the Island, did they cultivate it? A.—They cultivated it in corn, potatoes, melons and such like stuff as farmers generally raise. Have lived in the neighborhood twenty-six years, in the bottom, right across, three-quarters of a mile from the Missouri shore. Knew Mr. Sides; he at one time lived on the Island. Knew Mr. McCauley: he also lived there. Mr. Sides lived there and Mr. McCauley lived there; they claimed to own the middle and lower portion of the Island.

James Harr, (Rec. 76–80), the next witness for the defendant, testified: Have lived in Perry County, Mo.; have lived there for thirty-five years; live within three and a half miles from the Island. I have known it ever since it was there. Vince Panel was the first person on it. Knew McCauley and Brewer; they lived there and claimed to own it. Dr. Strong claimed to own a portion at one time. Knew Mr. Sides; he lived there once and raised corn on it. McCauley and Brewer lived on the same land that McClures now have.

Q.—State whether or not it was generally understood in the neighborhood you lived, that Mr. McClure, Mr. McCauley, Sides and Panel claimed that land at the time they lived on it? A.—Yes, sir; they were farming there on it and claimed it to be their land.

Q.—State if you know anything about pasturing cattle on it? A.—Yes, I know cattle was brought from the Missouri shore over there and pastured, and horses.

Q.—Do you know about the water between that and the Illinois shore? A.—Well, there was water there when I first saw it.

Q.—When first settled? A.—Yes, the biggest part of the year. There were several years I never seen it go dry, but I suppose there was times when the water was so low that a man could have rode across or waded it. I knew some stock trying to get across there once in a while in the quicksand.

Q.—Now, in your opinion, which State is the closest to it, the main bank of Illinois or the main bank of Missouri? A.—Well, I will tell you. To go to the main bank, the river bank, it is a long ways the nighest Missouri, because where the river bank used to run by John Drews—I boated from the sand bar up there, right where the timber is now they have got in lease—I hauled wood there with oxen and cows, with Frank and Ed Berry.

Q.—There were wood yards on this side? A.—Yes, sir.

Q.—Opposite this Island? A.—Yes, sir.

Q.—Did the boats run through there? A.—There was the main channel up this side when I hauled wood.

Q.—Where the main channel run then, was between this Island and the Illinois shore? A.—Yes, sir; there was no Island there then.

Emmet Dean, (Rec. 80–81), the next witness for the defendant, testified: First knew the Island in 1873. Brewer, McCauley and Panel were the first ones on it when I saw it first. I have knowledge that Layton was there, but did not see him then. Brewer had the lower part, McCauley the middle part, and Panel the upper part. McClure is now occupying the part that Brewer owned at that time. They used the Island for pasturing

stock. I pastured a horse and two mules there in '80 or '81—the horse in '77 or '78. They just turned them loose on the Island. There was water all round, so the stock couldn't get off. The stock staid there all winter. It was known in the neighborhood that Brewer and McCauley claimed to own the Island; I didn't hear anybody else claim it.

Q.—Charged people for putting stock on there? A.—Yes, sir; I paid him by the head for the stock; I believe three dollars, if I don't mistake, a head.

——o——

Appellant condenses Strong's deposition of eleven interrogatories into three lines. This fairly indicates the nature of their so-called "Abstract." Strong says (Rec. 52–56) he bought J. McCauley's middle portion in 1873, by contract of release in writing—owned it two years—had undisputed possession—built houses—fenced and cultivated and pastured the land—paid tax in Missouri and was not assessed in Illinois. In 1885, through Blanford, my agent, I sold to J. McCauley. Do not know what became of my release from McCauley. The "Abstract" of McCauley's evidence is equally incomplete; sixty-five answers are run into twenty-six lines. McCauley says (beginning at Rec. 45), Answer 7 and 12, I purchased in 1871 the middle part; Answer 13, Vince Brewer had lower part from 1870; Answer 15, I bought Brewer out 1879; Answer 16–20, sold by deed to Sides in 1881, that is the deed, we signed and acknowledged it. (This deed, Ex. A, is partially destroyed and signatures are gone—Counsel). Answer 22, I used,

cultivated and pastured it; sold brush to the Government. Answer 22–23, Brewer and I resided on the Island. Answer 26-27, we had fence to separate our lands, but no fence around the Island; there was water around it *all the time*. Answer 28, never knew of stock coming on the Island. Answer 30, we had little stock, and needed no fence. Answer 35, I claimed absolute ownership. It was wild land. I cleared it, cultivated it and lived on it. Cross answer, gave Brown $100 for his part.

The above presents briefly the *salient* features of our evidence. Some of the transfers of possession were *by parol*, but that is proper under the ruling of this court. —Faloon vs. Simshauer, 130 Ill., 649. Against this evidence appellants present a claim that it was fenced off for pasturage by the Commoners. That fence, as shown by Dobbs' cross-examination, was a fence *across the point* on the *main land* that touched the two rivers a mile or so above this Island on each side. This Island was out in the river *opposite the point*, so fenced off, and that is all there is of it. In the same sense, a fence from Memphis to Charleston would enclose the Island of Cuba. It is claimed that occasionally cattle, in low water, would get over from the main land to the Island, and this is what is meant by "pasturing," as used by appellants. Woodly waded "knee deep" to get some of his cattle off, and lost some. Cohen's cattle got over there and he waded over on horseback to get them off. Burch's cattle "strayed" over and could not get back; they stayed there all winter in 1866, and were taken

up as estrays, when he found they were his. The court will search the record in vain for any other "fencing" or "pasturing." This question of possession is a question of *fact*. While there may be a little conflict on the question of cattle straying over, there is none as to our 20 years possession. Judge Wall heard the witnesses, saw their actions and weighed their evidence, and we are sure this court will not make haste to interfere with his finding on this question of fact.

Counsel resist our limitation title by saying appellant is a *quasi* municipal corporation. It is simply a grant of lands to certain people designated as the inhabitants of a prescribed territory, who have assumed a corporate existence, the better to handle the property. It is essentially a private corporation. This court has held (County of Piatt vs. Godell, 97 Ill,. 85) that a county may lose its swamp lands by adverse possession. For a stronger reason should these owners of this common. The public has no interest in the land. This grant and its incidents are relics of the fuedal system still alive in this country. The lands are not school lands, as intimated by counsel. Some of the *rents* derived may be used for school purposes; that is all.

It is claimed that appellant was asked by Assessor Sulser if he had any real estate, and answered "no." Sulser says that was "about six years ago," which would go back to Sept., 1889, and was the May assessment of that year. Appellee did not own the land till October 1, 1889.—(Rec. 67.) The State assessed the land, and it

is claimed it is immaterial who owns it. It is not shown that the appellants ever had it assessed or paid taxes on this land; and, in fact, they never did.

The claim of estoppel set up by appellant is preposterous, even if appellee did not give in the land. Estoppel is based on a fraudulent intent and a *fraudulent* result. See Gillespie vs. Gillespie, 159 Ill.. 84, the latest expression and where the facts are similar so far as disclaiming ownership is concerned.

We shall notice in conclusion a few other points made by counsel.

The claim that the boundary between Illinois and Missouri is the center of the main channel is conceded, but it is the main channel as it existed in 1818. The main channel of the river is now *east of Kaskaskia*, and boats never run on the west side. In the case of Griffin vs. Johnson, just decided by this court, the main channel is now *east* of the Island, and the old channel is cultivated corn-fields. Are Kashaskia and Crain's Island in Missouri? In the St. Louis Bridge case, 123 Ill., at p. 552, (relied on by counsel) it is said that as far back as history or tradition goes the main channel was west of Bloody Island. But all this is immaterial. The law of "Las Siete Partidas," vol. 1, p. 348, § 31, requires plaintiff to measure from bank to bank with a cord, then *double the cord*, and the point on the *intermediate* Island where this half of the cord falls is the thread. Very clear and very simple if it applied in this case. But if it

did apply counsel has not a scintilla of evidence to show he has so measured it and that the land claimed falls on the Illinois side of the half-cord; he relies on the *deep* channel, which may be the narrowest, and in this case our witnesses swear it is the narrowest, and are not contradicted. It is insisted that as the corporate head can only *lease* the land of these grantees no limitation can run. (p. 46 of argument.) Land is often so tied up that it can neither be leased nor sold for a life in being and 21 years afterward. Can no limitation run in such cases? This point is similar to the very remarkable idea (p. 46 of argument) that because the law creating this corporation is a *public law*, and so designates itself, no limitation can run. We confess ourselves utterly unable to answer so profound a suggestion, though we always thought that the difference between a public and a private law was in the matter of getting them in evidence. There are innumerable points like this made seemingly without chart or compass, and we will not follow further.

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T. B. WHITLEDGE,
Attorneys for Defendant in Error.

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her rights to the Government of the United States, one of the conditions of the act of cession being that "The French and Canadian inhabitants and other settlers of the Kaskaskias * * * shall have their possessions confirmed to them."—Act of Congress, Dec. 20. 1783. In 1809, Commissioners of the United States reported on the claim for this Common, speaking of it as a tract of land which "*seems* to have been bounded" by the two rivers, as shown by the plat.—2 Am. State Papers, 148. Congress "confirmed" the "decisions" of these Commissioners.—U. S. Stat., vol. 2, 607.

Now, many years ago, *an Island* formed in the Mississippi River in front of this land. It has always been an Island, though in late years, since the remarkable change of the main channel which has put Kaskaskia and all the land in controversy *west* of the main channel of the Mississippi, at time of low water there is dry land between the Island and the shore. On this state of facts, the Trustees of these Commons (created by the act of 1851 with authority to subdivide and lease) bring ejectment for the Island, claiming it *in fee*. Appellee denies that the French grant includes *Islands in the river*, and insist on twenty years' adverse possession also. Judge G. W. Wall, who tried this case, sustained appellee's position that under the French law governing this grant the appellant cannot claim Islands, and also held that there had been twenty years' adverse possession by appellee. In argument, we will consider these two points separately, and while so considering them, will incidentally reply to the various arguments of counsel.

BRIEF.

1.—Every grant of land must be governed by the law in force in the country at the date of the grant. O'Fallon, Ex'r, v. Daggett, 4 Mo., 346; Morgan v. Reading, 3 Smede & M., 404; Canal Appraisers v. The People, 17 Wend., 588. These cases are selected because they are like this case.

2.—The Law of "Las Siete Partidas" (the seven parts) so frequently cited by counsel is the code of Spain promulgated in 1343, and was not in force in Louisiana until 1769—a quarter of a century after our grant in 1743. See Moreau & Carleton's preface to their "Las Siete Partidas," XVIII–XXIII; Canal Appraisers v. People, 17 Wend., at page 588.

3.—The ancient French law in force in 1743 gave the riparian owner to the water's edge, but excluded all Islands in the river. Canal Appraisers v. People, 17 Wend., at page 592; Mackenzie's Roman Law, 178; Livingstone's article, Am. State Papers, vol. II, 39.

4.—The confirmation of this grant by the United States Government simply admitted its validity and added nothing to its force. The grants in point 1 *supra* were so confirmed. Langdeau v. Hanes, 21 Wal., 521; Richart v. Felps, 33 Ill., 433.

ARGUMENT.

The grant must be governed by the ancient French law. The confirmation of the grant is not a new grant to be construed according to the common law rules. In O'Fallon's case, 4 Mo., 346, the grant was made by the Governor of Louisiana after the Spanish law "Las Siete Partidas" had become the law of Louisiana; the grant so made was confirmed by our Government. The Court said, "The Spanish Government granted the land to the water's edge; this grant must be interpreted, understood, limited and restrained according to the law of the country in force at the time the grant was made." In the Canal case, from 17 Wend., *supra*, Chancellor Walworth assumed that the confirmation simply recognized the grant, and entered into an extended discussion of the law in force at the date of the grant. Our own Court says a confirmation is a declaration of the United States that "they had no claim to the land."—33 Ill., at page 439. And the Supreme Court of the United States declares the Virginia act of cession only required titles to be confirmed—no new title was to pass.—Langdeau v. Hanes, 21 Wal., 521. Then what was the law of France in 1743? Counsel have based their entire argument on the Spanish code which was never in force east of the Mississippi River, and which was not in force in Louisiana until 1769, when it was established by Count O'Reiley's proclamation who represented Spain.—17 Wend., 588, point 2 brief, *supra*. Nearly every enlightened nation, excepting England, reserved actually navigable rivers to the public. The Spanish code mentioned did

so.—2 M. & C., "Las Siete Partidas," 348, § 31. So did the French code Napoleon.—McKenzie's Roman Law, 178. So did the civil law, which was followed by most of these codes. The common law rule that the riparian owner owned the *soil under the water* to the thread of the stream is peculiar to England, and is in force in Illinois. The writer of this brief, in the case of Griffin v. Johnson, just decided by this Court, presented that phase of the common law for the consideration of this Court. There is no difference between counsel and ourselves on the common law rule. Nor do we contend that the accretions or alluvion, *i. e.*, imperceptible additions to the *shore* or *bank*, do not pass by the grant involved in this case. The common and codified law of every country and time seems to have agreed on this point. But the land in controversy is *an Island*, and the *real question is*, what was the French law in 1743 as to Islands arising in the river? Chancellor Walworth, in 17 Wend., at page 592, says, "By the French law, *even before* the adoption of the Napoleon code, Islands which were newly formed in the bed of a navigable river belonged to the Crown as the lord paramount, according to the principles of the Feudal system." Lord McKenzie's Roman Law, 178, declares that the Roman law giving Islands to adjoining owners "has been adopted in the modern French code so far as regards *private* rivers not navigable for vessels or rafts; but where an Island springs up in a public river, it is held to belong to the State if there is no title or prescription to the contrary." As noted above, this was the law *before* the code was adopted. By reference to 2 American State Papers, 39,

it will be seen that in adopting this code Napoleon, it was admitted, by the French Jurists to whom the code was submitted, that the law had always been as stated by Chancellor Walworth above quoted. There then is the law governing this grant as to the Island—it belongs to the Government—the public.

We do not mean to be understood as meaning that counsel *intentionally* present an unfair abstract. We do say that it *is* very unfair, one-sided, and incomplete. A voluminous record is thus thrust upon us with but a short time to straighten it out. In their *Statement*, at page 21, they seem to question the fact that this is an Island, and call it an accretion. It is an *Island*, so designated by all the witnesses and so expressly held by Judge Wall. Appellant's *Abstract* shows all of plaintiff's witnesses so called it, and so did plaintiff's counsel. No one questioned this below—not even the Surveyor.

Appellee also claims by virtue of twenty years' adverse possession. This chain of adverse possession is perfect, but appellant's abstract might as well not have been made for it shows nothing. In '70, Vince Panel owned part of the Island and Brewer had the other part, —these are mentioned by witnesses as the middle and lower parts. The upper part is no longer in existence. These men sold to McCauley, who sold in writing to Strong, in 1873, the whole Island, and Strong sold it back to McCauley, who sold by deed to Sides in 1881, who sold by deed in 1884 to McClure, Sr., who sold by deed of October 1, 1889, to appellee, his son. Here is what our witnesses say:

Joseph Panel, (Rec. 52–57), the first witness offered by the defendant, testified: I know Brewer's Island, between here (Chester) and St. Mary's; have known it all my life. I first lived on there about '69 or '70. A. J. Panel and Vincent Panel were in possession of it when I first went there; they had possession of the upper part of the Island, part of which is washed away, and part is there yet. They (A. J. Panel and Vince Panel) were the first persons on the Island. The next year George Layton and Bill Tucker settled the middle part of the Island, in '70. The next person on the Island was McCauley. Vince Panel bought out Hagan, and then he sold the middle Island to McCauley; that was about 1871. The middle part is what is called McClure's Island now. Brewer also had possession of the lower part; he went there about '71. He sold to McCauley and McCauley took possession. I staid on the Island until '73; then I left and was gone two years, and then I was on there until '81, off and on, made a crop or two, lived there backwards and forwards. There was as much water on the Illinois side as on the other side in 1881; I never saw it go dry while I was there. I fished through there in 1881; that was my fishing ground all the time. I found six feet of water at common stage of water, in July and August.

Q.—State whether the cattle from Kaskaskia Commons, when you first went there, ranged on that Island? A.—No, sir, never seen no cattle from Kaskaskia Commons; never was bothered with them from Kaskaskia. All the cattle I seen there was boated across from Missouri there; we boated them from the Missouri shore,

but never from the Illinois shore. McCauley and others who owned the Island took cattle for the purpose of pasturing, and got pay for it; they ferried the cattle over every fall.

Q.—State about the fences on that Island? A.—They had a little lot to turn milk cows into, and a lot of horses—that was about all the stock they had on the Island—just to keep them from running over the Island.

Q.—No occasion for a fence? A.—Only for their own purposes; no cattle could get to it from either shore.

Q.—Did you ever measure the distance between that Island from the Missouri shore to the Illinois shore? A.—Yes, sir.

Q.—State what it was, what shore was the Island closest to when you measured, the Illinois shore or the Missouri shore? A.—Well, it was a fraction under a quarter of a mile nearer to Missouri shore than to the Illinois shore.

Q.—Well, to the best of your recollection, when did the water first begin to get low enough so they could ford it during low water between the Illinois shore and this Island? A.—I never saw it that way until now. I left there in '81, and wasn't back there till a couple of years ago, and it never got that way until this "cut-off" came through. It isn't dry now, because we caught fish out of there not more than a week ago; there is a slough in there and fish in it.

Q.—Is it a fact that in an ordinary stage of water, the water runs all around it now, isn't that a fact? A.—Yes, sir.

Cross-examination: Q.—Didn't you hear these men testify awhile ago that that was a sand bar there, no timber on it, and cattle went out there to keep the mosquitos from eating them up? A.—I don't care what they testified: I never seen none. I heard them; yes, sir. If I had seen the cattle there I might have believed it, but I never saw any but what was boarded there.

A. Layton, (Rec. 64–69), next witness for the defendant, testified: I went on the Island in '69; I guess I was the first man that was on there; I was on the upper Island.

The Court—You mean the west end? A.—Yes, sir. Vince Panel was the next man; he settled on the middle Island. The Island was distinguished in three parts then; there was sloughs dividing them, and he took the middle Island. He staid there about a year, and then sold to Josiah McCauley. Vince Brewer owned the lower portion, just below that. He went there about '71; positively in '71 or '72; he was there when I left there.

Q.—Then I understand you to say the Island was divided by sloughs into three portions; you settled the upper portion, Mr. Panel the middle portion and afterwards sold to McCauley, and the lower portion Brewer owned when you were there? A.—Yes, sir.

Q.—State what was the depth of water between that Island and the Illinois shore about the time you were there? A.—I couldn't say anything as to the depth; there was plenty of water on both sides when I was there.

Q.—State if at any time during the year the water went dry between that and the Illinois shore when you was there? A.—No, sir.

Q.—When did you leave there? A.—About the year '72 or '73; I believe probably '73; I won't be positive as to date; not later than '73. I think I was there four crops, as near as I can remember.

Q.—Did any cattle range there from the Commons when you were there? A.—No, sir; no cattle.

Q.—Couldn't get there unless they would swim, could they? A.—No, sir.

Q.—Do you know what has become of the portion of the Island you claimed there? A.—I don't know; I have not been on the Island since I have been back here, but I don't think that any portion that I was on is there now. I think it has all washed away.

Fred. Easters, (Rec. 69–74), the next witness for the defendant, testified: I am eighty-three years old; I was born about two miles from this Brewer's Island, in Perry County, and have lived there all my life.

Q.—Just tell the Judge now, all about the Island, when it first made, and how it was made, in your own way? A.—It first formed by a boat sinking. This Brewer's Island used to be the land of Missouri, and the boats ran right up to the Okaw River; and the boat sunk and the Missouri bank kept caving in, and the water became the channel on this side altogether. There was no water on the other side, and there was the Missouri shore.

Q.—State how you know that was the Missouri shore? A.—I was born there and remained there until this time. That was Missouri, because there was no water on this side. There was a big wood yard there, and

there was no water there, and I hauled many a cord of wood across over to the main bank.

Q.—Where the Island is now, you say you hauled wood there? A.—Yes, sir. The Island commenced by a boat sinking in about '51 or '52; somewhere there, after the overflow; that was the first indication of this Island's forming. It was sunk right close to the bank on the Missouri shore, and then it kept washing around and caving in. The Island was first settled in '68 or '69. McCauley, Brewer, Panel, Layton and Tucker were the first three families there. McCauley and Brewer claimed the lower, and Panel and Tucker claimed the upper. That was in about '68 or '69.

Q.—Have you seen the Island every year since? A.—Nothing to hold me; I have to go right up and down by St. Mary's and can see it by looking right over.

Q.—State whether or not it was known in the neighborhood in which you lived, that McCauley and Brewer owned and claimed that Island? A.—Claimed the lower part. There was two Islands, with the division running east and west—run across that way (indicating). McCauley and him had the lower part, and Panel and Tucker the upper end.

Q.—State whether or not you know, whether stock was taken from the Missouri shore over there and pastured on that Island while Brewer and McCauley owned it? A.—Yes, sir; men took off stock every winter.

Q.—Charged for it? A.—I don't know.

Q.—Now please state about how the water was when first settled, how was the water between that and

the Illinois shore? A.—Well, the boats could go either way, either that side or this side.

Q.—State which shore it, the Island is nearest to? A.—The Missouri; from the main shore it is nearest to Missouri.

Cross-examination: Q.—Now when you first knew it, you say, where this Island now is, how far was that from you? A.—Within two miles from my house, in Missouri.

Q.—And this is now right across from St. Mary's? A.—No, way down below St. Mary's, way down on this side.

Q.—Now that boat sunk right by the Missouri shore? A,—Yes, sir.

Q.—After that boat sunk it began to form a little Island there around the wreck, and the river started out from the Missouri shore and kept running out? A.—Yes, sir; kept coming around the soft Missouri land and it kept slipping.

Q.—You was about two miles from there? A.—Just about two miles from the Island.

Q.—How far are you now from the river? A.—I suppose a little over a mile.

Q.—How far from St. Mary's? A.—I live five miles down this way.

Q.—Have you been on this Island lately? A.—No, I have not.

Q.—You don't know whether any cattle ever grazed there or not, do you? A.—Yes, seen many and many.

Q.—All over during the time these men owned it,

they boated them over from the Missouri shore? A.—No, they would swim them over; didn't have boats and things they have now.

Louis Hagan, (Rec. 73–76), the next witness for the defendant, testified:

Q.—Now do you know this Island in controversy? A.—Yes, sir; slightly acquainted with it.

Q.—How long have you known it? A.—Ever since '68.

Q.—Who was in possession of this Island and claiming it when you first knew it? A.—Well, Vince Panel was the first man I knowed anything about was in possession of it. He had the middle part. I, judge, Brewer had the lower part. I knowed the Island since '68, but in '70 Vince Panel was on the Island. Can't testify who he traded it to, but think McCauley was the man who went there next. Don't know what year Brewer moved on the lower portion.

Q.—State whether or not you know that he (Brewer) did claim to own and did live on the lower part? A.—Yes, sir; I know he squatted, or owned it. I know he lived there and cultivated it.

Q.—He lived on the lower part? A.—Yes, sir.

Q.—And McCauley upon the middle part? A.—Yes, sir.

Q.—State whether or not it was known in the neighborhood that these men claimed and owned that Island, that portion they settled upon? A.—Well, yes, it was well known in the neighborhood; yes.

Q.—How did they use the Island, did they cultivate it? A.—They cultivated it in corn, potatoes, melons and such like stuff as farmers generally raise. Have lived in the neighborhood twenty-six years, in the bottom, right across, three-quarters of a mile from the Missouri shore. Knew Mr. Sides; he at one time lived on the Island. Knew Mr. McCauley; he also lived there. Mr. Sides lived there and Mr. McCauley lived there; they claimed to own the middle and lower portion of the Island.

James Harr, (Rec. 76–80), the next witness for the defendant, testified: Have lived in Perry County, Mo.; have lived there for thirty-five years; live within three and a half miles from the Island. I have known it ever since it was there. Vince Panel was the first person on it. Knew McCauley and Brewer; they lived there and claimed to own it. Dr. Strong claimed to own a portion at one time. Knew Mr. Sides; he lived there once and raised corn on it. McCauley and Brewer lived on the same land that McClures now have.

Q.—State whether or not it was generally understood in the neighborhood you lived, that Mr. McClure, Mr. McCauley, Sides and Panel claimed that land at the time they lived on it? A.—Yes, sir; they were farming there on it and claimed it to be their land.

Q.—State if you know anything about pasturing cattle on it? A.—Yes, I know cattle was brought from the Missouri shore over there and pastured, and horses.

Q.—Do you know about the water between that and the Illinois shore? A.—Well, there was water there when I first saw it.

Q.—When first settled? A.—Yes, the biggest part of the year. There were several years I never seen it go dry, but I suppose there was times when the water was so low that a man could have rode across or waded it. I knew some stock trying to get across there once in a while in the quicksand.

Q.—Now, in your opinion, which State is the closest to it, the main bank of Illinois or the main bank of Missouri? A.—Well, I will tell you. To go to the main bank, the river bank, it is a long ways the nighest Missouri, because where the river bank used to run by John Drews—I boated from the sand bar up there, right where the timber is now they have got in lease—I hauled wood there with oxen and cows, with Frank and Ed Berry.

Q.—There were wood yards on this side? A.—Yes, sir.

Q.—Opposite this Island? A.—Yes, sir.

Q.—Did the boats run through there? A.—There was the main channel up this side when I hauled wood.

Q.—Where the main channel run then, was between this Island and the Illinois shore? A.—Yes, sir; there was no Island there then.

Emmet Dean, (Rec. 80–81), the next witness for the defendant, testified: First knew the Island in 1873. Brewer, McCauley and Panel were the first ones on it when I saw it first. I have knowledge that Layton was there, but did not see him then. Brewer had the lower part, McCauley the middle part, and Panel the upper part. McClure is now occupying the part that Brewer owned at that time. They used the Island for pasturing

stock. I pastured a horse and two mules there in '80 or '81—the horse in '77 or '78. They just turned them loose on the Island. There was water all round, so the stock couldn't get off. The stock staid there all winter. It was known in the neighborhood that Brewer and McCauley claimed to own the Island; I didn't hear anybody else claim it.

Q.—Charged people for putting stock on there? A.—Yes, sir; I paid him by the head for the stock: I believe three dollars, if I don't mistake, a head.

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Appellant condenses Strong's deposition of eleven interrogatories into three lines. This fairly indicates the nature of their so-called "Abstract." Strong says (Rec. 52–56) he bought J. McCauley's middle portion in 1873, by contract of release in writing—owned it two years—had undisputed possession—built houses—fenced and cultivated and pastured the land—paid tax in Missouri and was not assessed in Illinois. In 1885, through Blanford, my agent, I sold to J. McCauley. Do not know what became of my release from McCauley. The "Abstract" of McCauley's evidence is equally incomplete; sixty-five answers are run into twenty-six lines. McCauley says (beginning at Rec. 45), Answer 7 and 12, I purchased in 1871 the middle part; Answer 13, Vince Brewer had lower part from 1870; Answer 15, I bought Brewer out 1879; Answer 16–20, sold by deed to Sides in 1881, that is the deed, we signed and acknowledged it. (This deed, Ex. A, is partially destroyed and signatures are gone—Counsel). Answer 22, I used,

cultivated and pastured it; sold brush to the Government. Answer 22–23, Brewer and I resided on the Island. Answer 26-27, we had fence to separate our lands, but no fence around the Island; there was water around it *all the time*. Answer 28, never knew of stock coming on the Island. Answer 30, we had little stock, and needed no fence. Answer 35, I claimed absolute ownership. It was wild land. I cleared it, cultivated it and lived on it. Cross answer, gave Brown $100 for his part.

The above presents briefly the *salient* features of our evidence. Some of the transfers of possession were *by parol*, but that is proper under the ruling of this court. —Faloon vs. Simshauer, 130 Ill., 649. Against this evidence appellants present a claim that it was fenced off for pasturage by the Commoners. That fence, as shown by Dobbs' cross-examination, was a fence *across the point* on the *main land* that touched the two rivers a mile or so above this Island on each side. This Island was out in the river *opposite the point*, so fenced off, and that is all there is of it. In the same sense, a fence from Memphis to Charleston would enclose the Island of Cuba. It is claimed that occasionally cattle, in low water, would get over from the main land to the Island, and this is what is meant by "pasturing," as used by appellants. Woodly waded "knee deep" to get some of his cattle off, and lost some. Cohen's cattle got over there and he waded over on horseback to get them off. Burch's cattle "strayed" over and could not get back; they stayed there all winter in 1866, and were taken

up as estrays, when he found they were his. The court will search the record in vain for any other "fencing" or "pasturing." This question of possession is a question of *fact*. While there may be a little conflict on the question of cattle straying over, there is none as to our 20 years possession. Judge Wall heard the witnesses, saw their actions and weighed their evidence, and we are sure this court will not make haste to interfere with his finding on this question of fact.

Counsel resist our limitation title by saying appellant is a *quasi* municipal corporation. It is simply a grant of lands to certain people designated as the inhabitants of a prescribed territory, who have assumed a corporate existence, the better to handle the property. It is essentially a private corporation. This court has held (County of Piatt vs. Godell, 97 Ill,, 85) that a county may lose its swamp lands by adverse possession. For a stronger reason should these owners of this common. The public has no interest in the land. This grant and its incidents are relics of the fuedal system still alive in this country. The lands are not school lands, as intimated by counsel. Some of the *rents* derived may be used for school purposes; that is all.

It is claimed that appellant was asked by Assessor Sulser if he had any real estate, and answered "no." Sulser says that was "about six years ago," which would go back to Sept., 1889, and was the May assessment of that year. Appellee did not own the land till October 1, 1889.—(Rec. 67.) The State assessed the land, and it

is claimed it is immaterial who owns it. It is not shown that the appellants ever had it assessed or paid taxes on this land; and, in fact, they never did.

The claim of estoppel set up by appellant is preposterous, even if appellee did not give in the land. Estoppel is based on a fraudulent intent and a *fraudulent* result. See Gillespie vs. Gillespie, 159 Ill.. 84, the latest expression and where the facts are similar so far as disclaiming ownership is concerned.

We shall notice in conclusion a few other points made by counsel.

The claim that the boundary between Illinois and Missouri is the center of the main channel is conceded, but it is the main channel as it existed in 1818. The main channel of the river is now *east of Kaskaskia*, and boats never run on the west side. In the case of Griffin vs. Johnson, just decided by this court, the main channel is now *east* of the Island, and the old channel is cultivated corn-fields. Are Kashaskia and Crain's Island in Missouri? In the St. Louis Bridge case, 123 Ill., at p. 552, (relied on by counsel) it is said that as far back as history or tradition goes the main channel was west of Bloody Island. But all this is immaterial. The law of "Las Siete Partidas," vol. 1, p. 348, § 31, requires plaintiff to measure from bank to bank with a cord, then *double the cord*, and the point on the *intermediate* Island where this half of the cord falls is the thread. Very clear and very simple if it applied in this case. But if it

did apply counsel has not a scintilla of evidence to show he has so measured it and that the land claimed falls on the Illinois side of the half-cord; he relies on the *deep* channel, which may be the narrowest, and in this case our witnesses swear it is the narrowest, and are not contradicted. It is insisted that as the corporate head can only *lease* the land of these grantees no limitation can run. (p. 46 of argument.) Land is often so tied up that it can neither be leased nor sold for a life in being and 21 years afterward. Can no limitation run in such cases? This point is similar to the very remarkable idea (p. 46 of argument) that because the law creating this corporation is a *public law*, and so designates itself, no limitation can run. We confess ourselves utterly unable to answer so profound a suggestion, though we always thought that the difference between a public and a private law was in the matter of getting them in evidence. There are innumerable points like this made seemingly without chart or compass, and we will not follow further.

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Attorneys for Defendant in Error.

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STATE OF ILLINOIS.

In the Supreme Court,

Southern Grand Division.

MAY TERM, A. D. 1896.

The President and Trustees of the Commons of Kaskaskia,
Plaintiff in Error,

vs.

CHARLES McCLURE, Defendant in Error.

Error to Randolph County.

Reply of Plaintiff in Error.

WM. HARTZELL,
R. E. SPRIGG, } ATTORNEYS FOR PLAINTIFF IN ERROR.

CLARION STEAM PRINT, CHESTER, ILL.

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Reply of Plaintiff in Error.

The opening statement of the party who says he wrote the brief of the defendant in error is a surprise. We did not presume for a moment in the preparation of our brief that we could enlighten him, for we knew he had reached that point in the profession when all legal light in his opinion was concentrated in himself. Our only purpose was to

present the facts in a way which might assist the Court in arriving at a correct conclusion with as little labor as possible.

The reference to the opinion of the trial Court where the same is not embodied in the record, we have always deemed in bad taste, and particularly so, when that reference recites statements the Court never made. While it is true that Judge Wall tried this case in the Court below, it does not warrant the counsel who wrote the brief for the defendant in error to assume statements not made by the Court, which he most certainly did, when he says the Court "sustained appellee's position that under the French law governing this grant the appellant cannot claim Islands." The Court did not so hold, and the case turned wholly upon the question of defendant's possession. The preponderance of the evidence is with the plaintiff in this case, that the land in question formed many years ago, and that too on the Illinois side of the main and only channel of the river; we say this because Capt. Postal, an old river pilot and a very reputable man, swears that he has known the river and the main channel at this point since 1847, and at that time and ever since it has been between the Missouri shore and the land in controversy. Boats never could run any other way except in high water, when most of the Common would be overflowed. For many years, in fact, there was no water between the Island and the main bank of the Common except when the river was high. Capt. Postal is supported by the

witnesses Dobbs, Woodley, Cohen and Burch. The deeds offered in evidence by defendant in error also sustain Capt. Postal in locating the Island or Towhead in Illinois, and in establishing the main channel between it and the Missouri shore. Even Josiah McCauley, who once claimed a part of the Island, says (Rec. p. 50) the land adjoining this Island on the Illinois shore belonged to the Trustees of the Kaskaskia Commons.

Plaintiff insists that there is no evidence in the record connecting the defendant's possession with that of any of the former pretended claimants to said land. Sides conveyed his right to J. H. McClure in 1884, and in 1889 J. H. McClure conveyed his to Wm. McClure, but where and from whom did the defendant obtain his possessory right, and how long has he had it? Defendant's counsel say he did not own the land until October, 1889, but does the record show from whom he purchased or how he obtained possession? The record shows the defendant to be an intruder, drifting around "without chart or compass," and with the assistance of his counsel trying to attach his boat (for that is what he lives in) to the land of the plaintiff.

We certainly did not intend to, nor do we think we did make an unfair abstract in this case, and we fully believe when this Honorable Court comes to examine it they will find that it succinctly states the principal points relied on by both parties. Counsel for defendant have shifted their position since the trial below, and now concede that plaintiff is

entitled to accretions or alluvion formed to the shore or bank, but deny that under the grant it is entitled to Islands. The land in question has by imperceptible additions, for many years, been attached to the shore or main bank of the Common, and in Middleton v. Pritchard, 3 Scam., 520, the Court says "that all grants bounded upon a river not navigable by the common law entitle the grantee to all Islands lying between the main land and the center thread of the current."

The case of Griffin v. Johnson, recently decided by this Court and referred to by defendant's counsel, though not similar to the case at bar, is in line with our theory of plaintiff's case. Defendant's counsel admit that there is some conflict on the question of cattle from the Common being pastured on the Island; and is it not remarkably strange that none of the witnesses of defendant who persisted in knowing so much about the Island and the manner of its occupancy, never saw any of the stock which Dobbs, Woodley, Cohen, Burch and others pastured there for so many years?

In County of Piatt v. Goodell, 98 Ill., 84, referred to by defendant's counsel, the Court did hold that a county may lose its swamp land by adverse possession, but the reason assigned was that the county's right to the swamp land was not of that public character as exempted it from the operation of the limitation act of 1839. But the plaintiff is a public corporation created by law, and limited in its

acts to specific purposes, the principal one being to lease for a term not exceeding fifty years all or a portion of the Common for school purposes. Under the Constitution of 1848, Art. 11, it cannot be disposed of in any other way, and until so leased, it must be held and used in common by the inhabitants of the town of Kaskaskia, and not until then we insist is it liable to taxation and under no circumstances can title be acquired to any portion of said Common by adverse possession. The Common is leased at public outcry, to the public, for the benefit of the public, and the proceeds therefrom is used for the education of the children of the lessees as well as the children of the inhabitants of the town of Kaskaskia.

The act of the legislature enabling the inhabitants of the town of Kaskaskia to subdivide and lease all or any part of the Common, we insist makes the Common and the town a school district and exempts the Common from taxation until leased, and the title of the inhabitants to it is of such a nature that no one can acquire a title to any portion of it, leased or unleased, by adverse possession.

Take the land in controversy; it is part of the unleased Common, which the Constitution says "shall forever remain Common to the inhabitants of the town," and as soon as the defendant settled on it, he would at most be regarded only under the law as one of the community, an occupant by sufferance, and under no circumstances can he acquire title by adverse possession against the inhabitants of the

town and other Commoners. The lessees are in common with the inhabitants of the town entitled to use the unleased Common for the purposes of pasturage and estovers, and this is a public right, and the law will not permit a *squatter* to intrude upon it and deprive them of such use.

The Court will observe, that the description of the Common in the French Grant of 1743 is peculiar in this, that it simply locates it "in the point called *le point de bois* which runs to the entrance of the River Kaskaskia," and this indefinite description accounts for the Commissioners who located the Common and recommended its confirmation, stating in their report that the Common so granted by the French Government "*seems* to have been bounded north by the southern limits of the village, east by the Kaskaskia River, and south and west by the Mississippi and the limits of the Common-field, so called." Can there be any doubt that the Commissioners in locating this Common caused the lines to run to the center thread of the streams bounding it? The common law was in force in this country at that time, and in their location of the Common they were governed by it, as is clearly indicated by the plat accompanying their report. They could not locate the lines of the Common by the French grant, nor ascertain the quantity of land it shou'd contain, but from their knowledge derived no doubt from the old settlers, they bounded the Common as platted, and it necessarily goes to the center thread of the stream.

After the concession of defendant's counsel, that the plaintiff was a riparian proprietor, and as such was entitled to accretions or alluvion, we cannot but question their sincerity when they say that an Island which forms between the mainland and the center thread of the stream, and as in this case is attached to the mainland, does not belong to the adjacent proprietor. Their position is in direct conflict with the case of Middleton v. Pritchard *supra*, and with the case of Fuller v. Dauphin, 124 Ill., 542, where the Court says that "the title of a riparian owner whose land is bounded by a navigable slough or arm of the Mississippi River, extends to the middle thread of the slough, and includes *Islands* which are *separated* from the *mainland*, and which *lie between* the *mainland* and the *center* of the *slough*." Nothing is reserved in the confirmation made by Congress between the mainland and the center of the main channel of the Mississippi River, and had any reservation been intended it would have been specified in the act itself. Congress did not make and did not intend to make any reservation in the act of confirmation, and we feel justified in saying that all Islands, peninsulas and low pieces of land, sometimes dry and sometimes submerged by the water, between the main channel of the river and the shore of the Common land belong to the plaintiff as riparian owner.

With due deference to the peculiar views of the counsel who wrote the defendant's brief, we still insist that his client is estopped from asserting

a valid claim against the plaintiff. That he is an "artful dodger" we freely admit; he claims no land when the Assessor calls on him, thus defrauding the public out of the taxes the land should have paid; is a resident of Illinois when he wants to vote; acknowledges by the introduction of deeds on which his pretended title rests, that the land is in Illinois, and in defending this suit he seeks to show that the same land is in Missouri.

We think we have satisfactorily shown to this Court that the land in question is in Illinois, and belongs to the plaintiff as riparian owner; that it is part of the unleased Common, and belongs to the inhabitants of the town of Kaskaskia in common, and that under the laws of this State no one can acquire a title to it by adverse possession.

WM. HARTZELL,
R. E. SPRIGG,
Attorneys for Plaintiff in Error.

24 20

STATE OF ILLINOIS.

In the Supreme Court,

Southern Grand Division.

MAY TERM, A. D. 1896.

The President and Trustees of the Commons of Kaskaskia,
Plaintiff in Error,

vs.

CHARLES McCLURE, Defendant in Error.

Error to Randolph County.

Reply of Plaintiff in Error.

WM. HARTZELL,
R. E. SPRIGG, } ATTORNEYS FOR PLAINTIFF IN ERROR.

CLARION STEAM PRINT. CHESTER, ILL.

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Reply of Plaintiff in Error.

The opening statement of the party who says he wrote the brief of the defendant in error is a surprise. We did not presume for a moment in the preparation of our brief that we could enlighten him, for we knew he had reached that point in the profession when all legal light in his opinion was concentrated in himself. Our only purpose was to

present the facts in a way which might assist the Court in arriving at a correct conclusion with as little labor as possible.

The reference to the opinion of the trial Court where the same is not embodied in the record, we have always deemed in bad taste, and particularly so, when that reference recites statements the Court never made. While it is true that Judge Wall tried this case in the Court below, it does not warrant the counsel who wrote the brief for the defendant in error to assume statements not made by the Court, which he most certainly did, when he says the Court "sustained appellee's position that under the French law governing this grant the appellant cannot claim Islands." The Court did not so hold, and the case turned wholly upon the question of defendant's possession. The preponderance of the evidence is with the plaintiff in this case, that the land in question formed many years ago, and that too on the Illinois side of the main and only channel of the river; we say this because Capt. Postal, an old river pilot and a very reputable man, swears that he has known the river and the main channel at this point since 1847, and at that time and ever since it has been between the Missouri shore and the land in controversy. Boats never could run any other way except in high water, when most of the Common would be overflowed. For many years, in fact, there was no water between the Island and the main bank of the Common except when the river was high. Capt. Postal is supported by the

witnesses Dobbs, Woodley, Cohen and Burch. The deeds offered in evidence by defendant in error also sustain Capt. Postal in locating the Island or Towhead in Illinois, and in establishing the main channel between it and the Missouri shore. Even Josiah McCauley, who once claimed a part of the Island, says (Rec. p. 50) the land adjoining this Island on the Illinois shore belonged to the Trustees of the Kaskaskia Commons.

Plaintiff insists that there is no evidence in the record connecting the defendant's possession with that of any of the former pretended claimants to said land. Sides conveyed his right to J. H. McClure in 1884, and in 1889 J. H. McClure conveyed his to Wm. McClure, but where and from whom did the defendant obtain his possessory right, and how long has he had it? Defendant's counsel say he did not own the land until October, 1889, but does the record show from whom he purchased or how he obtained possession? The record shows the defendant to be an intruder, drifting around "without chart or compass," and with the assistance of his counsel trying to attach his boat (for that is what he lives in) to the land of the plaintiff.

We certainly did not intend to, nor do we think we did make an unfair abstract in this case, and we fully believe when this Honorable Court comes to examine it they will find that it succinctly states the principal points relied on by both parties. Counsel for defendant have shifted their position since the trial below, and now concede that plaintiff is

entitled to accretions or alluvion formed to the shore or bank, but deny that under the grant it is entitled to Islands. The land in question has by imperceptible additions, for many years, been attached to the shore or main bank of the Common, and in Middleton v. Pritchard, 3 Scam., 520, the Court says "that all grants bounded upon a river not navigable by the common law entitle the grantee to all Islands lying between the main land and the center thread of the current."

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Error to Randolph County.

Abstract, Brief and Argument

OF

Plaintiff in Error.

WM. HARTZELL,
R. E. SPRIGG, } ATTORNEYS FOR PLAINTIFF IN ERROR.

CLARION STEAM PRINT. CHESTER, ILL.

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ABSTRACT OF RECORD.

Placita of September term, 1895, of Randolph County Circuit Court, showing that the following is a complete copy of the record on the trial of said cause:

Copy of summons and return thereon.

4 Copy of complaint in ejectment by plaintiff, which states that on January 1, 1895, plaintiff was possessed of the following lands in said county, to-wit: East half of Outlot one (1) of the Commons of Kaskaskia, lying south of third and fourth surveys of said Commons, containing 200 acres, and being so possessed, the defendant entered thereon and unlawfully withholds the possession thereof from plaintiff.

5 Plea of not guilty by defendant.

Commencement of bill of exceptions, showing that the case was tried at the September term, 1895, of Randolph County Circuit Court before Judge George W. Wall without a jury. Recites that, be it remembered that on the trial of this case at said term of court, the plaintiff, to maintain the issues on its part, offered the following evidence:

6 The Grant by the French Government to the inhabitants of the parish of the Immaculate Conception of Kaskaskia, dependence of the Illinois,
7 tending to be confirmed in the possession of a Common which they have had a long time for the pasture of their cattle in the Point, called "la point
8 du bois," which runs to the entrance of the Kaskaskia river, dated at New Orleans, August 14, 1743.

9 The American State Papers, Vol. 2, page 148, containing the report of the Commissioners on the claims to the Commons, common fields and town
10 lots of the Village of Kaskaskia, and plat accompa-

nying the same, confirming title to the lands therein
11 described in the inhabitants of Kaskaskia, dated December 31. 1809, signed by Michael Jones and
13 E. Backus, Commissioners.

15 The United States Statutes, Vol. 2, page 607, enacted May 1, 1810, which confirms the report of the Commissioners above set forth, approved May 1, 1810.

16 Also Revised United States Statutes, Vol. 2, containing the acts of 1812, confirming the report of Commissioners made in 1809.

17 Capt. W. C. Postal, the first witness for plaintiff, examined by counsel for plaintiff, testified as follows: About twenty years ago I was a steamboat pilot on the Mississippi river. I have known the land (Island) in controversy in this suit since 1847. The main channel of the Mississippi river runs next to St. Mary's on the Missouri shore. It has always done this since I have known the river, since 1847.

Q.—That being the case, on which side of the river was McClure's Island? A.—On the east side, the Illinois side.

18 Q.—How often did you pass this; quite often, I suppose? A.—Well, along in the '40s I passed it as often as once a month, and for a time in the '50s I was out of the river business until about '58 or '59, and from that on I passed it every week. I was in the Memphis trade then; before that I was in the New Orleans trade and didn't pass it more than once a month.

Q.—And the main channel, you say, was always— A.—The main channel was always down the Missouri shore.

Q.—West of the Island? A.—Yes, sir.

19 Newman K. Dobbs, plaintiff's next witness, testified: I live in Kaskaskia Point; have resided there about sixty-two years. I have known what we call McClure's Island ever since it formed. There was an Island there once before, in '44, I think, although I don't remember the year exactly.

Q.—I will get you to state if you know on which side of the Island the boats ran—where the main channel was? A.—They invariably went to the Missouri shore.

Q.—State what you may know of the inhabitants then using the Island for pasturage and other purposes? A.—Well, the people on the Point there in Kaskaskia have always used it as a pasture since it has been an Island, till the last four or five years, I think. Since that last survey, there was no stock to run on it and it hasn't been used since.

Q.—How long have you known it since it was first pastured? A.—Oh, it has been pastured ever since it has been an Island. I don't remember any year, to my recollection, since it has been an Island but what the stock would get on it sometime in the year. Sometimes in the spring when the water was up so high, the stock could not get there. There might have been one or two years that the water

stayed up there, but generally speaking they used it as a pasture all the time.

Q.—How many years, Mr. Dobbs, have you used it? A.—It has been used for the last—ours have been there twenty years, ever since it has been an Island. I expect it has been there since '61.

Q.—Well, you speak of its being used as a pasture; now, what part of the other Commons was used for pasturage purposes? A.—Before—no, since the third and fourth surveys were made, we ran our fences to the river, which gave the stock access through the slough to the Island.

The Court:—Just state that again, please? A.—The Commons up there—we have had four surveys. After the first two surveys were made, the stock law was in force and we got a permit from the Board. The people of the Point got a permit from the Board to make the two last surveys into a pasture and they joined the pasture fence at the river, which included McClure's Island. That was in the last two surveys.

The Court:—Joins the pasture fence next to the river on which side? A.—On both sides. It joins the river right above St. Mary's and above the second survey, but they run a lane up the road and let the bank be one line for about a mile, then they came to the lower end of the second survey, the south side of it, and they run the fence due east across the second survey, and then run it due south

about a mile up to the first survey, then due south to the Kaskaskia river. It joined both rivers.

21 Q.—The fence extended from the bank of the Kaskaskia to the bank of the Mississippi river? A.—Yes, sir.

Q.—Was the Island included in that? A.—The Island was in that land that was fenced off.

Q.—For a pasture? A.—Yes; we used it for our stock always up to the last three or five years.

Q.—When was the fence built there, if you can tell? A.—Well, it has been a good many years ago. It was right after the second survey was made, about the time the stock law took force, somewhere about that time.

Q.—What was done before that; how was the Common lands used before that? A.—Before the stock law, the Common lands were fenced up; that is, the first and second surveys.

Q.—Did they have access to the unsurveyed Commons? A.—Yes, sir.

Q.—Including the Island? A.—Yes, sir.

Q.—Now, how long have you known stock to run on that McClure Island? A.—I run stock there, I can safely say, for the last fifteen years, ever since it was, ever since stock could get on it.

Q.—You spoke about the first Island that form-

ed there washing away in '44? A.--Yes, there was quite an Island formed there and washed away.

Q.—Now how long after that before this Island formed there, or the part of it that is there now? A.—The first I remember was after the high water
22 of '51. It was always a flat bar. The channel of the river, since I can recollect, was always close to the Missouri shore. When the water would be low, there would be a bar on the north side run out half a mile some places; was rather a flat bottom.

Q.—Well, now, what has made McClure's Island—what bar—this bar that you speak of? A.—Well, it formed—made up. I suppose the river deposited sand on that flat ground there.

Q.—Where were the additions made, on what end of the Island, up the river or down the river? A.—It has been building down the river all the time.

Q.—Your first recollection of the present Island forming there was in 1851? A.—I think '51 was the first I remember of any Island there.

27 George Woodley, witness for plaintiff, testified: I live on Kaskaskia Island; have resided there since 1856. I have known the Island since along in the '60s. I don't remember what year, but it was in the '60s that I first went over there and drove cattle off. The Island has been used, to my knowledge, by the Commoners for pasturage purposes since my first
28 acquaintance with it. I have driven cattle off there lots of times since the stock law was enforced. Be-

fore we had stock law, we had the big field all fenced off to itself. When the Commons was first surveyed off, the stock all went on those sand bars or towheads to get away from the mosquitos.

Q.—Now, what do you know about the main channel of the river and where it has run since you have been there? A.—It always ran on the west side of that towhead, as we called it in those days; that is, next to the Missouri shore.

29 Q.—Do you know about when this fence was built from the Kaskaskia to the Mississippi river, fencing off the unsurveyed Commons? A.—I guess about '82 or '83.

Q.—Did you ever have any conversation with any of the McClures about this Island? A.—No, sir. It was during the war, about '63 or '64, that I was first on this Island.

31 W. L. Cohen, a witness for plaintiff, being duly sworn, testified: I first saw this towhead, now McClure's Island, in '62 or '63.

32 Q.—On which side of that Island was the principal channel of the river? A.—On the Missouri side.

Q.—State all you know about the use of that Island, what it was used for by the inhabitants of the Point? A.—Well, they used it for farming and pasturage both; farmed part of it and pastured some of it.

Q.—Which, the Island. A.—You mean the McClure Island?

Q.—Yes, sir. A.—Why, we turned our stock out and they went down there in the woods. The first time I went through it was in the fall of '72. The stock run there then. I remember distinctly I went to where they were getting logs out of the river once. I went there to look for stock; it was in October; in the fall sometime, that year.

33 W. R. Burch, witness for plaintiff, testified: I live in Kaskaskia Precinct; lived there since 1847.

Q.—State what you may know in reference to the Island in controversy in this suit? A.—Well, I don't really remember when there was no Island
34 there. When I was a boy, I used to hunt down in that country. When the Island first formed, there was nothing but small willows on it. I suppose that must have been along '52, '53 or '54, or may be '56 or '57. I remember it when the willows were only two or three years old; small willows.

Q.—Where was the main channel of the river? A.—After the flood of '51, the boats always went on the other side, except in very high water.

Q.—Well, do you know about stock being pastured there? A.—Yes, sir. In the year 1866 I and my brother bought a lot of stock, fifty or sixty head of mixed cattle. Well, that summer they strayed over and got onto that Island or towhead, whatever they called it. There was no one living there then.

The water stayed up very high, and the cattle remained there until March, '67. After that, the river got lower; generally went dry every year after that.

Q.—There were times when it would be dry? A.—Frequently it would get entirely dry.

Q.—Do you know about the fence being built, fencing off the Commons, the unleased Commons?
35 A.—Yes sir; that was about the year of '77 or '78. That was on account of the stock law having been passed. The people got permission from the Board of Trustees of the Commons to make a fence from the Mississippi on the west, to come around to the Okaw river and along its bank, so they could turn stock on the south side so that they could range over that whole country.

Q.—Was this Island included in this arrangement? A.—Oh, yes, that was included, of course.

Q.—Was there any people living on that Island when you went after your stock? A.—At that time, in '66 or '67, there was no one living there at all.

37 Q.—You are acquainted with the McClures, are you? A.—Yes, sir.

Q.—Ever have any conversasion with them in reference to this Island? A.—Well, I was Deputy Assessor, two or three years ago, and went over there to assess these McClures. I went to see Wm. McClure first. He objected to giving in his property; claimed that he didn't live in Illinois. Afterwards

he came back and said it was all right; gave in his personal property.

Q.—Do you know about these men (McClures) voting in Illinois? A.—Yes, they voted up at our Precinct. We consider it all our Precinct. He voted there two or three times, the last four or five years back.

38 Wm. Sulser, the next witness for plaintiff, testified: I live at Kaskaskia; have lived in that neighborhood for the past twenty-seven years. I am acquainted with the McClures.

Q.—Ever have any conversation with them in reference to this Island? A.—I have.

Q.—State what it was? A.—Well, I was Deputy Assessor, about six years ago, and went over there to McClure and told him my business. He said he didn't think he could be assessed; that the Island belonged to Missouri. We parleyed around awhile and he finally came to the conclusion that he would give in his property, and he turned in the personal property. As Deputy Assessor, I asked him, Have you any real estate? and he said he had not.

Q.—Did he swear to the schedule? A.—He did, sir. I think this was six years ago, during Adams' term as Assessor.

39 James T. Douglas, plaintiff's next witness, being duly sworn, testified: I am County Surveyor of Randolph County, Illinois, and have been for the

last fifteen years. I made a survey of this Island in dispute. Witness being shown plat, (see Record for plat, page 41,) identified the same. William McClure was in possession of Outlot No. 1, as shown by said plat, when I made this survey. He had about thirty acres in cultivation right at or near his house, near the west end of the Island. Outlot No. 1, as shown by this plat, includes the most of the
40 Island that might be considered fit for cultivation. Plaintiff next offered in evidence the plat made by Surveyor Douglas, being the same plat contained in
41 the Record and marked at page 41.

43 A. Menard, plaintiff's next witness, testified: I live at Dozaville, on what is termed the Kaskaskia Island. I have known the land called McClure's Island since 1867. I went there then looking for stock. I was over there last spring as Deputy Assessor to assess the McClures. They gave in their personal property, but no real estate.

And thereupon the plaintiff rested, the foregoing being all the evidence offered in chief.

44 And the defendant, to maintain the issue on their part, offered the following evidence:

Mr. Horner:—We now offer the deposition of Josiah McCauley, taken in St. Louis, Mo., before E. A. Feehan; to which the plaintiff objected, but the objection was overruled by the Court, to which the plaintiff then and there excepted.

45 Deposition of Josiah McCauley:—I formerly

lived in Perry County, Mo.; moved here to St. Louis seven or eight years ago. First knew an Island in the Mississippi river between St. Mary's, Mo., and Chester, Ill., in 1871. I owned the middle portion of it. I traded for it with Vince Powell. I made a crop on it in '72 and '73, when my wife died, and I sold it to Dr. Strong in January of '74. I repur-
46 chased it in 1877 from Joseph Blanford and moved back there in the spring of that year. It was a long Island, with two sloughs angling across it. Vince Brewer settled the lower part of it in '70 or '71,—I think the spring of '71,—and he left there between '77 and '80. I traded for what he had in '79. Brewer cultivated a part of the land. No part was fenced. Part of time there was water all around the Island.

Defendant's counsel, in connection with the examination of this witness, offers an instrument purporting to be a deed executed by said McCauley and wife, dated September 13, 1881, to Rancy Sides; to which plaintiff's attorney then and there objected, for the reason that said deed had no signatures of the grantors and was not acknowledged before an officer.

48 Deposition continued:—I claimed ownership of it. It was wild land and I went in possession of it and cleared and cultivated part of it.

49 On cross-examination, witness stated: I traded a watch worth about $20.00 for the land I got from Vince Panel. I don't think there was land in cultivation when I first went there, and the house was

not covered. I never got any deed for it from any
50 one. I never had it listed foe taxes in either Illinois or Missouri. The land, adjoining this Island on the Illinois shore, belonged to the Trustees of the Kaskaskia Commons.

51 Certificate of Commissioner E. A. Feehan to McCauley's deposition.

52 Defendant next read deposition of S. E. Strong: I know of an Island in the river between St. Mary's and Chester. I owned a part of it in 1873, but had no deed, but had possession of a part of it. I sold it in 1875.

Joseph Panel, the first witness offered by defendant, testified: I know Brewer's Island, as it is
56 called, between here and St. Mary's, Mo. First knew it in '69 or '70, when A. J. Panel and Vince Panel were in possession of it. They had the upper part of it. They were the first persons on the Island. Afterwards McCauley bought Vince Panel out. Brewer also had possession of lower part of it.
57 Some cattle there, but they were ferried over from Missouri for pasturage. There was just as much water on one side of the Island as on the other; that was in '81.

64 A. Layton, defendant's next witness, testified: I think I first went on this Island in '69. There was no one there then. I guess I was the first man there. I was on the upper part of it.

The Court:--You mean the west end?

A.—Yes, sir. Vince Panel was the next man there. He settled on the middle of the Island. He was there but a short time, probably a year. He sold to Josiah McCauley. Vince Brewer, I think, was on the lower portion of it. He went there, I
65 think, in '71 or '72. There was plenty of water on both sides of it when I was there. Did not see any cattle there. I left there in '72 or '73, not later than '73, and haven't been on the Island since I came back here. I do not think any portion I was on then is there now; I think it has all washed away.

69 Fred. Easters, defendant's next witness, testified in substance as follows: I am eighty-three years old. This Island first formed by a boat sinking. This Brewer's Island used to be the land of Missouri and the channel of the river was on this side altogether. There was no water on the other side and that was the Missouri shore. I was born there, within two miles of this Island, and remained there until this time. I can't tell what year the boat sank.
70 I hauled wood there. This was about '51 or '52. Stock was taken from Missouri to the Island for pasturage. The boats could run on either side of it.

71 Cross-examination:—The boats all run right along the Missouri shore now. The Island is now away below St. Mary's. The boat I spoke of sinking was up near St. Mary's. I can't recollect the year or the name of the boat; I can't write and put
72 things down. The boat sank right by the Missouri bank. I came there in 1816. I haven't been on this Island lately. This Island has gradually filled up as
73

the water dried up. I am not acquainted with the land on the Illinois side. The Island I speak of forming by the boat sinking was near St. Mary's, on the Missouri side.

Louis Hagen, defendant's next witness, testified: I am slightly acquainted with the Island in
74 controversy; have been since '63. Vince Panel was the first man I knew there. He was in possession of the middle part. I think McCauley went there next. Panel was there I think in '70. He squatted
75 there and cultivated some. I have lived in that neighborhood twenty-six years.

Cross-examination:—These men I speak of liv-
76 ing on the Island just squatted there. They only owned it by squatter's rights; it didn't belong to them.

James Horr, the next witness, testified: I live in Perry County, Mo.; lived there thirty-five years. I live about three miles from this Island. I have known it ever since it was there. Vincent Panel was the first porson I knew there. I knew McCauley was on the Island, but do not know where. So was a Mr. Sides and Vince Brewer Cattle were brought there from Missouri to pasture. There was
77 water between the Island and the Illinois side when
78 I first knew it.

79 Cross-examination:--When the main channel was next to the Missouri shore, there was no Island there. I do not know where it is now.

80 Emmett Dean, defendant's next witness, testified: I know this Island. Brewer, McCauley and Panel were the first people I knew on there, in '73. I pastured a horse there in '77 or '78, and in '80 and '81 I had mules there. They were just turned loose on the Island. There was water then all around
81 there. These parties claimed the Island. I didn't hear anyone else claim it.

82 Defendant next offered a deed from Josiah McCauley and wife to Veries R. Sides, dated Sept. 13, 1881; also a small plat claimed and identified as part of the deposition, to the introduction and read-
83 ing of which plaintiff's counsel then and there objected, but the Court overruled the objection, to which ruling of the Court the plaintiff excepted.

85 Defendant next offered a deed of V. R. Sides and wife to J. H. McClure, dated Sept. 18, 1884, which was objected to by the plaintiff, but the Court overruled the objection, and the plaintiff then and there excepted to the ruling of the Court.

87 Defendant next offered a deed of I. H. McClure and wife to William McClure, dated Oct. 1, 1889, which was objected to by plaintiff, and overruled by the Court, and excepted to by plaintiff.

89 Clerk's certificate to copy of this deed.

91 And the plaintiff, to further sustain the issues on its part, offered the following evidence:

William Hartzell, being duly sworn, testified:

I knew Vince Brewer. I would not be positive, but it seems to me that it was in '72 or '73 that he came to me, and wanted me to write to the Government authorities about the land, and I did write some letters for him. I told Mr. Brewer at the time that I thought it belonged to the Kaskaskia Commons, but that I would write. Then the Commissioner stated that if it was Government land, he would have to have it surveyed and pay all costs, and have to contest with others who might wish to purchase it, and when Brewer found this out he decided to quit. I was not acting as his attorney. (Objected to by defendant's attorneys as incompetent.)

And the above and foregoing was all the evidence offered in the case.

92 Judgment of the Court, Sept. 19, 1895, for the defendant and against the plaintiff for costs.

93 Copy of motion by plaintiff for a new trial.

93 But the Court denied the motion, and gave judgment for the defendant, to which decision of the Court in denying said motion and rendering judgment against the plaintiff, the plaintiff by their counsel then and there excepted.

Conclusion of bill of exceptions, signed by George W. Wall, Judge, Dec. 5, 1895.

95 Clerk's certificate and seal to the Record.

96 Assignment of Errors.

STATEMENT.

On the 17th day of August, 1743, Vandruil, Governor, and Salmon, Commissary Orderer of the province of Louisiana, on the petition of the inhabitants of the parish of the Immaculate Conception of Kaskaskia, dependence of the Illinois, confirmed to them the possession of a certain Common in the Point, called *le point de bois*, which they have been in possession of for a long time for the pasturage of their cattle, etc.

This grant comprised a large tract of land, bounded by the Village of Kaskaskia, the Mississippi river, the Common fields of Kaskaskia and the Kaskaskia river, and was to remain in common without altering its nature, except that the Commoners might use it for the purposes of pasturage and estovers.

"After the conquest of the country by England, the result of the war commenced in 1756 and terminated by the treaty of Paris of 1763, no interference was attempted with any of the grants made by the India Company or by the Crown of France in this part of Louisiana, nor by Virginia after its conquest by arms, in 1778. Virginia ceded the country to the United States by deed dated March 1st, 1784, by authority of an act for that purpose passed October 20, 1783. That act provides that the French and Canadian inhabitants, and other settlers of the Kaskaskias, Saint Vincents and the neighboring villages, who have professed themselves citizens of

Virginia, shall have their possessions and titles confirmed to them, and be protected in the enjoyment of their rights and liberties." On March 26, 1804, by an act of Congress, Commissioners were appointed to examine into this, among other claims to land in Illinois, and after their examination they recommended the confirmation, among others, this claim as a Common to the inhabitants of the Town of Kaskaskia, on the 31st day of December, 1809, and so reported to the Congress, and Congress on the 1st day of May, 1810, passed an act that all the decisions made by these Commissioners entered in their transcript bearing date December 31, 1809, and transmitted to the Secretary of the Treasury, be confirmed.

Accompanying the report of the Commissioners is a plat designating the boundary of said Commons and giving the number of acres. The inhabitants of the Town of Kaskaskia having the authority under the Constitution of the State of Illinois of 1848, to have the said Commons subdivided and leased, did by petition as provided by the said Constitution obtain a Legislative enactment in force January 23, 1851, entitled "An act to provide for leasing the lands granted as a Common to the inhabitants of the Town of Kaskaskia, in Randolph County, or so much of said lands as it may be to the interest of the inhabitants of said Town to lease for school and other purposes." The President and Trustees who were named in said act met and organized by electing a President, and Clerk, and Treasurer, and at

once proceeded under the law to survey, divide and plat a portion of said Commons into lots, and leased the same at public outcry to the highest bidder, for the term of fifty years, the payments to be made annually, and the proceeds arising from said leases have been appropriated annually by them and their successors in office for the education of the children of the inhabitants of Kaskaskia, and such residents as are by immemorial custom Commoners upon said Commons, and the children of the lessees of said lots and lands so leased.

There have been four surveys and plats made of said Commons, and the lands so platted were leased to the highest bidders for a term of fifty years. The first survey and plat of about 2,000 acres was made in February, 1855; the second of about 2,200 acres was made in December, 1867; the third of about 780 acres was made in February, 1889, and the fourth of about 2,500 acres was made in May, 1889.

The land in question is an accretion, and being higher along the east bank of the main river than where it connects with the Common lands, has the appearance of an Island or towhead, as it is called, and it never has been surveyed, platted and offered for sale by the President and Trustees of the Commons of Kaskaskia, or anyone for them, as the law directs.

BRIEF.

Grant and confirmation of the French Government to the inhabitants of the Immaculate Conception of Kaskaskia, August 14, 1743.

Translations of French Records, pages 38 and 39, State Auditor's office.

Deed of cession from Virginia, conveying to the United States the territory north westward of the river Ohio, with the proviso, "That the French and Canadian inhabitants and other settlers of the Kaskaskias, Saint Vincents and the neighboring villages who have professed themselves citizens of Virginia shall have their possessions confirmed to them and be protected in the enjoyment of their rights and liberties."

Hurd's Statutes, 1895, p. 16 and 17.

Act to appoint Commissioners to allot the lands claimed by the inhabitants of said villages, etc.

U. S. Statutes, vol. 2, chap. 35, sec. 2, 3, 4, p. 277.

An act to revive and continue for a further time the authority of the Commissioners of Kaskaskia.

U. S. Statutes, vol. 2, chap. 16, p. 517.

Report and plat of the Commissioners appointed by act of Congress to allot the lands claimed by the inhabitants of Kaskaskia.

American State Papers, Public Lands, vol. 2, p. 148 and 149.

An act confirming the decisions of the Com-

missioners in favor of the claimants of land in the district of Kaskaskia.

U. S. Statutes, vol. 2, chap. 40, p. 607.

An act for the revision of former confirmations, and for confirming certain claims to land in the district of Kaskaskia.

U. S. Statutes, vol. 2, chap. 22, sec. 3, p. 678.

The act of Congress confirming the reports of the Commissioners is an operative grant of all the interests the United States had in the land described in the transcript of the Commissioners under that date, and confirms the land in terms to the inhabitants of the Town of Kaskaskia.

Herbert v. Lavalle, 27 Ill., 454.

The deed of cession from Virginia did not pass any title to the United States for the possessions of the inhabitants and settlers mentioned therein. The fee never was in the United States. The acceptance of the deed of cession, imposed upon the United States the duty of performing the conditions stipulated, and also to protect the inhabitants in the enjoyment of their property rights.

Langdeau v. Hanes, 21 Wall., 521.

The act of Congress confirming the titles and claims of certain towns and villages to village lots and Commons is paramount to a title held under an old Spanish concession confirmed afterwards.

Chouteau v. Eckart, 2 How., 344.

Whatever claim or interest there was in the

United States passed out by the corfirmation act of May 1, 1810, in the lands therein mentioned.

Doe v. Hill, Breese, 304.

What only is required by treaty stipulations.

McMichan v. U. S., 7 Otto, 204.

A survey was necessary to sever the private lands from the public domain; to ascertain what portion of the domain ceded by Virginia passed by the cession, and that was found by first establishing the claims of the settlers; the remainder only belonged to the United States.

Richart v. Felps, 33 Ill., 433.

A survey approved by the United States and accepted by the confirmee is conclusive evidence that the land granted is the same described and bounded by the survey, etc.

Guitard v. Stoddard, 16 How., 494.

A grant by Congress is as binding as a patent; and a confirmation by law is to all intents and purposes a grant.

Strother v. Lucus, 12 Peters, 410.

Gerrett et al. v. Taylor et al., 9 Cranch, 43.

A survey and confirmation of the Commons by the United States is binding upon them, and against all those claiming adversely to it.

Dent v. Emmeger, 14 Wall., 308.

The law governing alluvial formations apply as well to public as to private rights. The law is well

settled that cities and towns as well as individuals whose lands are bounded by a stream of water which changes its course gradually by alluvial formations, shall still hold by the same boundary, including the accumulated soil. No other rule can be applied on just principles.

The Mayor etc. of New Orleans v. The U. S., 10 Peters, 662.

All grants of land bounded by fresh-water rivers, where the expressions designating the water line are general, confer the proprietorship on the grantee to the middle thread of the stream, and entitles him to the accretions.

Jones v. Soulard, 24 How., 41.

If a fresh-water river running between the lands of separate owners, insensibly gains on one side or the other, the title of each continues to go *ad filum medium aquae.*

3 Kent's Com., side page 428.

The right to alluvial formation or batture, or right of accretion, is a vested right inherent in the property, and cities as well as individuals may acquire it as owner of the front or riparian proprietor. The civil law says, that the ground gained on a river by alluvion, or imperceptible increase belong to the owner of the adjoining land *jure gentium.* This is also the rule of the common law.

3 Kent Com., side page 428, note *b* and *a.*

Municipality No. 2 v. Orleans Cotton Press, 18 Louisiana, 122.

A mere intruder on land is limited to his actual possession, and the right of riparian proprietor does not attach to him.

Watkins v. Lessees of Holman et al., 16 Pet., 25.

A lessee of a portion of the Cahokia Commons bordering on the Mississippi river is entitled to the accretions thereto caused by the receding of the stream or a change in the current, during his term, even though the bank of the stream is named as a boundary of the devised premises.

Cobb v. Lavalle, 89 Ill., 331.

The things which belong separately or severally to cities and towns are fountains of water, market places, alluvions of rivers, forests and pastures, and all other places which are established for the common use.

The 9th law tit. 20 of partita 3, approved by the Court in The Mayor etc. v. The U. S., 10 Pet., 724.

The boundary line between the States of Illinois and Missouri is the middle of the main channel of the river; when there are several channels, the middle of the principal one is the boundary.

Buttenuth v. St. L. Bridge Co., 123 Ill., 545-553.

If the Mississippi river forms the boundary line of land granted by the United States, the grantee becomes a riparian owner both by the common and the civil law, and his grant extends to the center of the current.

Houck v. Yates, 82 Ill., 179.

All alluvions belong to the riparian proprietor, both by the common and civil law. All grants bounded upon a river not navigable by the common law entitles the grantee to all Islands lying between the main land and the center of the stream.

Middleton v. Pritchard, 3 Scam., 520, 522.
Fuller v. Dauphin, 124 Ill., 542.
City of Chicago v. Laflin, 49 Ill., 176.
Brown et al. v. Bressler, 64 Ill., 488.

All lands granted as a Common to the inhabitants of any town, hamlet, village or corporation shall forever remain common to the inhabitants of such town, hamlet, village or corporation; but the said Commons may be divided and leased in such manner as may be provided by law, etc.

Constitution of Illinois, 1848, art. 11.

An act to provide for leasing the lands granted as a Common to the inhabitants of the Town of Kaskaskia for school and other purposes.

Laws of Illinois, 1849 and 1851, p. 5.

The last section of this act concludes as follows: "And this act shall be taken, considered and construed as a public act in all Courts whatever."

If entry is not made under a paper title, the possession is considered adverse to that portion only of the premises actually occupied.

Turney v. Chamberlain, 15 Ill., 271.
Bristol et al. v. Carroll County, 95 Ill., 93.
Tyler on Ejectment, p. 894.

Twenty years' actual possession under claim of ownership sufficient to bar title when the owner of title is not under disability.

Flaherty v. McCormack et al., 113 Ill., 548.

Squatter who holds permissively gains no right.

Sacket v. McDonnell, 8 Biss., 394.

The act authorizing the leasing of the Commons, makes it school lands, and as such it is not taxable until it is leased or otherwise used for profit.

Hurd's Stat., sec. 2, chap. 120.

Laws of 1849 and 1851, p. 5.

Possession of tenant in common is not adverse to his co-tenants so long as the relation exists.

Winters v. Haines, 84 Ill., 585.

In case of an express trust, the statute of limitations does not apply until the trust is disavowed by the trustee, and adverse right or interest is insisted upon and made known to the *cesti que trust.*

Home v. Ingram, 125 Ill., 198 and 232.

Municipal corporations are not within the operation of the statute of limitations as respects public rights.

Logan County v. City of Lincoln, 81 Ill., 156.

Lee v. Town of Mound Station, 118 Ill., 304.

Catlett v. The People, 151 Ill., 23.

The statute of limitations does not run against a *quasi* municipal corporation. The rule in this State is, that the statute may be interposed to all actions by such corporations to enforce mere private rights, but it is equally well settled that it is no defense to

those involving public rights.

Greenwood v. Town of LaSalle, 137 Ill., 228.

Municipal corporations are mere creatures of the Legislative will, and can exercise no powers except such as the State has conferred upon them. All powers they possess are held by them in *trust* for the people of the community, and for the public generally.

Zanone v. Mound City, 103 Ill., 556.

Catlett v. The People, 151 Ill., 24.

When a municipal corporation represents the public at large, or the State, the statute of limitations as such is not applicable.

Catlett v. The People, 151 Ill., above.

Madison County v. Bartlett, 1 Scam., 67,

County of Piatt v. Goodell, 97 Ill., 84.

Our understanding of the law is, that as respects all public rights, or as respects property held for public use, *upon trusts*, municipal corporations are not within the statute of limitations.

The People etc. v. Boyd et al., 132 Ill., 67.

It would be a pernicious doctrine to establish that public rights of municipalities could be cut off by the neglect of the appointed officers for an unreasonable time to enforce them.

Logan County v. City of Lincoln, 81 Ill., 159.

County of Piatt v. Goodell, 97 Ill., 89.

2 Dillon on Municipal Corporations, sec. 532, 533.

The Trustees of the Commons act only as the agents of the State in the discharge of the duties

imposed upon them by law, and their omission of duty will not prejudice the rights of the inhabitants of the Town of Kaskaskia who are the beneficiaries.

Culver v. City of Streator, 130 Ill., 244-5.

No one should ever erect a house or other building or works in the squares, nor on the commons, nor in the roads belonging to the commons of cities, towns or other places; for as those things are left for the advantage and common use of all, no one should take possession of them, or do or erect any works thereon for his benefit; and if any one contravenes this law, that which he does shall be destroyed; and he shall not acquire a right thereto by prescription.

23d law tit. of partida 3, approved in The Mayor etc. of New Orleans v. The U. S., 10 Peters, 722.

Declaration of defendant to the Assessor that he had no real estate for taxation, estops him.

Tucker et al. v. Conwell et al., 67 Ill., 552.
Flower et al. v. Elwood et al., 66 Ill., 438.
Robbins et al. v. Moore et al., 129 Ill., 30.
Chandler v. White et al., 84 Ill., 438.

A verbal statement is a good estoppel where the party has made an admission which is clearly inconsistent with the evidence he proposes to give or the title or claim which he proposes to set up.

Baker v Pratt, 15 Ill., 571.
Internat. Bank etc. v. Bowen et al., 80 Ill., 541.

Where a party fails to make his rights known, when fairness and good conscience requires that he should do so to protect the interests of others, he cannot be heard as against them to assert such rights.

Lloyd v. Lee, 45 Ill., 277.
Kunear v. Mackey, 85 Ill., 98, 99.
Thor et al. v. Oleson et al., 125 Ill., 365.

ARGUMENT.

This is an action of ejectment brought by the President and Trustees of the Commons of Kaskaskia to recover certain land claimed by the defendant under the twenty years' limitation law.

This land being part of the Commons was ceded by the French Government to the inhabitants of the parish of the Immaculate Conception of Kaskaskia in 1743, as a Common, and was to remain in common without altering its nature, except that Commoners might use it for the purposes of pasturage and estovers. Virginia by conquest of arms acquired this territory in 1778, and ceded the same to the United States in 1784, with the reservation, "That the French and Canadian inhabitants, and other settlers of the Kaskaskias, Saint Vincents and neighboring villages, who have professed themselves citizens of Virginia, shall have their possessions and titles confirmed to them, and be protected in the enjoyment of their rights and liberties."

Deed of Cession from Virginia, Hurd Stat, 18.

In 1804, by an act of Congress, Commissioners were appointed to examine into this, among other claims to land in Illinois, and after such examination they did on the 31st day of December, 1809, recommend for confirmation this claim as a Common to the inhabitants of the Town of Kaskaskia, and Congress did on the 1st day of May, 1810, pass an act that all the decisions made by these Commissioners entered in their transcript, bearing date

December 31, 1809, and transmitted to the Secretary of the Treasury, be confirmed.

American State Papers, Public Lands, vol. 2, 148.
U. S. Stat., vol. 2, chap. 40, p. 607.

Accompanying the report of said Commissioners is a plat designating the boundary of said Commons and giving the number of acres.

Sec. 3, chap. 22, U. S. Stat., vol. 2, p. 678, provides further, "That the decisions made by the Commissioners, heretofore appointed for the purpose of examining the claims of persons to lands in the district of Kaskaskia, in favor of such claimants to town or village lots, outlots or rights in common, to Commons and common fields as entered in the transcripts of decisions, bearing date the 31st day of December, 1809, which have been transmitted by the said Commissioners to the Secretary of the Treasury according to law, be confirmed to all such rightful claimants according to their respective rights thereto." That the report of the Commissioners created by law, and its confirmation by the Congress of the United States, vested the title to the Commons in the inhabitants of the Town of Kaskaskia, there cannot, we think, be any room for doubt. The act of Congress confirming the report of the Commissioners is an operative grant of all the interest the United States may at any time have had in the land described in the transcript of the Commissioners under that date, and confirms the Commons in terms to the inhabitants of the Town of Kaskaskia.

Herbert v. Lavalle, 27 Ill., 454.

In the case of Doe etc. v. Hill, Breese, 304, the Court holds the confirmation made by the Governor of the Northwest Territory valid, and holds that it operates as a release on the part of the United States, of all their rights. But we are not confined alone to the decisions of our State Courts to sustain the legal and binding effect of the confirmations of Congress. In the case of Langdeau v. Hanes, 21 Wall., 521, the Supreme Court of the United States holds that the deed of cession from Virginia did not pass any title to the United States for the possessions and settlers mentioned therein; their possessions and titles were recognized and respected not only by the French and English authorities before, but also by Virginia at the time she acquired the territory by conquest, and she reserved them specifically to the inhabitants and settlers in the deed of cession. The fee never was in the United States. The acceptance of the deed by the United States from Virginia imposed upon them the duty of performing the condition and giving the protection stipulated; and that to confirm the possessions and titles of the inhabitants was to give them such further assurance as would enable them to enjoy undisturbed their possessions, and assert their rights to their property in the Courts of the country, as fully and completely as if their titles were derived directly from the United States. Virginia recognized the general rule of public law in this respect, that by the cession or sale of territory from one Government to another, sovereignty and public property alone pass, and the private holdings

of the inhabitants are not affected. The confiscation of private property in territory acquired by conquest by the conqueror would outrage the sense of justice and right in all civilized nations. This territory, therefore, was received by the United States from Virginia with the obligation resting upon them to respect the principles of public law, and to secure to the inhabitants of the territory by confirmation or grant their titles and possessions. In Chouteau v. Eckart, 2 How., 344, the Supreme Court of the United States says that the act of Congress passed on the 13th of June, 1812, confirming the titles and claims of certain towns and villages, to village lots and commons, gave a title which is paramount to a title held under an old Spanish concession confirmed by Congress in 1836. In the case of Les Bois v. Bramell, 4 How., 459, the Court says, this law vested in the city (St. Louis) corporation the town common in fee simple, and gave full power to the Legislature of Missouri to incorporate it into the city by extending the city charter over i t. The Court in this case, like that of Chouteau v. Eckart above, holds that the Government being unable to confirm the same land to two adverse claimants, must determine between the conflicting titles, and its decision is final as to them. The treaty stipulations of our Government require, according to McMichan v. The United States, 7 Otto, 204, to sustain the titles which would have been sustained by the Government from which our title to the territory was derived.

France and England, and Virginia after her con-

quest of the territory, always recognized the titles and possessions of the French and Canadian inhabitants and other settlers of the Town of Kaskaskia and the neighboring villages, and the United States under the deed of cession from Virginia were obligated not only by the established rule of public law, but also by the letter and spirit of the grant to confirm them in all their titles and possessions. A survey was necessary by the United States for the purpose only of severing the private lands from the public domain; to find out what portion of the domain ceded by Virginia passed by the cession, and this was ascertained by first establishing the claims of the settlers; the residue only belonged to the United States subject to their disposal. Although the claims of the inhabitants to their possessions may have been *in-choate*, the deed of cession imposed on the United States a binding obligation to perfect them; and the legislation of Congress from 1804 has proceeded upon this broad principle of justice, as is fully evidenced by the modes adopted to investigate these claims through Boards of Commissioners, and then confirming their action, as was done in the case of the Commons of Kaskaskia in 1810. Accompanying the report of the Commissioners to the Secretary of the Treasury, December 31, 1809, was the plat designating the Commons of the Town of Kaskaskia, and the confirmation of the report of the Commissioners included the confirmation and ratification of the plat, and is as binding on the Government and vests the title as fully and absolutely in the inhabitants of the Town of Kas-

kaskia as a patent would have done. In support of this position, we respectfully refer to Guitard v. Stoddard; 16 How., 494; Strother v. Lucus, 12 Pet., 410; and Dent v. Emmeger, 14 Wall., 308. In the grant of this Common by the French Government, the beneficiaries are the inhabitants of the parish of the Immaculate Conception of Kaskaskia; and in the confirmation by the Government of the United States, the beneficiaries are the inhabitants of the Village of Kaskaskia, but the Court will observe that the inhabitants of the parish of the Immaculate Conception of Kaskaskia at the time the French grant of the Common was made, were, for the purpose of protection for themselves and families from Indian outrages, necessarily compelled to reside within the village, and but few—if any—parishioners of the parish resided elsewhere; and the Commissioners finding the parishioners still residents of the village, in their report to the Secretary of the Treasury recommended that the title to the Common be confirmed to the inhabitants of the Village of Kaskaskia. From the authorities above given, we do not hesitate to say that there is no room for doubt that the title to the Common is in the inhabitants of the Town of Kaskaskia. But it will be claimed and insisted upon by the defendant that the inhabitants of the Town of Kaskaskia, under their grant, are not riparian proprietors; that they are not entitled to the possession of the land in question, because it is an accretion to the Common, formed by the gradual receding of the waters of the Mississippi river. If the alluvion formed in front of and at-

ached to the Common on the west, does not belong to the inhabitants of the Town of Kaskaskia who own the Common, then it is Government land and subject to be disposed of by it.

On behalf of the plaintiff, we insist that the rights and privileges of a riparian proprietor apply as well to the public, as to private persons. In Jones v. Soulard, 24 How., 41, in error from the Circuit Court of the United States for the district of Missouri, the Court holds that the eastern boundary line of the corporation of the City of St. Louis extends to the middle thread of the Mississippi river, and the alluvion formed by the receding of the waters of the river belong to the city and its grantee. The *quay* or common fronting the City of New Orleans and lying on the Mississippi river was designated as such in 1724, and from that time appropriated to the public use; being common property to the use of which strangers as well as the inhabitants of the city are entitled in common. In 1825 the United States through their attorney sought to recover this *quay* or common from the City of New Orleans; and in the case of The Mayor etc. of New Orleans v. The United States, 10 Peters, 662, the Court says, "It appears that this *quay* has been greatly enlarged by the alluvial formations of the Mississippi river, and from this fact an argument is drawn against the right of use in the city, at least to the extent asserted. The history of the alluvial formations by the action of the waters of this mighty river is interesting to the public, and still more so to the riparian proprietors. The question

is well settled at common law that the person whose land is bounded by a stream of water which changes its course gradually by alluvial formations, shall still hold by the same boundary, including the accumulated soil. No other rule can be applied on just principles. Every proprietor whose land is thus bounded is subject to loss by the same means which may add to his territory; and as he is without remedy for his loss, in this way, he cannot be held accountable for his gain. This rule is no less just when applied to public, than to private rights." Under this decision there can be no doubt of the riparian proprietorship of the owners of the Commons of Kaskaskia; and it is equally true that all grants bounded by fresh-water rivers, where the expressions designating the water line are general, as in the case of the boundary of the Commons of Kaskaskia, confer the proprietorship on the grantee to the middle thread of the stream and entitles it to the accretions. If a fresh-water river running between the lands of separate owners, insensibly gains on one side or the other, the title of each continues to go *ad filum medium aquae.* This is the doctrine laid down by Kent, vol. 3, side page 428, and in note *b* and *a* on same page we find "That the doctrine of alluvions has caused much expensive litigation in New Orleans, and the Roman, Spanish and French laws applicable to the case have been examined and discussed with profound research and ability."

In the case of Municipality No. 2 v. Orleans Cotton Press, 18 Louisiana, 122, it was declared that

the right to future alluvial formation, or right of accretion, was a vested right inherent in the property, and an essential attribute of it, resulting from natural law, in consequence of the situation of the land to which it attaches. It was an accessory to the principal estate or land, and cities as well as individuals may acquire it, as owner of the front, or riparian proprietor. The civil law says that the ground gained on a river by alluvion or imperceptible increase belongs to the owner of the adjoining land, *jure gentium*. This is also the rule of the common law."

In the case of Watkins v. The Lessees of Holman et al, 16 Peters, 25, the court says that a mere intruder on land is limited to his actual possession, and the right of a riparian proprietor does not attach to him. What else is the defendant in this case but an intruder, or squatter? When he was called upon by the assessor to list his property for taxation, he unequivocally stated that he did not have any real estate, which was a public admission that he did not claim the land. The 23d law tit. 32 of Partida 3, and which is approvingly referred to by the court in the case of The Mayor &c. of New Orleans v. The United States, 10 Peters, 724, is as follows: "No one ought to erect a house or other buildings or works in the squares, nor on the commons, nor on the roads which belong to the commons of cities, towns or other places, for as these things are left for the advantage or convenience and the common use of all, no one ought to take possession of them, or do, or erect any works there

for his own particular benefit; and if anyone contravenes this law, that which he does there must be pulled down and destroyed; and if the corporation of the place where the works are constructed choose to retain them for their own use, and not pull them down, they may do so, and they may make use of the revenue they derive therefrom in the same manner as any other revenues they possess; and we moreover say that no man who has erected works in any of the above-mentioned places can or shall acquire a right thereto by prescription."

This Court in the case of Cobb v. Lavalle, 89 Ill., 331, held that a lessee of a portion of the Cahokia Commons bordering on the Mississippi river is entitled to the accretions thereto caused by the receding of the waters of the river or a change in the current during his term, even though the bank of the river is named as the boundary of the demised premises. In Buttenuth v. St. Louis Bridge Co., 123 Ill., 545 to 553, this Court fixed the boundary line between this State and Missouri in the middle of the main channel of the river, and where there are several channels the middle of the principal one is the boundry. Under this decision all doubt is removed in this case, as the main channel has always been closest to the Missouri shore and between the land in question and the Missouri shore. This Court in numerous cases has held that where the Mississippi river forms the boundary of land granted by the government, the grantee becomes a riparian proprietor, and entitled to all islands

lying between the main land and the center thread of the stream; and will only cite Middleton v. Pritchard et al, 3 Scam., 520, which is the leading case on this question, and Honk v Yates, 82 Ill., 179.

The position assumed by the defendant in the Court below, that the Commons of Kaskaskia was granted at the time the civil law was in force, and that the grant thereby extended only to low-water mark on the river is not tenable. This rule of the civil law does not apply either in Louisiana or Missouri in a case like this, and it certainly does not in this State, and it is repudiated by the Supreme Court of the United States. For the sake of the argument, suppose the civil law was in force in all its vigor, when the grant of the Common was made by the French Government; did it not devolve upon the United Ststes after the acquisition of this territory by Virginia and its cession to them to confirm the titles and possessions of the French and Canadian inhabitants and other settlers in the territory? And did not the United States in strict conformity with the deed of cession confirm them in their titles and possessions, including this Common? And if the United States confirmed to the inhabitants of the town of Kaskaskia more land as a Common than was included in the French grant, can the defendant benefit by it? The United States was bound by their acceptance of the deed of cession from Virginia to confirm the Common to the inhabitants of the town of Kaskaskia, but the deed did not limit them as to the *maximum* number of acres, and if they in their confirmation extended

the grant to the middle of the main channel of the Mississippi river, which the Courts hold they did, it was no violation of their obligation under the deed of cession. The Court will observe that the Common is bounded by the village of Kaskaskia, the Mississippi river, the Common fields of Kaskaskia and the Kaskaskia river, and by this boundary it was confirmed by Congress to the inhabitants of the town of Kaskaskia in 1810. The Common as confirmed by the United States doubtless contained as many acres as the original French grant did, at least the Commoners have never been heard to complain; and if, in the confirmation they imcluded an additional amount, they had the undoubted authority under the law to do so, regardless of any application of the civil law. We therefore insist that the rule of the civil law cannot apply, and that the confirmation of the Common to the inhabitants of the town of Kaskaskia must be governed by the rule of the Common law, which makes the middle of the main channel of the Mississippi river the boundary line of the Common in question. We have conclusively shown I think, that the Common of the town of Kaskaskia has been granted and confirmed to the inhabitants of said town; that by said grant and confirmation said inhabitants of said town are riparian proprietors, and that the Common so granted and confirmed is bounded on the South and West by the middle line of the main channel of the Mississippi river.

Again we insist that the contention of the defendant that he has acquired title to the common

land in question by twenty years' possession is not tenable. The Court will observe that the French grant specifically states that it "shall remain in common without altering its nature." The report of the commissioners as confirmed by the United States designates it as a common for the use of the inhabitants, and the constitution of 1818 of this State, Article 8, Section 8, provides that, "All lands which have been granted as a common to the inhabitants of any town, hamlet, village or corporation, by any person, body politic or corporate or by any government having power to make such grant, shall forever remain common to the inhabitants of such town, hamlet, village or corporation; and that said commons shall not be leased, sold or divided under any pretense whatever. And the constitution of 1848, Article 11; is identical with the provision of the said constitution of 1818, with this addition; that "the said commons, or any of them, or any part thereof, may be divided, leased, or granted in such manner as may hereafter be provided by law, on petition of a majority of the qualified voters interested in such commons, or any part of them." Under the constitution of 1848 authorizing the leasing of the commons, the legislature of this State in 1851 on the petition of a majority of the qualified voters of the town of Kaskaskia interested in said common did pass an act entitled an act to provide for leasing the lands granted as a common to the inhabitants of the town of Kaskaskia or so much of said lands as it may be to the interests of the inhabitants of said town to

lease for school and other purposes. Section one of said act relates to the corporation and its powers; section two to the manner of organizing and the term of office of the trustees, etc.; section three provides how the common or any part thereof shall be leased and the maximum length of time; and section 5 provides the mode of leasing the lots, &c. Section 6 provides that the proceeds of the lands and lots of the said common of Kaskaskia so leased as provided by this act shall, after defraying the expenses attending the leasing of said lands and lots, be used and applied to the education of the children of the inhabitants of Kaskaskia, and such residents as are, by immemorial custom, Commoners upon said Common, and the children of the lessees of said lots and lands so leased &c; section 7 authorizes the President and Trustees to appropriate a portion of the proceeds arising from the leasing of said Commons to the purpose of religion, and for the support and advancement thereof, but an appropriation for this purpose can only be made on petition of a majority of the voters of said town of Kaskaskia, indicating the religious purposes to which the same shall be applied, and the amount thereof; Section 16 concludes as follows; "And this act shall be taken, considered and construed as a public act in all courts whatsoever."

The constitution provision of 1848 is the first authority given to the inhabitants of the town of Kaskaskia to change the use of said Common from pasturage to agricultural or other purposes, and then only on the petition of a majority of the qualified

voters of said town. But the provision does not change the ownership, for it specifically states that it shall forever remain Common to the inhabitants of such town, hamlet, village or corporation. The law passed in conformity therewith, authorizes the President and Trustees therein created to survey and divide into lots, all or a portion of said Common, and lease the same at public outcry to the highest bidder, for a period not exceeding fifty years, and the proceeds arising therefrom shall be applied to the education of the children of the inhabitants of the town of Kaskaskia, and the children of the lessees of said lands. At the expiration of the term for which they were leased, the possession under the law is vested again in the inhabitants of the town of Kaskaskia in common for their common benefit until by a petition of a majority of the legal voters of said town the President and Trustees are again required to lease them as provided by law. Under the said constitutional inhibition the lessees are bound to surrender possession at the expiration of their terms, and they will be trespassers until they do; and can a mere squatter on the unleased common, which cannot be alienated in any way by the corporation except by the statute, acquire a proprietory right equal to or superior to a lessee? The defendant claims the land in question in fee, and the court below so found, and the finding we insist is in violation of the letter and the sprit of the grant and corfirmation, as well as the constitution of the State of Illinois. There is but one way

known to the law by which the corporation can deprive the inhabitants of the possession and use of the common or any part of it, and that is by leasing it in the mode provided by the legislature, and that deprivation continues only during the term of the lease. The corporation cannot alienate the fee nor can it vest a possessory right in anyone for any length of time to any portion of said common, except in the manner provided by law. The inhabitants of the town of Kaskaskia are under disability, created by the constitution, in the disposition of the common, and this disability is a bar to the possessory right claimed by the defendant. The constitution of 1848, under which the authority to lease the common was given, and under which the defendant's pretended possession must have commenced, provides that said common shall forever remain common to the inhabitants of such town, hamlet, village or corporation, but the defendant by his acts assumes the position that grants, confirmations and constitutional provisions must all be abrogated, in the interests of his pretended claim. The Act incorporating the President and Trustees of the Commons of Kaskaskia is a public law, made so by the act itself, and the duties of the corporation are all of a public character, and this Court, in the case of Greenwood v. The Town of LaSalle, 137 Ill., 228, says, that the doctrine is well settled in this State that the statute of limitations cannot be interposed in defence of an action involving public rights. The plaintiff is at least a *quasi* municipal corporation, and the duties devolv-

ing upon it by law are in the nature of a *trust*, and for the benefit of the public, and it would be a dangerous doctrine to establish, that public rights created in this way could be cut off by the mere neglect of the corporate authorities for a number of years to enforce them. It would place the public at the mercy of the officials, who if disposed to be dishonest could by mere inaction fritter away the property rights of the corporation. The plaintiff in its corporate capacity acts only as the agent of the State in the discharge of the duties imposed upon it by law, and its omission of duty cannot be taken advantage of by the statute of limitations.

Wm. Selser, a witness for the plaintiff, five or six years ago was a deputy assessor, called on the defendant to list his (defendant's) property, and after listing the personal property the defendant was asked if he had any real estate and he answered he had not, nor did he list any for taxation. We insist that this statement made by the defendant to the assessor that he had no real estate for taxation estops him from now setting up a claim to the land in question. His action in scheduling his personal property and disclaiming at the same time any interest in land and *swearing to the schedule* deceived the assessor, and was also a fraud on the public, which was interested to the extent of the taxes the land should have paid, and this we claim will estop the defendant from now asserting title to the land.

That the main and only channel of the river is

between the Island in controversy and the Missouri shore cannot be questioned on an examination of the evidence of the witnesses. Capt. Postal, an old river pilot testified "have known the channel of the river since 1847, and it was always next to St. Marys on the Missouri shore. The Island is on the east side, the Illinois side of the channel. In the forties I passed the Island as often as once a month, and from 1858 to 1859, I passed it every week, and the main channel was always down the Missouri shore, west of the Island." Dobbs has lived in Kaskaskia point for 62 years and has known the Island or towhead since it was formed. Woodley has known it as a towhead or Island since in the 60's; Cohen has known the towhead now called McClures Island since '62 or '63; and Burch has lived in Kaskaskia precinct since 1847 and has known the towhead or Island all this time and hunted on it when a boy All these witnesses say it has been pastured by the commoners as long as they have known it, and that the main and only channel of the river was always on the Missouri side of the Island; that it was for many years fenced off with other parts of the common by the commoners by permission of the board and used as pasture for their stock, and when the river was not high the land between the main land and the Island was dry. Burch, Sulser and Menard were at different times deputy assessors of Randolph county and as such assessed, with defendant's consent, his property, and Burch also says that the Island was considered in their precinct and that the Mc-

ing upon it by law are in the nature of a *trust*, and for the benefit of the public, and it would be a dangerous doctrine to establish, that public rights created in this way could be cut off by the mere neglect of the corporate authorities for a number of years to enforce them. It would place the public at the mercy of the officials, who if disposed to be dishonest could by mere inaction fritter away the property rights of the corporation. The plaintiff in its corporate capacity acts only as the agent of the State in the discharge of the duties imposed upon it by law, and its omission of duty cannot be taken advantage of by the statute of limitations.

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STATE OF ILLINOIS.

In the Supreme Court,

Southern Grand Division.

MAY TERM, A. D. 1896.

The President and Trustees of the Commons of Kaskaskia,
Plaintiff in Error,

vs.

CHARLES McCLURE, Defendant in Error.

Error to Randolph County.

Abstract, Brief and Argument

OF

Plaintiff in Error.

WM. HARTZELL,
R. E. SPRIGG, } ATTORNEYS FOR PLAINTIFF IN ERROR.

CLARION STEAM PRINT. CHESTER, ILL.

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ABSTRACT OF RECORD.

1 Placita of September term, 1895, of Randolph County Circuit Court, showing that the following is a complete copy of the record on the trial of said cause:

Copy of summons and return thereon.

Copy of complaint in ejectment by plaintiff, which states that on January 1, 1895, plaintiff was possessed of the following lands in said county, to-wit: East half of Outlot one (1) of the Commons of Kaskaskia, lying south of third and fourth surveys of said Commons, containing 200 acres, and being so possessed, the defendant entered thereon and unlawfully withholds the possession thereof from plaintiff.

Plea of not guilty by defendant.

Commencement of bill of exceptions, showing that the case was tried at the September term, 1895, of Randolph County Circuit Court before Judge George W. Wall without a jury. Recites that, be it remembered that on the trial of this case at said term of court, the plaintiff, to maintain the issues on its part, offered the following evidence:

The Grant by the French Government to the inhabitants of the parish of the Immaculate Conception of Kaskaskia, dependence of the Illinois, tending to be confirmed in the possession of a Common which they have had a long time for the pasture of their cattle in the Point, called "la point du bois," which runs to the entrance of the Kaskaskia river, dated at New Orleans, August 14, 1743.

The American State Papers, Vol. 2, page 148, containing the report of the Commissioners on the claims to the Commons, common fields and town lots of the Village of Kaskaskia, and plat accompa-

nying the same, confirming title to the lands therein
11 described in the inhabitants of Kaskaskia, dated December 31, 1809, signed by Michael Jones and
13 E. Backus, Commissioners.

15 The United States Statutes, Vol. 2, page 607, enacted May 1, 1810, which confirms the report of the Commissioners above set forth, approved May 1, 1810.

16 Also Revised United States Statutes, Vol. 2, containing the acts of 1812, confirming the report of Commissioners made in 1809.

17 Capt. W. C. Postal, the first witness for plaintiff, examined by counsel for plaintiff, testified as follows: About twenty years ago I was a steamboat pilot on the Mississippi river. I have known the land (Island) in controversy in this suit since 1847. The main channel of the Mississippi river runs next to St. Mary's on the Missouri shore. It has always done this since I have known the river, since 1847.

Q.—That being the case, on which side of the river was McClure's Island? A.—On the east side, the Illinois side.

18 Q.—How often did you pass this; quite often, I suppose? A.—Well, along in the '40s I passed it as often as once a month, and for a time in the '50s I was out of the river business until about '58 or '59, and from that on I passed it every week. I was in the Memphis trade then; before that I was in the New Orleans trade and didn't pass it more than once a month.

Q.—And the main channel, you say, was always— A.—The main channel was always down the Missouri shore.

Q.—West of the Island? A.—Yes, sir.

19 Newman K. Dobbs, plaintiff's next witness, testified: I live in Kaskaskia Point; have resided there about sixty-two years. I have known what we call McClure's Island ever since it formed. There was an Island there once before, in '44, I think, although I don't remember the year exactly.

Q.—I will get you to state if you know on which side of the Island the boats ran—where the main channel was? A.—They invariably went to the Missouri shore.

Q.—State what you may know of the inhabitants then using the Island for pasturage and other purposes? A.—Well, the people on the Point there in Kaskaskia have always used it as a pasture since it has been an Island, till the last four or five years, I think. Since that last survey, there was no stock to run on it and it hasn't been used since.

Q.—How long have you known it since it was first pastured? A.—Oh, it has been pastured ever since it has been an Island. I don't remember any year, to my recollection, since it has been an Island but what the stock would get on it sometime in the year. Sometimes in the spring when the water was up so high, the stock could not get there. There might have been one or two years that the water

stayed up there, but generally speaking they used it as a pasture all the time.

Q.—How many years, Mr. Dobbs, have you used it? A.—It has been used for the last—ours have been there twenty years, ever since it has been an Island. I expect it has been there since '61.

Q.—Well, you speak of its being used as a pasture; now, what part of the other Commons was used for pasturage purposes? A.—Before—no, since the third and fourth surveys were made, we ran our fences to the river, which gave the stock access through the slough to the Island.

The Court:—Just state that again, please? A.—The Commons up there—we have had four surveys. After the first two surveys were made, the stock law was in force and we got a permit from the Board. The people of the Point got a permit from the Board to make the two last surveys into a pasture and they joined the pasture fence at the river, which included McClure's Island. That was in the last two surveys.

The Court:—Joins the pasture fence next to the river on which side? A.—On both sides. It joins the river right above St. Mary's and above the second survey, but they run a lane up the road and let the bank be one line for about a mile, then they came to the lower end of the second survey, the south side of it, and they run the fence due east across the second survey, and then run it due south

about a mile up to the first survey, then due south to the Kaskaskia river. It joined both rivers.

21 Q.—The fence extended from the bank of the Kaskaskia to the bank of the Mississippi river? A.—Yes, sir.

Q.—Was the Island included in that? A.—The Island was in that land that was fenced off.

Q.—For a pasture? A.—Yes; we used it for our stock always up to the last three or five years.

Q.—When was the fence built there, if you can tell? A.—Well, it has been a good many years ago. It was right after the second survey was made, about the time the stock law took force, somewhere about that time.

Q.—What was done before that; how was the Common lands used before that? A.—Before the stock law, the Common lands were fenced up; that is, the first and second surveys.

Q.—Did they have access to the unsurveyed Commons? A.—Yes, sir.

Q.—Including the Island? A.—Yes, sir.

Q.—Now, how long have you known stock to run on that McClure Island? A.—I run stock there, I can safely say, for the last fifteen years, ever since it was, ever since stock could get on it.

Q.—You spoke about the first Island that form-

ed there washing away in '44? A.—Yes, there was quite an Island formed there and washed away.

Q.—Now how long after that before this Island formed there, or the part of it that is there now? A.—The first I remember was after the high water
22 of '51. It was always a flat bar. The channel of the river, since I can recollect, was always close to the Missouri shore. When the water would be low, there would be a bar on the north side run out half a mile some places; was rather a flat bottom.

Q.—Well, now, what has made McClure's Island—what bar—this bar that you speak of? A.—Well, it formed—made up. I suppose the river deposited sand on that flat ground there.

Q.—Where were the additions made, on what end of the Island, up the river or down the river? A.—It has been building down the river all the time.

Q.—Your first recollection of the present Island forming there was in 1851? A.—I think '51 was the first I remember of any Island there.

27 George Woodley, witness for plaintiff, testified: I live on Kaskaskia Island; have resided there since 1856. I have known the Island since along in the '60s. I don't remember what year, but it was in the '60s that I first went over there and drove cattle off. The Island has been used, to my knowledge, by the Commoners for pasturage purposes since my first
28 acquaintance with it. I have driven cattle off there lots of times since the stock law was enforced. Be-

fore we had stock law, we had the big field all fenced off to itself. When the Commons was first surveyed off, the stock all went on those sand bars or towheads to get away from the mosquitos.

Q.—Now, what do you know about the main channel of the river and where it has run since you have been there? A.—It always ran on the west side of that towhead, as we called it in those days; that is, next to the Missouri shore.

29 Q.—Do you know about when this fence was built from the Kaskaskia to the Mississippi river, fencing off the unsurveyed Commons? A.—I guess about '82 or '83.

Q.—Did you ever have any conversation with any of the McClures about this Island? A.—No, sir. It was during the war, about '63 or '64, that I was first on this Island.

31 W. L. Cohen, a witness for plaintiff, being duly sworn, testified: I first saw this towhead, now McClure's Island, in '62 or '63.

32 Q.—On which side of that Island was the principal channel of the river? A.—On the Missouri side.

Q.—State all you know about the use of that Island, what it was used for by the inhabitants of the Point? A.—Well, they used it for farming and pasturage both; farmed part of it and pastured some of it.

Q.—Which the Island. A.—You mean the McClure Island?

Q.—Yes, sir. A.—Why, we turned our stock out and they went down there in the woods. The first time I went through it was in the fall of '72. The stock run there then. I remember distinctly I went to where they were getting logs out of the river once. I went there to look for stock; it was in October; in the fall sometime, that year.

33 W. R. Eurch, witness for plaintiff, testified: I live in Kaskaskia Precinct; lived there since 1847.

Q.—State what you may know in reference to the Island incontroversy in this suit? A.—Well, I don't really remember when there was no Island
34 there. When I was a boy, I used to hunt down in that country. When the Island first formed, there was nothing but small willows on it. I suppose that must have been along '52, '53 or '54, or may be '56 or '57. I remember it when the willows were only two or three years old; small willows.

Q.—Where was the main channel of the river? A.—After the flood of '51, the boats always went on the other side, except in very high water.

Q.—Well, do you know about stock being pastured there? A.—Yes, sir. In the year 1866 I and my brother bought a lot of stock, fifty or sixty head of mixed cattle. Well, that summer they strayed over and got onto that Island or towhead, whatever they called it. There was no one living there then.

The water stayed up very high, and the cattle remained there until March, '67. After that, the river got lower; generally went dry every year after that.

Q.—There were times when it would be dry? A.—Frequently it would get entirely dry.

Q.—Do you know about the fence being built, fencing off the Commons, the unleased Commons?
35 A.—Yes sir; that was about the year of '77 or '78. That was on account of the stock law having been passed. The people got permission from the Board of Trustees of the Commons to make a fence from the Mississippi on the west, to come around to the Okaw river and along its bank, so they could turn stock on the south side so that they could range over that whole country.

Q.—Was this Island included in this arrangement? A.—Oh, yes, that was included, of course.

Q.—Was there any people living on that Island when you went after your stock? A.—At that time, in '66 or '67, there was no one living there at all.

37 Q.—You are acquainted with the McClures, are you? A.—Yes, sir.

Q.—Ever have any conversasion with them in reference to this Island? A.—Well, I was Deputy Assessor, two or three years ago, and went over there to assess these McClures. I went to see Wm. McClure first. He objected to giving in his property; claimed that he didn't live in Illinois. Afterwards

he came back and said it was all right; gave in his personal property.

Q.—Do you know about these men (McClures) voting in Illinois? A.—Yes, they voted up at our Precinct. We consider it all our Precinct. He voted there two or three times, the last four or five years back.

38 Wm. Sulser, the next witness for plaintiff, testified: I live at Kaskaskia; have lived in that neighborhood for the past twenty-seven years. I am acquainted with the McClures.

Q.—Ever have any conversation with them in reference to this Island? A.—I have.

Q.—State what it was? A.—Well, I was Deputy Assessor, about six years ago, and went over there to McClure and told him my business. He said he didn't think he could be assessed; that the Island belonged to Missouri. We parleyed around awhile and he finally came to the conclusion that he would give in his property, and he turned in the personal property. As Deputy Assessor, I asked him, Have you any real estate? and he said he had not.

Q.—Did he swear to the schedule? A.—He did, sir. I think this was six years ago, during Adams' term as Assessor.

39 James T. Douglas, plaintiff's next witness, being duly sworn, testified: I am County Surveyor of Randolph County, Illinois, and have been for the

last fifteen years. I made a survey of this Island in dispute. Witness being shown plat, (see Record for plat, page 41,) identified the same. William McClure was in possession of Outlot No. 1, as shown by said plat, when I made this survey. He had about thirty acres in cultivation right at or near his house, near the west end of the Island. Outlot No. 1, as shown by this plat, includes the most of the
40 Island that might be considered fit for cultivation. Plaintiff next offered in evidence the plat made by Surveyor Douglas, being the same plat contained in
41 the Record and marked at page 41.

43 A. Menard, plaintiff's next witness, testified: I live at Dozaville, on what is termed the Kaskaskia Island. I have known the land called McClure's Island since 1867. I went there then looking for stock. I was over there last spring as Deputy Assessor to assess the McClures. They gave in their personal property, but no real estate.

And thereupon the plaintiff rested, the foregoing being all the evidence offered in chief.

44 And the defendant, to maintain the issue on their part, offered the following evidence:

Mr. Horner:—We now offer the deposition of Josiah McCauley taken in St. Louis, Mo., before E. A. Feehan; to which the plaintiff objected, but the objection was overruled by the Court, to which the plaintiff then and there excepted.

45 Deposition of Josiah McCauley:—I formerly

lived in Perry County, Mo.; moved here to St. Louis seven or eight years ago. First knew an Island in the Mississippi river between St. Mary's, Mo., and Chester, Ill, in 1871. I owned the middle portion of it. I traded for it with Vince Powell. I made a crop on it in '72 and '73, when my wife died, and I sold it to Dr. Strong in January of '74. I repur-
46 chased it in 1877 from Joseph Blanford and moved back there in the spring of that year. It was a long Island, with two sloughs angling across it. Vince Brewer settled the lower part of it in '70 or '71,—I think the spring of '71,—and he left there between '77 and '80. I traded for what he had in '79. Brewer cultivated a part of the land. No part was fenced. Part of time there was water all around the Island.

Defendant's counsel, in connection with the examination of this witness, offers an instrument purporting to be a deed executed by said McCauley and wife, dated September 13, 1881, to Rancy Sides; to which plaintiff's attorney then and there objected, for the reason that said deed had no signatures of the grantors and was not acknowledged before an officer.

48 Deposition continued:--I claimed ownership of it. It was wild land and I went in possession of it and cleared and cultivated part of it.

49 On cross-examination, witness stated: I traded a watch worth about $20.00 for the land I got from Vince Panel. I don't think there was land in cultivation when I first went there, and the house was

not covered. I never got any deed for it from any
50 one. I never had it listed foe taxes in either Illinois or Missouri. The land, adjoining this Island on the Illinois shore, belonged to the Trustees of the Kaskaskia Commons.

51 Certificate of Commissioner E. A. Feehan to McCauley's deposition.

52 Defendant next read deposition of S. E. Strong: I know of an Island in the river between St. Mary's and Chester. I owned a part of it in 1873, but had no deed, but had possession of a part of it. I sold it in 1875.

Joseph Panel, the first witness offered by defendant, testified: I know Brewer's Island, as it is
56 called, between here and St. Mary's, Mo. First knew it in '69 or '70, when A. J. Panel and Vince Panel were in possession of it. They had the upper part of it. They were the first persons on the Island. Afterwards McCauley bought Vince Panel out. Brewer also had possession of lower part of it.
57 Some cattle there, but they were ferried over from Missouri for pasturage. There was just as much water on one side of the Island as on the other; that was in '81.

64 A. Layton, defendant's next witness, testified: I think I first went on this Island in '69. There was no one there then. I guess I was the first man there. I was on the upper part of it.

The Court:--You mean the west end?

A.—Yes, sir. Vince Panel was the next man there. He settled on the middle of the Island. He was there but a short time, probably a year. He sold to Josiah McCauley. Vince Brewer, I think, was on the lower portion of it. He went there, I think, in '71 or '72. There was plenty of water on both sides of it when I was there. Did not see any cattle there. I left there in '72 or '73, not later than '73, and haven't been on the Island since I came back here. I do not think any portion I was on then is there now; I think it has all washed away.

Fred. Easters, defendant's next witness, testified in substance as follows: I am eighty-three years old. This Island first formed by a boat sinking. This Brewer's Island used to be the land of Missouri and the channel of the river was on this side altogether. There was no water on the other side and that was the Missouri shore. I was born there, within two miles of this Island, and remained there until this time. I can't tell what year the boat sank. I hauled wood there. This was about '51 or '52. Stock was taken from Missouri to the Island for pasturage. The boats could run on either side of it.

Cross-examination:—The boats all run right along the Missouri shore now. The Island is now away below St. Mary's. The boat I spoke of sinking was up near St. Mary's. I can't recollect the year or the name of the boat; I can't write and put things down. The boat sank right by the Missouri bank. I came there in 1816. I haven't been on this Island lately. This Island has gradually filled up as

the water dried up. I am not acquainted with the land on the Illinois side. The Island I speak of forming by the boat sinking was near St. Mary's, on the Missouri side.

Louis Hagen, defendant's next witness, testified: I am slightly acquainted with the Island in
74 controversy; have been since '63. Vince Panel was the first man I knew there. He was in possession of the middle part. I think McCauley went there next. Panel was there I think in '70. He squatted
75 there and cultivated some. I have lived in that neighborhood twenty-six years.

Cross-examination:—These men I speak of liv-
76 ing on the Island just squatted there. They only owned it by squatter's rights; it didn't belong to them.

James Horr the next witness, testified: I live in Perry County Mo.; lived there thirty-five years. I live about three miles from this Island. I have known it ever since it was there. Vincent Panel was the first person I knew there. I knew McCauley was on the land, but do not know where. So was a Mr. Sides and Vince Brewer Cattle were brought there from Missouri to pasture. There was
77 water between the Island and the Illinois side when
78 I first knew it.

79 Cross-examination:—When the main channel was next to the Missouri shore, there was no Island there. I do not know where it is now.

80 Emmett Dean, defendant's next witness, testified: I know this Island. Brewer, McCauley and Panel were the first people I knew on there, in '73. I pastured a horse there in '77 or '78, and in '80 and '81 I had mules there. They were just turned loose on the Island. There was water then all around
81 there. These parties claimed the Island. I didn't hear anyone else claim it.

82 Defendant next offered a deed from Josiah McCauley and wife to Veries R. Sides, dated Sept. 13, 1881; also a small plat claimed and identified as part of the deposition, to the introduction and read-
83 ing of which plaintiff's counsel then and there objected, but the Court overruled the objection, to which ruling of the Court the plaintiff excepted.

85 Defendant next offered a deed of V. R. Sides and wife to J. H. McClure, dated Sept. 18, 1884, which was objected to by the plaintiff, but the Court overruled the objection, and the plaintiff then and there excepted to the ruling of the Court.

87 Defendant next offered a deed of I. H. McClure and wife to William McClure, dated Oct. 1, 1889, which was objected to by plaintiff, and overruled by the Court, and excepted to by plaintiff.

89 Clerk's certificate to copy of this deed.

91 And the plaintiff, to further sustain the issues on its part, offered the following evidence:

William Hartzell, being duly sworn, testified:

I knew Vince Brewer. I would not be positive, but it seems to me that it was in '72 or '73 that he came to me, and wanted me to write to the Government authorities about the land, and I did write some letters for him. I told Mr. Brewer at the time that I thought it belonged to the Kaskaskia Commons, but that I would write. Then the Commissioner stated that if it was Government land, he would have to have it surveyed and pay all costs, and have to contest with others who might wish to purchase it, and when Brewer found this out he decided to quit. I was not acting as his attorney. (Objected to by defendant's attorneys as incompetent.)

And the above and foregoing was all the evidence offered in the case.

92 Judgment of the Court, Sept. 19, 1895, for the defendant and against the plaintiff for costs.

93 Copy of motion by plaintiff for a new trial.

93 But the Court denied the motion, and gave judgment for the defendant, to which decision of the Court in denying said motion and rendering judgment against the plaintiff, the plaintiff by their counsel then and there excepted.

Conclusion of bill of exceptions, signed by George W. Wall, Judge, Dec. 5, 1895.

95 Clerk's certificate and seal to the Record.

96 Assignment of Errors.

STATEMENT.

On the 17th day of August, 1743, Vandruil, Governor, and Salmon, Commissary Orderer of the province of Louisiana, on the petition of the inhabitants of the parish of the Immaculate Conception of Kaskaskia, dependence of the Illinois, confirmed to them the possession of a certain Common in the Point, called *le point de bois*, which they have been in possession of for a long time for the pasturage of their cattle, etc.

This grant comprised a large tract of land, bounded by the Village of Kaskaskia, the Mississippi river, the Common fields of Kaskaskia and the Kaskaskia river, and was to remain in common without altering its nature, except that the Commoners might use it for the purposes of pasturage and estovers.

"After the conquest of the country by England, the result of the war commenced in 1756 and terminated by the treaty of Paris of 1763, no interference was attempted with any of the grants made by the India Company or by the Crown of France in this part of Louisiana, nor by Virginia after its conquest by arms, in 1778. Virginia ceded the country to the United States by deed dated March 1st, 1784, by authority of an act for that purpose passed October 20, 1783. That act provides that the French and Canadian inhabitants, and other settlers of the Kaskaskias, Saint Vincents and the neighboring villages, who have professed themselves citizens of

Virginia, shall have their possessions and titles confirmed to them, and be protected in the enjoyment of their rights and liberties." On March 26, 1804, by an act of Congress, Commissioners were appointed to examine into this, among other claims to land in Illinois, and after their examination they recommended the confirmation, among others, this claim as a Common to the inhabitants of the Town of Kaskaskia, on the 31st day of December, 1809, and so reported to the Congress, and Congress on the 1st day of May, 1810, passed an act that all the decisions made by these Commissioners entered in their transcript bearing date December 31, 1809, and transmitted to the Secretary of the Treasury, be confirmed.

Accompanying the report of the Commissioners is a plat designating the boundary of said Commons and giving the number of acres. The inhabitants of the Town of Kaskaskia having the authority under the Constitution of the State of Illinois of 1848, to have the said Commons subdivided and leased, did by petition as provided by the said Constitution obtain a Legislative enactment in force January 23, 1851, entitled "An act to provide for leasing the lands granted as a Common to the inhabitants of the Town of Kaskaskia, in Randolph County, or so much of said lands as it may be to the interest of the inhabitants of said Town to lease for school and other purposes." The President and Trustees who were named in said act met and organized by electing a President, and Clerk, and Treasurer, and at

once proceeded under the law to survey, divide and plat a portion of said Commons into lots, and leased the same at public outcry to the highest bidder, for the term of fifty years, the payments to be made annually, and the proceeds arising from said leases have been appropriated annually by them and their successors in office for the education of the children of the inhabitants of Kaskaskia, and such residents as are by immemorial custom Commoners upon said Commons, and the children of the lessees of said lots and lands so leased.

There have been four surveys and plats made of said Commons, and the lands so platted were leased to the highest bidders for a term of fifty years. The first survey and plat of about 2,000 acres was made in February, 1855; the second of about 2,200 acres was made in December, 1867; the third of about 780 acres was made in February, 1889, and the fourth of about 2,500 acres was made in May, 1889.

The land in question is an accretion, and being higher along the east bank of the main river than where it connects with the Common lands, has the appearance of an Island or towhead, as it is called, and it never has been surveyed, platted and offered for sale by the President and Trustees of the Commons of Kaskaskia, or anyone for them, as the law directs.

BRIEF.

Grant and confirmation of the French Government to the inhabitants of the Immaculate Conception of Kaskaskia, August 14, 1743.

Translations of French Records, pages 38 and 39, State Auditor's office.

Deed of cession from Virginia, conveying to the United States the territory north westward of the river Ohio, with the proviso, "That the French and Canadian inhabitants and other settlers of the Kaskaskias, Saint Vincents and the neighboring villages who have professed themseives citizens of Virginia shall have their possessions confirmed to them and be protected in the enjoyment of their rights and liberties."

Hurd's Statutes, 1895, p. 16 and 17.

Act to appoint Commissioners to allot the lands claimed by the inhabitants of said villages, etc.

U. S. Statutes, vol. 2, chap. 35, sec. 2, 3, 4, p. 277.

An act to revive and continue for a further time the authority of the Commissioners of Kaskaskia.

U. S. Statutes, vol. 2, chap. 16, p. 517.

Report and plat of the Commissioners appointed by act of Congress to allot the lands claimed by the inhabitants of Kaskaskia.

American State Papers, Public Lands, vol. 2, p. 148 and 149.

An act confirming the decisions of the Com-

missioners in favor of the claimants of land in the district of Kaskaskia.

U. S. Statutes, vol. 2, chap. 40, p. 607.

An act for the revision of former confirmations, and for confirming certain claims to land in the district of Kaskaskia.

U. S. Statutes, vol. 2, chap. 22, sec. 3, p. 678.

The act of Congress confirming the reports of the Commissioners is an operative grant of all the interests the United States had in the land described in the transcript of the Commissioners under that date, and confirms the land in terms to the inhabitants of the Town of Kaskaskia.

Herbert v. Lavalle, 27 Ill., 454.

The deed of cession from Virginia did not pass any title to the United States for the possessions of the inhabitants and settlers mentioned therein. The fee never was in the United States. The acceptance of the deed of cession, imposed upon the United States the duty of performing the conditions stipulated, and also to protect the inhabitants in the enjoyment of their property rights.

Langdeau v. Hanes, 21 Wall., 521.

The act of Congress confirming the titles and claims of certain towns and villages to village lots and Commons is paramount to a title held under an old Spanish concession confirmed afterwards.

Chouteau v. Eckart, 2 How., 344.

Whatever claim or interest there was in the

United States passed out by the corfirmation act of May 1, 1810, in the lands therein mentioned.

Doe v. Hill, Breese, 304.

What only is required by treaty stipulations.

McMichan v. U. S., 7 Otto, 204.

A survey was necessary to sever the private lands from the public domain; to ascertain what portion of the domain ceded by Virginia passed by the cession, and that was found by first establishing the claims of the settlers; the remainder only belonged to the United States.

Richart v. Felps, 33 Ill., 433.

A survey approved by the United States and accepted by the confirmee is conclusive evidence that the land granted is the same described and bounded by the survey, etc.

Guitard v. Stoddard, 16 How., 494.

A grant by Congress is as binding as a patent; and a confirmation by law is to all intents and purposes a grant.

Strother v. Lucus, 12 Peters, 410.

Gerrett et al. v. Taylor et al., 9 Cranch, 43.

A survey and confirmation of the Commons by the United States is binding upon them, and against all those claiming adversely to it.

Dent v. Emmeger, 14 Wall., 308.

The law governing alluvial formations apply as well to public as to private rights. The law is well

settled that cities and towns as well as individuals whose lands are bounded by a stream of water which changes its course gradually by alluvial formations, shall still hold by the same boundary, including the accumulated soil. No other rule can be applied on just principles.

The Mayor etc. of New Orleans v. The U. S., 10 Peters, 662.

All grants of land bounded by fresh-water rivers, where the expressions designating the water line are general, confer the proprietorship on the grantee to the middle thread of the stream, and entitles him to the accretions.

Jones v. Soulard, 24 How., 41.

If a fresh-water river running between the lands of separate owners, insensibly gains on one side or the other, the title of each continues to go *ad filum medium aquae.*

3 Kent's Com., side page 428.

The right to alluvial formation or batture, or right of accretion, is a vested right inherent in the property, and cities as well as individuals may acquire it as owner of the front or riparian proprietor. The civil law says, that the ground gained on a river by alluvion, or imperceptible increase belong to the owner of the adjoining land *jure gentium.* This is also the rule of the common law.

3 Kent Com., side page 428, note *b* and *a.*

Municipality No. 2 v. Orleans Cotton Press, 18 Louisiana, 122.

A mere intruder on land is limited to his actual possession, and the right of riparian proprietor does not attach to him.

Watkins v. Lessees of Holman et al., 16 Pet., 25.

A lessee of a portion of the Cahokia Commons bordering on the Mississippi river is entitled to the accretions thereto caused by the receding of the stream or a change in the current, during his term, even though the bank of the stream is named as a boundary of the devised premises.

Cobb v. Lavalle, 89 Ill., 331.

The things which belong separately or severally to cities and towns are fountains of water, market places, alluvions of rivers, forests and pastures, and all other places which are established for the common use.

The 9th law tit. 20 of partita 3, approved by the Court in The Mayor etc. v. The U. S., 10 Pet., 724.

The boundary line between the States of Illinois and Missouri is the middle of the main channel of the river; when there are several channels, the middle of the principal one is the boundary.

Buttenuth v. St. L. Bridge Co., 123 Ill., 545-553.

If the Mississippi river forms the boundary line of land granted by the United States, the grantee becomes a riparian owner both by the common and the civil law, and his grant extends to the center of the current.

Houck v. Yates, 82 Ill., 179.

All alluvions belong to the riparian proprietor, both by the common and civil law. All grants bounded upon a river not navigable by the common law entitles the grantee to all Islands lying between the main land and the center of the stream.

Middleton v. Pritchard, 3 Scam., 520, 522.
Fuller v. Dauphin, 124 Ill., 542.
City of Chicago v. Laflin, 49 Ill., 176.
Brown et al. v. Bressler, 64 Ill., 488.

All lands granted as a Common to the inhabitants of any town, hamlet, village or corporation shall forever remain common to the inhabitants of such town, hamlet, village or corporation; but the said Commons may be divided and leased in such manner as may be provided by law, etc.

Constitution of Illinois, 1848, art. 11.

An act to provide for leasing the lands granted as a Common to the inhabitants of the Town of Kaskaskia for school and other purposes.

Laws of Illinois, 1849 and 1851, p. 5.

The last section of this act concludes as follows: "And this act shall be taken, considered and construed as a public act in all Courts whatever."

If entry is not made under a paper title, the possession is considered adverse to that portion only of the premises actually occupied.

Turney v. Chamberlain, 15 Ill., 271.
Bristol et al. v. Carroll County, 95 Ill., 93.
Tyler on Ejectment, p. 894.

Twenty years' actual possession under claim of ownership sufficient to bar title when the owner of title is not under disability.

Flaherty v. McCormack et al., 113 Ill., 548.

Squatter who holds permissively gains no right.

Sacket v. McDonnell, 8 Biss., 394.

The act authorizing the leasing of the Commons, makes it school lands, and as such it is not taxable until it is leased or otherwise used for profit.

Hurd's Stat., sec. 2, chap. 120.

Laws of 1849 and 1851, p. 5.

Possession of tenant in common is not adverse to his co tenants so long as the relation exists.

Winters v. Haines, 84 Ill., 585.

In case of an express trust, the statute of limitations does not apply until the trust is disavowed by the trustee, and adverse right or interest is insisted upon and made known to the *cesti que trust.*

Home v. Ingram, 125 Ill., 198 and 232.

Municipal corporations are not within the operation of the statute of limitations as respects public rights.

Logan County v. City of Lincoln, 81 Ill., 156.

Lee v. Town of Mound Station, 118 Ill., 304.

Catlett v. The People, 151 Ill., 23.

The statute of limitations does not run against a *quasi* municipal corporation. The rule in this State is, that the statute may be interposed to all actions by such corporations to enforce mere private rights, but it is equally well settled that it is no defense to

those involving public rights.

Greenwood v. Town of LaSalle, 137 Ill., 228.

Municipal corporations are mere creatures of the Legislative will, and can exercise no powers except such as the State has conferred upon them. All powers they possess are held by them in *trust* for the people of the community, and for the public generally.

Zanone v. Mound City, 103 Ill., 556.
Catlett v. The People, 151 Ill., 24.

When a municipal corporation represents the public at large, or the State, the statute of limitations as such is not applicable.

Catlett v. The People, 151 Ill., above.
Madison County v. Bartlett, 1 Scam., 67,
County of Piatt v. Goodell, 97 Ill., 84.

Our understanding of the law is, that as respects all public rights, or as respects property held for public use, *upon trusts*, municipal corporations are not within the statute of limitations.

The People etc. v. Boyd et al., 132 Ill., 67.

It would be a pernicious doctrine to establish that public rights of municipalities could be cut off by the neglect of the appointed officers for an unreasonable time to enforce them.

Logan County v. City of Lincoln, 81 Ill., 159.
County of Piatt v. Goodell, 97 Ill., 89.
2 Dillon on Municipal Corporations, sec. 532, 533.

The Trustees of the Commons act only as the agents of the State in the discharge of the duties

imposed upon them by law, and their omission of duty will not prejudice the rights of the inhabitants of the Town of Kaskaskia who are the beneficiaries.

Culver v. City of Streator, 130 Ill., 244-5.

No one should ever erect a house or other building or works in the squares, nor on the commons, nor in the roads belonging to the commons of cities, towns or other places; for as those things are left for the advantage and common use of all, no one should take possession of them, or do or erect any works thereon for his benefit; and if any one contravenes this law, that which he does shall be destroyed; and he shall not acquire a right thereto by prescription.

23d law tit. of partida 3, approved in The Mayor etc. of New Orleans v. The U. S., 10 Peters, 722.

Declaration of defendant to the Assessor that he had no real estate for taxation, estops him.

Tucker et al. v. Conwell et al., 67 Ill., 552.
Flower et al. v. Elwood et al., 66 Ill., 438.
Robbins et al. v. Moore et al., 129 Ill., 30.
Chandler v. White et al., 84 Ill., 438.

A verbal statement is a good estoppel where the party has made an admission which is clearly inconsistent with the evidence he proposes to give or the title or claim which he proposes to set up.

Baker v. Pratt, 15 Ill., 571.
Internat. Bank etc. v. Bowen et al., 80 Ill., 541.

Where a party fails to make his rights known, when fairness and good conscience requires that he should do so to protect the interests of others, he cannot be heard as against them to assert such rights.

Lloyd v. Lee, 45 Ill., 277.
Kunear v. Mackey, 85 Ill., 98, 99.
Thor et al. v. Oleson et al., 125 Ill., 365.

ARGUMENT.

This is an action of ejectment brought by the President and Trustees of the Commons of Kaskaskia to recover certain land claimed by the defendant under the twenty years' limitation law.

This land being part of the Commons was ceded by the French Government to the inhabitants of the parish of the Immaculate Conception of Kaskaskia in 1743, as a Common, and was to remain in common without altering its nature, except that Commoners might use it for the purposes of pasturage and estovers. Virginia by conquest of arms acquired this territory in 1778, and ceded the same to the United States in 1784, with the reservation, "That the French and Canadian inhabitants, and other settlers of the Kaskaskias, Saint Vincents and neighboring villages, who have professed themselves citizens of Virginia, shall have their possessions and titles confirmed to them, and be protected in the enjoyment of their rights and liberties."

Deed of Cession from Virginia, Hurd Stat, 18.

In 1804, by an act of Congress, Commissioners were appointed to examine into this, among other claims to land in Illinois, and after such examination they did on the 31st day of December, 1809, recommend for confirmation this claim as a Common to the inhabitants of the Town of Kaskaskia, and Congress did on the 1st day of May, 1810, pass an act that all the decisions made by these Commissioners entered in their transcript, bearing date

December 31, 1809, and transmitted to the Secretary of the Treasury, be confirmed.

American State Papers, Public Lands, vol. 2, 148.
U. S. Stat., vol. 2, chap. 40, p. 607.

Accompanying the report of said Commissioners is a plat designating the boundary of said Commons and giving the number of acres.

Sec. 3, chap. 22, U. S. Stat., vol. 2, p. 678, provides further, "That the decisions made by the Commissioners, heretofore appointed for the purpose of examining the claims of persons to lands in the district of Kaskaskia, in favor of such claimants to town or village lots, outlots or rights in common, to Commons and common fields as entered in the transcripts of decisions, bearing date the 31st day of December, 1809, which have been transmitted by the said Commissioners to the Secretary of the Treasury according to law, be confirmed to all such rightful claimants according to their respective rights thereto." That the report of the Commissioners created by law, and its confirmation by the Congress of the United States, vested the title to the Commons in the inhabitants of the Town of Kaskaskia, there cannot, we think, be any room for doubt. The act of Congress confirming the report of the Commissioners is an operative grant of all the interest the United States may at any time have had in the land described in the transcript of the Commissioners under that date, and confirms the Commons in terms to the inhabitants of the Town of Kaskaskia.

Herbert v. Lavalle, 27 Ill., 454.

In the case of Doe etc. v. Hill, Breese, 304, the Court holds the confirmation made by the Governor of the Northwest Territory valid, and holds that it operates as a release on the part of the United States, of all their rights. But we are not confined alone to the decisions of our State Courts to sustain the legal and binding effect of the confirmations of Congress. In the case of Langdeau v. Hanes, 21 Wall., 521, the Supreme Court of the United States holds that the deed of cession from Virginia did not pass any title to the United States for the possessions and settlers mentioned therein; their possessions and titles were recognized and respected not only by the French and English authorities before, but also by Virginia at the time she acquired the territory by conquest, and she reserved them specifically to the inhabitants and settlers in the deed of cession. The fee never was in the United States. The acceptance of the deed by the United States from Virginia imposed upon them the duty of performing the condition and giving the protection stipulated; and that to confirm the possessions and titles of the inhabitants was to give them such further assurance as would enable them to enjoy undisturbed their possessions, and assert their rights to their property in the Courts of the country, as fully and completely as if their titles were derived directly from the United States. Virginia recognized the general rule of public law in this respect, that by the cession or sale of territory from one Government to another, sovereignty and public property alone pass, and the private holdings

of the inhabitants are not affected. The confiscation of private property in territory acquired by conquest by the conqueror would outrage the sense of justice and right in all civilized nations. This territory, therefore, was received by the United States from Virginia with the obligation resting upon them to respect the principles of public law, and to secure to the inhabitants of the territory by confirmation or grant their titles and possessions. In Chouteau v. Eckart, 2 How., 344, the Supreme Court of the United States says that the act of Congress passed on the 13th of June, 1812, confirming the titles and claims of certain towns and villages, to village lots and commons, gave a title which is paramount to a title held under an old Spanish concession confirmed by Congress in 1836. In the case of Les Bois v. Bramell, 4 How., 459, the Court says, this law vested in the city (St. Louis) corporation the town common in fee simple, and gave full power to the Legislature of Missouri to incorporate it into the city by extending the city charter over i t. The Court in this case, like that of Chouteau v. Eckart above, holds that the Government being unable to confirm the same land to two adverse claimants, must determine between the conflicting titles, and its decision is final as to them. The treaty stipulations of our Government require, according to McMichan v. The United States, 7 Otto, 204, to sustain the titles which would have been sustained by the Government from which our title to the territory was derived.

France and England, and Virginia after her con-

quest of the territory, always recognized the titles and possessions of the French and Canadian inhabitants and other settlers of the Town of Kaskaskia and the neighboring villages, and the United States under the deed of cession from Virginia were obligated not only by the established rule of public law, but also by the letter and spirit of the grant to confirm them in all their titles and possessions. A survey was necessary by the United States for the purpose only of severing the private lands from the public domain; to find out what portion of the domain ceded by Virginia passed by the cession, and this was ascertained by first establishing the claims of the settlers; the residue only belonged to the United States subject to their disposal. Although the claims of the inhabitants to their possessions may have been *in-choate*, the deed of cession imposed on the United States a binding obligation to perfect them; and the legislation of Congress from 1804 has proceeded upon this broad principle of justice, as is fully evidenced by the modes adopted to investigate these claims through Boards of Commissioners, and then confirming their action, as was done in the case of the Commons of Kaskaskia in 1810. Accompanying the report of the Commissioners to the Secretary of the Treasury, December 31, 1809, was the plat designating the Commons of the Town of Kaskaskia, and the confirmation of the report of the Commissioners included the confirmation and ratification of the plat, and is as binding on the Government and vests the title as fully and absolutely in the inhabitants of the Town of Kas-

kaskia as a patent would have done. In support of this position, we respectfully refer to Guitard v. Stoddard; 16 How., 494; Strother v. Lucus, 12 Pet., 410; and Dent v. Emmeger, 14 Wall., 308. In the grant of this Common by the French Government, the beneficiaries are the inhabitants of the parish of the Immaculate Conception of Kaskaskia; and in the confirmation by the Government of the United States, the beneficiaries are the inhabitants of the Village of Kaskaskia, but the Court will observe that the inhabitants of the parish of the Immaculate Conception of Kaskaskia at the time the French grant of the Common was made, were, for the purpose of protection for themselves and families from Indian outrages, necessarily compelled to reside within the village, and but few—if any—parishioners of the parish resided elsewhere; and the Commissioners finding the parishioners still residents of the village, in their report to the Secretary of the Treasury recommended that the title to the Common be confirmed to the inhabitants of the Village of Kaskaskia. From the authorities above given, we do not hesitate to say that there is no room for doubt that the title to the Common is in the inhabitants of the Town of Kaskaskia. But it will be claimed and insisted upon by the defendant that the inhabitants of the Town of Kaskaskia, under their grant, are not riparian proprietors; that they are not entitled to the possession of the land in question, because it is an accretion to the Common, formed by the gradual receding of the waters of the Mississippi river. If the alluvion formed in front of and at-

ached to the Common on the west, does not belong to the inhabitants of the Town of Kaskaskia who own the Common, then it is Government land and subject to be disposed of by it.

On behalf of the plaintiff, we insist that the rights and privileges of a riparian proprietor apply as well to the public, as to private persons. In Jones v. Soulard, 24 How., 41, in error from the Circuit Court of the United States for the district of Missouri, the Court holds that the eastern boundary line of the corporation of the City of St. Louis extends to the middle thread of the Mississippi river, and the alluvion formed by the receding of the waters of the river belong to the city and its grantee. The *quay* or common fronting the City of New Orleans and lying on the Mississippi river was designated as such in 1724, and from that time appropriated to the public use; being common property to the use of which strangers as well as the inhabitants of the city are entitled in common. In 1825 the United States through their attorney sought to recover this *quay* or common from the City of New Orleans; and in the case of The Mayor etc. of New Orleans v. The United States, 10 Peters, 662, the Court says, "It appears that this *quay* has been greatly enlarged by the alluvial formations of the Mississippi river, and from this fact an argument is drawn against the right of use in the city, at least to the extent asserted. The history of the alluvial formations by the action of the waters of this mighty river is interesting to the public, and still more so to the riparian proprietors. The question

is well settled at common law that the person whose land is bounded by a stream of water which changes its course gradually by alluvial formations, shall still hold by the same boundary, including the accumulated soil. No other rule can be applied on just principles. Every proprietor whose land is thus bounded is subject to loss by the same means which may add to his territory; and as he is without remedy for his loss, in this way, he cannot be held accountable for his gain. This rule is no less just when applied to public, than to private rights." Under this decision there can be no doubt of the riparian proprietorship of the owners of the Commons of Kaskaskia; and it is equally true that all grants bounded by fresh-water rivers, where the expressions designating the water line are general, as in the case of the boundary of the Commons of Kaskaskia, confer the proprietorship on the grantee to the middle thread of the stream and entitles it to the accretions. If a fresh-water river running between the lands of separate owners, insensibly gains on one side or the other, the title of each continues to go *ad filum medium aquae.* This is the doctrine laid down by Kent, vol. 3, side page 428, and in note *b* and *a* on same page we find "That the doctrine of alluvions has caused much expensive litigation in New Orleans, and the Roman, Spanish and French laws applicable to the case have been examined and discussed with profound research and ability."

In the case of Municipality No. 2 v. Orleans Cotton Press, 18 Louisiana, 122, it was declared that

the right to future alluvial formation, or right of accretion, was a vested right inherent in the property, and an essential attribute of it, resulting from natural law, in consequence of the situation of the land to which it attaches. It was an accessory to the principal estate or land, and cities as well as individuals may acquire it, as owner of the front, or riparian proprietor. The civil law says that the ground gained on a river by alluvion or imperceptible increase belongs to the owner of the adjoining land, *jure gentium*. This is also the rule of the common law."

In the case of Watkins v. The Lessees of Holman et al, 16 Peters, 25, the court says that a mere intruder on land is limited to his actual possession, and the right of a riparian proprietor does not attach to him. What else is the defendant in this case but an intruder, or squatter? When he was called upon by the assessor to list his property for taxation, he unequivocally stated that he did not have any real estate, which was a public admission that he did not claim the land. The 23d law tit. 32 of Partida 3, and which is approvingly referred to by the court in the case of The Mayor &c. of New Orleans v. The United States, 10 Peters, 724, is as follows: "No one ought to erect a house or other buildings or works in the squares, nor on the commons, nor on the roads which belong to the commons of cities, towns or other places, for as these things are left for the advantage or convenience and the common use of all, no one ought to take possession of them, or do, or erect any works there

for his own particular benefit; and if anyone contravenes this law, that which he does there must be pulled down and destroyed; and if the corporation of the place where the works are constructed choose to retain them for their own use, and not pull them down, they may do so, and they may make use of the revenue they derive therefrom in the same manner as any other revenues they possess; and we moreover say that no man who has erected works in any of the above-mentioned places can or shall acquire a right thereto by prescription."

This Court in the case of Cobb v. Lavalle, 89 Ill., 331, held that a lessee of a portion of the Cahokia Commons bordering on the Mississippi river is entitled to the accretions thereto caused by the receding of the waters of the river or a change in the current during his term, even though the bank of the river is named as the boundary of the demised premises. In Buttenuth v. St. Louis Bridge Co., 123 Ill., 545 to 553, this Court fixed the boundary line between this State and Missouri in the middle of the main channel of the river, and where there are several channels the middle of the principal one is the boundry. Under this decision all doubt is removed in this case, as the main channel has always been closest to the Missouri shore and between the land in question and the Missouri shore. This Court in numerous cases has held that where the Mississippi river forms the boundary of land granted by the government, the grantee becomes a riparian proprietor, and entitled to all islands

lying between the main land and the center thread of the stream; and will only cite Middleton v. Pritchard et al, 3 Scam., 520, which is the leading case on this question, and Honk v Yates, 82 Ill., 179.

The position assumed by the defendant in the Court below, that the Commons of Kaskaskia was granted at the time the civil law was in force, and that the grant thereby extended only to low-water mark on the river is not tenable. This rule of the civil law does not apply either in Louisiana or Missouri in a case like this, and it certainly does not in this State, and it is repudiated by the Supreme Court of the United States. For the sake of the argument, suppose the civil law was in force in all its vigor, when the grant of the Common was made by the French Government; did it not devolve upon the United Ststes after the acquisition of this territory by Virginia and its cession to them to confirm the titles and possessions of the French and Canadian inhabitants and other settlers in the territory? And did not the United States in strict conformity with the deed of cession confirm them in their titles and possessions, including this Common? And if the United States confirmed to the inhabitants of the town of Kaskaskia more land as a Common than was included in the French grant, can the defendant benefit by it? The United States was bound by their acceptance of the deed of cession from Virginia to confirm the Common to the inhabitants of the town of Kaskaskia, but the deed did not limit them as to the *maximum* number of acres, and if they in their confirmation extended

the grant to the middle of the main channel of the Mississippi river, which the Courts hold they did, it was no violation of their obligation under the deed of cession. The Court will observe that the Common is bounded by the village of Kaskaskia, the Mississippi river, the Common fields of Kaskaskia and the Kaskaskia river, and by this boundary it was confirmed by Congress to the inhabitants of the town of Kaskaskia in 1810. The Common as confirmed by the United States doubtless contained as many acres as the original French grant did, at least the Commoners have never been heard to complain; and if, in the confirmation they imcluded an additional amount, they had the undoubted authority under the law to do so, regardless of any application of the civil law. We therefore insist that the rule of the civil law cannot apply, and that the confirmation of the Common to the inhabitants of the town of Kaskaskia must be governed by the rule of the Common law, which makes the middle of the main channel of the Mississippi river the boundary line of the Common in question. We have conclusively shown I think, that the Common of the town of Kaskaskia has been granted and confirmed to the inhabitants of said town; that by said grant and confirmation said inhabitants of said town are riparian proprietors, and that the Common so granted and confirmed is bounded on the South and West by the middle line of the main channel of the Mississippi river.

Again we insist that the contention of the defendant that he has acquired title to the common

land in question by twenty years' possession is not tenable. The Court will observe that the French grant specifically states that it "shall remain in common without altering its nature." The report of the commissioners as confirmed by the United States designates it as a common for the use of the inhabitants, and the constitution of 1818 of this State, Article 8, Section 8, provides that, "All lands which have been granted as a common to the inhabitants of any town, hamlet, village or corporation, by any person, body politic or corporate or by any government having power to make such grant, shall forever remain common to the inhabitants of such town, hamlet, village or corporation; and that said commons shall not be leased, sold or divided under any pretense whatever. And the constitution of 1848, Article 11, is identical with the provision of the said constitution of 1818, with this addition; that "the said commons, or any of them, or any part thereof, may be divided, leased, or granted in such manner as may hereafter be provided by law, on petition of a majority of the qualified voters interested in such commons, or any part of them." Under the constitution of 1848 authorizing the leasing of the commons, the legislature of this State in 1851 on the petition of a majority of the qualified voters of the town of Kaskaskia interested in said common did pass an act entitled an act to provide for leasing the lands granted as a common to the inhabitants of the town of Kaskaskia or so much of said lands as it may be to the interests of the inhabitants of said town to

lease for school and other purposes. Section one of said act relates to the corporation and its powers; section two to the manner of organizing and the term of office of the trustees, etc.; section three provides how the common or any part thereof shall be leased and the maximum length of time; and section 5 provides the mode of leasing the lots, &c. Section 6 provides that the proceeds of the lands and lots of the said common of Kaskaskia so leased as provided by this act shall, after defraying the expenses attending the leasing of said lands and lots, be used and applied to the education of the children of the inhabitants of Kaskaskia, and such residents as are, by immemorial custom, Commoners upon said Common, and the children of the lessees of said lots and lands so leased &c; section 7 authorizes the President and Trustees to appropriate a portion of the proceeds arising from the leasing of said Commons to the purpose of religion, and for the support and advancement thereof, but an appropriation for this purpose can only be made on petition of a majority of the voters of said town of Kaskaskia, indicating the religious purposes to which the same shall be applied, and the amount thereof; Section 16 concludes as follows; "And this act shall be taken, considered and construed as a public act in all courts whatsoever."

The constitution provision of 1848 is the first authority given to the inhabitants of the town of Kaskaskia to change the use of said Common from pasturage to agricultural or other purposes, and then only on the petition of a majority of the qualified

voters of said town. But the provision does not change the ownership, for it specifically states that it shall forever remain Common to the inhabitants of such town, hamlet, village or corporation. The law passed in conformity therewith, authorizes the President and Trustees therein created to survey and divide into lots, all or a portion of said Common, and lease the same at public outcry to the highest bidder, for a period not exceeding fifty years, and the proceeds arising therefrom shall be applied to the education of the children of the inhabitants of the town of Kaskaskia, and the children of the lessees of said lands. At the expiration of the term for which they were leased, the possession under the law is vested again in the inhabitants of the town of Kaskaskia in common for their common benefit until by a petition of a majority of the legal voters of said town the President and Trustees are again required to lease them as provided by law. Under the said constitutional inhibition the lessees are bound to surrender possession at the expiration of their terms, and they will be trespassers until they do; and can a mere squatter on the unleased common, which cannot be alienated in any way by the corporation except by the statute, acquire a proprietory right equal to or superior to a lessee? The defendant claims the land in question in fee, and the court below so found, and the finding we insist is in violation of the letter and the sprit of the grant and corfirmation, as well as the constitution of the State of Illinois. There is but one way

known to the law by which the corporation can deprive the inhabitants of the possession and use of the common or any part of it, and that is by leasing it in the mode provided by the legislature, and that deprivation continues only during the term of the lease. The corporation cannot alienate the fee nor can it vest a possessory right in anyone for any length of time to any portion of said common, except in the manner provided by law. The inhabitants of the town of Kaskaskia are under disability, created by the constitution, in the disposition of the common, and this disability is a bar to the possessory right claimed by the defendant. The constitution of 1848, under which the authority to lease the common was given, and under which the defendant's pretended possession must have commenced, provides that said common shall forever remain common to the inhabitants of such town, hamlet, village or corporation, but the defendant by his acts assumes the position that grants, confirmations and constitutional provisions must all be abrogated, in the interests of his pretended claim. The Act incorporating the President and Trustees of the Commons of Kaskaskia is a public law, made so by the act itself, and the duties of the corporation are all of a public character, and this Court, in the case of Greenwood v. The Town of LaSalle, 137 Ill., 228, says, that the doctrine is well settled in this State that the statute of limitations cannot be interposed in defence of an action involving public rights. The plaintiff is at least a *quasi* municipal corporation, and the duties devolv-

ing upon it by law are in the nature of a *trust*, and for the benefit of the public, and it would be a dangerous doctrine to establish, that public rights created in this way could be cut off by the mere neglect of the corporate authorities for a number of years to enforce them. It would place the public at the mercy of the officials, who if disposed to be dishonest could by mere inaction fritter away the property rights of the corporation. The plaintiff in its corporate capacity acts only as the agent of the State in the discharge of the duties imposed upon it by law, and its omission of duty cannot be taken advantage of by the statute of limitations.

Wm. Selser, a witness for the plaintiff, five or six years ago was a deputy assessor, called on the defendant to list his (defendant's) property, and after listing the personal property the defendant was asked if he had any real estate and he answered he had not, nor did he list any for taxation. We insist that this statement made by the defendant to the assessor that he had no real estate for taxation estops him from now setting up a claim to the land in question. His action in scheduling his personal property and disclaiming at the same time any interest in land and *swearing to the schedule* deceived the assessor, and was also a fraud on the public, which was interested to the extent of the taxes the land should have paid, and this we claim will estop the defendant from now asserting title to the land.

That the main and only channel of the river is

between the Island in controversy and the Missouri shore cannot be questioned on an examination of the evidence of the witnesses. Capt. Postal, an old river pilot testified "have known the channel of the river since 1847, and it was always next to St. Marys on the Missouri shore. The Island is on the east side, the Illinois side of the channel. In the forties I passed the Island as often as once a month, and from 1858 to 1859, I passed it every week, and the main channel was always down the Missouri shore, west of the Island." Dobbs has lived in Kaskaskia point for 62 years and has known the Island or towhead since it was formed. Woodley has known it as a towhead or Island since in the 60's; Cohen has known the towhead now called McClures Island since '62 or '63; and Burch has lived in Kaskaskia precinct since 1847 and has known the towhead or Island all this time and hunted on it when a boy All these witnesses say it has been pastured by the commoners as long as they have known it, and that the main and only channel of the river was always on the Missouri side of the Island; that it was for many years fenced off with other parts of the common by the commoners by permission of the board and used as pasture for their stock, and when the river was not high the land between the main land and the Island was dry. Burch, Sulser and Menard were at different times deputy assessors of Randolph county and as such assessed, with defendant's consent, his property, and Burch also says that the Island was considered in their precinct and that the Mc-

Clures voted there. Douglas, the county surveyor, surveyed the Island and the part occupied by Wm. McClure is on the west half of out lot one, opposite lot 68 in the 4th survey of the common. The defendant's plea admits this possession is on the east half of said out lot one, as plat also shows. Defendant seeks to prove by his witnesses that he and his predecessors have been in actual possession of the land in question for over 20 years and that the Island is in Missouri. When Caldwell in 1878 wanted to claim a portion of the Island as being in Missouri the witness Panel thought it was in Illinois, but now he thinks it is in Missouri. Easters says the Island is in Missouri, because a boat sunk at the Missouri bank and it kept washing around it until the channel was driven to the Illinois side; that the boats were run along the Missouri shore, and it is dry land between the Island and the Illinois shore. Hagen knew of one man who owned it according to squatters right. In connection with his oral evidence the defendant offered three deeds, one from McCauley and wife to Sides in 1881, one from Sides and wife to Josiah McClure in 1884, and one from Josiah McClure and wife to Wm. McClure in 1889,, all describing the Island or land as laying and being in Sections 32, 33 and 28, Township 7 South, Range 7 West, in Randolph county, State of Illinois. It is only by these deeds that defendant can connect his, with the possession of any of the former squatters upon this land, and he is bound by the recitals in said deeds. The descriptions in said deeds the Court will notice are too indefinite and uncertain to make them even color

of title, which doubtless was the intention at the time of their execution, but they are sufficient to establish beyond cavil the *admissions* and *declarations* of the parties, that the *land is in Randolph county, State of Illinois* as alleged in the plaintiff's declaration. The location of the land in question by the deeds offered by the defendant himself, and his declaration of citizenship while living on said premises by assessing his property, paying taxes, and voting in Kaskaskia Precinct in Randolph county, State of Illinois, all overwhelm him in his puny efforts to locate the land in dispute in the State of Missouri.

With full confidence in the justice of our cause we respectfully submit that the judgment of the Circuit Court should be reversed.

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