FISHER v. CARTER.

Case No. 4,815.
{1 Wall. Jr. 69.}[1]

Circuit Court, E. D. Pennsylvania. Nov. 8, 1843.

MONUMENTAL AND TRADITIONARY EVIDENCE.

1. At no time in the history of Pennsylvania, neither before October 13th, 1760, nor since, have islands in her larger rivers been open to settlement on the same terms with fast-land generally. They could be settled only on agreed terms.

[Cited in Jones v. Tatham, 20 Pa. St. 403.]

2. The court speak of acts and monuments, and of judicial and professional tradition viewed as evidence; and, in the absence of more direct testimony, regard them as an authoritative means of ascertaining ancient opinion of fact.

At the junction of the Susquehanna and Juniata rivers in Pennsylvania, stands a very valuable island called, sometimes, "Baskin's" or "M'Elear's Island," and sometimes "Duncan's Island;"—the subject of the present ejectment. The plaintiff shewed title by residence, improvement and cultivation from 1749 to 1802. In the year last named, the Penns, being indebted to Thomas Duncan, Esquire (subsequently one of the justices of the supreme court of Pennsylvania), for professional services, conveyed this island to that gentleman. These services, the value of which did not exactly appear, were the principal consideration of the conveyance. The defence was, that admitting the plaintiff's ability to recover on other grounds,[1] yet that islands in the great rivers of Pennsylvania had never been open to settlement on what are called common terms; the terms on which lands in general were settled, and by which the plaintiff claimed title in this case. The plaintiff admitted that after October, 1700 (when, as will hereafter appear, the proprietaries took possession of a large amount of this sort of property), islands were not thus open to settlement; but contended that prior to that time they were. And this point it was which was in issue in the case.

It is here necessary to present a view of the juridical history of this subject

In one case (Carson v. Blazer, 2 Bin. 475; decided in 1810) the supreme court of Pennsylvania decided that the great navigable rivers of the state were never the subject of riparian ownership, but belonged to the commonwealth. In his opinion in that case, Chief Justice Tilghman, speaking of the proprietary, said: "No doubt he retained the entire right of the river and of every thing in the river, in order that he might make such use of it as would be most conducive to the public benefit" Page 476.

In another case (Hunter v. Howard, 10 Serg. & R. 243, 245; decided in 1823),—not absolutely requiring such a dictum,—Mr. Justice Duncan, delivering the opinion of the court (the chief justice being absent), said, that "islands in the great rivers of Pennsylvania,

under the provincial government, were never the subjects of appropriation either by office right or settlement The proprietaries appropriated them to their

own use by special warrants." And afterwards: "Thus, from the first settlement of the country, we see, these islands were withdrawn from appropriation." At the time when this sentiment was delivered, his honour was the owner of the island now in suit; and the question in controversy had, at that time, been agitated in regard to it. In a third case (Shrunk v. Schuylkill Nav. Co., 14 Serg. & R. 71, 79; decided in 1826), Chief Justice Tilghman, giving the opinion of the court upon a point respecting rivers, argued against one of the parties rights, because if he had such rights in the river he "would have a right to the islands also, contrary to universal opinion and practice. These islands," continues the chief justice, "have never been open to applicants under the common terms of office either under the proprietary or state government; but have always been sold on special contract, and for higher prices;" and his honour refers to the case of Hunter v. Howard, last cited, "for a particular account of the manner in which islands have been granted." Chief Justice Tilghman, it is necessary to state, was born in the year 1756, and began the study of the law in the year 1772, in the office of Benjamin Chew, Esquire, then at the head of the profession and afterwards chief justice of Pennsylvania. His father removed from Maryland in 1762, and was, some time subsequently, appointed secretary of the proprietary land-office; a situation which he held with distinguished reputation for several years. Mr. Justice Duncan was born in 1760.

It appeared, on the other hand, that the point now in issue had twice arisen in the inferiour courts of the state; but that the decisions there were in direct contrariety to each other. It had also been twice before the supreme court, but no opinion was given in either case; the point not being in issue in one case (McElear v. Elliott, 14 Serg. & R. 242, 250); and in the other (not reported), where it was in issue, the court not being able to agree. The evidence of documents from the land-office made it plain that after October 13th, 1760, islands were not open to settlement on common terms; but it was not so clear from those records how the case had been anteriour to that date. The records did, however, shew that there was something like instances of the same course of general policy in regard to islands before that year as subsequently. For example: after October 13th, 1760, the proprietaries would not allow an island to be returned on a warrant for fast-land. They exacted, for islands, a price much higher than for fast-land. They did not knowingly permit settlements to be made on islands, but regarded persons who made them as intruders. They gave leases under special restrictions, but did not regard such occupancy as giving a right to pre-emption.

After the Revolution, the same course of policy with regard to islands was carefully continued by the commonwealth. See the act of 8th April, 1785, § 13, and of 6th March, 1793. While the course of policy respecting islands, prior to October 13th, 1760, appeared from the evidence which follows: 1680, June 20th. A return of survey of a certain "island" in the Delaware. This paper was endorsed: "Island in the Delaware." 1684, February 2nd.

A warrant to survey another certain "island," and certain meadow-land described. The endorsement, however, had no reference to any island, and was simply "The Meadows at" &c. William Penn died in 1718; and the foregoing two were the only warrants for islands in his time. There was abundant evidence of his care to appropriate manors, or tenths of general surveys. 1754, August 29th. A letter from the secretary of the land-office to Lawrence Groden, Esquire, in which the secretary expresses his surprise that a certain person who, it appeared, kept forcible possession of another island in the Delaware river, against the proprietaries tenant, could not be taken by the sheriff. "I should be sorry," says the secretary, in speaking of the sheriff, "to be obliged to complain against him to the governour; but I must do it if I cannot get process of court executed. However, let the writ be renewed every court, that it may appear how much he is in fault" 1754, October 17th. The proprietaries having granted to two of their agents, a certain number of acres of good land, and well situated; an island, having, as appeared by the surveyor's draft, two houses upon it, was included in the survey; but it did not appear by the caveat books, that any caveat was made by the persons named in the survey as settlers. In 1770, a caveat by some persons claiming under a former warrant and improvement was dismissed. 1758, November 15th. A warrant requesting the surveyor to make a regular survey of a yet different island, that it might be leased "on such terms as may be agreed on." Surveyed accordingly, "on the proprietaries account." 1760, March 8th. A warrant reciting, that divers persons had presumed to destroy the timber and commit waste on another island (described) in the Susquehanna, and without any license from "us" had taken upon themselves to clear part of the said island; that the proprietaries were desirous to prevent such waste and spoil being made on the said island for the future, and that the same should be forthwith surveyed and returned "for our use." Warrant of survey accordingly. 1760, May 13th. A lease for three-years, by the proprietaries, of an island in the Susquehanna, "surveyed and returned for the use of the said proprietaries." The tenant stipulates, in rict terms, that if he commit any waste, or if he assign the island or his lease without a license in writing

from the proprietaries, his lease shall become utterly void. Then came the following warrant from the sons of Wm. Penn; and this document it was (the plaintiff contended) which first withdrew islands from general sale. 1760, October 13th. "Whereas during the life of our late honoured father, William Penn, Esquire, divers orders and warrants were given, &c. to survey or cause to be surveyed to and for his and our use and behoof, the tenth part of all such lands as should be from time to "time surveyed and laid out in the several counties of our province. (These tenths composed what are known as "Manors.") And whereas, notwithstanding the said warrants and orders given as aforesaid, and our own repeated orders and warrants &c. since from time to time, they were not executed or observed as they ought to have been, (to our great loss and disappointment:) And we now judge it necessary to revive and renew the said orders: These are therefore to authorize and require you, as soon as conveniently may be, to survey or cause to be surveyed for our, proper use and behoof (the tenth part of the before referred to sort of land:) ☞ And that in such future surveys to be made, you take particular care to survey for our own use the several unappropriated islands in the, rivers Delaware, Schuylkill and Susquehanna, and the several other rivers and creeks in our own said province, and make returns from time to time of the same premises into our secretary's office for our use agreeable to the said former and this our renewed warrant and orders in that behalf." This warrant was endorsed "A warrant to survey for the proprietaries use all the islands in the rivers Susquehanna, Schuylkill and Delaware:" and in pursuance of it, 88 islands were surveyed and returned between the years 1760 and 1770. The island now in controversy was among these, and surveyed November 13th, 1760. The surveyor's draft states that the island is called "Baskin's Island," and notes the fact of there being a settlement upon it

It appeared, further, from the testimony of the deputy secretary of the land-office (who had been connected with that department for thirty-five years) that having been requested by the plaintiff to examine all papers respecting islands in order to give his deposition, he had carefully done so; and that although many patents had issued for islands, he could not find one case where a patent had been founded upon actual settlement. And again, that among the records of the land-office, but separate from its general concerns, are files called "proprietary files," which relate exclusively to the private estates of the Penns; and that among these files he found, when he came into the department, in 1809, all papers, with a single exception, of whatsoever sort which relate to islands.

Mr. J. Fisher, of Lewiston, and Mr. Randall for plaintiff:

The point before the court has never been decided; nor was it in issue in those cases where we find an expression of opinion from the bench. What has fallen from judges is explained by the fact that notice was not directed to the epoch which is now proved to be an important one. The number of islands granted prior to October 13th, 1760, is

comparatively small; for it is matter of common knowledge that the settlement of the state, at that early day, was only along the southeastern part. Ever since October 13th, 1760, or, in other words, since the only time the islands or their history have come to be subjects of notice, we admit what is said. Judges, when speaking on the subject were speaking in a general way; and we ought not to seek for truth to a certain intent in every particular. It is plain that Chief Justice Tilghman and Judge Duncan cannot be regarded as speaking otherwise than in a general way. They cannot be taken as meaning to make themselves witnesses of a state of things which had passed away several years before either of them was born. They state, at best what they derived from others; and these, in turn, may have rendered what they had learned but intermediately. How imperfect is such evidence! The speaker may have been unworthy of credit: he may have ill expressed himself; or the hearer may have ill conceived what was well expressed. In short coming through the open channel of the human mind, all such tradition, even admitting the source to be pure, comes to us with the adulteration of imperfect conceptions, of weak motives; of fancies and foregone opinions; of oblivion and false remembrance, and of those varied springs of errour which must impart themselves to any such mode of transmitting truth. The dictum of Judge Duncan ought not to be cited at all. He could not have meant that his own dictum should decide his own cause. But all these, at any rate, were but obiter dicta: they possess naught of "the solidity of the judgment-seat." How do we find judicial opinion expressed when attention was directed to the point? In one case, the avoidance of any opinion. In two other cases (inferiour courts), one court is in direct opposition to the other: while on the first and only occasion that the point was in issue in the supreme court, there was a divided bench, and no opinion at all. Is the defendant aided by the records from the land-office? We do not deny that the proprietaries could take possession of unappropriated islands prior to October 13th, 1760; though, as we have said, few were so taken prior to that date. Nor do we deny that when once, in any manner, islands had been appropriated, they were subject to whatever terms of tenure or of disposition the proprietaries preferred. But

can one case be shewn where a person, settled on an island prior to 13th October, 1760, with an intention of remaining there, was dispossessed because he had not made a special agreement for it? The only case from which such a notion could possibly be induced, is that of the warrant of October 17th, 1734. Now, there, the marks on the draft are the only evidence of settlement at all; and these were probably made by way of description and for the sake of identification. The settlement may have been abandoned; for no mention is made of occupancy. It may have been an Indian residence. It may have been no residence at all; and temporary in its very origin. It may have been made on behalf of the proprietaries. Who can say when, how, by whom or for what it was made? Sixteen years afterwards, to be sure, some caveat was dismissed; but how prosecuted, if prosecuted, or wherefore dismissed we know not Besides, our occupancy began five years before this. The great warrant of October 13th, 1700, did undoubtedly withdraw islands from common settlement. But it is a renewal of "said orders." What orders? Orders to survey islands? Not at all; but to survey tenths or manor lands. "They (i. e. those orders) were not executed or observed as they ought to have been." All that relates to islands comes afterwards, and is adjectitious. It is a new and substantive order; and this is sufficiently manifest notwithstanding a careless expression towards the end of the warrant; by which a reference intended to apply to manor lands, is made to include islands likewise. It is manifest, we say; for, otherwise, the warrant of October 13th, 1760, is made to recite that William Penn had issued divers orders and warrants to appropriate islands in general; while the evidence shews that only two warrants were issued in his time about islands at all; both of them for single islands; one of which islands, moreover, the return of survey treats just as it does fast, land. But the warrant is to survey unappropriated islands. The survey here did not follow the warrant; for the island was certainly appropriated. It was known as "Baskin's Island." The surveyor's draft thus calls it. So obvious was this appropriation that although the survey was made in 1760, no steps were ever taken to dispossess the settlers at all till 1802. The island was then transferred, not for money (for the title was not marketable), but in liquidation of certain professional services whose value don't appear. This fact shews that the Penns did, themselves, regard their title as, at least doubtful. An island so valuable as this would not, otherwise, have been thus disposed of. Indeed, it is evident that the surveyor misapprehended his authority. His endorsement shews that he regarded his warrant as a direction to survey all islands.

After full argument on the other side, by Mr. M'Cormick, of Harrisburgk, and Mr. Mallery, the charge of the court was delivered by

BALDWIN, Circuit Justice. The case of Carson v. Blazer [supra] goes far to decide by implication the one before us. It was there declared that the founder of our state, from motives of an enlarged publick policy, had reserved to himself the ownership of all the larger streams of the commonwealth;—the riparian owner coming but to low water mark.

The river includes what is in the river, whether above the water or under it. And it is obvious that if any man might, at his pleasure, have taken possession of all the islands in a stream, he would have had it quite within his power to impede what we are told was the wise design of the proprietary owner. But we can scarcely regard the point as one which has been decided. Let it be examined, then, upon the grounds of historical evidence. Thorough research has been made into the early records of the land-office; and the fidelity of counsel has presented to us every thing, probably, which can be gleaned from that field of inquiry. The evidence from those records is not we may admit, of the most direct kind. It is not wholly irreconcilable with the notion that islands were open to settlement in 1749: but this is not the natural inference from it. On the contrary: though all islands were particularly taken into possession by the great warrant of 13th October, 1760, and were thenceforth the subjects of peculiar and notorious regard, yet we do not discern any striking change in any matter connected with the disposal of them. Nay, so far as we can compare the history of that sort of property before and after the 13th October, 1760, we find that the general policy in regard to it has been always the same. Then, there is this remarkable fact: that diligent search into all these records does not afford one precedent of an island granted upon common terms, though it does furnish to us many grants of islands. Admit that what is thus stated is, in each instance, but negative evidence. The circumstance impairs not its strength; for the case is one where, under any hypothesis contrary to that which we assume, there could scarcely fail to be positive evidence: and in such a case negative evidence is as strong as any that can be conceived. In truth, it is negative in form merely, not in effect.

In the third place, we have evidence in the external order or disposition of the papers relating to islands. This sort of evidence, the evidence of acts and monuments, is justly deemed of a high order. Any mere assertion that such and such opinions were held, or that such and such facts existed, depends for its credibility upon a variety of circumstances. But an external fact, a

course of outward action, performed in observance of an opinion or practice, and testifying to it, indicates a clearness and fixity of idea which can leave but little doubt of its existence. It would, to be sure, be more satisfactory could the defendant shew, affirmatively, that this disposition of things had exited from the beginning; for this would be nearly conclusive. But the presumption from the state of the papers at the earliest date to which we can reach is in his favour. They were found in their present position by the deputy secretary of the land office when he first came into the department; and no effort of the plaintiff's counsel has shewn when any change was made, or that there was, ever, a time when a different state of things from the present existed. Certainly we do know that a course of external practice no where more generally descends than in large state offices. The clerk, on his coming there, finds a practice prevailing: he is trained up in it: he follows it in his gradations upward; and when he is old he will not depart from it. Super-added to all this, are declarations from eminent lawyers of a past day, which accord with what has been already mentioned; and serve both to explain and to confirm it To be sure, this court is not disposed to regard with favour what an English reporter styles "circuit traditions;" but we are now inquiring what state of facts existed three generations ago; a date beyond that to which the law supposes human memory ever to reach. We are without living witnesses; and in this as in other questions relating to ancient things, what can we do but call to our aid the less perfect lights of tradition? In examining any ancient historical fact, if unable to procure testimony from persons who lived at the very epoch which is the subject of our inquiry, we endeavour to ascertain what has been said by intelligent persons living in the generation immediately or almost next. Such persons, we may grant are liable to errour; but they are less so than any persons living in a subsequent generation: And we appeal to their declarations, not, of course, as to decisions, from which there can be no appeal, but as to credible witnesses, likely to be informed on the subjects about which they speak. The counsel of the plaintiff has argued against this sort of evidence from the imperfection of the channels through which it comes to us. There would be force in such an argument were the distance great or the links of transmission numerous; but where, as in this case, the witness is separated from the time about which he speaks, only by a single generation, the channel is so short and close that truth may be supposed to reach, us in almost the same purity wherewith it issued from the wellhead. It is worth observing too, that the testimony here given is, not as to an opinion, but as to a fact. In regard to the former, it is certainly true, as the plaintiff's counsel argues, that a witness transmits what he understood, or what he remembers, or what he conceives; and there may be great adulteration of truth while its outward shape and seeming is preserved; but the simplicity of notion involved in the existence or non-existence of a fact, admits scarce any variations from truth but in the substitution of another and opposite fact; a matter not to be presumed. The declarations of the late Chief Justice Tilghman the court regards as entitled to particular

respect It has been the just praise of that excellent magistrate that he delivered few dicta; and his statement of any fact (much more of one about which he was so likely, from associations in youth, to be informed) will receive from those who knew him high deference, even though the source of his information be not specially declared. Let it moreover be observed that the chief justice speaks, not only of what he himself thought but also of that which had been universal opinion—and practice. Indeed, for much of our law we are unable to shew any visible and now existing source. It is tradition attested by monuments; successive judges and sages of the law recording what themselves were taught; was attested by external facts, and was notorious to every one: all consentient in opinion, and so transmitting to the last that which was more perfectly known to the first. We do know, however, that many matters have been solemnly adjudged, of which there is no report; and many statutes have been passed of which there remains not now a record. These remarks apply particularly to the land tenures of Pennsylvania; in regard to which many principles are perfectly settled and have long been, touching whose origin it would probably pass research to discover so much as a dictum.

Upon the whole, while the case does not offer the directest most connected, and most conclusive testimony that could be desired, we yet possess strong leading facts on which to found opinion; and in regard to things which took place ninety-three years ago, what more ought you to expect? Landmarks remain to us: the connecting links, the cement the filling up, may naturally have crumbled away in the lapse of a century. And it having passed into maxim, that all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other side to have contradicted, we are of opinion that your verdict should be for the defendant

The jury were about to give their verdict, when the plaintiff asked leave and was allowed to suffer a non-suit.

[1] {Reported by John William Wallace, Esq.}

[1] It is clear that the plaintiff could not, in any event, have recovered; his title being but equitable.