

**BRIEF IN SUPPORT OF BRIGHT'S PROPOSED FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

[Subtitled: "*ALL WAITING FOR A FLOOD*"]

“There is yet 3000 bbls of flour to take down above this place and all waiting for a flood.”

These words of Jacob Bucher to his brother in a letter of May 11, 1826, among many others, taken directly from the exhibits cited by Nancy Shedd, defendants' expert, on page 9 of her report (DE 42), are the hint that Ms. Shedd's conclusion (DX 42, p. 12) that “the Little Juniata River was never historically used by the residents of the region as a ‘broad highway’ for the transport of people and commerce in quantity from, into or through the region” is absolutely wrong.

What Bucher's words actually prove is that the Little Juniata was a navigable river and that the residents of the Little Juniata Valley, rather than use any other method of transportation, chose year after year for half a century to wait for the river to be high enough to transport by boat to the eastern markets the large quantities of surplus agricultural and manufacturing products which resulted from the significant economic activities they established.

In fact, the primary and secondary evidence is overwhelming that for at least 50 years in the late 18th and early 19th centuries the residents of the Little Juniata Valley “historically” used and depended on the Little Juniata as their “broad highroad” for the transportation of both goods and people in quantity from, into and through the region. (Cf. Bright's Proposed Findings of Fact, 124-156)

For some reason, Ms. Shedd believes that a river is not navigable if the residents of the area had to “resort” to it. On page 188 of Day 4 of her testimony and on page 8 of her report,

relying on a letter from Charles Cadwallader, who complained that he would have to “risque” his paper on the river once again, she concludes that the residents of the Little Juniata Valley used the river only as a last resort. In her report she defines “resort” to mean “to have no other recourse” (DX 42, p. 8). From there, she leaps to the erroneous opinion that the Little Juniata was not a navigable river.

Even assuming that her definition to be accurate, why that supports her contention that the Little Juniata was not navigable is not apparent for if the river was the only “recourse” of the residents of the valley, that would seem to compel the conclusion that it was in fact used to carry the surplus produce of the valley to the eastern markets.

Of course, theoretically, at least, they did have another choice: the roads. But, in fact, what the evidence shows is that the residents, in engaging in the significant commercial activities spread throughout the valley, and despite the fact that the river was occasionally unpredictable and low, looked to the Little Juniata as their preferred method among the only two available to them for transporting the products of their hard labor to the important eastern markets, particularly to Baltimore.

What the evidence shows is that the Little Juniata was the commercial lifeline of the valley. Its navigability, even though interrupted during periods of low water (which affected all of the rivers of the state from time to time) was the key to the merchants’ ability to get their products to market in Baltimore and elsewhere at a reasonable cost. It wasn’t a “last” resort. It was the only “resort” that made economic sense.

What the snippet of Bucher correspondence cited by Ms. Shedd proves is that the residents of the Little Juniata Valley chose to wait for the water to become high enough to send their products down the river rather than risk the other method, to-wit, wagons by road, that she

suggests erroneously was their “first resort.” Their “risqué”/reward assessment must have dictated this choice, otherwise they would not have made it. They were not stupid people and they lived in closer company with nature than we do.

This choice, by people whose reliance on the river demanded that they know it well (like Eskimos know sea ice), is confirmed by another reference made by Ms. Shedd on the same page (p. 9) of her report.

At the bottom of page 9 of DX 42, Ms. Shedd describes a *Huntingdon Gazette* report quoting a resident of the Frankstown branch valley (both Heberling and Shedd agreed that the experience in the Frankstown branch was relevant to the Little Juniata branch) who reported that “Monday and Tuesday 9 arks laden with flour passed this place in safety, destined for the Baltimore market,” thus, in Shedd’s words, indicating that the products of the valley merchants “had been accumulating in the warehouses since the end of the previous year” waiting for the high water.

Did those merchants choose to load their products on wagons and haul them over the mountains? Apparently not. Despite the periods of low water, they accumulated those products in warehouses and chose to wait for the river level to be high enough so that they could use the 80-90-foot arks, each of which could hold 350-450 barrels of flour or 1200 to 1300 bushels of grain (DX 42, p. 5), to take their products to market.

The most compelling evidence of this is found in Ms. Shedd’s own testimony on Day 4 at pages 170-172. There Ms. Shedd, discussing DX 7 to bolster her misguided conclusion about the river’s unreliability, sites to her fruitless search through the *Huntingdon Gazette* to see if there was any report of arks moving down the river between February 28 and May, 1827, a period of

time which appeared to have unusually dry. Finding none, she concludes that the river was unreliable and therefore, presumably, non-navigable.

To highlight the serious flaw in her analysis, one must ask: what does this piece of evidence show that the farmers, millers and factors did about it? Did they load the products of their labor on wagons and drag them through the gaps or over the mountains?

Absolutely not. They patiently waited for the river. When, in May, the river was finally high enough, they loaded 50 arks with produce and floated them down the river to market. (DX 7)

That is 50 arks each with the equivalent of 350 to 450 barrels of flour or 1200 bushels of grain. Even at the lower numbers, that is 17,500 barrels of flour, grain, whisky, wood shingles or 60,000 bushels of grain or whatever else they exported.

There is no circumstance under which a wagon train with that kind of load would ever have been mounted and if mounted would have escaped mention in the *Huntingdon Gazette* or private correspondence.

To be sure, there is some documentary evidence that the residents used wagons to occasionally transport a small amount of goods short distances -- a load of paper, perhaps, to a nearby newspaper in desperate need of some (DX 26) or a special order Forte piano (DX 1).

But load the equivalent of 17,500 barrels of flour on wagons and drag them over the mountains? No way. Not even to Huntingdon, much less Baltimore.

The only reference in the evidence to the use of wagons by the valley residents to haul their commercial goods is a reference in *Africa* to the use of wagons to get the goods to the landing at Birmingham so that the goods could be loaded onto the arks (*Africa*, p. 394; D2, p. 149; D5, p. 24).

When the residents discuss among themselves transporting to market the large quantities of products “accumulating in the warehouses,” it is the river and only the river that they discuss.

Ms. Shedd concludes, on page 10 of her report:

By contrast, overland travel on the region’s system of primitive highways – however arduous – was the mode of transportation employed on a regular and consistent basis.

This conclusion, however, is totally wrong, at least for the large quantities of commercial traffic sent downstream to Baltimore.

In fact, as is made clear below, the overwhelming evidence is that the residents of the region never resorted to the “region’s system of primitive highways” to transport their commercial products in quantity to the eastern markets. They used to river.

And these people knew the river.

Again, it is the evidence marshaled by Ms. Shedd herself, cited on page 5 of her report (DX 42), which proves it.

She admits that when the river was high enough the products of the residents’ enterprise and hard work were “swept” to market down the river in “large [80-90 feet], strongly-built and high-sided” arks, which, she acknowledges, were in universal use throughout Pennsylvania to transport all kinds of produce down stream to market.

One report from the *Huntingdon Gazette* confirmed that at the time of the report there were seven arks at Spruce Creek. (CX. 41) It would have taken at least nine such arks alone to transport the 3000 barrels of flour referred to in Ms. Shedd’s report. Who knows how many such arks were needed to carry the products accumulating in warehouses over the course of a winter. But is there any reference to the number of wagons available to transport the 3000 barrels of

flour over the “region’s system of primitive highways” or that anyone suggested that they see about doing so? Not one.

Arks 60-90 feet in length could not have been easy or cheap for people of the valley to build, especially for a one-way trip. In one primary reference cited by Ms. Shedd, the letter writer notes that 120 arks had been built over the winter. (D4, p. 161; DX 32; D4, 161) That is 120 boats each 60-90 feet in length, 16-20 feet wide and 3.5 feet deep. It could not have been easy or cheap.

But they expended the money, energy and time to make them and entrusted large quantities of commercial products to the float. Even at the lower numbers of the range, 120 arks carried the equivalent of 42,000 barrels of product or 144,000 bushels of grain. Forty-two thousand barrels of flour and other products is a large and valuable load, possibly the product of the entire previous year’s harvest not used for the immediate food needs of the residents. If, as Ms. Shedd theorizes, wagons were the transportation method of “first resort,” why were the merchants willing to entrust 42,000 barrels or 144,000 bushels to the river?

The answer to that question is simple. Because, as Ms. Heberling testified (Cf. Bright’s Proposed Findings 85-90 and citations therein) river transportation was easier, faster, cheaper and a lot more predictable and safe than the defendant’s witnesses would have this Court believe. And it was available. Certainly not on the schedule a railroad or stage coach line might be able to keep, perhaps. But river transportation was probably not as unpredictable as Ms. Shedd and the other defense witness want to make it out to be. Bucher, the writer of the May 11, 1825, letter who noted the 3000 barrels waiting for a flood, also remarked that the season was a “backwards” one, with “remarkable” dry weather. In other words, usually that time of the year would have

been expected to be wetter and the river higher, but this particular year the weather conditions were unusually dry. Still, there is no thought of using wagons. They “wait[ed] for a flood.”

In fact, as Ms. Shedd notes at the bottom of page 9 of her report (DX 42), things became more “normal” (her word, and she was an English major) in 1826, with weeks of wet weather in March, weather predictable enough that the merchants were satisfied to accumulate their goods over the winter in warehouses and wait for the high water they knew was coming in the spring. (D2, p. 79; DX 5) The river, therefore, could be counted on to provide high enough water during two important periods of the year, the spring and the fall. By mid summer, when the river was probably at its lowest, the residents had already floated to market the products which had been accumulating in warehouses over the winter. And in the fall, they could count on the river to float the products of their harvest. That is all they needed.

Most significantly, however, there is another side to this coin. That side is the evidence that the residents of the valley used any other method of transportation for the large quantities of commercial goods sent to market. That side, though, is blank.

At the bottom of page 9 of her report, Ms. Shedd, in commenting on the dryness of the 1827 spring, writes:

Had the rains not come at the end of May, the cargo of these arks would not have been moved to market or would have had to find an alternative means to transport and/or markets.

The problem is that there is not one piece of evidence to support it.

One searches the record in vain for the slightest evidence that the residents of the Little Juniata ever elected, despite the sometimes lengthy periods of dry weather during which the roads would also be at their least muddy, to use any method of transportation, or even prepare to use any method, other than the river for their commercial goods and produce.

What is glaringly missing from Ms. Shedd's report and defendants' evidence, primary or secondary, is any letter, newspaper account, bill of lading or other document from which it might be concluded that the residents of the Little Juniata Valley, when confronted with a dry period, even one lasting many weeks, ever used, or even considered using, wagons to transport the large quantities of the products of their endeavors to the commercial markets of the east.

One is right to ask Ms. Shedd:

Where is the evidence that the people of the Little Juniata Valley transported their large quantities of commercial goods to market in wagons over the regions system of primitive highways? If, in May, 1827, instead of waiting for the river, the residents would have done something besides load the 50 arks, what is it that they would have done? How many wagons, men and horses would it have taken to drag 17,500 barrels of flour? If you could load maybe 30 barrels of flour on one wagon, that is over 580 wagons instead of fifty arks. One driver per wagon? Two horses per wagon? Four? Even at two, that is more than 1100 horses. Provisions for 580 men and who knows how many horses? How long would it have taken? Would they have loaded the wagons in Birmingham only to unload them in Huntingdon and re-load the barrels on boats there? Would they have wagoned all the way to Baltimore? Feed hundreds of men and thousands of horses for a month or two? Is there any evidence that at the beginning of May, 1827, with the dry spell several weeks old, that anyone suggested that they begin to think about alternative transportation methods?

Ms. Shedd provides no evidence that answers these questions, because there is none. We certainly have historical evidence that the merchants carried their commercial products in wagons -- but they used the wagons to carry the products to the town landing in Birmingham in order to load them onto arks. We have evidence that they transported small quantities of goods

over short distances in wagons (Cf., Bright's Proposed Findings of Fact, 186-194 and citations therein).

There is, however, not one single piece of evidence cited by Ms. Shedd from which we can conclude that the residents of the Little Juniata Valley ever, much less regularly and consistently, organized the wagon transportation which would have been required to carry the large quantities of produce which they loaded on the arks. If they had done so, surely it would have been referred to somewhere in the local correspondence or newspapers. It would have been a massive undertaking. There would have been newspaper announcements of the dates on which the wagon trains departed or were expected to depart. There would be stories about the heroics, tragedies and successes of those trips; how many wagons left, how many broke down, who led them, how many blacksmiths were necessary, how many carpenters to fix broken wagon wheels, who fell off and broke his neck or drove his wagon off the hillside. Something. But Ms. Shedd provides nothing.

In fact the newspaper did report on the current river conditions, but no report on the conditions of the roads for commercial traffic. No report that said "The roads are hoped to be dry and passable next week for the annual wagon train to Huntingdon" or "Because of the prolonged dry spell rendering the river unfloatable, 3000 barrels of flour currently stored in the warehouse of M. Wallace will be transported by wagon on the 30th hence. Drivers and horses needed."

The ultimate conclusion from all of this is inescapable.

The residents of the Little Juniata River Valley had a lot to transport to market. They had a thriving economy which produced far more than they could use themselves. The economy produced much for which other people, principally in the east, were willing to pay good money. According to all of the evidence produced by all of the parties, there was only one economical

way to get the product of their labor to market in time to sell it profitably – the Little Juniata River.

Ms. Shedd makes much of the fact that the ark was a craft which was useful only in the downriver direction and that keel boats could not be used on the Little Juniata. Therefore, she says, commerce only went in one direction.

This analysis is, of course, wrong. “Commerce” was two-way. Products went down river. Money came back up river (presumably along with the rivermen). There was no need for an ark or keel boat to carry money. The residents of the valley made products and grew produce for their own needs. Except for an occasional piano or other luxury or an emergency load of paper, the residents of the Little Juniata did not need much up-river traffic in products. Transporting down river products paid for in Baltimore was the key to the commerce of the Little Juniata valley. As Ms. Heberling made clear in her testimony, the economy within the valley was a barter economy. What was needed was an outlet for the excess which the valley produced beyond what it used. (Cf., Bright’s Proposed Findings of Fact 33-37 and citations therein)

Even if river traffic in commercial goods went in only one direction there is no principle of logic or law which says that one-way river traffic is not commerce. Most of the commercial river traffic, even on rivers whose navigability is not questioned, went one way. No known case supports the proposition that commercial traffic must go both up river and down river in order that a river be considered navigable.

Ms. Shedd also makes much of the fact that the flow in the river was a little unpredictable. Again, however, there is no case which would require as a *sine qua non* of navigability that a river have sufficient flow all year round to support commercial traffic. The cases cited in Bright’s Proposed Conclusions of Law appear to point in the other direction, to-

wit, that if the river is capable of commercial traffic in its natural condition it is navigable, even if its navigability is hindered by obstructions at various times of the year. (Cf., Bright's Conclusions of Law, 9-16)

There is no question but that the Little Juniata was capable of supporting commercial traffic at the most important times of the year, the testimony of Defendants' witnesses to the contrary.

The testimony of the other defense witnesses is totally unpersuasive and need not be commented on at length. That is because despite the testimony of Capt. Aspenleiter and Dr. Barone, the navigators of the Little Juniata obviously knew what they were doing. What Aspenleiter and Barone testified could not be done was in fact done by the rivermen of the valley.

Even at the river's highest, the trip down the Little Juniata was not exactly a wild ride down the Colorado. Perhaps the time of Capt. Aspenleiter and Dr. Barone would have been better spent figuring out exactly how did the rivermen of the 18th and 19th century accomplish their task, because it is perfectly obvious that they accomplished it. Dr. Barone might find it useful to calculate how the muscle power and ingenuity of rural America could overcome the forces of nature quantified in his hydrological equations.

Dr. Barone's images of out-of-control boats crashing to kindling like so many eggs thrown against a wall are figments of his imagination. The fact that he supports these images with nicely crafted mathematical calculations cannot undermine the common sense conclusion that he is simply wrong. Does he think the residents of the valley spent the winter building 120 arks they knew were going to end up as toothpicks before the trip was over? Does he think that after several weeks of low water they were going to load the equivalent of 17,500 barrels of

goods into 50 arks only to have them crash into a cliff wall on the first sharp turn or a boulder they did not know was there?

As for Capt. Aspenleiter, the obstacles that he cited in his testimony were likely not there in the late 1700s and early 1800s. What did he think the builders of the railroad did with the millions of tons of rock they blasted from the cliffsides along the river? Where did he think that rock ended up?

It is beyond obvious that the rivermen of the valley had the means to control these vessels and to keep them from splintering on the cliffs and rocks (ropes, perhaps? held by men on shore to guide the boats around sharp curves or rocky obstacles which they knew were there?). If they didn't, the merchants of the area would certainly have found another way.

But they did not find another way (at least not until the canal and railroad came).

To be sure, Ms. Shedd is able to cite evidence that arks were occasionally lost, but the only rational conclusion to be drawn from the evidence is that the residents of the valley considered the economic benefit well worth the risk, otherwise we can be sure that it was a risk they would not have taken year after year for at least five decades.

The arks must have made it down river enough times to justify their repeated use. The residents built 120 of them over one winter. They built them because they planned to load every single one of them with valuable cargo – at least 42,000 barrels or 144,000 bushels worth. Those arks must have made it to market often enough to justify loading them with large quantities of valuable produce and entrusting both the arks and their precious cargo to the skills of the rivermen.

It is important to point out one more consideration in connection with the decision which the Court has to make in this case. The question of navigability has nothing to do with the

“taking” of private property. The point of looking at navigability from the historical perspective is that a navigable river never belonged to the owners of the land along its banks. Defendants’ predecessors in title never owned the riverbed adjacent to their real estate. So even if a river is no longer “navigable” in the sense that it is not used as a “broad highroad” of commerce today, there is no legal basis on which the ownership of the riverbed would “revert” to the riparian landowners. The Commonwealth has always owned the riverbed of the Little Juniata and the Commonwealth had elected to retain that ownership.

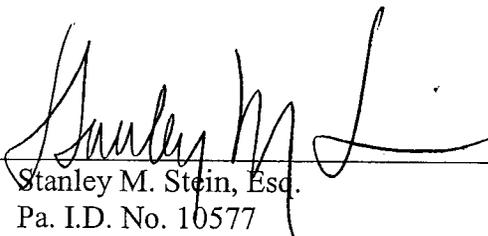
In short, there is only one conclusion which can be drawn from this evidence:

The Little Juniata, for the farmers, millers, iron manufacturers and other merchants of the Little Juniata Valley, was a “broad highroad of commerce” on which they relied virtually exclusively to get their produce to eastern markets. The Little Juniata was not the avenue of last resort. It was the “broad highroad” of first and only resort. The Little Juniata was a navigable river and it belongs to the citizens of the Commonwealth of Pennsylvania.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Brief in Support of Bright's Proposed Findings of Fact and Conclusions of Law was served via First Class, U.S. mail, postage prepaid, this _____ day of November, 2006, upon the following:

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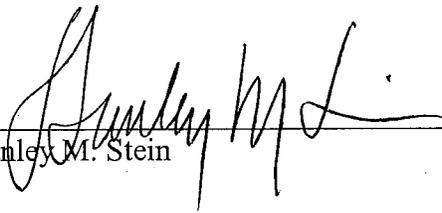
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