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January 26, 2005

The Honorable John E. Bridges
Chelan County Superior Court
Department No. 3
401 Washington Street
Wenatchee, WA 98807

Re: Borders v. King County
Cause No. 05-2-00027-3

Dear Judge Bridges:

Pursuant to LR 5(d)(5), enclosed with this letter is a copy of several territorial statutes and of a law review article cited in the Secretary of State's Response to Washington State Democratic Central Committee's Motion to Dismiss For Lack of Subject Matter Jurisdiction. Other out-of-state authority cited in the Response has already been provided by other parties, and in the interest of avoiding unnecessary duplication, we rely upon the materials provided by other parties.

Sincerely,

/s/

JEFFREY T. EVEN
Assistant Attorney General
(360) 586-0728

:pmd
cc: Counsel of record



University of Arkansas at Little Rock Law Journal
Summer, 1998

***891 JUDICIAL COUP D'ETAT: MANDAMUS, QUO WARRANTO AND THE ORIGINAL
JURISDICTION OF THE SUPREME COURT OF ARKANSAS**

Logan Scott Stafford [FN1]

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On May 7, 1874, four of the five justices of the Supreme Court of Arkansas assembled in the state capitol on West Markham Street to deliver the court's decision in *Brooks v. Page*. The issue in the case seemed relatively simple. The state auditor had issued a warrant for \$1,000, and the state treasurer was reluctant to pay the warrant until the court settled certain legal questions. Shortly after convening, the court handed down a one page, three paragraph opinion declaring that it was appropriate for the treasurer to pay the warrant.

The court's decision was, however, anything but routine. The case had been contrived by the court's chief justice, and its purpose was to confirm an attempted coup d'etat by disgruntled members of the chief justice's political party. The grounds outside the state capitol were ringed with breastworks manned by the state militia. The troops were there to protect the capitol and the court from the masses of armed men who had poured into Little Rock to support a governor ousted from office by judicial decree. Three days earlier, supporters of the ousted governor had kidnapped two of the supreme court justices and held them at gunpoint to prevent the court from meeting to decide *Brooks v. Page*. Only hours before the court met, the two judges had escaped their captors thanks to the timely arrival of United States mounted infantry. After the court issued its opinion, a certified copy was immediately telegraphed to the president of the United States.

It soon became apparent that the chief justice, popularly called "Poker Jack," had overplayed his hand. After reviewing the court's opinion, the attorney general of the United States advised the president to disregard it. Less than a week after issuing the opinion, the four justices were escorted out of town, protected from enraged citizens by United States soldiers. By the end of the month, one of the justices had resigned, and the other three had been impeached by the Arkansas House of Representatives.

The decision in *Brooks v. Page* culminated a tumultuous five year period during which the supreme court greatly expanded its own original jurisdiction to issue writs of mandamus and writs of quo warranto. This enlargement of the court's original jurisdiction occurred during the tenure of a chief justice who displayed an unprecedented willingness to use the court's powers to advance the interests of a particular political faction. It is possible that the *892 institutions of the state could have survived a supreme court that assumed extraordinary powers, or a chief justice who actively participated in partisan politics, but when these two trends coincided, as they did during the period leading up to the issuance of *Brooks v. Page*, the resulting chaos toppled the government of which the court was a part and the constitution under which the court was organized.

The Arkansas Supreme Court has, since its creation in 1836, exercised the power to issue writs of mandamus and quo warranto. A writ of mandamus is an order issued to a public officer directing the officer to perform an act required by law or refrain from performing an act enjoined by law. [FN1] A writ of quo warranto is the traditional way of testing the right of a person to hold an office, although it can also be used to determine the right to exercise a public franchise. When a court issues a writ of quo warranto, the party to whom it is issued must appear before the court and show by what right (literally, "by what warrant") the party purports to hold a particular office or to exercise a particular public franchise. [FN2]

The power to order a public officer to perform an act and the power to determine whether a public officer is entitled to hold office are formidable powers to confer on a court. Throughout most of its history the Arkansas Supreme Court's issuance of writs of mandamus or quo warranto has been limited to cases involving the court's jurisdiction to hear appeals from or exercise supervisory control over the inferior courts of the state. During the five year period ending with *Brooks v. Page*, the supreme court exercised original jurisdiction to issue these two extraordinary writs. Between 1869 and 1874 a party could apply directly to the supreme court for a writ of mandamus ordering a public official, whether or not that official was a member of the judicial department, to take or refrain from taking a particular action. During the same period it was possible to test any public official's right to hold office by invoking the supreme court's original jurisdiction to issue a writ of quo warranto.

The court's expansion of its original jurisdiction during that period illustrates the delicacy with which the checks and balances of the constitution are calibrated. In 1870 the court used its original mandamus jurisdiction to decree the seating of certain members of the General Assembly. Several months later the court ordered the lieutenant governor to appear before it and show cause why he should not be removed from office. In 1873 the attorney general attempted to remove the governor from office by invoking the court's original jurisdiction to issue writs of quo warranto. *Brooks v. Page* involved *893 the exercise of the court's original jurisdiction to issue a writ of mandamus to a state officer. It was also the last official act of the four justices who signed the opinion.

I. THE SUPREME COURT'S ORIGINAL JURISDICTION UNDER PRE-1868 CONSTITUTIONS

A. Original Jurisdiction under the Constitution of 1836

Arkansas was admitted to the union in 1836 with a constitution that was somewhat vague regarding the supreme court's original jurisdiction to issue writs of mandamus and quo warranto:

The Supreme Court, except in cases otherwise directed by this constitution, shall have appellate jurisdiction only, which shall be coextensive with the State, under such restrictions and regulations as may from time to time be prescribed by law. It shall have general superintending control over all inferior and other courts of law and equity. It shall have power to issue writs of error and supersedeas, certiorari and habeas corpus, mandamus and quo warranto and other remedial writs, and to hear and determine the same. [FN3]

Whether this language vested the supreme court with original jurisdiction to issue writs of quo warranto arose in an 1839 case styled *State v. Ashley et al.* [FN4] The attorney for the state filed a motion in the supreme court asking that certain individuals be required to appear and show cause why a writ of quo warranto should not issue against them for usurping the office of directors of the state Real Estate Bank. The individual directors countered that the supreme court lacked original jurisdiction to issue a writ of quo warranto. The court denied the state's motion after first determining that it lacked jurisdiction because the proceeding was criminal rather than civil in nature. In dictum, however, the court interpreted the constitution as conferring on it original jurisdiction to issue writs of quo warranto provided the proceeding was civil rather than criminal in character. [FN5]

Twelve years later, however, the court reversed its position and ruled that it lacked original jurisdiction to issue writs of mandamus or quo warranto. In *894 *Ex parte Allis* [FN6] a building contractor asked the supreme court to issue a mandamus requiring the secretary of state, the state auditor, and the state treasurer to certify the amount of compensation due the contractor for construction performed at the state penitentiary. The court declined to issue the writ, ruling that it could only issue writs of habeas corpus, mandamus, and quo warranto pursuant to its general superintending control of inferior courts. In cases not involving control of an inferior court, a party seeking any of the three named writs or any other remedial writ had to apply first to a lower court and appeal an adverse decision to the supreme court.

In the *Ex parte Allis* opinion the court conceded that it could exercise original jurisdiction to prevent a failure of justice when all subordinate courts were incompetent to act. This limited exception was applied in *Ex parte Crise*, [FN7] when the supreme court considered an original petition asking for a writ of mandamus against the state auditor because there was at the time a vacancy in the office of the only circuit judge with jurisdiction to issue the writ. Once the circuit court vacancy was filled, the supreme court declined to retain jurisdiction of the case. [FN8]

B. Original Jurisdiction under the Constitution of 1861

When Arkansas seceded from the Union in May of 1861, the secession convention remained in session and adopted a new constitution for the state. The language of the Constitution of 1861 defining the jurisdiction of the supreme court was almost identical to that contained in the Constitution of 1836, except six words were added to make the final clause read:

[I]t shall have power to issue writs of error and supersedeas, certiorari and habeas corpus, mandamus and quo warranto and other remedial writs, in aid of its appellate jurisdiction, and to hear and determine the same. [FN9]

By adding the phrase "in aid of its appellate jurisdiction," the drafters undoubtedly intended to codify the holding of *Ex parte Allis*-i.e., the supreme court's power to issue writs of habeas corpus, mandamus and quo warranto was limited to cases involving the exercise of the court's appellate jurisdiction.

When Union forces occupied Little Rock in September of 1863, the entire Confederate state government, including the supreme court, moved to the town *895 of Washington in Hempstead County, where it continued to function until May of 1865. During its June 1864 term in Washington the supreme court again considered the question of its original jurisdiction to issue a writ of quo warranto. The prosecuting attorney for the Fifth Judicial Circuit was Little Rock attorney Samuel W. Williams. [FN10] As prosecuting attorney for the judicial circuit in which the supreme court was held, Williams was the ex-officio attorney general for the state. [FN11] Following the surrender of Little Rock to federal forces, Williams remained in the occupied capital rather than move within Confederate lines with the rest of the Arkansas state government. When the court met in Washington on January 1, 1864, Williams was not present, and the court was forced to appoint an acting attorney general to represent the state. [FN12] In the spring of 1864 Williams took the oath of allegiance to the United States and ran for circuit judge in the loyalist state government organized in Little Rock. [FN13]

On July 9, 1864, the acting attorney general applied to the supreme court for a writ of quo warranto requiring Williams to appear before it and show "by what warrant" he was legally entitled to hold the office of attorney general. [FN14] The threshold question presented by the application was whether the supreme court had original jurisdiction to issue a writ of quo warranto. In normal times the Pulaski County Circuit Court would have been the appropriate forum to issue the writ, but Pulaski County was occupied by the Union army. If the supreme court's jurisdiction in quo warranto proceedings were limited to reviewing the decisions of inferior courts, the practical effect would be to place Williams beyond the reach of the Confederate state government in Hempstead County. The General Assembly could, of course, remove Williams through impeachment, but it was not clear in the summer of 1864 that a quorum of the legislature could be assembled in Hempstead County.

In a rather lengthy opinion that devoted much ink to providing an intellectual justification for secession, Justice Albert Pike carved out a limited circumstance in which the court did have original jurisdiction:

We therefore declare it to be now the opinion of this court that, in cases involving the civil rights of the State as Sovereign, affecting virtually its *896 character and the proper administration of the Government, in which the public has a direct and immediate interest, and where the right to a public office, franchise, liberty, or privilege is the subject-matter of the controversy, this court is by the constitution invested with original jurisdiction to be exercised by means of a writ of mandamus, or quo warranto, according as the State may by her Attorney General ask for one or the other, in order to cause the admission of the proper person to, or to oust the party illegally holding of, such public office, franchise, liberty or privilege; but to hear and determine the case, and being, pro haec vice, both a court of first instance and in the last resort. [FN15]

Although some opinions issued by the Confederate state supreme court during the last year of the war were later redocketed and issued by the post-war supreme court, [FN16] the political sentiments expressed in the Williams decision made it an unsuitable candidate for such treatment. Consequently, the opinion does not appear in the official Arkansas reports.

C. Original Jurisdiction under the Constitution of 1864

A few months before the Confederate state supreme court issued its decision in *State v. Williams*, a group of pro-Union Arkansans gathered in Little Rock and prepared a new state constitution. The new constitution was approved in March of 1864 in an election that was conducted in a somewhat irregular fashion since the southern half of the

state was still under Confederate control and the northern half of the state was overrun with guerrillas. [FN17] President Abraham Lincoln recognized the provisional state government formed under the new constitution, [FN18] and during the last year of the Civil War Arkansas had two state governments—a Confederate state government in the Hempstead County town of Washington, and a Union state government in Little Rock.

The Constitution of 1864 expressly repudiated the Constitution of 1861 and dropped the phrase "in aid of its appellate jurisdiction" that had been added *897 by the 1861 document to the supreme court's jurisdictional definition. The phrase was probably deleted simply because it had been added by the secession convention. There is no evidence that the framers of the 1864 Constitution intended to overrule the holding of *Ex parte Allis* and confer on the supreme court original jurisdiction to issue writs of mandamus or quo warranto. In any event, during the four years of its existence the supreme court organized under the Constitution of 1864 was never presented with the opportunity to address the question of its original jurisdiction to issue writs of mandamus or quo warranto.

II. THE SUPREME COURT'S ORIGINAL JURISDICTION UNDER THE CONSTITUTION OF 1868

A. Prelude to the 1868 Constitution

When the Civil War ended in the spring of 1865, officials of the Confederate state government in Hempstead County turned over the state's archives to their Union counterparts in Little Rock and went home. [FN19] In a remarkably short period of time the political elements that had led Arkansas out of the Union in 1861 regained control of the machinery of state government. [FN20] The Unionist state legislature had passed an act disenfranchising any person who supported the Confederacy after April 18, 1864, [FN21] but the very first decision issued by the Unionist supreme court had declared the act unconstitutional. [FN22] In the August 1866 general election former supporters of the Confederacy, running under the "Conservative" party label, captured most of the seats in the General Assembly and all three positions on the state supreme court. [FN23] Isaac Murphy, who had been elected in 1864 to head the pro-Union state government formed in Little Rock, was still governor, but the overwhelming victory by ex-Confederates at the 1866 general election left Murphy with few allies in either the legislative or judicial branches. [FN24]

*898 The 16th General Assembly, which met from November 5, 1866, to March 23, 1867, [FN25] spent much of its time attempting to restore, to the extent legally and politically possible, the status quo antebellum. The legislators recognized the changed legal status of slaves by approving legislation granting blacks the right to marry, make and enforce contracts, give evidence, make wills, and purchase and convey real and personal property. [FN26] Blacks were barred from attending any public school, however, "except such as may be established exclusively for colored persons," and were denied the right to intermarry with white persons, vote, serve on juries, or join the state militia. [FN27]

In an effort to keep recently freed slaves in a virtual state of peonage, the legislature passed an "Act to Regulate the Labor System in this State." [FN28] In addition to giving employers a lien on any goods produced by a laborer, the act made laborers who quit their jobs without just cause liable to their employer for the full amount of wages that would have been due at the expiration of the employment contract. Anyone who enticed a laborer away from his employer before the expiration of his employment contract was guilty of a criminal offense.

The General Assembly ended criminal prosecutions for wartime offenses by passing, over Governor Murphy's veto, a general amnesty and pardon for all crimes except rape committed during the period of hostilities. [FN29] Although the grant of immunity applied to persons on both sides, the number of ex-Confederates liable to prosecution for wartime offenses was undoubtedly much higher than the number of former Union supporters.

An act to benefit war veterans, also approved over the governor's veto, was particularly rankling to the many Arkansans who had fought for the Union. [FN30] The act set aside ten percent of the state's revenues for the relief of destitute, wounded, or disabled soldiers and the destitute widows of deceased soldiers. Because persons already provided for by the United States government *899 were excluded from coverage, only Confederate veterans and their widows qualified for state benefits.

The General Assembly vote with the most far-reaching implications occurred in December of 1866, when both the

senate and the house overwhelmingly rejected the proposed Fourteenth Amendment to the United States Constitution. [FN31] Arkansas and Tennessee each organized a provisional state governments loyal to the Union before the Civil War ended, and as late as May of 1866 there was strong sentiment in Congress for readmitting both states to the Union. The Tennessee legislature ratified the Fourteenth Amendment on July 19, 1866, [FN32] and five days later Congress readmitted Tennessee to the Union. [FN33] If the Arkansas General Assembly that convened in November of 1866 had followed suit, the state might have been spared the eight years of congressional reconstruction that followed. [FN34]

The resurgence of conservative political power that occurred in Arkansas in 1866 was not an aberration. Most governments organized in the southern states during the period immediately after the Civil War were dominated by former Confederates, who proceeded to act as though little, other than the questions of slavery and secession, had been settled by the war. [FN35] The political course chosen in Arkansas and other southern states produced a backlash among northern voters and the ascendance of a more radical bloc within the Republican Party. Unlike Presidents Abraham Lincoln and Andrew Johnson, who considered secession a nullity and were prepared to recognize any former Confederate state that organized a loyal state government backed by a significant number of its citizens, the radical Republicans argued that a state forfeited its statehood by adopting a secession ordinance and that the decision to readmit it to the Union was reserved to Congress by Article 4, § 3 of the United States Constitution.

The radical Republicans skirmished with President Johnson throughout 1866. They lacked the votes to override numerous presidential vetoes, but since the Senate and House of Representatives were the sole judges of their respective memberships, [FN36] the radicals in Congress were able to block the seating of senators and representatives from former Confederate states, including Arkansas. [FN37] In the congressional elections of November 1866, *900 northern voters, concerned that the fruits of four years of struggle were slipping away, gave the radical Republicans the majorities they needed in both houses of Congress to override presidential vetoes and implement their version of reconstruction. [FN38]

Between March 2, 1867, and July 19, 1867, the new Congress approved a series of acts, all over the veto of President Johnson, whose purpose was "to provide for the more efficient Government of the Rebel States." [FN39] The Reconstruction Acts placed ten of the former Confederate states, including Arkansas, under military rule and set conditions for their readmission to the Union. [FN40] First, a majority of the state's voters had to approve a new state constitution acceptable to Congress. The legislature formed under the new constitution then had to ratify the proposed Fourteenth Amendment. Finally, the Fourteenth Amendment had to be approved by a sufficient number of states to become a part of the United States Constitution. [FN41]

Over the next year Arkansas proceeded to comply with the first two readmission conditions. Supporters of congressional reconstruction held a series of meetings around the state to encourage the registration of voters and drum up support for a new constitution. In the 1866 general election pro-Union candidates had called themselves Unionists to avoid identification with the national Republican Party, but by the spring of 1867 proponents of a new state constitution were freely using the label "Republican" to describe their movement. [FN42] The emerging Arkansas Republican Party drew its support from three disparate groups of voters.

The dominant force in the new party consisted of men who had recently immigrated to Arkansas from northern states. Many of these newcomers were former Union army officers who had come to the state during the war as members of the Federal army of occupation and stayed on after hostilities ended. The group also included businessmen who were attracted to the state by investment opportunities as well as agents of the Freedmen's Bureau who were primarily interested in the welfare of former slaves.

A second group of Republican supporters consisted of Arkansans who had lived in the state before the war. Most were Unionists who had opposed secession in 1861 and helped form the pro-Union state government under the *901 Constitution of 1864 only to see control of that government captured by ex-Confederates at the 1866 general election. The group also included a few former supporters of the Confederacy who decided in the years after the war that the Republican Party offered more opportunities for political and economic advancement. Though more numerous than their northern-born allies, many of these "native" [FN43] Unionists lacked the education, the political sophistication, and the organizational skills of the recent immigrants and, as a result, the group had less influence in

the Republican Party. Because of their longer ties to the state, native Unionists tended to be more conservative on both economic and social issues than recent immigrants, which made it easier for them to form alliances with ex-Confederates. [FN44]

Newly freed slaves formed the third major bloc of Republican voters. Most members of the Republican Party recognized that the party could never expect to garner the support of a majority of the state's white voters. Blacks made up about one quarter of the state's population, [FN45] and throughout the reconstruction period the Republican Party worked hard to register and attract the support of black voters. Most recently freed slaves credited the Republican Party for their emancipation, and gratitude, coupled with the refusal of most Democrats to accept the social or political equality of blacks, ensured black support of Republican candidates and programs. [FN46]

Although most former Confederates opposed congressional reconstruction, they had trouble agreeing on a unified strategy. Some urged every eligible white man to register and vote against a constitutional convention, while others took little interest in the convention process, either because they preferred military rule to a democratic government in which former slaves participated or because they expected to defeat any constitution proposed by the convention. [FN47] The voter qualifications set by the Reconstruction Acts also hurt the anti-constitution cause. Although the acts disenfranchised only those *902 who had taken an oath of allegiance to the United States and afterwards supported the Confederacy, this excluded group included most of the pre-war political elite who would normally have led the anti-constitution campaign. [FN48] The acts also required prospective voters to sign a lengthy oath, [FN49] and many opponents of a new constitution were reluctant to sign an oath that they found to be intimidating, confusing, or humiliating. [FN50]

The commander of the military district to which Arkansas was assigned [FN51] by the Reconstruction Acts set the first Tuesday in November, 1867, as the date for Arkansans to vote on whether to hold a constitutional convention. [FN52] In an election tainted by irregularities, 41,134 votes were cast for and 13,558 votes were cast against a constitutional convention. [FN53] Based on the vote the district military commander ordered a constitutional convention held in Little Rock beginning on January 7, 1868, and certified the election of seventy delegates to the convention. [FN54]

*903 B. Constitutional Convention of 1868

The constitutional convention met for thirty-one days between January 7th and February 14th of 1868. [FN55] The stenographic record of convention proceedings reveals that debate focused on topics such as miscegenation, voter qualifications, and parliamentary maneuvers which had little to do with the document ultimately approved by the convention. The actual drafting of the constitution was assigned to a Committee on the Constitution, its Arrangement and Phraseology, which was controlled by recent immigrants to the state. [FN56] The committee's final product was submitted to the convention at 7:00 p.m. on February 10, 1868, [FN57] under procedural rules that precluded amendment from the floor or separate votes on individual provisions. [FN58] Following a session that lasted into the early morning hours of February 11, 1868, the delegates approved the proposed constitution by a vote of 46 to 20. [FN59]

The Constitution of 1868 was in many ways a progressive document. It guaranteed equality before the law regardless of race and extended the franchise to all male citizens. [FN60] Unlike the constitutions of 1836, 1861, and 1864, representation in the General Assembly was based on total population, not white male inhabitants, a change that substantially increased the representation of districts in eastern Arkansas with large black populations. [FN61]

Another significant, though not necessarily progressive, change from earlier constitutions lay in the allocation of powers among the three departments *904 of government. The proposed constitution greatly strengthened the executive branch by conferring on the governor the power to appoint a number of public officials, including circuit court judges and prosecuting attorneys, who were chosen by the General Assembly or directly elected by the voters under earlier constitutions. [FN62]

One of the more controversial provisions of the proposed constitution increased the number of supreme court justices from three to five. Four associate justices were still elected by the voters, but the chief justice was to be appointed by the governor with the advice and consent of the senate. [FN63] The addition of two associate justices

to the court was strongly opposed by Conservative members of the convention, who perceived the expansion as an attempt to create more political offices for Republicans. [FN64] Even some of the constitution's Republican supporters questioned the need for two new judges on the court. In explaining their votes on the proposed constitution, eleven delegates who voted for the constitution noted their objection to increasing the size of the court. [FN65] Since the convention ultimately approved the proposed constitution by a vote of 46 to 20, it is doubtful that the provision expanding the court would have passed had it been submitted for a separate vote.

In contrast to the provision adding two justices to the court, the provision defining the supreme court's jurisdiction drew little discussion. It stated:

The Supreme Court shall have general supervision and control over all inferior courts of law and equity. It shall have power to issue writs of *905 error, supersedeas, certiorari, habeas corpus, mandamus, quo warranto and other remedial writs, and to hear and determine the same. Final judgments in the inferior courts may be brought by writ of error or by appeal to the Supreme Court in such manner as may be prescribed by law. [FN66]

Omitted from the 1868 jurisdictional statement was a clause that had appeared in all earlier constitutions stating that the court "shall have appellate jurisdiction only." The absence of debate about deletion of this clause suggests that most of the delegates did not realize that the document substantially expanded the court's original jurisdiction.

One other provision of the proposed constitution merits discussion since it was to play a pivotal role in maintaining Republican political control of the state during the next eight years. Article VIII went to great lengths to deny the vote to opponents of congressional reconstruction. By incorporating the disqualification provision of the congressional Reconstruction Acts the constitution effectively disenfranchised those Confederates who had served in the state government of Arkansas before the war. [FN67] The constitution absolved those former rebels who had "openly advocated or ... voted for the reconstruction proposed by Congress, and accepted the equality of all men before the law" [FN68] The General Assembly could remove the disabilities related to support of the Confederacy of any person who "in good faith returned to his allegiance to the government of the United States" but not those who, after the adoption of the Constitution, "persisted in opposing the acts of Congress and Reconstruction thereunder." [FN69] As a final precaution the constitution set out a lengthy oath to be taken by all those who registered to vote. An applicant had to swear that he accepted "the civil and political equality of all men" and agree "not to attempt to deprive any person or persons, on account of race, color or previous condition, of any political or civil right, privilege or immunity enjoyed by any other class of men." [FN70]

The schedule to the proposed constitution provided for the offices created by the proposed constitution to be filled at the same March 13, 1868, election in which the electorate voted for or against the proposed constitution. [FN71] The Republican Party met in Little Rock on January 15, 1868, while the constitutional convention was still in session, and nominated candidates for the *906 offices created by the constitution. In fact, many members of the nominating committee were also delegates to the constitutional convention. [FN72]

Democratic opponents of a new constitution convened a state convention on January 27, 1868. [FN73] The convention called on voters to reject any constitution "submitted by the supposed constitutional convention" then in session, particularly any effort to extend suffrage to blacks, but, consistent with their opposition to the entire constitutional process, the Democrats declined to nominate candidates for the offices created by the proposed constitution. [FN74] Since the Reconstruction Acts required a new constitution to be approved by a majority of registered voters, many opponents of the proposed constitution thought they could defeat it by registering to vote and then not voting. [FN75] Congress foiled this strategy on March 11, 1868, two days before Arkansas voters went to the polls, by passing a fourth Reconstruction Act requiring only a majority of those voting to approve a new constitution. [FN76]

The election on the proposed constitution began on March 13, 1868, only a month after the convention adjourned, and continued for several days. There were actually two separate elections. The state board of election commissioners, consisting of three Republican delegates to the constitutional convention, supervised a civil election in which participants voted on the constitution and the offices to be filled at the constitution. The military conducted a separate poll in which the only matter on the ballot was the proposed constitution. Most opponents of the constitution voted only in the military poll. [FN77] On April 1, 1868, the state board of election commissioners certified that the constitution had been ratified in the civil election by the unlikely margin of 30,380 to 41. [FN78]

The military declared the constitution approved at its poll by a vote of 27,913 for and 26,597 against. [FN79]

Since they ran without opposition, Republicans were elected to all offices created by the new constitution. The new legislature convened in April and immediately ratified the Fourteenth Amendment, [FN80] and on June 22, 1868, *907 Congress readmitted Arkansas to the Union. [FN81] The new governor was Powell Clayton, who had come to Arkansas in 1862 with the 5th Kansas Cavalry Regiment, and eventually rose to the rank of brigadier general in command of the Union garrison at Pine Bluff. [FN82] His lieutenant governor was James M. Johnson, a pre-war resident of Madison County who had commanded the 1st Arkansas Infantry Volunteers, a federal regiment recruited during the war in northwest Arkansas. [FN83] Most of the other Republican state executive officers were recent immigrants to the state, a fact that caused some resentment among the native Arkansans who had joined the Republican Party. [FN84]

The Republican nominees for the four elected supreme court justice positions reflected a better balance between native Unionists and recent immigrants to the state. Two of the new justices, Lafayette Gregg and William M. Harrison, were longtime residents who had held political offices in the state before the war. The other two elected justices, Thomas Bowen and John M. McClure, were northerners who had served in the Union Army and had come to the state during or after the war.

Justice Lafayette Gregg was born in Alabama in 1825, but his family moved to Washington County in northwest Arkansas when he was ten. He represented Washington County in the lower house of the Arkansas legislature for one term in 1854 and served as prosecuting attorney of the Fourth Judicial District from 1856 until the start of the Civil War. [FN85] Throughout the secession crisis and subsequent hostilities Gregg remained loyal to the Union. [FN86] He assisted in recruiting and later commanded the Fourth Arkansas Cavalry Volunteers, which served with Union forces in northwest Arkansas. [FN87] In December of 1866 he presided over a convention of Unionists from counties in northwest Arkansas who gathered at Fort Smith to pass resolutions supporting the reconstruction policies of Congress and urging approval of the *908 Fourteenth Amendment. [FN88] A month later Governor Murphy appointed Gregg to be chancellor of the state's chancery court, but in retaliation for his support of reconstruction, the Conservative-dominated General Assembly of 1866-67 refused to confirm his appointment. [FN89]

Justice William M. Harrison was born in Maryland in 1818. He came to Arkansas in 1840 and taught school for a year in Chicot County before returning to Maryland, where he continued to teach school while studying law. Harrison returned to Arkansas in the spring of 1844 and was licensed to practice law a year later. He opened an office at Columbia in Chicot County but moved to Monticello after Drew County was created in 1847. [FN90] From 1852 to 1856 he represented Ashley, Drew, and Chicot Counties in the Arkansas Senate. [FN91] He was elected to the Arkansas House of Representatives in 1860, and in the tumultuous session that immediately preceded the Civil War, he voted in favor of calling a convention to consider secession. [FN92] His whereabouts during the war are unclear. No records exist showing service in either army, and the fact that he was over fifty when the war began would have enabled him to avoid military service.

Justice Thomas M. Bowen was born in Iowa in 1835. He passed the Iowa bar at age eighteen and was elected on the Democratic ticket to the Iowa House of Representatives in 1856. At the outbreak of the Civil War he helped form a company of home guards at Clarinda, Iowa. In the summer of 1861 the company voted to join the First Regiment of Nebraska Volunteers, then being formed to the west of Iowa in Nebraska Territory. Bowen apparently expected to serve on the Nebraska frontier fighting Indians because he abruptly resigned his commission when the regiment was transferred to Tennessee in February of 1862. Bowen moved his family to Kansas in the summer of 1862 and soon became associated with Kansas Senator Jim Lane, who had been authorized by President Lincoln to raise three regiments for service in the Union Army. Bowen was rewarded in the fall of 1862 with an appointment as colonel and commander of the 13th Kansas Infantry, which soon marched into northwest Arkansas as a part of General James G. Blount's invasion force. In November and December of 1862 the regiment participated in the Union victories at Cane Hill and Prairie Grove. Bowen spent most of the remaining war in garrison duty at Van Buren in Crawford County. He managed to divorce his wife, who was still living in Kansas, and marry the daughter of a wealthy Van Buren *909 physician and patent medicine manufacturer. During the spring of 1864, he was granted three months leave to attend the national Republican convention that met in Baltimore and renominated President Lincoln. He returned to his command in the summer of 1864 and was promoted to brevet brigadier general in January of 1865. Rather than return to Kansas when the war ended, Bowen settled with his new wife in the Van

Buren area and engaged in farming. Within a year he became active in Arkansas politics. He was a Crawford County delegate to the 1868 constitutional convention, and after arriving in Little Rock, was elected president of the convention. [FN93]

The final elected member of the court, John M. McClure, was to become a principal player in state politics for the next eight years. McClure was born in Ohio in 1834. After working as a printer, he studied law and was admitted to the bar in 1855. He practiced law in Kalida, Ohio, for six years before entering the Union Army in September of 1861 as a first lieutenant with the 57th Ohio Infantry Volunteers. His regiment participated in a number of major battles east of the Mississippi River including Shiloh and Vicksburg. The regiment's only service in Arkansas came in 1863 when it took part in the successful siege of Arkansas Post. The fact that McClure was promoted only twice, first to captain, and later to major, during his four years of service, suggests an undistinguished military career. During the first two years of the war, he was the regimental quartermaster and probably saw little actual combat. Regimental muster rolls also indicate that McClure spent a considerable amount of time back in Ohio on detached recruiting duty. He was court martialed and dismissed from the service in September of 1862, but this decision was apparently overturned because he continued to serve in the 57th Ohio until at least August of 1864. [FN94] His prowess at the poker table did earn him a nickname-"Poker Jack"-which stuck with him throughout his subsequent political career in Arkansas. [FN95]

McClure moved with his family to Arkansas in July of 1865. With financial backing from his wife's cousin, an Ohio Congressman, he rented a confiscated plantation at Swan Lake in Arkansas County and attempted *910 unsuccessfully to raise cotton. [FN96] He later worked as an agent of the Freedmen's Bureau, the entity set up by Congress to assist newly freed slaves. [FN97] After Congress passed the Reconstruction Acts in 1867, McClure turned to politics. Although a Democrat before moving to Arkansas, he joined the Arkansas Republican Party and was appointed a voter registrar in Arkansas County. Despite a prohibition against registrars running for office, he was elected as a delegate to the 1868 constitutional convention. There he served on the important Committee on the Constitution, its Arrangement and Phraseology, which drafted the document ultimately submitted to the voters. [FN98]

According to an unflattering character sketch that appeared in a Cincinnati newspaper, when the Republican Party met to nominate candidates for the offices created by the proposed constitution, McClure wrote a friend in Ohio asking for advice whether to seek a position as United States senator or state supreme court justice. The friend replied that he should take the judicial position because the "picking" was more promising. [FN99] The extent to which McClure did financially profit from his service on the court is debatable. Throughout his six years on the court he was dogged by allegations that he accepted bribes to decide cases, but none of his critics ever presented convincing evidence of such malfeasance. McClure did not dispute frequent allegations that he was paid to lobby the Arkansas legislature while he sat on the court, and during testimony before a Senate committee in 1872 he admitted accepting levee bonds as compensation for persuading legislators to approve a bill authorizing the issuance of the bonds. [FN100] During most of his tenure on the court, McClure was editor and co-owner of the state's principal Republican newspaper. The newspaper provided McClure with a platform for attacking those who opposed him or his politics, although he was sometimes willing to temper the tone of his editorials in exchange for the payment of cash. [FN101]

McClure had a striking physical appearance which often prompted comment in news reports and biographical sketches. He stood nearly six feet tall and carried some two hundred pounds on a powerful frame. He had a long, very full beard and usually smoked a large cigar. His normal attire, even in *911 summer, was a long Prince Albert style coat and tall black felt hat with a broad brim, which undoubtedly added to his imposing presence. Even his enemies conceded that McClure was not lacking in courage, either physical or political. His temperament seemed to reflect his hours at the poker table because throughout his professional career in Arkansas, he proved willing to take extraordinary risks to achieve a goal. In an age when most politicians subscribed, at least publicly, to orthodox religious views, McClure openly proclaimed his nonbelief in the Christian faith. [FN102]

To balance out the four elected associate justices, Governor Clayton named William W. Wilshire to the post of chief justice. Wilshire was born in Illinois in 1830. Despite the death of his father when Wilshire was five, he managed to obtain an rudimentary public school education. Following an unsuccessful trip to the California gold fields in the early 1850's, he returned to Illinois in 1855 and became involved in coal mining and the mercantile

business. He began reading law under the tutelage of a local attorney in 1859, but his legal education was interrupted by the Civil War. In September of 1862 he recruited a company of infantry that eventually became a part of the 126th Illinois Infantry Regiment. As a major in that regiment he served with the Army of Tennessee at the siege of Vicksburg in early 1863. His regiment then joined the Federal army that marched slowly west from Helena during the summer of 1863 and eventually occupied Little Rock. Wilshire served with occupation forces in the capital city until July of 1864, when his wife's ill health forced him to resign his commission. After the war he decided to move to Little Rock and complete his legal studies.

Wilshire was one of the few Union army veterans actively involved in politics during the reconstruction period who appears to have gotten along well with former Confederates. Upon his admission to the bar in 1866 he formed an partnership with Elbert H. English, chief justice of the supreme court under the Confederate state government. A year later the supreme court, consisting of three former Confederates elected in the Conservative landslide of 1866, appointed Wilshire state solicitor general. [FN103]

*912 C. The New Supreme Court and Original Jurisdiction

The new supreme court justices assumed office in July of 1868 but did not issue any opinions until the following December. [FN104] During that first term the court considered the question of its original jurisdiction. In *Jones v. Little Rock* [FN105] a citizen asked the supreme court to issue an injunction restraining the mayor and aldermen of the city of Little Rock from issuing notes or bonds intended to circulate as money. In a unanimous opinion authored by Chief Justice Wilshire, the court ruled that it lacked original jurisdiction to issue an injunction, and it did so with broad language that appeared to reaffirm the holding of the pre-war court in *Ex parte Allis*. After quoting the constitutional language that defined the court's jurisdiction, [FN106] the opinion stated:

Thus it will be seen that this clause of the Constitution limits the original jurisdiction of the Supreme Court to those writs enumerated in that clause, or such 'other remedial writs' as may be properly used in the exercise of its appellate jurisdiction, or that may be necessary in the exercise of the power of general supervision and control over the inferior courts; and the power of this court, to issue the writs referred to in that clause of the Constitution, is confined to the full and complete exercise of its appellate jurisdiction, and the exercise of a general supervision and control over the inferior courts of the State, and does not extend to writs of injunction, upon the filing of an original bill of complaint in this court. [FN107]

The plaintiff in *Jones v. City of Little Rock* then asked the Pulaski County Chancery Court to enjoin the issuance of notes or bonds by the mayor and aldermen, and when the chancellor refused to intervene, the plaintiff filed an original petition with the supreme court for a writ of mandamus compelling the chancery court to issue a restraining order against the mayor and alderman. [FN108] The petition did not present a jurisdictional problem since the court was being asked to control an inferior court. Without addressing the jurisdiction issue, the court refused relief on the merits, ruling that the plaintiff had failed to show that he would be personally injured by the issuance of the notes or bonds.

At its next term in June of 1869 the court was again asked to issue a writ of mandamus, this time to enjoin the state treasurer from issuing interest-*913 bearing certificates. In *Price & Barton v. Page* [FN109] the court split along lines that reflected the period that court members had resided in the state. In a three to two decision authored by McClure and joined by the other two northern justices, Wilshire and Bowen, the court declared that it did have original jurisdiction to issue a writ of mandamus. [FN110] Although the majority opinion questioned whether *Ex parte Allis* was correctly decided, the actual basis for the holding was the absence of language in the 1868 constitution limiting the supreme court to "appellate jurisdiction only." This restriction had appeared in the 1836, 1861, and 1864 constitutions, [FN111] but McClure, who had served on the convention committee that drafted the 1868 constitution, declared that the restriction was omitted by the drafters of the 1868 constitution with the intention of conferring on the supreme court unrestricted original jurisdiction to issue the writs of habeas corpus, mandamus, and quo warranto.

Harrison and Gregg, the two justices who had resided in the state since before the war, dissented. They interpreted the first sentence of Article VII, section 4, as conferring on the supreme court general supervisory control over inferior courts and the second sentence as listing the writs that could be issued by the supreme court incidental to its power to control inferior courts. In other words, the supreme court could, as it was asked to do in the second *Jones v.*

City of Little Rock case, issue a writ of mandamus to control an inferior court. The supreme court could also issue a writ of quo warranto to determine whether a person was entitled to hold office as a judge of an inferior court. But, according to the dissenters, the supreme court lacked original jurisdiction to issue either writ in a case in which it was not exercising supervisory control over an inferior court.

D. The Election of 1870

The court's unanimous refusal to exercise original jurisdiction in *Jones v. City of Little Rock* was announced on May 24, 1869. [FN112] Six months later, three of the five justices, including the author of the *Jones* opinion, decided in *Price & Barton v. Page* [FN113] that the court did have original jurisdiction to issue a writ of mandamus to a state executive officer. This sudden turnabout by the three *914 northern justices on the court coincided with a change in the Arkansas political landscape. During 1869 the coalition of northern immigrants, native Unionists, and former slaves who made up the Arkansas Republican Party began to unravel, and the resulting intra-party strife may have contributed to the court's willingness to expand its original jurisdiction.

In the spring of 1869 a group of legislators consisting primarily of native Unionists and led by Lieutenant Governor James M. Johnson denounced the administration of Governor Powell Clayton. [FN114] The professed reasons for their dissatisfaction with Clayton were his use of the state militia to suppress dissent and his mismanagement of state finances, but underlying the revolt was lingering resentment at the exclusion of native Unionists from state offices. After Republicans at the national level formed a Liberal Republican faction opposed to the policies of President Ulysses S. Grant, Johnson put together a state Liberal Republican organization. The organization's title, of course, was something of a misnomer since most members of Johnson's faction came from the right wing of the Arkansas Republican Party. [FN115]

During the same period that Johnson was leading a revolt from the right, a second group of Republican dissidents coalesced under the leadership of Joseph Brooks, a charismatic white clergyman who had come to Arkansas from Iowa as chaplain to a black infantry regiment. Brooks' initial power base within the Republican Party was the black community, which he had mobilized in the campaign for a new constitution. After Brooks attacked the financial excesses of the Clayton administration, he began to attract the support of many white, anti-Clayton Republicans. [FN116] Observers were soon referring to the Brooks Republicans as "Brindetails," a label often attributed to Brooks' ability to roar like a brindle bull when delivering speeches. [FN117] Brooks himself claimed that his faction was initially called "Brindle" because it contained both black and white Republicans and that the "tail" was later added by the official newspaper of the Clayton faction. [FN118]

Despite these defections on both ends of the political spectrum, most members of the Republican Party continued to support Clayton. The Constitution of 1868 authorized the governor to appoint all inferior court *915 judges, prosecuting attorneys, township officers, and precinct officers, [FN119] and during his first year in office Clayton had used these extensive appointment powers to build a formidable political machine. Clayton's political control was further enhanced by legislation approved in 1868 which placed the determination of who could vote in each county in the hands of a three-man board of registration. The governor named all three members of each board of registration and could remove a board member at any time without cause. [FN120] The act's net effect was to give the governor virtually absolute power to determine who was allowed to vote, particularly after the supreme court ruled that no court could review a decision of a county board of registration. [FN121] Members of the regular Republican Party who remained loyal to Clayton were labelled "Minstrels," a reference to the minstrel show background of John J. Price, the Republican speaker of the Arkansas House of Representatives and editor of the party newspaper. [FN122]

As the 1870 general election approached, all three Republican factions courted Democratic voters, primarily with promises of constitutional change to remove voting disabilities. The Democrats were still too disorganized in 1870 to mount a statewide challenge to the divided Republican Party, but the Democrats did nominate a number of candidates for the state legislature. [FN123] In the 1870 general election a number of anti-Clayton Republicans as well as some Democrats were elected to the lower house of the General Assembly. [FN124] Since only half the senators and no state officers were up for reelection, [FN125] the *916 regular Republicans (Minstrels) retained control of the senate and all state executive offices except lieutenant governor.

During the 1870 election campaign Clayton had made clear his intention to seek election to the United States Senate when the legislature convened in January of 1871. [FN126] Clayton's senatorial aspirations produced two controversies, which drew the supreme court into the conflict between Clayton and his opponents. In both instances, a majority of the justices proved willing to use the court's original jurisdiction to advance the political agenda of Clayton.

The first controversy involved the contested election of several legislators. On election day in November of 1870 Republicans opposed to Clayton had seized control of certain Pulaski County polling places and proceeded to choose their own election judges and accept ballots. The regular election judges, who had been chosen by a Clayton-appointed election board, set up competing polling places and conducted their own election. As a result two sets of election returns were certified to George McDiarmid, the Pulaski County Clerk. Anti-Clayton Republicans carried the boxes controlled by the insurgent judges. Six Democrats and a pro-Clayton Republican were elected according to the returns certified by the regular judges. Within a few days after the election Clayton allegedly reached an agreement with the Democrats whereby he would back the seating of the Democratic legislative candidates in exchange for Democratic support of his Senate bid. [FN127] Justice Bowen, and perhaps McClure, may have been involved in these negotiations. [FN128]

The constitution provided that each house of the General Assembly was the "judge of the qualifications, election and return of its members," [FN129] but instead of taking their case to the legislature, the six Democrats and one pro-Clayton Republican filed an original petition with the supreme court asking that it issue a writ of mandamus compelling McDiarmid to certify the returns of the regular election judges. On December 31, 1870, two days before the legislature convened, the supreme court voted 3 to 2 in favor of issuing the *917 writ. [FN130] The majority opinion in *Howard v. McDiarmid*, [FN131] which was authored by McClure and joined by Bowen and Wilshire, concluded that McDiarmid was obligated to certify the returns of the regular election judges. The three denied that the court was interfering with the authority of the legislative branch to determine the election of its own members, arguing unconvincingly that the court was determining only whether certain returns should be forwarded to the secretary of state, not whether certain persons had been elected.

Gregg and Harrison dissented in *Howard v. McDiarmid* on the familiar grounds that the supreme court lacked original jurisdiction to issue a writ of mandamus except in the exercise of superintending control over inferior courts. Gregg went further and argued that the legislature possessed the sole and exclusive power to determine the election of its members.

While *Howard v. McDiarmid* was still pending before it, the supreme court was asked to use its original jurisdiction to remove a major obstacle standing between Clayton and a United States Senate seat. Clayton had promised his Minstrel supporters that he would not resign as governor so long as Lieutenant Governor James M. Johnson, the leader of the Liberal Republicans, stood next in the line of succession. To oust Johnson from office and thereby free Clayton to accept a Senate seat, the Minstrel attorney general filed an application asking the supreme court to require Johnson to show cause why a writ of quo warranto should not be issued against him. [FN132] The basis for challenging the lieutenant governor's right to office was his alleged failure to qualify for the office within fifteen days of receiving notice of his election in March of 1868, as required by the schedule to the constitution. [FN133]

The parties to the quo warranto proceeding were still trading motions before the supreme court when the 1871 General Assembly convened. On January 11, 1871, the General Assembly elected Clayton to the United States Senate, [FN134] but the governor was not prepared to accept the seat until Johnson's fate was resolved. Possibly due to the slow pace of the quo warranto proceeding, the Minstrels tried an alternative way to remove Johnson from the line of succession. On January 30th, pro-Clayton legislators in the house filed articles of impeachment charging Johnson, who was ex-officio president of the *918 senate, with allowing Joseph Brooks to take a seat in the senate despite the fact that Brooks' election was contested by his opponent. [FN135] After the house effectively killed the attempt to impeach Johnson by voting to postpone indefinitely consideration of the impeachment resolution, [FN136] those seeking Johnson's ouster were forced to rely on the quo warranto application pending in the supreme court.

The supreme court did not meet between January 31, 1871, and February 13, 1871. During this two week hiatus,

which was initially attributable to the illness of Chief Justice Wilshire, Thomas Bowen announced his resignation from the court. [FN137] On February 13th Clayton named Circuit Judge John Bennett, a Clayton loyalist, to Bowen's seat on the court, and the court met for the first time in two weeks. [FN138] On February 14th the house responded to the turnover on the court by appointing a committee to inquire into the conduct of the justices of the supreme court and determine the extent to which they were corruptly using their office to "gratify the wishes" of the governor. [FN139]

The house action failed to deter the court. On February 15th, one day after the house opened its investigation of the supreme court, the court decided by a 3 to 2 vote that it had original jurisdiction to issue a writ of quo warranto to the lieutenant governor. [FN140] McClure, who authored the opinion, was joined by Chief Justice Wilshire and newly appointed Justice Bennett. The result, of course, was portended by the court's earlier assumption in *Price & Barton v. Page* of original jurisdiction to issue a writ of mandamus. The only surprising feature of McClure's February 15th opinion was his resurrection of the Confederate supreme court's decision in *State v. Williams* [FN141] to support the court's original jurisdiction to issue a writ of quo warranto to a state officer. Technically, the Williams opinion had no precedential value since it was decided after the Constitution of 1864 had supplanted the court that issued it, but McClure deemed it "entitled to much respect and weight" given the legal ability of the justices who issued it. [FN142]

*919 Justices Gregg and Harrison opposed issuance of the writ. [FN143] Like Johnson, both came from the native Unionist wing of the party, but more importantly, both had taken the position in *Price & Barton v. Page* [FN144] that the court lacked original jurisdiction to issue a writ of mandamus, and the same reasoning applied to the court's original jurisdiction to issue a writ of quo warranto.

As soon as the court adjourned on the afternoon of February 15th, Wilshire submitted his resignation as chief justice. [FN145] Clayton elevated McClure to the chief justice position, and named Elhanan J. Searle, another Clayton ally, to the associate justice seat formerly held by McClure. [FN146] It now appeared to his opponents that Clayton had the three votes on the court needed to oust the lieutenant governor.

On February 16th, the same day that Clayton forwarded the nominations of McClure and Searle to the senate, [FN147] the house voted to impeach Clayton. [FN148] In addition to various financial and election frauds, the articles of impeachment alleged that Powell had "conspired with the members of the Supreme Court of the State of Arkansas to maliciously and unlawfully deprive Lieutenant Governor James M. Johnson of his said office of Lieutenant Governor." [FN149] Article VI, § 10 of the constitution provided that the impeachment of the governor caused his powers and duties to devolve upon the lieutenant governor. To block the transfer of gubernatorial power to Johnson, the attorney general filed an application with the supreme court for a writ of mandamus enjoining Johnson from assuming the governor's office until Clayton could be tried by the senate. [FN150] On February 16th, without waiting for the full court to act, McClure issued a temporary restraining order barring *920 Johnson from exercising the functions of governor. [FN151] On the same day Clayton wrote the house, asserting that his impeachment did not suspend him from office until the house formally presented the articles of impeachment to the senate. [FN152] Meanwhile, pro-Clayton members of the senate prevented the formal presentation of impeachment articles by disappearing for the next week. [FN153] Without a quorum present the senate was not legally in session, and the house could not present the articles of impeachment to the upper chamber. [FN154]

With its efforts to suspend Clayton from office stymied by the lack of a senate quorum, the house struck back on February 18th by voting to impeach McClure for engaging in a conspiracy "with Governor Powell Clayton and others, to unlawfully and maliciously deprive Lieutenant Governor James M. Johnson of his office" and issuing "a writ of mandamus, without authority and in violation of law and the constitution of the State of Arkansas, upon Lieutenant Governor James M. Johnson, now acting Governor of the State of Arkansas, by reason of Governor Powell Clayton having been impeached by the House of Representatives." [FN155] For good measure, the articles included the charge that McClure had accepted bribes to influence his actions as supreme court justice. [FN156] The decision to impeach McClure was motivated in part by a desire to keep him from presiding over the quo warranto proceeding. Johnson's attorneys also filed a motion with the supreme court to disqualify the new chief justice from sitting further in the case. [FN157] If McClure was suspended from office or voluntarily recused from the quo warranto proceeding, and Clayton was also suspended from office, then Johnson, as acting governor, would name an acting chief justice to preside over his own case. [FN158] The constitution did not address the effect of

impeachment on a supreme court justice, and McClure continued to sit in the case.

*921 During the week following the court's issuance of the writ of quo warranto to Johnson, tensions increased in and around the capitol. What had begun as political jockeying between the governor and lieutenant governor had escalated into a confrontation that pitted the governor, a majority of the senate, and a majority of the supreme court against the lieutenant governor and a majority of the house of representatives. On February 22, 1871, Johnson issued a formal demand that Clayton surrender the governor's office. [FN159] Clayton's supporters responded by forming a company of militia to resist by force any attempt to oust Clayton from office. [FN160]

On February 25, 1871, the supreme court backed down. It issued a one paragraph opinion concluding that Johnson had qualified for office within the mandated fifteen days of receiving notice of his election. [FN161] The court's sudden retreat reflected the facts of the case rather than political pressure. Johnson's attorneys presented testimony that demonstrated rather conclusively that Johnson had in fact qualified for office within the fifteen day constitutional deadline. James L. Hodges, the chairman of the election commission appointed to supervise the 1868 election, testified that he had delivered a certificate of election to Johnson on May 1, 1868. [FN162] Johnson claimed under oath that he received the notice on May 1, 1868, and took the oath of office on May 5, 1868. [FN163] State Senator George McCown confirmed that Johnson took the oath in the senate chamber on May 5, 1868. [FN164] The only rebuttal testimony offered by the state was the attorney general's assertion that he "was of the impression that Hodges had said, about two years ago, that he (Hodges) was of the impression that perhaps Johnson had not qualified within the fifteen days." [FN165] *922 In the face of such testimony, the court had little choice, politically or legally, but to rule in the lieutenant governor's favor. [FN166]

The court's decision seemed to ease tensions between the two sides. On the same day that the court issued its decision, the senate assembled a quorum for the first time since the impeachment of Clayton, and for the next week the senate and house haggled over the procedures for an impeachment trial. [FN167] On March 4, 1871, Clayton reluctantly declined his January election to the United States Senate, [FN168] and the house voted to end further impeachment proceedings against the governor. [FN169]

The stalemate over gubernatorial succession was resolved a week later through a complicated game of political chairs. The secretary of state, Robert J. T. White, resigned. James M. Johnson then resigned the lieutenant governor's office, and Clayton appointed Johnson to replace White as secretary of state. [FN170] With the lieutenant governor's office vacant, the president pro tempore of the senate stood next in line to become governor. [FN171] On March 13, 1871, immediately after Clayton notified it of Johnson's appointment as secretary of state, the senate elected Ozra A. Hadley, a Clayton supporter, as its new president pro tempore. [FN172] When on March 14, 1872, the General Assembly again elected Clayton to the United States Senate, [FN173] he could safely resign as governor to take his seat in the Senate.

The settlement of the Clayton-Johnson imbroglio did not end impeachment proceedings against McClure. Prior to his trial in the senate the house dropped all charges against the McClure except that stemming from his issuance of a temporary restraining order to prevent the lieutenant governor from assuming the governor's office. [FN174] The chief justice demurred to the single remaining charge. In a lengthy address to the senate, McClure argued that his issuance of the temporary restraining order on February 16, 1871, was not "illegal" because the house had not yet presented articles of impeachment *923 against Clayton to the senate. [FN175] The senate agreed and voted nineteen to zero to sustain McClure's demurrer. [FN176] It then awarded McClure \$2,000 to pay his defense counsel and ordered five thousand copies of the transcript of the trial printed at public expense. [FN177] Since McClure was part owner of the company that held the state printing contract, the entire impeachment experience may have been professionally damaging to the chief justice, but it was financially rewarding.

The December 1870 term marked the emergence of a much more political supreme court. The court had declared in November of 1869, when it decided *Price & Barton v. Page*, that it had original jurisdiction to issues writs of mandamus to a state official in a case not involving its supervision of inferior courts, but the political overtones of that decision, if they existed at all, were muted. Its December 31, 1870, decision in *Howard v. McDiarmid*, ordering a particular set of legislative election returns forwarded to the secretary of state, followed by its February 15, 1871, decision in *State v. Johnson*, ordering a state official to appear before it and prove his right to office, demonstrated that the court was willing to exercise its original jurisdiction in a blatantly political manner.

The court's assumption of original jurisdiction to hear petitions for writs of mandamus or quo warranto produced at least one unforeseen problem. It opened the court to a flood of petitions invoking its original jurisdiction. The Gazette complained about the effect on the court's docket:

As an inevitable consequence now, and one to be continually increasing, the court is overwhelmed with applications invoking the exercise of original jurisdiction-so much as to disturb its functions and impair its usefulness in the exercise of its appropriate appellate jurisdiction, and the court and the bar are to become even more painfully conscious of the rapid accumulation of arrears upon the docket. [FN178]

Many of the cases crowding the court's docket by the end of the December 1870 term were election contests. Any candidate dissatisfied with the results of the 1870 election could contest the election by filing an application with the court for a writ of quo warranto against his opponent. The court eventually ruled in *Ramsey v. Carhart* [FN179] that only the attorney general could apply to the supreme court for a writ of quo warranto because, "The issue was between the State and the person in office, and not between two persons who claimed to *924 exercise its duties." [FN180] By designating the attorney general as gatekeeper, the court managed to regain control of its docket. The decision also insured that the court's original jurisdiction to issue writs of quo warranto could only be invoked by the political faction that controlled the office of attorney general.

The December 1870 term of court also thrust John McClure to the forefront of the Arkansas political scene. Prior to that term Thomas Bowen had been the most politically active of the justices. Clayton was clearly in charge of the Arkansas Republican Party, but Bowen was his principal political operative. As a United States Senate minority report put it, "(Clayton's) chief advisor and constant attendant was Thomas M. Bowen... Bowen was the omnipresent and ever present, his mentor and monitor, his man Friday, his very shadow." [FN181] After Bowen resigned from the court in February of 1870, President Grant appointed him governor of Idaho Territory. [FN182] With Bowen's departure and with Clayton absent in Washington most of the time, McClure assumed a more prominent role in the Republican Party. [FN183] He acquired partial ownership of the Little Rock Morning Republican, the official newspaper of the party, [FN184] and was elected chairman of the Republican state central committee. [FN185] As the bitter feud within the Republican party intensified, McClure would find it increasingly difficult to separate his role as chief justice from his role as a party leader.

The two new justices who joined the court during the December 1870 term maintained the balance between newcomers and natives. John E. Bennett, who replaced Iowan Thomas M. Bowen, was born in New York and graduated from Genesee College in Lima, New York. He was working in a dry goods store in Cleveland, Ohio, when the Civil War began. Bennett enlisted in the *925 75th Illinois Infantry Volunteers and participated in a number of battles east of the Mississippi. By the end of the war he reached the rank of brevet brigadier general and commanded an infantry brigade in the 1st Division of the Army of the Cumberland. After the war Bennett joined the Regular Army as a captain and came to Arkansas as judge advocate of the military district that included Arkansas and Mississippi. He studied law and was admitted to practice in Arkansas in 1868. [FN186] In July of 1868 Governor Clayton named Bennett judge of the first judicial circuit (Mississippi, Crittenden, Desha, Monroe, and Phillips Counties), [FN187] a position he still held when Clayton elevated him to the supreme court in February of 1871. [FN188]

Elhanan J. Searle also joined the court in February of 1871 following the resignation of William W. Wilshire. Like Wilshire, Searle came from Illinois. He graduated from Northwestern University in 1859 and studied law in Chicago before joining the firm of Lincoln and Herndon in Springfield, Illinois. Searle enlisted in the Union Army as a private with the 10th Illinois Volunteer Infantry Regiment and eventually rose to the rank of lieutenant colonel. He probably came to Arkansas in 1862 as part of the Federal forces commanded by General James G. Blount. During the winter of 1862-63 he assisted future Lieutenant Governor James M. Johnson in recruiting the First Arkansas Infantry Volunteers from among pro-Union supporters in the northwestern part of the state. Johnson was named commander of the new unit, and Searle became his second-in-command. The unit participated in General Steele's disastrous Camden campaign in the spring of 1864, and Searle fought at Jenkins Ferry and may have participated in the battle of Poison Springs. Searle appears to have spent most of the war, however, in northwest Arkansas around Fort Smith. He assisted in recruiting the Fourth Arkansas Cavalry, which was commanded by future Justice Lafayette Gregg. Searle left Federal service in August of 1865 and soon opened a law practice in Fort Smith. [FN189] He served as prosecuting attorney of the ninth judicial circuit from February to *926 October of 1866 and

as circuit judge of the same district from February 1867 to July 1868. [FN190]

E. The Election of 1872

The settlement of the Clayton-Johnson affair did little to reduce the infighting between the various factions of the Republican Party. The Brindletails, who now styled themselves "Reform Republicans," were still led by Joseph Brooks. A Liberal Republican organization existed, but James M. Johnson's surrender to Clayton during the legislative session deprived the group of a credible leader, and many Liberal Republicans switched their allegiance, either to Brooks' Brindletail faction or to the Democrats. [FN191]

In April of 1871 the Brindletail United States Attorney for Arkansas persuaded a grand jury to indict Clayton for fraud in the certification of congressional candidates following the 1870 election, but the circuit court for the eastern district of Arkansas dismissed the indictment on the grounds that the governor was not an election officer within the meaning of the federal law. [FN192] Clayton's opponents also sought to block his seating by the United States Senate, but a special committee appointed to investigate allegations concerning the 1870 election failed to sustain the charges against Clayton. [FN193] Clayton retaliated by persuading President Grant to replace a number of federal officeholders aligned with the Brindletail faction.

As the 1872 election approached, the Reform Republicans, the Liberal Republicans, and the Democrats formed a coalition ticket with Brooks as its gubernatorial candidate. [FN194] The coalition was fragile at best, since the three groups shared little in common other than opposition to the Minstrel faction that controlled state government.

The Minstrels recognized the threat posed by the coalition and, in an effort to attract Liberal Republican and Democratic support, they nominated Judge Elisha Baxter as their gubernatorial candidate. Baxter had immigrated to Arkansas from North Carolina in 1852 and had played a prominent role in setting up a loyalist state government in 1864. He was elected to the United States Senate in 1864 but never took his seat due to objections from radical Republican senators. Since July of 1868 Baxter had served as judge of the *927 third judicial circuit (Randolph, Lawrence, Fulton, Izard, Jackson, and Independence Counties), [FN195] which kept him removed from the activities that tainted many in the Minstrel wing of the Republican Party. [FN196]

To counter the Minstrel tactics the Brindletails gave the Democrats several minor seats on the Reform Republican ticket. This upset Liberal Republicans who withdrew from the coalition and nominated as their candidate for governor Dr. Andrew Hunter, a Methodist minister new to politics. The Democrat state central committee immediately abandoned the Brindletails and endorsed Hunter, but Hunter chagrined both Liberal Republicans and Democrats by refusing to run. The Democrat central committee then switched its support back to Brooks, but by this time the party leaders had lost credibility with many rank-and-file Democratic voters. In the end, two slates of candidates were presented to the voters at the November 1872 election—a regular Republican (Minstrel) ticket headed by Elisha Baxter and a Reform Republican (Brindletail) ticket headed by Joseph Brooks. Although the absence of polling data makes it difficult to draw conclusions, it seems reasonable to assume that most Liberal Republicans and Democrats joined the Brindletails in supporting Brooks. The voter registration and election processes were controlled by acting Governor Hadley and Secretary of State James M. Johnson, both of whom backed Baxter. [FN197]

For the first time since 1868 there were supreme court candidates on the ballot. The seats occupied by William M. Harrison and Elhanan J. Searle were set to expire in January of 1873. By this time Harrison's break with the Minstrel faction was complete, and he became one of two persons nominated for supreme court justice on the Reform Republican (Brindletail) ticket. [FN198] The regular Republican (Minstrel) nominees for the court were the incumbent, Searle, and Marshal L. Stephenson, circuit judge for the first judicial circuit (Mississippi, Crittenden, Desha, Monroe, and Phillips Counties). [FN199]

A brief explanation of election practices in 19th century Arkansas makes it easier to understand subsequent events. Prior to 1868 voting in Arkansas was viva voce—i.e., by word of mouth. [FN200] The voter appeared before the *928 election judges and orally announced his vote. The Constitution of 1868 provided for voting by ballot, [FN201] but the state did not provide official written ballots which the voter then marked to indicate his preference. Instead, the political parties provided ballots with the names of their candidates preprinted on the ballot, and the voter deposited

the ballot at the appropriate poll. The parties often used distinctly colored ballots which made it easy for an observer at the polls to determine which slate of candidates was favored by a particular voter. In theory, a voter could split his ticket by crossing out the names of some candidates on a party-provided ballot and writing or pasting in the names of other candidates, but widespread illiteracy made such alterations unlikely. [FN202] Since the use of party-provided ballots forced most voters to cast a straight party ticket, it was difficult to throw out a vote for one candidate on a ticket without at the same time invalidating the votes for all other candidates on the same ticket.

The November 1872 elections produced the usual charges by both sides of widespread voting fraud. In many districts two polls were conducted. To provide an evidentiary basis for subsequent election contests, persons who were denied registration in the official polls voted in separate "side polls" by filing affidavits that demonstrated their eligibility to vote and indicated their voting preference. [FN203] It was not until December 13, 1872, almost a month after the election, that Secretary of State James M. Johnson, who had not bucked the Minstrels since his confrontation with Clayton during the last legislative session, finally announced that Baxter had received 41,874 votes to Brooks' *929 38,073 votes. [FN204] These totals did not include the votes from at least four counties, which were thrown out due to varying irregularities. [FN205]

The other Minstrel candidates for statewide office—including the supreme court nominees, Searle and Stephenson—were declared elected by margins roughly equal to that which decided the gubernatorial election. [FN206] Incumbent Justice Harrison tried to keep his seat on the court by filing an election challenge in federal district court. To invoke federal court jurisdiction Harrison alleged that election fraud had denied blacks the right to vote contrary to the Enforcement Acts recently passed by Congress to implement the Fifteenth Amendment to the United States Constitution. [FN207] United States District Judge Henry C. Caldwell ruled that Harrison's suit was a simple state election contest that did not involve the denial of voting rights on account of race and dismissed the complaint for lack of federal jurisdiction. [FN208]

The 1872 election left the supreme court solidly in the control of the Minstrel wing of the Republican Party. John M. McClure, John E. Bennett, and Elhanan J. Searle were now joined by Marshal L. Stephenson. These four justices, all of whom were aligned politically with Powell Clayton and the Minstrel faction of the Republican Party, shared remarkably similar back-grounds. All were born in the north, all had served as officers in the Union Army, and all had lived in Arkansas less than ten years.

Marshal L. Stephenson, the newest member of the court, was born in the border state of Kentucky, but at an early age his parents moved to Granville, Illinois, where he received a primary education at Granville Academy. He began reading law in Springfield, Illinois, and was admitted to the bar in 1860. When the Civil War broke out, Stephenson joined the 10th Illinois Cavalry Volunteers as a captain and was soon promoted to major. His military service *930 prior to 1863 was chiefly in Missouri although he did participate in the battle of Prairie Grove, Arkansas, in December of 1862. In the fall of 1863 he was promoted to colonel and assigned to raise what eventually became the 2nd Arkansas Infantry Volunteers. Stephenson commanded six companies of the regiment that participated in General Frederick Steele's Camden campaign in the spring of 1864, even though the regiment had not been formally mustered into Federal service. He was severely wounded at the battle of Jenkins Ferry, the last organized battle of the campaign. The regiment was finally mustered into the Union Army at Little Rock on July 6, 1864, and Stephenson commanded the unit for the remaining months of the war. Stephenson settled in Fort Smith after leaving the army. He briefly attended law school in Cincinnati, Ohio, and was admitted to practice in Arkansas in April of 1866. [FN209] He moved to Huntsville in 1867, where he was living when Clayton named him judge of the fourth judicial circuit (Van Buren, Searcy, Marion, Newton, Carroll and Madison Counties) in 1868. [FN210] In 1871 Stephenson moved to Helena and took John E. Bennett's seat as judge of the first judicial circuit (Mississippi, Crittenden, Desha, Monroe, and Phillips Counties) after the latter resigned his circuit judgeship to accept a seat on the supreme court. [FN211]

Justice Lafayette Gregg had drawn an eight year term in 1868, so his seat on the court was safe until 1876, but the 1872 election left Gregg isolated from his colleagues on the court. McClure, Bennett, Searle, and Stephenson had supported Baxter during the 1872 election, while Gregg had backed Brooks. [FN212] The departure of Harrison also meant that Gregg was the only native Unionist on the supreme court. Finally, and most significantly, Harrison had usually voted with Gregg in opposing the original jurisdiction of the court to issue writs of mandamus and quo warranto. If Stephenson sided with the other Minstrel justices, then a solid majority of the court supported an

expansive view of the court's original jurisdiction.

F. The 1873 Legislative Session

The Constitution of 1868 required election returns for state executive offices to be transmitted to the secretary of state and opened by the presiding officer of the senate in the presence of the members of the General Assembly *931 during the first week of the legislative session. [FN213] The legislature was scheduled to convene on January 6, 1873. Although each house was the sole judge of election contests involving its members, [FN214] the admission of senators and representatives to the legislative chambers on the first day of the session was controlled by Secretary of State James M. Johnson, [FN215] who was expected to favor Minstrel legislators when seating the General Assembly.

A group consisting primarily of Reform Republicans (Brindletails) held a state convention the day before the General Assembly convened and attempted to persuade Democratic members of the legislature to join them in forming a separate General Assembly that would recognize Brooks as governor. Despite the cooperation between Democrats and Reform Republicans during the recent election, these efforts to organize an alternative General Assembly were thwarted largely through the efforts of Chief Justice McClure. The results of congressional elections were determined by the governor, [FN216] and the Democrats, who had supported Lucien C. Gause for Congress from the First Congressional District and Thomas M. Gunter from the Third Congressional District, were very concerned during the days immediately after the 1872 election that acting Governor Ozra A. Hadley would issue certificates of election to the Minstrel congressional candidates-Asa Hodges and former chief justice William W. Wilshire. McClure was able to dissuade Hadley from issuing the election certificates before he left the governor's office, and in return, about twenty Democrats agreed to join the Minstrel-controlled General Assembly rather than the alternative body organized by the Brindletails. [FN217]

The problem of organizing the 1873 General Assembly was further complicated by a vacancy in the office of presiding officer of the senate. The lieutenant governor was the ex-officio presiding officer of the senate, but the lieutenant governor's office had been vacant since Johnson's resignation in March of 1871, and that vacancy could not be filled until the presiding officer *932 presented the election returns to the General Assembly. Ozra A. Hadley, the president of the senate and acting governor since the resignations of both Clayton and Johnson, normally presided in the absence of a lieutenant governor, but Hadley had not been reelected to the senate. [FN218] This conundrum was solved on the morning of January 6th, when the senate met and elected John M. Clayton, the younger brother of Powell Clayton, as its new president. When the senate and house convened in joint session later that day to canvass the results of the gubernatorial election, Clayton acted as presiding officer. [FN219] Secretary of State Johnson reported to the legislators that Baxter had received 41,684 votes and Brooks 38,726 votes, and Clayton declared Baxter the winner. [FN220] McClure then administered the oath of office to Baxter. [FN221]

After failing to induce Democrats to join them in forming an alternative General Assembly, the Reform Republican (Brindletail) convention appointed a committee to document the frauds committed in the recent election. In mid-January the committee published an address to the public charging that "Clayton, Hadley, McClure & Co." had thrown out a sufficient number of votes to give Baxter the victory and the Minstrels control of both houses of the legislature. According to the committee's count Brooks had defeated Baxter by a vote of 43,992 to 42,894. [FN222]

Although the constitution empowered the legislature to determine contested gubernatorial elections, [FN223] Brooks took no steps in January to challenge Baxter's election before the General Assembly, which was controlled by Minstrel Republicans who supported Baxter. An appeal to President Grant would have been equally fruitless since the Reform Republicans had backed Grant's opponent, Horace Greeley, for president in the 1872 election. [FN224]

Brooks did seek relief in the federal courts. On January 7, 1873, the day after John Clayton declared the election of Baxter, Brooks filed a complaint with the United States District Court patterned after the election challenge filed by William M. Harrison the preceding November. [FN225] A week later, the federal court threw out Harrison's suit for lack of jurisdiction, [FN226] and Brooks eventually dropped his federal court action.

*933 Brooks also sought to involve the United States Congress in the dispute. United States Senator Benjamin F.

Rice, a Brooks supporter whose term did not expire until March 3, 1873, tried to interest the Senate in an investigation of Baxter's election, but other than sending an assistant sergeant-at-arms to Little Rock to interview witnesses, the Senate took no action. [FN227]

Meanwhile, some members of the Minstrel faction who had supported the election of Baxter began to have second thoughts about the new governor. Baxter had opposed secession, but he was also a native southerner who had lived in Arkansas since 1852. His political views tended to be more conservative than those of most members of the Minstrel wing of the Republican Party.

The first indication that Baxter was not prepared to march lock step with Clayton, McClure, and the other Minstrel leaders came on January 18, 1873, when the legislature elected a United States senator to replace Benjamin F. Rice. Clayton and McClure backed former Supreme Court Justice Thomas Bowen, who had resigned as governor of Idaho Territory and returned to Arkansas. [FN228] Baxter made it known that he supported Thomas Dorsey, a railroad developer who had lived in the state only two years. [FN229] The governor did not actively lobby for Dorsey's election, but the mere knowledge of Baxter's preference for Dorsey probably swayed some legislators. The Democrats nominated Augustus H. Garland, who had served as Arkansas' representative in the Confederate States Senate during the last year of the war. When it became apparent to Democratic members of the legislature that they lacked the votes to elect Garland, they threw their support to Dorsey, whose principal allure was that Clayton opposed him. [FN230]

Much more troubling to many Minstrels than his support of Dorsey was Baxter's willingness to appoint Democrats to public office. Baxter had pledged during the fall campaign and in his inaugural address to name qualified men to public office regardless of party affiliation, but many listeners did not take these promises seriously. After taking office, however, Baxter proceeded to carry out his campaign vow by appointing Democrats to a number of vacant offices including his own seat as circuit judge. [FN231] To Minstrels accustomed to *934 use of the governor's appointive power to benefit the party, Baxter's naming of Democrats to office was political heresy.

Baxter also alienated a small, but influential group of Minstrels by opposing a bill designed to aid railroad companies in which several prominent Republicans held stock. Since 1868 the state had issued some \$5.2 million in bonds to finance the construction of railroads. Most of the bonds had gone to companies whose directors were politically connected to the Clayton administration. To pay the interest on these bonds, each railroad company receiving bonds was assessed a tax which continued until the company repaid the principal amount of the bonds. [FN232] A bill introduced in the 1872 legislative session, dubbed the "Railroad Steal Bill" by its opponents, would have permitted a railroad company to transfer stock to the state in exchange for the state's assumption of sole liability for repaying the bonds previously issued to the company. To service the railroad debt assumed by the state, the bill imposed a three mil tax on all property in the state. [FN233]

Finally, Baxter backed efforts to amend the state constitution to remove the disabilities imposed on many former Confederates. The General Assembly had approved such an amendment at its 1871 session, [FN234] but the constitution required two successive legislatures to approve the amendment before its submission to a popular vote. [FN235] The 1873 General Assembly approved the amendment on January 21, 1873, [FN236] and Baxter immediately issued a proclamation submitting it to a public vote on March 3, 1873. [FN237] Voter turnout was extremely light, but on April 19, 1873, Baxter declared the amendment adopted by an overwhelming vote of 25,199 to 3,695. [FN238] By comparison, some 80,000 votes had been cast in the November election. [FN239] The governor and chief justice clashed behind the scenes during the six weeks it took to tally the votes, and Baxter later claimed to have blocked efforts by McClure to prevent the reporting of election returns from several counties. [FN240]

*935 G. The McClure-Baxter War Commences

Chief Justice McClure was the first prominent Minstrel politician to turn against Baxter. Other Minstrels aligned with McClure in the spring of 1873 included Thomas Bowen, former supreme court justice and unsuccessful candidate for United States senator; Charles Tankersley, the speaker of the house; and Volney Voltaire Smith, who had been elected lieutenant governor on the same ticket as Baxter. [FN241] Although history eventually labelled the revolt of the Minstrels against their own governor as the "Brooks-Baxter War," in its early stages the confrontation

was dubbed the "McClure-Baxter War." McClure, who controlled the editorial columns of the Little Rock Daily Republican, [FN242] later testified before a congressional committee that his paper "declared war" on Baxter in February of 1873. [FN243] The first Gazette references to the "McClure-Baxter War" date to April of 1873. [FN244]

McClure attributed his break with Baxter to the governor's appointment of Democrats to state positions, [FN245] but a contributing factor to McClure's opposition was Baxter's refusal to go along with the bill to shift the railroad debt to the state. [FN246] The Daily Republican strongly supported the bill, [FN247] and McClure was probably paid by the railroads to lobby the legislature to pass the bill. [FN248] On April 9, 1873, the Gazette published a lengthy letter from William M. Wilshire, the former chief justice and current member of Congress, [FN249] attacking the railroad bill and warning: "I hear it whispered that, should the *936 bill pass the senate, and the governor should veto it, articles of impeachment would be preferred against him." [FN250]

The letter provoked an angry response from the Daily Republican, penned by McClure:

Judge Wilshire says he hears it whispered that should the governor veto the bill that articles of impeachment would be preferred against him. The mere act of vetoing a bill is not an impeachable offense—the bribery of men, with appointments to office, if they will pass or defeat a bill, by the executive, is just as much an impeachable offense as the payment of so much money. [FN251]

Since McClure and the other anti-Baxter Minstrels had bitterly opposed the election of Joseph Brooks in the fall of 1872, it seems unlikely that their goal in the spring of 1873 was to place Brooks in the governor's seat. If, however, they could persuade the house to impeach Baxter, it would trigger the governor's immediate suspension from office and make Lieutenant Governor Volney Voltaire Smith, a compliant ally of McClure, the acting governor. The threat of impeachment did not daunt Baxter, who continued to oppose the railroad bill. [FN252] McClure did not carry through on the threat to impeach the governor, but he was almost certainly behind an alternative move with the same result as impeachment.

The constitution stated that contested elections for governor were to be determined by the General Assembly. [FN253] On April 18, 1873, Brooks filed a belated petition with the Arkansas house of representatives asking for leave to present proof showing that he had been elected governor. [FN254] The Gazette, which had slowly been won over to Baxter's side since he assumed office in January, blamed McClure for the petition. In a front page editorial, it declared: "The people are able to judge, and will determine which is the most deserving of praise or support—Gov. Baxter, for fighting the corrupt machinations of the ring to the death, or the McPocre following for trying to install Mr. Brooks as governor." [FN255]

*937 Two days later the Gazette attributed a more sinister plot to the anti-Baxter forces. Brooks' election petition would be referred to a house committee for investigation at which point McClure would issue a mandamus restraining Baxter from exercising the duties of governor pending the resolution of the election contest in the General Assembly. [FN256] The end effect would be the same as impeachment—Lieutenant Governor Volney Voltaire Smith would become acting governor while the election contest was decided. If the legislature adjourned without resolving the contest, Smith would serve as the state's chief executive until the legislature reconvened in 1875.

In theory, the house should have been more receptive to Brooks' petition in April than it would have been the previous January. To those Brindetail Republican and Democratic house members elected on the same ticket with Brooks, Baxter's opponents could now add the votes of Minstrel Republican legislators disenchanted with Baxter's policies. One day after Brooks filed the petition, however, the house overwhelmingly voted to reject it. [FN257] The extent to which Baxter had eroded Brooks support in the house was reflected in the vote—only nine of the thirty-six representatives elected on the ticket with Brooks voted to grant his petition. [FN258]

McClure claimed that Baxter had coopted many of Brooks' supporters by promising them appointments to public office. [FN259] While this may explain some votes, there were additional factors that hurt Brooks' cause. The petition was filed less than a week before the date designated for adjournment of the legislature, and many members were reluctant to take up a divisive election contest so late in the session. Many Democratic members, who might have supported Brooks in January, were impressed by Baxter's stand on the railroad bonds and his bipartisan

approach to filling offices. Moreover, Brooks had "burned his bridges" with Democratic members of the house in January when he issued a bitter condemnation of those Democrats who entered the regular legislature rather than join a Brindletail assembly. Finally, as was shortly to become apparent, not all members of the Minstrel wing of the Republican Party were ready to join McClure's anti-Baxter crusade. [FN260]

*938 During the closing days of the legislative session Baxter's opponents made an unsuccessful attempt to transfer some of the executive powers concentrated in the governor. Now that the franchise was open to ex-Confederates, it was imperative for the Minstrels to get voter registration out of Baxter's hands. An 1868 statute, approved when Powell Clayton was chief executive, placed control of voter registration in each county in a three-member board of registration appointed by the governor. [FN261] An election bill was introduced in early April that would have placed the voter registration process under the control of a five member commission composed of the lieutenant governor (Volney Voltaire Smith), state auditor (Stephen Wheeler), state treasurer (Henry Page), one member from the senate, and one from the house. [FN262] Since Smith, Wheeler, and Page were Minstrels, passage of the bill would have ensured Minstrel control of future elections. The bill was not approved, however, and Baxter emerged from the session with his election powers intact.

H. The Quo Warranto Proceeding

The adjournment of the General Assembly on April 25, 1873, did not end hostilities between the chief justice and the governor. On May 11, 1873, the Gazette reported a disquieting bit of intelligence:

There has been a current rumor for two weeks or more, that the attorney general will file an application before the supreme court, at its meeting on Monday, for quo warranto against Gov. Baxter. Just exactly what truth there is in this we do not know. It has further been rumored that after the filing of the application, a writ will be issued against the governor directing him to appear before the court and show by what authority he holds his position. Then, it is stated, the programme is for the lieutenant governor to step forward and exercise the duties of governor while the court inquires into the case, which would doubtless require four years, thus leaving Mr. Smith as governor. Whether there is any foundation for all this, we do not know. [FN263]

*939 The attorney general was T. D. W. Yonley. [FN264] Although Yonley had been elected to office on the same ticket with Baxter, he had joined the anti-Baxter faction led by McClure.

While waiting for Yonley to file his application, Baxter confirmed the political realignment that had taken place since his election by retaining the legal services of Elbert H. English and Freeman W. Compton, both members of the Democratic political establishment as well as former justices of the Confederate state supreme court. [FN265] Baxter also signalled his willingness to use military force to block any attempt to oust him by surrounding himself with a militia company of forty to fifty men called the "Governor's Guard." The Republican United States Attorney for Arkansas referred to the company as "reckless young men, without any visible means of support, gamblers, unreconstructed men who have a bitter feeling to all northern men, and to all law and order, in fact." [FN266] The commander of the Governor's Guard described his men as respectable clerks and mechanics but conceded that most of them were Democrats. [FN267] Baxter also purged the state militia of officers connected to his Republican opponents, and in a highly symbolic gesture divided the militia into two commands, one headed by William W. Wilshire, Republican and ex-Union army officer, and the other by Robert C. Newton, Democrat and ex-Confederate army officer. [FN268]

On June 2, 1873, Attorney General Yonley filed the long-anticipated quo warranto application with the supreme court. [FN269] The supreme court was scheduled to complete its June 1873 term in one week, but in deference to the political importance of the case, it agreed to consider the attorney general's application without delay. For two full days beginning on the afternoon of June 2, 1873, the court listened to oral arguments by the attorney general and attorneys for Baxter. [FN270] The attorney general had filed the pleading in the name of the state of Arkansas but "ex relatione" Joseph Brooks, meaning on the *940 information of Brooks who had a private interest in the matter. [FN271] The pleading alleged that Baxter had "usurped, intruded into and unlawfully held" the office of governor and asked the court to issue a writ of quo warranto requiring Baxter to show by what right he claimed to hold the office. [FN272] Baxter's attorneys objected to the filing of the pleading, arguing that the court lacked jurisdiction to hear a quo warranto application directed to the governor. The justices retired to determine what questions would be argued, and when they reconvened, the chief justice announced that the court would hear argument on the narrow

preliminary question whether Yonley should be granted leave to file the application. [FN273] Freeman Compton argued that question, but he also addressed the question of the court's jurisdiction. [FN274]

The courtroom in the east wing of the capitol was packed with observers, eager to kibitz on the high stakes political game. At the opposite end of the capitol Baxter sat in the executive office, surrounded by armed members of the Governor's Guard. McClure claimed that one of Baxter's militia officers actually attended the oral argument with a martial law proclamation in his pocket. [FN275] The Minstrel sheriff of Pulaski County, whose duties included acting as process server for the supreme court, was threatened with death if he attempted to serve any writ issued by the court on the governor. [FN276] Baxter himself later admitted that he would have declared martial law and dispersed the court had it issued a writ of quo warranto against him. [FN277]

After permitting opposing counsel to argue for two days, Justice Gregg announced from the bench at five o'clock on June 4, 1873, that a majority of the court (Justices Bennett, Gregg, Searle, and Stephenson) had concluded that the supreme court lacked jurisdiction to determine an election contest for the office of governor. The chief justice was the lone dissenter. [FN278] The court then *941 adjourned for the summer without issuing a written opinion in the case. The four justices in the majority agreed that each would reduce his views to writing during the summer vacation and that one of them would draft an opinion to be delivered when the court reconvened for its December term. [FN279]

Yonley would not have filed a lawsuit with the political implications of *State ex rel. Brooks v. Baxter* without the backing of those Minstrel Republicans opposed to Baxter. If McClure was the leader of the anti-Baxter faction, and there is no reason to doubt the frequent charges that he was, [FN280] it is somewhat puzzling that McClure encouraged the quo warranto proceeding without first ascertaining the views of his fellow justices. Yonley's petition was prepared during the first week of May, but its filing was delayed until June 2nd, [FN281] possibly to give the chief justice time to lobby his colleagues. McClure knew that Gregg would never vote to grant the writ. Although Gregg had supported Brooks during the 1872 campaign, [FN282] he had consistently taken the position in earlier opinions that the supreme court lacked original jurisdiction to issue a writ of quo warranto. [FN283] The three remaining justices-Bennett, Searle, and Stephenson-were Minstrels, but in June of 1873 the Minstrel wing of the Republican Party was not united behind McClure in his fight with Baxter. Crucial to the votes of the three Minstrel justices was the stance of Powell Clayton, who though now in Washington, D.C., was still the acknowledged head of the Minstrel wing of the party. On June 3rd, while the supreme court was hearing oral argument on the attorney general's application for a writ of quo warranto, Clayton cabled Baxter:

The quo warranto proceedings against you have been inaugurated without my knowledge or approval, and are in my opinion unwise and highly detrimental to the interest of the State I believe you are the legitimate governor of Arkansas, and as much as I regret to see our State disgraced abroad by distractions at home, I hope you will stand firm regardless of results. [FN284]

*942 Clayton's telegram, which was also signed by Senator Dorsey, was reprinted on the front page of the *Gazette* on June 4th, the day the court retired to decide whether to issue the writ. Not only was Clayton the leader of the Minstrels; he had appointed Bennett and Searle to the supreme court and Stephenson to the circuit court. If Clayton was still backing Baxter, these three justices would have been hesitant to join McClure in granting the attorney general's application.

An additional consideration may have influenced the vote of Searle and Stephenson. Both had run for the court on the same ticket as Baxter and had won election by narrow margins. If Baxter's election could be overturned by writ of quo warranto, then their own elections were vulnerable to challenge on the same grounds.

It is possible, of course, that McClure never intended for the court to oust Baxter from office. If the supreme court simply agreed to issue the writ of quo warranto ordering Baxter to appear before the court, without deciding on the merits whether to remove Baxter, and the justices then dispersed to their homes for the summer recess, it would leave McClure, the only court member scheduled to remain in Little Rock, in a position to do considerable mischief before the court reconvened in November. Under the Arkansas Civil Code, any judge of the supreme court could issue an injunction in a case pending before the court. [FN285] Two years earlier McClure's use of this power to enjoin Lieutenant Governor James M. Johnson from assuming the office of governor had produced a political firestorm and led to the chief justice's impeachment. [FN286] The concern that McClure might again use his

injunctive power was voiced by the Gazette as early as May 18, 1873:

McClure and his confederates thought a majority of judges might be brought to the point of removing Baxter, or that at least a majority could be induced to let the writ issue; then, as an individual member of the court, after the writ was issued and served, it was his purpose to enjoin Baxter from acting as governor, install the lieutenant governor, and let the inquiry, under the quo warranto, sleep for four years, in which time he and his ring with Upham in command of the militia, could work their will upon the helpless people of this state. [FN287]

***943** If this was McClure's strategy, it was thwarted when his fellow justices decided that the supreme court lacked jurisdiction to consider a gubernatorial election contest.

Although rebuffed by both the legislature and the supreme court, Brooks and his supporters were not ready to give up. The Arkansas Civil Code allowed a person entitled to a public office to bring suit in circuit court for the recovery of the office. [FN288] On June 16, 1873, Brooks filed a complaint under the Civil Code in Pulaski County Circuit Court claiming that he had been elected governor at the November 1872 election and asking the court to place him (Brooks) in possession of the office and grant him judgment against Baxter for the salary paid to date. [FN289] Two days later Attorney General Yonley filed a similar pleading on behalf of the state. [FN290] Brooks' case was assigned to John Whytock, who had held the post of judge of the seventh judicial circuit (Hot Spring, Saline, Prairie, White, and Pulaski Counties) [FN291] since his appointment by Powell Clayton in July of 1868. [FN292]

Brooks' attorneys spent much of August and September taking depositions of election officials throughout the state gathering evidence to substantiate the contention that Brooks had won the election. [FN293] Meanwhile, McClure kept up a steady stream of attacks on the governor in the editorial columns of the Daily Republican. On July 4, 1873, the governor gave an Independence Day speech at Lewisburg in which he publicly excoriated the chief justice, whom he repeatedly referred to as "Poker Jack." [FN294] For the next month McClure railed against Baxter, whom he called the "dirty, cowardly, lying, dissembling wretch who now holds the office of governor." [FN295]

McClure also took the unusual step of publishing in installments his dissent in the quo warranto decision even though the majority opinion had not ***944** yet been prepared. [FN296] His position was that the attorney general, not the court, determined whether a writ of quo warranto should issue against a public official. The person against whom the writ was issued could then challenge the jurisdiction of the court by filing the appropriate responsive pleading. McClure accused the majority of allowing Baxter to meet Yonley at the courthouse door and block the attorney general's filing of the quo warranto application. [FN297]

Baxter was not obligated to file a responsive pleading to Brooks' circuit court complaint until October 6, 1873, the first day of the court's next term. [FN298] The supreme court's decision in the quo warranto action presumably settled the question of the circuit court's jurisdiction to try an election contest between rival gubernatorial candidates, but that decision would not be issued in written form until the supreme court reconvened for its December term. Baxter therefore prevailed upon Searle and Stephenson, who had both left the state after the supreme court adjourned in June, to return to Little Rock in September for the purpose of issuing the court's written opinion in the quo warranto proceeding. [FN299]

Stephenson wrote Gregg, who was still in Fayetteville, and asked for his views. Gregg prepared the written opinion that now appears in the official Arkansas Reports [FN300] and sent it by mail to Little Rock. Stephenson took Gregg's draft opinion to United States District Judge Henry Caldwell and solicited his thoughts. Caldwell was a close friend of Baxter and was the same judge who in January of 1873 had dismissed William M. Harrison's federal challenge to Stephenson's election to the supreme court. After reviewing Gregg's draft opinion, Caldwell suggested that it needed a summarizing statement that the public could readily grasp. He met in the supreme court library with Searle and Stephenson and drafted the following language that appears as the penultimate paragraph of the opinion in the official reports: [FN301]

***945** Under the constitution, the determination of the question as to whether a person exercising the office of governor has been duly elected or not, is vested exclusively in the general assembly of the state, and neither this or any other state court has jurisdiction to try a suit in relation to such contest, be the mode or form what it may, whether at the suit of the attorney general, on the relation of a claimant through him, or by an individual alone claiming a right to the office. Such issue should be made before the general assembly. It is their duty to decide, and

no other tribunal can determine that question. [FN302]

The paragraph was obviously intended as a warning to the Pulaski County Circuit Court not to take jurisdiction of the complaint now pending before it. [FN303] Stephenson copied Judge Caldwell's suggested language and sent it to Gregg in Fayetteville who, though reluctant to decide a case still pending in a lower court, agreed that the supreme court needed to include language "so plain that none can mistake." [FN304] Gregg recopied the paragraph, attached it to his written opinion, and sent the opinion to Little Rock. [FN305]

McClure later claimed that Gregg's written opinion broadened the oral opinion announced by Gregg from the bench on June 4, 1873. According to McClure the only issue decided by the court in June was whether the attorney general should be granted leave to file a motion for a writ of quo warranto, and the court decided not to grant leave without reaching the issue whether it had jurisdiction to grant a writ of quo warranto. [FN306] McClure also maintained that Bennett, who had voted with the majority in June, refused to sign the written opinion because it went beyond what the court had orally decided in June. [FN307]

Bennett did not sign the written opinion authored by Gregg because it was never presented to him for his approval or signature. He claimed to have first learned of the opinion when it was published in the newspapers, and he testified that he would not have signed the written opinion had it been *946 presented to him. [FN308] His objection went not so much to the opinion itself as to the irregular way in which it was prepared and issued. [FN309]

The written quo warranto opinion, signed by Gregg, Searle, and Stephenson, was filed with the supreme court clerk on the morning of September 29, 1873. [FN310] Announcements later the same day revealed the political negotiations that led to the issuance of the opinion. Major Generals Wilshire and Newton, the two militia commanders appointed by Baxter in May, resigned their commissions, and Baxter ordered the militia disbanded. Attorney General Yonley dismissed the state's lawsuit challenging Baxter's election which he had filed in Pulaski County Circuit Court the preceding June. [FN311] The governor also released a letter from George H. Williams, the attorney general of the United States, stating that President Grant would recognize as governor of Arkansas the person determined by the legislature and the supreme court. [FN312]

It was apparent to even the most unsophisticated observer that the announcements of September 29, 1873, were the result of a carefully crafted political settlement. The architect of the armistice was Powell Clayton. The agreement reached between Clayton and Baxter was described in Clayton's subsequent cross-examination of Baxter before a congressional committee investigating the Brooks-Baxter controversy:

Clayton: I wanted you to muster all [of the militia] out, democrats and republicans?

Baxter: Yes.

Clayton: On the ground, first, that the militia was unnecessary, as you could administer the affairs of the State peaceable through the courts and civil tribunals; and, second, on the ground that the disbandment of the militia would produce a feeling among the republicans that the militia of the State were not placed in the hands of men who they thought would persecute them?

*947 * * *

Baxter: You finally demanded it of me with an oath. You said that it must be done, or that I would never have the benefit of the quo-warranto decision.

* * *

Clayton: Did I say how I knew about that?

Baxter: Afterward you did, but not till I had agreed to do it. After I had agreed to it, you extended your hand, and said, "Well, shake hands on that." "Yes," said I, "but I do not like the manner of doing this." You remarked, "Well, I do not know what the judges will do, but it is my impression that you will have the benefit of the quo-warranto decision." [FN313]

Stephenson confirmed that he and Searle had withheld filing the written quo warranto opinion until Clayton obtained Baxter's commitment to disband the militia. [FN314]

I. The Cease-fire

The filing of the supreme court's written opinion in *State ex rel. Brooks v. Baxter* signalled a lull in hostilities

between the chief justice and the governor. For months McClure had schemed to oust the governor while attacking him incessantly in the Daily Republican, the official newspaper of the Minstrel wing of the party. On September 30, 1871, the day after the supreme court issued its written decision in *State ex rel. Brooks v. Baxter*, McClure sold his interest in the newspaper to four other prominent Minstrel officeholders-Senator Powell Clayton, Lieutenant Governor Volney V. Smith, Auditor Stephen Wheeler, and Treasurer Henry Page. [FN315] A penitent McClure penned a farewell editorial entitled "Doxology" in which he confessed that the newspaper had frequently represented the views of the proprietor rather than the party. [FN316] In an announcement that appeared in the newspaper on October *948 8th, the Republican State Central Committee sought to distance itself from the newspaper's former editor:

By reason of the late change in the management of the LITTLE ROCK REPUBLICAN -the central organ of the party-certain personal embarrassments, which it is of no service now to recount, have been removed, and that paper hereafter will not only reflect the general policy of the party, but will also be fully in accord with the present administration of the government of the State. [FN317]

The only member of the state committee who failed to sign the statement was McClure. [FN318]

Additional evidence that the chief justice was prepared to accept the status quo came when the court decided *Wheeler v. Whytock*. [FN319] That case had commenced in June, shortly after Brooks sued Baxter in Pulaski County Circuit Court, when James R. Berry, the candidate for state auditor on the Brooks ticket, filed a similar suit in Pulaski County Circuit Court seeking the ouster of Stephen Wheeler, the Minstrel candidate declared elected by the legislature. As soon as the supreme court issued its written opinion in the quo warranto proceeding, Wheeler applied to the supreme court for a writ of prohibition ordering Judge Whytock not to take jurisdiction of Berry's complaint. On January 3, 1874, a divided supreme court granted the writ of prohibition. Searle and Stephenson thought it clear that the writ should issue because the same provision of the constitution that vested the legislature with exclusive jurisdiction to try an election contest for the office of governor also applied to the office of auditor. Bennett and Gregg opposed granting the writ. They pointed out that issuance of the writ of prohibition was discretionary with the supreme court and argued that the jurisdictional question could easily be decided on appeal of any action taken by the circuit court. The swing vote was McClure, and his written opinion seemed to confirm his acceptance of the proposition that the courts lacked jurisdiction to determine who was governor:

As to all matters of contested election for the offices of governor, lieutenant governor, secretary of state, auditor, treasurer, attorney general, *949 and superintendent of public instruction, I am of the opinion that it can only be had before the general assembly. Section 525 of the Code provides for a suit before the circuit court for the recovery and possession of an office. If the remedy thus provided can be confined to the offices other than those named in Section 19, Article Six of the Constitution, no conflict of jurisdiction can arise between the general assembly and the circuit court. I do not believe the legislature intended to give the circuit court jurisdiction of contested elections, which by the constitution was cognizable only before that body. [FN320]

McClure attempted to reconcile this pronouncement in *Wheeler v. Whytock* with his dissent in *State ex rel. Brooks v. Baxter*. The latter case was a quo warranto proceeding to determine whether Elisha Baxter was entitled to hold the office of governor. According to McClure, a decision against Elisha Baxter in the quo warranto proceeding would not necessarily entitle Joseph Brooks to the office of governor, [FN321] and consequently *State ex rel. Brooks v. Baxter* was not an "election contest" vested exclusively in the General Assembly. Whatever the soundness of McClure's attempt to distinguish a quo warranto proceeding against an incumbent governor from an election contest between rival candidates for governor, the decision in *Wheeler v. Whytock* clearly established that a circuit court lacked jurisdiction to determine an election contest for governor.

J. The November 1873 Special Election

Shortly after the General Assembly adjourned in April of 1873, Baxter appointed fifty of its members (nine senators and forty-one representatives) to public offices. The governor scheduled a special election for November 4, 1873, to fill the resulting vacancies in the legislature. [FN322] The removal of political disabilities earlier that year meant that for the first time since 1866 large numbers of former Confederates would be eligible to vote and run for office. To ensure that all those qualified were able to vote, Baxter named a number of Democrats to election boards around the state and ordered a new registration in those counties in which elections were to be held. [FN323]

*950 Except in a few races the Republicans did not nominate candidates for the special election, and as a result Democrats won nearly all the vacant seats. [FN324] The official explanation for the party's failure to nominate candidates in the special election was that Baxter had promised not to call a special session of the General Assembly and the results of the election were therefore meaningless. [FN325] A equally plausible reason is that the party realized that the registration of large numbers of previously disfranchised Democratic voters made it unlikely that Republicans could win in many legislative districts.

Despite Democratic gains in the November special election, most Republicans reluctantly continued to support Baxter. [FN326] McClure probably summed up the attitude of many Republicans, including himself, in his testimony the following year to a congressional committee investigating the Brooks-Baxter controversy:

But the republicans were in this condition, that they did not know what to do. If they allowed Baxter to go over absolutely to the democracy [i.e., the Democrats] the State would be lost to the republican party; and some of them thought they would hang on and fix it up somehow and live from hand to mouth until the next election. They thought they could probably hold Baxter with such influences as could be brought to bear on him, and with careful nursing, until the next election. [FN327]

K. Hostilities Resume

In March of 1874 Senators Clayton and Dorsey returned to Little Rock to meet with Republican leaders and make plans for the fall election. As in 1870 no state offices would be at stake in the election, but half the senate and all of the house of representatives would be on the ballot. During their visit, the two senators met with Governor Baxter. The exact nature of their discussions was not made public at the time. The Gazette speculated that the senators' purpose was to thwart the "fair registration and fair election" planned for the fall election. [FN328] A Republican newspaper reported rumors that Baxter was offered a lifetime appointment as a federal judge if he would relinquish the office of governor. [FN329]

*951 In testimony delivered four months later, McClure provided what is probably an accurate description of the reason for the senators' trip. [FN330] The three—Clayton, Dorsey, and McClure—met and decided on a twofold strategy for the November 1874 elections. First, they would attempt to elect Republicans in those districts with a Republican majority. Second, in those districts without a Republican majority, they would attempt to divide the Democrats and throw Republican support to the Democratic candidate who promised to allow an election contest between Baxter and Brooks when the General Assembly met in January of 1875. The three Minstrel leaders were well aware that Brooks would win any fairly conducted election contest for the governorship. Although McClure denied any involvement in the 1872 election frauds, he candidly admitted: "I knew that if the matter was ever brought to a contest, or was ever brought to a point, were the facts ever disclosed in the case, Baxter would go out." [FN331] The anticipated result of the triumvirate's strategy was a reunited Republican Party with Joseph Brooks as governor and Minstrel Republicans retaining most other state offices including four of the five supreme court positions.

The principal obstacle to the plan was Baxter's control of the election process. The 1868 voter registration act concentrated control of voter registration in the governor, and every election since had demonstrated the political advantages to which these dictatorial powers could be put. If their plan was to succeed, Clayton, Dorsey, and McClure needed some assurances from Baxter that he would not use his control of registration to block the election of Republicans to the legislature. Of the three, only Clayton and Dorsey could approach Baxter. Both senators still enjoyed fairly cordial relations with the governor. In the senatorial election the previous year, Baxter had backed Dorsey over Thomas Bowen, who had the support of Clayton. [FN332] Clayton and Dorsey had supported Baxter during the quo warranto crisis a year earlier, and Clayton had worked out the reconciliation that ended McClure's *952 "war" on the governor. As McClure put it, "Up to that time March of 1874 Senators Clayton and Dorsey had been friendly to the governor as against myself." [FN333]

Clayton and Dorsey met with Baxter and requested his assent to the election of a Republican legislature. [FN334] In exchange for his cooperation Baxter demanded the resignations of a number of officeholders. [FN335] In later testimony before a congressional committee, Baxter identified the resignations he demanded:

Baxter: I thought it proper to have the registration [sic] of all the persons in the line of succession. That would include Lieutenant-Governor Smith, your brother, John M. Clayton [president of the senate], Mr. Tankersley,

speaker of the house, Attorney-General Yonley, Judge McClure, and I do not know whether I included Oliver [Pulaski County Sheriff] and Wheeler [state auditor], but I intended to. [FN336]

Baxter's response suggests that he may not have fully appreciated that the goal of Clayton, Dorsey, and McClure was to bring about an election contest that would put Brooks in the governor's chair. The governor appeared more concerned about an attempt to impeach him and thought he could minimize the danger of impeachment by eliminating all Minstrel officeholders in the line of succession. [FN337]

Baxter's conditions were unacceptable to Clayton, Dorsey, and particularly McClure. The forced resignations of so many prominent Minstrel officeholders would have greatly weakened the Minstrel wing of the party and doomed any chances of a reunited Republican Party. The two senators returned to Washington, and there shortly appeared a notice indicating that McClure was foreclosing a lien on the stock of the printing company that published the Little Rock Daily Republican. [FN338] On April 2, 1874, the St. Louis Republican published a telegram from an unnamed Washington, D.C., correspondent stating:

Senators Dorsey and Clayton have returned from Arkansas not particularly well pleased with the political prospect in that state next fall as it looks viewed from their stand-point. The only hope of the republicans as far as can be learned here is that the supreme court, before which Brooks is now *953 contesting Baxter's right to the gubernatorial chair, will decide against the latter. But of this it is admitted there is only a very slight probability. [FN339]

The correspondent was in error about the options open to those Republicans who wanted to oust Baxter. There was no contest between Brooks and Baxter then pending before the supreme court. The suit to oust Baxter filed by Brooks the preceding June was still pending before Judge John Whytock of the Pulaski County Circuit Court, but the case appeared moot. The supreme court's written opinion in the quo warranto proceeding, issued in September and signed by three of the five justices, stated unequivocally that no state court had jurisdiction to try an election contest for governor. Shortly after that opinion was issued, Baxter's attorneys filed a demurrer denying that the circuit court had jurisdiction to hear the case. [FN340] The effect of the demurrer was to state: Assuming for purposes of argument that the allegations in Brooks' complaint are true, the circuit court lacks jurisdiction to grant the relief requested. [FN341] The validity of the demurrer was confirmed in January when three of the five supreme court justices voted in *Wheeler v. Whytock* to issue a writ of prohibition ordering Judge Whytock not to take jurisdiction of an identical case involving a contest for the office of state auditor. Brooks' Pulaski County Circuit Court ouster suit was ripe for dismissal, and in fact, Brooks' attorney had led Freeman Compton, one of Baxter's attorneys, to believe that the case would be dismissed. [FN342]

On Saturday, April 11, 1874, Elbert English, Baxter's other attorney, was in Pulaski County Circuit Court on an unrelated matter, when Judge Whytock announced from the bench that due to the sitting of the United States Circuit Court in Little Rock, no cases would be called the following week without the consent of counsel. [FN343] Whytock later claimed that his announcement applied solely to cases requiring a jury to be impaneled, but English denied hearing any such qualification. [FN344]

On Monday, April 13th, Brooks' attorney called up the case of Brooks v. Baxter, and Judge Whytock took Baxter's demurrer under submission. [FN345] *954 Notice that the case had been submitted for decision appeared in the newspapers on Tuesday, April 14th. [FN346] Elbert English was tied up in federal court and never saw the notice. [FN347] Freeman Compton was in Camden and read the notice of submission in the newspaper, but he assumed English was appearing for Baxter and that the case had been submitted so that Whytock could rule that he lacked jurisdiction. [FN348]

On Wednesday, April 15th, with neither of Baxter's attorneys present in court, Judge Whytock announced that he was overruling Baxter's demurrer, in effect holding that the circuit court did have jurisdiction to try the case. The court's next procedural step should have been to permit Baxter to file a response to Brooks' original complaint. Instead, after waiting about two hours, Whytock proceeded to rule on the merits of the case. [FN349] He entered a judgment ousting Baxter from the office of governor, declaring Brooks entitled to the office, and awarding Brooks a judgment for \$2,218, the salary collected by Baxter since his inauguration in January of 1873. [FN350]

Judge Whytock was not persuasive when he subsequently defended his actions before a congressional committee.

He argued that by entering a final judgment, he was merely placing the case in a posture where the question of who was entitled to the governor's salary, which he did not consider settled by the earlier supreme court decisions, could be appealed immediately to the supreme court. He denied any intent to oust Baxter from office and refused to take responsibility for the "outside scuffling" that resulted from his order. [FN351]

The "outside scuffling" that followed entry of the judgment against Baxter was quick and dramatic. As soon as Whytock announced his decision, Brooks went to the supreme court chambers located in the east end of the state capitol, where McClure administered the governor's oath of office to Brooks. [FN352] Accompanied by a dozen supporters, Brooks then walked across the hall to the west end of the building, forcibly ejected Baxter from the governor's office, and seized control of the state capitol. [FN353]

*955 The chief justice later denied that Whytock's judgment was part of a prearranged plan to oust Baxter but eventually admitted under cross-examination that he "may have had some knowledge" that Brooks' complaint would be brought up in Whytock's court. When questioned about why he had sworn Brooks into office only months after swearing Baxter into the same office, McClure told an incredulous congressional committee that he would have administered the gubernatorial oath of office to anyone who asked. [FN354]

After leaving the capitol on April 15th, Baxter wired President Grant. He advised the president of Whytock's decision and Brooks' seizure of the state capitol, and requested federal assistance in regaining the executive office. [FN355] Brooks also telegraphed the president and asked that the state-owned arms held at the federal arsenal in Little Rock be delivered to him. [FN356]

The response of the Grant administration was conditioned by events following the 1872 election in Louisiana, where the president had used military force to settle a contest between rival gubernatorial candidates. [FN357] Because the Louisiana intervention had provoked widespread criticism, the administration was cautious about choosing sides in the Arkansas controversy. Grant's attorney general, George H. Williams, sent essentially the same response to both Arkansas gubernatorial contenders. To Baxter, he wired:

[A]s the controversy related to your right to hold a State office, its adjudication, unless a case is made under the so-called enforcement act, belongs to the state courts. If the decision of which you complain is erroneous, there appears to be no reason why it may not be reviewed and a correct decision obtained from the Supreme Court of the State. [FN358]

The attorney general advised Brooks:

*956 [T]hat he [the President] declines to comply with your request, as he is not advised that your right to hold the office of Governor has been fully and finally decided by the courts of Arkansas. [FN359]

The attorney general's telegrams defined the ground rules for the two gubernatorial claimants. Both understood the importance of presidential recognition, and the Grant administration had indicated that it would defer to the Arkansas Supreme Court on the question of who was governor.

The willingness of the federal government to let the courts resolve the dispute was undoubtedly welcomed by the Brooks forces. Clayton and Dorsey, who were backing Brooks' case in Washington, immediately cabled:

The President's action is in full accord with your views. We rely on your maintaining your vantage ground, which you must hold at any cost. Our position here is that the courts must determine the question, and no collusion will be allowed to interfere. [FN360]

Although neither senator was ever questioned under oath about his role in the Brooks-Baxter affair, the quick endorsement of Brooks' coup d'etat suggests that Whytock's decision did not come as a surprise to either of them. [FN361]

McClure was undoubtedly delighted when Brooks received the attorney general's telegram. [FN362] For almost a year he had labored, often alone, to remove Baxter from office. Now the president of the United States had announced that the court over which he presided should determine which of the contestants was entitled to the governor's office. With Clayton, Dorsey, and most of the Minstrel leadership now behind the effort to remove Baxter, the chief justice could count on the votes of the three Minstrel justices-Bennett, Searle, and Stephenson.

Since Justice Gregg had supported Brooks in the 1872 election, even he might be brought around provided the case could be framed in a way that did not involve the exercise of the supreme court's original jurisdiction. The posture of two of the Minstrel justices became apparent on April 20th when a group of state officers telegraphed the president that they recognized *957 Brooks as the governor of Arkansas. The first three names on the list of signatories were McClure, Searle, and Stephenson, followed by a note that Gregg and Bennett were not in the city. [FN363]

Baxter, who had consistently denied the authority of the courts to decide who was governor, was obviously less pleased with the response from Washington. By this time supporters of both Brooks and Baxter were pouring into Little Rock, which was quickly divided into two armed camps. Brooks' forces occupied the area surrounding the state capitol on Markham Street. Baxter set up his headquarters in the Anthony Hotel, two blocks east of the state capitol, and his troops occupied most of Little Rock east of Main Street. [FN364] Although the leadership on each side sought to restrain its supporters, the concentration of so many armed men in the capital city made armed clashes inevitable. Following a confrontation on April 20th in Little Rock between Baxter's militia and United States troops in which one person was killed and several wounded, [FN365] Baxter telegraphed the president and suggested an alternative to letting the courts resolve the contest:

As I cannot move my troops to assert my claims to the office of Governor without a collision with the United States troops, which I will not cause under any circumstances, I propose to call the Legislature together at an early day and leave them to settle the question, as by law they alone have the power but to do this, the members of the legislature must have assurances of protection from you and a guarantee that they may meet in safety. This will be a peaceable solution of the difficulty and I will readily abide the decision of the legislature. [FN366]

Meanwhile, two former justices of the Arkansas Supreme Court were separately working in Washington on Baxter's behalf. Following the collapse of the Confederate state government in 1865, Albert Pike, who had expanded *958 the court's original jurisdiction in *State v. Williams*, [FN367] had drifted about the country before settling in Washington, D.C., in November of 1868. [FN368] On April 20, 1874, Pike published a tract entitled *The True Merits of the Controversy for the Consideration of Honest Men* in which he described the supreme court's refusal to issue a writ of quo warranto in *State ex rel. Brooks v. Baxter* and its issuance of a writ of prohibition in *Wheeler v. Whytock*, and argued that if the president felt bound to enforce the decisions of the courts, he should enforce those two decisions. [FN369]

On April 16th former Chief Justice William Wilshire, who was now in Washington as a member of Congress, attacked the legality of Whytock's decision in a letter to the president. [FN370] Wilshire repeated his arguments in a letter forwarded to the *Gazette* for publication. [FN371] Wilshire also secured approval of a house resolution calling on President Grant to keep that body informed of communications with Brooks and the commander of United States troops in Arkansas. [FN372]

The efforts of Pike and Wilshire, combined with news reports now filtering out of Arkansas, probably gave the Grant administration a more complete picture of the legal steps leading up to Brooks' seizure of the state capitol. The president's reply to Baxter's proposal avoided naming either the supreme court or the legislature as the final arbiter of the dispute:

I heartily approve any adjustment peaceably of the pending difficulty in Arkansas-by means of the legislative assembly, the courts or otherwise-and I will give all the assistance and protection I can under the Constitution and laws of the United States to such modes of adjustment. I hope the military forces will be now disbanded. [FN373]

In response to Wilshire's resolution, the president provided the house of representatives with copies of all communications between the White House and Arkansas. [FN374]

*959 With the president now expressing a willingness to abide by the decision of either the legislature or the courts, the "Brooks-Baxter War" became a race to see which side could obtain a decision from its preferred forum. Baxter immediately issued a proclamation calling a special session of the General Assembly to convene in Little Rock on May 11, 1874. [FN375] It was essential, therefore, for Brooks to secure a favorable decision from the supreme court before the legislature could meet. A majority of the supreme court had publicly expressed support for Brooks in the April 20th telegram to the president, but this endorsement fell short of the type of judicial determination to which the which the president referred. The only way for the supreme court to place its official seal on Brooks' assumption of power was to get a case before it in which it could approve the judgment entered by Judge

Whytock on April 15th. The supreme court normally approves a lower court decision by reviewing and affirming the decision. Baxter had not asked the court to review Whytock's judgment of ouster and was unlikely to do so until the legislature confirmed his election or the court membership changed. [FN376] Consequently, on April 26th, in an effort to get Whytock's decision before the supreme court where it could be affirmed, Brooks appealed the decision to the high court. [FN377] There were, however, procedural problems with using the Brooks' appeal to endorse Whytock's judgment of ouster. In the first place, Brooks had no grounds for appeal since the circuit court judgment granted him everything requested in his original complaint. Even if the supreme court managed to finesse this procedural obstacle, there was still the question of timing. The court had to act before the General Assembly convened on May 11th. Baxter was a necessary participant in an appeal and could easily delay a final decision by the supreme court for weeks if not months by insisting that the court adhere to its own rules governing appeals. [FN378]

Someone on the Brooks side-McClure was almost certainly involved-came up with an alternative way for the supreme court to ratify Judge Whytock's actions. Along with other Minstrel state officials, the auditor, Stephen Wheeler, and treasurer, Henry Page, had gone over to Brooks. To create a case or controversy for the supreme court to resolve, Brooks requisitioned \$1,000 to pay expenses incurred by members of his militia. Wheeler *960 issued to Brooks a state warrant which Page refused to pay, claiming uncertainty as to who was governor. Brooks then invoked the supreme court's original jurisdiction by petitioning the court to issue a writ of mandamus ordering Page to pay the warrant. Attorney General Yonley, who not surprisingly had also joined the Brooks camp, filed a response on behalf of Page asserting that Baxter, not Brooks, was the lawful governor of Arkansas. [FN379] This gave McClure his case or controversy. All that remained was for the supreme court to assemble and decide whether Brooks was the governor of Arkansas.

The supreme court justices had adjourned the December 1873 term on February 12, 1874, with the understanding they would not meet again until the June term of court unless there was business of importance. [FN380] The clerk was given instructions to adjourn court from Monday to Monday until otherwise notified. [FN381] With the exception of McClure, none of the court members were in Little Rock on May 2, 1874, when Brooks petitioned the court to issue a mandamus against Page. The chief justice summoned the other justices to convene on Monday, May 4th. [FN382] Bennett denied receiving notice from McClure but obviously knew about the court meeting since he accompanied Searle and Stephenson to Little Rock. [FN383] Gregg, who was in Fayetteville, did not receive the notice in time to attend. [FN384]

On Sunday evening, May 3rd, the Memphis train reached Argenta (now North Little Rock) with Bennett, Searle, and Stephenson on board. There the train was boarded by a group of fifteen to twenty members of Baxter's militia commanded by a Captain James Williams [FN385] who, after confirming the identities of Bennett and Searle, ordered the two to accompany him. An indignant Bennett objected and demanded to know for what crime and on *961 whose authority they were being arrested. After arguing with the two justices for several moments, Williams lost patience and ordered his men to remove the two from the train. They were taken across the Arkansas River by skiff and moved to St. John's College, which was located east of the Federal arsenal in what is now McArthur Park. During several hours of confinement at the college, Bennett made repeated demands to see Baxter. Williams, who was still in charge of the men guarding the justices, eventually agreed to take the two to see Baxter, but when the group left the college, they walked south away from the settled area of the city. At this point both Bennett and Searle became even more apprehensive about their personal safety, but Williams assured the two judges that they would not be harmed. He provided them with blankets, and the group spent the rest of Sunday night bedded down in a ravine south of the city of Little Rock. [FN386]

Justice Stephenson was on the train with his two colleagues, but the Baxter militia did not recognize him, and he escaped capture. He managed to reach the state capitol on Markham Street in Little Rock, which was within Brooks' lines, and alert the Brooks forces to the kidnapping of the two justices. [FN387]

His report caused consternation within the Brooks ranks since the supreme court could not act with only McClure and Stephenson present. McClure telegraphed Attorney General Williams to report the incident which he claimed was "done by Baxter's order for the reason that he believed the Supreme Court might take some action" [FN388] A writ of habeas corpus demanding delivery of the two jurists was issued and placed in the hands of Henry Oliver, the Pulaski County Sheriff and a supporter of Brooks. According to the Gazette, McClure signed the writ, but no

record of its issuance appears in the supreme court's records. [FN389] Oliver served the writ on the commander of Baxter's militia, who denied any knowledge of the whereabouts of the missing justices. [FN390] After additional efforts to find Bennett and Searle proved unsuccessful, a frustrated Oliver proposed that Baxter, whose location was known, be abducted and held hostage until the missing justices were returned. [FN391] The sheriff's suggestion, which might have provoked a bloody clash, was not followed. Oliver then *962 telegraphed Clayton asking for the assistance of federal troops, [FN392] and by the evening of Monday, May 4th, federal troops had joined in the hunt for Bennett and Searle. Captain T. E. Rose of the 16th United States Infantry traced the missing judges as far as St. John's College where the trail went cold. He telegraphed the War Department:

[F]rom Governor Baxter's report, these gentlemen are in the hands of lawless men who are responsible to no authority.... The friends of Messieurs Bennett & Searle think that they have been murdered. I hardly believe this to be the case, as I think Baxter's statements in regard to them are not true. [FN393]

While the army and Brooks' supporters searched Little Rock for the missing justices, the two were being held at a farm some fourteen miles west of Little Rock on the road to Benton, where they had been taken at daybreak on the morning of Monday, May 4th. After dark on Monday evening, they were moved again, this time to Benton, which was filled with large numbers of armed Baxter men. The two jurists spent most of the day Tuesday in a hotel in Benton, closely guarded at all times. [FN394] Bennett nevertheless managed to smuggle out a letter appealing for help from the commander of United States troops in Little Rock, who immediately dispatched two detachments of soldiers, one by train and one by horseback, toward Benton. [FN395]

Fortunately for the two justices, the officer now in charge of their confinement, a man named T. A. Summerhill, proved less resolute than their previous captors. Summerhill initially advised the justices that they were to be taken to a farm five miles off the road between Benton and Little Rock. By now federal troops were scouring the countryside looking for the missing justices, and Summerhill, who was under orders not to let the justices be retaken, became concerned about his possible criminal liability for his role in the affair. After discussions that included the promise of a monetary reward, Summerhill agreed to let the two escape when the opportunity arose. As a precaution against the possibility that the escape might be a pretext for killing *963 them, the justices persuaded the Saline County sheriff and several prominent citizens to accompany them on the ride toward Little Rock. [FN396]

On Tuesday evening, May 5th, the group set out by horseback on the road from Benton to Little Rock. Along the way Summerhill informed the Saline County sheriff that he planned to release the two judges. As evidence of his good faith, Summerhill handed Bennett his pistols. The Saline County group then wheeled their horses and returned to Benton, while Summerhill, Bennett, and Searle continued alone toward Little Rock. [FN397] About ten miles west of the capital the three encountered a body of riders. Bennett bolted for the nearest woods, but Searle halted the riders who turned out to be United States troops searching for the missing judges. Searle and Summerhill accompanied the troops back to Little Rock. Although it took him most of the night, Bennett managed to reach Little Rock about daybreak on Wednesday, May 6th. [FN398] The May 7th edition of the Gazette crowed: "The lost is found. Bennett and Searle have turned up. They have been on a trip to the country for the benefit of their health." [FN399]

McClure, Bennett, Searle, and Stephenson were now safely within Brooks' lines. The only absent member of the court was Gregg, who was still in Fayetteville. [FN400] Due to a procedural flaw in the Constitution of 1868, there was a substantial question as to whether the supreme court could act with Gregg absent. Earlier constitutions had provided that any two of the three supreme court justices constituted a quorum. [FN401] Inexplicably, the drafters of the Constitution of 1868 added two justices to the court but failed to address how many of the five justices had to be present in order for the court to conduct business. When the court first assembled in July of 1868, the justices decided informally that the absence of a single justice might preclude the court from *964 acting, and the court had never heard cases with only four justices present. [FN402] In December of 1868 the legislature had passed a statute providing that three of the justices constituted a quorum but requiring at least three justices to concur in any decision, [FN403] but this failed to settle doubts about the number of justices needed for a quorum, and out of an abundance of caution the court continued the practice of not meeting unless a full bench was present. [FN404] When Chief Justice Wilshire was too ill to attend the June 1870 term of court, the court cancelled its entire term despite a full docket of pending cases. [FN405]

In May of 1874, however, the need for a prompt supreme court endorsement of Judge Whytock's decision overcame any reservations about the court's ability to function with only four justices present. The Gazette protested:

The idea of holding a special session of the supreme court, surrounded by the Brooks mob, and by less than a full bench of judges, is the latest prop McClure can find for the Brooks usurpation. A decision made under such circumstances would have no more weight than Whytock's pretended judgment in favor of Brooks. [FN406]

On the morning of Wednesday, May 6th, McClure, Searle, and Stephenson assembled in the east wing of a state capitol guarded by Brooks' militiamen to hear oral argument on Brooks' application for issuance of a writ of mandamus ordering Treasurer Henry Page to pay the \$1,000 warrant issued by Auditor Stephen Wheeler. [FN407] The following morning the three justices, now joined by Bennett, announced the court's decision in the case of Brooks v. Page. Brooks' right to relief turned on whether he was the governor of Arkansas, and the court concluded that the circuit court decision made Brooks the governor:

The only question that we deem it necessary to notice is did the circuit court have the jurisdiction to render the judgment in the case of Brooks vs. Baxter? We feel some delicacy about expressing an opinion upon the question propounded, but under the pleadings it has to be passed *965 upon, incidentally, if not absolutely, in determining whether the relator (Joseph Brooks) is entitled to the relief asked, for his right to office if established at all, is established by judgment of the Circuit Court of Pulaski County. We are of opinion that the Circuit Court had jurisdiction of the subject matter, and its judgment appears to be regular and valid.

Having arrived at these conclusions, the demurrer is overruled, and the writ of mandamus will be awarded as prayed for. [FN408]

The court made no effort to reconcile its decision in Brooks v. Page with its earlier opinions in State ex rel. Brooks v. Baxter or Wheeler v. Whytock. McClure, who five months earlier had written in Wheeler v. Whytock that Judge Whytock had no jurisdiction to decide an election contest for a state executive office, offered the unpersuasive excuse that the supreme court had no choice but to accept the validity of Judge Whytock's judgment ousting Baxter since the judgment had not been appealed or superseded. [FN409] In his defense of the opinion Stephenson argued that by demurring to Brooks' complaint, Baxter had confessed himself a usurper of the governor's office, and that the supreme court could not go outside the pleadings and determine otherwise. [FN410]

The purpose of the decision was, of course, to demonstrate the supreme court's approval of Whytock's judgment ousting Baxter from office. As soon as the court issued its written opinion on May 7th, Brooks telegraphed President Grant:

Supreme court decided today that the Pulaski circuit court has jurisdiction of the subject matter of the case of Brooks v. Baxter, and the Judgment is regular and valid, and that I am governor of Arkansas. A certified copy of the opinion has been telegraphed Attorney-General Williams. [FN411]

Since earlier communications with Washington had indicated that the supreme court would not be in session until June, the four justices who decided Brooks v. Page followed up with their own telegram to the president confirming that the court had properly met in continuation of its December term to hear the case. [FN412]

*966 It was now Baxter's play. To trump McClure's court decision recognizing Brooks as the legitimate governor, Baxter needed the endorsement of a majority of the General Assembly. He had already issued a call for the legislature to meet on the following Monday, May 11th, but there were practical and legal problems with convening a legislative session. Although Baxter's supporters controlled most of Little Rock, Brooks' militia surrounded the state capitol on West Markham where the legislature normally met. Legislators summoned to the special session were understandably concerned for their physical safety, and one group went so far as to telegraph the president and request federal protection. [FN413] These security problems were compounded by the likelihood of election contests involving the fifty legislative seats filled at the special election the preceding November. Many of the legislators who had accepted gubernatorial appointments following the 1873 regular session had not officially resigned their legislative seats, thereby creating a technical argument that no vacancies existed to be filled by special election. [FN414] The voter registration ordered by Baxter prior to the special election also opened the door to challenges to the seating of the newly elected legislators. [FN415]

Meanwhile, attorneys for both gubernatorial claimants were presenting their respective cases to the Grant

administration. Baxter was represented by the Washington firm of Pike and Johnson, consisting of former Justice Pike and former Confederate Senator Robert Johnson. They were joined by a Little Rock attorney, Uriah M. Rose, who was able to provide first-hand knowledge of events in the state. [FN416] Brooks sent several representatives to Washington to plead his case, including Attorney General T. D. W. Yonley. [FN417] Most of the *967 Arkansas congressional delegation, including both senators, backed Brooks. [FN418] The exception was former Chief Justice Wilshire, who had been elected to Congress on the Baxter ticket and never wavered in his support of the governor. [FN419]

On Saturday, May 9th, two days after the supreme court decided Brooks v. Page, United States Attorney General George H. Williams, who had been meeting with representatives of the two gubernatorial claimants in Washington, put forward an agreement for resolving the dispute. Brooks and Baxter would each issue a call for the General Assembly to meet in the state capitol on May 25th to determine which of the two had received a majority of the votes at the November 1872 election. Each would send home his militia except for a small personal bodyguard. Until the legislature rendered its decision, the question of which claimant would exercise the office of governor would be determined by the president based on the applications previously submitted by each claimant. [FN420]

On the following day Brooks telegraphed his acceptance of the proposal but reminded the attorney general that the state supreme court had ruled that he was governor. [FN421] He had been assured since the early days of his coup, by Clayton and other supporters in Washington, that the administration backed his claim, and Brooks probably expected Grant to recognize him as governor pending the legislature's decision. [FN422] A two week delay would also give Brooks time to coordinate the seating of a legislature favorably disposed toward his claim.

*968 Baxter refused to accept the attorney general's plan. [FN423] He objected to issuing a joint call with Brooks since this appeared to acknowledge that he and Brooks had equally legitimate claims to the governor's chair. [FN424] Baxter was probably also concerned about convening the legislature in a state capitol surrounded by Brooks' militia since in 1871 and again in 1873 the Minstrels now backing Brooks had used their physical control of the state capitol to determine the seating of the General Assembly.

Over the next two days, as legislators began to arrive in Little Rock, Baxter exchanged telegrams with Washington. On May 11th Grant proposed to Baxter that the General Assembly adjourn for ten days to give Brooks the opportunity to summon those legislators who supported him. The president again asked both sides to disband their forces "so that the general assembly may act free from any military pressure or influence." [FN425]

Baxter replied, agreeing to the president's suggestion regarding adjournment of the General Assembly with one qualification. Under the constitution, the legislature could only adjourn from day to day until a quorum was present. Baxter indicated that once a quorum of legislators was present: "I am in favor of their adjourning as long as they please, until every supposed Brooks adherent is present." [FN426] Baxter also agreed to disband his troops in the proportion that Brooks disbanded his, but he demanded that Brooks deposit the state arms in the state armory, turn possession of the state capitol over to Secretary of State James M. Johnson, and move his troops "as far from it west as I am east." [FN427] This would have placed Baxter's troops east of Main Street and Brooks' troops west of Broadway, with the capitol located in a "no man's land" between the two forces.

Although a quorum of the legislature had not yet arrived in Little Rock, Baxter's proposal was endorsed by the president of the senate and eight other senators, as well as the speaker of the house and thirty-six other members. [FN428] *969 Attorney General Williams immediately wired back: "I am directed by the President to say that he considers your proposition fair and reasonable, and I have asked for its immediate acceptance by Brooks." [FN429]

Now it was Brooks who rejected the administration's proposal. In a rambling telegram sent to the president on May 11th, Brooks seemed to back off his earlier willingness to let the legislature decide the contest. He questioned the right to office of many of the legislators then being sworn in and implied that the president had a constitutional duty to give full faith and credit to the decisions of the courts of Arkansas. Brooks also claimed that disbanding his troops would lead to the assassination of the supreme court judges. [FN430] In a telegram to the attorney general on May 12th Brooks urged the president to recognize either him or Baxter as governor, based on the arguments previously submitted by the two, rather than on what the General Assembly decided. [FN431] On the 14th Brooks again wired the president. He reiterated his willingness to issue a joint call with Baxter to convene the General Assembly but

refused to recognize the body now assembling within Baxter's lines. The authority of that body, he claimed, could only be determined by the courts, and he proposed to bring an immediate case before the supreme court to determine the question. [FN432] A final telegram, sent shortly after midnight on May 15th, suggested that the election contest be referred to a congressional committee for resolution. [FN433]

While the Grant administration was engaged in long distance diplomacy with the rival claimants, members of the General Assembly slowly began to assemble in Little Rock. Because the state capitol was held by Brooks' forces, the legislature met in the Ditter Block located on East 2nd Street, between Cumberland and Rock Streets. [FN434] Seventeen house members from the 1873 *970 General Assembly were present on the morning of Monday, May 11th. [FN435] They were joined by fourteen new members elected at the November 1873 special election. [FN436] This left the lower chamber eleven short of the forty-two members required for a quorum. Four more new members appeared on May 12th, but the lack of a quorum again forced an adjournment. The house finally assembled a quorum on the morning of May 13th when forty-four members answered the clerk's roll call. [FN437]

The senate experienced similar problems assembling a quorum. Four old senators appeared on May 11th. The secretary of state sent in a list of new senators, but it was not until May 13th that fourteen senators, or more than required for a quorum appeared. [FN438] Although the legislature met in an area of Little Rock controlled by Baxter forces, there was apparently no attempt to prevent Brooks' supporters from attending the session. To the contrary, legislators who backed Brooks were encouraged to attend since their presence was needed for a quorum. [FN439]

On Thursday, May 14th, the General Assembly appointed a committee to wait on Baxter and afterwards met in joint session to hear his executive message. The Gazette probably went too far when it characterized these actions as legislative recognition that Baxter was governor. [FN440] In a rather short speech to the General Assembly, Baxter made it clear that he did not consider the contest officially settled: "To you is submitted the question of who is governor and your early attention is invited to its consideration." [FN441] Baxter also urged the legislature to convene a constitutional convention. [FN442]

L. Apparent Victory

Brooks' continued insistence that the supreme court or a congressional committee or some body other than the currently assembled legislature Assembly should determine who was governor undoubtedly stretched the patience of the Grant administration. [FN443] According to the St. Louis Republican, Brooks' refusal to accept a legislative settlement of the contest had "used him *971 up with Grant." [FN444] Before the Arkansas General Assembly could decide the contest between Baxter and Brooks, the Grant administration did. On May 15, 1874, Attorney General Williams issued his formal opinion to the president regarding the respective claims of Baxter and Brooks for recognition as the governor of Arkansas. After reciting the legal history of the controversy, the opinion concluded:

The general assembly has decided that Baxter was elected. The circuit court of Pulaski County has decided that Brooks was elected. Taking the provision of the constitution which declares that contested elections about certain State officers, including the governor, shall be determined by the general assembly, and that provision of the law heretofore cited which says that all contested elections of governor shall be decided by the legislature, and the two decisions of the supreme court affirming the exclusive jurisdiction of that body over the subject, and the conclusion irresistibly follows that said judgment of the circuit court is void. A void judgment binds nobody. [FN445]

The attorney general dismissed the supreme court's decision in Brooks v. Page. He referred to the April 20th telegram supporting Brooks, which was signed by McClure, Searle, and Stephenson, as well as state Treasurer Henry Page, and declared sarcastically:

Accordingly, the pleadings [in Brooks v. Page] were made up by the parties, both of whom were on the same side in the controversy, and the issue so made was submitted to judges virtually pledged to give the decision wanted; and there, within the military encampment of Brooks, they hurriedly, but with delicacy, as they say, decided that he was governor—a decision in plain contravention of the constitution and laws of the State, in direct conflict with two other recent decisions of the same court deliberately made. I refrain from comment. [FN446]

Based on his attorney general's opinion, Grant issued a proclamation declaring that Baxter was the governor of Arkansas and ordering all "turbulent and disorderly" persons to return to their homes within ten days. [FN447] The president's proclamation ended armed resistance by the Brooks forces. On the evening of May 15th Brooks sent his

militia commander to negotiate terms with his counterpart in Baxter's militia. These terms were published the following day. Troops loyal to Brooks were to be disbanded and allowed to *972 return unmolested to their homes. Their transportation home was to be provided at state expense. Baxter militia members were to move to their respective counties where they were to be used for no other purpose than preservation of the public peace "without regard to politics, color, or any participation in the recent troubles." [FN448] Brooks evacuated the statehouse early in the morning of Tuesday, May 19th, leaving a single man to turn over the state arms to Baxter forces. He then rode west toward Fort Smith with a detachment of mounted men. [FN449]

The magnanimous terms extended to Brooks and his militia did not apply to the four supreme justices who had decided *Brooks v. Page*. The president's proclamation reached Little Rock about 5:00 p.m. on May 15th, and at 1:30 a.m. the following morning McClure left the state on the first train north. [FN450] Bennett and Searle also departed, probably on the same train with the chief justice. The Gazette reported that all three jurists spent some anxious moments in the mail room at the railway station, under the protection of United States soldiers, before they were able to leave the state. [FN451] On May 19th, the day that Brooks and the last of his militia evacuated the state capitol, Stephenson submitted his resignation from the court. He was escorted through Baxter lines by two United States soldiers and put on a train to his home in Helena. [FN452]

The president's proclamation ended the armed phase of the confrontation between Baxter and Brooks. The affair had not been bloodless. During the month between Whytock's decision and Brooks' evacuation of the state capitol, approximately twenty men died and several times that many were wounded in skirmishes between the rival militias. [FN453]

The General Assembly remained in session until May 28, 1874. On May 16th it scheduled a statewide special election on June 30, 1874, at which voters would decide whether to convene a constitutional convention in Little Rock. Delegates to the convention were to be selected at the same election. [FN454]

The legislature also took several precautions to keep the judicial branch of government from interfering with the submission of a new constitution. It passed legislation that effectively prevented the supreme court from meeting again until the fourth Monday in November, well after the submission of the new constitution to the electorate. [FN455] This procedural change apparently did not *973 alleviate legislative concerns about the judiciary, because four days later the legislature approved a second act stating that "all Judges of this State are prohibited from issuing any writ of process whatever, or taking any action, or assuming any jurisdiction in or about, or in connection with the election provided for in the Constitutional Convention Act." [FN456]

The General Assembly then set out to remove from office those supreme court justices most likely to interfere with the election on a new constitution. The Constitution of 1868 stated that impeachment of the governor suspended him from office, but it did not address the effect of impeachment of a supreme court justice. To remedy this, the General Assembly approved a statute which authorized the governor to appoint a suitable replacement for any state officer who was impeached. [FN457] On May 25th the house voted 52 to 9 to impeach McClure on grounds of treason. "When the speaker announced the vote there was the loudest applause." [FN458] Two days later the house approved articles of impeachment against Bennett and Searle. [FN459] Of the four justices who signed the court's the opinion in *Brooks v. Page*, only Stephenson, who resigned his court seat on May 19th, escaped impeachment. [FN460] The fifth member of the court, Lafayette Gregg, had remained in Fayetteville throughout the month-long confrontation between Brooks and Baxter. The legislature tacitly recognized Gregg's neutrality in the affair by naming him to the board of trustees of the new State Industrial University in Fayetteville. [FN461]

Although the General Assembly adjourned on May 28, 1874, before the senate could try the three impeached justices, Baxter immediately named their replacements. In place of McClure, the governor appointed Elbert H. English, who had represented Baxter in his court battles with Brooks. [FN462] He named his other attorney, Freeman W. Compton, to Bennett's seat. [FN463] Hence, only nine years after the collapse of the Confederate state government, two of the three *974 Confederate state supreme court justices were back on the high bench. The third acting justice named by Baxter was John T. Bearden, former judge of the Sixth Judicial Circuit, [FN464] who took Searle's place on the court. [FN465] The permanent replacement for Stephenson was former justice William M. Harrison, whom Stephenson had allegedly defeated in the 1872 general election. [FN466]

M. The War Continues

The Republican opponents of Elisha Baxter were not finished. They still controlled the Arkansas congressional delegation, and on May 27, 1874, the day before the Arkansas General Assembly adjourned, the United States House of Representatives passed a resolution calling for the appointment of a select committee of five members to "inquire into the disturbed condition of governmental affairs in the State of Arkansas." [FN467] The committee, which came to be called the "Poland committee" after its chair, Republican Representative Luke P. Poland of Vermont, [FN468] met in Washington from May 30th to June 13th and heard testimony from supporters of Brooks. [FN469] The Poland Committee's very first witness was the omnipresent John McClure, who, depending on one's political perspective, was either the current chief justice or the former chief justice of Arkansas. [FN470] John Whytock, who had resigned as circuit judge on May 29th, also testified. [FN471] The committee moved the hearings to Little Rock in July where it met from July 18th to July 28th. [FN472] This time it heard witnesses from both sides of the controversy. In addition to Governor Baxter, four former (McClure, Bennett, Searle, and Stephenson) and three current (Compton, English, and Gregg) supreme court justices testified. [FN473]

*975 The congressional investigation did not slow the effort to replace the Constitution of 1868. The election on June 30, 1874, was a resounding victory for opponents of that constitution. By an overwhelming vote of 80,259 to 8,607 the voters approved the convening of a constitutional convention. [FN474] Of the ninety-one delegates selected to attend the convention, over seventy were Democrats. [FN475] The fraud and intimidation during the election was extensive, even by the standards of the time, [FN476] but the Gazette was probably correct when it argued that the margin of victory was too great to be attributed to voting irregularities. [FN477]

The convention delegates assembled in Little Rock on July 14, 1874, and by September 7, 1874, they completed the document that forms the core of the present constitution of the state. The major changes lay in the two areas for which Democrats blamed the abuses of the reconstruction period: the power of the governor and state finances. The governor's term was cut from four to two years, and his appointive powers were curtailed by making a number of offices elective. The state and local governments could no longer issue bonds or otherwise lend their credit, and their ability to levy property taxes was capped. [FN478]

The document changed the composition and jurisdiction of the supreme court. The number of justices was reduced from five to three, with a proviso that the General Assembly could increase the number to five once the state achieved a population of one million. [FN479] The proposed document also redefined the supreme court's jurisdiction so as to limit its ability to issue writs of mandamus and quo warranto:

The Supreme Court, except in cases otherwise provided by this Constitution, shall have appellate jurisdiction only, which shall be coextensive with the State, under such restrictions as may from time to time be prescribed by law. It shall have a general superintending control over all inferior courts of law and equity; and, in aid of its appellate and supervisory jurisdiction, it shall have power to issue writs of error and supersedeas, *976 certiorari, habeas corpus, prohibition, mandamus and quo warranto, and, other remedial writs, and to hear and determine the same. [FN480]

As an additional precaution against any court assuming power to determine the right to a state office, the proposed constitution vested the General Assembly with "exclusive jurisdiction" to determine a contested election for governor, secretary of state, treasurer, auditor, or attorney general. [FN481]

The schedule to the proposed constitution called for its submission to the electorate on October 13, 1874. All state, district, county, and township offices created by the proposed constitution were to be filled at the same election. [FN482]

The Democrats met in Little Rock on September 8, 1874, and nominated their first complete slate of candidates for state office since the Civil War. [FN483] The gubernatorial nomination was offered to Baxter, but after he declined, the Democrats nominated Augustus H. Garland. [FN484] Elbert H. English received the nomination for chief justice of the supreme court. The associate justice nominees were David Walker, who had served as chief justice during the short-lived post-war Conservative regime that ended with reconstruction, and William M. Harrison, the pro-Union lawyer from Pine Bluff who had been elected to the court in 1868 as a Republican but lost his seat in 1872 after breaking with the Minstrel wing of the party. [FN485]

The Republican state convention met in Little Rock on September 15, 1874. [FN486] An address to the convention prepared by a committee on which McClure served and may have chaired laid down the Republican Party line. It claimed that Baxter was not governor when he issued the call for the legislature to convene and that all actions leading up to the constitutional convention were therefore null and void. [FN487] Consistent with this position, the Republicans did not nominate candidates for the state offices to be filled in the October 13th election. Instead, they pinned their hopes on Federal intervention to restore Brooks to office and protect Republican officeholders elected in 1872 to four year terms under the 1868 Constitution. [FN488]

*977 On October 13, 1874, voters approved the proposed constitution by a three to one margin, [FN489] and the unopposed candidates nominated by the Democrats were elected to all state offices created by the constitution. [FN490] The election results were announced on October 30. According to the constitution's schedule the newly elected state officers were supposed to assume their duties within fifteen days after receiving notice of their election. [FN491] The major obstacle to the assumption of power by the Democratic state officers was the Poland committee, which had still not submitted a report to the United States House of Representatives and was scheduled to resume public hearings in Little Rock at 10:00 a.m. on November 12, 1874. Approximately one hour before the committee met, Augustus H. Garland and the other Democrats elected to state offices on October 13th quietly took their respective oaths of office. [FN492]

When the committee hearings opened, the first witness called to testify was Elisha Baxter. His interrogator was John McClure:

McClure: State what official position, if any, you now hold.

Baxter: I have, until a very recent date, held the position of governor of the State of Arkansas. There is a question, real or pretended, to be raised by parties in the State, that the constitutional convention which has resulted in bringing Mr. Garland to the gubernatorial chair was illegal and unconstitutional. If that should prove to be so, I am governor of the State of Arkansas; otherwise I am not, and I hold no official position.

* * *

McClure: At what time did you terminate your connection with the executive office of the State.

Baxter: In the manner just now described, Mr. Garland took charge of the gubernatorial office this morning at 9 o'clock.

* * *

McClure: You yielded possession quietly?

*978 Baxter: I went with him to the office, believing, as I do, that the constitutional convention and all that preceded it and followed it were legal. But I state here, very distinctly, that, in the event it shall be decided that Mr. Garland is not governor of the State of Arkansas, I am.

McClure: You have, then voluntarily surrendered the office to him and he has taken possession?

Baxter: Mr. Garland has possession of the office.

McClure: You entered no protest whatever?

Baxter: Except in manner [sic] as now stated. [FN493]

Augustus H. Garland was then called to testify:

McClure: What official position, if any, do you now hold?

Garland: I am governor of the State of Arkansas. [FN494]

McClure: When did you qualify as such?

Garland: About 9 o'clock this morning.

* * *

McClure: Did you acquire [possession of the office] peaceably?

Garland: I did. [FN495]

Having established for the record that Baxter had peaceably yielded the governor's office to Garland, McClure turned the cross-examination of other witnesses over to other attorneys and did not participate further in the hearings on November 12th. His failure to take part suggests his involvement in the next move of the war.

The following day, Volney Voltaire Smith, the Republican lieutenant governor under the Constitution of 1868, issued a proclamation claiming to be the governor of Arkansas. In the proclamation, Smith argued that the Constitution of 1874 had not been legally adopted and that the Constitution of 1868 was still in force. Smith

therefore claimed the office of governor on the *979 grounds that Baxter had abdicated the office by voluntarily turning it over to Garland. Smith promised not to use force to oust Garland "unless the President of the United States recognizes me as the governor of the state." [FN496]

Although it is impossible to prove that McClure was behind the attempted coup of November 13, 1874, the circumstantial evidence supports his involvement. McClure's questions to Baxter and Garland on the morning of November 12th were designed to lay the legal basis for Smith's claim to office. Smith's proclamation of November 13th was printed and distributed by John J. Price, McClure's former partner in the publishing business. Finally, Smith was a relatively weak personality who usually followed the lead of others. During the early days of McClure's war on Baxter, Smith had acquiesced to various McClure machinations designed to place Smith in the chief executive's chair, and the events of November 13th fit the same pattern. [FN497]

Whoever the author, Smith's farcical attempt to set up a Republican state government quickly collapsed. Garland immediately had warrants issued for the arrest of Smith and Price, and the legislature authorized a reward of \$1,500 for Smith's capture. Smith had already left for Washington to plead his case, but the Pulaski County Sheriff did arrest John Price for conspiracy to overthrow the state government. [FN498] Smith's efforts to enlist Grant's support were unsuccessful; the president refused to intervene in Arkansas until the Congress finished its investigation. [FN499]

By December of 1874 the Poland Committee had finished taking testimony and was back in Washington. For two days, December 17 and 18, 1874, it listened while McClure laid out the legal arguments for recognizing the government created under the Constitution of 1868 as the true government of the state. [FN500] McClure argued that the legislature lacked the power to call a constitution convention because the Constitution of 1868 could be altered or replaced only by following the amendment process set out in the constitution. [FN501] He compared the assertion that the people retained the right to unmake the government created by the Constitution of 1868 to the "delusion that led the South into rebellion, and which cost the North three hundred and twenty thousand lives to demonstrate what was not true." [FN502] Alternatively, McClure argued that even assuming that the legislature had the power to call *980 a constitutional convention, the body that assembled in May of 1874 was not the General Assembly of Arkansas because it included persons elected in the November 1873 general election to seats that had never been vacated. [FN503]

Meanwhile, the state government formed under the Constitution of 1874 was in limbo pending the report of the Poland committee. The General Assembly was understandably hesitant to consider substantive legislation until Congress had resolved the legitimacy of the government formed under the new constitution, but this uncertainty did not prevent the newly elected supreme court from reviewing Judge Whytock's now famous judgment that precipitated Brooks' seizure of power.

On November 12, 1874, before he yielded the governor's office to Garland, Baxter petitioned the supreme court for a writ of certiorari quashing further proceedings before the Pulaski County Circuit Court lest they be "used as a pretext for further attempts to harass and injure him." [FN504] The writ was granted by William M. Harrison, who was a member of the court under either the Constitution of 1868, by virtue of his appointment following Stephenson's resignation, or the Constitution of 1874, by virtue of his election in October of 1874. Since the new chief justice, Elbert H. English, was an attorney of record in the case, he recused, and Samuel W. Williams [FN505] was appointed special chief justice. The court unanimously agreed that its decision in *State ex rel. Brooks v. Baxter*, which stated that no state court had jurisdiction to decide a gubernatorial election contest, was the law of the case and should have controlled the result before the Pulaski County Circuit Court. As alternative support for the circuit court's lack of jurisdiction, the high court cited the decision in *Wheeler v. Whytock* as well as Attorney General Williams' opinion, which it set out in full. [FN506] The court dismissed the decision in *Brooks v. Page*, noting the "simulated" character of the case as well as the fact that only four of the five supreme court judges had participated in the decision. [FN507]

On February 6, 1875, the Poland Committee finally submitted to the United States House of Representatives a report signed by four of its five members. [FN508] The majority report concluded that the present government of the state of Arkansas had been ratified by a large majority of its citizens and that no amount of irregularities by which that government was brought to power *981 justified interference by the federal government. [FN509] One

committee member submitted a minority report urging Congress to declare that the Constitution of 1868 was still in force and that Joseph Brooks was the lawful governor of Arkansas. [FN510]

The Minstrels mounted one final effort to place Brooks in office and reinstate the other state officials elected under the Constitution of 1868. On February 3, 1875, Powell Clayton, who probably had advance intelligence of the Poland Committee's decision, persuaded the United States Senate to approve a resolution calling for the president to provide any information in his possession relating to affairs in Arkansas. [FN511] Grant responded with a statement expressing his opinion that the testimony before the Poland Committee showed that Brooks had been elected governor of Arkansas only to be replaced with a new state government "by violence, intimidation, and revolutionary proceedings." [FN512] The president called on Congress to relieve him from acting on the matter by deciding whether proceedings in Arkansas should be permitted to stand. [FN513] The president's message was widely interpreted as an invitation for Congress to overturn the conclusions of the Poland committee, thus freeing him to intervene militarily to restore Republican control of the Arkansas state government. [FN514]

The war ended quietly, however, on March 2, 1875, when Representative Poland called up his committee's report, and the house gave each committee member one hour to discuss the report. [FN515] After a lengthy debate, the house approved the report 150 to 81. [FN516]

The Arkansas Republican Party acquiesced. In a telegram published in the Republican on March 6, 1875, Clayton announced:

The action of Congress on Arkansas affairs is conclusive. The validity of the new constitution and the government established thereunder ought no longer to be questioned. It is the duty of republicans to accept the verdict, and render the same acquiescence which we would have demanded had the case been reversed. [FN517]

*982 III. EPILOGUE

After the Brooks-Baxter affair ended his service on the court, John E. Bennett returned to Helena. He had discovered a process for extracting cotton seed oil from ginned cotton bolls and built several large mills to exploit the process. In 1883 he sold the mills and moved to Clark County, South Dakota. He farmed for several years and again became involved in Republican Party politics. He was elected state's attorney for Clark County in 1888 and justice of the South Dakota Supreme Court in 1889. He died at age sixty in Pierre, South Dakota, on December 31, 1893. [FN518]

Thomas M. Bowen left Arkansas, this time for good, in January of 1875. He moved to Colorado and practiced law until 1876, when he was elected a district court judge. He invested in several gold mines and resigned from the bench four years later after a rich strike at one of the mines. He was elected to the lower house of the Colorado legislature in 1882, and the following year he achieved a long held ambition when the legislature elected him to the United States Senate. After a single undistinguished term in the Senate, he returned to Colorado and the mining business. His final years were spent in Pueblo, Colorado, where he died on December 30, 1906. [FN519]

After adoption of the 1874 Constitution cut short his term on the court, Lafayette Gregg returned to Fayetteville and the practice of law. He was the Republican candidate for governor in 1886 but received only 54,063 of the 163,882 votes cast. [FN520] When the legislature added two justices to the supreme court in 1889, [FN521] Gregg was an unsuccessful Republican nominee in a special election held to fill the two newly created positions. [FN522] In March of 1890 he joined the faculty of the first law department at the University of Arkansas in Fayetteville, where he taught constitutional and international law. [FN523] Gregg died in Fayetteville on November 1, 1891. [FN524]

William M. Harrison did not run for reelection to the supreme court after his eight year term ended in 1882. He practiced law in Pine Bluff until 1888, *983 when he retired and lived quietly at home. The eighty-two year old former justice died at his home on February 15, 1900. [FN525]

Elhanan J. Searle moved to Chicago, Illinois, about 1875 and practiced law. In 1887 he moved to Rock Island, Illinois, where he lived until his death on August 18, 1906. [FN526]

Marshall L. Stephenson returned to Helena where he practiced law for many years. A twenty year old German immigrant named Jacob Trieber made arrangements to read law with the former justice, and after Trieber was admitted to the bar in 1876, Stephenson and Trieber practiced together for some twenty years. [FN527] With the support of Powell Clayton, who continued to control Republican patronage in the state until after the turn of the century, Trieber was appointed a federal judge in 1900 and went on to become one of Arkansas' most distinguished jurists. [FN528] Stephenson continued to live in Helena until his death at Battle Creek, Michigan, on September 18, 1911. [FN529]

William W. Wilshire, who had come to Arkansas as an officer in the Union Army that occupied Little Rock, emerged from the Brooks-Baxter confrontation very much a hero to many former Confederates. On his return to Little Rock from Washington in May of 1874 he was met at the station by a marching band and large crowd. [FN530] On May 29, 1874, the Arkansas General Assembly adopted a joint resolution expressing its thanks to Wilshire "for the firm, manly, consistent sic and patriotic course he has taken at Washington, to maintain and uphold the lawful government of the State of Arkansas." [FN531] Unfortunately, the same conduct that won him praise from the Arkansas legislature may have alienated some of his fellow Republicans in Congress. On June 16, 1874, a sufficient number of Republicans joined Democrats in voting to oust Wilshire from his congressional seat in favor of Thomas M. Gunter, his Democratic opponent in the 1872 election. [FN532] Fortunately for Wilshire, the 1873 General Assembly had redrawn the congressional districts to place Gunter and Wilshire in a different districts for the 1874 general election. [FN533] Wilshire ran for Congress as a Conservative in that election, and *984 with Democratic support, he defeated the Republican nominee. [FN534] He did not run for reelection in 1876 and remained in Washington where he engaged in the private practice of law until his death on August 19, 1888. [FN535] His remains were returned to Little Rock for burial in Mt. Holly Cemetery.

Only one of the reconstruction era supreme court justices returned permanently to live in Little Rock. The irrepressible John M. McClure opened a law practice in Little Rock. Among the clients he attracted were the railroads whose interests he had so ably advanced before the Arkansas General Assembly. Despite calls for his prosecution, no charges were brought against him for his role in the 1874 coup d'etat. He continued his active participation in politics and was the 1876 Republican nominee for member of Congress from the third district. There were two Democratic candidates on the ballot, and McClure came within 261 votes of being elected. [FN536] In later years McClure traveled widely, and his obituary described him as one of the best known men in the entire country. He died at his home in Little Rock on July 7, 1915. [FN537] The Gazette, which had frequently vilified him during his tenure on the high court, published a conciliatory obituary which concluded:

He was widely known throughout the state and nation and his ability as a lawyer was generally recognized. During the bitter days of reconstruction he had many tilts with the opposition, and many harsh words were said of him, all of which have long since been buried. The fearless old fighter, pursuing the even tenor of his way and without the pale of politics, numbered among his friends many of the old political enemies who labored hard to dethrone him during the troublous times when Powell Clayton ruled the state with iron hand. [FN538]

[FNa1]. B.S.B.A., University of Arkansas, Fayetteville (1969); J.D., Harvard Law School (1971); Professor of Law, University of Arkansas at Little Rock School of Law.

[FN1]. See Ark. Code Ann. § 16-115-101 (Michie 1987).

[FN2]. See Ark. Code Ann. § 16-118-105 (Michie 1987).

[FN3]. Ark. Const. of 1836, art. VI, § 2.

[FN4]. 1 Ark. 279 (1839). Two years earlier the court had ruled in Taylor v. Governor, 1 Ark. 21 (1837), that it had the "power" to issue a mandamus to the governor, but the issue of the court's original jurisdiction was not argued in that case. A subsequent case, Hawkins v. Governor, 1 Ark. 570, 584 (1839), concluded that the court lacked "jurisdiction" to issue a mandamus to the head of a coordinate department of government.

[FN5]. See 1 Ark. at 310-11.

[FN6]. 12 Ark. 101 (1851).

[FN7]. 16 Ark. 193 (1855).

[FN8]. At least one justice argued that the supreme court did not lose jurisdiction when the circuit court position was filled. See Ex Parte Crise, 16 Ark. at 195-96 (English, C.J., dissenting).

[FN9]. See Ark. Const. of 1861, art. VI, § 2.

[FN10]. See ARK. SECRETARY OF STATE, HISTORICAL REPORT OF THE SECRETARY OF STATE 466 (1986).

[FN11]. See Ark. Const. of 1861, art. VI, § 14 ("The attorney for the circuit in which the Supreme Court is held shall attend the court and prosecute for the State.").

[FN12]. See Ark. Sup. Ct. Judgment Record H at 18.

[FN13]. See id. at 23.

[FN14]. See id. The pleading charged that Williams had taken an oath of allegiance to a "false and fraudulent" government which was the public enemy of the people of the Arkansas. See id.

[FN15]. Ark. Sup. Ct. Opinion Book L at 283-84 (opinions delivered at Washington, the temporary seat of government).

[FN16]. See reporter's note at 24 Ark. 1. The republished opinions appear at 24 Ark. 371-477.

[FN17]. The constitution was approved by a vote of 12,426 to 222. See OFFICIAL RECORDS OF THE REBELLION, ser. I, vol. 41, pt. iv., at 723 (1893). By contrast, over 60,000 votes had been cast in the 1860 gubernatorial election. See HISTORICAL REPORT OF THE SECRETARY OF STATE, supra note 10, at 241.

[FN18]. Lincoln had issued a proclamation in December of 1863 announcing that he would recognize any provisional state government of a Confederate state organized by at least ten percent of the state's electorate. See Presidential Proclamation of December 8, 1863, 13 Stat. 737 (1866). The 12,000 plus votes cast for the Constitution of 1864 easily satisfied Lincoln's ten percent threshold.

[FN19]. See MICHAEL B. DOUGAN, CONFEDERATE ARKANSAS-THE PEOPLE AND POLICIES OF A FRONTIER STATE IN WARTIME 125-26 (1976).

[FN20]. This process is described in Richard B. McCaslin, Reconstructing a Frontier Oligarchy: Andrew Johnson's Amnesty Proclamation and Arkansas, 49 ARK. HIST. Q. 313 (1990).

[FN21]. See Act 17 of 15th Ark. General Assembly, 1864 Ark. Acts 48.

[FN22]. See Rison v. Farr, 24 Ark. 161 (1866).

[FN23]. See THOMAS S. STAPLES, RECONSTRUCTION IN ARKANSAS 1862-1874, 109 (Peter Smith ed. 1964) (1923). See also WEEKLY ARK. GAZETTE, September 1, 1866, at 2 (quoting descriptions of the Conservative sweep as reported by Memphis Post and St. Louis Democrat).

[FN24]. Unionists still held a number of lower court posts. In February of 1867 the lower house of the General Assembly voted to impeach Judge Augustus N. Hargrove of the Ninth Judicial Circuit and Judge Elias Harrell of the Eighth Judicial Circuit, both of whom were accused, among other things, of anti-Confederate bias. See ARK. HOUSE JOURNAL 493-96, 552-58 (1866-67). Apparently, neither judge was ever tried by the senate. See id. at 916, 969, 996.

[FN25]. See HISTORICAL REPORT OF THE SECRETARY OF STATE, *supra* note 10, at 342.

[FN26]. See Act 35 of 16th Ark. General Assembly, 1866-67 Ark. Acts 99, § § 1-4. All blacks cohabiting as husband and wife were deemed lawfully married, and future marriages between blacks were to be governed by laws applicable to whites. See *id.* at § § 3 and 4. County clerks were directed, however, to record black marriages in a separate record books.

[FN27]. See *id.* at § § 2 and 5.

[FN28]. Act 122 of 16th Ark. General Assembly, 1866-67 Ark. Acts 298.

[FN29]. See Act 71 of 16th Ark. General Assembly, 1866-67 Ark. Acts 169. The pardon act was repealed when the Republicans gained control of the General Assembly following the adoption of the Constitution of 1868. See Act 57 of 17th Ark. General Assembly, 1868-69 Ark. Acts 213.

[FN30]. See Act 31 of the 16th Ark. General Assembly, 1866-67 Ark. Acts 90.

[FN31]. See ARK. HOUSE JOURNAL 289-91 (1866-67).

[FN32]. See 34th Tenn. Gen. Assembly, Spec. Sess. of July 4, 1866, at 23.

[FN33]. See Act of July 24, 1866, 14 Stat. 364 (1868).

[FN34]. See Paige E. Mulhollan, Arkansas General Assembly of 1866 and Its Effect on Reconstruction, 20 ARK. HIST. Q. 331, 333 (1961).

[FN35]. See ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863-1877, 224-26 (1988).

[FN36]. See U.S. CONST. art 1, § 5.

[FN37]. See generally Jan C. Sarna, A Promise for Reunion: Lincoln-Johnsonian Reconstruction in Arkansas, 1862-1866, 209-25 (1978) (unpublished M.A. thesis, Tulane University) (on file Hendrix College Library).

[FN38]. See generally FONER, *supra* note 35, at 261-68.

[FN39]. Act of March 2, 1867, 14 Stat. 428 (1868); Act of March 23, 1867, 15 Stat. 2 (1869); Act of July 19, 1867, 15 Stat. 14 (1869).

[FN40]. See § 2, Act of March 2, 1867, 14 Stat. 428 (1867). As explained *supra* in text accompanying note 34, Tennessee avoided congressional reconstruction.

[FN41]. See § 5, Act of March 2, 1867, 14 Stat. 428, 429 (1867).

[FN42]. See STAPLES, *supra* note 23, at 154.

[FN43]. The term "native" should not be taken literally since in 1868 very few adult Arkansans could claim birth in the state. As used in this article the term refers to Arkansans who were residents of the state prior to the Civil War.

[FN44]. Cf. MICHAEL B. DOUGAN, ARKANSAS ODYSSEY 241-42 (1995); Martha Ann Ellenburg, Reconstruction in Arkansas (1967) (unpublished Ph.D. dissertation, University of Missouri, Columbia) (photo. reprint 67-13,848 by University Microfilms, Inc., Ann Arbor, Michigan).

[FN45]. According to the 1860 census, blacks made up 26 percent of the state's 435,000 inhabitants. By 1870 the percentage of blacks in the population had declined slightly to 25 percent. See U.S. BUREAU OF CENSUS, THE

STATISTICS OF THE POPULATION OF THE UNITED STATES 1870, 3-5, Table I (1872).

[FN46]. See Ellenburg, *supra* note 44, at 46-47.

[FN47]. See generally STAPLES, *supra* note 23, at 169-74; Cal Ledbetter, Jr., *The Constitution of 1868: Conqueror's Constitution or Constitutional Continuity*, 44 ARK. HIST. Q. 16, 22-23 (1985); Orval T. Driggs, Jr., *The Issues of the Powell Clayton Regime, 1868-1871*, 8 ARK. HIST. Q. 1, 7 (1949).

[FN48]. On May 24, 1867, the United States Attorney General issued a formal opinion concluding that the Reconstruction Acts disenfranchised those state executive officers, judges with statewide jurisdiction, and members of the General Assembly who had taken an oath of allegiance to the United States and afterward engaged in rebellion against the United States. See 12 Op. Att'y Gen. 141 (1867). Congress later passed a third act extending the bar to all civil offices created by a state for the administration of justice. See Act of July 19, 1867, 15 Stat. 14 (1869). See also Eugene G. Feistman, *Radical Disenfranchisement in Arkansas 1867-68*, 12 ARK. HIST. Q. 126, 137 (1953).

[FN49]. See Act of March 23, 1867, 15 Stat. 2 (1869).

[FN50]. See Ledbetter, *supra* note 47, at 22-23.

[FN51]. The Reconstruction Act of March 2, 1867, placed Arkansas and Mississippi in the Fourth Military District. See 14 Stat. 428 (1868).

[FN52]. See Headquarters, Fourth Military District, General Order No. 31 (September 26, 1867), reprinted in DEBATES AND PROCEEDINGS OF THE CONVENTION WHICH ASSEMBLED AT LITTLE ROCK, JANUARY 7, 1868, UNDER THE PROVISIONS OF THE ACT OF CONGRESS OF MARCH 2ND, 1867, AND THE ACTS OF MARCH 23RD AND JULY 19TH, SUPPLEMENTARY THERETO, TO FORM A CONSTITUTION FOR THE STATE OF ARKANSAS 27 (Little Rock, 1868) [hereinafter DEBATES AND PROCEEDINGS OF 1868 CONSTITUTIONAL CONVENTION].

[FN53]. See Headquarters, Fourth Military District, General Order No. 43 (September 26, 1867), reprinted in DEBATES AND PROCEEDINGS OF 1868 CONSTITUTIONAL CONVENTION, *supra* note 52, at 33.

[FN54]. See Headquarters, Fourth Military District, General Order No. 37 (September 26, 1867), reprinted in DEBATES AND PROCEEDINGS OF 1868 CONSTITUTIONAL CONVENTION, *supra* note 52, at 32.

[FN55]. See generally DEBATES AND PROCEEDINGS OF THE 1868 CONSTITUTIONAL CONVENTION, *supra* note 52. Sixty-two of the seventy delegates were white. Of these, forty-five of the white delegates had lived in Arkansas prior to the war, and the remaining seventeen were recent immigrants to the state. There were eight black convention delegates, about half of whom had resided in the state prior to 1860. Based on voting patterns during the convention, forty-eight of the delegates supported Republican reconstruction policies, seventeen were Democrat-Conservative opponents of reconstruction, and five were not aligned with either camp. See Richard I. Hume, *The Arkansas Constitutional Convention of 1868: A Case Study in the Politics of Reconstruction*, 39 J. So. Hist. 183 (1973). See also Joseph M. St. Hilaire, *The Negro Delegates in the Arkansas Constitutional Convention of 1868: A Group Profile*, 33 Ark. Hist. Q. 38 (1974).

[FN56]. See Ledbetter, *supra* note 47, at 26. The committee members and the state of their birth were as follows: Joseph Brooks (New York); James L. Hodges (New York); John McClure (Ohio); James Portis (North Carolina); John N. Sarber (Pennsylvania); Clifford Sims (Pennsylvania); and Charles W. Walker (Arkansas). See DEBATES AND PROCEEDINGS OF 1868 CONSTITUTIONAL CONVENTION, *supra* note 52, at 4-11.

[FN57]. See DEBATES AND PROCEEDINGS OF 1868 CONVENTION, *supra* note 52, at 582.

[FN58]. See DEBATES AND PROCEEDINGS OF 1868 CONVENTION, *supra* note 52, at 611.

[FN59]. See DEBATES AND PROCEEDINGS OF 1868 CONVENTION, *supra* note 52, at 656-57.

[FN60]. See Ark. Const. of 1868, art. I, § 3; art. VIII, § 2.

[FN61]. See Ark. Const. of 1868, art. V, § 8. The Constitution set out the initial apportionment of legislative seats, which was to remain in effect until 1875. See Ark. Const. of 1868, art. XIV, § 2.

[FN62]. See Ark. Const. of 1868, art. VII, § 5; art. XV, § 6. Both sections permitted the General Assembly to provide another method for selecting circuit court judges and prosecuting attorneys. Under the 1836 Constitution, the General Assembly elected circuit court judges and prosecuting attorneys. See Ark. Const. of 1836, art. VI, § § 7 & 13. The selection method was changed to direct election by an 1848 amendment. The Constitutions of 1861 and 1864 provided for the direct election of circuit judges and prosecuting attorneys. See Ark. Const. of 1861, art. VI, § § 8 & 14; Ark. Const. of 1864, art. VII, § § 8 & 15.

[FN63]. See Ark. Const. of 1868, art. VII, § 3.

[FN64]. See DEBATES AND PROCEEDINGS OF THE 1868 CONVENTION, *supra* note 52, at 659 (statement of William A. Beasley of Columbia County); *id.* at 663 (statement of Daniel Coates of St. Francis County); *id.* at 672 (statement of Samuel J. Matthews of Drew County); *id.* at 674 (statement of James P. Portis of Ouachita County); *id.* at 675 (statement of R. G. Puntney of Drew County).

[FN65]. See DEBATES AND PROCEEDINGS OF THE 1868 CONVENTION, *supra* note 52, at 662 (statement of Joseph Brooks of Phillips County); *id.* at 664 (statement of George W. Dale of Independence County); *id.* at 665 (statement of Amos H. Evans of Monroe County); *id.* at 668 (statement of Robert Hatfield of Franklin County); *id.* at 671 (statement of Gayle H. Kyle of Dallas County); *id.* at 672 (statement of James W. Mason of Chicot County); *id.* at 672 (statement of Peter C. Misner of Independence County); *id.* at 675 (statement of Nathan N. Rawlings of Ouachita County); *id.* at 676 (statement of Franklin M. Rounsaville of Yell County); *id.* at 677 (statement of F. M. Sams of Madison County); *id.* at 678 (statement of Clifford Sims of Desha County, supporting four justices).

[FN66]. Ark. Const. of 1868, art. VII, § 4.

[FN67]. See *id.* at art. VIII, § 3, 4th subdivision.

[FN68]. *Id.* at art. VIII, § 3, proviso.

[FN69]. *Id.* at art. VIII, § 4.

[FN70]. *Id.* at art. VIII, § 5.

[FN71]. See ARK. CONST. OF 1868, Schedule, § § 1 and 2. These officers were then to serve as though elected at the November 1868 election. See *id.* at art. XV, § 3. The governor appointed all township and precinct officers. See *id.* at art. XV, § 5.

[FN72]. See STAPLES, *supra* note 23, at 251.

[FN73]. See ARK. GAZETTE, January 28, 1868, at 2.

[FN74]. See ARK. GAZETTE, February 18, 1868, at 2; STAPLES, *supra* note 23, at 248-51.

[FN75]. See Ellenburg, *supra* note 44, at 86-87.

[FN76]. See Act of March 11, 1868, 15 Stat. 41 (1869).

[FN77]. See Ledbetter, *supra* note 47, at 38-39.

[FN78]. See DEBATES AND PROCEEDINGS OF THE 1868 CONSTITUTION, *supra* note 52, at 795.

[FN79]. See Letter from Major General Alvan C. Gillem, Commander of Fourth Military District, to General U.S. Grant, Commander of Armies of the United States (April 23, 1868) reprinted in DEBATES AND PROCEEDINGS OF 1868 CONSTITUTIONAL CONVENTION, *supra* note 52, at 804-09.

[FN80]. The General Assembly convened on April 2, 1868, and ratified the Fourteenth Amendment on April 3, 1868. See ARK. HOUSE JOURNAL 20 (1868). After Congress recognized the new state government, the legislature adopted a second joint resolution approving the Fourteenth Amendment. See J. Res. IX, 17th Ark. General Assembly, 1868 Ark. Acts 347.

[FN81]. See Act of June 22, 1868, 15 Stat. 72 (1869). President Johnson vetoed the readmission bill on the grounds that Arkansas was already a state, but Congress immediately passed the bill over his veto. See *id.*

[FN82]. See WILLIAM H. BURNSIDE, THE HONORABLE POWELL CLAYTON 11-22 (1991).

[FN83]. See biographical sketch in ARK. GAZETTE, August 20, 1869, at 2.

[FN84]. See STAPLES, *supra* note 23, at 252. In his memoirs, Clayton addressed this charge by setting out what appears to be a credible listing of the nativity of each state executive officer. The governor, treasurer, attorney general, commissioner of immigration and state lands, and the superintendent of public instruction were all born in the north. The lieutenant governor, secretary of state, and auditor were southerners. See POWELL CLAYTON, THE AFTERMATH OF THE CIVIL WAR IN ARKANSAS 298-99 (1915).

[FN85]. See HISTORICAL REPORT OF THE SECRETARY OF STATE, *supra* note 10, at 337, 464.

[FN86]. See ARK. GAZETTE, November 3, 1891, at 2.

[FN87]. See DAVID Y. THOMAS, ARKANSAS IN WAR AND RECONSTRUCTION 385 (1926).

[FN88]. See ARK. GAZETTE (Weekly), January 1, 1867, at 2.

[FN89]. See ARK. GAZETTE, January 22, 1867, at 2. The senate voted 21 to 1 not to confirm Gregg.

[FN90]. See Harrison's obituary in ARK. GAZETTE, February 16, 1900, at 2.

[FN91]. See HISTORICAL REPORT OF THE SECRETARY OF STATE, *supra* note 10, at 334-35.

[FN92]. See ARK. HOUSE JOURNAL 410 (1860).

[FN93]. Most of the biographical information regarding Bowen is taken from Gary Craven Gray, Thomas Meade Bowen: The Early Years, 1835-1875 (1973) (unpublished M.A. thesis, University of Denver) (on file at University of Denver). Shorter biographical sketches of Bowen appear in 1 DICTIONARY OF AMERICAN BIOGRAPHY 506 (1928) (reprint 1964), and 12 NATIONAL CYCLOPAEDIA OF AMERICAN BIOGRAPHY 560 (1904).

[FN94]. See Military Records of John McClure, 57th Ohio Infantry (September 2, 1861, to August 14, 1865) (on file at National Archives, Washington, D.C.).

[FN95]. See Driggs, *supra* note 47, at 5 n.19. McClure's reputation as a gambler predated his army days. An article in a newspaper from his home state characterized his legal abilities as "all acquired in bar rooms, at poker tables, and on the race course." CINCINNATI ENQUIRER (date unknown), reprinted in ARK. GAZETTE, March 10, 1871, at 4.

[FN96]. See CLAYTON, *supra* note 84, at 301; Driggs, *supra* note 47, at 5.

[FN97]. See Cortez A.M. Ewing, *Arkansas Reconstruction Impeachments*, 13 *ARK. HIST. Q.* 137, 149 (1954).

[FN98]. See *DEBATES AND PROCEEDINGS OF THE 1868 CONVENTION*, supra note 52, at 60. As explained in the text supra at note 58, no floor amendments were permitted to the committee's proposed draft constitution.

[FN99]. See *CINCINNATI ENQUIRER* (date unknown), reprinted in *ARK. GAZETTE*, March 10, 1871, at 4.

[FN100]. See *S. REP. NO. 42-512*, at 344-45 (1873) (testimony of John McClure). The act authorizing the levee bonds can be found at 1871 *Ark. Acts* 88.

[FN101]. McClure admitted that he once agreed to refrain from attacking a particular railroad in exchange for the payment of \$6,000. See *id.* at 345.

[FN102]. Except as otherwise noted, the biographical material on McClure is drawn from 19 *THE NATIONAL CYCLOPAEDIA OF AMERICAN BIOGRAPHY* 224 (1926); *THE ENCYCLOPEDIA OF THE NEW WEST* 190-91 (1881); C. R. STEVENSON, *ARKANSAS TERRITORY-STATE AND ITS HIGHEST COURTS* 71 (1946); and McClure's obituary in the *ARK. GAZETTE*, July 8, 1915, at 10.

[FN103]. The biographical information on Wilshire is drawn from *BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS 1774-1989*, SEN. DOC. NO. 100-34, at 2064 (1989); 2 *FAY HEMPSTEAD, HISTORICAL REVIEW OF ARKANSAS* 718 (1911); 13 *THE NATIONAL CYCLOPAEDIA OF AMERICAN BIOGRAPHY* 483 (1906); 1 *JOHN HALLUM, BIOGRAPHICAL AND PICTORIAL HISTORY OF ARKANSAS* 453 (1887); and Wilshire's obituary in the *ARK. GAZETTE*, August 21, 1888, at 4.

[FN104]. The old court met in June of 1868 but issued no opinions during the June term. See reporter's note at 25 *Ark. 190*. The new court first convened on July 6, 1868, but the court issued no formal opinions until December. See *Ark. Sup. Ct. Judgment Record A*, No. 2, at 207-12.

[FN105]. 25 Ark. 284 (1869).

[FN106]. The text of the constitutional provision is set out supra in text accompanying note 66.

[FN107]. 25 Ark. at 287.

[FN108]. See *Jones v. Mayor and Aldermen of the City of Little Rock*, 25 Ark. 301 (1869).

[FN109]. 25 Ark. 527 (1869). In *Ex parte Fuller*, 25 Ark. 443 (1869), also decided at the June 1869 term, the court carefully refrained from expressing any opinion on the original jurisdiction of the court to issue a writ of mandamus.

[FN110]. The court ultimately decided not to issue the writ, but its conclusion on the jurisdictional issue is hardly dictum given the space it devoted to the question.

[FN111]. See *Ark. Const. of 1836*, art. VI, § 2; *Ark Const. of 1864*, art. VII, § 6.

[FN112]. See *Ark. Sup. Ct. Judgment Record A*, No. 2, at 256.

[FN113]. The judgment in *Price & Barton v. Page* was entered on November 29, 1869. See *Ark. Sup. Ct. Judgment Record A*, No. 2, at 310.

[FN114]. See *ARK. GAZETTE*, May 14, 1869, at 2; *ARK. GAZETTE*, June 2, 1869, at 2.

[FN115]. See *STAPLES*, supra note 23, at 379-82; *DOUGAN*, supra note 44, at 256-57; *Driggs*, supra note 47, at 61-66.

[FN116]. See *STAPLES*, supra note 23, at 374; *DOUGAN*, supra note 44, at 256; *Driggs*, supra note 47, at 63-65.

[FN117]. See DALLAS T. HERNDON, CENTENNIAL HISTORY OF ARKANSAS 299 (1922); James H. Atkinson, The Arkansas Gubernatorial Campaign and Election of 1872, 1 ARK. HIST. Q. 307, 308 n.3 (1942).

[FN118]. See S. REP. NO. 42-512, at 217 (1873) (testimony of Joseph Brooks).

[FN119]. See Ark. Const. of 1868, art. VII, § 5; Schedule, § § 5 and 6.

[FN120]. See Act 19 of 17th Ark. General Assembly, 1868 Ark. Acts 50.

[FN121]. See Ex parte Allen, 26 Ark. 9 (1870).

[FN122]. See HERNDON, supra note 117, at 299.

[FN123]. See STAPLES, supra note 23, at 380-83. During most of the reconstruction period Democrats and Conservatives worked together to oppose the Republicans and their policies. Republican opponents often put forward a common ticket on which some candidates ran as Democrats and others as Conservatives. Over a period of time the two opposition groups merged into a single Democratic party. Rather than attempt to define the precise point at which the merger culminated, this article uses the term "Democrat" to refer to members of both opposition groups.

[FN124]. There were twenty-one Republicans in the senate (including both Minstrels and Brindletails), five Democrats, and one Liberal Republican. The house consisted of fifty-four Republicans (again both Minstrels and Brindletails), twenty Democrats, and eight Liberal Republicans. See Driggs, supra note 47, at 69 n.1, (quoting from Weekly Herald, January 7, 1871). According to the Gazette the senate totalled eighteen Republicans, five Conservatives (Democrats) and three Liberal Republicans. The house consisted of forty-four Republicans, twenty-nine Conservatives (Democrats), and nine Liberal Republicans. See ARK. GAZETTE, November 19, 1870, at 4.

[FN125]. The constitution provided four year terms for the governor, lieutenant governor, secretary of state, auditor, treasurer, attorney general, and superintendent of public instruction. See Ark. Const. of 1868, art. VI, § 1. Senators normally served a four year term, but to ensure that half the senate was elected every two years, the constitution limited half the senators elected in 1868 to two year terms. See Ark. Const. of 1868, art. V, § 9.

[FN126]. Prior to ratification of the 17th Amendment to the United States Constitution in 1912, United States senators were elected by the legislature. See U.S. CONST. art. I, § 3 (amended 1912).

[FN127]. See S. REP. NO. 42-512, at 389 (1873) (minority report). The alleged political deal also involved Clayton's certification of certain congressional candidates favored by the Democrats. The allegations against Clayton were the subject of extensive hearings before a Senate committee, and two of the three committee members concluded that the charges were not sustained because there was no direct evidence linking Clayton with any agreements made by his friends and supporters. See id. at 1-10.

[FN128]. Bowen was actively involved in making deals to secure the election of Clayton. See id. at 91-92, 100 (testimony of E. A. Fulton); id. at 168, 171 (testimony of E. H. Chamberlain); id. at 295 (testimony of A. A. C. Rogers).

[FN129]. Ark. Const. of 1868, art. V, § 4.

[FN130]. See Ark. Sup. Ct. Judgment Record A, No. 2, at 412.

[FN131]. 26 Ark. 100 (1970).

[FN132]. Contrary to some histories of the period, the initial application was not filed on December 14, 1870. See, for example, Ewing, supra note 97, at 140. The attorney general first filed a quo warranto application on November 12, 1870, but apparently Johnson was not properly served with the application. See Ark. Sup. Ct. Docket Book, Case

No. 174 (December Term 1870). That application was dismissed, and a new application filed on December 14, 1870. See Ark. Sup. Ct. Docket Book, Case No. 190 (December Term 1870).

[FN133]. See State v. Johnson, 26 Ark. 281 (1871).

[FN134]. See ARK. HOUSE JOURNAL 83 (1871).

[FN135]. See *id.* at 227-30 (1871).

[FN136]. See *id.* at 237-38 (1871).

[FN137]. See Ark. Sup. Ct. Judgment Record A, No. 2, at 438-39. An entry on February 1, 1871, states that the court adjourned until February 6, 1871, due to the illness of the Chief Justice. An entry on February 6, 1871, states that the court could not meet because Justice Bowen had resigned.

[FN138]. See Ark. Sup. Ct. Judgment Record A, No. 2, at 439-40; ARK. GAZETTE, February 14, 1871, at 4.

[FN139]. See ARK. HOUSE JOURNAL 337 (1871).

[FN140]. See ARK. GAZETTE, February 16, 1871, at 4. The opinion explaining the issuance of the writ of quo warranto is reported in State v. Johnson, 26 Ark. 281, 281-88 (1871).

[FN141]. See *supra* text accompanying notes 10-15.

[FN142]. See 26 Ark. at 283.

[FN143]. The dissent, which was not issued until the court ruled on the merits of the case, is reported at 26 Ark. 295-308. Several times in the dissent Gregg uses the pronoun "we," suggesting that he expected another justice to join him. Newspaper accounts state that Harrison announced from the bench that he too dissented, but Harrison did not sign the dissent later recorded in the court's opinion book. See ARK. GAZETTE, February 16, 1871, at 4.

[FN144]. See discussion *supra* in text accompanying note 109.

[FN145]. See ARK. GAZETTE, February 16, 1871, at 4.

[FN146]. See ARK. GAZETTE, February 17, 1871, at 4. The resignation and subsequent appointments were noted in Ark. Sup. Ct. Judgment Record A, No. 2, at 453-54.

[FN147]. According to the senate journal, Clayton forwarded certain nominations on the morning of February 16, 1871, but the journal does not indicate which nominations. See ARK. SENATE JOURNAL 178 (1871).

[FN148]. See ARK. HOUSE JOURNAL 376-77 (1871). Caswell B. Neal, a Democratic representative from Sebastian County, later testified that Brindletail and Democratic caucuses had jointly agreed to impeach Clayton. See S. REP. NO. 42-512, at 179 (1872) (testimony of Caswell B. Neal).

[FN149]. ARK. HOUSE JOURNAL 369-71 (1871).

[FN150]. See *State of Arkansas ex rel. Powell Clayton v. James M. Johnson*, Ark. Sup. Ct. Docket Book, Case No. 212 (December Term 1870).

[FN151]. See *id.*

[FN152]. Letter from Governor Powell Clayton to Speaker of the Ark. House of Rep. (February 16, 1871) reprinted in ARK. HOUSE JOURNAL 385-86 (1871).

[FN153]. According to one anti-Clayton senator, the missing solons were in "houses of prostitution, or skulking near the graveyard, in company with prostitutes." ARK. SENATE JOURNAL 190-91 (1871). In reality, the absent senators were hiding in the country home of former justice Thomas Bowen. See S. REP. NO. 42-512, at 54 (1873) (testimony of O. P. Snyder); *id.* at 133-34 (testimony of O. A. Hadley).

[FN154]. See Ewing, *supra* note 97, at 143. The senate last met on Thursday, February 16, 1871. It was unable to assemble a quorum until Saturday, February 25, 1871. See ARK. SENATE JOURNAL 177-86 (1871). The senate was not officially informed of Clayton's impeachment until March 2, 1871. See ARK. SENATE JOURNAL 208 (1871).

[FN155]. See ARK. HOUSE JOURNAL 395, 408-409 (1871).

[FN156]. See *id.* at 395.

[FN157]. See Ark. Sup. Ct. Judgment Record A, No. 2, at 460.

[FN158]. This seems to have been the concern of the Clayton faction. See S. REP. NO. 42-512, at 60 (testimony of Charles W. Tankersly) & 127 (testimony of O. A. Hadley).

[FN159]. Johnson's letter to Clayton stated that the articles of impeachment had been presented to the senate, thereby suspending Clayton, and demanded "possession of the office, books, papers, etc., and all the facilities appertaining to said Executive office." Letter from James M. Johnson to Powell Clayton (February 22, 1871) reprinted in TRIAL OF HON. JOHN MCCLURE CHIEF JUSTICE OF THE SUPREME COURT OF ARKANSAS BEFORE THE SENATE OF THE STATE OF ARKANSAS ON IMPEACHMENT BY THE HOUSE OF REPRESENTATIVES 74 (1872) (James M. Pomeroy, Reporter).

[FN160]. See S. REP. NO. 42-512, at 128-33 (testimony of O.A. Hadley).

[FN161]. The one paragraph opinion delivered by the court on February 25, 1871, is reported in 26 Ark. at 295. During the week between the issuance of the writ of quo warranto and the court's final decision, the court disposed of several procedural motions by the lieutenant governor including his demand for a jury trial. The opinions related to the disposition of these motions are reported in 26 Ark. at 288-295.

[FN162]. See Aff. of James L. Hodges (February 17, 1871), State v. Johnson, 26 Ark. 281 (1871) (Case No. 190, December 1870 term).

[FN163]. See Aff. of James M. Johnson (February 17, 1871), State v. Johnson, 26 Ark. 281 (1871) (Case No. 190, December 1870 term).

[FN164]. See Aff. of George W. McCown (February 17, 1871), State v. Johnson, 26 Ark. 281 (1871) (Case No. 190, December 1870 term).

[FN165]. Since there is no affidavit from Attorney General Montgomery in the court records, his statement must have been delivered in open court. The quoted paraphrase of the statement appeared in the ARK. GAZETTE, February 23, 1871, at 2.

[FN166]. See Ark. Sup. Ct. Judgment Record A, No. 2, at 463.

[FN167]. The to-and-fro exchange between the two bodies is described in Ewing, *supra* note 97, at 145-47. See also ARK. SENATE JOURNAL 188-89, 208-09 (1871); ARK. HOUSE JOURNAL 393, 480-82, 490, 511-14, 524 (1871).

[FN168]. See ARK. SENATE JOURNAL 217 (1871); ARK. HOUSE JOURNAL 543 (1871).

[FN169]. See ARK. HOUSE JOURNAL 537-41 (1871).

[FN170]. See ARK. SENATE JOURNAL 266 (1871).

[FN171]. See Ark. Const. of 1868, art. VI, § 11.

[FN172]. See ARK. SENATE JOURNAL 266 (1871).

[FN173]. See ARK. SENATE JOURNAL 272 (1871); ARK. HOUSE JOURNAL 716-17 (1871).

[FN174]. See TRIAL OF JOHN MCCLURE, *supra* note 159, at 26. The house dropped the first two charges because they involved McClure's conduct as an associate justice. McClure had resigned as associate justice when Clayton appointed him chief justice.

[FN175]. See TRIAL OF JOHN MCCLURE, *supra* note 159, at 83-108.

[FN176]. See ARK. SENATE JOURNAL 198 (1871).

[FN177]. See *id.* at 358, 370 (1871).

[FN178]. ARK. GAZETTE, January 17, 1871, at 4.

[FN179]. 27 Ark. 12 (1871).

[FN180]. 27 Ark. at 14.

[FN181]. S. REP. NO. 43-512, at 380, 403 (1873).

[FN182]. See Gray, *supra* note 93, at 182.

[FN183]. Secretary of State James M. Johnson testified that all important political moves by the regular Republicans during the 1872 campaign were approved by a triumvirate consisting of Clayton, McClure, and acting governor Hadley. See H.R. REP. NO. 43-2, at 392 (1874) (testimony of J. M. Johnson).

[FN184]. Issues of the Morning Republican are not available for the first six months of 1871. The masthead for the issue of December 31, 1870, indicates that Price and Barton were the publishers. See MORNING REPUBLICAN (Little Rock), December 31, 1870, at 1. According to the July 1, 1871, masthead, McClure had replaced Barton as publisher. See MORNING REPUBLICAN (Little Rock), July 1, 1871, at 1. Beginning February 13, 1872, the name of the newspaper was changed to the "LITTLE ROCK DAILY REPUBLICAN." See LITTLE ROCK DAILY REPUBLICAN, February 13, 1872, at 1. The word "Daily" was dropped from the masthead on July 30, 1874. See LITTLE ROCK REPUBLICAN, July 30, 1874, at 1.

[FN185]. McClure is shown as a member of the state central committee as early as April of 1872. See LITTLE ROCK DAILY REPUBLICAN, April 8, 1872, at 2. McClure served as acting chairman of the Republican State Central Committee during the canvass for the election of 1872. See H.R. REP. NO. 43-771, at 89 (1874) (testimony of John McClure).

[FN186]. See 14 THE NATIONAL CYCLOPAEDIA OF AMERICAN BIOGRAPHY 335 (1910) (reprint 1967).

[FN187]. See Act 7 of 17th Ark. General Assembly, 1868 Ark. Acts 25.

[FN188]. See HISTORICAL REPORT OF THE SECRETARY OF STATE, *supra* note 10, at 456. According to testimony before a U.S. Senate committee investigating charges against Powell Clayton, Clayton appointed Bennett to the circuit bench about a month after the latter's admission to the bar. See S. REP. NO. 42- 512, at 243 (1873) (testimony of W. H. Rogers).

[FN189]. See Clio Harper, *Prominent Members of the Early Arkansas Bar-Biographies of 1797-1884*, at 328 (1940) (unpublished manuscript, on file with Arkansas History Commission); Carolyn Pollan, *Fort Smith Under Union Military Rule September 1, 1863- Fall, 1865*, 6 J. FT. SMITH HIST. SOC. 1, 6 n.10 (1982). See also THOMAS, *supra* note 87, at 385; GOODSPEED PUBLISHING CO., *HISTORY OF BENTON, WASHINGTON, CARROLL, MADISON, CRAWFORD, FRANKLIN, AND SEBASTIAN COUNTIES, ARKANSAS 224-25* (1889).

[FN190]. See *HISTORICAL REPORT OF THE SECRETARY OF STATE*, *supra* note 10, at 475-76.

[FN191]. See STAPLES, *supra* note 23, at 389; DOUGAN, *supra* note 44, at 258.

[FN192]. See *U.S. v. Clayton*, 25 F. Cas. 458 (C.C.E.D. Ark. 1871) (No. 14,814).

[FN193]. See S. REP. NO. 42-512, at 1-21 (1873). Clayton was represented in the hearings by Bowen and McClure.

[FN194]. Each of the three opposition parties named three members to a joint campaign committee. See *ARK. GAZETTE*, August 9, 1872, at 4.

[FN195]. See Act 7 of 17th Ark. General Assembly, 1868 Ark. Acts 25.

[FN196]. This information comes from a short autobiography provided by Baxter in 1876. See Letter from Elisha H. Baxter to Robert W. Trimble (May 27, 1876) (on file with Arkansas History Commission, Robert W. Trimble collection).

[FN197]. See generally STAPLES, *supra* note 23, at 388-95; DOUGAN, *supra* note 44, at 258-59.

[FN198]. The other nominee on the Reform Republican ticket was John Whytock, circuit judge for the seventh circuit (Hot Spring, Saline, Prairie, White and Pulaski Counties), who soon withdrew his nomination and was replaced by John T. Bearden. See JOHN H. HARRELL, *THE BROOKS AND BAXTER WAR: A HISTORY OF THE RECONSTRUCTION PERIOD IN ARKANSAS 125, 162* (1893).

[FN199]. See 1 *ANNALS OF ARKANSAS 190* (Dallas T. Herndon ed., 1947).

[FN200]. See Ark. Const. of 1836, art. IV, § 8; Ark. Const. of 1864, art. IV, § 8. The Constitution of 1861 did provide for voting by ballot, but the only election held under that constitution occurred in parts of the state in 1862. See Ark. Const. of 1861, art. IV, § 8.

[FN201]. See *Ark. Const. of 1868, art. VIII, § 1*: "In all elections by the people the electors shall vote by ballot." This section was amended in 1873. See *infra* text accompanying note 238.

[FN202]. This balloting practice continued until the adoption of the Australian ballot in 1891. See Act 30 of 1891, 1891 Ark. Acts 32. A description of balloting practices prior to 1891 can be gleaned from *Jones v. Glidewell*, 53 Ark. 161, 13 S.W. 723 (1890). Ironically, the supreme court did not question the practice of privately provided ballots until a group of black leaders used it to enforce loyalty to the Republican party. In *Jones v. Glidewell* a faction within the black community agreed to "open" their ballots before depositing them in the ballot box. This enabled poll watchers to determine whether a voter was attempting to vote "a Democratic split or stripped ticket." Voters who attempted to vote without exhibiting their ticket were subjected to threats and intimidation. The court concluded that such tactics deprived the voters of their constitutional right to a secret ballot.

[FN203]. See George H. Thompson, *Leadership in Arkansas Reconstruction 178* (1968) (unpublished Ph.D. dissertation, Columbia University) (photo. reprint 69-9221 by University Microfilms, Inc, Ann Arbor, Michigan).

[FN204]. See *ARK. GAZETTE*, December 13, 1872, at 4. Johnson later testified to a slightly different vote total-41,681 votes for Baxter, and 38,415 votes for Brooks. See H.R. REP. NO. 43-2, at 387 (1874) (testimony of J. M. Johnson).

[FN205]. In testimony before a congressional committee Johnson identified the four counties as Greene, Johnson, Prairie, and Scott. See H.R. REP. NO. 43-2, at 387 (1874) (testimony of J. M. Johnson). Later in the same testimony he listed Greene, Johnson, Poinsett, and Scott. See *id.* at 393. Shortly before the election McClure prepared proclamations for acting governor Hadley's signature ordering new registrations in Greene and Johnson counties. See *id.* at 265-66 (testimony of Frank Strong). This was apparently the basis for not counting returns from those counties.

[FN206]. The final votes totals for the supreme court were:

M. L. Stephenson	40,763
E. J. Searle	40,502
William Harrison	39,136
J. T. Bearden	39,230

ARK. GAZETTE, December 13, 1872, at 4.

[FN207]. See Act of June 10, 1872, 17 Stat. 348 (1872).

[FN208]. See Harrison v. Hadley, 11 F. Cas. 649 (C.C.E.D. Ark. 1873) (No. 6,137).

[FN209]. The biographical information on Stephenson is drawn from Harper, *supra* note 189, at 351; THOMAS, *supra* note 87, at 386; and Stephenson's obituary in the ARK. GAZETTE, September 19, 1911.

[FN210]. See HISTORICAL REPORT OF THE SECRETARY OF STATE, *supra* note 10, at 463.

[FN211]. See HISTORICAL REPORT OF THE SECRETARY OF STATE, *supra* note 10, at 456. C. C. Waters held the seat for twenty-nine days between Bennett and Stephenson.

[FN212]. See H.R. REP. NO. 43-771, at 66 (1874) (testimony of Robert A. Burton).

[FN213]. See Ark. Const. of 1868, art. VI, § 19; § 55, Act 73 of 1868, 1868 Ark. Acts 326.

[FN214]. See Ark. Const. of 1868, art. V, § 14.

[FN215]. The law required the secretary of state to lay before each house a list of members elected based on the returns of his office. See Act 73 of 17th Ark. General Assembly, 1868 Ark. Acts 326. Johnson testified that he issued tickets to control admission to the legislative chambers. See H.R. REP. NO. 43-2, at 391 (1874) (testimony of J. M. Johnson).

[FN216]. The secretary of state returned the vote to the governor, who issued a proclamation declaring the person with the highest number of votes elected to Congress. See § 50, Act 73 of 17th Ark. General Assembly, 1868 Ark. Acts 325.

[FN217]. See H.R. REP. NO. 43-2, at 213-15 (1874) (testimony of John McClure); *id.* at 373-76 (testimony of J. N. Smithee). Governor Baxter later issued certificates of election to Hodges and Wilshire as well as Oliver P. Snyder, the Minstrel candidate in the Second Congressional District. The elections of all three men were challenged before the U.S. House of Representatives, which ultimately seated Hodges and Snyder, but gave Wilshire's seat to Gunter. See HISTORICAL REPORT OF THE SECRETARY OF STATE, *supra* note 10, at 295.

[FN218]. See H.R. REP. NO. 43-771, at 40 (1874) (testimony of John M. Clayton).

[FN219]. See *id.*

[FN220]. See ARK. SENATE JOURNAL 15-17 (1873). These vote totals differ slightly from those reported by Johnson in December. See text *supra* at note 204.

[FN221]. See *id.* at 19.

[FN222]. See ARK. GAZETTE, January 23, 1873, at 2.

[FN223]. See Ark. Const. of 1868, art. VI, § 19.

[FN224]. See HERNDON, *supra* note 117, at 189.

[FN225]. See ARK. GAZETTE, January 8, 1873, at 2.

[FN226]. See *supra* text accompanying note 208.

[FN227]. See ARK. GAZETTE, January 23, 1873, at 1. The assistant sergeant-at-arms issued several subpoenas but then quickly withdrew them. See ARK. GAZETTE, January 28, 1873, at 4.

[FN228]. See Gray, *supra* note 93, at 182-84.

[FN229]. Dorsey had moved to the state from Sandusky, Ohio, in the spring of 1871. See ARK. GAZETTE, February 17, 1871, at 4.

[FN230]. See ARK. GAZETTE, January 19, 1873, at 2. The vote is reported at ARK. SENATE JOURNAL 124-45 (1873).

[FN231]. See STAPLES, *supra* note 23, at 402-03; H.R. REP. NO. 43-2, at 414 (1874) (testimony of Henry M. Cooper); ARK. GAZETTE, March 11, 1873, at 1. Baxter claimed that the only Democrats he appointed to office in the spring of 1873 were first cleared by Powell Clayton. See H.R. REP. NO. 43-2, at 414 (1874) (testimony of Elisha Baxter).

[FN232]. See Act 48 of 17th Ark. General Assembly, 1868 Ark. Acts 148-53.

[FN233]. The text of the original bill is set out in HARRELL, *supra* note 198, at 172-73, and ARK. GAZETTE, April 5, 1873, at 2.

[FN234]. See J. Res. of March 10, 1871, 18th Ark. General Assembly, 1871 Ark. Acts 351.

[FN235]. See Ark. Const. of 1868, art. XIII, § 1.

[FN236]. See J. Res. of January 21, 1873, 19th Ark. General Assembly, 1873 Ark. Acts. 483.

[FN237]. See compiler's note to Ark. Const. of 1868, art. VIII, § 3 (1873).

[FN238]. See ARK. GAZETTE, April 20, 1873, at 1, 2.

[FN239]. See vote total from governor's race set out *supra* text accompanying note 204.

[FN240]. See H.R. REP. NO. 43-2, at 412 (1874) (testimony of Elisha Baxter). There is no other evidence of a Republican effort to defeat the amendment. In fact, an election day editorial in the Republican argued that adoption of the amendment would not cause the party to lose the state. See LITTLE ROCK DAILY REPUBLICAN, March 3,

1873, at 2.

[FN241]. See ARK. GAZETTE, May 21, 1873, at 1.

[FN242]. The extent of McClure's control is difficult to prove. McClure admitted that he wrote a good many articles for the Daily Republican, but he denied that he supervised the editorial columns of the paper. See H.R. REP. NO. 43-2, at 215 (1874) (testimony of John McClure).

[FN243]. See H.R. REP. NO. 43-771, at 19, 95 (1874) (testimony of John McClure). McClure may have erred in dating the start of the war to February. As late as mid-March of 1873 the Republican published an editorial praising Baxter's devotion to the Republican cause. See LITTLE ROCK DAILY REPUBLICAN, March 13, 1873, at 2. The first critical editorial appeared on April 7, 1873. See LITTLE ROCK DAILY REPUBLICAN, April 7, 1873, at 2.

[FN244]. See ARK. GAZETTE, April 11, 1873, at 2.

[FN245]. See H.R. REP. NO. 43-771, at 18 (1874) (testimony of John McClure).

[FN246]. See HARRELL, *supra* note 198, at 175; H.R. REP. NO. 43-2, at 270 (1874) (testimony of M. L. Stephenson). See also Letter from Elisha Baxter to New York Herald (April 28, 1874), reprinted in H.R. REP. NO. 43-2 at 427 (1874).

[FN247]. See LITTLE ROCK DAILY REPUBLICAN, March 27, 1873, at 2; April 5, 1873, at 2; April 7, 1873, at 2.

[FN248]. See ARK. GAZETTE, April 5, 1873, at 2 (suggesting that McClure was a paid lobbyist for the bill).

[FN249]. In the 1872 election Wilshire was a third district congressional candidate on the Baxter ticket. Baxter issued a certificate of election to Wilshire, but his election was contested by Thomas M. Gunter. Wilshire served in Congress until June 16, 1874, when the U.S. House of Representatives decided that Gunter was entitled to the seat. See HISTORICAL REPORT OF THE SECRETARY OF STATE, *supra* note 10, at 295 n.6.

[FN250]. ARK. GAZETTE, April 9, 1873, at 2.

[FN251]. LITTLE ROCK DAILY REPUBLICAN, April 10, 1873, at 2.

[FN252]. McClure prepared amendments to the bill in an effort to make it more palatable to Baxter. See LITTLE ROCK DAILY REPUBLICAN, May 21, 1874, at 2. The senate adopted the amendments and sent the bill back to the house, which failed to concur with the senate amendments. See ARK. GAZETTE, April 10, 1873, at 1, 3; April 25, 1873, at 4; April 26, 1873, at 4.

[FN253]. See Ark. Const. of 1868, art. VI, § 19.

[FN254]. See ARK. GAZETTE, April 19, 1873, at 4.

[FN255]. ARK. GAZETTE, April 20, 1873, at 1. "McPocre," of course, was a pejorative reference to the poker-playing chief justice. See *supra* text accompanying note 95.

[FN256]. See ARK. GAZETTE, April 22, 1873, at 2. McClure's issuance of a similar writ during the Clayton-Johnson confrontation had led to the chief justice's impeachment. See *supra* text accompanying note 155. Professor Thompson questions the accuracy of the Gazette's conspiracy theory in Thompson, *supra* note 203, at 207.

[FN257]. See ARK. GAZETTE, April 20, 1873, at 1. The vote against hearing the petition was 63 to 8.

[FN258]. See H.R. REP. NO. 43-127, at 4 (1875). According to the Gazette only eight members voted to grant the petition. See ARK. GAZETTE, April 20, 1873, at 1.

[FN259]. See H.R. REP. NO. 43-771, at 18 (1874) (testimony of John McClure). Baxter's appointment of some forty house members to public office after the session ended lends credence to McClure's charge.

[FN260]. These conclusions regarding the reasons for the failure of Brooks' April petition are based on the statements of individual legislators explaining their vote on Brooks' petition, as reported in the ARK. GAZETTE, April 20, 1873, at 4; April 23, 1873, at 1. See also discussion in Thompson, supra note 203, at 204.

[FN261]. See Act 19 of 1868, 1868 Ark. Acts. 50.

[FN262]. See ARK. GAZETTE, April 10, 1873, at 1.

[FN263]. ARK. GAZETTE, May 11, 1873, at 2.

[FN264]. Yonley had joined the pro-Union state government in 1864 and served as chief justice of that government's supreme court from 1864 to 1866. See HISTORICAL REPORT OF THE SECRETARY OF STATE, supra note 10, at 450.

[FN265]. See HARRELL, supra note 198, at 180. As early as January of 1873 English had offered to publish communications from Baxter in the Arkansas Gazette without it appearing that Baxter was the author. See Letter from E. H. English to Gov. Baxter (January 28, 1873) (on file with Arkansas History Commission, L. C. Gulley Collection).

[FN266]. H.R. REP. NO. 43-771, at 37 (1874) (testimony of Stephen R. Harrington).

[FN267]. See H.R. REP. NO. 43-2, at 408 (1874) (testimony of John Peay).

[FN268]. See ARK. GAZETTE, May 17, 1873, at 1. See also H.R. REP. NO. 43-2, at 270, 444 (1874) (testimony of M. L. Stephenson and Robert C. Newton). Ironically, during the Civil War Newton commanded a Confederate force that captured Baxter and sent the future governor to Little Rock to be tried for treason. See ANNALS OF ARKANSAS, supra note 199, at 191.

[FN269]. See ARK. GAZETTE, June 3, 1873, at 4.

[FN270]. See Supreme Court Judgment Book C, No. 1, at 292-293.

[FN271]. A question arose during oral argument as to whether the application was defective because made on the relation of Brooks. Yonley offered to strike Brooks' name from the pleading, but since Baxter's attorneys and the court were more focused on the jurisdictional question, this offer was not pursued. See *State ex rel. Brooks v. Baxter*, 28 Ark. at 130-31.

[FN272]. The pleading is reprinted in ARK. GAZETTE, June 3, 1873, at 4.

[FN273]. See H.R. REP. NO. 43-2, at 270 (1874) (testimony of E. J. Searle); *id.* at 266 (testimony of M. L. Stephenson). Stephenson testified that a majority of the justices agreed in chambers that the court lacked jurisdiction of the case. See *id.*

[FN274]. See *id.* at 266-67 (testimony of M. L. Stephenson). See also *State ex rel. Brooks v. Baxter*, 28 Ark. 129, 131 (1873).

[FN275]. See H.R. REP. NO. 43-771, at 6 (1874) (testimony of John McClure). A later witness confirmed this story. See H.R. REP. NO. 43-2, at 247 (1874) (testimony of E. N. Hill).

[FN276]. See H.R. REP. NO. 43-2, at 339 (1874) (testimony of W. S. Oliver).

[FN277]. See H.R. REP. NO. 43-2, at 410 (1874) (testimony of Elisha Baxter). Justices Gregg and Stephenson, however, discounted any suggestion that a display of military force by the governor influenced the court's decision. See H.R. REP. NO. 43-2, at 186 (1874) (testimony of Lafayette Gregg); *id.* at 270 (testimony of M. L. Stephenson).

[FN278]. See ARK. GAZETTE, June 5, 1873, at 4.

[FN279]. See H.R. REP. NO. 43-2, at 267 (1874) (testimony of M. L. Stephenson).

[FN280]. In a letter to the New York Herald, Baxter accused McClure of being behind Yonley's filing of the application. See Letter from Elisha Baxter to New York Herald (April 28, 1874), reprinted in H.R. REP. NO. 43-2, at 427 (1874).

[FN281]. Rumors that the quo warranto would be filed first appeared as early of May 9, 1873. See ARK. GAZETTE, May 9, 1873, at 2. Yonley's application for the writ states that Baxter had illegally used the office of governor for some three months. Since Baxter had been in office four and one half months when the application was filed, it seems likely that it was drafted in early May.

[FN282]. See H.R. REP. NO. 43-771, at 66 (1874) (testimony of Robert A. Burton).

[FN283]. See Gregg's dissenting opinion in State v. Johnson, 26 Ark. 281, 295 (1871).

[FN284]. Telegram from Powell Clayton and Thomas Dorsey to Elisha Baxter (June 3, 1873), reprinted in ARK. GAZETTE, June 4, 1873, at 1.

[FN285]. See ARK. CODE OF PRACTICE IN CIVIL CASES § 295 (1871), 1871 Ark. Acts 237.

[FN286]. The chief justice was not overly concerned about a second impeachment for abusing his office. In April he bragged in the Daily Republican that he had been impeached once, and was rather fond of it. See LITTLE ROCK DAILY REPUBLICAN, April 10, 1873, at 2.

[FN287]. ARK. GAZETTE, May 18, 1873, at 2. Two days later the paper claimed that since the entire supreme court bench had to be present to dissolve an injunction issued by a single justice, McClure planned to prevent dissolution of the injunction by not attending sessions of the court. See ARK. GAZETTE, May 21, 1873, at 1. McClure denied both charges in the columns of the Daily Republican. See LITTLE ROCK DAILY REPUBLICAN, May 23, 1873 at 2.

[FN288]. ARK. CODE OF PRACTICE IN CIVIL CASES § 525 (1869) stated:

Whenever a person usurps an office or franchise to which he is not entitled by law, an action by proceedings at law may be instituted against him, either by the State or the party entitled to the office or franchise, to prevent the usurper from exercising the office or franchise.

[FN289]. See ARK. GAZETTE, June 18, 1873, at 1.

[FN290]. See ARK. GAZETTE, June 19, 1873, at 1.

[FN291]. See Act 7 of 17th Ark. General Assembly, 1868 Ark. Acts 26

[FN292]. See HISTORICAL REPORT OF THE SECRETARY OF STATE, *supra* note 10, at 471.

[FN293]. The depositions are printed in full in H.R. REP. NO. 43-2, at 15-122 (1874).

[FN294]. See LITTLE ROCK DAILY REPUBLICAN, July 10, 1873, at 2.

[FN295]. The quote is from the column published on July 8th. See LITTLE ROCK DAILY REPUBLICAN, July 8, 1873, at 2. These columns contain such frequent references to what was said to McClure and what McClure said in

response that there can be little doubt as to their authorship.

[FN296]. See LITTLE ROCK DAILY REPUBLICAN, July 9, 1873, at 1; July 10, 1873, at 1; July 11, 1873, at 1; July 12, 1873, at 1; July 14, 1873, at 1; and July 15, 1873, at 1.

[FN297]. See Ark. Sup. Ct. Opinion Record D, No. 2, at 362. McClure's dissent does not appear in the official Arkansas Reports.

[FN298]. Under section 126 of the Arkansas Code of Practice in Civil Cases a defense had to be filed on the first day of the term on which the case is set for trial. See Act 48 of 18th Ark. General Assembly, 1871 Ark. Acts 230. The next term of the Pulaski County Circuit Court began on the fourth Monday after the second Monday in September. See Act 53 of 19th Ark. General Assembly, 1873 Ark. Acts 116.

[FN299]. See H.R. REP. NO. 43-2, at 267 (1874) (testimony of M. L. Stephenson); id. at 278 (testimony of E. J. Searle). Both men received a telegram from William W. Wilshire asking them to return to Little Rock.

[FN300]. See 29 Ark. 129 (1873).

[FN301]. This entire episode was described by Stephenson in his testimony before a congressional committee. See H.R. REP. NO. 43-2, at 267-68 (1874) (testimony of M.L. Stephenson).

[FN302]. 28 Ark. at 139.

[FN303]. Stephenson so testified before a congressional committee. See H.R. REP. NO. 43-2, at 268 (1874) (testimony of M. L. Stephenson).

[FN304]. See Letter from Lafayette Gregg to E. J. Searle and M. L. Stephenson (September 18, 1873), reprinted in H.R. REP. NO. 43-2, at 326-27 (1874); id. at 188 (testimony of Lafayette Gregg).

[FN305]. See id. at 267 (testimony of M. L. Stephenson); id. at 140- 41 (testimony of N. W. Cox, Clerk of the Supreme Court).

[FN306]. McClure's version was backed by Searle. See H.R. REP. NO. 43-2, at 278 (1874) (testimony of E. J. Searle). The contemporaneous newspaper report of the court's announcement from the bench states that the court concluded that it had no jurisdiction. See ARK. GAZETTE, June 5, 1873, at 4. Stephenson also testified that the court decided it lacked jurisdiction. See H.R. REP. NO. 43-2, at 272 (1874) (testimony of M. L. Stephenson).

[FN307]. See H.R. REP. NO. 43-771, at 5 (1874) (testimony of John McClure).

[FN308]. See H.R. REP. NO. 43-2, at 257-58 (1874) (testimony of John E. Bennett).

[FN309]. See H.R. REP. NO. 43-2, at 190 (1874) (testimony of Lafayette Gregg).

[FN310]. See H.R. REP. NO. 43-2, at 145 (1874); ARK. GAZETTE, September 30, 1873, at 1. The clerk did not copy the opinion into the opinion records of the supreme court until after the Brooks-Baxter affair ended. See Ark. Sup. Ct. Opinion Record D, No. 2, at 356.

[FN311]. See ARK. GAZETTE, September 30, 1873, at 1.

[FN312]. See Letter from George H. Williams, Attorney General of the United States, to Elisha Baxter, Governor of Arkansas (September 15, 1873) (on file with Arkansas History Commission, Robert W. Trimble collection). The letter was in response to Baxter's own letter to the president requesting assistance.

[FN313]. H.R. REP. NO. 43-2, at 427 (1874) (testimony of Elisha Baxter).

[FN314]. See H.R. REP. NO. 43-2, at 271 (1874) (testimony of M. L. Stephenson).

[FN315]. The transaction was described in a legal notice that appeared six months later when McClure took steps to foreclose his lien on the stock of the printing company due to nonpayment of the purchase price. See LITTLE ROCK DAILY REPUBLICAN, April 3, 1874, at 2. See also ARK. GAZETTE, October 3, 1873, at 2 (describing the acquisition of the paper by interests friendly to Governor Baxter). The sale of the newspaper was probably a part of the settlement that led to the September 29, 1873, cease-fire. See H.R. REP. NO. 43-2, at 426 (1874) (testimony of Elisha Baxter).

[FN316]. See LITTLE ROCK DAILY REPUBLICAN, September 30, 1873, at 2.

[FN317]. LITTLE ROCK DAILY REPUBLICAN, October 8, 1873, at 1, reprinted in H.R. REP. NO. 43-771, at 164-65 (1874).

[FN318]. See H.R. REP. NO. 43-771, at 69 (1874) (testimony of Robert A. Burton).

[FN319]. The written opinion was omitted from the official reports of the supreme court because it was one of several cases "not deemed of sufficient importance to warrant their insertion." 28 Ark. xiv. The manuscript opinion can be found in Ark. Sup. Ct. Opinion Record D, No. 2, at 191. It is reprinted in H.R. REP. NO. 43-2, at 482 (1874).

[FN320]. Ark. Sup. Ct. Opinion Record D, No. 2, at 194.

[FN321]. This lends support to the Gazette's claim that McClure's goal in the quo warranto action was to replace Baxter with Lieutenant Governor Smith. See *supra* text accompanying note 263.

[FN322]. See Executive Proclamation of Elisha Baxter, Governor of Arkansas (September 18 1873), reprinted in H.R. REP. NO. 43-2, at 223-27 (1874).

[FN323]. See H.R. REP. NO. 43-127, at 7 (1875). Attorney General Yonley initially gave an opinion approving the appointment of new election judges but later reversed himself and ruled that the judges appointed for the 1872 election continued in office. See ARK. GAZETTE, October 29, 1873, at 1. The second opinion was generally disregarded.

[FN324]. See H.R. REP. NO. 43-127, at 8 (1875).

[FN325]. See *id.* See also CLAYTON, *supra* note 84, at 351.

[FN326]. Cf. LITTLE ROCK DAILY REPUBLICAN, November 15, 1873, at 2.

[FN327]. H.R. REP. NO. 43-771, at 19 (1874) (testimony of John McClure).

[FN328]. See ARK. GAZETTE, March 24, 1874, at 2.

[FN329]. See CAMDEN TRIBUNE (date unknown), reprinted in ARK. GAZETTE, April 8, 1874, at 3. Baxter later confirmed that he was offered a federal judgeship by an individual representing Clayton and Dorsey. See Letter from Elisha Baxter to New York Herald (April 28, 1874), reprinted in H.R. REP. NO. 43-2, at 427, 431 (1874).

[FN330]. See H.R. REP. NO. 43-771, at 96 (1874) (testimony of John McClure).

[FN331]. H.R. REP. NO. 43-771, at 103 (1874) (testimony of John McClure). McClure denied any personal knowledge of election frauds. See *id.* at 90. During his war on Baxter the previous year, McClure had written an editorial in the Republican denying anything to do with election frauds but culminating in the cryptic statement: "The chief justice has no actual knowledge of any frauds in the late election, either one way or the other, but it is not improbable that he might give the names of some witnesses who could throw some light on the subject." LITTLE ROCK DAILY REPUBLICAN, August 23, 1873, at 2. As early as the preceding summer, the Gazette had absolved

Baxter of any involvement in election frauds, which it blamed on Hadley, McClure, and Bowen. See ARK. GAZETTE, July 1, 1873, at 1.

[FN332]. See H.R. REP. NO. 43-772, at 415 (1874) (testimony of Elisha Baxter); H.R. REP. NO. 43-771, at 67 (testimony of Robert A. Burton).

[FN333]. H.R. REP. NO. 43-771, at 95 (1874) (testimony of John McClure).

[FN334]. See *id.* at 96 (testimony of John McClure).

[FN335]. See H.R. REP. NO. 43-2, at 419 (1874) (testimony of Elisha Baxter).

[FN336]. *Id.* at 426.

[FN337]. Pursuant to an 1871 statute, the gubernatorial line of succession was lieutenant governor, president pro tempore of the senate, speaker of the house of representatives, and chief justice of the supreme court. See Act 45 of 18th Ark. General Assembly, 1871 Ark Acts 213.

[FN338]. See LITTLE ROCK DAILY REPUBLICAN, April 3, 1874, at 4.

[FN339]. ST. LOUIS REPUBLICAN, April 2, 1874, reprinted in ARK. GAZETTE, April 3, 1874, at 2.

[FN340]. The demurrer, which was filed on October 8, 1873, is reprinted in H.R. REP. NO. 43-2, at 467 (1874).

[FN341]. "In effect (a demurrer) is an allegation that, even if the facts as stated in the pleading to which objection is taken be true, yet in their legal consequences are not such as to put the demurring party to the necessity of answering them or proceeding further with the cause." BLACK'S LAW DICTIONARY 298 (Abridged 6th ed. 1990).

[FN342]. See H.R. REP. NO. 43-2, at 396 (1874) (testimony of Freeman Compton).

[FN343]. See H.R. REP. NO. 43-2, at 395-96 (1874) (testimony of E. H. English).

[FN344]. See *id.*; H.R. REP. NO. 43-771, at 77 (1874) (testimony of John Whytock).

[FN345]. See H.R. REP. NO. 43-771, at 77 (1874) (testimony of John Whytock). The court's docket entry is reprinted in H.R. REP. NO. 43-2, at 474 (1874).

[FN346]. See ARK. GAZETTE, April 14, 1874, at 4; LITTLE ROCK DAILY REPUBLICAN, April 14, 1874, at 4.

[FN347]. See H.R. REP. NO. 43-2, at 396 (1874) (testimony of E. H. English).

[FN348]. See H.R. REP. NO. 43-2, at 397 (1874) (testimony of Freeman Compton).

[FN349]. Whytock claimed that because Baxter intended to take an interlocutory appeal of the jurisdiction question, there was no need to permit Baxter to defend the suit on the merits. See H.R. REP. NO. 43-771, at 80 (1874) (testimony of John Whytock). Baxter testified that he would have presented a defense on the merits had Whytock given him the opportunity. See H.R. REP. NO. 43-2, at 418-19 (1874) (testimony of Elisha Baxter).

[FN350]. The judgment is reprinted in H.R. REP. NO. 43-2, at 468 (1874).

[FN351]. See H.R. REP. NO. 43-771, at 77-85 (1874) (testimony of John Whytock).

[FN352]. See H.R. REP. NO. 43-771, at 96-98 (1874) (testimony of John McClure).

[FN353]. See ARK. GAZETTE, April 17, 1874, at 1, 4; LITTLE ROCK DAILY REPUBLICAN, April 16, 1874, at

4. A writ to enforce the judgment was never issued; Brooks apparently had only a signed copy of the judgment in his possession when McClure swore him into office. See ARK. GAZETTE, April 17, 1874, at 4.

[FN354]. See H.R. REP. NO. 43-771, at 97-98 (1874) (testimony of John McClure).

[FN355]. See Telegram from Elisha Baxter, Governor of Arkansas, to the President of the United States (April 15, 1874), microformed on Letters received by the Department of Justice from the State of Arkansas 1871-1884, Microfilm Publication M1418 (National Archives).

[FN356]. See Telegram from Joseph Brooks to U. S. Grant (April 15, 1874), microformed on Letters received by the Department of Justice from the State of Arkansas 1871-1884, Microfilm Publication M1418 (National Archives).

[FN357]. See JOEL GRAY TAYLOR, LOUISIANA RECONSTRUCTED, 1863-1877, 227-49 (1974). See also HARRELL, *supra* note 198, at 218.

[FN358]. Telegram from George H. Williams, United States Attorney General, to Honorable Elisha Baxter (April 16, 1874), reprinted in HARRELL, *supra* note 198, at 211, and SEN. MISC. DOC. NO. 43-65, at 122 (1875).

[FN359]. Telegram from George H. Williams, United States Attorney General, to Honorable Joseph Brooks (April 16, 1874), reprinted in HARRELL, *supra* note 198, at 211.

[FN360]. Telegram from Powell W. Clayton and S. W. Dorsey to Joseph Brooks (April 16, 1874), reprinted in LITTLE ROCK DAILY REPUBLICAN, April 18, 1874, at 1.

[FN361]. Clayton did offer brief testimony in the subsequent house hearings, but he was not questioned about his knowledge of Brooks' plans. See H.R. REP. NO. 43-771, at 452 (1874). In his memoirs written some years after the affair, Clayton claimed that he decided not to testify in the house hearings because he objected to the attorneys representing both Brooks and Baxter. See CLAYTON, *supra* note 84, at 349.

[FN362]. The Republican proposed as early as April 17, 1874, that the courts decide the question of who was governor. See LITTLE ROCK DAILY REPUBLICAN, April 17, 1874, at 2.

[FN363]. See Telegram to U. S. Grant, President of the U.S. (April 20, 1874), microformed on Letters received by the Department of Justice from the State of Arkansas 1871-1884, Microfilm Publication M1418 (National Archives). Searle denied that he had taken sides in the dispute between Brooks and Baxter. See ARK. GAZETTE, April 21, 1874, at 1. A letter containing language identical to the telegram was also sent on the same date. See Letter to U. S. Grant, President of the U.S. (April 20, 1874), microformed on Letters received by the Department of Justice from the State of Arkansas 1871-1884, Microfilm Publication M1418 (National Archives). The signatures of McClure, Searle, and Stephenson on the letter appear to be identical to the signatures appearing in the records of the supreme court.

[FN364]. See ARK. GAZETTE, April 18, 1874, at 4.

[FN365]. This first skirmish is described in a number of sources. See HARRELL, *supra* note 198, at 223-30; ARK. GAZETTE, April 22, 1874, at 4.

[FN366]. Telegram from Elisha Baxter, Governor of Arkansas, to the President of the United States (April 22, 1874), microformed on Letters received by the Department of Justice from the State of Arkansas 1871-1884, Microfilm Publication M1418 (National Archives).

[FN367]. See text *supra* at note 15.

[FN368]. See WALTER L. BROWN, A LIFE OF ALBERT PIKE 443 (1997).

[FN369]. See ARK. GAZETTE, April 26, 1874, at 2. The tract is included as an exhibit to H.R. REP. NO. 43-127 (1875).

[FN370]. See Letter from W. W. Wilshire, Representative of the 3rd District of Arkansas, to U. S. Grant, President of the United States (April 16, 1874), microformed on Letters received by the Department of Justice from the State of Arkansas 1871-1884, Microfilm Publication M1418 (National Archives).

[FN371]. See ARK. GAZETTE, April 23, 1874, at 1.

[FN372]. See 2 CONG. REC. 3207 (daily ed. April 20, 1874).

[FN373]. Telegram from U. S. Grant, President, to Hon. Elisha Baxter, Little Rock (April 22, 1874), reprinted in H.R. REP. NO. 43-127, at 6 (1874); also reprinted in ARK. GAZETTE, April 23, 1874, at 4, and HARRELL, *supra* note 198, at 231.

[FN374]. See 2 CONG. REC. 3348 (daily ed. April 24, 1874).

[FN375]. See Executive Proclamation by Elisha Baxter, Governor of Arkansas (April 22, 1874) (on file with Arkansas History Commission, Robert W. Trimble collection), reprinted in ARK. GAZETTE, April 23, 1874, at 4.

[FN376]. Several months later, after the confrontation with Brooks had ended and a new supreme court seated, Baxter did seek supreme court review of Whytock's decision. See **Baxter v. Brooks, 29 Ark. 173 (1874)**, discussed *infra* text accompanying note 504.

[FN377]. See H.R. REP. NO. 43-2, at 476 (1874).

[FN378]. On May 8, 1874, the supreme court clerk issued a summons requiring Baxter to answer Brooks' appeal by the first day of the court's June term. See *id.* at 476.

[FN379]. The pleadings in Brooks v. Page are reprinted in H.R. REP. NO. 43-2, at 462-65 (1874). The petition for mandamus was filed with the court on May 2, 1874. Yonley's response was not filed until May 6, 1874.

[FN380]. See H.R. REP. NO. 43-2, at 258 (1874) (testimony of John E. Bennett); Ark. Sup. Ct. Judgment Record C, No. 1, at 416.

[FN381]. See H.R. REP. NO. 43-771, at 9 (1874) (testimony of John McClure). The clerk's entry on each Monday from February 16, 1874, through May 4, 1874, states: "There not being a quorum present. It is ordered by the Judges present that court stand adjourned until [the following Monday]." Ark. Sup. Ct. Judgment Record C, No. 1, at 417-19.

[FN382]. See H.R. REP. NO. 43-2, at 280 (1874) (testimony of E. J. Searle).

[FN383]. See *id.* at 258 (testimony of John E. Bennett).

[FN384]. See H.R. REP. NO. 43-2, at 407 (1874) (testimony of Lafayette Gregg).

[FN385]. Harrell states that Williams was later elected sheriff of Hempstead County. See HARRELL, *supra* note 198, at 238. According to the records of the secretary of state, a "J. Williams" served as sheriff of Hempstead County from 1874 to 1882. See HISTORICAL REPORT OF THE SECRETARY OF STATE, *supra* note 10, at 646. See also letter from James W. Williams, Captain, Company A, Hempstead County Guards, to Editor of Daily Republican (April 20, 1874), reprinted in LITTLE ROCK DAILY REPUBLICAN, April 23, 1874, at 4.

[FN386]. The kidnapping is described in detail in the testimony of Bennett. See H.R. REP. NO. 43-2, at 258-599 (1874) (testimony of John E. Bennett).

[FN387]. See H.R. REP. NO. 43-2, at 276 (1874) (testimony of M. L. Stephenson).

[FN388]. Telegram from John McClure, Chief Justice, to Attorney General Williams (May 4, 1874), microformed on Letters received by the Department of Justice from the State of Arkansas 1871-1884, Microfilm Publication M1418 (National Archives).

[FN389]. See ARK. GAZETTE, May 6, 1874, at 4.

[FN390]. See *id.*

[FN391]. See H.R. REP. NO. 43-2, at 340 (1874) (testimony of Henry Oliver).

[FN392]. See Telegram from W. S. Oliver, Sheriff of Pulaski County, through Powell Clayton to Secretary of War (May 4, 1874), microformed on Letters received by the Department of Justice from the State of Arkansas 1871-1884, Microfilm Publication M1418 (National Archives); See also ARK. GAZETTE, May 6, 1874, at 4.

[FN393]. Telegram from T. E. Rose, Captain, 16th Infantry, to War Department, Adjutant General's Office (May 4, 1874), microformed on Letters received by the Department of Justice from the State of Arkansas 1871-1884, Microfilm Publication M1418 (National Archives).

[FN394]. See H.R. REP. NO. 43-2, at 259-60 (1874) (testimony of John E. Bennett).

[FN395]. See Telegram from Thomas E. Rose, Captain, 16th Infantry, to War Department, Adjutant General's Office (May 7, 1874), microformed on Letters received by the Department of Justice from the State of Arkansas 1871-1884, Microfilm Publication M1418 (National Archives).

[FN396]. See H.R. REP. NO. 43-2, at 260, 263-64 (1874) (testimony of John E. Bennett). Summerhill later provided an affidavit to the Brooks forces stating that the two justices were supposed to be killed. See *Aff. of T. A. Summerhill* (May 7, 1874), reprinted in *LITTLE ROCK DAILY REPUBLICAN*, May 15, 1874, at 1.

[FN397]. See H.R. REP. NO. 43-2, at 259-60 (1874) (testimony of John E. Bennett). A contemporaneous news account states that Bennett fired the pistol, and the sheriff's horse bolted. See ARK. GAZETTE, May 7, 1874, at 4.

[FN398]. See H.R. REP. NO. 43-2, at 260 (1874) (testimony of John E. Bennett). On arriving in Little Rock Summerhill deserted to the Brooks forces. Two days later Baxter militiamen attempted to arrest Summerhill as he entered a Little Rock restaurant. Summerhill escaped, but his companion was shot and killed. See *LITTLE ROCK DAILY REPUBLICAN*, May 11, 1874, at 4.

[FN399]. ARK. GAZETTE, May 7, 1874, at 1.

[FN400]. Gregg testified that he did not receive notice in time to attend the meeting of the court during the week of May 4, 1874, and would not have attended even if notified. See H.R. REP. NO. 43-2, at 407 (1874) (testimony of Lafayette Gregg).

[FN401]. See Ark. Const. of 1836, art. VI, § 2; Ark. Const. of 1861, art. VI, § 2; Ark. Const. of 1864, art. VII, § 2.

[FN402]. See H.R. REP. NO. 43-771, at 86 (1874) (testimony of John McClure).

[FN403]. See Act 1 of 17th General Assembly, Adjourned Session, 1868-69 Ark. Acts 1.

[FN404]. See *id.* at 86 (testimony of John McClure); H.R. REP. NO. 43-2, at 260 (1874) (testimony of John E. Bennett).

[FN405]. See Ark. Sup. Ct. Judgment Record A, No. 2, at 362. See also ARK. GAZETTE, May 29, 1874, at 4.

[FN406]. ARK. GAZETTE, May 7, 1874, at 1.

[FN407]. See Ark. Sup. Ct. Judgment Record C, No. 1, at 420. Bennett was apparently still wandering in the woods when the court met. See Telegram from Joseph Brooks, Governor of Arkansas, to President U. S. Grant (May 6, 1874), microformed on Letters received by the Department of Justice from the State of Arkansas 1871-1884, Microfilm Publication M1418 (National Archives).

[FN408]. The opinion does not appear in the official Arkansas Reports. It is found in Ark. Sup. Ct. Opinion Book C, No. 2, at 355, reprinted in ARK. GAZETTE, May 8, 1874, at 1.

[FN409]. See H.R. REP. NO. 43-771, at 10 (testimony of John McClure).

[FN410]. See H.R. REP. NO. 43-2, at 269 (1874) (testimony of M. L. Stephenson).

[FN411]. Telegram from Joseph Brooks to His Excellency U. S. Grant (May 7, 1874) and telegram from N. W. Cox, Clerk, to Geo. H. Williams, Attorney General (May 7, 1874), microformed on Letters received by the Department of Justice from the State of Arkansas 1871-1884, Microfilm Publication M1418 (National Archives).

[FN412]. Brooks sent a telegram to the president stating that the court had been in continuous session since December 1873. See Telegram from Joseph Brooks, Governor of Arkansas, to U. S. Grant, President of U.S. (May 8, 1874), microformed on Letters received by the Department of Justice from the State of Arkansas 1871-1884, Microfilm Publication M1418 (National Archives). The four justices sent a separate telegram confirming the statement in Brooks' letter. See Telegram from John McClure, J. E. Bennett, M. L. Stephenson, and E. J. Searle to U. S. Grant, President of United States (May 8, 1874), microformed on Letters received by the Department of Justice from the State of Arkansas 1871-1884, Microfilm Publication M1418 (National Archives).

[FN413]. See Telegram from thirty members of General Assembly to the President of the United States (May 10, 1874), microformed on Letters received by the Department of Justice from the State of Arkansas 1871-1884, Microfilm Publication M1418 (National Archives).

[FN414]. The current constitution prohibits the appointment of a member of the General Assembly to any civil office. See Ark. Const., art. 5, § 10. The 1868 constitution prohibited a person holding a state or county office from being elected to the General Assembly, but it was not clear that a legislator forfeited his seat by accepting a state or county office. See Ark. Const. of 1868, art. V, § 11.

[FN415]. As indicated supra note 323, Attorney General Yonley had issued conflicting opinions regarding the legality of the registration preceding the special election.

[FN416]. See ARK. GAZETTE, May 21, 1874, at 4; HARRELL, supra note 198, at 246.

[FN417]. See ARK. GAZETTE, May 1, 1874, at 4.

[FN418]. See LITTLE ROCK DAILY REPUBLICAN, April 21, 1874, at 1. See also Telegram from Powell Clayton, S. W. Dorsey, O. P. Snyder, Asa Hodges, and Wm. J. Hynes (April 15, 1874), reprinted in LITTLE ROCK DAILY REPUBLICAN, April 22, 1874, at 1.

[FN419]. See Letter from W. W. Wilshire to Editors, Gazette (April 17, 1874), reprinted in ARK. GAZETTE, April 23, 1874, at 1.

[FN420]. See Telegram from George H. Williams, United States Attorney General, to Hon. Joseph Brooks and Hon. Elisha Baxter (May 9, 1874), reprinted in HARRELL, supra note 198, at 246.

[FN421]. See Telegram from Joseph Brooks, Governor of Arkansas, to Attorney General Williams (May 10, 1874), microformed on Letters received by the Department of Justice from the State of Arkansas 1871-1884, Microfilm Publication M1418 (National Archives). Brooks also issued a proclamation accepting the proposal and convening a

special session of the General Assembly on May 25, 1873. See Proclamation by Governor Joseph Brooks (May 11, 1874) (on file at the Arkansas History Commission, Robert W. Trimble collection).

[FN422]. On May 11th Clayton telegraphed Brooks: "Accept at once the attorney-general's proposition. Will telegraph our reasons when Baxter accepts." Telegram from B.F. Rice & Powell Clayton to Joseph Brooks (May 11, 1874), reprinted in Benjamin S. Johnson, *The Brooks-Baxter War*, 2 PUBL. ARK. HIST. ASSOC. 122, 164 (1908).

[FN423]. See Telegram from Elisha Baxter, Governor of Arkansas, to Geo. H. Williams, Attorney General (May 9, 1874), microformed on Letters received by the Department of Justice from the State of Arkansas 1871-1884, Microfilm Publication M1418 (National Archives).

[FN424]. See *id.* In a marginal notation on a copy of Brooks' call for the legislature to convene, Baxter wrote: "(T)his proposition was submitted to me during the Brooks Rebellion but I declined to accept it on the grounds that I would not consent to anything that would directly or indirectly recognize Mr. Brooks as gov. of Arkansas." See Proclamation by Governor Joseph Brooks, *supra* note 421.

[FN425]. Telegram from U. S. Grant, President of United States, to Elisha Baxter (May 11, 1874), reprinted in Johnson, *supra* note 422, at 162.

[FN426]. Telegram from Elisha Baxter, Governor of Arkansas, to U. S. Grant, President of United States (May 11, 1874), microformed on Letters received by the Department of Justice from the State of Arkansas 1871-1884, Microfilm Publication M1418 (National Archives).

[FN427]. *Id.*

[FN428]. See Johnson, *supra* note 422, at 163.

[FN429]. Telegram from George H. Williams, United States Attorney General, to Elisha Baxter (May 11, 1874), reprinted in ARK. GAZETTE, May 14, 1874, at 2.

[FN430]. See Telegram from Joseph Brooks, Governor of Arkansas, to U. S. Grant, President (May 11, 1874), microformed on Letters received by the Department of Justice from the State of Arkansas 1871-1884, Microfilm Publication M1418 (National Archives). Baxter telegraphed the president that Brooks' concerns about the safety of the supreme court justices was "utterly unfounded." See Telegram from Elisha Baxter, Governor of Arkansas, to U. S. Grant, President (May 13, 1874), microformed on Letters received by the Department of Justice from the State of Arkansas 1871-1884, Microfilm Publication M1418 (National Archives).

[FN431]. See Telegram from Joseph Brooks, Governor of Arkansas, to Geo. H. Williams, Attorney General (May 12, 1874) microfilmed on Letters received by the Department of Justice from the State of Arkansas 1871-1874, Microfilm Publication M1418 (National Archives).

[FN432]. See Telegram from Joseph Brooks to President U. S. Grant (May 14, 1874), microformed on Letters received by the Department of Justice from the State of Arkansas 1871-1884, Microfilm Publication M1418 (National Archives).

[FN433]. See Telegram from Joseph Brooks, Governor of Arkansas, to President U. S. Grant (May 15, 1874), microformed on Letters received by the Department of Justice from the State of Arkansas 1871-1884, Microfilm Publication M1418 (National Archives).

[FN434]. See H.R. REP. NO. 43-771, at 7 (1874) (testimony of John McClure). The map at page 23 of the same document shows the spelling as the "Didter Block."

[FN435]. See extract from Arkansas House Journal in H.R. REP. NO. 43-2, at 522 (1874).

[FN436]. See *id.* at 523.

[FN437]. See *id.*

[FN438]. See *id.* at 525.

[FN439]. See H.R. REP. NO. 43-127, at 9 (1874).

[FN440]. See ARK. GAZETTE, May 15, 1874, at 1.

[FN441]. *Id.*

[FN442]. See *id.*

[FN443]. See STAPLES, *supra* note 23, at 418-19.

[FN444]. ST. LOUIS REPUBLICAN (date unknown), reprinted in ARK. GAZETTE, May 15, 1874, at 2.

[FN445]. 14 U.S. Op. Atty. Gen. 391, 398 (May 15, 1874).

[FN446]. *Id.* at 400.

[FN447]. See Presidential Proclamation of May 15, 1874, 18 Stat. 846 (1874).

[FN448]. HARRELL, *supra* note 198, at 258-59.

[FN449]. See ARK. GAZETTE, May 20, 1874, at 4.

[FN450]. See H.R. REP. NO. 43-771, at 16 (1874) (testimony of John McClure).

[FN451]. See ARK. GAZETTE, May 21, 1874, at 4.

[FN452]. See H.R. REP. NO. 43-2, at 276 (1874) (testimony of M. L. Stephenson).

[FN453]. See ARK. GAZETTE, May 28, 1874, at 4.

[FN454]. See Act 2 of 19th General Assembly, 1st Spec. Sess., Ark. Acts 3.

[FN455]. See Act 9 of 19th Ark. General Assembly, 1st Spec. Sess., 1874 Ark. Acts 12-13. The legislature also cancelled the May term of all circuit courts. See Act 15 of 19th General Assembly, 1st Spec. Sess., 1874 Ark. Acts 20-21.

[FN456]. Act 17 of 19th Ark. General Assembly, 1st Spec. Sess., 1874 Ark. Acts 22.

[FN457]. See Act 11 of 19th General Assembly, 1st Spec. Sess., 1874 Ark. Acts 14. The statute was approved after McClure's impeachment but before the impeachment of Bennett and Searle.

[FN458]. ARK. GAZETTE, May 26, 1874, at 1.

[FN459]. See ARK. GAZETTE, May 28, 1874, at 1.

[FN460]. Attorney General Yonley and Circuit Judge Whytock also lost their positions. Yonley resigned in late May of 1874. See ARK. GAZETTE, May 28, 1874, at 1; HISTORICAL REPORT OF THE SECRETARY OF STATE, *supra* note 10, at 316. Whytock resigned on May 29, 1874. See HISTORICAL REPORT OF THE SECRETARY OF STATE, *supra* note 10, at 471; H.R. REP. NO. 43-771, at 76 (1874) (testimony of John Whytock).

[FN461]. See Act 31 of 19th General Assembly, 1st Spec. Sess., 1874 Ark. Acts 39.

[FN462]. See HISTORICAL REPORT OF THE SECRETARY OF STATE, *supra* note 10, at 450. English qualified on June 2, 1874. See Ark. Sup Ct. Judgment Record C, No. 1, at 425.

[FN463]. See HISTORICAL REPORT OF THE SECRETARY OF STATE, *supra* note 10, at 451. Compton qualified on June 3, 1874. See Ark. Sup. Ct. Judgment Record C, No. 1, at 426.

[FN464]. See HISTORICAL REPORT OF THE SECRETARY OF STATE, *supra* note 10, at 467.

[FN465]. See H.R. REP. NO. 43-2, at 279 (1874) (testimony of E. J. Searle). The transcript refers to Searle's successor as "Judge Reardon." Supreme court records do not reflect that Bearden ever qualified for office.

[FN466]. See H.R. REP. NO. 43-2, at 512 (1874) (testimony of W. M. Harrison). Harrison claimed to have qualified on June 1, 1874, but the supreme court records do not reflect his qualification.

[FN467]. 2 CONG. REC. 4305 (daily ed. May 27, 1874).

[FN468]. The other committee members were J. D. Ward of Illinois, Stewart L. Woodford of New York, Milton Saylor of Ohio, and Joseph H. Sloss of Alabama. See 2 CONG. REC. 4366 (May 28, 1874). Henry J. Scudder of New York was later named to replace Woodford.

[FN469]. The testimony is reported in H.R. REP. NO. 43-771 (1974).

[FN470]. The testimony is set out in H.R. REP. NO. 43-771, at 1-36 (1874). McClure testified again on June 6, 1874. See *id.* at 85-105.

[FN471]. See *id.* at 74-85.

[FN472]. See H.R. REP. NO. 43-2, at 1-485 (1874).

[FN473]. See *id.* at 4, 409, 451 (testimony of Elisha Baxter); *id.* at 211 (testimony of John McClure); *id.* at 256 (testimony of John Bennett); *id.* at 277, 318 (testimony of E.J. Searle); *id.* at 266, 322 (testimony of M.L. Stephenson); *id.* at 396, 401 (testimony of F.W. Compton); *id.* at 395, 401 (testimony of E.H. English); *id.* at 185, 407 (testimony of Lafayette Gregg).

[FN474]. See H.R. REP. NO. 43-2, at 544 (1874).

[FN475]. See ARK. GAZETTE, July 2, 1874, at 2.

[FN476]. For example, Phillips County, which contained a large number of black voters likely to oppose the convention, returned a vote of 3,296 for, and none against the convention. See ARK. GAZETTE, July 8, 1874, at 1.

[FN477]. See ARK. GAZETTE, July 2, 1874, at 2.

[FN478]. See Ark. Const., art. 16, § § 1, 8, & 9, amended by Ark. Const. amendments 20, 62, & 65.

[FN479]. See Ark. Const., art. 7, § § 2, 3.

[FN480]. See Ark. Const., art. 7, § 5. See also art. 7, § 6, which confers on the court original jurisdiction to issue a writ of quo warranto to determine the right to office of a circuit judge or chancellor, or to determine the legal existence of a political corporation.

[FN481]. See Ark. Const., art. 6, § 4.

[FN482]. See ARK. CONST., Schedule, § 3.

[FN483]. The Democrats, running under the label "Conservative," had mounted a state-wide challenge in 1866, but most state executive offices were not on the ballot in that election.

[FN484]. See ARK. GAZETTE, September 11, 1874, at 1.

[FN485]. See ARK. GAZETTE, September 10, 1874, at 1.

[FN486]. See LITTLE ROCK REPUBLICAN, September 16, 1874, at 1.

[FN487]. See LITTLE ROCK REPUBLICAN, September 17, 1874, at 1.

[FN488]. See ANNALS OF ARKANSAS, supra note 199, at 198.

[FN489]. On October 30, 1874, the three person board named by the schedule to supervise the election declared it approved by a vote of 78,697 to 24,807. See Proclamation by the State Board of Election Supervisors, reprinted in ARK. CODE ANN., Constitutions, at 373. See also H.R. REP. NO. 43-2, at 545 (1874).

[FN490]. See ANNALS OF ARKANSAS, supra note 199, at 198.

[FN491]. See ARK. CONST. OF 1874, Schedule, § 20.

[FN492]. See ANNALS OF ARKANSAS, supra note 199, at 200.

[FN493]. H.R. REP. NO. 43-2, at 485 (1874).

[FN494]. H.R. REP. NO. 43-2, at 485 (1874).

[FN495]. Id.

[FN496]. See ARK. GAZETTE, November 15, 1874, at 1, 4.

[FN497]. The Gazette charged that Smith was the pawn of Clayton and McClure. See ARK. GAZETTE, November 15, 1874, at 1.

[FN498]. The charges against Price were later dismissed. See ARK. GAZETTE, November 15, 1874, at 4.

[FN499]. See ARK. GAZETTE, December 8, 1874, at 1.

[FN500]. See Senate Misc. Doc. No. 65, 43d Cong., 2nd sess., 22-77.

[FN501]. See id. at 29.

[FN502]. Id. at 36.

[FN503]. See id. at 38.

[FN504]. **29 Ark. 173 (1874).**

[FN505]. This was the same Samuel W. Williams whose defection to the Union in 1864 had precipitated the Confederate state supreme court's decision in State v. Williams. See discussion supra text accompanying notes 10-15.

[FN506]. See 29 Ark. at 190-201.

[FN507]. See 29 Ark. at 187-88.

[FN508]. See 3 CONG. REC. 1034 (daily ed. February 6, 1875). Congressmen Poland, Scudder, Sayler, and Sloss signed the report.

[FN509]. See H.R. REP. NO. 43-127, at 16 (1874). According to Staples this principle had recently been used by the Grant administration to justify its support of a Republican state government in Louisiana. To preserve Republican control of Louisiana, the party was willing to give up control of Arkansas. See STAPLES, *supra* note 23, at 438.

[FN510]. See H.R. REP. NO. 43-127, at 17-70 (1874). The dissenter was Congressman Ward.

[FN511]. See 3 CONG. REC. 922 (daily ed. February 3, 1875).

[FN512]. See 3 CONG. REC. 1055 (daily ed. February 8, 1875).

[FN513]. See *id.*

[FN514]. See quotations from various northern newspapers reprinted in ARK. GAZETTE, February 10, 1875, at 1; February 17, 1875, at 1.

[FN515]. See 3 CONG. REC. 2085 (daily ed. March 2, 1874).

[FN516]. See *id.* at 2117-18.

[FN517]. LITTLE ROCK REPUBLICAN, March 6, 1875, at 1.

[FN518]. See 14 THE NATIONAL CYCLOPAEDIA OF AMERICAN BIOGRAPHY *supra* note 186, at 335.

[FN519]. See 1 DICTIONARY OF AMERICAN BIOGRAPHY *supra* note 93, at 506.

[FN520]. See HISTORICAL REPORT OF SECRETARY OF STATE, *supra* note 10, at 242.

[FN521]. See Act 20 of 27th Ark. General Assembly, 1889 Ark. Acts 19.

[FN522]. See 1 DAVID Y. THOMAS, ARKANSAS AND ITS PEOPLE; A HISTORY 1541- 1930, 220 (1930).

[FN523]. See 2 DAVID Y. THOMAS, ARKANSAS AND ITS PEOPLE; A HISTORY 1541- 1930, 543 (1930).

[FN524]. See ARK. GAZETTE, November 3, 1891, at 2.

[FN525]. See ARK. GAZETTE, February 16, 1900, at 2.

[FN526]. See Harper, *supra* note 189, at 328.

[FN527]. See Gerald W. Heaney, Jacob Trieber: Lawyer, Politician, Judge, 8 U. ARK. LITTLE ROCK L.J. 421, 424 (1986).

[FN528]. See *id.* at 434-35.

[FN529]. See ARK. GAZETTE, September 19, 1911, at 12.

[FN530]. See ARK. GAZETTE, May 28, 1874, at 4.

[FN531]. J. Res. VI, 19th Ark. General Assembly, 1st Spec. Sess., 1874 Ark. Acts 53.

[FN532]. See 2 CONG. REC. 5046 (daily ed. June 16, 1874); ARK. GAZETTE, June 18, 1874, at 1 (suggesting that Gunter had won the election, but that "tardy justice" was done only because Wilshire failed to back Brooks).

[FN533]. See Act 90 of 19th Ark. General Assembly, 1873 Ark. Acts 223.

[FN534]. See HISTORICAL REPORT OF THE SECRETARY OF STATE, *supra* note 10, at 216.

[FN535]. See 13 THE NATIONAL CYCLOPAEDIA OF AMERICAN BIOGRAPHY, *supra* note 103, at 483.

[FN536]. See HISTORICAL REPORT OF THE SECRETARY OF STATE, *supra* note 10, at 217.

[FN537]. See ARK. GAZETTE, July 8, 1915, at 10.

[FN538]. *Id.*

END OF DOCUMENT

1891 Territorial Code

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CODE OF WASHINGTON.

[Secs. 3105-3110

SECTION

- 3127. Clerk to issue commission to take depositions.
- 3128. Notice of contest, etc., contested; requisites of, how and when served.
- 3129. Sheriff to return notice to clerk; fees of same.
- 3130. Procuring attendance of witnesses by justices of the peace.
- 3131. Of the taking of depositions of witnesses, how certified, etc.
- 3132. Justices may adjourn return of depositions.
- 3133. Clerk may appoint another justice if either fail to serve.

SECTION

- 3134. Fees of sheriff and justices of the peace in such cases.
- 3135. Clerk to forward proceedings to secretary of the territory.
- 3136. Duty of Secretary in contested elections.
- 3137. Respective houses to try contested elections.
- 3138. After notice of contest, depositions may be taken, subject to same rules as depositions in district court, and to be returned to secretary of the territory.
- 3139. Legislature may take depositions, or examine witnesses.

Sec. 3105. Any elector of the proper county may contest the right of any person declared duly elected to an office to be exercised, in and for such county; and also any elector of a precinct may contest the right of any person declared duly elected to any office in, and for such precinct, for any of the following causes: (1.) For mal-conduct on the part of the board of judges or any member thereof. (2.) When the person whose right to office is contested, was not, at the time of election, eligible to such office. (3.) When the person whose right is contested shall have been previous to such election convicted of an infamous crime, by any court of competent jurisdiction, such conviction not having been reversed nor such person relieved from the legal infamy of such conviction. (4.) When the person whose right is contested has given to any elector or inspector, judge or clerk of the election, any bribe or reward, or shall have offered any such bribe or reward for the purpose of procuring his election. (5.) On account of illegal votes.

Legal vote

Sec. 3106. No irregularity or improper conduct in the proceedings of the board of judges or any one of them shall be construed to amount to such mal-conduct as to annul or set aside any election, unless the irregularity or improper conduct shall have been such as to procure the person whose right to the office may be contested, to be declared duly elected when he had not received the highest number of legal votes.

Sec. 3107. When any election held for an office exercised in and for a county is contested on account of any mal-conduct on the part of the board of judges of any precinct election, or any member thereof, the election shall not be annulled and set aside upon any proof thereof, unless the rejection of the vote of such precinct or precincts shall change the result as to such office, in the remaining vote of the county.

Legal vote

Sec. 3108. Nothing in the fifth ground of contest, specified in section 3105 shall be so construed as to authorize an election to be set aside on account of illegal votes, unless it shall appear that an amount of illegal votes has been given to the person whose right to the office is contested, which, if taken from him would reduce the number of his legal votes below the number of votes given to some other person, for the same office after deducting therefrom the illegal votes which may be shown to have been given to such other person.

Sec. 3109. No person shall be competent to contest an election unless he is a qualified elector of the district, county or precinct, as the case may be, in which the office is to be exercised.

Sec. 3110. When any such elector shall choose to contest the right of any person declared duly elected to such office, he shall within ten days after such person shall have been declared elected to such office, file with the clerk of the court for the district having jurisdiction, a written statement setting forth specifically: (1.) The name of the party contesting

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such election and that he is a qualified elector of the district, county or precinct, as the case may be, in which such election was held; (2.) The name of the person whose right to the office is contested; (3.) The office; (4.) The particular cause or causes of such contest, which statement shall be verified by the affidavit of the contesting party that the matters and things therein contained are true as he verily believes.

SEC. 3111. When the reception of illegal votes is alleged as a cause of contest, it shall be sufficient to state generally that illegal votes were cast, which, if given to the person whose election is contested in the specified precinct or precincts, will, if taken from him reduce the number of his legal votes below the number of legal votes given to some other person for the same office; but no testimony shall be received of any illegal votes unless the party contesting such election shall deliver to the opposite party, at least three days before such trial, a written list of the number of illegal votes and by whom given, which he intends to prove on such trial and no testimony shall be received of any illegal votes, except such as are specified in such list.

SEC. 3112. No statement of the cause of contest shall be rejected, nor the proceedings thereon dismissed by any court before which such contest may be brought for trial, for want of form, if the particular cause or causes of contest shall be alleged with such certainty, as will sufficiently advise the defendant of the particular proceedings, or cause for which such election is contested.

SEC. 3113. Upon such statement being filed it shall be the duty of the clerk to inform the judge of the district court who may give notice and order a special term of said court, to be held at the usual place of holding said court, on some day to be named by him, not less than ten nor more than twenty days from the date of such notice, to hear and determine such contested election: *Providing*, That if no special term is called, such contest shall be determined at the first regular term of said court after such statement is filed.

SEC. 3114. The clerk of said court shall also at the time issue a citation, for the person whose right to the office is contested, to appear at the time and place specified in said notice, which citation shall be delivered to the sheriff, or constable, and be served upon the party in person, or if he cannot be found, by leaving a copy thereof at the house where he last resided.

SEC. 3115. The said clerk shall issue subpoenas for witnesses in such contested election, at the request of either party, which shall be served by the sheriff or constable, as other subpoenas, and the district court shall have full power to issue attachments to compel the attendance of witnesses who shall have been duly subpoenaed to attend, if they fail to do so.

SEC. 3116. Said court shall meet at the time and place designated to determine such contested election, by the rules of law and evidence governing the determination of questions of law and fact, so far as the same may be applicable, and may dismiss the proceedings, if the statement of the cause or causes of contest is insufficient, or for want of prosecution. After hearing the proofs and allegations of the parties, the court shall pronounce judgment in the premises, either confirming or annulling and setting aside such election, according to the law and right of the case.

Sec. 3117. If in any such case it shall appear that another person than the one returned, has the highest number of legal votes, said court shall declare such person duly elected.

Sec. 3118. The judge, clerk, sheriff, or constable and witnesses, shall receive respectively the same fees from the party against whom judgment is given, as are allowed for similar service in the district court.

Sec. 3119. If the proceedings are dismissed for insufficiency, want of prosecution, or the election is by the court confirmed, judgment shall be rendered against the party contesting such election, for costs, in favor of the party whose election was contested.

Sec. 3120. If such election is annulled, and set aside, judgment for costs shall be rendered against the party whose election was contested, in favor of the party contesting the same.

Sec. 3121. Each party shall be liable for the costs created by himself, to the officers and witnesses entitled thereto, which may be collected in the same manner in which similar costs are collected, in the district court.

Sec. 3122. Either party, feeling himself aggrieved by the judgment of said court, may appeal therefrom to the supreme court, as in other cases of appeal thereto.

Sec. 3123. Whenever an election shall be annulled, and set aside, by the judgment of the district court, when no appeal has been taken therefrom within ten days, such certificate or commission, if any have been issued, shall be thereby rendered void.

CONTESTING ELECTION OF PROSECUTING ATTORNEY.

Sec. 3124. In case of any contest in regard to any election to fill the office of district attorney, such contest shall be tried in like manner, by the district court.

CONTESTING ELECTION OF MEMBERS OF LEGISLATURE.

Sec. 3125. The right of any person declared duly elected to a seat in the council, or house of representatives, may be contested by any qualified voter of the county or district to be represented by such councilman or representative.

Sec. 3126. The person contesting such election, shall, within thirty days after election, file with the clerk of the district court of the district in which the alleged cause, or causes of the contest originated, a concise statement of the grounds on which he intends to rely, verified by affidavits.

Sec. 3127. Immediately on the filing of such statement in the clerk's office, the said clerk shall issue a commission directed to two justices of the peace in the contestant's district, to meet at such time and place, as shall be specified in such commission, not less than twenty, nor more than thirty days from the time of issuing the same, for the purpose of taking depositions of such witnesses as the parties to such contest may wish to examine.

Sec. 3128. Written notice of such contest, specifying the time and place of taking depositions, and before whom to be taken, and a copy of the statement certified by the clerk of said court shall be delivered to the person whose election is contested; or if he cannot be found, it shall be left at the house where he last resided, by the sheriff of the county in which such person claims his residence, within ten days after such statement shall have been filed in the clerk's office.

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SEC. 3129. The sheriff, into whose hands such notice and certified copy may come, shall make due service thereof, and shall return to the proper clerk, a certified copy of such notice, with the manner and time of service endorsed thereon, for which he shall be entitled to receive from the party contesting such election, the same fees for service and mileage, as are allowed in the district court for service of original writs.

SEC. 3130. Either of said justices of the peace shall have power, at any time, to issue subpoenas for witnesses, at the request of either party, to be served by the sheriff as other subpoenas, and such justices, when met at the time and place appointed to take such depositions, shall have the same power to issue attachments, and assess fines against witnesses, as is given to justices of the peace in the trial of suits instituted before them.

SEC. 3131. Said justices of the peace shall meet at the time and place appointed to take the depositions of witnesses produced by the parties, which shall be reduced to writing by said justices, and sworn to and subscribed by said witnesses respectively, and duly certified by said justices as depositions are in other cases, noting in the caption of each deposition by which party the witness was called.

SEC. 3132. Said justices may continue said examination from day to day, if the business shall require it, and when the same is closed they shall deliver the depositions taken before them, together with their said commissions, to the clerk of the district court by whom the same was issued.

SEC. 3133. If at any time, either of the said justices shall become unable to proceed in such examination, said clerk may supply the vacancy by designating any other justice of the peace of the district in the place of such justice.

SEC. 3134. The sheriff, for the service of such subpoenas, and the justice for issuing the same and taking the deposition, shall receive from the party at whose instance such services are performed, the same fees as are allowed them for similar service in other cases.

SEC. 3135. It shall be the duty of said clerk to seal up such depositions together with the original statement of the grounds of such contest, and the copy of notice served upon the party, whose right is contested, and the commission issued to the justices of the peace and transmit the same by mail to the secretary of the territory, endorsing thereon the names of the contesting parties, and the branch of the legislature before which such contest is to be tried.

SEC. 3136. It shall be the duty of the secretary of the territory to deliver the same unopened to the presiding officer of the house in which such contest is to be tried, on or before the second day of the session of the legislature, next after taking such depositions, and such presiding officer shall immediately give notice to said house that said papers are in his possession.

SEC. 3137. Each house of the legislature is the judge of the qualifications and election of its members, and shall try all contested elections of its members in such manner as it may direct.

SEC. 3138. At any time after notice of any contest shall be given and before the trial of such contested election before the proper branch of the legislature, it may be lawful for either party to such contest, to take depositions to be read on the trial thereof, in like manner and under the

same rules as are allowed and required in the cases of depositions to be read on any trial pending in the district court, and such deposition when thus taken shall be sealed up by the officer taking the same and directed to the secretary of the territory, who shall keep the same unopened, and deliver them to the presiding officer of the house in which such contest is to be tried, to be disposed of by such officer as the depositions specified in section 3135.

Sec. 3139. Nothing contained in this chapter shall be so construed as to abridge the right of either branch of the legislature trying any contested election, from granting commissions to take testimony, or from sending for and examining before such branch any witnesses it may desire to hear on such trial.

CHAPTER CCXLIV.

MISCONDUCT AT ELECTIONS, COMPENSATION OF OFFICERS.

SECTION

3140. Threats, menace or force to influence voter, fine.
 3141. Furnishing ticket falsely representing names thereon to person who cannot read, fine.
 3142. Deceiving elector and causing him to vote differently from intention, fine.
 3143. Fraudulent voting or attempting to vote, fine.
 3144. Voting or attempting to vote more than once, fine.
 3145. Officer of election inducing elector to vote, fine.
 3146. Officer of election attempting to pry into ballot, etc., fine; officer of election disclosing a ballot by him illegally ascertained,

SECTION

3147. Malfeasance or misfeasance of officers, fine.
 3148. Penalty for corruptly influencing voters.
 3149. Secretary of territory to notify prosecuting attorney of county auditor failing to return abstracts, etc.
 3149. Certificate of secretary presumptive evidence.
 3150. Prosecuting attorney to present parties violating this act.
 3151. Fees of officers conducting and connected with elections.
 3152. Time within which officers must qualify.
 3153. Tenure of office prescribed.

Sec. 3140. No person shall in any way directly or indirectly, by menace or other corrupt means or device, (directly or indirectly), attempt to influence any person in giving or refusing to give his vote in any such election, or to deter or dissuade any person from giving his vote therein, or to disturb, hinder, persuade, threaten or intimidate any person from giving his vote therein, nor shall any person at any such election, knowingly and willfully make any false assertion or propagate any false report concerning any person who shall be a candidate thereat, which shall have a tendency to prevent his election, or with a view thereto, and if any person shall be guilty of any act forbidden or declared to be unlawful by this section, he shall be deemed and taken to be guilty of a misdemeanor and, on conviction thereof, shall be punished by fine or imprisonment, or both at the discretion of the court, before which such conviction shall be had: *Provided*, That in no case shall such fine exceed the sum of two hundred and fifty dollars, or such imprisonment the term of six months.

Sec. 3141. If any person shall furnish any elector wishing to vote at any election held pursuant to law who cannot read, with a ticket, such person informing or giving such elector to understand that it contains a name or names written or printed thereon, different from the name or names which are written or printed thereon, such person shall upon conviction thereof, be fined in any sum not less than fifty nor more than five hundred dollars.

Sec. 3142. If any person shall defraud any elector at any such election, by deceiving and causing him to vote for a different person for any office than such elector desired or intended to vote for, or shall fraudulently attempt to deceive and cause such elector thus to vote for a different person for any office than he intended and desired to vote for, such person