



JUDGE JOHN McCLURE, Little Rock

SIGNIFICANT DECISIONS OF THE SUPREME COURT OF ARKANSAS

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Brooks v. Page (May 7, 1874)

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During its 160-year history the Supreme Court of Arkansas has issued a number of controversial decisions. One such decision--*Brooks v. Page*--proved so unpopular that it led within weeks to the removal from the bench of every justice who had joined in the opinion.

The decision grew out of the gubernatorial election of 1872. The Republican Party had gained control of Arkansas state government in 1868 in the wake of the congressional Reconstruction Acts, but after four years in power the Republicans had split into two factions. The regular wing of the party nominated Circuit Judge Elisha Baxter for governor. A group of Reform Republicans named a ticket headed by Joseph Brooks. Rather than nominate a candidate, the Democratic state committee endorsed Brooks, and most Democrats who were eligible to vote probably supported Brooks. Baxter was declared the winner and sworn into office in January of 1873, but Brooks contested the election in several forums including the federal courts, the General Assembly, and the state courts. The matter seemed settled

in June of 1873 when the Arkansas Supreme Court refused to issue a writ of quo warranto that would have forced Baxter to prove his right to the governor's office.

By the spring of 1874, however, many regular Republicans had become disenchanted with Baxter after the governor appointed a number of Democrats to public office and refused to back legislation for the relief of the railroads. Following his defeat in the quo warranto action, Brooks had filed an election contest in Pulaski Circuit Court, but no action had been taken in the case after Baxter had filed a demurrer. On April 14, 1874, Circuit Judge John Whytock, a regular Republican, set a hearing on Baxter's demurrer without advising Baxter's attorneys. The following day Whytock overruled the demurrer and issued a judgment declaring that Brooks was the governor of Arkansas. Brooks, accompanied by armed men, proceeded to the state capitol and ejected Baxter from the governor's office. Over the next few weeks armed supporters of both candidates poured into Little Rock.

Both sides appealed to President Ulysses S. Grant for support, but the president announced that the matter should be settled by either the Arkansas legislature or the Arkansas courts. The General Assembly was known to favor Baxter, but four of the five members of the supreme court were from the regular Republican wing that now supported Brooks. Baxter issued a call for a special session of the legislature, while Brooks searched for a way to secure a supreme court's ruling that he was the legal governor. Affirming Whytock's judgment would have taken too long, so Brooks created a case or controversy for direct submission to the high court. Both the state auditor, Stephen Wheeler, and the state treasurer, Henry Page, were in Brooks' camp and willing to cooperate in creating a controversy. Brooks requisitioned \$1,000 to pay the cost of his militia. Wheeler issued a state warrant for that amount, which Page obligingly refused to pay, citing uncertainty as to who was governor. Brooks then filed an original action in the supreme court asking the court for a writ of mandamus ordering Page to pay the warrant.

Since the court had recessed in February and was not scheduled to begin its next term until June, all members except Chief Justice John McClure, a longtime nemesis of Baxter, were out of the city. McClure summoned the other justices to convene on

May 4, 1874. Justices John Bennett, Elhanan Searle, and Marshall Stephenson immediately set out for the capital, but when their train arrived at Argenta Station on the north side of the Arkansas River, an armed detachment of Baxter militia kidnapped Bennett and Searle. The Baxter forces did not recognize Stephenson who escaped to Little Rock, bringing news of the abduction of Bennett and Searle. The two kidnapped justices were taken to Benton and held prisoner until May 5, 1874, when they managed to escape. On May 7, 1874, four of the five members of the court issued an opinion holding that Whytock's decision made Brooks the governor. The opinion was immediately forwarded to Washington, but in the meantime Baxter had managed to assemble a quorum of the General Assembly, which endorsed him as governor.

On May 15, 1874, President Grant settled the contest in Baxter's favor after the United States Attorney General issued an opinion concluding that the Arkansas constitution vested the legislature with the exclusive power to determine an election contest for governor. The attorney general's opinion curtly dismissed the Arkansas Supreme Court's "made up" decision in *Brooks v. Page*, which, according to the attorney general, "was submitted to judges virtually pledged to give the decision wanted. . . ."

On the same day that news of the president's decision reached Little Rock, three of the supreme court justices--McClure, Bennett, and Searle--left town. Four days later Stephenson resigned and also left town. After declaring Baxter the governor, the General Assembly remained in session long enough to impeach McClure, Bennett, and Searle, and enact legislation suspending all three from office. The adoption of a new constitution in October of 1874 ended the terms of the three impeached justices before they could be brought to trial in the senate. In November 1874, a new supreme court formed under the Constitution of 1874 unanimously repudiated *Brooks v. Page*, and the opinion was omitted from the official Arkansas Reports.

For a more detailed description of the role of the Arkansas Supreme Court in the Brooks-Baxter War, see Scott Stafford, *Judicial Coup D'Etat: Mandamus, Quo*

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- 39 Ark. Const., Amend. 80, §7(A).
40 Ark. Const., Amend. 64; Ark. Code Ann. 16-17-704 (1999 Supp.).
41 Ark. Const., Amend. 80, §7(B).
42 The process for the Supreme Court's promulgation of a rule is, as best I can tell, not reduced to a formulaic process. Thus, any suggestion I might make regarding how to employ it would be speculative. There are committees in place as to most sets of rules, and membership of those committees is a matter of public record.
43 See *State v. Lester*, 343 Ark. 662, 38 S.W.3d 318 (2001); *Curtis v. State*, 301 Ark. 208, 783 S.W.2d 47 (1990).
44 Ark. Const., Amend. 80, §7(B).
45 See *McGrew v. State*, 338 Ark. 30, 991 S.W.2d 588 (1999); *McArthur v. Pulaski County Circuit Court*, 253 Ark. 501, 504 488 S.W.2d 5 (1972).
46 See *State v. Roberts*, 321 Ark. 31, 900 S.W. 2d 175 (1995).

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Warranto and the Original Jurisdiction of the Supreme Court of Arkansas, 20 UALR L. J. 891 (1998).

- 1 See *State ex rel. Brooks v. Baxter*, 28 Ark. 129 (1873).
2 The opinion does not appear in the official Arkansas Reports. It can be found in Arkansas Supreme Court Opinion Book C, No. 2, at 355.
3 14 U.S. Op. Atty. Gen. 391, 400 (May 14, 1874).
4 See *Baxter v. Brooks*, 29 Ark. 173, 187 (1874).

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