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THEIR PRIDE AND ORNAMENT: JUDGE BENJAMIN JOHNSON AND THE FEDERAL COURTS IN EARLY ARKANSAS

*Lynn Foster**

Benjamin Johnson served as a federal judge in Arkansas for twenty-eight years, spanning the time from Arkansas's creation as a territory to its early statehood. He was one of its first territorial judges, serving a longer term than any of the others, and its first federal district court judge. He was also one of the most prominent early Arkansans and a member of what has been called "the Family," a political dynasty that wielded a great deal of power in antebellum Arkansas. This article discusses the highlights of Johnson's judicial career and influence, and the attempt to impeach him, set against the backdrop of early Arkansas history.

I. BACKGROUND

Benjamin Johnson was born in Scott County, Kentucky, on January 22, 1784, to Robert Johnson and Jemima Suggett, pioneers who had moved from Virginia. Robert and Jemima had a total of eleven children, of whom Benjamin's brothers James and John served in the United States House of Representatives, and Richard held the offices of U.S. Representative and Senator from Kentucky, later serving as U.S. Vice-President under Martin Van Buren from 1837 to 1841.¹

Benjamin Johnson married Matilda Williams in 1811, was admitted to the Kentucky bar, and served as a judge both in the Lexington Circuit and in the district court in the Lexington area,² although he resigned prior to 1820 because of "considerations of a private nature."³

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1. See generally LELAND WINFIELD MEYER, *THE LIFE AND TIMES OF COLONEL RICHARD M. JOHNSON OF KENTUCKY* 20-41 (1932) and Thomas A. DeBlack, *A Garden in the Wilderness: The Johnsons and the Making of Lakeport Plantation, 1831-1876* 1-27 (1995) (unpublished Ph.D. thesis, University of Arkansas at Fayetteville) (on file with the University of Arkansas at Little Rock Law Library) (discussing the parents and siblings of Benjamin Johnson).

2. See MEYER, *supra* note 1, at 20.

3. Letter from William Littell to President Monroe (Sept. 14, 1820), in 19 *TERRITORIAL PAPERS OF THE UNITED STATES, ARKANSAS TERRITORY* 216 (Clarence E. Carter ed. 1953) [hereinafter *TERRITORIAL PAPERS*].

Meanwhile, the land that would later become Arkansas passed from France to Spain in 1763, back again to France in 1800, and thence to the United States as part of the Louisiana Purchase in 1803, when Benjamin Johnson was 19 years old. In 1812, when Louisiana achieved statehood, the District of Arkansas became the southern portion of the Territory of Missouri⁴ and its present-day southern boundary was set. In 1819, as Missouri prepared to enter the Union as a state, Congress changed the name of the remaining territory to Arkansas and set its present-day northern boundary, with the capital at the Post of Arkansas, "until the territorial legislature should direct otherwise."⁵ Thus by 1819 the northern, eastern, and southern boundaries of the territory of Arkansas corresponded to those of the present day, but the western territorial boundary was not fixed at its final location until 1828, when northwestern Arkansas was ceded by the Cherokees.⁶

The governmental structure of territorial Arkansas was, like that of most territories at the time, modeled after the type of government set out by the Northwest Ordinance. Territorial Arkansas was to progress through two stages of government. In the first stage, President Monroe appointed five officials: Governor William Miller, a brigadier general and hero of the war of 1812 and a resident of New Hampshire; the governor's assistant, Secretary Robert Crittenden, a native Kentuckian and brother of John Jordan Crittenden (who served as U.S. Senator, Governor of Kentucky, and U.S. Attorney General during his career); and the three judges of the territorial Superior Court, who were in addition to function as a legislature, until a general assembly could be formed. Andrew Scott of Missouri Territory, Charles Jouett of Michigan Territory, and Robert P. Letcher of Kentucky were appointed to be the first three territorial judges. The territorial government was to commence on July 4, 1819.

This stage lasted less than a year, and in fact ended, with elections for the General Assembly, before the governor even arrived. The new government, meeting at the Arkansas Post, adopted all laws of the Missouri Territory not repugnant to the organic act establishing the Arkansas Territory, and established two judicial circuits and circuit courts,⁷ replacing the courts of common pleas that had operated in the Missouri Territory.⁸ In August,

4. See Act of June 4, 1812, 2 Stat. 743.

5. Act of Mar. 2, 1819, 3 Stat. 493.

6. See Act of May 24, 1828, Sec. 8, 4 Stat. 305.

7. See Act of Aug. 3, 1819, Laws of the Territory of Arkansas 70-82 (1821).

8. Circuit courts moved around multi-county "circuits"; courts of common pleas met in one place only, usually the county seat, and sometimes had more limited jurisdiction. At this point Arkansas had only five counties: Arkansas and Lawrence comprised the first circuit, and Clark, Hempstead, and Pulaski counties, the second circuit. See *id.* at 73.

Crittenden appointed circuit judges, attorneys, and other government officials.⁹

The Superior Court was slow to commence operations. Its first judicial session took place in January 1820 at the Arkansas Post, but Judge Scott presided alone, since Jouett and Letcher had left the Territory the prior August.¹⁰ The territorial legislature complained in April that a prisoner had been languishing in a county jail for two years without trial because, with only one judge, the Superior Court was unable to hear capital cases;¹¹ and complained again in October that the courts were “virtually shut.”¹² Meanwhile, Letcher resigned and Monroe appointed Joseph Selden of Virginia to succeed him.¹³ Jouett resigned as well,¹⁴ and Monroe appointed John Thompson of Ohio as Jouett’s successor.¹⁵ Thompson, however, never reached the Arkansas Territory, changing his mind and turning back at Jackson, Mississippi.¹⁶

Monroe then appointed Benjamin Johnson to replace Thompson,¹⁷ in response to requests from the candidate’s brother, U.S. Senator Richard M. Johnson, as well as other senators and prominent Kentuckians.¹⁸ Johnson arrived in time to sit with Andrew Scott at the second superior court session, held in June of 1821 at “the Little Rock.”

9. See Executive Register for the Arkansas Territory, in 19 TERRITORIAL PAPERS, *supra* note 3, at 789, 791-95, 801.

10. See Petition to the President by the Territorial Assembly (Feb. 11, 1820), in 19 TERRITORIAL PAPERS, *supra* note 3, at 143, 144-45.

11. See Recommendation to the President by the Territorial Assembly (Apr. 1820), in 19 TERRITORIAL PAPERS, *supra* note 3, at 170-71.

12. Memorial to Congress by the Territorial Assembly (Oct. 1820), in 19 TERRITORIAL PAPERS, *supra* note 3, at 234.

13. See James Monroe, Commission of Joseph Selden as Judge (May 13, 1820), in 19 TERRITORIAL PAPERS, *supra* note 3, at 182-83.

14. The *Arkansas Gazette* printed a letter stating that a “swarm of Musquetoes” had driven him from the territory. ARKANSAS GAZETTE, Nov. 18, 1820.

15. See Letter from John Thompson to John Quincy Adams (Aug. 30, 1820), in 19 TERRITORIAL PAPERS, *supra* note 3, at 213-14 (accepting his commission).

16. See ARKANSAS GAZETTE, Nov. 18, 1820. Indeed, John Quincy Adams, the Secretary of State, wrote: “[t]hey have accepted the appointments, and received the salaries to the last hour that they could, and never went to the Territory . . .” V MEMOIRS J.Q. ADAMS 212 *quoted* in 19 TERRITORIAL PAPERS, *supra* note 3, at 249.

17. See James Monroe, Commission of Benjamin Johnson as Judge (Jan. 23, 1821), in 19 TERRITORIAL PAPERS, *supra* note 3, at 258.

18. Letter from Richard M. Johnson to the Secretary of State (Sept. 26, 1820), in 19 TERRITORIAL PAPERS, *supra* note 3, at 219. See *generally* 19 TERRITORIAL PAPERS, *supra* note 3, at 203-04, 207-08, 241. Benjamin Johnson did not, however, have the support of Governor Miller, Secretary Crittenden, or Judge Scott, who all wrote the President urging the appointment of Judge Neil McLane. Letter from Governor Miller, Judge Scott, and Secretary Crittenden to the President (no date), in 19 TERRITORIAL PAPERS, *supra* note 3, at 253.

II. THE TERRITORIAL SUPERIOR COURT

Superior court judges were appointed for four years but were subject to removal by the President. In 1819, the Arkansas Territorial Superior Court had jurisdiction of all criminal and penal cases; exclusive jurisdiction of all capital cases; original civil jurisdiction concurrently with the inferior courts; and exclusive appellate jurisdiction in all civil cases involving amounts in controversy of \$100 or more. One judge constituted a court of original jurisdiction, and two judges an appellate court.¹⁹ The combination of original and appellate jurisdiction was common at the beginning of the nineteenth century; courts had less business and jurisdictional lines were not so rigidly drawn as they are today.

In the territories, one court system handled both "state" matters, such as most crimes, trespasses and insolvency, and federal matters, such as trading with Indians without a license.²⁰ In effect, the territorial superior court served as a combined state and federal appellate court. It was also the court of last resort, there being no appeal upward until 1828.

Some of the opinions of the Superior Court for the Territory of Arkansas have been preserved for us through the efforts of Samuel H. Hempstead, who published them in 1856, in a volume also containing the opinions of the District Court for the District of Arkansas, and Ninth Circuit opinions arising in Arkansas. In the preface, he acknowledged his debt to Johnson: "The late Benjamin Johnson, of Arkansas, who sat in those courts for nearly thirty years, and was their pride and ornament, generally wrote out his opinions, and before his death placed such as had been preserved in my hands."²¹

Benjamin Johnson was clearly a dominant presence on the territorial superior court. He sat as a member of the bench in 112 of the 150 cases in which decisions were published. Of those 112, 16 were actually written by him, 17 were written by others, and 78 were per curiam opinions in which he was present on the panel.

19. See Act of Mar. 2, 1819, 3 Stat. 493, Sec. 7.

20. The scope of the original criminal jurisdiction of the court was well described by Judge Selden in a charge he made to the grand jury, published in full in the *Arkansas Gazette* of Nov. 3, 1821. Major federal crimes consisted of treason, trading with Indians without a license, and counterfeiting. Arkansas had adopted those Missouri territorial laws in force in 1819, such as murder, manslaughter, robbery, assault, etc. They were available to the bench and bar in *Geyer's Digest*, supplemented by the printed acts of the Arkansas territorial legislature.

21. SAMUEL H. HEMPSTEAD, REPORTS OF CASES ARGUED AND DETERMINED IN THE UNITED STATES SUPERIOR COURT FOR THE TERRITORY OF ARKANSAS, FROM 1820 TO 1836; AND IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARKANSAS, FROM 1836 TO 1849; AND IN THE UNITED STATES CIRCUIT COURT FOR THE DISTRICT OF ARKANSAS, IN THE NINTH CIRCUIT, FROM 1839 TO 1856 vii-viii (1856) [hereinafter cited as a nominative reporter, "Hempstead"].

The early nineteenth century was a colorful, lawless time in Arkansas's history, and some of that atmosphere is preserved in the decisions, although much of it must be read between the lines, with a background knowledge of the contemporary persons and events. From what little we can glean through the frame of appellate law and archaic vocabulary of common law pleading, we are afforded a glimpse here and there of the way of life in the territory and early state of Arkansas. At the time of Benjamin Johnson's death in 1849, no railroad had yet come to Arkansas; no telegraph lines had been strung. No bridges spanned the Arkansas River. Arkansas was a slave state, with no industry to speak of. Pastimes were few and politics figured prominently, often becoming deadly.

Politics in antebellum Arkansas was in large part a contest between two factions. One faction (the "Family") consisted of the brothers Henry, James and Elias Conway, their cousin Ambrose Sevier, the brothers Wharton and Elias Rector (also their cousins), Benjamin Johnson (Sevier's father-in-law), his sons Robert Ward and Richard H. Johnson, and prominent attorney and land speculator Chester Ashley. The other faction consisted of Robert Crittenden and his followers, including attorneys Robert C. Oden, William Cummins, Absalom Fowler, and Albert Pike. Prior to statehood there were no national parties in Arkansas; afterward Family members by and large became leaders in the Democratic Party.²² Crittenden died young, two years before statehood, but those in his faction generally became Whigs. Most of these early political leaders were men of wealth and power, connected by complex business and personal relationships.

The chief avenue to wealth and power on the cash-poor, agricultural frontier was land. The process of gaining ownership of land, however, was not necessarily easy. From 1686 to 1804, civil law had prevailed in Arkansas by virtue of her possession by Spain and France.²³ Legal historian Lawrence Friedman states that "[t]he civil law left some legacies behind. One was a muddled collection of land grants . . ."²⁴ This was certainly the case in Arkansas. Some early settlers claimed Spanish land rights; others, French. Indian holdings also complicated the picture. In 1804, Arkansas's indigenous tribes were the Osages, Caddos and Quapaws, but additional treaty rights to Arkansas land were given by the U.S. government to such tribes as the

22. For a good account of the latter years of the Family, see Michael B. Dougan, *A Look at the "Family" in Arkansas Politics, 1858-1865*, 29 *ARK. HIST. Q.* 99 (1970).

23. See generally MORRIS S. ARNOLD, *UNEQUAL LAWS UNTO A SAVAGE RACE: EUROPEAN LEGAL TRADITIONS IN ARKANSAS, 1686-1836* (1985) and *COLONIAL ARKANSAS 1686-1804: A SOCIAL AND CULTURAL HISTORY* (1991) for accounts of the legal system, and life in general, in Arkansas under the French and Spanish.

24. LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 365 (2d ed. 1985).

Choctaws, Chickasaws, and Cherokees, before they were ultimately displaced and moved to the Indian Territory.²⁵ Finally, Congressional actions affecting land rights were no less confusing. In 1812, Congress set aside 2 million acres of Arkansas as a "Military Tract" to veterans of the War of 1812.²⁶ In 1815, in response to the severe New Madrid earthquakes of 1811 and 1812, Congress offered certificates in compensation to earthquake victims which could be exchanged for public land.²⁷ Finally, settlers who lived on and improved specially designated lands could purchase them later under "preemption" laws.

Competing with these groups of claimants were the land speculators. William Russell, a founder of Little Rock, was one of the surveyors who plied his trade in what later became Illinois, Missouri, and Arkansas. Of him, an early settler wrote to a Land Office official, "It is easy for A crafty Surveyor to become A crafty Land Speculator."²⁸ Thousands of acres passed through Russell's hands. Many attorneys were land agents and speculated in land. One such was Chester Ashley, one of the first attorneys to settle in Arkansas and a later U.S. Senator.

These conflicting land rights caused a multitude of lawsuits in the territory and early state, some of which eventually reached the United States Supreme Court.²⁹ Attorneys profited from these lawsuits as well. As will be shown, Benjamin Johnson played a major role in land disputes, deciding many of the most important claims.

Three opinions from the first of Johnson's sessions on the bench appear in Hempstead's *Reports*. Of these, *Russell v. Wheeler*,³⁰ written by Johnson, was an important link in the chain of events that would confirm the location and owners of the village of Little Rock. *Russell v. Wheeler* pitted claimants possessing New Madrid certificates against preemption claimants, and

25. When the territory of Arkansas was established, large tracts of land were reserved to the Quapaws, the Caddos, the Cherokees, and shortly thereafter, the Choctaws. The last portions of these lands were not ceded to the United States until 1835, less than a year before Arkansas became a state. See generally S. CHARLES BOLTON, *ARKANSAS, 1800-1860: REMOTE AND RESTLESS* 67-87 (1998) for a history of the Indian frontier as it moved westward through Arkansas.

26. See Act of May 6, 1812, 2 Stat. 728.

27. See Act of Feb. 17, 1815, 3 Stat. 211. See generally PAUL W. GATES, *HISTORY OF PUBLIC LAND LAW DEVELOPMENT* (1968) for a definitive treatment of federal laws and policy regarding public land.

28. Letter from Chilo Moultrie to Josiah Meigs (Apr. 10, 1822), in 19 *TERRITORIAL PAPERS*, *supra* note 3, at 420, 422.

29. See *Lytle v. Arkansas*, 50 U.S. (9 How.) 314 (Jan. 1850 Term); *Rector v. Ashley*, 73 U.S. (6 Wall.) 142 (Dec. 1867 Term); *Hot Springs Cases*, 92 U.S. 698 (Oct. 1875 Term); *Muse v. Arlington Hotel*, 168 U.S. 430 (1897), as well as other cases discussed *infra*.

30. *Hempstead*, *supra* note 21, at 3, 21 F. Cas. 66 (1821) (No. 12,164a).

involved some of the most prominent early Arkansans on both sides. One William O'Hara, a land speculator, obtained New Madrid certificates, used them to claim land that is now Little Rock, and assigned part interest in them to James Bryan and Stephen Austin. Unfortunately, the land they claimed partly overlapped land originally preempted in 1814 by an early frontiersman, and eventually sold to William Russell and others. Speculative interest in Little Rock land grew as the Arkansas Territory was formed and discussions began over moving the capital away from the Arkansas Post to a more central location. During 1820, prominent persons purchased Little Rock land from either the O'Hara side or the Russell side.³¹ In October, the territorial legislature did indeed designate Little Rock the temporary seat of government beginning June 1, 1821. The New Madrid claimants had by now built on the disputed land. Amos Wheeler, acting on behalf of O'Hara and other New Madrid claimants, offered several sections to the territory for government use. Russell tried to enter the land, was rebuffed, and sued Wheeler for forcible entry and detainer. He won a favorable verdict from a jury in justice of the peace court. The Circuit Court of Pulaski County overturned the verdict, and Russell appealed to the superior court.³²

Johnson, writing the superior court opinion in June of 1821,³³ reversed the verdict (holding in favor of Russell). In disputing the defendant's contention that the verdict below was "fatally defective" because it did not contain the correct wording, the court stated that if the meaning of the jury was clear, "yet the court are bound to work and mould the verdict into form according to the real justice of the case."³⁴ The court thus held in favor of the preemption holders. Immediately thereafter ensued, as one observer put it:

a scene of true western life and character that no other country could present. First we saw a large wood and stone building in flames, and then about one hundred men, painted, masked, and disguised in almost every conceivable manner, engaged in removing the town. These men, with

31. Persons buying land from New Madrid claimants at one time or another, before the final settlement, included Governor Miller and attorney Chester Ashley. Persons buying land from preemption claimants during 1819 included Secretary Crittenden, Speaker of the House Joseph Hardin, attorney Robert C. Oden, Territorial Judge Andrew Scott, receiver Henry Conway, William Trimble, and Thomas Eskridge (these latter two would later sit on the territorial superior court). See LONNIE J. WHITE, *POLITICS ON THE SOUTHWESTERN FRONTIER: ARKANSAS TERRITORY 1829-1836* 30-32 (1964).

32. None of this background is explained in *Russell v. Wheeler*. Accounts of the early controversy over Little Rock land can be found in WHITE, *supra* note 31, at 30-32; BOLTON, *supra* note 25, at 36-38; and MARGARET ROSS, *ARKANSAS GAZETTE: THE EARLY YEARS 1819-1866* 35-39 (1969).

33. According to Margaret Ross, since Judge Scott owned some of the disputed land, he recused himself and Johnson wrote the opinion. See ROSS, *supra* note 32, at 36.

34. *Russell*. Hempstead, *supra* note 21, at 7, 21 F. Cas. at 15.

ropes and chains, would march off a frame house on wheels and logs, place it about three or four hundred yards from its former site, and then return and move off another in the same manner. They all seemed tolerably drunk, and among them I recognized almost every European language spoken. They were a jolly set indeed. Thus they worked amid songs and shouts, until by night-fall they had completely changed the site of their town. Such buildings as they could not move they burned down, without a dissantant [sic] voice.

The occasion of this strange proceeding was as follows: The Territorial Court was then in session at Diamond Hill [today Crystal Hill], about thirty miles distant on the river above, and the news had reached Little Rock on the morning of our arrival that a suit pending in this Court and involving the title to the town, wherein one Russell of St. Louis was the claimant, had gone against the citizens of Little Rock and in favor of Russell. The whole community instantly turned out en masse and in one day and night Mr. Russell's land was disencumbered of the town of Little Rock. They coolly and quietly, though not without much unnecessary noise, took the town up and set it down on a neighboring claim of the Quapaw tribe, and fire removed what was irremovable in a more convenient way. The free and enlightened citizens of Little Rock made a change of landlords more rapidly than Bonaparte took Moscow.³⁵

A few months later, the two sides compromised, dividing the land between them.³⁶

After the seat of territorial government moved to Little Rock, the court met in various buildings before the Old State House was occupied in 1836. During the court's first few sessions in Little Rock, it used the Baptist Meeting-House.³⁷ In October of 1825, the court met in Colonel Conway's frame house.³⁸ For awhile, the court met in a house owned by Chester Ashley. William Pope, who sometimes acted as court clerk, related an incident from Judge Johnson's court occurring at that time:

On one occasion while the court was in session Judge Benjamin Johnson, one of the judges of the court, and who was at times very irritable, discovered Colonel Ashley in the act of whittling, with his pen knife, one of the wooden benches in the court room. Doubtless wishing for some

35. THOMAS JAMES, THREE YEARS AMONG THE INDIANS AND MEXICANS 108-09 (Milo Milton Quaife ed., Citadel Press, 1966) (1846).

36. See A Bill of Assurances [sic], and Letter from Samuel Anderson to Josiah Meigs (Nov. 21, 1821), in 19 TERRITORIAL PAPERS, *supra* note 3, at 357, 364-65. Until 1818, the land in dispute belonged to the Quapaw Indians, which would have weakened the claims of both sides had either faction taken the other to court.

37. See FAY HEMPSTEAD, A PICTORIAL HISTORY OF ARKANSAS FROM EARLIEST TIMES TO THE YEAR 1890 192 (1890).

38. See ARKANSAS GAZETTE, Oct. 11, 1825.

object upon which to vent his ill-humor that day, he called out with some show of impatience, "Colonel Ashley, I wish you would quit cutting this court house to pieces!" To which Colonel Ashley replied good naturedly, "If it pleases your honor, I do not know who has a better right to do so; it is my property."³⁹

Terms of the Superior Court were set by the General Assembly. At first there were two, in June and October.⁴⁰ In 1820 the General Assembly attempted a restructuring of the lower courts, changing the circuit courts to courts of common pleas, each court to be administered by three judges. Circuit judges had to be "learned in the law"; however, the common pleas judges merely had to be "three respectable house-holders" appointed by the Governor. The new courts' jurisdiction was diminished, however; chancery jurisdiction was transferred to the superior court. The entire Superior Court would be required to ride one arduous circuit thus: February in Arkansas County, April in both Hempstead and Independence Counties, August in Arkansas County, and October in Hempstead and Independence Counties.⁴¹ For a territory with no bridges or ferries and almost no roads, this was a tall order. However, the legislature had immediate second thoughts because its very next act, passed on the same day, postponed the changes affecting the Superior Court for one year.⁴²

A common means of political criticism in those days was to write a pseudonymous letter to a newspaper, and in August of the following year, a letter from "Sulpicius"⁴³ was published in the *Arkansas Gazette*. Sulpicius complained that the law would make the members of territorial superior court "judicial camels to carry her laws, through the deserts of her territory."⁴⁴ He argued that neither Kentucky, Missouri, nor New York required their original judges to travel, at least not until bridges and ferries existed. He also criticized the requirement that the entire bench ride the same circuit together. Sulpicius's criticisms were heeded by the following legislature, which abolished the courts of common pleas, re-established circuit courts, and changed the terms of the superior court to three per year in Little Rock.⁴⁵ The

39. WILLIAM F. POPE, *EARLY DAYS IN ARKANSAS; BEING FOR THE MOST PART THE PERSONAL RECOLLECTIONS OF AN OLD SETTLER* 143 (1895). Pope arrived in Arkansas in 1832 to serve as a secretary to his uncle Governor Pope, replacing a prior secretary, also a nephew named William, who had been killed in a duel.

40. See Act of Aug. 3, 1819, Sec. 11, *Laws of the Territory of Arkansas* 70, 76 (1821).

41. See Act of Oct. 25, 1820, *Laws of the Territory of Arkansas* 118 (1821).

42. See *id.* at 123.

43. The original Sulpicius was a jurist who wrote more than 100 treatises on Roman law. See 11 *THE NEW ENCYCLOPAEDIA BRITANNICA* 379 (15th ed. 1998).

44. *ARKANSAS GAZETTE*, Aug. 18, 1821.

45. See Acts of Oct. 24, 1821, *Acts Passed by the General Assembly of the Territory of*

nineteenth century Sulpicius's identity is not known, but he was almost certainly one of the superior court judges.

Early Arkansas was notable for the number of duels among its most prominent men, but nonetheless many were shocked when in May of 1824 Benjamin Johnson's superior court brethren, Andrew Scott and Joseph Selden, engaged in a fatal duel. This account was told to William Pope by the son of Judge Scott:

Soon after Judge Selden went upon the bench he and Judge Andrew Scott, also of the Superior Court, and two ladies, became engaged in a social game of whist at the residence of one of the ladies at the Post of Arkansas. In the course of the game one of the ladies, Judge Scott's partner in the game, remarked: "Judge Selden, we have the tricks and the honors on you." To which Judge Selden very abruptly replied: "That is not so, madam."

The young lady, very much mortified at the ungracious reply, put up her handkerchief to hide her mortification, saying, "I did not expect to be insulted."

Judge Scott remarked to Judge Selden: "Sir, you have insulted a lady, and my partner, and you must apologize for your rudeness."

Judge Selden declined to apologize, saying: "I make no apology. She has stated what is not true."

Judge Scott seized a candlestick, which was standing on the card table, and hurled it at Judge Selden. Parties who were present interfered, and prevented further difficulty at that time.⁴⁶

However, the incident was not over. Scott challenged Selden to a duel. Several weeks elapsed, during which the court met, and according to the *Gazette*, the "variance" of the two judges toward each other interfered with court business.⁴⁷ (Judge Johnson was not present at this term, being temporarily in Kentucky with his family.⁴⁸) Dueling was illegal in the territory at this time,⁴⁹ and therefore, the judges met on the eastern side of the Mississippi. Scott shot and instantly killed Selden.

Apparently Scott was not prosecuted, even though he and the seconds clearly broke the law, which the editor of the *Gazette* was outraged enough to

Arkansas 3-6, 11 (1822).

46. POPE, *supra* note 39, at 36. Pope took pains to state that this account is verbatim what was told him by Scott's son, perhaps because even then it sounded farfetched.

47. ARKANSAS GAZETTE, June 15, 1824.

48. *See id.*, Apr. 13, 1824.

49. Territorial representative William Allen had been killed in a duel by attorney Robert C. Oden in 1820. The territorial legislature penalized dueling the following fall, and forbade territorial officials to duel. *See Act of Oct. 23, 1820, Laws of the Territory of Arkansas 110 (1821).*

reprint in the next issue.⁵⁰ Henry W. Conway, who was by now Arkansas Territory's delegate to Congress, merely wrote the Secretary of State that "I have learnt today that Joseph Selden Esqr, one of the Judges of the Superior Court of the Territory of Arkansas, died on the 26th of last month," with no further explanation.⁵¹ (Ironically, Conway himself would be killed in a duel by Territorial Secretary Crittenden in 1827.) President Monroe appointed William Trimble to fill Selden's place.⁵² Scott remained on the bench until his commission expired in 1827. At that time the Senate did not vote to renew it because of the duel,⁵³ and Thomas P. Eskridge was appointed in his place.⁵⁴

The October 1824 term of the Superior Court featured a case of great interest. During the prior year, a hunting party of Arkansans had been camped in Choctaw territory. A band of Osage warriors, seeking revenge on some Caddos, encountered the Arkansans and killed them on the spot. At the request of the U.S. government, the five Osage leaders of the band surrendered themselves to stand trial in Little Rock. Two were found guilty. They moved the Superior Court for a new trial, and then an arrest of judgment on various grounds: that the court had no jurisdiction over Osages, that the verdict was contrary to the evidence, and that the indictment was deficient in several regards. The court denied both motions and Judge Johnson delivered the death sentence "in a very impressive manner."⁵⁵ Hempstead related that the Osages were executed,⁵⁶ but in fact, the execution was postponed several times by the acting governor, and at the last the "unfortunate sons of the forest" were pardoned by President Adams and set free, to return to their country.⁵⁷

In 1827, the legislature finally prevailed in its efforts to require the Superior Court judges to ride circuits. Arkansas was divided into three judicial circuits, and Benjamin Johnson was assigned the second, consisting of Pulaski, Conway, Crawford, and Loveley Counties. During the same

50. See ARKANSAS GAZETTE, June 8, 1824, at 3.

51. Letter from Henry Conway to John Quincy Adams (June 23, 1824), in 19 TERRITORIAL PAPERS, *supra* note 3, at 679.

52. See James Monroe, Commission of William Trimble as Judge (June 26, 1824), *id.* at 681.

53. See Letter from Martin Van Buren to Henry Clay (Jan. 12, 1827), 20 TERRITORIAL PAPERS, *supra* note 3, at 366.

54. See John Quincy Adams, Commission of Thomas P. Eskridge as Judge (Mar. 3, 1827), in 20 TERRITORIAL PAPERS, *supra* note 3, at 412.

55. *Trial of Five Osage Indians for Murder*, ARKANSAS GAZETTE, Oct. 26, 1824, at 3.

56. See *United States v. Cha-to-kah-na-pe-sha, Hempstead*, *supra* note 21, at 27, 28, 25 F. Cas. 414, 414 (1824) (No. 14,789a).

57. See ARKANSAS GAZETTE of Oct. 19 and 26, 1824, Dec. 21 and 28, 1824, Jan. 4, 1825, Feb. 22, 1825, Apr. 5 and 19, 1825, May 3, 1825 and June 7, 1825.

session, the legislature added a fourth circuit, and also allowed the governor to notify the President if a judge refused to ride the circuit.⁵⁸

In 1828, Congress did indeed approve a fourth judge, James Woodson Bates, added the right of appeal from the Arkansas Superior Court to the U.S. Supreme Court, and confirmed the requirement that the judges ride circuits.⁵⁹ The aversion of the judges to riding the circuit can be partially explained by the following anecdote, told by an attorney to G.W. Featherstonhaugh, an English visitor to territorial Arkansas, who included the description in his travel memoirs:

He stated that some years ago, after a hard day's ride, there was only one cabin at which they could stop, and that it was very important to reach it during the winter season. This cabin belonged to an old hunter, a pioneer in that part of the country, to whom the lawyers—in virtue of the extensive jurisdiction he had over the wilderness—had given the title of Governor Shannon; it consisted of one solitary room with a mud floor, and not a single article of furniture except an old log that he had hollowed out, and that he slept in at night, and sat upon at other times. Upon this mud floor travellers used to stretch themselves in their blanket-coats, and there they pigged with the Governor, an old negress, and a team of dogs he kept to hunt the bars [bears], which were numerous around him. As there had never been a door—or any contrivance approaching it—to the cabin, the dogs used to come in and go out whenever they pleased: if they were all asleep, the barking of a wolf would rouse them, and out they would rush over the recumbent travellers, without being at all particular where they trod upon them. On their return, wet and covered with dirt, they made no ceremony of who they laid near, nor whom they laid upon, for dogs like to lie warm, and this was the reason why the Governor had made his bed in a log. It happened upon one occasion that a judge, who had never made this circuit before, favoured the Governor with his company, and becoming at length outrageously annoyed at the stench and filth of the dogs, one of which had acted very irreverently to his Honour, called out to the Governor, that if he did not take the dog away he would kill him on the spot. Upon which his Excellency replied, that he “would be _____ if the bl___d judges and lawyers of Arkansas hadn't slept with his dogs for seven years, and that if any man touched one of 'em, he would send him to sleep with the painters [panthers] in less than no time.” The Governor was well known to be a resolute fellow, and as there was no other settler nearer than 30 miles, and

58. See Act of Oct. 24, 1827, Acts Passed at the Fifth Session of the General Assembly of the Territory of Arkansas 33, 34-38 (1828).

59. See Act of Apr. 17, 1828, 4 Stat. 261, 261-62.

“a pretty considerable sprinkling of bars and painters about,” the judge thought it best to put up with this slight upon his authority.⁶⁰

Riding the circuit was not only uncomfortable and dirty. It could also be dangerous, as when Archibald Yell, later to be governor, almost drowned crossing the frozen Arkansas River while riding the circuit with some other attorneys from Fayetteville⁶¹ Perhaps as a trade-off for the imposition of circuit riding, the legislature limited the superior court to appellate jurisdiction in civil and equity cases. Its original jurisdiction in civil cases was abolished.⁶²

In October of 1828, a case involving Territorial Secretary Robert Crittenden came before the Superior Court. He had been indicted for sending a challenge to fight a duel (almost certainly the duel that killed Family member and Territorial Delegate to Congress Henry Conway). However, the court held that the indictment was deficient in two ways: for stating “on or about” a time, rather than a specific time; and because the indictment did not conclude “against the peace and dignity of the United States.” So saying, the court quashed the indictment and discharged the defendant.⁶³

Some of the most important cases decided by the superior court at this time involved Arkansas land claimed under supposed grants from the Spanish governor made at the close of the eighteenth century. In 1824, Congress had given the Territorial Superior Court jurisdiction to try land claims.⁶⁴ In November of 1827, “Bernardo Samperyac,” acting through his attorney Robert Oden, filed a bill in the Superior Court asking the court to confirm his grant of 400 arpens⁶⁵ from the Spanish governor Miro. U.S. Attorney Samuel C. Roane filed an answer stating that Samperyac did not exist, or if he did, that no one now living was authorized to file the bill, and asked that it be dismissed. On December 19, Roane moved to continue the cause until the next term. The court denied his motion. One John Hebrard appeared as a witness and gave testimony in open court, before judges Benjamin Johnson and William Trimble, that he had been *alcalde* [magistrate] in the Province of

60. 2 G. W. FEATHERSTONHAUGH, EXCURSIONS THROUGH THE SLAVE STATES 93-95 (1844).

61. See Albert Pike, *The Superior Court*, in JOHN HALLUM, BIOGRAPHICAL AND PICTORIAL HISTORY OF ARKANSAS 72, 77 (1887).

62. See Act of Oct. 24, 1827, Acts Passed at the Fifth Session of the General Assembly of the Territory of Arkansas 33, 34 (1828).

63. *United States v. Crittenden, Hempstead*, *supra* note 21, at 61, 25 F. Cas. 694 (1828) (No. 14,890a).

64. See Act of May 26, 1824, 4 Stat. 52, 52-56. Prior to that, a commission had decided such claims. The 1824 act called for land claims to be handled as equity cases, in a special one-time session of the court.

65. An arpen, or arpent, is 63.75 yards; a square arpent is .85 of an acre. See GATES, *supra* note 27, at 89 & n.4.

Louisiana, between 1789 and 1791, and commandant in Catahoola, from 1797 to 1803. He testified in full support of the claimants, stating that the grants from the governor were authentic, that he knew Samperyac, that fire had destroyed many records in New Orleans in the 1790s, and other information to that effect. Over one hundred similar cases, each for 400 arpens of land, appeared before the court in the five succeeding days, amounting to more than 60,000 acres of land. The court confirmed these grants in December of 1827.⁶⁶ The United States had one year in which to appeal; it did not. Roane had from the beginning expressed his doubts about the claims to Attorney General William Wirt, but did not send to Wirt the statements of the law in each case that the Attorney General insisted were necessary for the filing of the appeal.⁶⁷

Meanwhile, in February of 1828, Samperyac's claim transferred by deed to John J. Bowie,⁶⁸ who in turn sold it to Joseph Stewart. The group of claims confirmed by the court in December became popularly known as the "Bowie claims." In October, the court authorized the claimants to withdraw their original papers.⁶⁹ In April of 1829 the U.S. Commissioner of Lands wrote the U.S. Attorney with his suspicions as to the genuineness of the Bowie claims, asking that the original papers filed with the court be examined by an expert.⁷⁰ In September, Acting Governor Fulton (who had replaced Crittenden as Territorial Secretary) wrote President Jackson that "most persons here, believe that those claims are fraudulent."⁷¹ The government postponed the issuing of patents.⁷² A handful had already been issued and the Commissioner of Lands

66. *United States v. Samperyac, Hempstead*, *supra* note 21, at 118, 119-23, 27 F. Cas. 932, 932-34 (1831) (No. 16,216a), *aff'd*, *Sampeyreac v. United States*, 32 U.S. (7 Pet.) 222 (Jan. 1833 Term).

67. See Letter from William Wirt to Samuel C. Roane, in 20 TERRITORIAL PAPERS, *supra* note 3, at 565-66. A series of letters passed back and forth between William Wirt, the Attorney General, and Roane. Wirt believed the statute required Roane to send him copies of the Spanish laws and regulations, as well as a discussion of the rules, issues, facts and reasoning of the court in each case. Instead, Roane sent him everything he had, which was the record. See generally their correspondence at 20 TERRITORIAL PAPERS, *supra* note 3, at 288-89, 344-45, 596, 673-74, 759-68. See also H. DOC. No. 45 (21st Cong. 1st Sess.)

68. The brother of the Bowie of Bowie knife fame. "Bowie" is misspelled as "Borrie" in the first portion of the *Hempstead* version of *Samperyac*, which can be confusing to the first-time reader.

69. See Letter from Isaac T. Preston to George Graham (Oct. 10, 1829), in 21 TERRITORIAL PAPERS, *supra* note 3, at 72, 73. Many withdrew their papers, but originals from 58 cases remained on file.

70. See Letter from George Graham to Samuel C. Roane (Apr. 30, 1829), in 21 TERRITORIAL PAPERS, *supra* note 3, at 24.

71. Letter from William S. Fulton to Andrew Jackson (Sept. 7, 1829), in 21 TERRITORIAL PAPERS, *supra* note 3, at 67.

72. See Letter from George Graham to William S. Fulton (Oct. 13, 1829), in 21 TERRITORIAL PAPERS, *supra* note 3, at 81.

wrote the U.S. Attorney asking him to annul them.⁷³ Isaac T. Preston, the Register of the Land Office at New Orleans, traveled to Little Rock in October of 1829. In a letter to the Commissioner of Lands, he pointed out the many problems with the Bowie claims, including the obvious forged appearance of the orders of survey, the misspelling of Spanish words, the fact that many were written with the same ink and used the same witnesses, etc. "The toute ensemble to any eye accustomed to see ancient Spanish documents would produce the instant and undoubted conviction of their falsity."⁷⁴ Preston was quite critical of both the 1824 act and of the court's decrees:

[T]he law establishing the tribunal was a bad one as the result has awfully proved. And so are all laws establishing tribunals before which individuals may cite their government. The Government of a Country should act for itself & is presumed to be just & even generous to individuals. Otherwise it should be dissolved. The Judges of such tribunals too often adopt the baneful principle, that as judges they may see through the lights of law & evidence that to be true, which as individuals they know to be false & to conceive that these lamps were given to lead them into darkness instead of illumination.⁷⁵

The *Gazette* mentioned (but did not reprint) Preston's accusations, blandly protesting that if there was fraud, then it was fraud of the Bowies, and not the judges and lawyers of Arkansas.⁷⁶ The *Gazette* also made its own count of the acres involved and claimed the total was 30,000, not 60,000.⁷⁷

In November 1829, the President directed U.S. Attorney Roane to apply for a rehearing.⁷⁸ In April of 1830, Roane filed a bill of review against Bernardo Samperyac and the other claimants, alleging fraud on the part of the claimants, and perjury on the part of Hebrard. Counsel (Ashley and Crittenden) filed a brief against allowing a bill of review. Richard Searcy, a prominent Batesville attorney assisting Roane, researched the law and to his dismay,

[t]he more I searched into the subject the more complicated and difficult I have found it to be. Since my return home I have examined the libraries

73. See Letter from George Graham to Samuel C. Roane (Nov. 27, 1829), in 21 TERRITORIAL PAPERS, *supra* note 3, at 119.

74. Letter from Isaac T. Preston to George Graham, in 21 TERRITORIAL PAPERS, *supra* note 3, at 72, 77.

75. Letter from Isaac T. Preston to George Graham, in 21 TERRITORIAL PAPERS, *supra* note 3, at 78.

76. See *Spanish Claims*. ARKANSAS GAZETTE, Feb. 9, 1830, at 3.

77. See *id.*, July 28, 1830.

78. See Letter from George Graham to Samuel C. Roane (Nov. 10, 1829), in 21 TERRITORIAL PAPERS, *supra* note 3, at 96.

at this place and in 20 vols of Vesey & 6 Vols of Johnsons Chy. Reports and some other Books I have not been able to find a single instance in which a Bill of Review has been sustained. It is now certain that in all of the libraries of the Territory no reported case can be found and it may well be doubted whether the court will proceed without authorities to decree the necessary relief.⁷⁹

Also in April, William Trimble was not reappointed to the Superior Court.⁸⁰ In May, Edward Cross was appointed in his place. Also in May, Congress passed an act enabling the court to reverse or annul any former decrees it had made regarding land claims under the 1824 act and directing the Land Office to hold off from issuing patents until the original documents could be re-examined, and requiring the court to forward all documents, testimony and reasons for their decision to the U.S. Supreme Court if parties appealed.⁸¹ In August, Governor Pope expressed his displeasure with the U.S. Attorney and the court, stating in a letter published in the *Gazette* that "half in earnest" if it were true that the court had decided the original cases erroneously, if he were president, he would remove all of the judges without an investigation.⁸² The cause came up for hearing on January 26, 1831, and was heard by the court until February 1. Attorneys Chester Ashley, Robert Crittenden (the assignee of nine of the annulled patents), and, astoundingly, ex-Judge William Trimble (who had participated in the original decision) represented the Bowie claimants.⁸³ U.S. Attorney Roane was assisted in court by Secretary Fulton. On February 4, the defendants moved that the question of forgery of the order of surveys be submitted to a jury, but the court overruled this motion. On February 7, the court reversed its previous decrees. Benjamin Johnson wrote the opinion, which basically defended the court's right to reverse its decrees after so long a time, and to act with the full powers of a court of chancery, even though it had been given this particular, limited jurisdiction by an act of Congress. *Sampeyrec* was appealed to the United States Supreme Court, which affirmed the superior court in 1833.⁸⁴

79. Letter from Richard Searcy to George Graham (Nov. 16, 1829), in 21 TERRITORIAL PAPERS, *supra* note 3, at 160.

80. Delegate Ambrose H. Sevier, Conway's successor, was accused of having "caused" Trimble to be removed. See WHITE, *supra* note 31, at 120; ARKANSAS ADVOCATE, June 22, 1831.

81. See Act of May 8, 1830, 4 Stat. 399, 399-401.

82. See John Pope, *To the Public*, ARKANSAS GAZETTE, Aug. 4, 1830, at 3.

83. Today's Model Rules of Professional Conduct prohibit an attorney from participating in a case where he or she served as a judge, unless "all parties to the proceeding consent after consultation." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.12(a). The nineteenth century did have conflict of interest statutes, but they were much more limited than today's rules.

84. See *Sampeyrec v. United States*, 32 U.S. (7 Pet.) 222 (Jan. 1833 Term). At this stage, Joseph Stewart was the lone appellant. He claimed to be a bona fide purchaser from John J.

Josiah Shinn, an Arkansas historian, stated that “[w]hen the court reversed itself in 1831 the people were disgusted. Could there have been an election for Superior Court judges, there is little doubt but that, Eskridge, Trimble, Bates, and Johnson would have gone down under an overwhelming vote of popular disfavor.”⁸⁵

Why did the court (Johnson and Trimble) make the mistake in the first place? Roane (in his own defense) stated that the forgeries were “so well executed, as to deceive the most skillful persons we were able to procure for their inspection”⁸⁶ However, Preston was quite scornful of the forgery, and believed that it was so obvious that the judges should have discerned it.⁸⁷ Why did the court not grant a continuance? A possible reason is that at least one of the judges stood to gain from the Bowie claims. Suspicion certainly rests on Trimble, a friend of Crittenden,⁸⁸ since he, having been removed from the bench, argued the case on rehearing. However, Johnson had ties to Chester Ashley, who also argued the case on rehearing, and Johnson’s son-in-law, Ambrose Sevier, was a party to some of the land transactions.⁸⁹ Roane claimed that Richard Searcy was the “only Lawyer of reputation that is not engaged on the part of the claimants.”⁹⁰ Preston also agreed that a number of people were involved in the fraud. “Men of the deepest thought as well as the Bowies [!] are embarked in this business. I fear they are meditating some thing to increase and sanction their claims just as the law expires.”⁹¹ Two letters from “Jaw-Bone” published in the *Gazette* in 1830 accused Crittenden of profiting from the fraud at the expense of innocent purchasers.⁹² Territorial Secretary Fulton accused Bowie, Ashley, and Crittenden of profiting from

Bowie, ignorant of any fraud at the time of purchase, although on appeal he admitted that Sampeyreac was a fictitious person, Hebrard had committed perjury, and the evidence of title was forged. Thus on appeal one of the issues was whether Stewart had any rights since he was an innocent purchaser. The Court held that he did not, and expressed the opinion that he should not even have been admitted as a party. *See id.* at 241-42.

85. JOSIAH H. SHINN, *PIONEERS AND MAKERS OF ARKANSAS* 91 (1908).

86. Letter from Samuel C. Roane to George Graham (Jul. 20, 1829), in 21 *TERRITORIAL PAPERS*, *supra* note 3, at 155.

87. *See* Letter from Isaac T. Preston to George Graham (Oct. 10, 1829), in 21 *TERRITORIAL PAPERS*, *supra* note 3, at 74.

88. *See* WHITE, *supra* note 31, at 127.

89. Sevier also tried to prevent Congress from enacting a law to prevent frauds. *See* 21 *TERRITORIAL PAPERS*, *supra* note 3, at n.50.

90. Letter from Samuel C. Roane to George Graham (Nov. 8, 1829), in 21 *TERRITORIAL PAPERS*, *supra* note 3, at 158, 160.

91. Letter from Isaac T. Preston to George Graham (Oct. 10, 1829), in 21 *TERRITORIAL PAPERS*, *supra* note 3, at 74, 78.

92. *See* ARKANSAS GAZETTE, August 11, 1830, at 2, Sept. 1, 1830, at 2. According to Margaret Ross, “Jaw-Bone” was probably Chester Ashley. ROSS, *supra* note 32, at 93.

fraudulent sales.⁹³ In fact, the territorial legislature memorialized Congress seeking patents for all innocent purchasers “[who] were told by the ablest of the Bench and of the Bar” that they had good title.⁹⁴

Roane had unsuccessfully argued similar cases, decided in favor of the United States by U.S. District Court Judge Peck of Missouri, as precedent before the court in the 1827 hearings.⁹⁵

Johnson’s actions in the Bowie claims were characterized by Josiah Shinn, an early biographer as “Judge Johnson’s One Mistake.” Shinn credited Johnson with “a graceful overruling of his own decision a few years later and a greater caution throughout the rest of his long life in the investigation and application of precedents and legal authorities.”⁹⁶

Other than land claims, the Superior Court decided cases in a variety of areas. Decisions involving property, both real and personal (and including slaves) occupied much of the court docket. In 1831 the court issued an opinion written by Judge Cross ruling that ejectment was indeed a cause of action in Arkansas, and tracing its history. The *Gazette* reprinted the text of that opinion in full.⁹⁷ The poor monetary system during the nineteenth century also generated a number of cases before the court. Specie (gold coin) was scarce. The United States government did not yet print paper currency. Bank notes and promissory notes were circulated, but to a limited extent. The tension between the old common law, which limited the negotiability of such instruments, and the monetary needs of citizens in the new republic, particularly those living on the frontier, evinced itself in numerous court cases.

Court procedure differed mightily in the early nineteenth century from that of today. Today’s rules of civil procedure were as yet only a gleam in David Dudley Field’s eye. Instead, attorneys pleaded the old “forms of action”—account, assumpsit, covenant, debt, trespass, trover, etc. Pleadings

93. See Letter from William S. Fulton to Andrew Jackson (Aug. 3, 1831), in 21 TERRITORIAL PAPERS, *supra* note 3, at 358, 359.

94. Memorial from the Territorial Assembly to Congress (Nov. 5, 1831), in 21 TERRITORIAL PAPERS, *supra* note 3, at 421-22. William Trimble, by then Speaker of the House, signed the memorial.

95. See Letter from Samuel C. Roane to George Graham (July 20, 1829), in 21 TERRITORIAL PAPERS, *supra* note 3, at 157. The case Roane referred to was appealed to the U.S. Supreme Court and decided in 1836 as *Soulard’s Heirs v. United States*, 35 U.S. (10 Pet.) 100 (Jan. 1836 Term). Judge Peck presided over Spanish and French land claims in the federal district court of Missouri. Many of these claims involved the same parties who filed claims in Arkansas (Auguste Choteau, William Russell, Don Carlos de Villemont). Judge Peck repeatedly ruled against them. He was impeached in 1829, but the Senate failed to convict him by two votes. Congress took jurisdiction of land claims out of Peck’s court and returned it to a Board of Land Commissioners. See GATES, *supra* note 27, at 101-08 for a discussion of Missouri land claims.

96. SHINN, *supra* note 85, at 202.

97. See *Law Intelligence*, ARKANSAS GAZETTE, Apr. 6, 1831, at 1.

were much more technical, and courts could, and did, seize upon defects in pleadings to impose rulings not justified by facts or substantive law.⁹⁸

Article III federal judges hold their offices during “good behavior,” or, usually, for life, and can only be removed by impeachment. Territorial judges did not enjoy the life term, being appointed for four years at a time. In the autumn of 1832, the Crittenden faction attempted to remove Benjamin Johnson from office by impeachment. The attempt began on October 24, when a letter listing eight charges from William Cummins was published in the *Arkansas Advocate*, a Whig newspaper. In January of 1833, Egbert Harris sent the charges, with the request for impeachment, to the Speaker of the House of Representatives.⁹⁹

The first charge involved the murder trial of Charles Herod, one of three defendants who were tried separately before Judge Johnson. In the Herod trial, Johnson discharged the jury members after they had deliberated only one night and failed to reach a verdict. Cummins was assisting the prosecutor during this trial, and charged that such an early dismissal was “contrary to the settled practice of all criminal courts”¹⁰⁰

The second charge involved Colonel John Dunlop, an employee and a member of the household of Judge Johnson, who had a grievance against John F. Sapp. Sapp had injured Dunlop in the past, and Dunlop had frequently stated his intent to kill Sapp within earshot of the judge. In 1830, Dunlop shot at Sapp, on the porch of the courthouse, on two consecutive days. The second day, Sapp ran into the courtroom and claimed the protection of the court. “Judge Johnson, from the bench, answered his claim for protection, with a censorious, passionate, and violent reprimand.”¹⁰¹ Dunlop was indicted for shooting with intent to kill John Sapp. According to the charge, Judge Johnson pressured prosecutor Absalom Fowler to enter a *nolle prosequi*,

98. See Stephen A. Smith, *Arkansas Advocacy: The Territorial Period*, 31 *ARK. L. REV.* 449, 467-68 (1977). For an excellent, but short, account of the Territorial Superior Court, see J.W. Looney, *Law on the Frontier*, *ARK. LAW.*, Spring 1998, at 22.

99. See Letter from Egbert Harris to the Speaker of the House of Representatives (Jan. 9, 1833), in 21 *TERRITORIAL PAPERS*, *supra* note 3, at 593.

100. Letter from William Cummins to Benjamin Johnson, *ARKANSAS ADVOCATE*, Oct. 24, 1832, *reprinted in* 21 *TERRITORIAL PAPERS*, *supra* note 3, at 632, 636. For more allegations regarding this charge, see generally Statements of Orson V. Howell (Dec. 2, 1832) and James H. Caldwell (Nov. 13, 1832), in 21 *TERRITORIAL PAPERS*, *supra* note 3, at 614, 618-19.

101. Statement of Orson V. Howell (Dec. 2, 1832), in 21 *TERRITORIAL PAPERS*, *supra* note 3, at 614, 615. For other accounts of this incident, see Statements of Dr. John H. Cocke (Dec. 8, 1832), James H. Caldwell (Nov. 13, 1832), Absalom Fowler (Nov. 17, 1832), in 21 *TERRITORIAL PAPERS* 612-13, 619, and 628-29; and Letter from William Cummins to Benjamin Johnson, *ARKANSAS ADVOCATE*, Oct. 24, 1832, *reprinted in* 21 *TERRITORIAL PAPERS*, *supra* note 3, at 636.

which he did. Fowler later indicted Dunlop again and Johnson refused to try the case.¹⁰²

The third charge against Johnson was that during 1829, he had, while intoxicated in the street, drawn his knife and threatened to cut the throat of Smith C. Moss, a campaigner for Richard Searcy, who was running against Johnson's son-in-law, Ambrose Sevier, for territorial delegate.¹⁰³ Moss himself refuted this charge.¹⁰⁴

The fourth charge against Johnson was that he frequently held court in an intoxicated state, specifically during the October 1827 term and also while the Bowie claims were being decided. "I have once seen him so intoxicated on the bench as to be, in my judgment, wholly unfit to perform the duties of judge."¹⁰⁵ Other accusations of drunkenness alleged different locales: on a steamboat, at someone's house, in a tavern, in the street.¹⁰⁶ Cummins charged Johnson with being so frequently drunk during the adjudication of the Bowie claims that Judge Trimble in effect sat alone.¹⁰⁷

The fifth charge was that when on the bench Johnson was "peevish, irritable, impatient, petulant and rude," disrespectful to all except a few of his friends.¹⁰⁸ Regarding this charge, Orson Howell stated that in 1832, he was representing a plaintiff in a suit before the superior court in which Judge Johnson was one of the defendants. Judge Cross presided. Howell made a motion, and while he was arguing it "Judge Johnson (then at the bar) said several times so as to be easily heard by Judge Cross, 'No Lawyer would make such a motion'—'He ought to be fined for making such a motion' and other remarks of similar import."¹⁰⁹

102. As Sevier pointed out in his rebuttal, however, Dunlop was later killed by Sapp, while assisting a sheriff to arrest Sapp. See ARKANSAS GAZETTE, Feb. 27, 1833.

103. See Statements of John Saylor (Dec. 3, 1832) and Washington Smith (Nov. 10, 1832), in 21 TERRITORIAL PAPERS, *supra* note 3, at 623-24, and 625; and Letter from William Cummins to Benjamin Johnson, ARKANSAS ADVOCATE, Oct. 24, 1832, *reprinted in* 21 TERRITORIAL PAPERS, *supra* note 3, at 636.

104. See Letter from Smith C. Moss to Ambrose Sevier (Nov. 28, 1832), in 21 TERRITORIAL PAPERS, *supra* note 3, at 659-60.

105. Statement of Orson V. Howell (Dec. 2, 1832), in 21 TERRITORIAL PAPERS, *supra* note 3, at 615-16.

106. See Statements of Dr. John H. Cocke (Dec. 8, 1832) and John Caldwell (Nov. 13, 1832), Letter from Gilbert Marshall to William Cummins (Nov. 10, 1832), and Statements of Thomas W. Johnston (Dec. 1, 1832) and Absalom Fowler (Nov. 17, 1832), in 21 TERRITORIAL PAPERS, *supra* note 3, at 613, 619-20, 620, 621-22, and 629.

107. See Letter from William Cummins to Benjamin Johnson, ARKANSAS ADVOCATE, Oct. 24, 1832, *reprinted in* 21 TERRITORIAL PAPERS, *supra* note 3, at 637.

108. See Letter from William Cummins to Benjamin Johnson, ARKANSAS ADVOCATE, Oct. 24, 1832, *reprinted in* 21 TERRITORIAL PAPERS, *supra* note 3, at 637.

109. Statement of Orson V. Howell (Dec. 2, 1832), in 21 TERRITORIAL PAPERS, *supra* note 3, at 616. Also see Statements of Andrew Scott (Dec. 12, 1832) and Absalom Fowler (Nov. 17, 1832), in 21 TERRITORIAL PAPERS, *supra* note 3, at 617, 629.

The sixth charge attacked Johnson's legal opinions as being vacillating, inconsistent and contradictory.¹¹⁰

The seventh charge was that eight years earlier, Judge Johnson had made a secret deal with James Lemon and two others, conductors of a "faro bank." Johnson then bet against Judge Selden, who thought he was betting only against Johnson, but unbeknownst to him Johnson was dividing his profits from Selden with the bank. Ultimately, Selden lost about \$300.¹¹¹

The eighth and final charge was that Johnson improperly handled the case of Israel Embree. In 1827, Embree was indicted in Superior Court for murder. In 1828, jurisdiction over criminal cases was moved from the Superior Court to the circuit courts. Cummins accused Johnson of first voting with the other Superior Court judges to transfer Embree to the Circuit Court, and later improperly dismissing his indictment in the Circuit Court.¹¹²

In the opinion of at least one historian, Cummins's purpose in bringing the charges was to injure Sevier, then Territorial Delegate who was coming up for election, harm the Family and aid Crittenden, who announced his candidacy for delegate in 1833.¹¹³

Johnson himself made no official response. By the time the charges had reached Washington, D.C., President Andrew Jackson had reappointed him. Sevier defended Johnson on the floor of Congress, mainly by attacking the character of his accusers.¹¹⁴ Many prominent Arkansans¹¹⁵ wrote Congress in the judge's support, and the House Committee on the Judiciary issued a report stating that in its opinion territorial judges could not be impeached, and that even if they could, the evidence did not support the impeachment of Judge Johnson.¹¹⁶

However, his son, Robert Ward Johnson, nineteen or twenty at the time, was incensed by the attack on his father. He announced his intention to

110. See Statements of Orson V. Howell (Dec. 2, 1832) and Absalom Fowler (Nov. 17, 1832), in 21 TERRITORIAL PAPERS, *supra* note 3, at 616, 629; and Letter from William Cummins to Benjamin Johnson, ARKANSAS ADVOCATE, Oct. 24, 1832, reprinted in 21 TERRITORIAL PAPERS, *supra* note 3, at 638.

111. See Statement of James Lemon (Nov. 2, 1832), in 21 TERRITORIAL PAPERS, *supra* note 3, at 626; and Letter from William Cummins to Benjamin Johnson, ARKANSAS ADVOCATE, Oct. 24, 1832, reprinted in 21 TERRITORIAL PAPERS, *supra* note 3, at 638.

112. See Letter of William Cummins to the House of Representatives (Dec. 8, 1832), Statement of Absalom Fowler (Nov. 17, 1832), in 21 TERRITORIAL PAPERS, *supra* note 3, at 597-98 and 630; and Letter from William Cummins to Benjamin Johnson, ARKANSAS ADVOCATE, Oct. 24, 1832, reprinted in 21 TERRITORIAL PAPERS, *supra* note 3, at 638.

113. See WHITE, *supra* note 31, at 145-46.

114. ARKANSAS GAZETTE, Feb. 27, 1833.

115. Including the governor, other superior court judges, prominent attorneys and several clerks of court, among others. See generally 21 TERRITORIAL PAPERS, *supra* note 3, at 641-68.

116. See H. REP. 88, 22d Cong. 2d Sess. (1833).

challenge Cummins and Fowler to duel, but his plans were interrupted by a trip to Kentucky. When he returned in August of 1833, he issued the challenges. Both men declined. Robert Ward then attacked Cummins on the street, after which both men were placed under peace bonds. Robert Ward next posted placards labeling Fowler a coward. After Fowler ripped down the placards, he exchanged pistol shots with Johnson at the corner of Main and Markham.¹¹⁷

III. FEDERAL COURTS IN ARKANSAS AFTER STATEHOOD

The year 1836, in which Arkansas became a state, arguably marked the zenith of the Family. Robert Mentor Johnson of Kentucky was elected to the Vice Presidency. James S. Conway was elected the first governor of the new state of Arkansas. Elias Rector was reappointed federal marshal. His brother Wharton served as U.S. agent for the Creek tribe. Ambrose Sevier was chosen by the legislature to be one of the first two U.S. Senators. Statehood, of course, meant that Arkansas would become a federal judicial district with its own district court judge. Johnson, having served the longest term of all the territorial superior court judges, would have been an obvious candidate for the judgeship in any case. Andrew Jackson appointed him federal district judge in 1836.

The structure of the federal courts was different in 1836 than it is today. At that time the U.S. Court of Appeals did not exist. The federal court system consisted of two inferior courts: the district courts, one in each state, and the circuit courts. The circuit courts (later abolished in 1911) were presided over by district court judges and Supreme Court justices. They possessed both original and appellate jurisdiction, which waxed and waned as Congress repeatedly amended the Judiciary Act, but in general had original jurisdiction over diversity and criminal cases. Thus, as Arkansas's district judge, Benjamin Johnson rode the circuit, sometimes with Justice Peter V. Daniel of the United States Supreme Court. An anecdote concerning the circuit court has come down to us:

After Judge Johnson's appointment to the district bench, Mr. Justice Daniels came out upon the circuit. One day while a case was being argued, Judge Johnson expressed his opinion; whereupon the justice said with lofty dignity: "Judge Johnson, the court will first consult, and the associate justice of the supreme court will deliver the opinion of the court." The next day, when a case had been argued, the justice began to express his views, when Judge Johnson, seizing his arm, said in a stage whisper:

117. See POPE, *supra* note 39, at 165-66.

“Justice Daniels, the court will first consult and then the justice of the supreme court can deliver the opinion of the court.” The bar were immensely diverted, but Justice Daniels did not seem to enjoy the joke.¹¹⁸

In 1837, Congress amended the Judiciary Act, creating nine circuits, and placing Arkansas in the 9th Circuit, along with Alabama, Mississippi, and the eastern district of Louisiana.¹¹⁹ As district court judge, Johnson wrote twelve published opinions. As circuit court judge he wrote thirty-two published opinions alone and joined in six opinions with Justice Daniel.

Shortly after statehood, the new capitol building (today the Old Statehouse) was finished. The district court of Arkansas met in the north end of the west wing, on the first floor.¹²⁰ In the very first published decision of the new District Court of Arkansas, *United States v. Ta-wan-ga-ca*,¹²¹ Judge Johnson significantly limited the court’s jurisdiction. Ta-wan-ga-ca had been indicted for the murder of a white man in Indian Territory in the Superior Court of the Arkansas Territory; however that court ceased to exist when Arkansas became a state. The question was whether Ta-wan-ga-ca could now be tried by the District Court. First, Johnson ruled that the new district court was not a continuance of the territorial court. The new court had limited jurisdiction, fixed by Congress, which had neglected to continue over to the new court the business of the U.S. pending in the late superior court. Second, he ruled that the new district court had jurisdiction only over the state of Arkansas and not points west, that is, Indian Territory (74,000 square miles roughly corresponding to present-day Oklahoma).¹²² Thus, he released Ta-wan-ga-ca. This decision of course would have serious effects on justice in Indian Territory west of Arkansas. Congress promptly remedied this problem by extending the jurisdiction of the federal district court of Arkansas to include “crimes, offences, or misdemeanors, which may be committed against the United States, in any town, settlement, or territory, belonging to any Indian tribe”¹²³

Jurisdiction over Indian country came up again in April of 1840, when, sitting as a circuit judge, Benjamin Johnson decided two Indian Territory cases involving Moses Terrel as a defendant. In the first case, he was

118. George B. Rose, *Bench and Bar of Arkansas*, in FAY HEMPSTEAD, HISTORICAL REVIEW OF ARKANSAS: ITS COMMERCE, INDUSTRY AND MODERN AFFAIRS 433-34 (1911).

119. Act of Mar. 3, 1837, 5 Stat. 176-77.

120. See POPE, *supra* note 39, at 151.

121. See *United States v. Ta-wan-ga-ca*, Hempstead, *supra* note 21, at 304, 28 F. Cas. 18 (1836) (No. 16,435).

122. See Larry D. Ball, *Before the Hanging Judge: The Origins of the United States District Court for the Western District of Arkansas*, 49 ARK. HIST. Q. 199, 201 (1990), which also discusses Johnson’s opinions concerning the Indian Territory.

123. Act of Mar. 1, 1827, 5 Stat. 147.

prosecuted for robbing a white man, John Ballard, in the Indian country. In the second, he and a second defendant were prosecuted for assault with intent to kill the same unlucky Mr. Ballard. (Interestingly, in the first case Terrel is described as an Indian, and in the second, as a white, although the court would have the same jurisdiction either way.) In both cases the jury found the defendants guilty, but Judge Johnson arrested judgment and discharged the defendants, ruling that there were no federal laws making robbery or assault crimes in Indian country.¹²⁴

In April of 1844, the question of crimes in Indian country again was raised before the Circuit Court. During this term, Justice Peter V. Daniel of the U.S. Supreme Court presided over the court along with Benjamin Johnson. This time Moses Albery was the defendant, alleged to have murdered a white man. The court analyzed several federal statutes relating to its jurisdiction and concluded, once again, that it had no jurisdiction over Indian Territory.¹²⁵ Again, Congress tried to remedy this state of affairs by annexing Indian Territory to the State of Arkansas, and giving the district court the same jurisdiction over Indian Territory that the territorial superior court had possessed.¹²⁶

An interesting twist in the Indian Territory cases came up in April of 1845. The grand jury of the Circuit Court indicted William S. Rogers, a white man, for the murder of another white man in the Indian Territory. Rogers argued that he had moved to the Indian Country, joined the Cherokee tribe, married a Cherokee woman, and become a Cherokee in November of 1836, and that the victim had similarly joined the Cherokee tribe. Thus, since an "Indian" was alleged to have murdered an "Indian," the federal court had no jurisdiction. Judges Johnson and Daniel could not agree on a decision, and thus they certified the case to the United States Supreme Court for its decision. Weeks after the circuit court adjourned, Rogers escaped from prison and drowned several days later. Ironically, no one notified the Supreme Court, and Justice Taney delivered the now moot opinion, which was, in essence, once a white man, always a white man. The Court held that Congress did not intend to exempt whites adopted as Indians from federal jurisdiction, since they "will generally be found the most mischievous and dangerous inhabitants of the Indian country."¹²⁷

124. See *United States v. Terrel, Hempstead*, *supra* note 21, at 411, 28 F. Cas. 40 (1840) (No. 16,452); *United States v. Terrel, Hempstead*, *supra* note 21, at 422, 28 F. Cas. 41 (1840) (No. 16,453).

125. See *United States v. Albery, Hempstead*, *supra* note 21, at 444, 24 F. Cas. 765 (1844) (No. 14,426).

126. See Act of June 17, 1844, 5 Stat. 680.

127. *United States v. Rogers*, 45 U.S. (4 How.) 567 (Jan. 1846 Term). For a discussion of this case, see JOHN P. FRANK, *JUSTICE DANIEL DISSIDENTING: A BIOGRAPHY OF PETER V. DANIEL*

In 1847, Johnson discharged a prisoner indicted for being an accessory to the murder of an Indian "in the Indian country." Again, the basis for his decision was that the court had no jurisdiction because accessory to murder was not a federal crime.¹²⁸ Also in 1847, another facet of the "who is an Indian" question was entertained by Justices Daniel and Johnson, when a Cherokee was indicted for the murder of "Billy, a white boy" in the Cherokee country. The defendant did not dispute his act, but rested his defense on the argument that Billy was an Indian because his mother was at least part Indian (her tribe was not known). Although the murder was "wanton" and "shocking," the weight of the evidence established that Billy's mother was indeed an Indian. The court cited precedent going back to Justinian's *Institutes* that a child inherited his mother's status. Billy was therefore an Indian, and the prisoner, not guilty as a matter of law, was discharged.¹²⁹

Daniel and Johnson decided an interesting constitutional case in 1843, which does not appear in Hempstead's *Reports*, but was, luckily for twentieth century readers, published in the *Arkansas Gazette*¹³⁰ and is discussed by John P. Frank.¹³¹ Arkansas had enacted a statute which forbade the tolling of statutes of limitations during the time defendants were out of the state. Thus, a prospective defendant could simply leave the state while the statute of limitations ran, and return, unable to be sued, at the end of the time period. The court held that this statute violated the nineteenth century's most favorite clause of the Constitution, the contracts clause, since it would impair the obligation of contracts.

Land questions continued to dog the new state as they had the territory. In 1844, Congress extended the original 1824 act allowing claimants in Missouri and Arkansas to try the validity of their claims.¹³² In the late 1840s, a series of land claims cases was decided by Judge Johnson. In fact, of the twelve published district court decisions by Judge Johnson, seven concerned Spanish or French land claims. In 1846, he ruled that the district court could only confirm or reject the existence of a Spanish land grant claim against the U.S., and not divide or partition the land.¹³³ During the same year he rejected

1784-1860 (1964).

128. *United States v. Ramsay*, Hempstead, *supra* note 21, at 481, 27 F. Cas. 694 (1847) (No. 16,115).

129. *United States v. Sanders*, Hempstead, *supra* note 21, at 483, 27 F. Cas. 950 (1847) (No. 16,220).

130. *See Important Decision*, ARKANSAS GAZETTE, Apr. 24, 1844.

131. *See Frank*, *supra* note 127, at 282-83.

132. *See Act of July 17, 1844*, 5 Stat. 676.

133. *See Putnam v. United States*, Hempstead, *supra* note 21, at 332, 20 F. Cas. 90 (1846) (No. 11,484).

a suit involving a Spanish grant to the Baron de Bastrop which lay mostly in Louisiana, stating that it should be decided by a court situated in Louisiana.¹³⁴

In 1847, he was presented with a Spanish land claims case in which the land had been granted in 1793 to Don Joseph Valliere, the Arkansas post commander. There was an actual survey, often a sticking point in the claims cases, and the grant had been timely recorded. However, Valliere died in 1799, and there was no evidence that he ever took possession, and nothing more had been done during the next 50 years except that a pamphlet was published in 1844 containing the legal opinions of Daniel Webster, James Kent, and other legal eminences that the claim was valid. Johnson denied it because of the lapse of such a long time between the grant and the suit, with no possession.¹³⁵

The following year Johnson decided a French land claim case involving land granted to the notorious John Law, the director-general of the Company of the Indies, in 1718, by the King of France.¹³⁶ Johnson ruled that since Law had gone bankrupt, and his grant was transferred to the company, and subsequently back to the king, that the land passed from the king to the United States with the Louisiana Purchase, and that Law's heirs had no claim.

The longest of the land claims decisions was *Winter v. United States*, involving a total grant of a million arpens from Baron de Carondelet to Elisha Winter, Gabriel Winter, and others, in 1797.¹³⁷ Beginning in 1818, first the Louisiana Territory commissioner of land claims and later Congressional committees investigated the Winter claims. In 1819, Joshua G. Clarke, one of the claimants, alarmed by federal surveying of the Winter land for military bounty purposes, protested to the President that the Winter group had recorded their titles and lived on the land since 1798, and that a House of Representatives select committee had reported in favor of their titles.¹³⁸

The territorial legislature petitioned Congress to act on the Winter claims in 1820.¹³⁹ In 1822, John Miller, one of the claim holders, wrote to Josiah

134. See *Callendar v. United States*, Hempstead, *supra* note 21, at 334, 4 F. Cas. 1074 (1846) (No. 2321).

135. See *Valliere v. United States*, Hempstead, *supra* note 21, at 335, 28 F. Cas. 929 (1847) (No. 16,822).

136. See *Law v. United States*, Hempstead, *supra* note 21, at 338, 15 F. Cas. 17 (1848) (No. 8131). John Law styled himself the "Duke of Arkansas" and instigated a huge speculative scheme, in one of the first uses of paper money, that failed miserably and was called the "Mississippi Bubble." For a popular account of his career, see JACK WEATHERFORD, *THE HISTORY OF MONEY: FROM SANDSTONE TO CYBERSPACE* 129-32 (Three Rivers Press ed., 1997).

137. See *Winter v. United States*, Hempstead, *supra* note 21, at 344, 30 F. Cas. 350 (1848) (No. 17,895).

138. See Letter from Joshua G. Clarke to President Monroe, in 19 TERRITORIAL PAPERS, *supra* note 3, at 114-15.

139. See Memorial to Congress by the Territorial Assembly (referred Nov. 20, 1820), in 19

Meigs, offering to “silence” the Winter claims if the U.S. would give him an island in the Mississippi plus a thousand acres on the Arkansas side.¹⁴⁰

Winter’s claim was stronger than many. The grant had been proven. Winter had erected a stone monument, thus rendering his claim “notorious.” However, he did not possess a survey, often a sticking point with the land claims. Instead, he had a figurative “plot of survey,” which he had presented to the board of commissioners, as required by U.S. law, in 1808. Johnson began his opinion by praising counsel:

This case has been thoroughly investigated by the counsel on both sides, and it gives me pleasure to add, that it has been argued by them with great zeal and uncommon ability, and which will the better enable me to form a correct opinion upon the questions which it is now my duty to decide.¹⁴¹

Johnson did not question the authority of Carondelet to make a grant of one million arpens; the issue was whether the land was “separated from the royal domain, so as to vest a right of property in the grantee.”¹⁴² Citing Spanish law, Johnson noted the requirement of a survey for the grant to have taken place while Spain owned the territory. Thus he ruled against Winter’s heirs. The petitioners appealed to the Supreme Court, which granted the appeal; but the petitioners then abandoned the cause and the case was never heard.

The *De Villemont* case came before Judge Johnson during the same term of court. It, too, involved a grant of land by the Baron de Carondelet, in Chicot County, made in 1795 to Don Carlos De Villemont, the Spanish military commander of Arkansas Post from 1794 to 1802. The court found that the terms of the grant, which involved the grantees making a road and a clearing on the land, were not fulfilled. In addition, the precise location of the land could not be determined. Thus Johnson ruled against De Villemont and the other petitioners.

The final land grant case, *Glenn v. United States*, involved a grant made in 1796 by Colonel Delassus, commandant of the post of New Madrid, to James Clamorgan, of over half a million arpens of land in Arkansas.¹⁴³ Johnson ruled against Glenn, in a very brief decision rendered in April of 1849, the year that Johnson died, citing the same principles already handed down in the *Winter* and *De Villemont* cases: that the conditions of the grant

TERRITORIAL PAPERS, *supra* note 3, at 233.

140. See Letter from John Miller to Josiah Meigs (Feb. 4, 1822), in 19 TERRITORIAL PAPERS, *supra* note 3, at 401.

141. *Winter*, Hempstead, *supra* note 21, at 378, 30 F. Cas. at 363.

142. See *Winter*, Hempstead, *supra* note 21, at 379-80, 30 F. Cas. at 364.

143. *Glenn v. United States*, Hempstead, *supra* note 21, at 394, 10 F. Cas. 472 (1849) (No. 5481), *aff'd*, 54 U.S. (13 How.) 250 (Dec. 1851 Term).

were not fulfilled; that there was no survey; and that the grant was too vague to sufficiently specify the locality of the land. At the district court level, Albert Pike and D.J. Baldwin argued for the petitioners. The petitioners appealed to the Supreme Court, retaining as one of their counsel Daniel Webster. Attorney General Crittenden, the brother of Robert Crittenden, argued the cause for the United States. The Supreme Court affirmed Johnson, although it did hold that the terms of the grant sufficiently fixed its locality. Thus ended Benjamin Johnson's connection with the land grant cases, which consumed so much government time during the first half of the nineteenth century.

IV. CONCLUSION

Benjamin Johnson died on October 2, 1849. Of him, Albert Pike, who practiced in his court, said "He was a man of excellent ability and of much reading in the law, reading a new volume of reports with as great a zest as a devourer of fiction reads the latest novel."¹⁴⁴ Unfortunately, his judicial legacy has not been as great as it would have been had his opinions been published timely. "Remaining in manuscript for so many years, they have had but little influence upon the state's judicial history."¹⁴⁵ Nonetheless, he was an important decision maker in the area of land claims and federal law. For reasons of brevity, this article has not discussed all of his opinions, nor has it revealed the other facets of his life; his involvement with the ill-fated Arkansas Real Estate Bank; his relationships with prominent early Arkansans; his family relationships; and his founding and management of his huge plantation in Chicot County and his life as a planter.

After Johnson's death, the bar of the Supreme Court published a laudatory resolution that was printed in the *Arkansas Reports*.¹⁴⁶ It is fitting that one whose life and work were so concerned with the lawbook should be remembered and honored in the pages of those same books.

144. Pike, *supra* note 61, at 72.

145. Rose, *supra* note 118, at 428.

146. See Tribute of Respect to the Memory of the Hon. Benjamin Johnson, 10 Ark. [iv] (1850).