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An Early Opinion of an Arkansas Trial Court

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AN EARLY OPINION OF AN ARKANSAS TRIAL COURT

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The opinion printed below merits notice because it is apparently the oldest surviving opinion of an Arkansas trial judge.[1] It was delivered in 1824 in a suit in equity, evidently an accounting between partners, which was brought by James Hamilton against William Montgomery in 1823.

Relatively little can be discovered about the plaintiff James Hamilton. He was a merchant in Arkansas Post at least as early as November of 1821 when he moved into the "[s]tore lately occupied by Messrs. Johnston [and] Armstrong."[2] Montgomery, on the other hand, is quite a well-known character. From 1819 until 1821 he operated a tavern at the Post which was an important gathering place:[3] A muster of the territorial militia was held there on November 25, 1820,[4] and the village trustees were elected there in January of the following year.[5] Moreover, the first regular legislative assembly for the Territory of Arkansas met in February of 1820 in two rooms furnished by Montgomery, perhaps at his tavern.[6]

Important people travelling through the territory often stopped at Montgomery's establishment. In 1820, the famous American ornithologist, John James Audubon, who stayed there two nights, said

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1. Some appellate opinions of the Superior Court of the Territory of Arkansas from 1819-1836 were published in 1856 and are called HEMPSTEAD'S REPORTS.

The opinion below appears to be in the hand of a clerk, whose punctuation, when there was any, was erratic. I have added punctuation and divided the opinion into paragraphs since this did not seem to be taking liberties with the work of the judge himself. Some of the words, after 160 years, are illegible and I have indicated these with a question mark.

2. Arkansas Gazette, Nov. 3, 1821, at 3, col. 4.

3. *See generally*, E. BEARSS, MONTGOMERY'S TAVERN AND JOHNSTON AND ARMSTRONG'S STORE (1971); P. MARTIN, AN INQUIRY INTO THE LOCATIONS AND CHARACTERISTICS OF JACOB BRIGHT'S TRADING HOUSE AND WILLIAM MONTGOMERY'S TAVERN (1977).

4. Arkansas Gazette, Nov. 18, 1820, at 3, col. 4.

5. Arkansas Gazette, Jan. 20, 1821, at 3, col. 1.

6. E. BEARSS, *supra* note 3, at 21.

that it was "the Only Tavern in the Country."[7] Audubon does not mention Montgomery, but he found his wife "a handsome Woman of good Manners and rather superior to those in her rank of Life."[8] In 1821 Montgomery moved to the confluence of the White and Mississippi rivers, a place which was thereafter known as Montgomery's Point.[9] The Point became in time a famous steampoint landing. In 1828 General Andrew Jackson stopped there on his way to New Orleans and was entertained by Montgomery; the next year, President Jackson appointed him a Brigadier General in the militia.[10]

Judge Thomas P. Eskridge, the author of the opinion, was a Virginian who had come to Arkansas in 1820.[11] He was appointed circuit court judge by Acting Governor Robert Crittenden shortly after his arrival, and in January of 1823 he announced his candidacy for territorial representative to Congress.[12] But the next week he withdrew, apparently as a favor to Crittenden who had decided to support Henry W. Conway for the post.[13] Eskridge became a judge of the Superior Court of the Territory in 1827[14] where he served until shortly before his death in December of 1835. His obituary in the Arkansas Gazette contains very little information of interest,[15]

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7. AUDUBON'S AMERICA 146 (D. Peattie ed. 1940).

8. *Id.*

9. P. MARTIN, *supra* note 3, at 5.

10. Herndon, *A Little of what Arkansas was like a Hundred Years Ago*, 3 ARK. HIST. Q. 97, 123 (1944). The tavern at the Point was "built in the style of French houses, and was commonly thought of as a mansion for its day." *Id.* at 121. It had been erected soon after the turn of the century by Francis D'Armand, a French trader who had been at the Point since 1766. Scully, *Across Arkansas in 1844*, 13 ARK. HIST. Q. 31, 36 at n.8 (1954). In 1832 some of the old log cabins erected by D'Armand in 1766 were still standing. W. POPE, EARLY DAYS IN ARKANSAS 62 (1895).

11. M. ROSS, ARKANSAS GAZETTE: THE EARLY YEARS, 1819-1866, at 51 (1969).

12. *Id.*

13. *Id.*

14. J. SHINN, PIONEERS AND MAKERS OF ARKANSAS 201 (1908).

15. On December 15, 1835, the Arkansas Gazette ran the following obituary of Eskridge:

> The painful duty devolves on us today, of announcing the death of another of our distinguished citizens. The Hon. Thomas P. Eskridge, late one of the Judges of the Superior Court of this Territory, and formerly a Judge of the Circuit Court, is no more. He died at his residence in Crittenden county, week before last, after a short illness, of cholera morbus—leaving an amiable and interesting family to mourn the loss of a most affectionate husband and father, and a numerous circle of friends and acquaintances, the loss of a sincere and devoted friend, and intelligent and enterprising citizen. Judge Eskridge was a native of the State of Virginia, (of Stanton, we believe), from whence he emigrated to Arkansas in 1821, since which time he has been a citizen of our Territory. He had been a member of the Presbyterian

and though a few orders relative to his estate were entered from 1837 to 1839, no will was recorded and no inventory of his property was filed.[16]

Eskridge was not among the most prominent of Arkansas' territorial judges. He passed virtually unnoticed and his background is thus obscure. Probably he had learned his law as a clerk to a Virginia lawyer, although even this is uncertain. He did not rank high in popular estimation, did not attract the attention of the press or the public, and so later writers have all but ignored him. In fact, he is the only judge of the Superior Court of Arkansas who does not rate a full-fledged biography in any of the various Arkansas histories. He chose to live in Crittenden County, out of the limelight, evidently prefering to leave politics and matters of public visibility to others. But the opinion printed below reveals that he was a thoughtful craftsman, well-trained, and more than competent. The opinion is not brilliant, nor can it be called creative. Still less is it sprightly or animated. But it reveals an acquaintance with many of the best authorities, and the quotation from Judge Roane (Eskridge's fellow Virginian) shows the judge's appreciation at least of the well-turned phrase. More importantly, it demonstrates that only five years after Arkansas had become a territory even a middling judge could be conscientious, well-educated, and workmanlike. It is more than we have the right to expect of such a time and place, and the judge's learning stands in strong contrast to the situation which prevailed in Arkansas only ten years previous when the bench had been composed entirely of laymen totally unfamiliar with the form and substance of the law. This state of affairs had existed for almost 100 years, as a lawyer did not sit on an Arkansas bench until 1814.[17]

Church for several years, and sustained the character of a sincere christian and an exemplary and useful man.

Arkansas Gazette, Dec. 15, 1835, at 3, col. 1.

16. Mary B. Eskridge, "widow and relict of Thomas P. Eskridge," qualified as executrix for him on January 7, 1837. WILL RECORD, VOLUME A, 1826-1852, CRITTENDEN COUNTY (on microfilm at Arkansas History Commission, Little Rock). In the 1837 April term of the County Court two claims were allowed against the estate. Another claim was allowed in January of 1839. In the July term of that year all claims were ordered to be paid out of Eskridge's personalty. Finally, on October 31, 1839 the court ordered the sureties on Mrs. Eskridge's bond to show cause why judgment should not be entered against them in the amount of the claims, as the order of payment had not been obeyed. No further proceedings in this estate have been discovered.

17. The first lawyer to sit on an Arkansas court was George C. Bullitt of St. Genevieve, Missouri who was appointed pursuant to an Act of Congress of January 17, 1814, creating "an additional judge for the Missouri Territory . . . who shall reside at or near the Village of Arkansas." Bullitt had been admitted by the General Court of the Territory of Indiana

Eskridge's opinion demonstrates a sophisticated knowledge of the recondite issues which plague the relationship between law and equity, difficulties which even today generate learned debate.

It is equally noteworthy that at the end of his opinion the good judge upbraids losing counsel for his lack of learning; and he opines, in his last sentence, that "most cases which are lost may be ascribed to the inattentions of the Bar." This view, and Eskridge's manner of expressing it, cannot have endeared him to all the members of the bar, and spreading it upon the public record was, at the least, somewhat impolite if not impolitic. But it is, in any case, indicative of the standards to which the members of the Arkansas bar were expected to adhere in 1824. Remarks of this sort are not uncommon in other parts of the country during this period, and they reflect a class war that was being waged at the time in an effort to make the law a learned profession. In an extremely short time the law in Arkansas was becoming professionalized.

Circuit Court Records of Arkansas County, 1824-1829 (January term, 1824) (On microfilm at Arkansas History Commission, Little Rock. Roll 59. p. 186)

James Hamilton)
)
vs.) Chancery
)
William Montgomery)

A motion has been made by Mr. Sevier, counsel for the defendant, to dismiss the bill in this case, on the ground that an affidavit has not been annexed to it, or, in other words, because the truth of it has not been sworn to by the plaintiff.

This is a bill for discovery and relief. In some respects every bill may be said to be a bill of discovery, but there are bills purely so and known in practice by the denomination of bills of discovery, and in such bill a Court of Equity is only called upon to compel a discovery in order to enable the plaintiff to proceed at law; and having done so its power ceases. There are also bills for discovery &

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when it met in St. Louis on October 1, 1804. W. ENGLISH, THE PIONEER LAWYER AND JURIST IN MISSOURI 25 (1947). He served on the first board of the St. Genevieve Academy appointed in 1808 (*Id.* at 128) and "was a successful politician but never a very active lawyer" in St. Genevieve. *Id.* at 25-26. He was a member of the first House of Representatives of the Territory of Missouri. 3 L. HOUCK, A HISTORY OF MISSOURI 3 (1908). When Arkansas became a territory in 1819, Bullitt's court was abolished and he evidently left soon after.

relief, and in such a Court of Equity is not only called upon for discovery but relief also. The bill under consideration is of that character & to such it has always been considered necessary to have an affidavit annexed. But independent of this there is a general rule in Courts of Equity as to the affixture of an affidavit to a bill, and which rule it seems is applicable to the present case. The rule is this, that whenever the bill has a tendency to evoke the jurisdiction from a Court of Law to a Court of Equity it is necessary to have an affidavit annexed to it. See Mitford 52,[18] Barton's Equity 53,[19] & 1 Equity Cases Abridged 13,[20] The Court should here stop as the point last decided is conclusive as to the [—] of the bill, & therefore an expression of an opinion on the other points suggested would be extra judicial, not being fairly before the court. However, as an opinion has been asked, and as such an opinion may operate in favor of the parties by exempting them from future costs and vexation, it cannot reasonably be withheld.

First it is contended that there is no equity in the bill, and secondly that there has been a trial at law upon the merits & that the same is conclusive against the plaintiff. The first point was certainly made under a total misapprehension of the jurisdiction of a Court of Chancery. The jurisdiction of a Court of Chancery is either assistant to, concurrent with, or exclusive of that of a Court of Law. It is assistant to by removing impediments to a fair decision at Law, as by compelling a discovery, by perpetuating testimony, etc. It is concurrent with in cases of fraud, accident, mistakes, account, partitions, and dower; and its jurisdiction is exclusive in most matters of trust, trusts being the mere creatures of Equity. The boundary between the two jurisdictions was at one time in greater uncertainty than any other legal subject. The line of demarcation is now however fixed and certain, & it may be remarked that in modern times there has been an infinitely greater conformity of decision in the Courts of Chancery than those of Law. But from the earliest period the Courts of Chancery have exercised concurrent jurisdiction with Courts of Law in matters of account, & whenever a surety

18. J. MITFORD, TREATISE ON THE PLEADINGS IN SUITS IN THE COURT OF CHANCERY BY ENGLISH BILL 52 (1792).

19. C. BARTON, HISTORY OF A SUIT IN EQUITY FROM ITS COMMENCEMENT TO ITS FINAL TERMINATION 53 (1796).

20. Eskridge is using the three-volume Dublin edition of EQUITY CASES ABRIDGED which appeared in 1792. Since I do not have that edition ready to hand, it has not been possible to supply citations to it. The earlier two-volume edition is reproduced in volumes 21 and 22 of ENGLISH REPORTS.

case has been made out for relief, relief has never been denied. See Ludlow vs. Simond, 2 Caines Cases in Equity.[21] It is there said that Equity has jurisdiction in all matters of account, notwithstanding there is relief also at law, & though the relief at law may be had, yet if it be doubtful or difficult Equity will interpose. See also—Russell vs. Kennedy & Bruce, 9 John. Reports 1170.[22] The Court of Chancery has [having] concurrent jurisdiction with Courts of Law in all matters of account, there can be no doubt thus that the bill under consideration presents a fair and legitimate case for the interposition of a Court of Equity. It indeed makes one of the strongest cases within the recollection of the Court.

But admitting this, it is contended secondly that the Plaintiff by having made his election to proceed at law, & there having had a trial by jury upon the merits, has thereby precluded himself from coming into a Court of Equity. The Court feels no kind of difficulty in pronouncing that he has. Although it is abundantly manifest that the plaintiff might, in the first instance, have resorted to Equity, it is now too late after having made his election to take a trial at law. Why, it may be inquired, did not the plaintiff, as he undoubtedly had a right to do, in the Court of Law, when he discovered that the defendant was about to avail himself of all legal advantages, suffer a non suit & thereby reserve to himself the right of coming into a Court of Equity? Having failed to do so, he cannot, with any kind of plausibility, much less of right, avail himself of his own negligence and inattention as a ground of coming here. It is a rule of Equity, settled by a long & uniform succession of decisions, that where a defendant in a Court of Law through negligence and inattention fails to avail himself a [?] defense at law he cannot afterwards resort to Equity. This rule, it is apprehended, applies with equal, if not greater force to the case of plaintiffs. See Linplys Exect. v. Doby, 1 Wash. 185;[23] Atkyns 233, 215 referred to [in] Mitford, page 208, 9, 10;[24] 3 Equity Cases at 524, 5, 6;[25] 3 Call 351;[26] Cunningham vs. Caldwell, Hardin 136;[27] Long vs. Colston, 1 Hening & Munford 110.[28] The case from Wash. is conclusive on the subject of

21. Ludlow v. Simond, 2 Cai. Cas. (N.Y., 1805).
22. *See supra* note 20.
23. Tarpley's Administrator v. Dobyns, 1 Wash. 185 (Va. 1793).
24. Not identified.
25. *See supra* note 20.
26. Probably Terrell v. Dick, 1 Call 346 (Va. 1799) is meant.
27. Cunningham v. Caldwell, 3 Ky. 123 (1807).
28. Long v. Colston, 1 Hen. & M. 110 (Va. 1806).

election. The subject matter of controversy in the case from H & M was certain covenants between Long & Colston, which clearly furnished ground for the interposition of a Court of Equity, by way of decreeing a specific performance. Long, however, made his election to proceed at law in the action of covenant for damages & Colston, before the termination of the suit at law, filed his bill in the High Court of Chancery for an injunction and relief. The Court of Appeals decided that Long, having made his election to proceed at law for damages, could not be forced into Chancery unless upon strong & peculiar circumstances of equity; from which decision it would appear that it is only in extraordinary cases that a defendant in a Court of Law can force a plaintiff thence into a Court of Equity. With much less propriety, then, can the Plaintiff, after full trial there upon the merits by jury, come here. The celebrated Judge Roane in the course of his decision in the above case, speaking of the jurisdiction of a Court of Equity and the necessity of restricting it to its proper sphere, makes the following pointed remarks which may be considered as applicable to the case under consideration, as well as to all cases brought to a Court of Equity after a trial by jury upon the merits. "But," says he, "this jurisdiction must have its limits. It ought not to engulph and destroy the salutary jurisdiction of the Common Law. I wish not to see this small and precious germ, which within times not far remote took root and was with difficulty nourished as a wholesome & goodly plant yielding its friendly aid to the soil in which it grew, now outstrip its proper size, outrage its own nature, and like the famed Upas tree by its deleterious effluvia administer death and destruction round. I wish not to yield up everything to that encroaching jurisdiction, which knows not the inestimable trial by jury, and is blind to the incalculable superiority of viva voce testimony."[29] The circumstances of the plaintiff having evaded to mention in his bill the trial at law certainly cannot avail him any valuable purpose, for it is competent for the defendant to plead that fact, which would be conclusive. So, on the other hand, if the facts of the former trial appeared on the face of the bill, the defendant may demur which would be equally conclusive in his favor.

From the best consideration which the Court has been able to give this case, it is constrained, however reluctantly, to say that the Plaintiff is wholly without relief both at law and in equity. The Plaintiff's case may and probably does involve considerations of ex-

29. *Id.* at 130.

treme hardship, but it is the duty of the court to administer the law as it exists. It cannot alter it, nor can it depart from it as evidenced by the decisions of the sages of the law, not only from England but our own country, without justly incurring the imputation not only of ignorance but of presumptuous stupidity. The court may be permitted to remark in conclusion that it hopes that this decision may operate as a salutary admonition to the gentlemen of the Bar. It is a fact too well attested to admit of doubt that most cases which are lost may be ascribed to the inattentions of the Bar.

Let the bill be dismissed at the cost of the plaintiff.