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Justice on the Tennessee Frontier: The Williamson County Circuit Court 1810-1820

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I. INTRODUCTION**

Legal historians long have speculated on the influence of the frontier[1] on the development of American law. Early historians such

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** All references to the WILLIAMSON COUNTY CIRCUIT COURT MINUTE BOOK (1810-1820) will be cited as WmCo CC Min. Bk.

1. The term "frontier" connotes many meanings. *Webster's Dictionary* defines "frontier" as "that part of a settled, civilized country which lies next to an unexplored or undeveloped region." WEBSTER'S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE 582 (coll. ed. 1966). In the context of nineteenth-century America, legal historians often use the term "frontier" broadly. Thus "frontier" may refer to newly settled territories that have not obtained statehood, to sparsely populated parts of older states, or even to established but still young communities that may no longer face immediate problems of survival but must remain alert to avert problems that threaten social order.

For the purposes of this Note the term "frontier" connotes the third and broadest meaning. Williamson County in 1810 clearly was not a "Wild West" outpost subject to Indian attacks and cavalry charges. Neither, however, had it solved all the problems attendant to the creation of a new society in what was still a sparsely settled area. Moreover, the 1810-1820 circuit court *was* a "pioneer" court in the sense that it was the first to operate in Williamson County under the new judicial system adopted in Tennessee in 1809. An understanding of this definitional shading is essential to an understanding of this Note.

as Frederick Jackson Turner,[2] William Graham Sumner,[3] Roscoe Pound,[4] and Frederick L. Paxson[5] suggested that frontier law generally was less formal and more likely to lead to abuse than the English law forms followed in more civilized areas of the country.[6] Paxson described frontier law this way:

> But in these new communities, where they started with a great long table and a big white sheet of paper and abundance of ink, with no solicitation as to what they should write or not, it was easy to cut out institutions of government and to substitute others that they desired and approved.[7]

This belief that the crudities of frontier life carried over into the administration of justice has not been supported, however, by later research. The findings of William Wirt Blume[8] and Lawrence Friedman,[9] in particular, have undermined earlier speculations. While Blume and Elizabeth Brown found in the Northwest Territory a lack of "superstitious respect"[10] for old laws and legal institutions, Blume nevertheless saw "almost no evidence of the informality often supposed to be a characteristic of frontier justice. Instead, [he found] a strict compliance with applicable statutes, and, where the procedure was not governed by statute, with the English common law."[11]

This Note examines the history of one early nineteenth-century circuit court and the caliber of its bench and bar. To analyze the workings of that court, this Note applies the analytical framework adopted by Friedman, Blume, and other historians to the raw data provided by a study of the Williamson County Circuit Court records. In each of several substantive areas for which the court's

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2. F. TURNER, THE FRONTIER IN AMERICAN HISTORY (1937).

3. Roscoe Pound quotes Sumner as saying "some of our greatest political abuses have come from transferring to our now large and crowded cities maxims and usages which were convenient and harmless in backwoods country towns." R. POUND, THE SPIRIT OF THE COMMON LAW 112-13 (1921).

4. Pound, *The Pioneers and the Common Law*, 27 W. VA. L.Q. 1 (1920).

5. F. PAXSON, HISTORY OF THE AMERICAN FRONTIER 1763-1893 (stud. ed. 1924).

6. Blume, *Civil Procedure on the American Frontier*, 56 MICH. L. REV. 161, 203-06 (1957).

7. F. PAXSON, 13 REPORTS OF STATE BAR ASSOCIATION OF WISCONSIN 477 (1919-1921), *quoted in* Blume, *supra* note 6, at 205.

8. Blume wrote a series of five articles dealing with law and its administration on the American frontier. Blume, *Chancery Practice on the American Frontier*, 59 MICH. L. REV. 49 (1960) [hereinafter cited as *Chancery Practice*]; Blume, *supra* note 6; Blume, *Criminal Procedure on the American Frontier*, 57 MICH. L. REV. 195 (1958) [hereinafter cited as *Criminal Procedure*]; Blume, *Legislation on the American Frontier*, 60 MICH. L. REV. 317 (1962) [hereinafter cited as *Legislation*]; Blume, *Probate and Administration on the American Frontier*, 58 MICH. L. REV. 209 (1959) [hereinafter cited as *Probate*].

9. L. FRIEDMAN, A HISTORY OF AMERICAN LAW (1973).

10. Blume & Brown, *Territorial Courts and Law*, 61 MICH. L. REV. 467, 535 (1963).

11. Blume, *supra* note 6, at 209.

records provide information, the Note first considers Friedman's generalizations about nineteenth-century law and then interprets the Williamson County data in the light of those generalizations and the results of other case studies.

This Note proceeds on the theory that the records of the Williamson County Circuit Court reveal substantive decisionmaking representative of all newly established nineteenth-century judicial systems struggling for existence and order. It suggests possible explanations for those findings that do not comport with the results of previous studies in other areas. But this Note concludes that in Tennessee, as elsewhere, it was the strength of the American justice system that helped tame the frontier, rather than the frontier that "tamed" the law.

II. HISTORY OF THE WILLIAMSON COUNTY CIRCUIT COURT

A. *The Tennessee Judicial System*

Many changes in the Tennessee judicial system occurred during the early years of statehood. Originally a part of North Carolina, Tennessee in its 1796 constitution adopted almost verbatim the North Carolina judicial system,[12] which comprised two permanent courts. The Court of Pleas and Quarter Sessions[13] exercised county administrative functions and general trial jurisdiction. The legislature appointed the justices of the peace for this court, two from each "captain's company" per county, one extra if a town was included.[14] The county court heard misdemeanor, civil jury, and slave cases. It also apprenticed minors; licensed hotels and taverns; took bonds of liquor dealers; fixed prices of drinks, meals, and beds; authorized the building of dams and mills; dealt with deeds; and appointed

12. P. Cason, History of Tennessee's Court System From Its Beginning to 1834 (August 1930) (unpublished thesis in George Peabody College Library). The standard treatise on constitutional development in Tennessee is J. CALDWELL, STUDIES IN THE CONSTITUTIONAL HISTORY OF TENNESSEE (2d ed. 1907). The amount of North Carolina's influence is, however, a matter of debate. At least one author argues convincingly in favor of Pennsylvania influence. *See* Barnhart, *The Tennessee Constitution of 1796: A Product of the Old West*, 9 J.S. HIST. 532 (1943).

13. The Court of Pleas and Quarter Sessions usually is referred to as the county court.

14. TENN. CONST. art. V, § 12 (1796); Laska, *A Legal and Constitutional History of Tennessee, 1772-1972*, 6 MEM. ST. U.L. REV. 563, 590 n.161 (1976). This judicial selection method evidences the close relationship between the legislature and the military. State law required all free men and indentured servants between 18 and 45 to serve in the militia. Each county formed a militia regiment and within the county each district comprised a company with captains elected by the men eligible to serve. Justices of the peace were chosen from these companies. Kinard, *Frontier Development of Williamson County*, 8 TENN. HIST. Q. 3, 24-25 (1949).

guardians for orphans.[15] It was this tribunal with which early citizens were most familiar.

The Superior Court of Law and Equity exercised both trial jurisdiction and appellate[16] jurisdiction in cases tried before the county court.[17] Composed of three legislatively chosen judges,[18] who were required to attend every term, the Superior Court also exercised equity jurisdiction.[19] Under the 1796 constitution, however, no constitutional court of last resort existed.

The North Carolina system did not work well in pioneer Tennessee. The judiciary was so tied to the legislature that it could not take the initiative necessary to solidify its independence.[20] The lack of a reviewing court and of authoritative legal precedent made uniformity impossible.[21] After only a decade of operation, confusion and inconsistency permeated the Tennessee judicial system.[22] The response by judicial reformers led to the creation by the legislature of a new system not utilized in other southern states for several years.[23] Pioneer Tennessee, then, discarded much of the North Carolina system to create a system to meet its own needs.

The Act of 1809,[24] which took effect January 1, 1810, established

15. P. Marshall, Williamson County 16 (1917)(manuscript compilation in Williamson County, Tennessee, Public Library). Park Marshall's series of articles on the history of the county was published in 1917 by the Williamson County News under the title *Pertaining to the Early History of Franklin and Williamson County.* A scrapbook of those articles is on exhibit at the Tennessee State Library in Nashville. Citations in this paper are to the typed manuscript of the articles held by the Williamson County Public Library. For an excellent history of the Williamson county court, see Kinard, *supra* note 14, at 24-33, 127-31.

16. Laska, *supra* note 14, at 590 & n.163.

17. J. CALDWELL, SKETCHES OF THE BENCH AND BAR OF TENNESSEE 67 (1898); Laska, *supra* note 14, at 590.

18. In 1807 a fourth judge was added. Act of Dec. 3, 1807, ch. 34, 1807 Tenn. Pub. Acts, *reprinted in* 1 LAWS OF THE STATE OF TENNESSEE 1030 (E. Scott comp. 1821) [hereinafter cited as SCOTT].

19. In 1787 North Carolina divided its superior court, creating a chancery division referred to as the court of equity. The same judge sat both as superior judge and as chancellor, but each court had its own clerk and master. Cason, *supra* note 12, at 46. Tennessee initially adopted this system.

20. Laska, *supra* note 14, at 603-04. For example, the legislature selected all judges. Thus applicants for such judgeships constantly besieged the legislature. Furthermore, any unsuccessful litigant was free to appeal to the legislature for a private act that would override the effect of the judicial decision. Additionally, judges who interpreted land laws too narrowly were subject to impeachment. Not all of these problems were solved until the Constitution of 1834 was written. *Id.* at 604.

21. Williams, *History of the Courts of Chancery of Tennessee,* 2 TENN. L. REV. 6, 16 (1923).

22. *Id.*

23. North Carolina did not adopt such a system for ten years; Georgia did not reform its court system for a generation. *Id.* at 17.

24. Act of Nov. 16, 1809, ch. 49, 1809 Tenn. Pub. Acts, *reprinted in* 1 SCOTT, *supra* note 18, at 1148-56.

for the first time a Supreme Court of Errors and Appeals, which sat at Jonesboro for Washington District, Knoxville for Hamilton District, Nashville for Mero District, Clarksville for Robertson District, and Carthage for Winchester District.[25] The legislature abolished the superior courts and established instead five judicial circuit courts of law and equity.[26] Although the county court retained its administrative functions and jurisdiction over civil cases, exclusive criminal jurisdiction was transferred to the new circuit courts. The new courts also exercised civil jurisdiction concurrently with the county court and equity jurisdiction concurrently with the supreme court.[27]

B. Creation of the Williamson County Circuit Court

The Tennessee General Assembly passed the act establishing Williamson County on October 26, 1799[28] and assigned it to Mero District, which contained most of the counties in middle Tennessee.[29] The Act of 1809, which created the five judicial circuits, placed the Williamson County Circuit Court in the Fourth Circuit.[30]

The legislature selected Thomas Stuart judge of the Fourth Circuit.[31] James Robertson administered Stuart's oath at the courthouse in Nashville, and the latter received a commission signed by Governor Willie Blount.[32] Stuart held court in each county twice a year—two weeks in the spring and two weeks in the fall. In William-

25. Originally one circuit judge sat with two justices. Later the number of justices was increased to three. J. CALDWELL, *supra* note 17, at 69.

26. Even the new Act did not cure all the ills of the judicial system. Until 1834 the legislature continued to exercise a stranglehold over the courts. *Id.* at 70.

27. *See* notes 123-26 *infra* and accompanying text. In 1832 the legislature vested in the circuit courts jurisdiction over misdemeanors as well. Act of Oct. 22, 1832, ch. 22, at 35, 1832 Tenn. Pub. Acts.

28. Act of Oct. 26, 1799, ch. 3, 1799 Tenn. Pub. Acts, *reprinted in* 1 SCOTT, *supra* note 18, at 634-36.

29. The Mero District included Davidson, Sumner, Rutherford, Robertson, Dickson, Montgomery, Stewart, Jackson, Smith, Wilson, and Williamson Counties. In 1799 Andrew Jackson received a salary of $400.00 for his services as Attorney-General of the Mero District. Act of Oct. 26, 1799, ch. 58, 1799 Tenn. Pub. Acts, *reprinted in* 1 SCOTT, *supra* note 18, at 666. For an interesting discussion of Jackson's early career as an attorney, see Ely, "You will Discover how Loosely Business is Transacted in the Courts of this State": The Legal Practice of Andrew Jackson (October 20, 1978) (paper presented at the American Society for Legal History)(copy on file with the *Vanderbilt Law Review*).

30. Included in the Fourth Circuit were Bedford, Davidson, Giles, Lincoln, Maury, Rutherford, and Wilson Counties.

31. Since the act required judges to be residents of their districts, Stuart and his wife moved to Williamson County in 1812 and lived there for the rest of their lives. Stuart retired from the bench in 1836 when ratification of a new state constitution changed the circuit court structure. Major, *Judge Thomas Stuart*, 8 WM. CO. HIST. SOC'Y 137, 139 (1977).

32. WmCo CC Min. Bk. 6 (1810).

son County the circuit court convened on the second Mondays in May and November.[33] Judge Stuart opened court in Franklin on May 10, 1810.[34] Court convened in the county courthouse, a brick building in the center of the Franklin square. This courthouse was constructed in 1800; prior to that time court was held in the home of Thomas McKay.[35] Prisoners were confined in the jail, also located on the square near the market house. Because this building was dilapidated and insecure, court records show that most prisoners were boarded in the Davidson County jail. Not until 1816 did the county take steps to construct a new jail.[36]

The men chosen to compose the first jury pool[37] were pioneer settlers in the young county. Jury duty was not always highly regarded. The fining or excusing of jurors was an initial docket matter at each term of court. Fines were relatively light,[38] however, and frequent failure to appear was more often excused than fined.

Against this judicial background, pioneer settlers in Williamson County attempted to create and maintain order in a new society. That order did not necessarily presuppose harmony. Like other frontier courts, the Williamson County Circuit Court had to deal within a sometimes "lawless" atmosphere, administer laws often adopted verbatim from older, more stable societies, and depend for advocacy upon informally trained, circuit riding lawyers and judges. But in every area the achievements of this court indicate success in adapting to the peculiar needs of frontier society.

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33. In 1812 the opening dates were changed to the first Mondays in May and November. In 1817 term openings were changed to the first Mondays in February and August.

34. WmCo CC Min. Bk. 6-11 (1810). The first court officers were William Hulme, sheriff; William Smith, clerk; Felix Grundy, R.B. Sappington, Thomas Smith, and Henry Childress, bondsmen; and Alfred Balch, solicitor-general. *Id.*

35. THE GOODSPEED HISTORIES OF MAURY, WILLIAMSON, RUTHERFORD, WILSON, BEDFORD & MARSHALL COUNTIES OF TENNESSEE 789 (1971) [hereinafter cited as GOODSPEED HISTORIES], *reprinted from* HISTORY OF TENNESSEE FROM THE EARLIEST TIME TO THE PRESENT (W. Goodspeed ed. 1886) [hereinafter cited as GOODSPEED].

36. *Id.*

37. Jacob Garrett, John Witherspoon, Henry Cook, Daniel Perkins, James McEwen, Sion Hunt, George Hulme, Sherwood Green, Nicholas Scales, John H. Eaton, James Gruff, Archibald Lytle, Newton Cannon, John Bostick, James Allison, Guilford Dudley, Burwell Temple, John Crawford, William Neily, David Dickinson, Stephen Childress, Samuel Perkins, William Bond, Richard Hightower, Berry Nolen, Charles Boyles, Hendley Stone, Thomas Alexander, Nicholas T. Perkins, Samuel Morton, Thomas Gooch, William Anthony, John Wilson, Thomas Simmons, R. P. Currin, Collin McDaniel, Thomas Wilson. WmCo CC Min. Bk. 17 (1810).

38. Juror fines ranged from $0.50 to $5.00. Most jurors were fined $2.50 per day for failure to appear.

C. *The Early Bench and Bar*

Life was crude and violent in parts of the American frontier. Many early stories suggest that a drunken and corrupt form of personalized justice ruled the pioneer courts.[39] Undeniably, some judges were land speculators who ruled on their own claims, alcoholics who drank on the bench, forgers, or worse.[40] Many lawyers went armed, and duels were an everyday affair.[41] Yet stories of legal crud-

39. L. FRIEDMAN, *supra* note 9, at 141-42 & nn.8-9. For example, Friedman recounts the story of a Wisconsin Territory judge:

> At Green Bay, in 1816, two decades before Wisconsin Territory was established, an "old Frenchman" named Charles Reaume, who "could read and write a little," acted as justice of the peace. In his court, it was said, "a bottle of spirits was the best witness that could be introduced." Once, when the losing party scraped up some whiskey for the judge, Reaume ordered a new trial and reversed his prior decision, on the strength of this "witness." Reaume's "court" was a long, difficult journey from the county seat. His word, in effect, was final. He took care not to decide cases against those traders who were "able to bear the expense of an appeal"; hence his incompetence was not exposed to a wider public.

Id. at 141, *citing* Lockwood, *Early Times and Events in Wisconsin*, in SECOND ANNUAL REPORT AND COLLECTIONS OF THE STATE HISTORICAL SOCIETY OF WISCONSIN 98, 105-06, 126 (1856). *See also* 2 A. CHROUST, THE RISE OF THE LEGAL PROFESSION IN AMERICA 92-128 (1965) (particularly the authorities cited in n.1).

40. L. FRIEDMAN, *supra* note 9, at 142. Robert Reynolds, a former Illinois county court judge, was indicted for fraud after it was discovered that he had filed false land claims, forged the names of his witnesses, deponents, and grantors, and given depositions under an assumed name. *Id.*, *citing* THE LAWS OF INDIANA TERRITORY 1801-1809 lxxxix, xc (F. Philbrick ed. 1930).

A later Illinois Supreme Court justice who never studied law eventually resigned to prevent exposure of his utter incompetency. He left Illinois to become a "noted swindler, moving from city to city, and living by swindling strangers, and prostituting his daughters, who were very beautiful." *Id.*, *quoting* T. FORD, A HISTORY OF ILLINOIS FROM ITS COMMENCEMENT AS A STATE IN 1818 TO 1847, at 29 (1854).

41. *Id.*, *citing* W. KELLER, THE NATION'S ADVOCATE, HENRY MARIE BRACKENRIDGE AND YOUNG AMERICA 101, 104 (1956). Brackenridge visited Missouri in 1810-1811 and reported that many lawyers and judges carried pistols and knives. Evidence suggests that this practice was not confined to Missouri. Judge Reaume of Wisconsin openly displayed his hunting knife in court if a litigant showed any inclination to dispute his authority or rulings. 2 A. CHROUST, *supra* note 39, at 98. Furthermore, judges sometimes resorted to physical violence. Indiana Judge John Lindsay once quelled a disturbance in his courtroom by leaving the bench, beating one offender into submission, and kicking him out the door. *Id.* Nor were lawyers any less prone to violence. Chroust recounts several tales of courtroom violence:

> Kemp P. Battle once witnessed a vicious fistfight between two lawyers right in the courtroom in the presence of the court, but such incidents apparently were quite common. At the conclusion of the bout—ostensibly the court would not directly interfere so as not to cut short the fun—the court would simply fine the offenders. Since, as a rule, the two antagonists would make up and ask the court's pardon, the fines would usually be remitted. In Missouri an attorney denounced in severe tones a witness who was obviously lying. The witness' father, enraged by this attack on the honor of his son, promptly assailed the lawyer and was immediately shot down in open court by the party whom the lawyer represented. James Murray, the constable of Wake County, North Carolina, was sitting within the bar when during a trial a certain John Williamson came up from behind and for no apparent reason struck him with a rock.

Id. at 102 (footnotes omitted).

ity are often distorted. Alongside this fraud and crudity existed trained legal talent,[42] especially in larger, more economically stable communities near centers of government. This was the case in Michigan and the Northwest Territory,[43] Alabama, and Mississippi;[44] this also was the case in pioneer Tennessee, where early lawyers often were men of intelligence and education.[45]

From the beginning the quality of bench and bar in the Williamson County Court was high. Thomas Stuart, the first circuit judge, was an extremely able jurist who served on the circuit court for twenty-seven years.[46] Several other circuit judges who sat in interchange[47] with Stuart during the first decade also were men of ability.[48] Lawyers rode the circuits with the judges, maintaining simultaneous practices in several cities within the circuit. Six attorneys were admitted to practice in the Williamson County Circuit Court during the first term: Felix Grundy, Thomas Hart Benton, John Reid, Nicholas Perkins, Peter Booker, and Lemuel Montgomery.[49] Two of the six, Grundy and Benton, went on to become national legal and political figures.

If Felix Grundy had not lived in the same era as Clay and Webster, his fame might have been as great as theirs.[50] Born of English parents in 1777, Grundy grew up on the Kentucky frontier.[51] Well educated for the time,[52] he was elected in 1797 to the Kentucky

42. L. FRIEDMAN, *supra* note 9, at 144.

43. William Wirt Blume wrote several articles dealing with the Northwest Territory. *See* note 8 *supra*. *See also* Brown, *The Bar on a Frontier: Wayne County, 1796-1836*, 14 AM. J. LEGAL HIST. 136 (1970).

44. J. BALDWIN, THE FLUSH TIMES OF ALABAMA AND MISSISSIPPI (1957).

45. J. CALDWELL, *supra* note 17, at 71-77.

46. *See* note 31 *supra*. *See generally* Marshall, *Judge Thomas Stuart*, 8 TENN. HIST. MAG. 91 (1924).

47. The 1809 Act provided that each of the five circuit judges could sit in interchange for any of the others. Act of Nov. 23, 1809, ch. 126, § 7, 1809 Tenn. Pub. Acts, *reprinted in* 1 SCOTT, *supra* note 18, at 1206-07. During the first decade of the Williamson court six other men sat on the bench: Nathaniel Williams, Archibald Roane, John Jackson, Bennett Searcy, William Kelly, and Jacob Isaack.

48. Probably the most illustrious of these men was Archibald Roane, judge of the Second Circuit from 1811-1815. He served as territorial Attorney-General, state constitutional convention delegate, judge of the first superior court of law and equity, and second governor of Tennessee. J. CALDWELL, *supra* note 17, at 19-21. Jacob Isaak (often spelled Isaac or Isaacs) went on to become a Congressman in 1829. Other members of the Tennessee delegation elected in that year included David Crockett, John Bell, and James K. Polk. J. MOORE, TENNESSEE: THE VOLUNTEER STATE 1769-1923, at 403 (1923). Bennett Searcy also was prominent as a trial lawyer in Davidson County. Ely, *supra* note 29, at 11.

49. WmCo CC Min. Bk. 13 (1810).

50. J. CALDWELL, *supra* note 17, at 53.

51. GOODSPEED, *supra* note 35, at 386-87; P. Marshall, *supra* note 15, at 72-73.

52. Grundy studied at a Bardstown, Kentucky academy established by Dr. James Priestly. He began the study of medicine but switched to law. He was licensed as a lawyer in 1797. J. CALDWELL, *supra* note 17, at 54-55.

Constitutional Convention. Later he served as state legislator and supreme court chief justice there. In 1807 he came to Tennessee and subsequently represented the state in the United States Congress and Senate. He also served as Attorney General of the United States in the Van Buren Cabinet. Although he settled eventually in Nashville, Grundy, considered by some to be Tennessee's greatest litigator,[53] began his Tennessee law practice in Williamson County.

Thomas Hart Benton, who spent thirty years representing Missouri in the United States Senate, also began practice in Williamson County. Benton, whose family owned several thousand acres in the Hillsboro community, had a larger practice than any other lawyer in the county from 1809 to 1812.[54] He represented Williamson County in the state senate from 1809 to 1811. Benton also was a leader in early Tennessee judicial reform[55] and is credited with securing the passage of a bill giving blacks the right to trial by jury.[56] Although viewed by history as a westerner, Benton's legal roots are in pioneer Williamson County.

Two other early lawyers participated in historic episodes of national significance. John Reid was a member of Andrew Jackson's staff during the War of 1812 and fought at the Battle of New Orleans.[57] Nicholas Perkins came to Williamson County from the Mississippi Territory (now Alabama), where he had participated in the capture and transportation back to Richmond, Virginia, of Aaron Burr.[58] Another prominent lawyer-politician, John Bell,[59] moved to Franklin in 1816. He remained for approximately ten years, representing Williamson County in the state senate during much of the period. Later he served in both the Congress and the Senate. In 1860 he was nominated for President by the Constitutional Union Party.

In sum, the lawyers who appeared before the early Williamson County Circuit Court were positive rather than negative influences on pioneer justice. They fit easily into Friedman's mold: mobile, vigorous, quick-witted, adventurous.[60] Their presence in the circuit court facilitated the attempt to insure an orderly society.

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53. *Id.* at 59. Although Grundy is most often referred to as a criminal lawyer, records show that he represented clients on many matters. *Id.*

54. P. Marshall, *supra* note 15, at 73. *See generally* Chambers, *Thomas Hart Benton in Tennessee, 1801-1812,* 8 TENN. HIST. Q. 291 (1949).

55. *See* note 123 *infra* and accompanying text. *See also* Chambers, *supra* note 54, at 310-19.

56. J. CALDWELL, *supra* note 17, at 30.

57. P. Marshall, *supra* note 15, at 73.

58. *Id.*

59. *See generally* GOODSPEED, *supra* note 35, at 397.

60. L. FRIEDMAN, *supra* note 9, at 144.

III. LAW ON THE FRONTIER

A. *General Administration and Procedure*[61]

Perhaps the most convincing evidence that the first Williamson County Circuit Court proceeded with formality can be found in the countless entries regarding what were obviously routine matters of administration and procedure. The court adopted procedural rules during its first term. Attorneys were formally admitted at the beginning of each term. Both jurors and witnesses were fined for failure to appear. The grand jury also operated effectively as early as 1810, bringing periodic indictments and studying local problems such as road conditions.[62] Furthermore, the court routinely ordered the taking of depositions, granted permission to amend pleadings, and considered motions for new trial.[63] The court also granted attachments, execution on judgments, and *scire facias.*[64] Circuit judges appointed arbitrators or masters in appropriate cases.[65]

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61. Like many early courts, the Williamson County Circuit Court maintained only sketchy records of the cases heard before it. The early Minute Books style cases by names of parties and often make no mention of the subject matter of a civil suit. For this reason the number of cases used in this and subsequent discussions is fewer than the actual number of cases recorded.

62. The first reference to the Williamson County grand jury reveals that most of the 1810 panel failed to appear at the appointed time. WmCo CC Min. Pk. 87 (1810). Eventually they were impaneled, reported to Judge Stuart on county road conditions, and were dismissed. WmCo CC Min. Bk. 104 (1810). Subsequently, an 1811 jury presented another road report. WmCo CC Min. Bk. 189 (1811). In 1820 they returned misdemeanor presentments. WmCo CC Min. Bk. 1124 (1820).

Beginning in 1811 the grand jury also made periodic criminal indictments. *See, e.g.,* WmCo CC Min. Bk. 276 (1811)(petit larceny, assault and battery); WmCo CC Min. Bk. 483 (1813)(murder); WmCo CC Min. Bk. 572 (1813)(perjury); WmCo CC Min. Bk. 610 (1814)(counterfeiting); WmCo CC Min. Bk. 707 (1815)(larceny); WmCo CC Min. Bk. 734 (1816)(horse stealing); WmCo CC Min. Bk. 786 (1816)(murder, forgery); WmCo CC Min. Bk. 882 (1817)(larceny); WmCo CC Min. Bk. 945 (1818)(perjury); WmCo CC Min. Bk. 988 (1819)(horse stealing); WmCo CC Min. Bk. 1067 (1819)(stealing bank bills); WmCo CC Min. Bk. 1115 (1820)(horse stealing); WmCo CC Min. Bk. 1134 (1820)(larceny); WmCo CC Min. Bk. 1140 (1820)(perjury); WmCo CC Min. Bk. 1145 (1820)(perjury); WmCo CC Min. Bk. 1211 (1820)(perjury).

63. *E.g.,* WmCo CC Min. Bk. 57 (1810)(deposition); WmCo CC Min. Bk. 199 (1811)(motion for new trial); WmCo CC Min. Bk. 340 (1812)(motion to amend pleadings); WmCo CC Min. Bk. 454 (1812)(deposition); WmCo CC Min. Bk. 615 (1815)(motion for new trial); WmCo CC Min. Bk. 1155 (1820)(motion to amend pleadings). In fact, these entries are so numerous that the author has not attempted to tabulate them. The entries are terse; as in other cases, relevant details do not exist.

64. *E.g.,* WmCo CC Min. Bk. 456 (1812) (execution, *scire facias*); WmCo CC Min. Bk. 708 (1815)(*scire facias* set aside); WmCo CC Min. Bk. 909 (1817)(attachment granted); WmCo CC Min. Bk. 1126 (1820)(*scire facias*). *See* note 63 *supra.*

65. *E.g.,* WmCo CC Min. Bk. 213 (1811); WmCo CC Min. Bk. 652 (1815); WmCo CC Min. Bk. 877 (1817)(Edwards v. Staggs). Again the entries provide little information. The case of *Edwards v. Staggs,* however, provides just enough detail to tease the reader. The initial entry gives no hint as to the nature of the case, but records an agreement by the parties

Early circuit judges also granted Revolutionary War pensions. In 1820 four men presented to the Williamson County Circuit Court the first pension claims arising from their Revolutionary War service.[66] To qualify for pensions a veteran had to submit a detailed report of his assets and prove that he needed the grant. Grants of this kind became more frequent in subsequent years, and as late as 1832 twenty-five pensioners were alive in Williamson County.[67] Circuit judges also presided over the swearing in of new United States citizens. During the period 1810-1820 five men took the oath of allegiance before the bench in Williamson County.[68]

The entire record of Williamson County Circuit Court administration evidences a routine not unlike that of any other state court of the period. The actions are familiar, the proceedings formal. The very existence of this routine supports Blume's contention that justice on the frontier did not suffer from the lawlessness often imputed to the pioneers whom it served.[69]

B. The Law of Property

(1) Public Lands and Private Title

For most of the nineteenth century the basic issue in American real property law was land disposal.[70] The public land question touched every other national issue. The government's policy was to dispose of rather than manage its vast public lands; but as each old problem was solved, a new one emerged:

> There were chronic difficulties in determining title. Government surveys, for all their defects, made it possible to identify the physical aspects of the land. But title is a concept more elusive than longitude, more nebulous than a tree stump or a stream. Title became as vexatious and intractable a subject as the abolished law of tenure. Sometimes title depended upon the terms of some vast, ambiguous grant—from the federal government, or the King of Spain, or a dead proprietor. Or it had to take into account the patents (grants) of American state governments, possibly equivocal, possibly corrupt. . . . Raucous

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to abide by the decision of the arbitrator. One week later a final entry appears: the arbitrator finds that Staggs was drunk and remembers nothing of the events which led to the filing of the action. WmCo CC Min. Bk. 900 (1817). On the basis of that finding the judge dismissed the case!

66. Walter Tiffany, WmCo CC Min. Bk. 1193 (1820); James Hungerford, WmCo CC Min. Bk. 1200 (1820); John Talley, WmCo CC Min. Bk. 1218 (1820); Joseph Pinkerton, WmCo CC Min. Bk. 1227 (1820).

67. GOODSPEED HISTORIES, *supra* note 35, at 797.

68. These men were James Stewart, WmCo CC Min. Bk. 369 (1812); John Berkley, WmCo CC Min. Bk. 542 (1813); James Gordon, WmCo CC Min. Bk. 542 (1813); David Davis, WmCo CC Min. Bk. 915 (1817); and Andrew Campbell, WmCo CC Min. Bk. 1092 (1819). All were former British citizens.

69. *See* text accompanying note 11 *supra*.

70. For an extensive discussion of this issue, see L. FRIEDMAN, *supra* note 9, at 202-15.

> squabbles, arising under state and federal pre-emption laws, and the law and practice of local land offices, were meat and bread to Western lawyers. . . . Federal and state governments floated land scrip and bounty warrants. . . . These land certificates, passing from hand to hand, gave rise to a whole new body of law, a whole new body of controversies.[71]

Clearly the most important problem facing Tennessee during the first years of statehood was that of public lands.[72] North Carolina's cession of the Tennessee country to the federal government in 1789 was contingent upon the satisfaction out of these lands of the claims of its Revolutionary War soldiers and earlier land grants.[73] Once admitted to statehood, however, Tennessee maintained that neither North Carolina nor the federal government had any further power to claim its lands.[74] In 1799 Tennessee established its own land offices. The dispute between the two states and the federal government continued until 1806, when Congress passed an act ending the argument.[75] This settlement, which became the foundation of the Tennessee land system, reserved certain areas of the state for use by the federal government, assigned certain areas to satisfy North Carolina claims, and surrendered all other areas to the authority of the state of Tennessee. Although this settlement did not entirely solve the land disputes, it did provide a basis for later individual adjudication.

After 1809 property deeds of conveyance in Williamson County were registered in the Circuit Court and then recorded in the deed books. Deeds most often were introduced during the first day of each Circuit Court term, along with other administrative matters. Tracts ranged in size from less than an acre to several thousand acres. In the case of conveyances by both a husband and wife, the court occasionally required proof of the voluntariness of the wife's signature.[76]

Williamson County landowners faced the same title problems experienced elsewhere in Tennessee. Many landowners based their

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71. *Id.* at 212.

72. T. ABERNETHY, FROM FRONTIER TO PLANTATION IN TENNESSEE: A STUDY IN FRONTIER DEMOCRACY 182 (1932).

73. 1789 N.C. Sess. Laws, ch. 3, *reprinted in* 1 SCOTT, *supra* note 18, at 405-08. Specifically the cession act ceded "unreserved" lands, so North Carolina exercised its right to grant lands on military reservations. The conflicting Tennessee and North Carolina grants were a fruitful source of confusion to the public and revenue to lawyers.

74. T. ABERNETHY, *supra* note 72, at 183.

75. Act of April 18, 1806, ch. 31, *reprinted in* 2 THE PUBLIC STATUTES AT LARGE OF THE UNITED STATES OF AMERICA: FROM THE ORGANIZATION OF GOVERNMENT IN 1789 TO MARCH 3, 1845, at 381-83 (R. Peters comp. 1845).

76. WmCo CC Min. Bk. 646 (1815)(McPhail) (wife separated from husband); WmCo CC Min. Bk. 837 (1817)(Bond).

claims on North Carolina land grants.[77] Other deeds recited the grants of land in Davidson County or other nearby counties. Not surprisingly, therefore, the most common land action in pioneer Williamson County was the action for ejectment. This English action was a legal fiction that still thrived in parts of early nineteenth-century America.[78] Developed in the late 1400's to enable forcibly evicted lessees to recover possession of land,[79] the legal fiction of ejectment was designed to circumvent ancient land actions that did not apply to leases.[80] According to the form of the pleadings, the lessee of the person in possession ejected the lessee of the claimant. The ousted lessee then sued the ejector. In reality the suit was between the land claimant and the person actually in possession. The lessees, the leases, and the actual ouster were mere legal fictions, and the person in possession had to agree not to dispute the fictions before he was allowed to defend the action.[81]

Entries in the Williamson County Minute Books indicate that this fiction retained vitality in the nineteenth century. A typical entry of the period read:

> George W. Campbell's Lessee
> v. Ejectment
> William Kerr
>
> William Kerr the Tennant in possession on whom the notice in the said declaration was served and James Robertson Land Lord to the said William Kerr by their Attorney Come into court and by consent of the plaintiffs attorney and with the assent of the Court they are admitted in this cause in the room instead of the said Casual Ejectors upon condition they plead not guilty to the plaintiffs declaration and on the trial agree to admit lease entry ouster and rely on their title only and if upon the Trial of the issue the said William Kerr and James Robertson do not confess lease entry and ouster and by reason thereof the plaintiff cannot prosecute his suit then the taxation of costs upon such non proof shall cease and the said William Kerr and James Robertson shall pay such costs to the plaintiff as by the Court here shall be taxed and adjudged for such their default in not performing this rule and Judgment shall be entered against the said Casual Ejector by default and it is further ordered that if upon the trial of the said issue a verdict shall be given for the defendant or if the plaintiff shall not prosecute his suit upon any other cause than for the not confessing lease entry and ouster as aforesaid then the lessee of the plaintiff shall pay the costs.[82]

Occasionally the case was recorded in the old English style: For example, "John Doe, Lessee of David McGavock and others v. John

77. *E.g.*, WmCo CC Min. Bk. 44 (1810); *see* note 73 *supra*.
78. Blume, *supra* note 6, at 190.
79. *Id.*
80. L. FRIEDMAN, *supra* note 9, at 19.
81. Blume, *supra* note 6, at 190.
82. WmCo CC Min. Bk. 54-55 (1810).

McNary and others."[83] Ejectment actions frequently arose from title disputes between two large grantholders, or between a grantholder and several small farmers discovered living on his property. A plaintiff nearly always chose to submit his case to a jury; most juries found the plaintiff to have better title.[84]

Title suits were not always quickly resolved, however. In *Campbell's Lessee v. Kerr* the case was continued several times over a period of six years. Not until 1816 did a jury find plaintiff to have better title and award him the recovery of "his term yet to come of and in and to the tenements"[85] as well as damages of one cent and costs. In fact, during the course of the suit James Robertson died, but the court granted his heirs permission to defend the suit after they formally agreed to the ejectment fiction.[86]

Occasionally a jury in an ejectment action was asked to find special facts. For example, in the 1811 case of *Pillow v. Stanley,* the jury was presented evidence of a land survey and two lists of alleged boundaries and title records. They proceeded to consider and find on each fact separately, holding that in some areas the plaintiff's survey lines were correct, while in other places the defendant had presented persuasive evidence. The verdict was appealed, a new survey made, and in 1812 a jury declared Pillow to have the better title to the entire tract as determined by one of the many surveys.[87]

Often juries determined the value of certain tracts of land. Because the Williamson County Minute Books do not record the size of the tracts in dispute, no approximations of land value are apparent from the court records themselves. The valuations given often include fractional amounts. An 1815 jury found that one-third of a certain tract of land was worth $373.33 1/3.[88] An 1817 jury found a certain tract of land to be worth $1.75 per acre. The total value of this tract was $1120 with the spring, or $1000 without the spring.[89]

83. WmCo CC Min. Bk. 374 (1812). The use of the "John Doe" fictional name form probably fell out of use during this decade. Records from 1810-1820 indicate no further use of the fiction after 1812. The use may have continued after 1820, but the absence of entries for several years prior to that makes the possibility seem unlikely.

84. A successful plaintiff recovered possession of the land in question. Again lack of recorded information prohibits an exact tabulation of the disposition of ejectment cases. These suits often abated upon the death of one party. Other entries record a substitution of parties but no final disposition of the case. Of the 45 cases tried to a jury over the ten-year period, however, plaintiffs won 28, and defendants won 17.

85. WmCo CC Min. Bk. 776-77 (1816).

86. WmCo CC Min. Bk. 660 (1815).

87. WmCo CC Min. Bk. 472 (1812).

88. WmCo CC Min. Bk. 677 (1815).

89. WmCo CC Min. Bk. 835 (1817).

(2) Descent and Distribution

Another property function of the circuit court was will probate and estate administration. In a period of great expansion and acquisition enterprising individuals created large estates. The orderly postmortem administration of large parcels of real property thus became a particular concern of the courts. By the nineteenth century, American courts had adopted a formal set of rules drawing on both English land law and the American post-Revolutionary land experience.[90] Probate was still the exception, however, because only about five percent of the persons who died in a typical county left wills, and even fewer intestate estates were formally administered.[91]

In 1810 a commission appointed by the circuit judge administered Williamson County intestate estates. Routinely the commission assessed the decedent's property, divided it among the heirs, filed a report with the court, and was dissolved. Occasionally, however, even this routine administrative task could become a source of prolonged litigation. The case of the estate of Anthony Sharp is one example.[92] In November 1812 the court received a petition to divide real estate among the heirs of one Anthony Sharp, intestate decedent. The court granted the petition and ordered a survey.[93] At the May term, 1813, the court ordered the setting off of the dower of Peggy Sharp, wife of the late Anthony.[94] A commission of twelve freeholders was chosen to perform this task. At the November term, 1813, the commission returned to report it had distributed the lands of Anthony Sharp.[95] Several days later, payments were ordered for the job of setting off the dower of Peggy Sharp.[96] The task was complete, and the heirs should have lived happily ever after. Apparently, however, someone was not satisfied. In May 1814, a petition was filed to correct an error in the division among the heirs.[97] There is no record of the disposition of this petition, and the disgruntled heir or other party was not heard from for several years. He was not idle, however, because during that period someone secured evidence of the existence of a "will" for Anthony Sharp, and in 1817 he offered it for probate. This action not surprisingly resulted in a will contest.

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90. L. FRIEDMAN, *supra* note 9, at 219.

91. *Id.* at 220.

92. *See* Kinard, *supra* note 14, at 23-24. As a result of a 1786 North Carolina land grant, Anthony Sharp received 3840 acres in middle Tennessee. Abram Maury purchased from Sharp the tract on which he laid out the town of Franklin. *Id.*

93. WmCo CC Min. Bk. 469 (1812).

94. WmCo CC Min. Bk. 531 (1813).

95. WmCo CC Min. Bk. 573 (1813).

96. WmCo CC Min. Bk. 583 (1813)(expenses detailed).

97. WmCo CC Min. Bk. 612 (1814).

In May 1817, in the will contest styled *Henry v. Cook*, a motion to set aside an order of dismissal was granted.[98] The facts are unclear, but one party strongly believed the other party had contributed to the "loss" of the will. New guardians were appointed to represent the interests of the minors because the old guardian had acted against their interests.[99] At the November term, 1817, a jury deliberated and found no will in the case of Anthony Sharp.[100] But the jury's verdict was not the final pronouncement. Upon motion, the defendant in the will contest was granted a new trial.[101] Both sides geared up again, and several days later the court ordered depositions taken for both sides.[102] At the same time deeds from Anthony Sharp to one daughter were introduced to prove her interest in the land.[103] Activity continued, and the case came before the court for the final time during August 1818. The court granted a motion for change of venue, and the heirs and other interested parties went on to the greener (and presumably, less biased) pastures of Wilson County to settle their differences.[104] In May 1819, after a new trial, a Wilson County jury rendered a verdict identical to that of the earlier Williamson jury—the will offered was *not* the true last will and testament of Anthony Sharp.[105] Thus the court validated the original distribution of property among the heirs.

(3) Debt

The type of civil action most frequently litigated in the early Williamson County Circuit Court was the action for repayment of debt. This finding is not surprising in view of the conclusion by one historian that in the nineteenth century "the economy sailed on a sea of credit."[106] But extension of credit was risky, and it was important to know that one's debtor was solvent. The law could ensure the validity of any note that conformed to the requirements of negotiability, but the maker's solvency was another matter.[107] The country was large and the possibilities for escape from obligation were great. Creditors often had to look to sureties for repayment.[108] Some

98. WmCo CC Min. Bk. 838 (1817).
99. WmCo CC Min. Bk. 851 (1817).
100. WmCo CC Min. Bk. 908 (1817).
101. *Id.*
102. WmCo CC Min. Bk. 915 (1817).
103. *Id.*
104. WmCo CC Min. Bk. 962 (1818).
105. WILSON COUNTY CIRCUIT COURT MINUTE BOOK 364 (1819).
106. L. FRIEDMAN, *supra* note 9, at 236.
107. *Id.*
108. *Id.* at 237.

decisions indicate that courts treated sureties leniently,[109] but in Williamson County the courts strongly upheld the right of creditors to a judgment for the amount of their debts.

Table 1 summarizes the distribution of debt cases heard in the Williamson County Circuit Court during its first decade.[110] Appeals from county court decisions predominated in the circuit court's first year of existence. While the county court continued to exercise concurrent original jurisdiction and did hear a number of cases, the circuit court exercised both original and appellate jurisdiction.

TABLE 1

DEBT CASES DECIDED BY THE CIRCUIT COURT
1810-1820

	1810	1811	1812	1813	1814	1815	1816	1817	1818	1819	1820
DEBT	4	38	8	4	2	1	1	3	2	7	10
DEBT APPEAL	21	5	10	7	0	0	2	4	9	8	16

Each case was tried by a jury; even a case on appeal from the county court received a trial de novo. In returning a verdict (most often in favor of the plaintiff), the jury determined the amount of the debt and an additional award of "damages."[111] Interest on the awards was computed at twelve percent. Occasionally jurors were faced with an exchange of currency question. For example, Williamson County juries found that £110 in North Carolina currency was equivalent to $220 in Tennessee currency;[112] that nineteen dollars in North Carolina currency was equivalent to eight dollars in Tennessee currency;[113] and that £112 in Kentucky currency was equivalent to $123.33⅓ in Tennessee currency.[114]

109. *See, e.g.*, Clippinger v. Creps, 2 Watts 45 (Pa. 1833).

110. This category includes all cases denominated by the clerk as "Debt" or "Debt Appeal," as well as those not so titled but providing sufficient information to make such a designation appropriate. Few of the entries indicate the source of the debt.

111. Although the term "damages" is used in these cases by the court clerk, it seems unlikely that the recovery actually was in the nature of damages. The early common law debt action was a restitutionary action to recover a specific sum, such as money loaned. D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 4.2, at 233 (1973). It was viewed not as a breach of contract but as a property claim. The concept of debt was foreign to the contract concept. *Id.*

112. WmCo CC Min. Bk. 258 (1811).

113. WmCo CC Min. Bk. 459 (1812).

114. WmCo CC Min. Bk. 487 (1813).

C. *Equity Jurisdiction*

The question of equity jurisdiction was a constant source of controversy in early nineteenth-century America. By 1800 equity had long since lost the flexibility that made it an early source of law reform; it was as much in need of transformation as the common law.[115] American states evidenced no uniformity in their application of equity. In some states the two courts were distinct, with different judges for law and equity.[116] Other states had no separate equity system at all.[117] These states developed some rough equivalent of their own by making equitable defenses or remedies available in certain legal actions.[118] Through this process they attained "a curious anticipation of future general reforms."[119] Finally, many states gave equity jurisdiction to the same courts that handled suits at law.[120] For example, a 1782 North Carolina statute empowered the superior court to act also as equity court for the same district, with judges simply alternating roles.[121]

The question of equity jurisdiction presented a continuing problem during Tennessee's early years of statehood. Modeled on the North Carolina system, Tennessee first vested equity powers in the superior courts of law and equity. Superior court judges sat as chancellors in the same cities where the superior court met. Because there was no reviewing court and no authoritative precedent, equity jurisprudence in Tennessee reached a "low ebb" in the first decade of the nineteenth century.[122] The 1809 Act, which abolished superior courts of law and equity, was the culmination of years of reform proposals by Thomas H. Benton and others.[123] The Act vested equity powers in the newly created circuit courts. Apparently, however, that shift did not revitalize the system, because in 1811 the legislature again granted to the supreme court "exclusive jurisdiction in

115. L. FRIEDMAN, *supra* note 9, at 130. In the Middle Ages equity courts were a source of law reform because the Chancellor could apply a variety of remedies not available through the use of common law writs. *Id.* In nineteenth-century America, however, equity jurisprudence sometimes operated to limit, rather than expand, a litigant's opportunities for relief. *Id.* at 130-31.

116. States using this approach included Mississippi, Delaware, New Jersey, and New York. *Id.* at 130.

117. States having no separate equity system included Louisiana, Massachusetts, and Pennsylvania. *Id.*

118. *Id.*

119. *Id.* at 131, *quoting* R. MILLAR, CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE 40 (1952).

120. *Id.* at 130.

121. Ch. 11, 1782 Laws of N.C., *reprinted in* 1 SCOTT, *supra* note 18, at 261-65.

122. Williams, *supra* note 21, at 16.

123. *Id.* at 16-17.

all causes in equity" arising in the circuit courts.[124] In 1813 the legislature acted again, vesting concurrent jurisdiction in equity causes in the supreme and circuit courts.[125] Concurrent jurisdiction continued until 1822, when the supreme court justices again received exclusive jurisdiction to sit as chancellors around the State. These frequent legislative vacillations indicate the confused status of equity jurisprudence in Tennessee throughout this period.

Table 2 reveals the distribution of equity cases in Williamson County from 1810 to 1820. Rather surprisingly, a total of only nineteen cases in the ten-year period are labeled "Equity."[126] Records reveal that eight of those cases were nonsuited by the plaintiffs or dismissed by the court. Four were continued and apparently never resolved. In one case the parties agreed to arbitration. Thus during the ten-year period it is possible that the circuit judge sitting as chancellor actually decided as few as six cases. In three of these cases he granted an injunction.[127]

TABLE 2

EQUITY CASES IN THE CIRCUIT COURT
1810-1820

	1810	1811	1812	1813	1814	1815	1816	1817	1818	1819	1820
No. Cases Per Year	0	8	0	0	0	0	4	0	0	2	5

Why were so few equity cases heard by the circuit judges? At least one historian has advanced two reasons for the failure of Tennessee circuit judges to carry successfully the equity burden: the average circuit judge either was not well qualified by his training to sit as chancellor on the equity side, or he was not sufficiently interested and therefore tended to let the equity docket drift.[128] While the caliber of the judiciary appears to have been high in Williamson County during the early nineteenth century,[129] the scarcity of re-

124. Acts of Nov. 19, 1811, ch. 72, § 4, 1811 Tenn. Pub. Acts, *reprinted in* 2 SCOTT, *supra* note 18, at 37.

125. Act of Nov. 19, 1813, ch. 78, § 3, 1813 Tenn. Pub. Acts, *reprinted in* 2 SCOTT, *supra* note 18, at 146.

126. Cases considered here are only those labeled "Equity" or "Chancery" in the Minute Books. This list does not include specifically labeled suits considered elsewhere in the paper that may have been equitable in nature. For a discussion of divorce cases, see text accompanying notes 136-54 *infra*.

127. The record reveals no information concerning the facts of these cases or the subjects of the injunctions.

128. Williams, *supra* note 21, at 17.

129. *See* notes 46-48 *supra* and accompanying text.

corded equity cases provides arguable support for the conclusion that little emphasis was placed on chancery matters in the county.

The experience of a court of common pleas for the Northwest and Indiana Territories suggests another explanation for the infrequent use of equity jurisdiction.[130] Influenced by the judicial systems of Massachusetts and Pennsylvania, the legislature of the Northwest Territory never created a separate chancery court system,[131] providing instead that certain types of equitable relief might be given in common law courts.[132] Thus, equity was administered through common law forms. One of the most striking examples of this is the use of the writ of *scire facias* to commence actions to enforce mortgages.[133] While both North Carolina and Tennessee provided for separate equity jurisdiction within their established common law courts, North Carolina law also provided for overlap similar to that in Pennsylvania by allowing trial by jury in some cases that were traditionally equitable in nature.[134] It is therefore arguable that Tennessee courts in general, and the Williamson court in particular, provided equitable remedies through common law forms, or vice versa.

The scanty nature of available records makes it impossible to evaluate the influence of the frontier on nineteenth-century Williamson chancery court practice. The picture here is not even as complete as that of the Michigan Territory described by Professor Blume.[135] One can safely say only that chancery practice on the Tennessee frontier was less sophisticated than any other facet of the judicial system.

D. Divorce

During the first half of the nineteenth century, Victorian England was a "divorceless society"[136] in which judicial divorce was completely unavailable and in which only the very wealthy could

130. *See* Blume, *supra* note 6.

131. *Id.* at 193.

132. *See* text accompanying note 118 *supra.*

133. Blume, *supra* note 6, at 177-78. *Scire facias* is a common law writ founded on a matter of record, such as a judgment, requiring the person against whom it is brought to show cause why the party bringing it should not have the advantage of the record. The name is used to designate both the writ and the proceeding. The most common use of the writ is to revive a judgment after a period of time.

Since the law of mortgages, including redemption and foreclosure, clearly is equitable in nature, the use of this common law writ to enforce these rights must be viewed as one jurisdiction's attempt to integrate equitable principles into the common law system adopted by the legislature. *Id.*

134. L. FRIEDMAN, *supra* note 9, at 131.

135. *Chancery Practice, supra* note 8, at 95.

136. L. FRIEDMAN, *supra* note 9, at 181.

hope to squeeze a private bill of divorce out of Parliament.[137] The only alternatives open to unhappy couples were annulment,[138] divorce from bed and board,[139] adultery, or desertion.[140]

Some colonial and early state legislative bodies followed the English lead, granting only legislative divorces, but procedures were cumbersome and grounds varied greatly.[141] Poor people rarely could afford this method of divorce, and wealthy, well-connected citizens often created scandals by trying to "buy" divorces.[142] These inequities and abuses led several northern states to adopt constitutional provisions prohibiting legislative divorces and placing divorce jurisdiction in the courts.[143] Although northern states by 1800 had accepted the notion of judicial divorce, most southern states had not. For example, until 1817 South Carolina had not granted a single judicial divorce.[144] Georgia retained its constitutional provision allowing only legislative divorce and apparently granted few of those.[145] The southern states generally adhered to the English tradition.

In this respect, Tennessee differed from its sister southern states. While maintaining concurrent legislative jurisdiction over divorce actions, Tennessee followed the lead of the New England states in adopting a judicial divorce law prior to 1800.[146] Grounds for divorce were broad for the period and included impotence, bigamy, adultery, willful and malicious desertion, and conviction of a felony.[147] Proceedings were equitable in nature,[148] and proper service or notice was required. Thus, in theory, at least, absolute judicial divorce was possible in Tennessee at a time when most southern states rejected the idea.

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137. *Id.*

138. Annulment was very difficult to obtain. *Id.*

139. This term referred to a legal separation without right of remarriage. *Id.*

140. *Id. See also* Mueller, *Inquiry into the State of a Divorceless Society: Domestic Relations Law and Morals in England from 1660 to 1857,* 18 U. PITT. L. REV. 545 (1957).

141. 1 W. NELSON, DIVORCE AND ANNULMENT § 1.01 (2d ed. 1945). In New York, divorce was permitted only for adultery. Vermont allowed divorce for impotence, adultery, intolerable severity, three years' willful desertion, and long absence with the presumption of death. In New Hampshire, divorce was allowed if a spouse joined the Shaker sect. L. FRIEDMAN, *supra* note 9, at 182.

142. 1 W. NELSON, *supra* note 141, § 1.01.

143. *Id.*

144. L. FRIEDMAN, *supra* note 9, at 181-82.

145. *Id.*

146. Act of Oct. 26, 1799, ch. 19, 1799 Tenn. Pub. Acts, *reprinted in* 1 SCOTT, *supra* note 18, at 645-48.

147. *Id.* Tennessee's divorce statute was similar to that of Vermont.

148. For a case interpreting the 1799 statute, see Richmond v. Richmond, 18 Tenn. (10 Yer.) 343, 344 (1837).

Records of the Williamson County Circuit Court show conclusively that judicial divorce was actually utilized in Tennessee in the early nineteenth century. Between 1811 and 1820, eight suits for divorce were filed. The ground charged in most cases was abandonment or desertion. Because this normally meant that the whereabouts of the accused spouse were unknown, the court usually ordered publication and continued the case for at least one term. Even on the early nineteenth-century frontier, notions of due process notice requirements were in evidence. The possible lack of sophistication on the frontier apparently did not extend to procedural safeguards.

The first divorce case in the Williamson County Circuit Court was filed during the November term, 1811.[149] Archibald Potter had to wait two years, however, before his divorce was granted. As was frequently the case, his wife Leonore failed to appear in response to the 1811 summons. The court ordered publication and an *ex parte* hearing. The case did not appear on the docket again until four terms (two years) later.[150]

In one interesting way, the Potter case is not typical. Wives initiated five of the eight cases filed during the court's first decade. Because women were not allowed to bring suit in their own names during this period,[151] each of the five actions was brought on behalf of the wife by her "next friend." Five of the eight cases filed during the decade ended in absolute divorce. One divorce was denied, one case was dropped by the complainant, and one apparently never was replaced on the docket after the initial default by the defendant and publication order.

What do these statistics suggest? First, frequent assertion of abandonment as a ground for divorce may indicate either of two things. In a frontier society where life is hard, a man may find it easier simply to leave his home and family than to continue to fight the daily battle for existence. On the other hand, because of the relative ease of proof of an abandonment charge and the fact that such an allegation did not ruin the parties' reputation or bring shame to the families in the same way that an adultery charge did,[152]

149. WmCo CC Min. Bk. 325 (1811)(Potter v. Potter). *Goodspeed's* incorrectly cites the 1821 case of *Merritt v. Merritt* as the first case filed. GOODSPEED HISTORIES, *supra* note 35, at 795. The Merritt case, first filed in 1820, actually was the eighth divorce action filed since 1810.

150. WmCo CC Min. Bk. 578 (1813).

151. Not until 1836 did the Tennessee legislature enact a statute enabling women to bring suits for divorce in their own names. Act of Feb. 19, 1836, ch. 26, § 3, 1835-1836 Tenn. Pub. Acts.

152. 1 W. NELSON, *supra* note 141, § 4.01.

abandonment may have been employed as a face-saving method of obtaining a divorce.

Second, and more significantly, Williamson County records suggest that although early nineteenth-century moral standards were strict and "easy" divorces were frowned upon,[153] divorce was by no means a rarity in pioneer communities. More divorce cases were tried in Williamson County from 1810 to 1820 than cases involving any single felony, including murder. When proper statutory grounds were pleaded and requirements of notice complied with, the court did not hesitate to grant an absolute divorce.

Why was the Tennessee experience different from that of South Carolina or Georgia? The answer may lie in the fact that Tennessee in 1810 still lay at the edges of the frontier. Its society was not yet rigidly stratified, and opportunities still abounded for all who were willing to take advantage of them. In such a setting divorce may have been viewed as a safety valve, because, as Friedman points out:

> [A] divorceless state is not a state without adultery, prostitution, fornication. It is, more likely than not, a place sharply divided between official law and unofficial behavior. A country with rare or expensive divorce is a country with two sets of divorce laws, one for the rich, and one for the poor. The United States was two nations, too: yet enormous numbers of people owned property and had some stake in society. Easy divorce laws grew out of popular desire: desire to stabilize and legitimize relationships, to settle doubts about ownership of family property. Divorce was simplest to obtain and divorce laws most advanced in those parts of the country—the West especially—least stratified by class.[154]

In its moral as well as its political development, Tennessee was a child of the frontier, closer in spirit and experience to the frontier communities of the Northwest Territory than to the older southern heritage from which it sprang.

E. The Criminal Law

Colonial criminal law was remarkable for its emphasis on crimes against morality—the so-called "victimless" crimes. To the colonists every crime had a victim: society and its moral order.[155] The colonists adopted public corporal punishment because they believed that

> [e]xcept for the most hardened and abandoned cases, . . . men could respond to pressure and improve their way of life if they were instructed in proper

153. *Id.* § 1.06.

154. L. FRIEDMAN, *supra* note 9, at 183.

155. Friedman, *Notes Toward a History of American Justice*, 24 BUFFALO L. REV. 111, 114 (1974).

> behavior, punished for wrong conduct, subjected to shame and derision from their neighbors, and stigmatized when they strayed from the straight and narrow path. . . . The man who was whipped in view of everyone was receiving physical punishment; but far more important, perhaps he felt on his back the invisible whip of public opinion.[156]

For those hard core offenders who refused to respond to public punishment, however, the colonists did not hesitate to apply harsher remedies. Branding an offender left a permanent mark and made it difficult for the offender to return to his regular place in society.[157] Hanging, while infrequent, was still a public reminder of the wages of sin.

The rise of the commercial system in America, however, led to a more transient society; absolute social control by the community was no longer possible.[158] During the nineteenth century, then, the American criminal justice system experienced three dramatic changes: a sharp decline in prosecutions for sex crimes and religious offenses, the creation of the penitentiary system, and a softening of attitudes favoring capital punishment.

Without any major change in the statutory system, the rate of prosecutions for sex crimes and religious offenses declined sharply.[159] Criminal justice shifted its concern to the protection of private property and encouragement of the community's economic growth. Prosecution for crimes against property, such as burglary and theft, rose sharply.[160] William Nelson's research revealed that by 1800, more than forty percent of all prosecutions in Massachusetts were for theft, while only seven percent were for moral offenses.[161] Studies in Wisconsin and South Carolina confirm this result.[162] The reasons for this shift are readily discernible. Colonial leaders sought to build an ideal, godly society; nineteenth-century leaders sought wealth and opportunity.[163] The criminal "was no longer envisioned as a sinner against God but rather as one who preyed on the property of his fellow citizens."[164] Therefore, crimes against property were likely to be punished even more severely than crimes against the person.

Perhaps more significant in explaining this shift, however, is the basic hypocrisy of Victorian moral behavior itself. During the nineteenth century, a sharp line was drawn between behavior that

156. *Id.* at 113.
157. *Id. See generally* K. ERIKSON, WAYWARD PURITANS 197 (1966).
158. Friedman, *supra* note 155, at 117.
159. *Id.* at 116.
160. L. FRIEDMAN, *supra* note 9, at 258.
161. W. NELSON, AMERICANIZATION OF THE COMMON LAW 117 (1975).
162. Friedman, *supra* note 155, at 116-17.
163. *Id.* at 117.
164. W. NELSON, *supra* note 161, at 118.

was legally sanctioned and behavior that was unofficially tolerated. Victorians on both sides of the Atlantic drank, gambled, read dirty books, and engaged in sexual misconduct; but they pursued these pleasures so as not to threaten *publicly* the moral norms. Such behavior was tolerated if pursued discretely. Thus the official norms remained intact, and the criminal courts were free to devote their time to economically motivated—and blatant—violations of community standards.[165]

A second change in the nineteenth-century criminal justice system was the creation of the penitentiary system. Colonial punishment was corporal in nature and public in execution because peer pressure and mockery were considered deterrents as effective as physical abuse. Jails were designed only to hold prisoners awaiting trial and were small, dirty, and insecure. In the nineteenth century, however, reformers developed the idea of removing the criminal from society and rehabilitating him in a protected, closely monitored environment.[166] Most southern states clung to corporal punishment longer than northern states, but during the second quarter of the nineteenth century, imprisonment became a normal punishment for serious crimes.[167]

Attitudes favoring capital punishment also softened during the early nineteenth century. Beginning with Pennsylvania in 1794, several states enacted statutes creating degrees of murder and manslaughter that were not punishable by death.[168] Even states with a mandatory death penalty in all homicide cases did not apply the penalty uniformly. In South Carolina, for example, the typical homicide defendant was either acquitted or found guilty of the lesser crime of manslaughter.[169] One modern commentator believes that this gap between indictment and conviction probably prevailed in other parts of the country as well,[170] suggesting a dichotomy between the formal harshness prescribed by law and the somewhat less rigorous moral sense of the community.

Records of the Williamson County Circuit Court reveal both similarities to and contrasts with criminal justice developments in other frontier communities. For example, while the shift in emphasis from moral offenses to economic ones is evident in the county

165. For a discussion of this idea, see Friedman, *supra* note 155, at 120.

166. *See* L. FRIEDMAN, *supra* note 9, at 259.

167. Friedman, *supra* note 155, at 118.

168. States with such a statute included Pennsylvania, Virginia, Ohio, New York, and Missouri. L. FRIEDMAN, *supra* note 9, at 249.

169. J. WILLIAMS, VOGUES IN VILLAINY: CRIME AND RETRIBUTION IN ANTE-BELLUM SOUTH CAROLINA 38 (1959).

170. L. FRIEDMAN, *supra* note 9, at 251.

records, the development of a penitentiary system did not take place in Tennessee until the third decade of the nineteenth century. Moreover, while capital punishment apparently was not often meted out, harsh, public corporal punishment continued long into the nineteenth century. Table 3 summarizes the disposition of twelve types of criminal offenses prosecuted in the Williamson County Circuit Court from 1810 to 1820.[171] The number of cases is small, but on the basis of available information certain generalizations may be made.

Williamson County was typical in that prosecutions for crimes of a sexual or religious nature were almost nonexistent. Actually, only one case of rape was prosecuted between 1810 and 1820, and in that case the jury found the defendant not guilty.[172] Since it is unlikely that morality was any higher in an 1810 frontier town than in colonial communities, the theory presents itself that official attitudes at least toward private moral misconduct had softened. Furthermore, lesser crimes against the person apparently were not considered of grave significance. Although the conviction rates for assault or assault and battery were high, the usual fine for such infractions was only five dollars plus court costs. In most cases defendants admitted guilt. Of the two apparently more serious cases on record (fines of fifty dollars recorded), one defendant had his fine remitted to ten dollars plus costs. As in most early nineteenth-century communities, men apparently were allowed some freedom in displaying their emotions.

Unlike the situation in other frontier communities, however, persons convicted of more serious crimes in Williamson County were not usually fined, nor were they normally subjected to imprisonment. Unlike several older states, Tennessee had no penitentiary law until 1829.[173] Local jails, such as that in Williamson County, were designed primarily to hold prisoners awaiting trial. They were neither large enough nor secure enough to house convicted felons for long periods. Instead, corporal punishment continued to be the accepted procedure. Most convicted felons were sentenced to either branding or whipping, or a combination of both.

171. In contrast to their haphazard recording of the nature of civil actions, Williamson County Circuit Court clerks specifically designated criminal cases and identified carefully each stage of the typical prosecution: grand jury indictment, preliminary hearing, bond posting, jury selection, and verdict. The record of early criminal trials is clear.

172. WmCo CC Min. Bk. 719 (1815).

173. GOODSPEED HISTORIES, *supra* note 35, at 796. In 1829 Tennessee enacted its first comprehensive law providing for the incarceration of convicted felons. Act of Dec. 28, 1829, ch. 38, 1829 Tenn. Pub. Acts, *reprinted in* A COMPILATION OF THE STATUTES OF TENNESSEE OF A GENERAL AND PERMANENT NATURE 520-28 (R. Caruthers & A. Nicholson eds. 1836) [hereinafter cited as CARUTHERS & NICHOLSON].

TABLE 3

DISPOSITION OF CRIMINAL CASES
IN THE CIRCUIT COURT
1810-1820

Crime	Disposition				
	No True Bill	Nolle Prosequi	Change of Venue	Not Guilty	Guilty
Assault					4
Assault and Battery		1		1	8
Perjury		1	1	1	
Passing Counterfeit Bank Note					1
Stealing Bank Notes				1	
Forgery		1		2	
Slave Theft				1	2
Petit Larceny	3	2	4		
Grand Larceny					2
Rape				1	
Horse Stealing		2		2	3
Murder				5	3

This corporal punishment was primarily directed toward economic crimes. In a society in which money is scarce and property hard-earned, relatively harsh treatment for conviction of crimes against property is not unusual. In 1811 Joseph Venable was charged with "feloniously stealing, taking and carrying away" from Samuel Rogers twelve Spanish milled dollars (valued at twelve dollars local currency) and one-half of a Spanish crown (valued at fifty

cents).[174] He was found not guilty of taking the former but guilty of stealing the latter. For this theft of fifty cents he was sentenced to ten lashes at the public whipping post. S. Role received twenty lashes for grand larceny—stealing a woolen overcoat valued at ten dollars.[175] Yet the record of conviction and punishment of those accused of capital crimes supports Williams' finding that the death penalty was not often applied in frontier society.[176] Only one recorded hanging took place in Williamson County from 1810 to 1820. Adonijah Edwards was convicted in 1814 of passing a counterfeit bill on a Nashville bank.[177] For this crime Edwards lost his life.

Horse theft, which was a capital offense until 1807 and which still merited imposition of the death penalty for a second offense from 1810 to 1820, drew the harshest corporal punishment of any frontier crime in Williamson County.[178] Not one of the men convicted from 1810 to 1820, was actually put to death, however. The typical sentence was six hours in the public pillory, six months in jail, branding of "HT" on the left hand or thumb, and lashes on the bare back. In 1816 Sanford Bramblet received twenty lashes[179] and Martin Gurley thirty-nine,[180] in addition to the other punishments. In 1817 Tilman Gosset received eighteen lashes, branding on the left thumb, six hours in the pillory, and twelve months in jail; in addition, he was rendered infamous.[181]

Murder was at all times a capital offense in Tennessee, and at least one early Williamson County jury sentenced a first-degree

174. WmCo CC Min. Bk. 190 (1811).

175. WmCo CC Min. Bk. 499 (1813).

176. *See* text accompanying note 169 *supra.*

177. WmCo CC Min. Bk. 637 (1817). Charles Bennett was convicted of murder and sentenced to hang. He won an appeal, however, to the Supreme Court of Errors and Appeals. WmCo CC Min. Bk. 1099-1100 (1819). The author can find no record of the final disposition of that case. In any event there is no record that he was hanged.

178. From 1799-1807 the punishment for felonious stealing of a horse was death without benefit of clergy. Act of Oct. 23, 1799, ch. 20, 1799 Tenn. Pub. Acts, *reprinted in* 1 SCOTT, *supra* note 18, at 648. In 1807 the legislature modified the punishment for conviction of first offense:

> [a] number of lashes, not exceeding thirty-nine, be imprisoned at the discretion of the court, not less than six months, and not exceeding two years, shall sit in the pillory two hours on three different days, and shall be rendered infamous, . . . and shall be branded with the letters H.T. in such manner and on such part of his person as the court shall direct . . . .

Act of Dec. 3, 1807, ch. 73, § 4, 1807 Tenn. Pub. Acts, *reprinted in* 1 SCOTT, *supra* note 18, at 1056. The punishment for conviction of a second offense was death without benefit of clergy. *Id.*

179. WmCo CC Min. Bk. 809 (1816).

180. WmCo CC Min. Bk. 810 (1816).

181. WmCo CC Min. Bk. 846 (1816). At common law conviction of treason or a felony involved loss of political rights including competency to vote or act as witness or juror.

murderer to be hanged by the neck until dead.[182] The common law, which was in effect in Tennessee prior to the statute of 1829,[183] recognized no distinction in respect to degrees of murder. The punishment for all forms of felonious homicide committed with malice aforethought was death.[184] The common law did distinguish, however, between murder and manslaughter, which was defined as the unlawful killing of another without malice, either express or implied.[185] Manslaughter was further distinguished as voluntary or involuntary.[186] It was not a capital crime and was subject only to corporal punishment.

On two occasions in the first ten years of the Williamson County Court's existence, juries found defendants guilty of "felonious slaying" and sentenced them to be branded with an "M" on the left hand. Such was the fate of David Magness, convicted of killing Patton Anderson in 1810,[187] and Binkley Donaldson, convicted in 1816 of killing James Skelly.[188] Although the leniency of punishment in these cases may be explained by growing societal resistance to the death penalty, each case presents a unique fact situation that may account for its final disposition.

Noted by several historians because of the personages involved, the first murder case heard in the Williamson County Circuit Court arose not out of any local incident but on change of venue from Bedford County. In November 1810 Johnathan Magness and his two sons, Perry Green and David, were accused of killing Patton Anderson, a family enemy, outside the Bedford County Courthouse, where the two families were engaged in a lawsuit concerning an allegedly fraudulent land warrant. Because of the great amount of publicity surrounding the incident, the Magnesses asked for and were granted a change of venue. Thus began one of Williamson County's most interesting and prolonged criminal trials.

Accounts of the events surrounding the killing, and of the trial itself, vary greatly.[189] The most complete version of the story is also

182. WmCo CC Min. Bk. 1095 (1819). *See* note 177 *supra.*

183. Act of Dec. 9, 1829, ch. 23, §§ 1-8, 1829 Tenn. Pub. Acts, *reprinted in* CARUTHERS & NICHOLSON, *supra* note 173, at 316-17.

184. Bratton v. State, 29 Tenn. (10 Hum.) 103, 105-06 (1849).

185. *Id.* at 105.

186. *Id.*

187. WmCo CC Min. Bk. 130 (1810).

188. WmCo CC Min. Bk. 800 (1816).

189. *See* J. COWDEN, TENNESSEE'S CELEBRATED CASE: REVERSED BY HISTORY (1958). *See also* GOODSPEED HISTORIES, *supra* note 35, at 795; 1 J. MOORE, TENNESSEE: THE VOLUNTEER STATE, 1769-1923, at 882 (1923); 1 J. PARTON, LIFE OF ANDREW JACKSON 342-49 (1860); Chambers, *supra* note 54, at 329-31. For the purposes of this Note the author has attempted to confine herself to the undisputed facts. These facts alone make the event one of considerable interest.

the most suspect—an apologia written by a twentieth-century Magness family member. There is no doubt, however, that the case aroused the interest of both eminent lawyers and prominent citizens. John Haywood[190] and Thomas Hart Benton assisted in the prosecution; Felix Grundy was the defense attorney.[191] Among the witnesses was Andrew Jackson, friend of Patton Anderson as well as mentor of Thomas H. Benton.[192]

The Magness trial began on November 16, 1810, one month after the murder took place. The State tried its strongest case first, against David Magness, who actually pulled the trigger of the gun that killed Anderson. After a two-week trial, the sequestered jury found David Magness not guilty of "willful murder," but guilty of "felonious slaying," or manslaughter, a verdict considered tantamount to acquittal.[193] His only punishment was branding with an "M" on the left hand; but under the still-existing Tennessee law of imprisonment for debt, he was confined to jail until he paid his costs.[194] Perry and Johnathan Magness remained in jail awaiting their own trials, which were delayed by continuances until November 1811[195] and May 1812,[196] respectively. Although later found not guilty, they too spent two years in confinement because they could not post bond. The family fortune was exhausted by the costs of the first trial.[197]

The leniency of Binkley Donaldson's punishment, however, resulted not from any societal hesitancy in applying the death penalty but from the surprising vitality in nineteenth-century Tennessee of an ancient English plea known as "benefit of clergy." In England this phrase originally denoted an exemption granted to clergymen from judgments of secular courts or from arrest or attachment from criminal process.[198] Eventually, the scope of the privilege was narrowed to exemption from the death penalty otherwise inflicted upon conviction of certain crimes, and its application was extended to all

190. *See generally* GOODSPEED, *supra* note 35, at 388-89. Haywood was a prominent Nashville attorney.

191. Jenkins Whiteside, another prominent Nashville attorney, also was connected with the case, but it is unclear on which side he worked.

192. Jackson also gave testimony as to Anderson's "peaceful" nature. 1 J. PARTON, *supra* note 189, at 342-49.

193. *See* text accompanying notes 185-87 *supra.*

194. Act of Nov. 2, 1805, ch. 49, 1805 Tenn. Pub. Acts, *reprinted in* 1 SCOTT, *supra* note 18, at 873.

195. WmCo CC Min. Bk. 320 (1811).

196. WmCo CC Min. Bk. 405 (1812).

197. J. COWDEN, *supra* note 189, at 27.

198. 24B C.J.S. *Criminal Law* § 1983, at 579 (1962).

clerks or others who could read.[199] In practice the request was ceremonial in nature:

> After the verdict was rendered of guilty, the prisoner was asked by the court if he had anything to say why judgment should not pass against him. The prisoner then prayed his clergy; this was generally performed on his bended knees. He was then tested by an ordinary, who handed him a psalm to read, and he read the first verse. The judge then put the question to the ordinary, "legit vel non?" who answered, "legit." The prisoner was then taken without the bar of the court and branded in the hand. 1 Salk 61. The psalm usually given to the prisoner to read was the 51st, on account of the peculiar appropriateness of the first verse.[200]

The existence of this privilege in Tennessee in 1816 is significant, for the plea of benefit of clergy was rarely allowed at any time in this country.[201] In some jurisdictions the plea was recognized in early cases,[202] but in most states the plea either was never recognized as a common law privilege[203] or was expressly abolished by statute at an early date.[204] Further, Donaldson's case is not the only example of the use of the plea in nineteenth-century middle Tennessee. A Maury County court also granted benefit of clergy to convicted murderer Benjamin Rutledge in 1816.[205] In fact, Tennessee law provided a negative admission of the validity of the plea—several criminal statutes expressly denied benefit of clergy to those convicted of certain crimes.[206]

Despite the seeming aberration of the existence of this plea, however, the use of benefit of clergy in frontier Tennessee is logically explained by the fact that North Carolina, out of which Tennessee was created and from which she took most of her laws, was one of the few states that did recognize the validity of the plea from early times.[207] The use of benefit of clergy, however, does not weaken the argument that societal mores operated less harshly than did formal sanctions on criminal activity in pioneer Tennessee. This plea of leniency simply provided one more alternative to a system of capital punishment that was viewed with increasing disapproval.

An 1819 trial for horse theft highlights one other technical problem in early criminal justice: the refusal by a defendant to plead. A

199. *Id. See* State v. Bilansky, 3 Minn. 246, 253 (1859).

200. 3 Minn. at 253-54.

201. 5 WORDS AND PHRASES 489 (1967).

202. *E.g.*, State v. Carroll, 27 N.C. (5 Ired.) 139 (1844); State v. Gray, 5 N.C. (1 Mur.) 147 (1806).

203. *E.g.*, Fuller v. State, 1 Blackf. 63 (Ind. 1820).

204. *E.g.*, Commonwealth v. Gable, 7 Serg. & Rawl. 423, 425 (Pa. 1821).

205. GOODSPEED HISTORIES, *supra* note 35, at 761.

206. *E.g.*, Act of Oct. 23, 1799, ch. 9, § 1, 1799 Tenn. Pub. Acts, *reprinted in* 1 SCOTT, *supra* note 18, at 640 (willful slaying of slaves).

207. *See* State v. Carroll, 27 N.C. (5 Ired.) 139 (1844).

plea by an accused is a requisite for a proper criminal trial. It is not a mere formality but creates the issue upon which the trial is based.[208] At modern law if the accused refuses to plead, a plea of not guilty is entered for him.[209] At early common law, however, if an individual accused of a felony answered nothing at all, or irrelevantly, or pleaded not guilty but refused to put himself on the country,[210] he was said to stand mute and the trial could not proceed.[211] One authority has noted, somewhat ironically, the extremes to which courts went in analyzing the conduct of the accused: "Considerable refinement of learning was attained in determining the different consequences of standing mute for different reasons, such as obstinancy, dumbness, insanity, idiocy, [or] ignorance of the language. . . ."[212] Yet one Williamson County case exemplifies the effects that flow from certain classifications of behavior.

In 1819 the Williamson County grand jury indicted John Hardeman for horse stealing.[213] When arraigned he refused to plead; in fact, he refused to say anything. A jury was called to determine whether his refusal arose from "malice and obstinacy" or the "visitation of God." The jury found him to be obstinate, and he was held in contempt of court and sentenced to two hours in the pillory (one hour was later remanded). Another jury subsequently found him not guilty on the horse stealing charge.[214]

In sum, then, criminal justice in Williamson County, as in most frontier communities, reflected general societal values. Prosecution for crimes of a sexual or religious nature was virtually nonexistent; punishment instead was directed increasingly toward invasion of property rights. The lone recorded hanging and the retention of the phenomenon of benefit of clergy indicate an apparent softening of attitudes favoring capital punishment. Unlike developments in other states, however, Tennessee developed no penitentiary system until 1829. Thus, because local jails in Williamson County were ill-suited to accommodate prolonged incarceration, corporal punishment of varying severity continued in application. Clearly, the positive correlation between criminal laws and societal values encour-

208. 21 AM. JUR. 2d *Criminal Law* § 458 (1965).

209. *Id.* § 462.

210. Putting oneself on the country refers to submitting oneself to the jurisdiction of the jury. The term originated from the early English practice of choosing jurors from the country or neighborhood, by whose decisions the accused had to agree to be bound. A jury trial was called "trial by the country," and the action of the defendant was called putting oneself "on the country."

211. 21 AM. JUR. 2d *Criminal Law* § 458 (1965).

212. *Id.* § 462.

213. WmCo CC Min. Bk. 1002 (1819).

214. WmCo CC Min. Bk. 1020 (1819).

aged citizens to support and live within the developing judicial system on the frontier.

IV. CONCLUSION

Frontier communities have often been described as " 'lawless' or at least careless of law."[215] This was not the case, however, in early Williamson County. Available records of the circuit court from 1810 to 1820 reveal a formal court that contributed strongly to the maintenance of an orderly society. Much credit for this success is attributable to the strength of its bench and bar. Equally important was the ability of the legal system to accommodate the peculiar needs of frontier society, particularly in the development of substantive criminal laws that closely reflected general societal values. Yet this ability to deal with the unique problems of a recently settled and rapidly developing society in no way justifies the conclusion that frontier life overwhelmed the preexisting legal system brought westward by the American pioneers. The record of the first circuit court in Williamson County evidences a careful administration of justice that substantially preserved established legal principles and procedures.

CORNELIA ANNE CLARK

215. J. HURST, LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH CENTURY UNITED STATES 4 (1956).