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Terry Calvani

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# The Early Legal Career of Howell Jackson†

Terry Calvani\*

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## I. INTRODUCTION††

Felix Frankfurter observed in 1937 that "American legal history has done very little to rescue the [United States Supreme] Court

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†† Key to manuscript sources (All court documents are available from the clerk of the appropriate court unless otherwise indicated.)

AL: Alderman Library, University of Virginia.

CBR: Civilian and Business Records of the Confederacy, National Archives.

CMR: Confederate Military Records, National Archives.

FRC: Federal Records Center, Atlanta.

JDP: Papers of J.D. Porter, Tennessee State Archives.

MWF: Papers of Melville W. Fuller, Chicago Historical Society.

RPM: Records of the Provost Marshall, National Archives.

SHC: Harding-Jackson Papers, Southern Historical Collections, University of North Carolina.

TSA: Tennessee State Archives.

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from the limbo of impersonality."<sup>1</sup> Subsequently, numerous individual and collective works have focused on the more prominent figures in the history of that institution.<sup>2</sup> Unfortunately, there remain many justices of the Supreme Court who have received relatively little scholarly attention. Yet, as one political scientist has recently lamented, "[until] there is a fuller awareness of the interplay between individual personalities and decision making, it is unlikely there will be 'an adequate history of the Supreme Court . . . .'"<sup>3</sup>

One such individual is Justice Howell Jackson, who served on the Supreme Court for a brief period of time in the final decade of the nineteenth century. As a young man, Jackson was a distinguished member of the Tennessee bar. He was elected to the United States Senate in 1880. Six years later President Grover Cleveland appointed Jackson to the United States Circuit Court. Following the creation of the Court of Appeals by Congress in 1891, Jackson served the Sixth Circuit as its first presiding judge.<sup>4</sup> In the winter of 1893, Associate Justice Lucius Q. C. Lamar died and President Benjamin Harrison elevated Jackson to the United States Supreme Court.<sup>5</sup> Although there has been some scholarship devoted to Jack-

1. F. FRANKFURTER, *THE COMMERCE CLAUSE UNDER MARSHALL TANEY AND WAITE* 6 (1937).

2. Such works include both individual, e.g., G. DUNNE, *JUSTICE JOSEPH STORY AND THE RISE OF THE SUPREME COURT* (1970); M. HOWE, *JUSTICE OLIVER WENDELL HOLMES* (2 vols., 1957, 1963); W. KING, *MELVILLE WESTON FULLER* (1950); D. MORGAN, *JUSTICE WILLIAM JOHNSON: THE FIRST DISSENTER* (1954); J. MURPHY, *L.Q.C. LAMAR: PRAGMATIC PATRIOT* (1973), and collective studies, e.g., G. WHITE, *THE AMERICAN JUDICIAL TRADITION* (1976).

3. Atkinson, *Minor Supreme Court Justices: Their Characteristics and Importance*, 3 FLA. ST. U.L. REV. 348, 359 (1975).

4. While on the circuit court and court of appeals Jackson authored more than ninety opinions. One of the more important—at least from this writer's perspective as an antitrust lawyer—was *In re Greene*, 52 F. 104 (6th Cir. 1892). That decision, one of the "Whiskey Trust Cases," was one of the first constructions of the Sherman Act of 1890 and was important in the early development of that legislation. See generally W. LETWIN, *LAW AND ECONOMIC POLICY IN AMERICA* 142-81 (1954).

The United States Circuit Courts and the United States Courts of Appeals are often confused. The former were created by the Judiciary Act of 1789, ch. 20, 1 Stat. 73, and possessed both trial and appellate jurisdiction. In addition to jurisdiction in all cases in which the jurisdiction of the district court was not exclusive, the circuit court had sole jurisdiction in diversity suits. It also heard appeals from the district courts. The courts of appeals were created in 1891, and became almost exclusively intermediate appellate tribunals. Act of March 2, 1891, ch. 517, 26 Stat. 826. With the creation of the court of appeals, the appellate jurisdiction of the circuit courts was abolished in 1891, as were the courts themselves in 1911. Judicial Code of 1911, ch. 531, 36 Stat. 1087. See generally Surrency, *Federal District Court Judges and the History of their Courts*, 40 F.R.D. 139 (1967).

5. Jackson's term on the Supreme Court was brief, lasting about a year and a half. Writing fewer than fifty opinions before his death in August, 1895, he was without sufficient opportunity to make a more significant contribution to the Court's history. Poor health precluded Jackson's participation in *In re Debs*, 158 U.S. 564 (1895), and *United States v.*

son's term in the Senate and tenures on the Circuit Court, Court of Appeals, and Supreme Court, no attention has been focused on his early career.<sup>6</sup> This paper will seek to explore that period in order to secure some greater understanding of Jackson's career development.

## II. THE EARLY YEARS

### A. *The Jackson Family*

Jackson's family had lived in Virginia for several generations. His great-grandparents, James and Susan Ball, were descendants of early settlers.<sup>7</sup> James Ball, whose sister was George Washington's mother, was a tavern keeper at Chesterfield Court House (near Richmond) and a successful businessman. When he died in 1781, Ball's estate included property at Chesterfield Court House, a plantation on the Appomattox River, two smaller tracts of land on Skin-quarter Creek, an interest in a store vessel on the James River, and forty slaves. Elizabeth Ball, the youngest of James and Susan Ball's nine children, married William Jackson, a bricklayer from Manchester, Virginia. Elizabeth and William had three children, but only one, Alexander, survived childhood.<sup>8</sup>

Alexander was orphaned at an early age: his mother died in 1809 when he was a small child and his father a few years later in 1811. Alexander then went to live with his maternal aunt, Nancy Ball Miller, and her son, Samuel Thomas Miller. Samuel Miller, a young school teacher, apparently took charge of Alexander's education. After studying under Miller, Alexander left Virginia to pursue a medical education. Graduating from the University of Pennsyl-

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E. C. Knight Co., 156 U.S. 1 (1895), two of the more important cases during his term of office. His dissent in *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429 (1895), is probably his best remembered contribution to the *U.S. Reports*. See generally Schiffman, *Escaping the Shroud of Anonymity: Justice Howell Edmunds Jackson and the Income Tax Case*, 37 TENN. L. REV. 334 (1970).

6. Probably the best and most detailed piece on Jackson's political and judicial career is the brief sketch of him contained in a collective biography of Supreme Court justices. See Schiffman, *Howell E. Jackson*, in 2 THE JUSTICES OF THE UNITED STATES SUPREME COURT (L. Friedman & F. Israel eds. 1969).

7. S. MILLER, *LIFE OF SAMUEL THOMAS MILLER* 21 (1911). Unless otherwise indicated, information on Jackson's family background is taken from this source.

8. *Id.* at 29. There is some dispute concerning Alexander Jackson's birthdate. Three different sources list three different dates. The 1850 census lists him as 44 years old and implies an 1806 birthdate. U.S. Census manuscript, Shelby County, 1850. A biography of Tennessee legislators lists his birthdate as Feb. 22, 1805. 41 BIOGRAPHICAL DIRECTORY, TENNESSEE GENERAL ASSEMBLY 1796-1969, at 19 (1973). Finally, the Miller book, in two separate references, states Jackson's birthdate as 1803. S. MILLER, *supra* note 7. Miller has observed that the marriage between William and Elizabeth was not a happy one and that William Jackson drank to excess. *Id.* Since one of the purposes of the book appears to have been to preach temperance, this conclusion may be open to question.

vania Medical School in 1824, he returned to Virginia and spent the next several years practicing medicine in Halifax County.<sup>9</sup> In 1826 Dr. Jackson married Mary W. Hurt, the daughter of a Virginia clergyman. She would bear him three children—two sons, Howell and William, and a daughter, Mary.<sup>10</sup> In 1827 Dr. Jackson left Virginia and moved west, settling in Paris, Tennessee—a small town located near the Tennessee River just below the Kentucky line of West Tennessee.

Alex Jackson's sense of professional identity—a trait shared by his son Howell years later—was apparent. He held a medical degree at a time when few physicians were university trained and was active in medical professional associations. A charter member of the Tennessee State Medical Society, Jackson presented papers at its proceedings.<sup>11</sup>

In 1840 Dr. Jackson relocated some sixty-five miles to the southwest in Madison County, Tennessee. Like his son, Alex Jackson had an interest in politics and ultimately would become one of Madison County's leading citizens. He was elected as a Whig to the state legislature, serving terms from 1849 to 1853.<sup>12</sup> In his political campaigns Dr. Jackson avoided national problems and emphasized two local issues—the necessity and importance of common schools

9. Although many sources state that Jackson graduated from the University of Pennsylvania in 1823, *e.g.*, E. WILLIAMS, *HISTORIC MADISON* 251 n.13 (1946) [hereinafter cited as WILLIAMS], the school's records reflect that Alex Jackson graduated a year later in 1824. His senior thesis was entitled "Use of Cold in Fevers."

10. 41 *BIOGRAPHICAL DIRECTORY TENNESSEE GENERAL ASSEMBLY 1796-1969*, at 20 (1973).

11. *See, e.g.*, Jackson, *Medical Topography of West Tennessee*, 1833 Annual Meeting of the State Medical Society, cited in WILLIAMS, *supra* note 9, at 251. At the 1933 Annual Meeting of the State Medical Society, Jackson delivered a paper entitled "Medical Topography of West Tennessee." WILLIAMS, *supra* note 9, at 251.

12. 41 *BIOGRAPHICAL DIRECTORY TENNESSEE GENERAL ASSEMBLY 1796-1969*, at 20 (1973). In endorsing Jackson's candidacy for the state legislature, the *West Tennessee Whig* commented that while Jackson was not a fiery orator, his speeches were sensible and well received. *West Tennessee Whig*, May 11, 1849, at 2, col. 1; *id.*, June 8, 1849, at 2, col. 1. Yet, the campaign appears to have been a rough, free-wheeling affair. For example, Jackson, in an open letter to the citizens, complained of a falsehood's being circulated about him:

[It is alleged that] soon after I became a citizen of Madison County, I approached a gentleman on his deathbed and disturbed his last moments by requesting him to make a deed of Trust to secure my medical bill . . . I will say to all tis a base falsehood.

*West Tennessee Whig*, July 27, 1849. Yet Jackson defeated his opponent by a better than 2 to 1 margin. The official vote was 1142 for Jackson and 530 for his opponent. *West Tennessee Whig*, Aug. 3, 1849.

Interestingly, Dr. Jackson's brother-in-law, Granville Hurt, also a Whig, represented Carroll County in the state legislature from 1851 to 1853. 8 *BIOGRAPHICAL DIRECTORY TENNESSEE GENERAL ASSEMBLY 1796-1969*, at 23 (1969). Granville also had served as Justice of the Peace in Carroll County from 1848 to 1850, and as County Census Enumerator for the 1850 census. *Id.*

and the development of a transportation system.<sup>13</sup> After his two terms in the state legislature, Dr. Jackson served as mayor of Jackson from 1854 to 1856.<sup>14</sup> In 1857, he was a delegate to the state Whig Convention.<sup>15</sup>

Dr. Jackson's interest in education was life long, as his service as trustee for both West Tennessee College and Memphis Conference Female Institute reflects. His concern for good transportation is evidenced by the prominent role Dr. Jackson played in the opening of the Mississippi Central Railroad to Jackson. Jackson, being also a farmer, was also quite interested in the development of West Tennessee agriculture and was the founder and president of the West Tennessee Fair.<sup>16</sup>

Census materials reflect Dr. Jackson's steadily rising financial condition. The 1830 census indicates that Jackson owned four slaves, only one of whom was an adult.<sup>17</sup> By 1840, however, Jackson had acquired some 15 slaves.<sup>18</sup> In 1850 his real property was valued at 12,700 dollars,<sup>19</sup> but by 1860 realty was listed at 61,600 dollars and personal property at 88,500 dollars.<sup>20</sup>

### B. *College Days, Clerkship, and Law School*

Unfortunately, we know very little of Howell Jackson's early years, and his entry into college provides us our first opportunity to observe him. William English, in his study of the early Mississippi River Valley bar and judiciary, observed that as a rule "the southern lawyer had a very limited academic experience" compared to his Northern counterpart.<sup>21</sup> If Professor English is correct, Jackson is certainly an exception. Following the completion of his secondary education at a preparatory school, Jackson attended West Tennessee College.<sup>22</sup> The curriculum was traditional and candidates for admission were examined on English, Latin and Greek grammar, arithmetic, and geography. Proficiency in Virgil, Caesar, Sallust,

13. West Tennessee Whig, June 8, 1849, at 2, col. 1; *id.*, Aug. 3, 1849.

14. WILLIAMS, *supra* note 9, at 530.

15. West Tennessee Whig, Apr. 10, 1857, at 2, col. 3.

16. See generally WILLIAMS, *supra* note 9.

17. U.S. Census Manuscript, Henry Co., Tenn. (1830).

18. U.S. Census Manuscript, Madison Co., Tenn. 69 (1840).

19. U.S. Census Manuscript, Madison Co., Tenn. 442 (1850).

20. U.S. Census Manuscript, Madison Co., Tenn. 33 (1860).

21. English, *The Pioneer and Jurist in Missouri*, 11 U. MO. STUD. 12-13 (1947). See also Zillmer, *The Lawyer on the Frontier*, 50 AMER. L. REV. 27-42 (1916).

22. West Tennessee College, now Union University, operated a college preparatory secondary education program at that time as did many other colleges of that era. The college catalogue for 1844 lists Jackson as being in the "Academic Department, Student in Preparatory Department." West Tennessee College Catalogue (1844).

Cicero, and Xenophon also was expected as a requisite to admission.<sup>23</sup>

After graduating from West Tennessee in 1850, Jackson followed his father's long-expressed desire that he study at the University of Virginia.<sup>24</sup> Enrolling the following September for post-graduate work,<sup>25</sup> Jackson compiled a distinguished record during the two-year residence,<sup>26</sup> except for difficulties in mathematics and modern languages.<sup>27</sup>

In 1853 Jackson returned to Tennessee and elected to pursue a legal career reading law with two very distinguished members of the Tennessee bar. One of his mentors, A.W.O. Totten, was then an associate justice on the state supreme court.<sup>28</sup> The other, Milton Brown, besides having served in Congress, was a vigorous railroad promoter and an attorney with an active practice.<sup>29</sup> During the year of Jackson's clerkship, Brown enjoyed an interesting general practice, taking primarily trust, estate, and real estate matters. Jackson undoubtedly worked on the several cases that Brown took to the Tennessee Supreme Court that year. One of the more interesting cases involved the legality of testamentary manumission under Tennessee law. One James Watt had directed in his will "that all my slaves be set free and sent to a free state at my expense, as soon as possible." Watt's executor, represented by Brown, had filed a petition in the county court praying that manumission be perfected, but the court had refused the petition and directed that the slaves—a woman and her three children—be sold at auction, the proceeds to be paid into the estate and distributed to the beneficiaries. The court evidently had premised its holding on a Tennessee statute that it construed to permit manumission only to Africa.<sup>30</sup> Since the testator impermissibly had directed that the slaves be sent to a free state, the court reasoned that the entire manumission provision

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23. *Id.*

24. W. SPEAR, SKETCHES OF PROMINENT TENNESSEANS 446 (1888).

25. Univ. of Va. Matriculation Book, 28th Session, 1851-52; Univ. of Va. Matriculation Book, 29th Session, 1852-53 [AL]. See also M. DEVERE, STUDENTS OF THE UNIVERSITY OF VIRGINIA (1975).

26. Univ. of Va. Faculty Minutes (June 28, 1852); Univ. of Va. Faculty Minutes (June 23, 1853) [AL].

27. Univ. of Va. Faculty Minutes (Feb. 4, 1853) [AL].

28. Judge Totten served on the Tennessee Supreme Court from 1850 until 1855 and was one of the Tennessee commissioners to seek an alliance with the Confederate states in 1861. See generally J. CALDWELL, SKETCHES OF THE BENCH AND BAR OF TENNESSEE 154-55 (1898).

29. Brown had served as a Whig in Congress from 1841 to 1847; he had also served as president of the Mobile and Ohio Railroads from 1856 to 1871. See generally WILLIAMS, *supra* note 9, at 87-90.

30. See 1853-54 Tenn. Pub. Acts, ch. 50.

failed. An action on behalf of the slaves was filed in chancery court seeking to enjoin the court-ordered slave sale. Brown, on behalf of the executor, opposed the injunction. The slaves prevailed and the chancellor directed that they be shipped to Liberia at the expense of the estate. On appeal, the state supreme court adopted a middle course holding that while freedom for slaves was a primary provision of the will and the provision that the slaves be transported to a free state was secondary, the slaves would have to earn the money for their transportation.<sup>31</sup>

Following the clerkships, Jackson enrolled at Cumberland Law School. Again there are few records, but there is evidence that Jackson did well. For example, in March 1856, one of Jackson's professors, Nathan Green, wrote Jackson's father concerning his son's exemplary work as an opinion writer in moot court. Green suggested that the opinion ought to be read by members of the state supreme court.<sup>32</sup> Green himself was an interesting figure and may have had a significant effect on Jackson. A former chancellor and state supreme court justice, he had written the court's widely noted opinion in *Ford v. Ford*,<sup>33</sup> in which he recognized slave humanity in the law of bondage. As a result of his open espousal of the view that Congress had the right to abolish slavery in the District of Columbia, Green was urged to move North by many of his fellow Tennesseans. Moreover, as one commentator notes, "young men were cautioned not to attend Cumberland University."<sup>34</sup> Green would later become a vocal opponent of secession. Whether Green influenced Jackson's own opposition to secession is not known.<sup>35</sup>

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31. *Boon v. Lancaster*, 33 Tenn. (1 Sneed) 577 (1854). It was necessary for provision to be made to transport former slaves outside the state since state law made it a criminal offense for "free persons of color" to reside within the jurisdiction. 1831 Tenn. Pub. Acts, ch. 102. In 1841, the legislature had permitted certain free blacks to remain in the state with court approval. 1841-42 Tenn. Pub. Acts, ch. 191. The statute, however, had been repealed in 1849. 1840-50 Tenn. Pub. Acts, ch. 107.

Even when permitted to remain within the state, the lot of free blacks was not good. State law made provision for special trustees to supervise emancipated persons. 1851-52 Tenn. Pub. Acts, ch. 300, § 3. Such trustees had "the right to control the emancipated slaves [and] all rights, powers, and privileges . . . of the master of said slave." *Id.* Thus freedom in Tennessee might not be much better than slavery.

32. Letter from Nathan Green to Alexander Jackson (Mar. 7, 1856) [SHC].

33. 26 Tenn. (7 Hum.) 76 (1846). See Howington, *Not in the Condition of a Horse or an Ox; Ford v. Ford, The Law of Testamentary Manumission and the Tennessee Court's Recognition of Slave Humanity*, 34 TENN. HIST. Q. 249 (1975). For a general description of the law of slavery, see E. GENOVESE, *ROLL JORDAN ROLL* 25-49 (1972).

34. J. GREEN, *LIVES OF THE JUDGES OF THE SUPREME COURT OF TENNESSEE*, 94 (1947).

35. For biographical sketches of Green, see J. CALDWELL, *supra* note 28, at 139-43; J. GREEN, *supra* note 34, at 91-95.



## III. FIRST YEARS AT THE BAR

Graduating in 1856, Howell Jackson returned to Madison County to begin the practice of law. The prospects for Jackson, the young lawyer, were bright. He was well educated and better trained for his profession than the majority of attorneys of that era. Almost two years after Jackson's graduation from law school, Abraham Lincoln was to write that "the cheapest, quickest and best way" to establish oneself in the profession was to "read Blackstone's Commentaries, Chitty's Pleadings, Greenleaf's Evidence, Story's Equity, and Story's Equity Pleading, get a license, and go to the practice, and still keep reading."<sup>36</sup> Thus, if a formal education was an advantage, Jackson had it. Moreover, the Jackson family was prominent; Jackson's father had earlier served in the Tennessee legislature, was an active West Tennessee Whig, and had just completed his second term as mayor of Jackson. If more was needed to attract clients, Jackson advertised in the local paper. While most professional notices were relatively modest, reciting the lawyer's name and address, Jackson's included such statements as "Will attend promptly to all business entrusted to his care."<sup>37</sup> At a time when most Tennessee lawyers had ceased to ride the circuit, Jackson's advertisements also reflect a willingness to take cases in the surrounding counties.<sup>38</sup>

Yet the first two years of Jackson's law practice do not appear to have been very successful. Jackson seemingly did not enjoy any significant practice before the courts of record of Madison County. Despite his advertised willingness to ride the circuit and take out-of-county business, an examination of the records of the surrounding counties fails to reflect any significant practice by Jackson before those courts. There may not have been sufficient clients for a new and as yet untried lawyer. The population of Jackson was then less than 1,000 and there was a well-established bar of seasoned practitioners. For a young attorney unassociated with any more senior member of the bar, home did not provide many exciting opportunities.

In 1857 Jackson moved to Memphis, which was rapidly becom-

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36. Letter from Abraham Lincoln to James F. Thornton (Dec. 2, 1858), in 3 *THE COLLECTED WORKS OF ABRAHAM LINCOLN* 344 (R. Basler ed. 1953). For a discussion of the training of the legal profession at that time, see L. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 525-46 (1973).

37. See, e.g., *West Tennessee Whig*, Apr. 10, 1857, at 3, col. 6.

38. In his study of the early Tennessee bar, Professor Daniel Calhoun concludes that lawyers had virtually ceased to take cases outside their own counties prior to Jackson's admission to the bar. D. CALHOUN, *PROFESSIONAL LIVES IN AMERICA* 59-87 (1965).

ing a major city. The year before it had obtained a direct route to the Atlantic Ocean with the completion of the Memphis-Charleston Railroad.<sup>39</sup> The decade of the 1850's was one of growth for the city; the population tripled while taxable wealth increased by nearly 500 percent.<sup>40</sup> Memphis was to provide Jackson with many exciting opportunities.

Soon after arriving in Memphis, Jackson associated with David M. Currin. Currin was fifteen years senior to Jackson, and was well known in West Tennessee political and legal circles. An active Democrat, Currin had served in the state legislature as a presidential elector,<sup>41</sup> and following secession would represent Tennessee in the Confederate Congress at Richmond.<sup>42</sup> Jackson's new setting provided him his first real taste of a business and corporate practice. In the winter of 1857-58, Jackson travelled to New York to represent the Mississippi Central Railroad in debt security negotiations.<sup>43</sup> Currin's experience, coupled with his political and legal ties, were to provide Jackson opportunities he had not enjoyed in Madison County. Jackson acquired other significant ties in May 1859, when he married Sophie Malloy, the daughter of a Memphis banker whom Jackson was to count as one of his clients.

Currin's decision to take in Jackson appears sound. The firm, while not the busiest nor the most successful in Memphis, increased its market share after Jackson's association. In 1860, for example, Currin & Jackson filed slightly more than two percent of the cases docketed in chancery court. In 1861, when there were approximately 150 lawyers at the Memphis bar, they took more than five percent of the cases filed.<sup>44</sup> Indeed, Judge George Dixon, the principal trial court judge in Memphis, remarked of Jackson that he was "the finest lawyer in the State of Tennessee of his age."<sup>45</sup> Nevertheless, this period of Jackson's career is not very illuminating. It was his first real opportunity to practice, but it lasted only two years.

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39. J. YOUNG, *STANDARD HISTORY OF MEMPHIS, TENNESSEE* 95 (1912).

40. J. KEATING, *HISTORY OF THE CITY OF MEMPHIS* 384 (1888).

41. Currin was born in Murfreesboro, Tennessee, on November 11, 1817, and graduated from the University of Nashville in 1834. Following his marriage in 1845, he settled in Memphis. Currin served in the state legislature during its 1851-52 term representing the western counties of Fayette, Hardeman, and Shelby. Although an unsuccessful candidate for Congress in 1855, he served as an elector in the presidential contests of 1848, 1852, and 1856. 37 *BIOGRAPHICAL DIRECTORY TENNESSEE GENERAL ASSEMBLY 1796-1969*, at 42 (1973).

42. E. WARNER & W. YEARNES, *BIOGRAPHICAL REGISTER OF THE CONFEDERATE CONGRESS* 67 (1975).

43. G. MYERS, *HISTORY OF THE SUPREME COURT OF THE UNITED STATES* 597 (1912).

44. Rule Dockets 5-7, Shelby County Ch. Ct. (1859-61); *MEMPHIS CITY DIRECTORY: 1860*, at 355.

45. Letter from George Dixon to G. A. Henry (May 31, 1864) [CBR].

## IV. THE WAR

## A. Receiver of Property

In the spring of 1861 Tennessee seceded from the Union.<sup>46</sup> Jackson, a Whig like his father, opposed secession, but along with numerous Southern Whigs, he remained loyal to the South.<sup>47</sup> Although his brother William Jackson entered the Confederate Army and rose to the rank of brigadier general, Howell eschewed military service. Rather, the war provided Howell Jackson the opportunity to continue a law-related career in the service of the Confederate District Court. It also gave Jackson his first opportunity to evidence judicial ambition.

The court system of the Confederacy resembled that of the supplanted federal courts.<sup>48</sup> While the Provisional Constitution of the Confederacy originally provided that each state would constitute a judicial district, the constitutional amendment of May 21, 1861,<sup>49</sup> established two or more districts in the same states. The Judiciary Act of March 16, 1861, also provided that each district court judge should hold at least two terms annually in each of the former United States districts that had existed on November 1, 1860.<sup>50</sup> West H. Humphreys had been appointed judge for the United States District Court for the District of Tennessee by President Franklin Pierce in 1853. Following the secession of Tennessee, Jefferson Davis nominated Humphreys for appointment to the Confederate district court, and Humphreys' nomination was approved by the provisional government.<sup>51</sup>

In mid-summer of 1861, the United States Congress enacted legislation authorizing the confiscation of Southern assets in the North.<sup>52</sup> The Confederate Congress subsequently passed similar leg-

46. 1861 Tenn. Pub. Acts, ch. 1. See generally J. FERTIG, *THE SECESSION AND RECONSTRUCTION OF TENNESSEE* 15-33 (1898).

47. See also Address by Senator George Hoar, in K. MCKELLAR, *TENNESSEE SENATORS* (1942).

48. For a general discussion of the Confederate military judiciary, see W. ROBINSON, *JUSTICE IN GREY* (1941).

49. C.S.A. CONST. art. III, § 1 reprinted in C. LEE, *THE CONFEDERATE CONSTITUTIONS* 166-67 app. (1963).

50. Act of Mar. 16, 1861, sess. I, ch. 61, C.S.A. Prov. Cong. Stat. 75.

51. Humphreys, unlike his judicial colleagues in the other Confederate states, did not resign his commission as a United States District Judge. This fact later led to the impeachment and trial of Humphreys by Congress in the aftermath of the Civil War. For an excellent discussion of this judicial impeachment, see Hall, *West H. Humphreys and the Crisis of the Union*, 34 TENN. HIST. Q. 48 (1975). See also J. GREEN, *LAW & LAWYERS*, 21-23 (1950).

52. Act of Aug. 6, 1861, ch. 60, 12 Stat. 319. For a description of confiscation in the North, see H. SHAPIRO, *CONFISCATION OF CONFEDERATE PROPERTY IN THE NORTH* (1962).

isolation providing for the sequestration of alien-enemy property within the South.<sup>53</sup> Attorneys, agents, former partners or trustees holding or controlling property of any kind whatever were required to render accounts to Confederate court officials. Grand juries were required to investigate enemy-alien property within their jurisdiction. Moreover, every citizen was placed under a duty to volunteer information regarding such property. One scholar has noted that after 1861 the principal business of the Confederate courts was the administration of the sequestration statutes and that thousands of cases were handled pursuant to those laws.<sup>54</sup> Because of the large amount of property within the South owned by Northerners, sequestration funds provided the Confederacy with millions of dollars.<sup>55</sup>

The administration of the sequestration laws was vested in receivers appointed by the district courts. These bonded officers took possession of sequestered property, supervised its sale, and paid the proceeds into the Treasury. Fees were generous; receivers were allowed fees and expenses up to 5,000 dollars. In Tennessee a receiver was appointed for each of the three divisions within the district. Howell Jackson was appointed receiver for the Western Division of Tennessee by Judge Humphreys.<sup>56</sup>

### B. *The Military Court*

One of the most interesting aspects of Jackson's war career was his determined effort to secure a judicial appointment within the Confederate military. At the beginning and through the early months of the war, military judicial authority within the Confederacy was vested in general courts-martial composed of line officers. These courts were appointed by a commanding general and composed of between five and thirteen officers. Punishment was neither swift nor certain because of the difficulty of convening the necessary officers. Moreover, the detailing of officers to courts-martial did not seem a provident expenditure of command talent. To remedy these problems, General Robert E. Lee recommended and the Confederate Congress established a court in the fall of 1862 to be appointed by the President composed of permanent judicial officers holding the rank of colonel of cavalry in each army corps. These courts were

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53. Act of Aug. 30, 1861, sess. III, ch. 61, C.S.A. Prov. Cong. Stat. 201.

54. H. BEERS, *GUIDE TO THE ARCHIVES OF THE GOVERNMENT OF THE C.S.A.* 39 (1968).

55. *Id.*

56. For a description of Jackson's term as receiver, see notes 75-79 *infra* and accompanying text.

well-received and legislation was soon enacted increasing their number.<sup>57</sup>

In early 1864, Generals Stephen D. Lee and Nathan Bedford Forrest made application for the appointment of military judges for their respective commands.<sup>58</sup> Howell Jackson was thirty-one at the time. The requests of Generals Lee and Forrest posed the interesting prospect of securing a commission as a non-combatant field grade officer, and at the same time remaining active within his profession. As Jackson wrote his fellow Parisian, J.D.C. Atkins, then sitting in the Confederate Congress in Richmond: "I am exceedingly anxious to get the appointment, as it is in the line of my profession, suited to my tastes, and for which I feel myself better qualified than any other position in the service."<sup>59</sup> Jackson set out in earnest to obtain the appointment and secured the endorsement of Generals Lee,<sup>60</sup> Forrest,<sup>61</sup> and Polk,<sup>62</sup> together with those of the Tennessee Congressional delegation<sup>63</sup> and members of the Memphis bar.<sup>64</sup>

Ultimately, Jackson was unsuccessful. There is some evidence that the War Office decided not to create the additional judgeships.<sup>65</sup> Nevertheless, this effort by Jackson is significant. It is another strand in Jackson's career evidencing professional identification and judicial aspiration. It is also evidence of Jackson's commitment to the Confederacy when prospects for its future were not bright. Gettysburg, Vicksburg, Chickamauga Creek and Lookout Mountain-Missionary Ridge already had taken their toll; within a year, Appomattox Court House would be history. Discipline had

57. W. ROBINSON, *supra* note 48, at 362-72.

58. Letter from General S.D. Lee to General S. Cooper (Jan. 10, 1864) [CMR]; letter from Howell E. Jackson to J.D.C. Atkins (Feb. 8, 1864) [CBR].

59. Letter from Howell Jackson to J.D.C. Atkins (Jan. 25, 1864) [CBR].

60. Telegram from General S.D. Lee to General Cooper (Jan. 9, 1864) [CMR].

61. Letter from Howell E. Jackson to J.D.C. Atkins (Feb. 8, 1864) [CBR].

62. *Id.* It is unclear from Jackson's letter whether the endorsement was that of Lt. Gen. Leonidas Polk, or his nephew, Brig. Gen. Lucius Eugene Polk. Both Generals saw action in Tennessee.

63. Letter from J.D.C. Atkins to Secretary of War, James A. Seddon (n.d.); letter from G.A. Henry to Secretary of War James A. Seddon (Mar. 1, 1864); letter from G.A. Henry to Secretary of War James A. Seddon (Feb. 5, 1864); letter from G.A. Henry to Gen. Braxton Bragg (June 11, 1864); letter from members of Tennessee Congressional Delegation to Secretary of War James Seddon (June 9, 1864) [CMR]. Gustavos A. Henry, a life-long friend of Jefferson Davis, was one of Jackson's principal supporters in his effort to secure the judgeship.

64. *See, e.g.*, letter from George Dixon to G.A. Henry (May 31, 1864) [CMR]. There were numerous endorsements by others. *See, e.g.*, letter from D.B. Malloy to Jefferson Davis (May 3, 1864) [CBR].

65. *See* letter from Lt. E. Pasbury to Secretary of War James A. Seddon (June 4, 1864) [CMR]. There was also competition for the positions. *See* military records of Col. James E. Bailey [CMR].

waned, enlistments had greatly declined, and desertion had become a major problem.<sup>66</sup> The task of enforcing the Articles of War and punishing infractions would not have been popular.

## V. POST-WAR PRACTICE

### A. *Memphis*

Following the War, Jackson returned to Memphis and resumed the practice of law. The first order of business was to secure a pardon and the accompanying panoply of civil rights. Neither the general pardon provisions of the amnesty proclamation of President Lincoln of December 8, 1863, nor that of President Johnson of May 29, 1865, provided Jackson much comfort since those who had held civil office under the Confederacy were specifically excluded.<sup>67</sup> Pardon would be particularly important to lawyers since Congress had disbarred all who had either served the Confederacy in military or civil capacity from practicing in federal courts.<sup>68</sup> Moreover, until pardoned the exempted individual could neither acquire nor transfer title to property; nor could one obtain copyrights and patents.<sup>69</sup> Jackson necessarily felt the need to secure a special presidential pardon, which he set out to do in June of 1865. Of course, the question arose whether a pardon would relieve civil disabilities or merely nullify a prior crime.<sup>70</sup> Nevertheless, many undoubtedly hoped that a pardon would also restore the right to practice law.

Professor E. Merton Coulter has characterized the special petitions as being either "manly defenses" or "recantations."<sup>71</sup> Jackson's was more the latter. In his petition of June 18, Jackson sought

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66. See generally C. EATON, A HISTORY OF THE SOUTHERN CONFEDERACY 262-63 (1954).

67. 6 MESSAGES AND PAPERS OF THE PRESIDENTS 213-15, 310-12 (Richardson ed. 1904). The federal amnesty policy seemed a bit perverse. Individuals, except those holding the rank of general, who had themselves taken up arms against the Union could be pardoned simply by taking the amnesty oath, while all civil employees of the Confederacy, including Jackson, were required to secure a special presidential pardon.

68. Act of Jan. 24, 1865, ch. 20, 13 Stat. 424. The Act required that all attorneys seeking to practice before the federal courts take the so-called "iron clad" oath devised by Congress in 1862 which required the juror not only to swear future loyalty but to affirm past loyalty. Act of July 2, 1862, ch. 128, 12 Stat. 502. For a discussion of the oath, see H. HYMAN, ERA OF THE OATH (1954); H. HYMAN, TO TRY MEN'S SOULS 139-98 (1959).

The Supreme Court imposed a similar requirement on March 10, 1865, by rule demanding that all who practiced before it swear they had never exercised the functions of any office of any authority in the Confederacy. 6 C. FAIRMAN, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: RECONSTRUCTION AND REUNION, 1864-1888, pt. 1, at 58 (1971).

69. J. DORRIS, PARDON AND AMNESTY UNDER LINCOLN AND JOHNSON 136 (1953).

70. See generally E. COULTER, THE SOUTH DURING RECONSTRUCTION 1865-1877, at 136 (1947). See also H. HYMAN, ERA OF THE OATH 102 (1954).

71. E. COULTER, *supra* note 70, at 33.

to minimize the extent of his duties and responsibilities as Receiver of Property and noted he had not served in the "Rebel Service as a Soldier" or otherwise been active in secession politics.<sup>72</sup> According to Jackson, no session of court was ever held nor were decrees of sequestration issued in the division.

In the discharge of the duties of the office of Receiver, nothing of any value or consequence came into my hands or was received by me, except notes, bills, bonds and stocks belonging to Northern parties—all of which were carefully preserved and have since the close of the war been returned by me to their lawful and respective owners.<sup>73</sup>

He also stated that he ceased to act as Receiver in June 1862.<sup>74</sup>

These representations simply were not true. While most of the records for the Western Division have been lost, Jackson's role as a receiver was more significant. First, it is clear that Jackson continued in his capacity as receiver well beyond June 1862. Indeed, there are several documents executed by him as receiver as late as December 13, 1863.<sup>75</sup> Secondly, and more importantly, the extent and nature of Jackson's participation as receiver was much greater than that related to President Johnson in his petition for a presidential pardon. Existing documents reveal that Jackson took official possession of such diverse goods as agricultural commodities,<sup>76</sup> slaughtered beef,<sup>77</sup> and valuable machine tools and related supplies.<sup>78</sup> Considering the consumable nature of many of these goods, it seems doubtful that Jackson retained custody of property sequestered by him and was able to return such property to its rightful owners after the War, especially since the sequestration law required that goods be sold at auction. Moreover, evidence supports the proposition that at least some of the property commandeered by Jackson was turned over directly to Confederate military authorities for use in the war effort.<sup>79</sup>

Jackson's petition of June 18 was not granted. Nevertheless, his failure to secure a pardon at that time probably was not significant.

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72. Letter from Howell E. Jackson to President Andrew Johnson (June 18, 1865) [RPM].

73. *Id.*

74. *Id.*

75. *See, e.g.*, receipt signed by Howell E. Jackson acknowledging receipt of property from the quartermaster's office (Dec. 31, 1863) [CBR].

76. Receipt signed by Howell E. Jackson acknowledging receipt of property from Captain W. J. Sims, Quartermaster Officer (Apr. 17, 1862) [CBR].

77. Receipt signed by Howell E. Jackson acknowledging receipt of property from Quartermaster's Office (Nov. 26, 1861) [CBR].

78. Receipt signed by Howell E. Jackson acknowledging receipt of property from Major W.R. Hunt, Ordinance Officer (Dec. 18, 1861) [CBR].

79. Letter of Major W.R. Hunt to Howell E. Jackson (Dec. 7, 1861) [CBR].

Despite the large number of applicants, very few petitions had been granted through mid-August 1865.<sup>80</sup> By September, however, pardons had begun to be granted more freely and in December 1865, Jackson again petitioned President Johnson for a special pardon.<sup>81</sup> Again he asserted that his participation in "the late unfortunate Rebellion" was minimal: "Like the great mass of young men of the South, I was carried along with the tide of secession and rebellion without being a leader in the movement or an active participant in bringing it about."<sup>82</sup> Less than two months later the pardon was granted.<sup>83</sup>

What significance, if any, should be attached to Jackson's perjury is an interesting question. The misstatements seem collateral, yet Jackson surely appreciated their inaccuracy. Professor Harold Hyman has noted that many did not regard the oath a serious undertaking—particularly in the border states where "men took oaths to the Union one night and to the Confederacy the next . . . ."<sup>84</sup> After all "there were families to protect and property to maintain, and without the oaths these were endangered. They did not consider themselves liars, nor did their neighbors condemn them."<sup>85</sup> Others disagreed and thought that such a compromise of principle was an abomination.<sup>86</sup> Whether Jackson, a religious man, found this undertaking difficult cannot be determined and the answer to the question is probably not that important. As Professor Willie Lee Rose has observed, the oath was something that many men felt compelled to take in order to pick up the pieces of their lives and get started again.<sup>87</sup>

Jackson's former partner, David Currin, had died in the spring of 1864 at Richmond while serving in the Confederate Congress.<sup>88</sup>

80. J. DORRIS, *supra* note 69, at 139.

81. Letter from Howell E. Jackson to President Andrew Johnson (Dec. 7, 1865) [RPM].

82. *Id.*

83. Amnesty Petition No. 3370 [RPM].

84. H. HYMAN, *supra* note 70, at 152.

85. *Id.* An editor of a Georgia paper urged his readers: to fortify themselves, if necessary, with "Dutch courage," raise the hand, swear and vote, and Senator Reverdy Johnson told his constituents to ignore the moral implications of their perjury as the oath was, in his opinion, unconstitutional. *Id.* at 153.

86. Professor Hyman notes that Alabama's Catholic bishop admonished his congregation that all false swearing was an abomination, and that Roger Taney rose from his deathbed to urge no compromise of principle. *Id.* at 152-53.

87. Comments by Professor Willie Lee Rose, Developing Legal Careers in the Nineteenth Century United States, program sponsored by the American Society for Legal History, in Philadelphia (October 23, 1976).

88. T. ALEXANDER & R. BERINGER, *THE ANATOMY OF THE CONFEDERATE CONGRESS* 349 (1972).



Bedford M. Estes became his new partner. Estes and Jackson were alike in many ways. They were the same age. During the previous generation, both of their families had migrated from Virginia and settled in West Tennessee. Their fathers had been active in state politics. Both had university educations and were law school graduates—Estes having attended the University of Nashville and graduated from the Louisville Law School. Estes also had practiced elsewhere (Lawrence County, Arkansas, and Brownville, Tennessee) before moving to Memphis in 1856.<sup>89</sup> Like Jackson, Estes would reflect a strong sense of professional identity that began to characterize the bar in the late nineteenth century. Indeed, Estes was a founding member of the American Bar Association<sup>90</sup> and a charter member and first president of the Tennessee Bar Association.<sup>91</sup> Interestingly, neither Jackson's nor Estes' inability to take the so-called "iron-clad" oath presented any difficulty. Less than a year after its passage by Congress, Judge Connally F. Trigg, a Lincoln appointee, had held the requirement unconstitutional as *ex post facto* legislation. Judge Trigg's opinion foreshadowed that of the United States Supreme Court in *Ex parte Garland*<sup>92</sup> delivered by Mr. Justice Field some twelve months later.

The two men had known each other at the Memphis bar before the War. They had been co-counsel in at least one case<sup>93</sup> and opposing counsel in another.<sup>94</sup> Although both were young men, their practice shortly would become one of the busiest and most exciting in Memphis. This was quite remarkable in view of the changes that took place in the Memphis bar following the Civil War. As one contemporary account states:

Before 1865 the accessions to the bar of Memphis had been gradual. . . . But in the years immediately following the war, the additions were rapid. . . .

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89. In 1856, after moving to Memphis, Estes entered into a partnership with Colonel E.W. Munford, and the firm Munford & Estes is reported to have enjoyed a large practice. As with Jackson, the war years brought disruption to Estes's career. Following secession, Estes left private practice. In the early days of the war, he was elected to the state legislature, but shortly thereafter was appointed Confederate States District Attorney for the Western District of Tennessee by President Jefferson Davis. Federal troops having occupied West Tennessee early in the war, Estes did not have much opportunity to enter into his official duties. He remained throughout most of the war at his home near Memphis and did not engage in any professional activities. For a biographical sketch of Estes, see J. KEATING & O. VEDDER, 2 HISTORY OF THE CITY OF MEMPHIS 121-27 (1888) [hereinafter cited as KEATING & VEDDER].

90. ABA, PROCEEDINGS OF FIRST ANNUAL MEETING 23, 37 (1878).

91. TENN. BAR ASS'N, PROCEEDINGS OF FIRST ANNUAL MEETING (1882).

92. 71 U.S. 333 (1866).

93. See, e.g., *Chafin v. Barinds*, No. 2492 (Shelby County Ch. Ct., filed Dec. 24, 1859).

94. See, e.g., *Kebler v. Walker*, No. 2804 (Shelby County Ch. Ct., filed Nov. 6, 1860).

Attracted by the geographical position . . . they came flocking from every quarter. Lawyers who had outgrown their county constituencies . . . sought this new and larger field.<sup>95</sup>

When Jackson first entered the Memphis bar in 1857 there were seventy-eight attorneys;<sup>96</sup> in 1866, there were at least 160<sup>97</sup> and forty more would hang out their shingle in the next three years.<sup>98</sup> Despite the increase in competition, the state court records for 1865 and 1866 reflect that Estes and Jackson were able to capture better than seven percent of the cases filed for those years.<sup>99</sup> While case counting is probative, it is not conclusive—it neglects the importance of office practice, and perhaps overstates the significance of litigated cases. Nevertheless, when one reviews the nature of the cases and identity of clients represented, it seems that the firm was not only busy, but was representing desirable clients in rather sophisticated matters.

Historians of the South have described a tripartite division of political power during this period. First, of course, were the Republicans who were in power at the close of, and following, the Civil War. Secondly, the Conservatives—the “Redeemers”—a loose alliance of Democrats and pre-War Whigs, were united initially by a desire to rid the state of Republican rule. Although allied by a common distaste for “Reconstruction” government, the Conservatives were nevertheless a heterogeneous mix—comprised of Whig Unionists alienated from the radical Republicans, Confederate Whigs, the political allies of Andrew Johnson, and the secessionists. Two strands of political thought within the Conservatives provided a further division of power. The Bourbons sought a restoration of the old planter regime, while the men of the “New South” were Southern, Whiggish capitalists, who saw the area’s future in industrialization and commerce. This latter group resembled and sought to ally itself with the conservative and capitalist Democrats of the Northeast.<sup>100</sup>

95. KEATING & VEDDER, *supra* note 89, pt. 2, at 80-81.

96. MEMPHIS CITY DIRECTORY (1857).

97. MEMPHIS CITY DIRECTORY, 241-42 (1866).

98. MEMPHIS CITY DIRECTGRY: 1868-1869, at 291-93 (1869).

99. This conclusion is based on an examination of the existing documents of courts of record in Shelby County. Complete Rule Dockets, reflecting the names of counsel of record, exist for the equity court for these years. It is also based on a more cursory reading through the Minute Books of the Circuit Court (which do not indicate systematically the names of counsel of record for cases).

100. *See generally* R. HART, REDEEMERS, BOURBONS AND POPULISTS (1975); C. WOODWARD, ORIGINS OF THE NEW SOUTH (1951). The Conservative alliance was not always amicable. Indeed, Professor Hart concludes:

The . . . Bourbons in Tennessee, though they agreed with Cleveland on limited government and a low tariff detested the businessmen who applauded Henry Grady’s New South. . . . [t]hese business and professional men were regarded by the Bourbons as

Jackson's practice reflected in some sense the "redeemed" New South and the ideology of the Southern Whig-Conservative Democrat alliance. Among local clients, Estes & Jackson represented most of the prominent banks and insurance companies, together with numerous commercial establishments of West Tennessee. The firm's individual clients included the presidents of local banks and officers of area railroads. In litigation, creditors were the usual clients; indeed, between 1865 and 1868 plaintiffs—usually creditors—were represented in eighty-nine percent of the cases.<sup>101</sup>

Federal bankruptcy records underscore the firm's creditor identity. Of the 1000 bankruptcy cases filed in the Memphis federal courts between July 1867 and December 1868, Estes & Jackson represented only two bankrupts—a very small percentage of the practice when compared to the firm's significant presence in chancery court.<sup>102</sup> This is particularly striking since younger attorneys appeared to take such cases in efforts to help support fledgling practices. Estes & Jackson evidently did not need, or desire, these cases.

Jackson had little objection to the representation of Northern mercantile and financial interests. Over the years the firm would enjoy a significant Northern custom in the Tennessee state courts. A review of both the federal and circuit court records underscores the interstate nature of Jackson's practice. Indeed Jackson saw in commerce and industry the future of the region. As his friend and colleague Senator George W. Hoar observed, Jackson "was anxious to have the South take her place as a great manufacturing community. . . ."<sup>103</sup>

Although the firm represented Northern interests, it avoided any identity with Reconstruction government. Indeed, one of the firm's first clients was General Nathan Bedford Forrest, against whom the United States had initiated both civil and criminal proceedings.<sup>104</sup> These cases stemmed from a criminal indictment against Forrest for treason presented by a federal grand jury in the

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traitors to Jeffersonian democracy and fellow-travelers with the Republicans, who did not like them either.

R. HART, *supra* at 56-57.

101. (New) Rule Dockets 1-10, (Shelby County Ch. Ct.).

102. Bankruptcy Dockets, U.S. Cir. Ct., Memphis, Tenn. (July 31, 1867 to Dec. 29, 1868) [FRC].

103. 2 G. HOAR, *AUTOBIOGRAPHY OF SEVENTY YEARS* 181 (1903).

104. See *United States v. Galloway*, No. 97 (W.D. Tenn. Sept. 1865). Galloway, Forrest's co-defendant, had been his aide-de-camp during the last three years of the war, and was editor of the unreconstructed Memphis *Avalanche* afterwards. R. HENRY, "FIRST WITH THE MOST" FORREST 367 (1944); J. MATHES, *GENERAL FORREST* 356, 366 (1902).

late fall of 1864.<sup>105</sup> The firm also represented Southerners in litigation testing the disposition of their property by military-Reconstruction governments for failure to pay federal taxes imposed by the Lincoln administration shortly after the beginning of the War.<sup>106</sup>

Jackson's identity with the "redeemed" New South is further reflected by his association with the state credit interests in the state debt repudiation controversy of the 1870's.<sup>107</sup> The state debt controversy brought Jackson political prominence by securing his elections to the state legislature in 1880 and the United States Senate in 1881. Consistent with the "New South" ethic of the Tennessee Redemmers, Jackson identified with the "state credit" wing of the Democratic party, whose philosophy was that the state could not legally, economically, or morally fail to honor its financial obligations.

A prelude to that controversy occurred in Memphis shortly after the Civil War. The city had guaranteed bonds issued by the Memphis, Newfield, and Little Rock Railroad on which the issuer was in default. Representing a group of bondholders, Jackson initiated litigation against the railroad and the municipality as guarantor.<sup>108</sup> Whether Jackson's advocacy of creditors faced with governmental default helped mold his later political position cannot be said. At least it suggests the possibility that Jackson's later political commitment to the "state credit" interest was influenced by this earlier professional relationship.

Another suit is worth brief mention. In 1870 the Tennessee state legislature imposed a tax on corporate stock in the hands of shareholders, even though the corporate charters provided that the corpo-

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105. An indictment was presented by a federal grand jury sitting in the Western District of Tennessee against Forrest charging him with treason on November 15, 1864. Forrest's biographer, J. Mathes, is clearly wrong in his assertion that Forrest was never indicted. See J. MATHES, *supra* note 103, at 361. *But see* R. HENRY, *supra* note 103, at 442.

Estes & Jackson represented the former cavalry commander in the civil attachment proceedings and were successful in securing a writ nolle prosequi. *United States v. Galloway*, No. 97 (W.D. Tenn., Sept. 1865); see *Law Docket 1A & Minute Books* (Sept. 9, 1865) [FRC].

106. *Tragg v. Newbrick*, No. 657 (Shelby County Ch. Ct., filed Jan. 24, 1866); *Sharp v. Williams*, No. 223 (Shelby County Ch. Ct., filed July 8, 1865). The federal taxes in question were authorized by the Act of June 7, 1862, ch. 98, 12 Stat. 422. For discussion of the law and efforts at its enforcement, see generally J. RANDALL, *CONSTITUTIONAL PROBLEMS UNDER LINCOLN* 316-23 (rev. ed. 1950). See also S. Doc. No. 98, 41st Cong., 2d Sess., for an examination of the postwar Southern courts' willingness to evict purchasers of lands sold under federal authority for non-payment of the direct tax. Ultimately, the taxes were held constitutional in *de Treville v. Smalls*, 98 U.S. 517 (1868).

107. See generally R. JONES, *TENNESSEE AT THE CROSSROADS* 3-17 (1977) [hereinafter cited as R. JONES].

108. *Adams v. Memphis-Newfield & Little Rock R.R.*, No. 686 (Shelby County Ch. Ct., filed Feb. 8, 1866).

rations would be tax exempt.<sup>109</sup> Fifteen suits were filed in the chancery court of Shelby County on behalf of banks, insurance companies, and their stockholders challenging the constitutionality of the new revenue measure.<sup>110</sup> Virtually all of the banks and insurance companies in the area retained Jackson to represent them in a legal challenge to the tax measure.<sup>111</sup> Jackson ultimately prevailed in the United States Supreme Court, arguing that the enforcement of the new tax law violated the non-impairment of contract clause of the United States Constitution.<sup>112</sup> The case is interesting not only as evidence of Estes & Jackson's relationship with New South financial interests, but as a reflection of the firm's standing at the bar. The case was important, and the parties, many of whom had other regular counsel, sought out Jackson to handle this matter. This Tennessee litigation is also significant since Jackson's 1870 argument is reflected in *Mobile & Ohio R.R. v. Tennessee*,<sup>113</sup> one of his most important Supreme Court opinions.

Since state criminal court records are missing for these years, it cannot be determined whether Estes and Jackson represented criminal defendants. Except for their representation of Nathan Bedford Forrest, the records of the federal district and circuit courts fail to reflect any criminal practice. Although in the firm's eight-year history it litigated forty-five cases before the state supreme court, none were criminal matters. This further suggests that criminal cases did not comprise any significant segment of the firm's practice. Unlike some Tennessee counties where court clerks specifically

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109. See, e.g., Acts of Tenn., ch. 81 (1870). The legislature had bestowed tax exemptions on these corporations in return for an expressly assumed obligation by the corporations in their charter to pay to the state a "bonus," usually in the amount of .5% of its capital stock.

110. Cases No. 733-48, 859 (Shelby County Ch. Ct., filed Jan. 16, 1873).

111. Initially Estes & Jackson were counsel of record in all of the chancery proceedings. However, other firms were involved, too. On appeal to the Tennessee and United States Supreme Courts, these other firms appeared as counsel of record in several of the cases, although Estes & Jackson represented more clients than did any other firm during this segment of the litigation.

Jackson won in the chancery court and secured the holding that the tax law violated the United States Constitution. See, e.g., *State v. Farrington*, No. 212, *State v. Dunscomb*, No. 213, *State v. Neely*, No. 211, *State v. Wicks*, No. 215 (Shelby County Ch. Ct., filed March 27, 1873). On appeal, however, the Tennessee Supreme Court reversed, reasoning that a tax on shares of stock was not a tax on the corporation's capital stock and thus not an impairment of the corporate charter. *Memphis v. Farrington*, 67 Tenn. 539, 547 (1876). The history of the Tennessee decision is interesting. After the initial decision was rendered, a motion to rehear was granted. The cases were resubmitted and held under advisement for over two years by an equally divided court. When the chief justice died, leaving the five judges, the reported Tennessee opinion was delivered with two judges dissenting.

112. *Farrington v. Tennessee*, 95 U.S. 679 (1877).

113. 153 U.S. 486 (1894).

recorded the race of black litigants, Shelby County court records did not reflect race. Thus it cannot be determined whether Jackson represented blacks, although the corporate-commercial nature of his practice probably precluded much professional contact with the freedmen.

One interesting aspect of Jackson's career is his ability to associate himself not only with able attorneys, but also with men of at least local prominence. Both Currin and Estes had been wise choices. In the fall of 1873 Jackson and Estes took in a new partner—Henry T. Ellett. Active in the Democratic Party, Ellett had served in the Mississippi state legislature, represented that state in Congress, and was appointed minister to Argentina by President Buchanan. He later helped frame the Mississippi ordinance of secession, and was appointed first postmaster-general of the Confederacy. After the War, Ellett had been elected to and served on the Mississippi Supreme Court.<sup>114</sup>

There is other evidence of professional success. During the years of Jackson's post-war Memphis practice, it was customary for the bar to advertise. As noted earlier, Jackson had been an aggressive advertiser in his first years at the Madison County bar.<sup>115</sup> Yet a review of the newspapers during this time span fails to reflect advertisements by Jackson or his firm, an indication that they found it unnecessary to seek more clients. While the tax rolls of Shelby County for this period have been lost and little other information exists about Jackson's financial stability, he was able to live in a fashionable neighborhood. Moreover, there is evidence that Jackson was active in the real estate market and that he served on the board of at least one major Memphis financial concern.

1873 was a year of transition in Jackson's life, and one of the more eventful in the history of Memphis. Initially the year looked as if it would be the city's most profitable; one contemporary observed that "an era of unexampled good fortune seemed to have begun."<sup>116</sup> Similarly, court records reflect a busy year for Jackson. That winter, however, smallpox afflicted the city, followed by a cholera epidemic. September brought a further epidemic of yellow fever to the city. 1873 also brought financial hardship. An unprecedented freeze brought river traffic to a standstill, and land transportation was crippled when disease decimated the city's horse popula-

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114. See generally KEATING & VEDDER, *supra* note 89, pt. 3, at 120.

115. See notes 37 & 38 *supra* and accompanying text.

116. 2 G. WARING, REPORT OF THE SOCIAL STATISTICS OF CITIES 142 (1887); see also J. KEATING, *supra* note 40, at 618.

tion.<sup>117</sup> Property values fell as Memphis acquired a reputation as an unhealthy place to live. More important was the Panic of 1873 and the three year depression that followed.<sup>118</sup>

The year also brought personal tragedy with the death of Jackson's wife. With his busy practice and five motherless children, Jackson now found himself in a difficult setting. As the year closed, Jackson not surprisingly elected to leave his Memphis practice and to return home to Jackson. The city's health problems, the depressed state of the economy, and the loss of his wife clearly contributed to Jackson's decision to move. Moreover, his family in Jackson would provide some support in raising his children.<sup>119</sup>

### B. Return to Jackson

After resettling in Madison County, Jackson practiced alone for a short time. By the end of 1874, he had established a partnership with General Alexander Campbell. Some four years senior to Jackson, he too was educated at West Tennessee College and Cumberland Law School and had studied under Judge Totten. Prior to the War he had enjoyed successive appointments as United States Attorney for the Western District of Tennessee from Presidents Pierce and Buchanan. Leaving the War as brigadier-general, Campbell returned to Jackson, where he organized the Bank of Madison and other business enterprises.<sup>120</sup>

The new law firm acquired clients quickly. In their first year together, Campbell and Jackson filed one-fifth of all the equity cases in the entire county. Moreover, these cases were as substantial as any filed in the Madison County courts. Jackson apparently did not represent any blacks in the courts in Madison County—where race was noted in the record. Whether this was a conscious policy

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117. For a description of these problems, see J. KEATING, *supra* note 40, at 620; 2 G. WARING, *supra* note 115, at 142; MEMPHIS CITY DIRECTORY (1873). See also Capers, *Yellow Fever in Memphis in the 1870's*, 24 MISS. VALLEY HIST. REV. 483 (1937-38).

118. The Panic of 1873 was felt quite heavily throughout the South. One commentator has noted that failures in the South amounted to eleven million dollars in the first two quarters of 1875 alone. E. COULTER, *supra* note 70, at 194. Interestingly, the Depression was not all bad from the perspective of the Southerner, since it is credited with driving the "economic carpetbaggers" North again. See C. Woodward, *supra* note 99, at 30.

119. By 1873 Jackson's marriage to Sophie had brought six children. Henry, the eldest, was born in 1860; Mary, the only girl to live to adulthood, was born two years later in 1862 during the middle of the War. William, named for his uncle, was born in 1864; Howell, Jr. was born three years later in 1867. The last two children, Sophie and Fannie, were born in 1870 and 1872. Fannie died in infancy in 1872, and Sophie died at age four not long after her mother.

120. For biographical sketches of Campbell, see generally E. WILLIAMS, *supra* note 9, at 184-86; J. CALDWELL, *supra* note 28, at 371-73.

cannot be said. He did oppose black litigants on several occasions.<sup>121</sup> As in Memphis, the litigation practice was concentrated on real estate, trusts, estates, and collection matters. Again plaintiffs—usually creditors—were represented much more often than defendants.<sup>122</sup>

The practice was also very different. There were fewer banks, insurance companies, and commercial establishments to represent in Jackson—a town only one-eighth the size of Memphis in 1875.<sup>123</sup> This difference compelled Jackson to change the nature of his practice. For example, Jackson began to take criminal cases. In 1875, he represented defendants in murder, malicious stabbing, forgery, and larceny cases together with less serious misdemeanor counts of disorderly conduct and nuisance.<sup>124</sup> Jackson's practice also was supplemented by cases he brought with him from Memphis.<sup>125</sup>

In April 1874, Jackson married Mary Harding, daughter of prominent Middle Tennessean W. G. Harding. Jackson had been acquainted with the Harding family since the spring of 1856 when he and his brother William, who had just graduated from West Point, spent a day or so in Nashville at the Harding family estate, Belle Meade, and visited with their father's friend, W.G. Harding.<sup>126</sup> Mr. Harding was one of Middle Tennessee's more prominent citizens—his family having settled there in 1798. Harding was educated in the North, but was an articulate spokesman for the Old South.

121. *See, e.g.*, *Brown v. Magee*, No. 1076 (Madison County Ch. Ct., filed June 6, 1875); *Bryant v. Darnell*, No. 1289 (Madison County Ch. Ct., filed March 31, 1877).

122. From 1875 to 1880, Campbell and Jackson represented plaintiffs in 79% of their cases. Rule Docket Books 3-5, Madison County Ch. Ct. [TSA]. Jackson was active in Madison County business circles. For example, he helped organize the Jackson Ice Company and the Jackson Building and Loan Association and served as vice president of the First National Bank.

123. Jackson's population in 1880 was 5377. E. WILLIAMS, *supra* note 9, at 532. In 1875 the population of Memphis was 40,230. J. YOUNG, *supra* note 39, at 213.

124. *See, e.g.*, State Docket, Madison County Cir. Ct. (1875-1878).

125. These cases include the suits filed by West Tennessee banks and insurance companies discussed at notes 107-10 *supra* and accompanying text. This litigation provided Jackson his first opportunity to appear before the United States Supreme Court. On December 10, 1877, Jackson was formally admitted to practice before the Court and took the required oath. Roll of Attorneys, U.S. Sup. Ct. Writing to his wife that evening, Jackson described the Court on which he would one day sit, as "a very noble and august body—consisting of nine judges—all wearing long silk robes." Letter from Howell E. Jackson to Mary Jackson (Dec. 10, 1877) [SHC]. Jackson was scheduled to open argument in the tax cases some two days later and acknowledged, at least to his wife, his nervousness: "I began to feel a little shaky at the idea for the Court is not only imposing in appearance but the courtroom (a splendid one) is crowded with distinguished lawyers from all parts of the country." *Id.* Despite his "butterflies," Jackson's argument prevailed and the decision of the Tennessee Supreme Court was reversed.

126. K. MCKELLAR, *supra* note 47, at 405.



His Belle Meade estate was a plantation of some 4000 acres, with an impressive mansion, its own grist mill, saw mill, three quarries, and a wildlife refuge-park of several hundred acres inhabited by some 250 deer. Jackson's marriage to Mary Harding was invaluable to his later career. It not only gave his children a mother but also provided him with prominent family and social connections in Middle Tennessee.<sup>127</sup>

## VI. JACKSON'S STANDING AT THE BAR

There is ample evidence that Jackson's professional reputation was held in high regard by his colleagues at the bar. This is reflected in part by his frequent selection by the bar to serve as special judge in the Madison County courts of record.<sup>128</sup> After having practiced for only two months in Madison County, Jackson was selected to sit as special judge in the circuit court.<sup>129</sup> The matters heard were not trivial. Illustrative is Jackson's second trial, a murder case involving the insanity defense and jury impeachment.<sup>130</sup> A verdict of guilty was returned and Jackson pronounced the death sentence.<sup>131</sup> Although the sentence was unpopular in the community, it was carried out three months later after Jackson's decision was affirmed by the state supreme court.<sup>132</sup>

127. *See generally*, W. CLAYTON, HISTORY OF DAVIDSON COUNTY, TENNESSEE 418 (1880).

Mary Harding would leave Nashville and move with her new husband to Jackson, Tennessee. Yet it is questionable whether she was content in Madison County; perhaps it was the absence of family, memories of the Belle Meade plantation, or the small town atmosphere of Jackson. She would over the next years return often to Belle Meade and spend considerable time there.

Jackson's second wife has been described as an energetic and industrious woman, but a woman with domestic tastes preferring home life to that of society, fashion and gaiety. K. McKELLAR, *supra* note 47, at 406-07. Howell and Mary Jackson would have two children: Elizabeth, born in 1876, and Louise, born in 1879.

Interestingly, Howell Jackson's brother, General William H. Jackson, had married Mary Harding's sister Selene in 1866.

128. The number of times that Jackson would sit as a special judge in the circuit and chancery courts over the next five years is legion. For example, during the 1876 July Term of the Chancery Court, Jackson sat as special judge in some 18 matters. Minute Book 8, Madison County Ch. Ct. 158-261.

129. Minute Book 1, Madison County Cir. Ct. (Jan. 29, 1875).

130. State v. McLean, No. 6 SD, (Madison County Cir. Ct., filed May 23, 1874).

131. The defendant, a poor farmer and sometime bricklayer, was tried for the first degree murder of his neighbor. A first trial had resulted in a mistrial.

After the trial, defense counsel obtained evidence that one of the jurors before the trial indicated that the defendant "should be hung." With this evidence McClean's attorneys argued that their client had not been accorded trial by an impartial panel. Jackson rejected the defendant's motion for a new trial, presumably on the basis that even if the evidence were true, it was not sufficient error to award a new trial. *See* Minute Book 1, Madison County Cir. Ct. (Sept. 23, 1875).

132. It should be noted that absent a finding of mitigating circumstances by the jury,

Jackson's attitude toward his judicial service appears mixed. On occasion he found his judicial duties tiresome. To his second wife he confided that he did not relish his position, but added: "[T]he lawyers select me and I cannot well refuse to act."<sup>133</sup> Yet, Jackson could refuse to serve; doubtless he did not regard the honor too onerous. Indeed, in the same letter quoted above, Jackson concluded by mentioning the possibility of serving on the state supreme court.

The frequency with which Jackson was chosen by the Madison County lawyers to sit as special judge is certainly some indication of his standing at the bar and his temperament for judicial duties. There were other indications of Jackson's professional standing. For example, when in 1878 Congress created a United States Court for the Western District of Tennessee, Jackson was the first person appointed to a committee of West Tennessee lawyers charged with the preparation of rules of court.<sup>134</sup> Jackson was also a law teacher, holding an appointment as professor of law at Southwestern Baptist University.<sup>135</sup> Of greater importance was Jackson's service on the Tennessee Court of Arbitration, a special tribunal of last resort created to assist the supreme court in eliminating its backlog of cases.<sup>136</sup> The statute creating the court expressly forbade the publi-

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the trial court could not commute the statutorily required sentence of death. STAT. TENN. §§ 4601, 5257 (Thomas & Steger 1872). The sentence was not popular in the community. Some 700 citizens signed a petition to the Governor asking that clemency be accorded McLean. *See* Jackson Sun, Jan. 7, 1876, at 3, col. 2.

133. Letter from Howell Jackson to Mary Jackson (Sept. 15, 1876).

134. 1 Minute Book 5 (W.D. Tenn., April 30, 1879). There is also other evidence of Jackson's professional abilities. *See, e.g.*, Diary of Robert Cartwell (Aug. 11, 1914) [TSA].

135. E. WILLIAMS, *supra* note 9, at 280. Jackson and his partner, Alexander Campbell, comprised two-thirds of the faculty, which was completed by state supreme court justice Thomas Freeman, against whom Jackson would later compete in Freeman's bid for renomination. Unfortunately, the school's records for that period have been lost or destroyed and nothing can be learned of Jackson's academic career.

136. This special appellate tribunal "of three persons learned in the law" was created by the state legislature on February 16, 1875. Act of Feb. 16, 1875, ch. 3, § 3, [1875] Tenn. Acts 55. Governor James D. Porter appointed Howell Jackson as one of the special judges in February 1875, which appointment Jackson enthusiastically accepted. Letter from Howell E. Jackson to Gov. James D. Porter (Feb. 22, 1875) [JDP].

Tennessee had previously experimented with such a court, and had in 1873 created a "Board of Arbitration," comprised of the chief justice of the state supreme court and "two persons of competent law knowledge" to hear appeals in cases remaining on the court's docket. H.R.J. Res. 45, [1873] Tenn. Acts 221. Except for the absence of the chief justice, the powers and duties of the 1873 and 1875 courts were much the same. The decisions of both courts were to be final, but jurisdiction under both acts had to be confirmed by all parties to the dispute. Interestingly, both acts provided that the decisions of the special courts were not entitled to any weight as precedent, except as the law of the case. These special courts as mechanisms for the elimination of backlogs were evidently well received as similar

caton of its opinions in the state reports and precluded use of the special court's opinions as precedent. The records of the court itself have been lost. One of Jackson's opinions, however, was commercially published in *Southwest Reports* at the request of a prominent Tennessee jurist. That opinion merits some attention.

The case, *Gosling v. Griffin*,<sup>137</sup> involved a suit by the indorsee of a note against the maker, who alleged its payment in defense. The case is important, not because of the legal question posed, but because it tells us something of Jackson's character and abilities. The trial court found for the defendant holding that he was entitled to notice of the assignment, and relied on an earlier decision of the Tennessee Supreme Court that had reached a similar conclusion under almost identical facts.<sup>138</sup> Jackson acknowledged that the earlier case was in point, yet reversed, refusing to follow the opinion of the Tennessee Supreme Court.<sup>139</sup> Although the Court of Arbitration was a court of last resort, it is somewhat unusual to see a special temporary arbitration court of limited jurisdiction refusing to follow a decision of the state's highest court.

Jackson's assertion of the special court's power to disregard the precedent established by the state supreme court was successful and his decision had an immediate impact in other courts. Within days of the decision it was cited by a trial court in Nashville as overruling earlier Tennessee precedent.<sup>140</sup> The Tennessee Supreme Court, in a subsequent case, reviewed and implicitly approved the decision in *Gosling*.<sup>141</sup> Despite the statutory prohibition, the opinion was cited by the courts of Tennessee as authority.<sup>142</sup> Some twelve years after the decision, one federal judge observed "[t]hat the case has become a leading one, and has been frequently followed and cited."<sup>143</sup>

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courts were created by subsequent legislatures. See Act of Mar. 21, 1877, ch. 69, [1877] Tenn. Acts 85; Act of Mar. 25, 1879, ch. 180, [1879] Tenn. Acts 224.

137. 85 Tenn. 737, 3 S.W. 642 (1875).

138. See *Vatterlien v. Howell*, 37 Tenn. (5 Sneed) 440 (1858).

139. *Gosling v. Griffin*, 85 Tenn. at 746, 3 S.W. at 645.

140. *Sawyer, Wallace & Co. v. Moran*, 3 Tenn. Ch. 35, 36 (1875).

141. *Richardson v. Rice, Stix & Co.*, 68 Tenn. 290, 292 (1878).

142. See, e.g., *Trigg v. Saxton*, 37 S.W. 567, 568 (Tenn. Ch. App. 1896); *Newman v. Aultman, Miller & Co.*, 51 S.W. 198, 202 (Tenn. Ch. App. 1899). Interestingly, the opinion has also been cited as authority by the courts of other states. See, e.g., *Wyoming County Bank v. Nichols*, 133 S.E. 129, 131 (W. Va. 1926); *Daniel v. Spaeth*, 168 S.W. 509, 513 (Tex. Civ. App. 1914).

143. *Exchange Nat'l Bank v. Johnson*, 30 F. 588, 595 (C.C.W.D. Tenn. 1887). Indeed, the court in that case appended to its own decision Jackson's entire opinion in *Gosling*. It should be noted, however, that Judge Hammond, presiding over the *Exchange National Bank* case, had been the winning counsel in *Gosling*, and that Jackson was sitting on the circuit court at the time of Hammond's decision in the later case.

In 1887 the state attorney general included the *Gosling* case in the official reports notwithstanding the express statutory prohibition against publication, with the note that "this case is reported on account of its importance, and by request of many members of the bar."<sup>144</sup>

Jackson's service on the Court of Arbitration was well regarded by the practicing bar. Many prominent lawyers opined that Jackson ought to be elected to a seat on the regular supreme court.<sup>145</sup> Jackson replied to such compliments stating that he "would not object" to the appointment if the court were to abandon its practice of riding circuit and sit permanently in Nashville.<sup>146</sup>

Not only would Jackson not object, three years later he would actively seek the Democratic nomination for the state supreme court. He confided to a friend on more than one occasion that to serve on the state supreme court was the "acme of his hope and ambition."<sup>147</sup> Jackson permitted his name to be placed before the convention in May 1878, as did the incumbent Colonel Thomas J. Freeman—Jackson's colleague on the Southwestern Law faculty and a Civil War hero who had been on the bench since 1870.<sup>148</sup> H. M. Doak, who two years earlier had become editor of the *Nashville American*, observed that Jackson consented to run "without eagerness," but having done so canvassed with energy.<sup>149</sup> The election was close; Jackson narrowly lost, garnering slightly better than forty-nine percent of the delegate votes.<sup>150</sup> Some maintained that in fact Jackson had won.<sup>151</sup>

All of the indicia—number of cases filed, identity of clients, type of case, respect of peers—seem to indicate that Jackson was a very successful attorney. In another realm, however, Jackson apparently did not do as well. Professor Maxwell Bloomfield notes in his study of the nineteenth century bar, "[s]uccess for the lawyer . . .

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Jackson's opinion in *Gosling* was also noted by one of the important commentators of commercial law of the day and was digested. See 1 DANIEL, NEGOTIABLE INSTRUMENTS § 830 (4th ed. 1891); 1 MEIGS DIG. 335 (2d ed.).

144. 85 Tenn. at 747.

145. Letter from Howell Jackson to Mary Jackson (April 22, 1875) [SHC]. See also Letters from Howell Jackson to Mary Jackson (April 21, 1875; April 3, 1875) [SHC].

146. Letter from Howell Jackson to Mary Jackson (April 22, 1875) [SHC].

147. J. HALLAM, DIARY OF AN OLD LAWYER 221 (1895).

148. For a biographical sketch of Colonel Freeman, see J. CALDWELL, *supra* note 28, at 309-11.

149. Doak, *Howell Edmunds Jackson*, in TENN. BAR ASS'N, PROCEEDINGS OF FIFTEENTH ANNUAL MEETING 76, 78 (1896).

150. Nashville Daily American, May 31, 1868, at 4.

151. Doak, *Mr. Justice Jackson*, 5 GREENBAG 209, 210 (1893).

did not necessarily imply large financial returns. . . ."<sup>152</sup> Jackson well illustrates this observation. On numerous occasions he complained that his fees were very difficult to collect.<sup>153</sup> In the fall of 1879, he wrote:

I am fast losing interest in the practice of law, which has run down so that it yields but little—hardly a support—and such litigation as there is has nothing either of value or interest in it. . . . If I could have some arrangement by which I could make enough to support myself and family . . . I would [leave] the practice of law.<sup>154</sup>

A later statement by Jackson noted that “[t]he law is yielding nothing at all and has run down so that it is not worth my time and attention.”<sup>155</sup>

Jackson seemed preoccupied with finances, and these difficulties were noted by others. Illustrative is General William Jackson’s observation of his brother’s financial problems in Howell’s decision to postpone a vacation trip to Belle Meade: “you know that pecuniary affairs weigh quite heavy with our dear brother and sister and it may be that he will want to practice there the month of June just to pay traveling expenses from Jackson to Belle Meade.”<sup>156</sup>

152. M. BLOOMFIELD, *AMERICAN LAWYERS IN A CHANGING SOCIETY: 1776-1876* at 146 (1976).

153. Letters from Howell Jackson to Mary Jackson (Sept. 11, 1876; Sept. 25, 1879; Oct. 5, 1879) [SHC].

154. Letter from Howell Jackson to Mary Jackson (Sept. 25, 1879) [SHC].

155. Letter from Howell Jackson to Mary Jackson (Oct. 2, 1879) [SHC].

156. Letter from William Jackson to Selene Jackson (Feb. 29, 1880) [SHC]. Henry, Howell’s oldest child, worked for a local concern opening and cleaning up the store. Letter from Howell Jackson to Mary Jackson (Oct. 4, 1879) [SHC]. Jackson’s eldest daughter, Mamie, was cautioned not to spend much on a planned trip to St. Louis—a trip which Jackson lamented came at a bad time. Letters from Howell Jackson to Mary Jackson (Oct. 2, 4, 10, 1879) [SHC].

The textual description of Jackson’s finances might be read as pertaining only to his professional law practice and not net worth from all sources of income. Records of the Madison and Shelby counties tax assessors’ offices indicate that Jackson owned property in their respective counties. As was indicated earlier, Jackson had been active in several business enterprises. Although most of the tax records for Madison County have been lost, there is some evidence that Jackson held property of value. For example, Madison County tax records for 1878 reflect that Jackson had personal property in one ward of the town of Jackson valued at \$4000. Following his nomination to the Circuit Court, Jackson acquired real estate in Davidson County, Tennessee. Moreover, there is some contradictory evidence as to Jackson’s wealth. A detailed description of the Belle Meade estate prepared in the 1800’s notes that the plantation was operated by the firm Jackson Bros., a partnership composed of Howell and W.H. Jackson. Annual operational expenses were some \$12,000 while gross receipts totaled approximately 40,000 per year. A 6 to 7% return on capital was generally expected. Thus, one cannot determine Jackson’s net worth with any precision by examining the success of his law practice alone.

## VII. ENTRY INTO POLITICS: THE STATE DEBT CONTROVERSY

Many historians of the post-War South have noted the important influence of Whig ideas and the prominent roles played by former Whigs in the Democratic Party—particularly its state credit wing—during this era.<sup>157</sup> Jackson, a pre-War Whig, found his move to the Democratic party an easy one, and, as before, appeared disinterested in political office. During their nominating convention of September 1876, the Democrats of Madison and Hardeman counties sought to nominate Jackson to the state senate, but he declined.<sup>158</sup> Moreover, Jackson's election to the legislature in 1880 appears not to be the result of any concerted effort by him to secure office. Indeed, it was almost fortuitous. Before focusing on his election, however, some attention should be devoted to the issues of the day.

Professor Robert Jones has characterized the state debt controversy as the dominant and most turbulent issue in Tennessee politics in the late 1870's and early 1880's.<sup>159</sup> During the 1820's and 1830's many states had issued or guaranteed bonds in efforts to encourage and foster economic growth through the development of internal improvements such as the construction of railroads, canals, and turnpikes. Governmental aid took the form of loans, stock purchases, land grants, and tax exemptions. Tennessee, like many of her sister states, participated in this subsidization of economic development, and by 1860 was one of the most heavily indebted jurisdictions. Yet there was little cause for concern; the projects underwritten seemed to be working well and contributing to the economic well-being of the state.

The Civil War brought about what became known as the state debt crisis. In addition to the loss of life, war brought about a complete reversal in the economic vitality of the state. Much of Tennessee was in a state of physical destruction. The War left the debt significantly higher than before, while the state's assets had drastically declined. The railroads, prime beneficiaries of the state's in-

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157. See C. WOODWARD, *supra* note 99, at 1-4, 26-28; Alexander, *Whiggery and Reconstruction in Tennessee*, 16 J. SO. HIST. 291-305 (1950). In Tennessee, pre-War Whigs were particularly active as Democrats in promoting a conservative response to the state debt controversy. One commentator notes that "old-line Whigs working in harmony with conservative and business-minded prewar Democrats dominated party councils until the late 1870's." R. JONES, *The State Debt Controversy in Tennessee, 1865-1883*, at 129 (Dec. 1972) (dissertation, Vanderbilt Univ.). Thus Jackson's change in political identification was one more of form than of substance.

158. Letter from Howell Jackson to Mary Jackson (Sept. 2, 1876).

159. R. JONES, *supra* note 107. This general discussion of the Tennessee debt controversy draws heavily on Professor Jones's work. Yet, debt controversy was not unique to Tennessee. For a description of the Virginia experience, see J. MOORE, *TWO PATHS TO THE NEW SOUTH* (1974).

debtedness, were in very poor condition, since much of the track and rolling stock had been destroyed during the fighting.

Following the war, the "Reconstructionist" government of Governor William Brownlow committed itself to internal improvement projects, particularly the reestablishment of the state's railroad network, as necessary ingredients for economic recovery. Fearing that the state might be called to honor its guarantees of railroad debt, Governor Brownlow urged the legislature to issue new bonds to meet the interest obligations under old bonds. The legislature responded, and over the next several years enacted numerous funding measures. Thus the amount of the state debt continued to escalate and, more importantly, became identified with the Brownlow government in the minds of many.

The election of 1869 brought an end to the fiscal policies of the Radical Republicans in Tennessee and a new constitution containing a provision expressly prohibiting the state from aiding private development projects.<sup>160</sup> Nevertheless, the serious problem remained of what was to be done with the state debt and how future interest payments were to be financed.

Initially, both political parties seemed to agree that the debt ought be paid, but by 1873 the state debt had become a partisan issue.<sup>161</sup> During the legislative session and ensuing months, three different groups seemed to emerge. First, those who thought the state had no choice but to honor its obligations felt as a pragmatic matter that Tennessee's future economic development depended on its credit standing in Eastern banking circles; repudiation would further undermine its already precarious position. Others objected to repudiation on a more moral plane, asserting that the state should keep its word. Secondly, those who urged the state to repudiate its debt obligations reasoned that the state could not afford present payment and postponement by new issues simply aggravated the problem. This position was also attractive to some because a majority of the debt was held by Northern and foreign interests.<sup>162</sup> The loss of slave property was used to justify the desire to avoid payment. Thus proponents of repudiation relied not only on economic hardship as a defense for nonpayment, but also on continuing sectional bitterness. A third group were those who, while

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160. TENN. CONST. art. 2, § 31.

161. At that time the state owed \$30,732,200, of which \$4,000,000 was past-due interest. Then Governor Brown estimated that the unpaid interest would cause the debt to increase by at least \$1,000,000 per year. R. JONES, *supra* note 107, at 23.

162. Indeed, one association of New York creditors alone claimed to represent owners of one-half of the outstanding debt. R. JONES, *supra* note 107 at 14.

opposed to repudiation, sought to avoid payment on a large number of "obligations" by urging very careful scrutiny to determine whether the securities had been initially issued in strict accordance with the law. It was thought that payment on a large number of bonds could be avoided in this manner.

The state's Republicans seemed united in holding that the state's obligations—at least the bona fide ones—must be paid, while the Democrats were sharply divided among the state-credit advocates of payment and a low-tax group whose members believed repudiation to be the best course. Jackson became closely identified with the state-credit wing of the Democratic Party.

Jackson did not seek office in 1880. As one contemporary observed: "Jackson was never a politician, had no taste for, made no effort in that direction."<sup>163</sup> The genesis of his nomination is interesting. During a public discussion of the state debt, Jackson mentioned to a friend that the audience should understand the issue better, and his friend called Jackson to the rostrum. One West Tennessee lawyer described his extemporaneous address as "full, clear, complete and exhaustive."<sup>164</sup> The speech was so well received that Jackson, despite his protests, was persuaded to run for the state legislature.<sup>165</sup>

When the legislature convened in January 1881, the most pressing issue was the selection of a United States Senator. Reflecting their division during the general election, the Democrats were unable to unite behind a single candidate. Senator James E. Bailey sought re-election, but his identification with the state-credit elements of his party made him unacceptable to low-tax Democrats. U. S. Postmaster General Horace Maynard was the most prominent Republican candidate who hoped to secure election by gathering unanimous Republican support coupled with some aid from state-credit Democrat lawmakers.

Balloting began on January 18, 1881. Republicans were unable to muster sufficient votes to elect Maynard or any other Republican. The Democrats were unable to unite behind a single candidate, and balloting entered its second week. Despite Jackson's earlier lack of

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163. HALLAM, *supra* note 147, at 221.

164. *Id.*

165. *Id.* See also J. PITTS, *PERSONAL AND PROFESSIONAL REMINISCENCES OF AN OLD LAWYER* 272 (1930). One contemporary has observed that Jackson's election to the legislature was secured through corruption. Diary of Robert H. Cartwell (Aug. 9, 1895) [TSA]. The diarist, however, absolves Jackson of any guilt: "Jackson himself did not use the money nor was aware of it, but it was done." *Id.* Cartwell cites no evidence in support of this observation, nor is this author aware of any.



political ambition, the flurry of campaigning and speechmaking may have sparked a desire to seek higher office.<sup>166</sup>

On January 26, Republican legislator and former Congressman R. R. Butler announced that since it was clear that no Republican was going to be elected, he was going to support freshman Democrat Howell E. Jackson. The announcement caused a great deal of confusion and many Democrats changed their votes to Jackson. Many Democrats feared that a Republican would be elected unless the warring factions of the party could agree on a candidate. Moreover, many Republicans followed Butler's lead and voted for Jackson.<sup>167</sup> When the vote was concluded, Jackson was elected with sixty-eight of the ninety-eight votes cast. Many Republicans sought to justify their abandonment of their party's candidate. Jackson was, in the words of one, "an unprovincial, unsectional, broad, liberal, Federal Democrat, a worthy successor of the present Senator, who will represent us nationally, as well as locally, in these times of public progress."<sup>168</sup> Another wrote that "as it became evident that we could not succeed, it was the duty of our party to vote for the best man in your party."<sup>169</sup> As Professor Roger Hart has recently noted: "The Republicans, ousted by the Redeemers a decade before, sent one of them to the Senate in 1881."<sup>170</sup>

The state debt controversy would not be settled for some time. Following his election to the Senate, Jackson continued to be involved in the dispute. During the election of 1882, after the state-credit group had abandoned the regular Democratic party, Jackson canvassed the state in support of the candidacy of John Fussell.<sup>171</sup> This obviously evidenced a commitment to the cause since Jackson, a Democrat, was opposing his party's candidate while many prominent state-credit Democrats, including Jackson's colleague in the Senate, Isham Harris, elected to remain faithful to the party.

### VIII. CONCLUSION

Several points, perhaps themes, emerge from an examination of Jackson's early professional career. First, it is interesting to observe the extent to which Jackson's early career, particularly that

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166. One report noted that Jackson had developed "a bad case of the Senatorial itch, and live[d] in hourly expectation of being taken up as the only Democrat who [could] be elected." R. HART, *supra* note 99, at 50.

167. R. JONES, *supra* note 107, at 118.

168. R. HART, *supra* note 99, at 51.

169. *Id.*

170. *Id.*

171. Jones, *supra* note 157, at 330.

in post-War Memphis, reflected the commercial and industrial outlook of the Whiggish Redeemers—the New South. This same perspective was to characterize Jackson's public political career some years later, suggesting that the later political career of at least this one lawyer was in part shaped by the political interests of his clients. If Jackson had represented debtors, bankrupts, and poor farmers, perhaps his political career—if it came about—would have been different. Secondly, despite the professional success Jackson enjoyed in his early career, it is interesting to observe that financial rewards did not seem to accompany a professional reputation. One can make this same observation about Jackson's later public career. There is evidence that despite his poor health, Jackson remained on the Court for financial reasons,<sup>172</sup> and that he might have retired from the Supreme Court if he could have been assured an early pension.

Thirdly, Jackson evidenced from an early age a keen desire to secure judicial office. While still in school Jackson had indicated judicial ambition. He actively sought a judicial appointment in the Confederate military, and campaigned for a seat on the Tennessee Supreme Court. Moreover, he accepted a position on the Court of Arbitration and numerous special appointments to the Madison County chancery court and state circuit court. Jackson's ambition seemed professional rather than political. He declined the Democratic nomination to the state legislature in 1876, and did not seek election to the state senate in 1880. His election to the United States Senate in 1881 was fortuitous. As Attorney General Richard Olney later observed: "He was not so much a Senator who had been appointed Judge, as a Judge who had served for a time as Senator."<sup>173</sup>

Jackson's career further seems to reflect the emerging sense of professionalism at the bar. His education, receivership in the Confederate District Court, committee service, academic appointment, special judgeships, standing at the bar, and even his campaign for a military judicial position, underscore Jackson's sense of professional identity. His selection as partners of men who also were imbued with the sense of professionalism then emerging at the bar accentuates this attachment. In this sense Jackson seems to epitomize the strong professional aspiration and identification described

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172. Letter from Gen. William Jackson to Chief Justice Melville W. Fuller (Jan. 28, 1895); Letter from Chief Justice Melville W. Fuller to Attorney General Richard Olney (Jan. 30, 1895); Letter from Howell Jackson to Chief Justice Melville W. Fuller (Feb. 28, 1895) [MWF].

173. Address by Attorney General Richard Olney, U.S. Supreme Court (Nov. 25, 1895), reprinted in 159 U.S. 701 (1895).

by Robert Wiebe in his study of the emerging middle class of late nineteenth century America.<sup>174</sup>

Another interesting aspect of Jackson's life is his sense of commitment. His effort to obtain the military judgeship, whose task it would be to enforce discipline in a sadly demoralized army in the closing days of the War; his service as a special judge in Madison County when the imposition of the death penalty would be required of the court even when the public opposed the execution of the defendant; his refusal to support his party's candidates when he opposed their policies—even after his election to the United States Senate—all seem to exemplify this trait. Even in the last months of his life, Jackson left his home in Tennessee and traveled to Washington to sit with an equally divided Court at the second hearing of the *Income Tax Cases*, knowing full well that the trip would hasten his death.<sup>175</sup>

Jackson's career is an interesting object of study, blending as it does a vital and successful professional career as a practicing attorney, a political career culminating in his election to the United States Senate, and judicial tenure on the two highest federal tribunals in the country. Future study of Jackson's terms in the Senate, Circuit Court, Court of Appeals, and Supreme Court may provide opportunities to test the effects of Jackson's early professional career on his later public life. Moreover, Jackson's hybrid politics and his respective appointments by Presidents Cleveland and Harrison may tell us more about the politics and process of appointment during this period of our history.

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174. R. WIEBE, *THE SEARCH FOR ORDER* 111-32 (1967). One must observe that Jackson's sense of professional identity seems in part the result of his father's very early appreciation of professionalism. See notes 9-20 *supra* and accompanying text.

175. See generally Schiffman, *supra* note 5.