



CHRONICLE

The Newsletter of the Tennessee Supreme Court Historical Society • Fall 2

TSCHS Celebrates Anniversary of Supreme Court Building And Opening of Supreme Court Museum *By Linda W. Knight*



Note About This Special Edition of the TSCHS Newsletter

By Linda W. Knight

Normally, the Society publishes a substantial newsletter each Fall, shortly before its Annual Banquet.

This year, instead of the Banquet, the Society is holding a very special event on December 4, to commemorate the 75th anniversary of the Supreme Court Building in Nashville and celebrate the opening of the Tennessee Judiciary Museum, to be located in the former Supreme Court Library.

Consequently, this edition of the Newsletter is abbreviated, containing an article previewing the December 4 event, but focusing on the 2011 TSCHS Banquet and Sam Elliott's extraordinary speech.

After the event, a full Newsletter will be published, featuring coverage of the December 4 celebration and the usual selection of articles that we publish, including coverage of the installation of Supreme Court Chief Justice Gary R. Wade, succeeding Justice Cornelia A. Clark.

The Tennessee Supreme Court Historical Society will host a significant and unique event in lieu of this year's traditional banquet.

December 4, 2012 marks the 75th anniversary of the Supreme Court Building at 401 Seventh Avenue North in Nashville. Coinciding with this anniversary will be the opening of the Tennessee Judiciary Museum, located in the splendid two-story room that once housed the Supreme Court Library. For the first few days the Museum is open, visitors will have a once-in-a-lifetime opportunity to view the originals of the three Tennessee Constitutions – from 1796, 1835 and 1870.

The evening will begin with a reception at the Hermitage Hotel, beginning at 6:00 P.M. A preview tour of the Museum, including the very first opportunity to view the Constitutions, will follow.

In addition to the Society, the Museum is a project of the Tennessee State Library and Archives and the Tennessee State Museum. The Society is grateful to these institutions for their marvelous support and indispensable contribution.

TSCHS 2011 Banquet

Court's Confederate History and Tributes to Deceased Justices Fones and Birch

By Linda W. Knight

The TSCCHS held a very successful Sixth Annual Recognition Banquet on October 4, 2011, preceded by a reception. The invocation was given by Linda W. Knight. Attorney General and Nominating Committee Chair Robert E. Cooper, Jr. announced the officers and Board members for the 2011-12 year. Tributes to retired Justices William H. D. Fones, Sr. and Adolpho A. Birch, both of whom passed away in 2011, were delivered, respectively, by Justices Frank F. Drowota, III and William M. Barker.

Supreme Court Clerk Michael W. Catalano and Dr. Wayne Moore, Assistant Archivist for the State of Tennessee, reported on the significant progress that has been made on the Society's ongoing project of preserving and archiving the records of the Court going back to the 1700's. During the reception preceding the Dinner, attendees had the rare opportunity to see a spectacular exhibit of documents and artifacts from historic Supreme Court cases.

The highlight of the evening was a fascinating speech by Sam Elliott, a member of Gearhiser, Peters, Elliott & Cannon, PLLC in Chattanooga and a former President of the Tennessee and Chattanooga Bar Associations. Mr. Elliott, introduced by Justice Barker, is a widely published historian. His highly descriptive speech educated the audience about the Tennessee court system during the War Between the States. Mr. Elliott used historical ironies and context, descriptions of vivid and memorable personalities, and the comments of reporters in newspapers to bring history to life. He graciously permitted us to publish the transcript of his entire speech in this Newsletter, as it would have been



impossible to choose what to leave out in a mere summary of his presentation.

In this Newsletter, you will also find a selection of pictures from the Dinner, including the artifact exhibit.

Confederate Courts

Speech by Sam Elliott, Esq.

*Delivered at Tennessee Supreme Court
Historical Society Dinner, October 4, 2011*

I'd like to set the stage for our subject tonight by briefly reviewing some of the many contradictions relating to Tennessee's role in the Civil War.

- In 1832, Tennessee's most famous son, Andrew Jackson, threatened to hang the nullifiers in South Carolina from the highest tree in that state (presumably a palmetto), and denied that there was a right to secede from the Union. Yet, the leaders of the movement for secession in Tennessee in 1861 were Jacksonian Democrats.
- A vote in February 1861 soundly rejected the notion that Tennessee might leave the Union. But a vote just 4 months later, in June, approved leaving the Union.
- East Tennessee voted against secession both times, yet asked the state government to be allowed to secede and form a new state after the vote in June, 1861. Our secessionist state government became anti-secession and vetoed that request.
- While Tennessee left the Union at the start of the Civil War, at the end of it, a Tennessean, Andrew Johnson, was the President of the United States.
- During a large segment of the War, the areas of the state that were in favor of secession, Middle and West Tennessee, were under Union control, while the area that opposed it, East Tennessee, was under Confederate control.

All of these little ironies make the story of Tennessee's Civil War experience more complex than that of just about any other state.

The starting point for any discussion of Tennessee's Confederate court system is the Constitution of 1835.

Prior to 1835, the judiciary was not an independent coequal branch of the state government. Instead, it existed completely at the discretion of the General Assembly.

But the Constitution of 1835 provided for "one Supreme Court, and such inferior courts as the legislature shall from time to time ordain and establish." There were to be three judges, one from each of the Grand Divisions, and the Court was to hold sessions at one place in each Grand Division. The judges of the Supreme Court were elected for a term of twelve years.

Subsequent legislation spelled out the boundaries of the Grand Divisions, provided that court was to be held twice a year in Nashville, and once in each of Jackson and Knoxville, and that the judges were to be paid at \$1,800 a year.

Of the inferior courts established by the Legislature, the most inferior, in a manner of speaking, were those of the Justices of the Peace. These officers had jurisdiction over certain estate administration matters and small claims. Acting as a body, they constituted the County or Quarterly Court, and therefore had an administrative as well as a judicial function.

There were also Chancery Courts, with traditional equity jurisdiction, and the Circuit Courts, of general civil jurisdiction and jurisdiction over criminal matters. Unlike today, the Circuit Courts' judicial districts were not coextensive with the Chancery divisions.

That was the extent of the so called "inferior" courts. There was no Court of Appeals.

On the federal side, the three federal districts -- East, Middle and West -- that we have today have been in place since 1839, although in 1860, there was a but a single United States District Judge for all of Tennessee.

The sectional struggle over slavery had waxed and waned ever since the Constitutional Convention of 1787. Tennessee was a slave state, but Tennesseans believed in the Union -- so long as the government of the Union did not threaten the economic or social peace of Tennessee citizens.

Unfortunately, one of the cornerstones of the Tennessee economy and social structure in the years before 1860 was the institution of slavery.

While most of Tennessee's enslaved population was in Middle and West Tennessee, and while there were many more slaveholders in Middle and West Tennessee than East Tennessee, the vast majority of Tennesseans, in all three Grand Divisions, supported the institution of slavery.

We all know that the sectional crisis was brought about by the election of Abraham Lincoln in November 1860, and the secession of several states in reaction to that.

At that time, our Governor was Isham Green Harris. Harris, "Green" to his family and friends, was a secessionist. (I'd probably want to go by Green rather than Isham myself.)

Harris called the Legislature into session in January 1861, and eventually a vote was called for in early February on the issue of calling a convention to consider the state's relationship with the Union. Tennesseans at that time decisively rejected the idea of secession.

But Tennesseans were what some historians call "conditional Unionists." In other words, "we'll stay in the Union, so long as the Federal government does not try to use force against the Southern states that have already seceded." And so, even

though it was the Confederate government that fired the first shot at Ft. Sumter in mid-April 1861, President Lincoln's call for 75,000 troops was enough to tip Tennessee into the secessionist column.

Governor Harris responded defiantly to the call for troops, and said in an emotional meeting at the Capitol that if being in favor of secession was treason, then before God he was a traitor. That same week, United States District Judge West Humphreys charged the federal grand jury that Lincoln's request for troops was unconstitutional, that Harris was right to refuse him, and that in the current state of the country, there was no such thing as treason.

In late April and early May of 1861, the Legislature went into secret session for several days, and when it was over, the public learned that the state was raising an army, had concluded a military alliance with the Confederacy, and the Legislature had declared the state's independence, subject to a ratifying vote on June 8, 1861.

So, technically, Tennessee did not secede. In fact, the Legislature specifically stated that it took no position on the "abstract doctrine of secession." Rather, Tennessee declared its independence from the United States.

Tennessee's Declaration of Independence was rooted in Article I, Sections 1 and 2 of the state Constitution, which then, as now, provided that the people had the right to "alter, reform or abolish the state government in such manner as they may think proper."

Even now, you each have a constitutional right to revolution.

The Tennessee Constitution, then, as now, was impossible to amend on the fly. But if Tennessee were to leave the Union, there were several bothersome references in the State Constitution that referred to Tennessee as one of the United States, and among other things, required state officers, such as the Governor, members of the Legislature, and the judiciary, to be United States citizens.

Instead of changing the Constitution, the General Assembly passed legislation that repealed any aspect of Tennessee law that required the public officers of the state to swear to support the Constitution of the United States.

More importantly to our subject tonight, to further sever ties with the North, the General Assembly passed a measure that "no suits, whether pending or hereafter brought, in behalf of or for the benefit of any citizen or citizens of either of the states of the late United States of America (except Kentucky, Missouri, and Maryland), now adhering to the Government of which A. Lincoln claims to be President, shall be maintained in the courts of law or equity in this State."

Furthermore, all laws that authorized administrators or executors to be from one of the Northern states were repealed.

Thus, in the space of about 6 weeks, state courts that had functioned as part of the legal system of the United States became state courts that functioned as part of the legal system of the Confederacy.

And this was confirmed when the electorate voted to ratify the Declaration of Independence and to join the Confederacy on June 8, 1861, although, as we all know, East Tennessee wanted to remain in the Union.

And as frosting on the cake, West Humphreys, United States District Judge for the several districts of Tennessee, became the Confederate States District Judge.

So, with that background, what effect did Tennessee's joining the Confederacy have on the operation of the courts? There were several developments that we will explore, that indicate that very little went on in the time Tennessee was a Confederate state.

First, the Legislature requested, but did not mandate, that the Supreme Court and the Circuit and Chancery Courts suspend hearing civil cases for twelve months. Only criminal cases and cases where both parties wanted the court to proceed were approved. The purpose of the resolution was to suspend the operation of the courts until conditions got more settled for civil litigation.

This appears to have been honored by the courts. A notice appeared in the Nashville Union & American for August 15, 1861 from Chancellor Bromfield Ridley of the Third Chancery Division in Middle Tennessee. Chancellor Ridley said that in accordance with the request of the Legislature, he would be hearing only cases that were ex parte in nature, and such cases that the parties on both sides might agree to try.

Of course, conditions were unsettled because there was a civil war on. Even before Tennessee joined the Confederacy, it began raising troops to defend the state against an anticipated Yankee incursion. And that need for troops was another significant factor in the operation of the Confederate courts.

According to the State Library and Archives, there were 1,067 lawyers in Tennessee in 1860. In preparing for this talk, I analyzed biographical materials for a number of lawyers prominent enough to be members of the pre-war General Assembly.

Of those men -- and there were approximately 200 or so of them who were of what one would call military age in 1861 -- 166 went into the Army. By rough extrapolation, one could estimate that anywhere from 60% to 75% of the lawyers in Tennessee left their practice for military endeavors.

A scholar who did an analysis of the backgrounds of a group of 100 East Tennessee Confederate leaders -- politicians, field grade officers, public servants -- found that 22 of that 100 were lawyers, and another 4 were law students. There's evidence, then, both statistical and anecdotal, that a significant part of the new Army's leadership were lawyers.

Furthermore, some lawyers, primarily in East Tennessee, left their practices because they were Unionists. For example, Andrew J. Fletcher, who at times lived in Carter, Cocke, Greene and Bradley Counties, went as a refugee to Indiana during the War, but returned in 1865 to become Secretary of State for five years.

Incidentally, Fletcher is said to have coined the term "carpetbagger."

Future governor DeWitt Clinton Senter was arrested and held prisoner by the Confederate government for six months, although ironically it was he who ended radical Republican rule during the relatively brief period of Tennessee's reconstruction.

In all, about 115,000 Tennesseans served in the Confederate Army, and another 31,000 in the Union Army.

When one considers that there were approximately 400,000 white males of all ages in Tennessee in 1860, it's easy to see that the Legislature was right that things were unsettled -- to the effect that most of the lawyers and many of the litigants, as well as a number of judges and clerks and potential jurors, were in the Army.

This is confirmed by an item in the May 16, 1862 Athens Post, which reported on a court date in Monroe County that week. There were few people in court on this occasion. "The truth is a large portion of the male population has gone to the wars. Nobody much account left at home except the womenfolk who are cultivating the fields in the absence of their husbands and brothers."

So the lawyers were in the Army. Much of the court personnel were in the Army. Most of the potential litigants were in the Army. It would have been hard to conduct a court system under such circumstances.

Another significant factor that held the Confederate court system back was the invasion of the state by Federal forces, and the Confederate reaction to that invasion.

Tennessee remained intact as a Confederate state until the Federal invasion of February 1862, where, by the fall of Ft. Henry and Ft. Donelson, large portions of the state fell out of Confederate control. At least until then, and in Confederate-held areas thereafter, it appears that the business of the courts was indeed limited to criminal cases, estate administration, sequestration sales and the like.

In East Tennessee, this was reinforced on April 8, 1862, two

days after the start of the Battle of Shiloh, when Confederate President Jefferson Davis suspended civil jurisdiction for all cases except administration of estates, probate of wills, partition of property, appointment of guardians and the like. He also suspended the writ of habeas corpus. This order was in effect until October 4, 1862.

One of the criminal cases that continued during this interval was reported by the Athens Post of Sept. 19, 1862, although I doubt all of the cases were this interesting. The reporter sat in on a case tried in Benton, the county seat of Polk County. A preacher was charged with “yielding to the promptings of the world, the flesh and the devil and of being concerned with things below more than things above.”

The reporter wrote that “the trial excited a great interest, and excited the grandest display of forensic eloquence as has been our good fortune to listen to.” The charge of the honorable judge was pointed, and as the correspondent left, the jury was still debating the case under the shade of the locust trees outside the courthouse. I’m disappointed to say that I could not find an account of how that trial turned out.

A review of the East Tennessee newspapers of 1862 and 1863 shows that there are quite a number of estate matters, attachments, sequestration sales, and notices by publication for those matters, and even one divorce. But in keeping with the request of the Legislature and, for a while, the order of President Davis, normal civil cases seem to have been either at a standstill or at an extremely low level.

The most significant civil case in Confederate-held East Tennessee I was able to find related to the draft. The Confederacy was in need of soldiers, and the Sheriffs and the County Courts had significant duties in that regard. In this particular case, the Circuit Judge and the Chancellor sat together on a habeas corpus case and determined that the Deputy Clerk and Master of Bradley County was exempt from being drafted under Confederate law. There may have been a little bit of home cooking there; but the case does illustrate the problem that the War was causing for the normal functioning of the courts.

Legislative fiat and request, lack of lawyers and litigants, disruption by invasion and the reaction thereto, then, all limited what went on in Tennessee’s “inferior” Confederate courts.

Before I turn to the Supreme Court, I would like to spend a minute on the operations of the Confederate States District Court for Tennessee.

As I mentioned, Judge West Humphreys, the United States District Judge, became the Confederate District Judge, without going through the formality of resigning the Federal office he held by lifetime appointment. The United States Congress took a dim view of these shenanigans, and impeached him on charges that he had publicly called for secession, given aid for the armed rebellion, conspired with

Jefferson Davis, served as a judge for the Confederacy and, acting in that capacity, ruled for the confiscation of the property of Military Governor Andrew Johnson and U. S. Supreme Court Justice John Catron, both of whom, of course, had remained loyal to the Union. As a result of his trial in absentia in the Senate, he was removed as United States District Judge in 1862.

While as Confederate judge, Judge Humphreys was primarily limited to East Tennessee, and while most of his cases were sequestration cases, he did on occasion exercise his habeas corpus powers to actually protect the rights of East Tennessee unionists who were the victims of overzealous Confederate authorities there.

Now, I want to conclude with a review of the Tennessee Supreme Court during these “unsettled” times. At the time of secession, or independence, the Tennessee Supreme Court had three Justices, each representing one of the three Grand Divisions.

Robert J. McKinney was the East Tennessee Justice, and had served on the Court since 1847. An immigrant from Ireland who had practiced law in Rogersville, Greeneville and Knoxville, McKinney seems to have opposed secession and was a reluctant adherent to the rebel cause, although in 1862 when he was up for reelection, it was made out he was an enthusiastic secessionist.

Unquestionably loyal to the Confederacy was large-bodied Archibald Wright of Memphis, a close ally of Governor Harris, who had appointed Wright to his seat on the Court when Harris’s brother, Justice William R. Harris, died from injuries in a steamboat explosion in 1858. Justice Wright had two sons in the Confederate Army, and it appears that from the start he was much more concerned with military than judicial matters.

The Middle Tennessee representative on the Court was one of the most illustrious names in Tennessee legal history, Robert L. Caruthers. On the bench since 1852, Caruthers had been Clerk of the Tennessee House of Representatives, Attorney General for his circuit, served in the Legislature and in Congress. He took a leading role in founding Cumberland University in Lebanon, and a few years later, the Cumberland University School of Law. Caruthers was also quite pro-Confederate, and quickly resigned his seat on the Court to become a member of the provisional Confederate Congress.

Governor Harris appointed Edwin H. Ewing to Caruthers’ place, but Ewing only served during the September 1861 term in Knoxville, which it appears wasn’t much of a term.

The Court met on September 9, and Justice McKinney administered the oath of office to Ewing. But the reporter for the Knoxville Register observed “that there is a general feeling among the members of the bar, and of the suitors in court, owing to the state of the country, and the absence of

Judge Wright, to postpone all litigated cases to a future term.”

There was an election in October 1861 to fill out the rest of Justice Caruthers' term, and William F. Cooper of Nashville was elected.

There was a December 1861 term in Nashville, but there is little evidence as to what it did. In fact, for all of 1861, there are only two reported cases, one from the term in Jackson in April 1861, Jennings v. Joiner & Norris, 41 Tenn. 645, having to do with the steamboat Naomi, and one from the September term in Knoxville, Taliaferro v. Wright, 1 Shannon 178, relating to the multifariousness of pleading.

But there are things that would lead one to conclude that the War disrupted matters pretty seriously, especially as it related to keeping records of what the Supreme Court did.

For example, we know that Justice Caruthers had already resigned before the September term, yet the published opinion from Knoxville in Shannon's Reports shows him as its author.

The April 16, 1861 edition of the Memphis Appeal contains a letter reporting from the proceedings at Jackson that tells us that on April 13, “the Supreme Court is still in session, and the judges are deciding cases with their usual celerity. The stay law of the last legislature they have knocked into ‘pi,’ deciding it to be unconstitutional and void in every particular.”

The April 23, 1861 edition of the Appeal indicates that the Supreme Court at Jackson decided five cases relating to the claims of the heirs of Gen. James Winchester dealing with the title to real estate in Memphis and its suburbs, at least relating to the original proprietors and their heirs. One would think that that these two cases would be significant enough to be reported. Of course, our Attorney General and Reporter, John Waller Head, became a colonel in the Confederate Army in 1861. The Jennings case, relating to the Naomi, was actually reported in volume 1 Coldwell, and Coldwell was the first Attorney General after the War.

Clearly, the War disrupted the Court's ability to decide cases and report its decisions.

There was a special term of the Court set in Knoxville for March 1862, but Justice McKinney was the only Justice to attend. He opened court at the first of the week, and appeared each day, but his colleagues did not appear.

Here's a hint why: Nashville was an occupied town at that time, and the Federals had severed Tennessee in two by their control of the Tennessee River. We know that Justice Wright was with the Confederate Army at that time, because General Frank Cheatham mentioned him in his report of the Battle of Shiloh in early April. I couldn't find anything about Justice Cooper's whereabouts, but if he was in Nashville, the Union authorities there wouldn't have been inclined to let him go conduct a Confederate court in Knoxville.

Even though Jackson stayed in Confederate hands until June 1862, the map shows it was effectively behind enemy lines, so there was no court there for the April term, 1862.

The final term we have evidence of is the regular term in Knoxville for

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September 1862. A Deputy Clerk opened court for a week from September 8 to September 13, 1862 in Confederate Knoxville, but not even Justice McKinney showed up.

And that was the end of the Tennessee Supreme Court until the spring of 1865, when the civilian state government was reconstituted under Unionist control.

What happened to the Justices of the Confederate Supreme Court after the War?

Justice McKinney was accused of having Union proclivities, which he may indeed have had, but was reelected in a Confederate election in 1862, after protesting his loyalty to the "Cause." He died in 1875, having assembled a good-sized estate.

Justice Wright had two sons in the Rebel Army, and one was killed serving in his artillery battery at the Battle of Murfreesboro. Justice Wright was consulted as sort of an unofficial Attorney General by Governor Harris on a matter of state government in 1863, and stayed with the Confederate Army of Tennessee to the end. He lost a good portion of his substantial wealth in the War, and died in 1884. His surviving son eventually became the United States Secretary of War, Governor of the Philippines, and Ambassador to Japan. His oldest daughter married William C. Folkes, who himself became a Justice of the Tennessee Supreme Court.

Justice Caruthers only served a term in the provisional Confederate Congress, and was the choice of Confederate Tennesseans to follow Governor Harris in 1863, but could not constitutionally take his seat, because under the Constitution of 1834 a Governor could only take office while the General Assembly was in session. He died at the age of 82, in the words of his memorial in Tennessee reports, "without a ruffle to disturb his life, or an enemy to disturb its happiness and enjoyment."

And Justice William F. Cooper got a second chance. The Fourteenth Amendment kept judicial officers of the Confederacy from serving again, but there was a general amnesty enacted by Congress in 1872. He was elected Chancellor right after that it seems, and then elected again to the Supreme Court in 1878, served six years, and eventually died in 1909.

After the War, the present and future lawyers and court personnel came home from the Army, some, like future Governor John C. Brown of Giles County, resuming their practices, some, like William E. Winstead of Co. C 55th TN Infantry, becoming Williamson County's first County Court Clerk after the Civil War. I have been told by a mutual friend in Franklin that Mr. Winstead was the great, great, great grandfather of our Chief Justice, [Cornelia A. Clark]. And some veterans themselves became Justices of the Tennessee Supreme court, nine in all. The most illustrious included Peter Turney, a veteran of General Lee's Army of Northern Virginia, who resigned his seat as Chief Justice to become Governor, and Horace Lurton, who took Turney's place as Chief Justice. Lurton served as a lieutenant in the 35th Tennessee Infantry and later went on the Sixth Circuit Court of Appeals, became Dean of the Vanderbilt Law School, and eventually an Associate Justice of the United States Supreme Court.

The story of Tennessee's Confederate Courts is one where the norms and practices of the past could not keep up with an attempted revolution, invasion, and the disruption of society caused by war. Perhaps the last best word on the subject was stated by the Supreme Court in *Smith v. Isehour*, 43 Tenn. 214, an 1866 opinion, wherein the Court observed that Tennessee's Confederate experiment "culminated in . . . war; the authorities controlling the federal government triumphed, and the question is, we hope, finally and forever settled by that tribunal [that is, war] from which there is no appeal."

1 This speech is printed with permission of the author. Mr. Elliott, a member of Gearhiser, Peters, Elliott & Cannon, PLLC in Chattanooga and a former President of the Tennessee and Chattanooga Bar Associations, is a noted historian and is widely published. He is Chairman of the Tennessee Historical Commission and a member of the Tennessee Civil War Preservation Association. He is also a Board member and Past President of the Friends of the Chickamauga and Chattanooga National Military Park and a member of Historians of the Western Theater. An article derived from this speech was published at page 28 of the January 2012 issue of the Tennessee Bar Journal, Vol. 48, No. 1; see <http://www.tba.org/journal/archive>.

TSCHS MEMBERSHIP APPLICATION

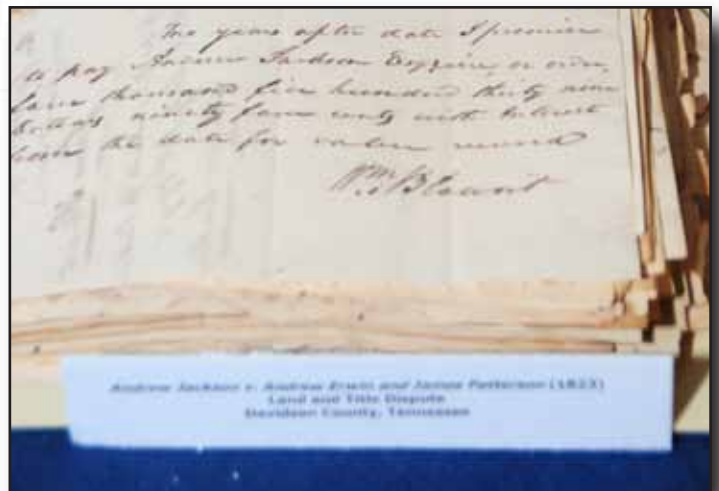
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2011 Banquet



2011 Banquet



2011 Banquet



to what extent...

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Dr
L. Howell

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until the deposition is taken, where
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by Nathaniel H. Darby

Phil^d June 11th 1796

and after date I promise
- Jackson Esquire, or order,
five hundred thirty nine
dollars cents with interest
for value received

Wm Blount