



2004

## Courts and Lawyers on the Arkansas Frontier

Lynn Foster

University of Arkansas at Little Rock William H. Bowen School of Law, [lcfooster@ualr.edu](mailto:lcfooster@ualr.edu)

Follow this and additional works at: <https://lawrepository.ualr.edu/lawreview>



Part of the [Common Law Commons](#), [Courts Commons](#), [Jurisdiction Commons](#), and the [Legal History Commons](#)

---

### Recommended Citation

Lynn Foster, *Courts and Lawyers on the Arkansas Frontier*, 26 U. ARK. LITTLE ROCK L. REV. 543 (2004).  
Available at: <https://lawrepository.ualr.edu/lawreview/vol26/iss3/7>

This Article is brought to you for free and open access by Bowen Law Repository: Scholarship & Archives. It has been accepted for inclusion in University of Arkansas at Little Rock Law Review by an authorized editor of Bowen Law Repository: Scholarship & Archives. For more information, please contact [mmserfass@ualr.edu](mailto:mmserfass@ualr.edu).

Lynn Foster\*

I. INTRODUCTION

The Louisiana Purchase annexed millions of acres of land west of the Mississippi to the United States. From the Gulf of Mexico to Canada, the common law legal system of the United States replaced the civil law system of France and Spain, the previous sovereigns of the scattered European posts and settlements. The common law system of courts, judges, attorneys and juries was imposed over this unruly frontier. White Americans, ex-French and Spanish subjects, Native Americans, and slaves petitioning for freedom are all to be found on the dockets of these courts, which some have characterized as “discouragingly primitive” and “crude.”<sup>1</sup>

The record books<sup>2</sup> and court files<sup>3</sup> of the Arkansas Post courts from 1808 to 1814 reveal how this new judicial system was imposed on the

---

\* Professor of Law at the University of Arkansas at Little Rock William H. Bowen School of Law. The author is indebted to Judge Morris Arnold, the foremost authority on the law in colonial and territorial Arkansas, and Professor S. Charles Bolton of the UALR History Department, both of whom reviewed the manuscript and suggested various changes. Lynn Morrow and Greg Bast of the Missouri State Archives provided access to the General Court records and generously made photocopies of case files. Linda Pine and the staff of the UALR Archives also supplied photocopies. The author also thanks Russell Baker at the Arkansas History Commission, Kathryn Fitzhugh at the UALR/Pulaski County Law Library, and research assistant extraordinaire Matt Wells. Work on the Arkansas Territorial Records and Briefs Collection is being made possible by a grant from the Donaghey Foundation. A slightly different version of this article was published at 42 ARK. HIST. Q. 289 (2003) and is reprinted here by permission.

1. ANTON-HERMANN CHROUST, 2 THE RISE OF THE LEGAL PROFESSION IN AMERICA, 92–128 (1965). For other discussions of law on the frontier, see LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW (2d ed. 1985) and WILLIAM FRANCIS ENGLISH, THE PIONEER LAWYER AND JURIST IN MISSOURI (21 University of Missouri Studies no. 2, 1947).

2. Clerks kept the record books of these courts. Each day the clerk would enter the proceedings: for example, when the court convened; the names of the presiding judges; the names of the grand jurors summoned, those who failed to appear, and how they were sanctioned; the outcome of each complaint brought before the grand jury; and if a trial, the names of the jurors and the verdict. As each case was called the clerk noted its disposition, such as whether it was continued to a later day or term, or whether it was dismissed. The books also contain other business of the courts, such as admitting attorneys to practice, granting licenses to ferry operators, commissioning surveys for roads, approving reimbursements to the sheriff, etc. Between 1808 and 1814, the courts of quarter sessions and of common pleas kept separate books. See generally Records of the Court of General Quarter Sessions, District of Arkansas [hereinafter Quarter Sessions] and Records of the Court of Common Pleas, District of Arkansas [hereinafter Common Pleas] (both on file at the Arkansas History Commission, on microfilm).

3. The court files consist of documents filed by attorneys with the court clerks, including pleadings, motions, affidavits, and depositions; copies of various instruments such as

community of the Arkansas Post and the surrounding territory. Studying the workings of those early courts, their officers and suitors, and the earliest cases not only sheds light on the practice of law on the southwest frontier, but also opens a window on life in Arkansas during the first two decades of the nineteenth century, a period about which we know little.<sup>4</sup> This article discusses the formation and structure of those early courts, some of the earliest judges and attorneys (most of whom were laypersons), and traces the career of the first law-trained lawyer began his practice at the Arkansas Post. This article relates the stories of several of the earliest disputes involving lawyers and judges in this frontier court. The information in these files has been lost to history and is revealed here for the first time in nearly two centuries.

## II. THE FRONTIER COURT SYSTEM

In 1803 Arkansas<sup>5</sup> became part of the United States by virtue of the Louisiana Purchase.<sup>6</sup> Less than a year later, Congress sectioned off what would become Louisiana, naming it the Territory of Orleans.<sup>7</sup> Congress annexed the remainder of the Purchase, including Arkansas, to the Territory of Indiana, designating it the District of Louisiana.<sup>8</sup> As such, its laws were enacted by the Indiana territorial legislature, comprised of Governor William Henry Harrison and the Indiana territorial judges.<sup>9</sup> A year later, Congress made the District of Louisiana a territory in its own right.<sup>10</sup> Arkansas comprised the southernmost portion of the Territory of Louisiana, just north of the Territory of Orleans. In 1812, when the Territory of Orleans achieved

---

deeds and contracts; writs and orders issued by the court; and process accompanied by returns of the sheriffs. Venire writs for grand juries from the first several years have also survived. *See generally* Arkansas Territorial Records and Briefs Collection [hereinafter Records and Briefs] (on file at the UALR/Pulaski County Law Library).

4. *See generally* S. CHARLES BOLTON, TERRITORIAL AMBITION: LAND AND SOCIETY IN ARKANSAS, 1800 TO 1840 (1993) and ARKANSAS 1800–1860: REMOTE AND RESTLESS (1998) for general treatments of territorial Arkansas; MORRIS S. ARNOLD, UNEQUAL LAWS UNTO A SAVAGE RACE: EUROPEAN LEGAL TRADITIONS IN ARKANSAS, 1686–1836 (1985) (representing the authoritative work on law in both colonial and territorial Arkansas and the foundation on which much of this article stands).

5. Throughout this article, “Arkansas” refers to the area that is Arkansas today. Similarly, “Missouri” refers to the area that constitutes contemporary Missouri and not the Missouri Territory, which originally stretched west to the Rockies and north into Canada.

6. Treaty Between the United States of America and the French Republic, 8 Stat. 201 (1803).

7. 2 Stat. 283 (1804).

8. 2 Stat. 287 (1804).

9. 2 Stat. 283 (1804). In the first stage of territorial government the governor and highest court judges served as the legislature. *Id.*

10. 2 Stat. 331 (1805).

statehood and took the name of Louisiana, for clarity's sake the old Territory of Louisiana was renamed the Territory of Missouri.<sup>11</sup> Arkansas remained the southernmost part of the Territory of Missouri until it was granted territorial status in its own right, as the Territory of Arkansas, on July 4, 1819.<sup>12</sup>

The Louisiana Territory was subdivided into five "districts" in 1804.<sup>13</sup> Between 1804 and 1814, Arkansas was sometimes part of a larger district or county, and sometimes a district or county in its own right with its own county government—a confusing state of affairs that hindered the administration of justice.

In 1804, Arkansas was part of the huge District of New Madrid; the district's court of record sat at the town of New Madrid,<sup>14</sup> over 200 miles by river from Arkansas Post.<sup>15</sup> In 1806, Territorial Governor James Wilkinson created the first "District of Arkansas,"<sup>16</sup> but it was abolished in 1807 by Acting Governor Frederick Bates.<sup>17</sup> In August 1808, Territorial Governor Lewis Meriwether re-established the District of Arkansas.<sup>18</sup> The Courts of Common Pleas and General Quarter Sessions of the Peace for the Arkansas District, the first functioning courts of record, convened at Arkansas Post, the district's seat of government, intermittently from December 1808 to March 1814. In 1812, Territorial Governor Benjamin Howard abolished the District of Arkansas for a second time and annexed the area to the new County of New Madrid<sup>19</sup> because of the difficulty of keeping the offices at the distant Post filled and staffed.<sup>20</sup> The area finally regained a permanent separate status as the County of Arkansas on the last day of December,

11. 2 Stat. 743 (1812).

12. 3 Stat. 493 (1819).

13. The districts bore the same names as their Spanish predecessors. From north to south, they were: St. Charles, St. Louis, Ste. Genevieve, Cape Girardeau, and New Madrid. Proclamation of William Henry Harrison, Governor (Oct. 1, 1804), in 13 TERRITORIAL PAPERS OF THE UNITED STATES 51–52 (Clarence E. Carter ed. 1948) [hereinafter TERRITORIAL PAPERS].

14. *Id.*

15. ARNOLD, *supra* note 4, at 75.

16. Proclamation by Governor James Wilkinson (Jan. 1, 1806), in 13 TERRITORIAL PAPERS, *supra* note 13, at 540.

17. Proclamation (July 7, 1807), in 1 THE LIFE AND PAPERS OF FREDERICK BATES 152–53 (Thomas Maitland Marshall ed. 1926) [hereinafter THE LIFE AND PAPERS OF BATES].

18. Proclamation (Aug. 20, 1808), in 2 THE LIFE AND PAPERS OF BATES, *supra* note 17 at 15–16.

19. Proclamation by Governor Howard (Oct. 1, 1812), in 14 TERRITORIAL PAPERS, *supra* note 13, at 599–600.

20. Bates wrote the judges in November 1809, stating "I send you blank commissions, and ask, that you employ your best efforts in filling them worthily. On your success in this attempt will probably depend the existence of your Settlements as a *Separate District*." To the Judges of the District of Arkansas (Nov. 16, 1809), in 2 THE LIFE AND PAPERS OF BATES, *supra* note 17, at 115–16.

1813.<sup>21</sup> Once more the Post was the seat of a court of record, specially established by Congress and now called the General Court.<sup>22</sup> In 1819 Arkansas became a territory in its own right. The Territorial Superior Court, the highest court, was established and met briefly at the Post until the seat of government moved to Little Rock in 1821.<sup>23</sup>

Although the record books of these territorial courts are available to researchers at the Arkansas History Commission, for many years it was believed that all of the case files of these courts had been lost.<sup>24</sup> However, recently discovered case files from these courts, as well as from the General Court records in St. Louis, together with the record books, reveal much “new” information.<sup>25</sup>

#### A. The Advent of Common Law

Then as now, the common law judicial system of the United States differed markedly from civilian legal systems of France and Spain. The dispenser of justice in colonial Arkansas was the commandant at the Arkansas Post. During the last four decades of colonial government, commandants had civil and probate jurisdictions over cases where low amounts of money were at issue, although Morris Arnold convincingly argues that commandants at the Post often exceeded their jurisdiction and ruled on more significant disputes without resort to the Governor in New Orleans.<sup>26</sup> Dispute resolution at the Post did not involve extensive pleadings, written records, or lawyers.<sup>27</sup> Indeed, “[t]he Spanish officers would not have tolerated the technicalities and quibbles of an American lawyer. All kinds of forensic disputation was discouraged, whether in the courts or in the community gather-

---

21. Act of Dec. 31, 1813, § 2, Acts Passed by the General Assembly of the Territory of Missouri 6, 10 (1814).

22. 3 Stat. 95 (1814).

23. Act of Oct. 18, 1820, § 2, Laws of the Territory of Arkansas 104–105 (1821).

24. “Though the Arkansas judicial records for 1808 to 1814 several times refer to the files of the court, no files have in fact survived.” ARNOLD, *supra* note 4, at 170.

25. During the spring of 2001, Law Library employee Louise Lowe discovered the existence of territorial case files mingled with the Arkansas Supreme Court records and briefs collection at the UALR/Pulaski County Law Library. Professors Kathryn Fitzhugh and Lynn Foster, together with their research assistants, identified twenty-five files from the period of 1808 to 1814. Coincidentally, at the same time case files from Missouri territorial appellate courts housed at the Missouri State Archives were indexed and made available to remote researchers. Some of the cases tried at Arkansas Post had been appealed to the General Court, which sat at Ste. Genevieve and St. Louis. Thus for a few of the earliest cases a surprising amount of information is available from three sources: record books from Arkansas Post, documents filed with the Arkansas court, and documents filed on appeal in Missouri.

26. ARNOLD, *supra* note 4, at 49, 53–54.

27. *Id.*

ings.”<sup>28</sup> The jury, the right to refuse to incriminate oneself, and the writ of habeas corpus were nonexistent under the rule of France and Spain. Civilian spouses had more equal rights in marital property because of the community property system, and generally parents could not disinherit their children under the civil law.<sup>29</sup> Instead of consulting written statutes and case law, as would common law judges, commandants at the French and Spanish posts used as authority a few volumes of laws from the civil codes, based originally on those of Rome, and relied heavily on unwritten practices and usages of the local communities.<sup>30</sup>

The former French, Spanish, and American inhabitants of the Louisiana Purchase were ambivalent about the American takeover. On the one hand, protection from Indian attacks increased with the increased number of soldiers and forts and gradual westward movement of the frontier. On the other hand,

[i]t was clearly perceived by the people and landowners, both French and Americans, that under the new government they would have to pay taxes, work the roads, render military service, furnish their own rifles, powder and ball, knapsacks and even provisions, in order to protect themselves against the inroads of the Indians; that the settlement of land titles provided by the Act of 1804 would take a long time, and that the method of doing business in a summary and quick way, with which they were familiar under the Spanish government, would be followed by a slower, more expensive and technical system. It was apparent that the system of litigation introduced by the Americans in upper Louisiana checked trade and hence arose great dissatisfaction. People preferred the quick judgment of one man to twelve.<sup>31</sup>

The French citizens of the Arkansas Post would have noted, and probably disliked, several aspects of the new judicial system. First, there was the multiplicity of courts: common pleas, quarter sessions, oyer and terminer, orphans, probate—all took the place of the informal meeting, with few or no written petitions, before a single commandant. Second, the American system required far more officials. Judges, justices of the peace, prosecuting attorneys, clerks, treasurers, sheriffs, constables, coroners, recorders, and notaries public, at a minimum, administered the judicial system

---

28. ENGLISH, *supra* note 1, at 37.

29. See generally JOHN HENRY MERRYMAN, *THE CIVIL LAW TRADITION* (1969) (providing a succinct treatment of civil law).

30. For a discussion of these “unwritten norms,” see STUART BANNER, *LEGAL SYSTEMS IN CONFLICT: PROPERTY AND SOVEREIGNTY IN MISSOURI, 1750-1860* 51–66 (2000). See generally ARNOLD, *supra* note 4 (discussing Spanish and French law at the Post and the transition to American jurisprudence).

31. LOUIS HOUCK, *2 A HISTORY OF MISSOURI FROM THE EARLIEST EXPLORATIONS AND SETTLEMENTS UNTIL THE ADMISSION OF THE STATE INTO THE UNION* 387 (1908).

at the county level. Third, white male citizens had a legal obligation to participate as both grand and petit jurors. Public trials, especially jury trials, provided mysterious, sometimes confusing but always entertaining theater for the community. Fourth, lawyers were indispensable to the new order.

## B. The Structure and Jurisdiction of the Courts

When the first Arkansas courts of record began operation in 1808, the Louisiana territorial statutes called for dual courts in each district: the Court of Common Pleas, and the Court of General Quarter Sessions of the Peace. They were to hold three terms each year.<sup>32</sup> Their terms were staggered so that they followed each other at one-week intervals, thus theoretically allowing lawyers enough time to travel the circuit to the next session.<sup>33</sup> For most intents and purposes the two courts really were one; they met on the same days and were administered by the same judges. They differed only as to their subject-matter jurisdiction, and by the fact that separate record books for each court were kept. Court met six days a week, Monday through Saturday, although the first sessions lasted only a few days.

The Court of Common Pleas exercised civil jurisdiction and could "hold pleas of assize, scire facias, replevins, and hear and determine all manner of pleas, suits, actions and causes civil, personal, real and mixed according to law."<sup>34</sup> The Court of General Quarter Sessions had jurisdiction over all criminal cases except those punishable by death. Originally only the General Court had jurisdiction over these, but by 1808, jurisdiction had been decentralized to special courts of oyer and terminer.<sup>35</sup> The statute called for a judge of the General Court to travel to the district and sit with the quarter sessions judges to hold the court of oyer and terminer.<sup>36</sup> No such court ever met at the Post; only one indictment of murder was ever issued, and the district was dissolved before the defendant could be tried. The Court of General Quarter Sessions issued a writ of venire to the sheriff before and during each of its terms, requiring him to summon a grand jury to be present on the first day of the term and for as long as needed thereafter. Petit juries seem to have been called informally, probably from a pool of men in the vicinity of the courthouse.

---

32. Act of July 3, 1807, ch. 38, § 2, Laws of a Public and General Nature, of the District of Louisiana, of the Territory of Louisiana, of the Territory of Missouri, and the State of Missouri up to the Year 1824 105, 106 (1842) [hereinafter *Laws*]

33. ENGLISH, *supra* note 1, at 66. However, it seems that no St. Louis or Ste. Genevieve lawyers traveled to the Post—it was simply too far away.

34. *Laws*, *supra* note 32 §16, at 13.

35. Literally, "to hear and to determine." Historically courts so named had original jurisdiction over serious crimes. WILLIAM C. ANDERSON, A DICTIONARY OF LAW 742 (1893).

36. *Laws*, *supra* note 32, ch. 38, § 13.

The criminal law enacted by the territorial legislature and enforced by the courts at this time was notable in several respects. Courts could order the bodies of executed murderers to be “delivered to a surgeon for dissection.”<sup>37</sup> The punishment for rape was castration, “to be performed by the most skilful physician, at the expense of the territory, in case the party convicted shall not have sufficient property to pay the same and costs.”<sup>38</sup> Other penalties for non-capital crimes included imprisonment, fines, whippings and the pillory. It was a crime for children or servants to refuse to obey the lawful commands of their parents or masters, and if found guilty by a justice of the peace, they would be sent to a jail or house of correction until “they shall humble themselves to the said parent’s or master’s satisfaction.”<sup>39</sup> Those guilty of capital crimes could not avail themselves of the “benefit of clergy,” a legal device originating in medieval times that enabled at first clergy, and later anyone, to escape capital punishment if they could read a passage from the Bible.<sup>40</sup> Slaves were largely isolated from the criminal justice system. They had the right to a jury only in cases of murder and arson; otherwise they were punished at the discretion of the court.<sup>41</sup> Native Americans were not under the jurisdiction of American courts.

In addition, like other courts of the period, the Court of General Quarter Sessions had responsibilities that would fall to Arkansas county quorum courts<sup>42</sup> today. It heard and adjusted property tax assessment claims, managed the money for the county, issued licenses and levied taxes on businesses such as taverns, merchants and ferries, and authorized the planning and construction of roads, bridges and government buildings such as court houses and jails. During this period, welfare of the needy was the responsibility of local governments. The single recorded incident of this latter between 1808 and 1814 occurred in the spring of 1810, when the grand jury decided that John Taylor, an inhabitant of Arkansas who had been ill for several years, was unable to support himself. The court ordered the sheriff

---

37. Act of Nov. 4, 1808, Laws, *supra* note 32, ch. 65, § 2, at 209, 210.

38. *Id.* § 8, at 211. Some readers may recall that the first case in Hempstead’s Reports, the earliest bound compilation of Arkansas territorial and federal cases, concerns a man’s rape of his stepdaughter. The defendant was sentenced to castration, but Governor Miller commuted the sentence. *United States v. Dickinson*, Hempstead 1, 25 F. Cas. 849 (1820) (No. 14957A).

39. Act of Nov. 4, 1808, Laws, *supra* note 32, ch. 65, § 32, at 217.

40. *Id.* § 39, at 218. For a discussion of the evolution of the benefit of clergy doctrine, see Friedman, *supra* note 1, at 71.

41. Act of Nov. 4, 1808, Laws, *supra* note 32, ch. 65, § 35, at 217.

42. Although originally Arkansas quorum courts had a few judicial functions, today they have virtually none. The few statutes that concern the judicial powers of counties authorize the county judge to act only in the absence of the circuit judges. Arkansas Code Annotated §§ 14-14-1001 to 1003 (LexisNexis 1998 & Supp. 2003).



“to provide at as low a Rate as possible his maintenance, clothing washing and mending.”<sup>43</sup>

The judges of the courts of common pleas and general quarter sessions in each district were not required to be lawyers, but merely “respectable inhabitants.”<sup>44</sup> The statute required between three and five judges per court, but only two had to be present to conduct business. Judges served terms of four years,<sup>45</sup> and received three dollars’ pay for each day they held court.<sup>46</sup>

As districts grew they were subdivided into townships by the Court of Quarter Sessions. Justices of the peace presided over township courts. These officials had jurisdiction over “small causes” involving less than sixty dollars, mostly actions of debt. They could hear no criminal cases, no actions of slander, replevin or trespass, and no cases involving title to land. The officer of the court was not a sheriff but a constable. Appeal could be had to the court of common pleas.<sup>47</sup> The statutes also established orphans’ courts, with jurisdiction over orphaned children. Orphans’ courts were to be held by justices of the courts of common pleas, but the only record of such a court at the Arkansas Post during this period is one brief entry in the record book.<sup>48</sup> Probate courts were created as well, with separate probate judges. Probate judges could not render final judgments—common plea judges had to issue those—and the judgments were appealable to the General Court. The record books provide no clue as to whether the Probate Court met during this period.

Appeals from the courts of common pleas and general quarter sessions were heard by the General Court. Originally the General Court met twice a year in St. Louis, but by 1808, the legislature had moved the spring term of the court to Ste. Genevieve.<sup>49</sup> The General Court had concurrent jurisdiction over civil and criminal cases and was the court of appeal, and of last resort, in the Territory of Louisiana. The right to appeal ended at the boundaries of the territory, there being no appeal to any other federal courts. From its inception, the General Court’s judges were all lawyers.

---

43. Quarter Sessions, *supra* note 2, at 43.

44. Laws, *supra* note 32 § 1, at 65.

45. *Id.* §§ 1–2, at 65.

46. *Id.* § 5, at 65.

47. *Id.* at 2.

48. The courts met at the house of Mary Moore, who presented a bill every session. On August 8, 1810, she billed the court \$1.00 for use for the orphans court. However, the court refused payment without stating any reasons. Quarter Sessions, *supra* note 2, at 48.

49. Laws, *supra* note 32, at 51.

### C. The Eve of the First Session—July 1808

In July of 1808, Territorial Secretary Frederick Bates (the equivalent of a lieutenant governor) visited Arkansas Post. Bates, who also served on the Land Commission, had traveled to Hopefield<sup>50</sup> to hear persons claiming land grants from Spain. He was perplexed at the lack of claimants—only Joseph Stillwell, a settler on the Arkansas River, appeared.<sup>51</sup> He therefore decided to travel onward to Arkansas Post and try to collect more claims, even though they would be late. There were indeed a number of claimants and their agents at the Post.<sup>52</sup>

Bates had in his possession two blank justice of the peace commissions from Governor Meriwether Lewis. On his visit, after meeting numerous men, he commissioned Benjamin Fooy, an early settler who had emigrated from Holland,<sup>53</sup> to be Justice of the Peace at Hopefield, and Captain George Armistead, a military officer at Fort Madison at the Post, to the same position at Arkansas Post.<sup>54</sup> They served for only a few months, as they were replaced by new officials appointed by the judges at the Post.

### D. The First Session—December 1808

On Monday, December 5, 1808, the first session of the new courts convened at the Post of Arkansas. Situated on low ground near the mouth of the Arkansas River, the Post was the most populous white settlement in Arkansas from 1803 to at least 1820. Henri de Tonti established the Post in 1686, and although it had fluctuated in size and changed location several times, by the first decade of the nineteenth century it numbered around 500 persons.<sup>55</sup> At this time, Cherokees lived in a number of settlements to the

---

50. The Spanish had established Hopefield as El Campo del Esperanza, across the Mississippi from Chickasaw Bluffs. Hopefield does not exist today, but it was at the approximate site of present-day West Memphis. Chickasaw Bluffs is today Memphis. 1 CENTENNIAL HISTORY OF ARKANSAS 102 (Dallas T. Herndon ed. 1922).

51. To the Land Commissioners (Aug. 15, 1808) in 2 LIFE AND PAPERS OF BATES, *supra* note 17, at 12.

52. *Id.* at 12–13. Like most other early travelers, Bates had nothing kind to say about the inhabitants of the Post. “The People are for the most part so entirely unacquainted with every kind of business, except of that of the chase, it is not at all to be wondered at that affairs requiring method, order and an observance of legal forms, should be totally unintelligible to them.” To Albert Gallatin (July 22, 1808), 2 THE LIFE AND PAPERS OF BATES, *supra* note 17, at 8.

53. ARNOLD, *supra* note 4, at 158.

54. *Id.* at 30.

55. John B. Treat, the Indian factor at Arkansas Post between 1805 and 1810, wrote that the population consisted of “between sixty and seventy families, nine, or ten of which are from the three states Virginia, Maryland, and Pennsylvania; the others (one or two excepted) are all French, either natives; or those who emigrated from the Illinois, New Orleans, and

north on the St. Francis River. Estimates as to the number of Cherokees in this location vary, and during this time period there was an intermittent flow across the Mississippi, west through these settlements, into northwestern Arkansas, and back. Indeed, there may well have been even more Cherokees at the largest settlement on the St. Francis than there were whites at Arkansas Post.<sup>56</sup> Quapaw villages lay relatively close to the Post, close upstream on the Arkansas River. Osages lived much further to the northwest on the Arkansas and Osage Rivers, in what is today Missouri and Oklahoma, in villages of their own. Neither Quapaws nor Osages *per se* appear in the early record books of the Arkansas courts. Cherokees, however, and whites living among the Cherokees, are mentioned with some frequency during this period. As will be discussed later, Cherokees, unlike the other two tribes, were skilled at manipulating the justice system for their own purposes.

One caveat is in order here, however. The terms “French,” “Quapaw,” and “Cherokee” may conjure up heterogeneous populations of these three groups, but that was far from the case. There had been extensive intermarriage between the French at the Post and the Quapaws. This led to both French-Quapaw families at the Post and Quapaw-French families at the Quapaw village.<sup>57</sup> A number of whites lived and intermarried with the Cherokees. Many of the Cherokee leaders were part white; one, John D. Chisholm, who will be mentioned later, immigrated to the United States from Scotland. This intermingling presented problems for the legal system, in which one’s “race” and free or slave condition—free negro, mulatto, slave, Indian, white—determined one’s legal status. Actual ancestry and choices of lifestyle did not fit neatly into the pigeonholes of the law.<sup>58</sup>

---

two or three from Europe.” Treat to the Secretary of War (Nov. 15, 1805), in 13 TERRITORIAL PAPERS, *supra* note 13, at 278. Both French and Americans owned slaves, whom Treat estimated to number about sixty. The population of the Post fluctuated as hunters, trappers, and traders, a significant portion of the inhabitants, came and went. See also ARNOLD, *supra* note 4, at 151–52, for more on the population at the Post at this time.

56. For a discussion of the Cherokees in northeast Arkansas during this time period, and estimates of the size of the St. Francis settlements see generally Robert A. Myers, *Cherokee Pioneers in Arkansas: The St. Francis Years 1785-1813*, 56 ARK. HIST. Q. 127 (1997).

57. “Most of the inhabitants of that village [the Post] are of mixed blood, and the same mixture is observable among the Indians, who are now reduced to a very few in number.” AMOS STODDARD, SKETCHES, HISTORICAL AND DESCRIPTIVE, OF LOUISIANA 206 (1812). See also MORRIS S. ARNOLD, THE RUMBLE OF A DISTANT DRUM 7–14 (2000) (discussing Quapaw and French intermarriage).

58. See generally Ariela J. Gross, *Litigating Whiteness: Trials of Racial Determination in the South*, 108 YALE L.J. 109 (1998); Daniel J. Sharfstein, *The Secret History of Race in the United States*, 112 YALE L.J. 1473 (2003); Michael A. Elliott, *Telling the Difference: Nineteenth-Century Legal Narratives of Racial Taxonomy*, 24 LAW & SOC. INQUIRY 611 (1999) (representing examples of critiques of how courts made racial determinations between “races” during the nineteenth century). Gross’s article is particularly interesting because she

The Arkansas judges and other officials presented their commissions from Governor Lewis for the record. Francois Vaugine was the “presiding,” or chief, judge. Vaugine, a merchant then in his mid-40s, was a member of a prominent French family. He had grown up in Louisiana and had lived at the Post for sixteen years.<sup>59</sup> Joseph Stillwell, one of the associate judges, had lived at the Post for ten years. Now in his mid-50s, originally from New Jersey,<sup>60</sup> Stillwell had received a grant of land from Governor Carondelet 15 by 40 arpents<sup>61</sup> and had come to Arkansas to perfect this claim in 1797, locating it on the Arkansas River about four miles upstream from Arkansas Post.<sup>62</sup> Charles Refeld was the third judge to be commissioned, but he declined. Benjamin Fooy from Hopefield, the third judge, was not present at the first term. These four men, long-time settlers, titled “Esquire” in the record book, definitely fit the statutory requirement of respectability. None of them were lawyers.

The clerk of the court, John W. Honey, had moved to the Post from Missouri. Honey, though, would stay in Arkansas for less than a year before returning to Missouri, where he would later hold various official posts. Besides the clerkship, Honey also held the positions of treasurer, recorder, and judge of the probate court.<sup>63</sup> Harold Stillwell, brother of Joseph, served as sheriff.<sup>64</sup> Andre Fagot was commissioned as coroner, justice of the peace and notary public.<sup>65</sup> During this first session the court appointed Isaac Fooy, Benjamin’s brother, constable for Hopefield and Michel Pringle constable for the Arkansas Post and Little Prairie.<sup>66</sup> The court appointed Andre Fagot interpreter for the numerous French citizens of Arkansas.<sup>67</sup> At this time there were far more French than Americans living at the Post, although the ratio was changing rapidly.

In the first term of the Court of Common Pleas no cases were called on the docket. On the criminal side, the Court of General Quarter Sessions

discusses in depth an Arkansas Supreme Court case.

59. ARNOLD, *supra* note 4, at 158.

60. *Id.*

61. An arpen, or arpent, was the French and Spanish measure for land commonly used in land grants. It could refer either to a distance or an area. Lengthwise, an arpent is 63.75 yards long; a square arpent is .85 of an acre. PAUL W. GATES, HISTORY OF PUBLIC LAND LAW DEVELOPMENT 89, n.4 (1968) Typically French and Spanish tracts were long, narrow lots fronting on water. *Id.* at 89.

62. 1 CENTENNIAL HISTORY OF ARKANSAS, *supra* note 50, at 126–27. Stillwell was one of the few successful Spanish land grant claimants, in part because he settled and improved his land. *Id.* at 127.

63. Appointments to Civil Offices by Governor Lewis (Sept. 30, 1808), 2 THE LIFE AND PAPERS OF BATES, *supra* note 17, at 30.

64. *Id.*

65. *Id.*

66. Common Pleas, *supra* note 2, at 1.

67. *Id.* at 2.

convened the first grand jury ever at the Post. Recently enacted statutes required a grand jury to be drawn by lot from a pool of names of sixty free white male citizens over the age of twenty-one<sup>68</sup> who were:

honest and intelligent householders, farmers, merchants and traders . . . not being clergymen, practitioners of physic, or attorneys of any court, sheriffs, or their deputies, ferry-keepers, or constables, or such as be, or be reputed, persons of ill fame, but altogether such as be of the best fame, reputation and understanding and credit in there [sic] district.<sup>69</sup>

The record book is silent as to how the grand jurors were selected. It is hard to believe, however, that a pool of sixty such men existed in the vicinity of the Post at that time.

The mixed origins of the white male residents are clearly seen in the composition of the first grand jury.<sup>70</sup> At least eight of the twenty four summoned were of French extraction. Several others had German names. The rest were English and Irish. The ethnic composition of the jury, though, did not correspond to the make-up of the Post's general population.<sup>71</sup> Of the men who had been summoned, Hagen, Fowler, Brinsback and Forenash defaulted. They would be fined unless the court accepted their excuses for not appearing.<sup>72</sup> The grand jury could consider complaints brought by anyone including its own members, but at this first session no one complained, and so the jury was discharged on the first day. Before the court adjourned, planning was begun for roads from the Post to "the Bayou" and to the "Arkansas Prairie."<sup>73</sup>

68. Act of Oct. 28, 1808, Laws, *supra* note 32, ch. 60, § 2, at 198, 199.

69. *Id.* at 198.

70. The grand jurors were John Henry (or possibly Hendrez or Hendry), Joseph Bougy (or Bogy, or Bougie), Daniel Mooney, Frederick Hagen, William Glass, Benjamin Fowler, Samuel Carter, Christian Pringle, Leonard Rush, Francois Michel (or Mitchel), Baptiste Desruijsseaux, Raffile Brinsback, Michel Pringle, John Hadley, Charles Forenash (or Falanash), Anthony Woolf, Jacob Greenawault, Isaac Rider, August De Surville, Jean Baptiste Duchassine, James Scull, Peter Lefevre Junior, Tanas Racine, and Robert Algou (or Algoe, or Aljou). Spelling of all words in the record books varies wildly, but particularly the spelling of names. The names are spelled in a particular way here either because (1) the name is spelled in that form most of the time, e.g., Hewes Scull versus Hugh Scull; (2) the person signed his name in that form, e.g., Benjamin Fooy versus Benjamin Foy; or (3) in particularly hard cases, this is the way the name has been spelled by contemporary historians, e.g., Desruijsseaux. In quotations from the record books the original text has been preserved exactly as it appears in the book with regard to spelling, capitalization and punctuation.

71. Morris Arnold theorizes that the French *habitants* were reluctant to involve themselves with the court system. ARNOLD, *supra* note 4, at 162-63.

72. Quarter Sessions, *supra* note 2, at 1.

73. *Id.* at 1-2.

## III. LAWYERS IN THE FRONTIER COURTS

American lawyers followed on the heels of the establishment of American courts. Lawyers filled many roles. As judges, they rendered justice (although at outset few judges except those of the highest court were attorneys because practice offered the possibility of much greater income).<sup>74</sup> Lawyers often served the courts in other capacities, such as justices of the peace, sheriffs, and clerks. As attorneys at law, they provided the interface between courts and suitors. They functioned in other roles such as conveyancers, personal representatives of decedents' estates, commissioners, agents, and auditors, assisting in the conduct of judicial business. In the course of their activities, many of them attained wealth in land and slaves. Many speculated in land. Money was scarce on the frontier, and lawyers accepted payment in peltries, land, slaves, and notes.

We know little about Arkansas's first attorney at law, Perly Wallis. He appeared before the judges during the December 1808 Term and was admitted to the bar. In order to practice as an attorney at law before any court in the Territory of Louisiana, statutes required the applicant to present a license from one or more of the judges of the General Court.<sup>75</sup> Wallis produced "sufficient document of his good and Moral Character and of his having been a practicing Attorney in a former Court of this District."<sup>76</sup> This court was probably the justice of the peace court of Captain Henry Armistead.<sup>77</sup> Indeed, in September 1808 Wallis wrote to Frederick Bates after the latter's visit to the Post, reporting the apprehension of an alleged murderer and some felons, and stating that he had lent Armistead "every assistance" within his power. He also requested copies of the territorial laws as there were none at Arkansas Post.<sup>78</sup> Morris Arnold has concluded that Wal-

---

74. ENGLISH, *supra* note 1, at 48–49.

75. Act of July 3, 1807, Laws, *supra* note 32, ch. 38, § 58, at 105, 123.

76. Common Pleas, *supra* note 2, at 2.

77. We know that Armistead held court because of Wallis's letter and because the record book of the Court of Common Pleas mentions him as "late judge." *Id.* at 3. However, as early as January 1, 1806, Governor Wilkinson appointed John B. Treat, Charles Refeld, Francois Vaugine, Leonard Repler, Joseph Bougy, and Francois Valliere justices of the common pleas and quarter sessions court. Proclamation by Governor Wilkinson (Jan. 1, 1806) in 13 TERRITORIAL PAPERS, *supra* note 13, at 540. There is no evidence that this court ever met but if it did, Wallis may have tried cases before it. Or, he could have practiced in the 1808 justice of the peace court of Benjamin Fooy at Hopefield.

78. Perly Wallis to Bates (Sept. 1, 1808), in 2 LIFE AND PAPERS OF BATES, *supra* note 17, at 23–24. Wallis wrote "we have had serious work and hard swearing here last week capt Armistead has had his hands head & heart full Burnet has been apprehended for the murder of Patterson and many others have been arraigned for felony and bound to the Peace Burnet is sent to New Madrid gaol I have lent capt Armistead every assistance in my Power which Perhaps was very imperfect as we have not the Laws of the Teritory." *Id.* The Post's distance from St. Louis was no doubt a factor behind its lack of the statutes necessary for the func-

lis was illegally admitted to practice during that first term.<sup>79</sup> This seems to be true, but the actions of the judges become more understandable when we recall that none of them were lawyers. An attorney at law was necessary to prosecute criminal cases. Based on the evidence—his skill at pleading and his success rate against his competitors—Wallis was almost certainly an experienced lawyer. Bates stated that Wallis was from “Ouachita.”<sup>80</sup> Wallis had already been practicing law within the district. As contrasted with his first competitors, Wallis displayed a superior knowledge of the law.

In early Arkansas, as now, public opinion of lawyers was ambivalent. Though most lawyers were effective and performed valuable and necessary services, many were perceived as unscrupulous. They were closely identified with land speculators, who were also the object of public fear and derision.

The practice of law could be violent, owing not only to the general lawlessness of the frontier communities, but also because of the “code duello.” Judges routinely sat armed in the courtroom. Judges and lawyers settled personal and political disagreements by dueling, even as far north as St. Louis.<sup>81</sup> Some of these duelists rose to such prominence that today Arkansas towns and counties bear their names. But how did a frontier lawyer build a practice? Perly Wallis’s appearances in the early courts of Arkansas provide one answer to this question.

The court held its first session in December 1808, but having no business, it adjourned after three days. During the next session, which convened on Monday, April 3, 1809, Perly Wallis, the only attorney at law, represented four plaintiffs: Francois Michel, George Hook, William Hickman, and William Bradford, in five suits. The forms of action were debt and trespass on the case.<sup>82</sup> The amounts at stake ranged from \$207 to \$2,754.<sup>83</sup> Two of his clients discontinued their suits, and thus were required to reimburse the costs of the defendants. The other lawsuits were continued over until the August Term.<sup>84</sup> The record book does not list Wallis as attorney for any civil defendants. Plaintiffs were more promising clients.

---

tioning of the court.

79. ARNOLD, *supra* note 4, at 168.

80. To the Land Commissioners (Aug. 15, 1808); *id.* at 13. The Post of Ouachita is today Monroe Louisiana.

81. ENGLISH, *supra* note 1, at 67–68.

82. Debt was the most common form of action during this time period. No federal bankruptcy laws or courts existed; instead debtors were deemed insolvent, usually at the instigation of creditors, by state courts. Debtor’s prison was abolished in the United States during this period. Trespass on the case, a rather amorphous cause of action, was also common. Trespass on the case could also encompass actions we regard as separate today, such as slander.

83. Common Pleas, *supra* note 2, at 4–14.

84. *Id.*

On the criminal side, in the Court of Quarter Sessions of the Peace, Perly Wallis presented a commission from "John Scot Esquire Attorney General of the Territory of Louisiana" appointing him Deputy Attorney General for the District of Arkansas, and was sworn in.<sup>85</sup> As Deputy Attorney General, Wallis would bring charges before the grand jury and prosecute criminal cases. During this term, Wallis had a wide-open field; he was the only attorney on both the criminal and the civil dockets. Parties not represented by him either represented themselves, appearing in their "own proper person," or granted a power of attorney to another person who then represented them in court as an "attorney in fact."<sup>86</sup>

During the April 1809 term in the Court of General Quarter Sessions of the Peace, the court held six jury trials and three bench trials. The record books occasionally bring to mind the game of musical chairs. A defendant could be dismissed from charges one day and sit on someone else's jury the next day.<sup>87</sup> Trials were held with dispatch—oftentimes several would take place in a single day. The same jury would sit all day long, usually through several trials. During this term, all of the charges were assault and battery except two. John Berry was charged with "treating Indians with whiskey and getting them drunk." He was found guilty and sentenced to costs and ten days in prison.

The second charge of the grand jury was against Wallis himself. On the second day of the term, John Breck Treat, the Indian agent at the Arkansas Post factory,<sup>88</sup> complained to the grand jury against Perly Wallis. In the instrument filed with the grand jury, Treat claimed that

A number of Suits suppos'd ten, or eleven have since the last Court been commenced at this place. At this time by inquiry at the Clerk's office

---

85. Quarter Sessions, *supra* note 2, at 6.

86. Attorneys in fact were not admitted to the bar and could not practice as attorneys at law, although some of them, e.g., Messrs. Darby, Kirpatrick, and Henderson, represented almost as many clients as Perly Wallis.

87. For example, during the April 1809 term, Perly Wallis represented George Hook in an action for debt against John B. Treat. Three men on the jury were Wallis's clients in cases already begun and continued until the next term. Common Pleas, *supra* note 2, at 22–34. During the August 1810 term William Mabbett pursued a number of lawsuits against various men, including three against Christopher Kauffman. Kauffman sued Mabbett in debt and one of the trial jurors was Richard Melton, who was a defendant in another suit by Mabbett. These types of relationships occur again and again in the record books. *Id.* at 43–46, 48, 49.

88. "Indian factories" were simply trading houses established by the federal government. The factory system had numerous goals, some of which were: to replace private fur traders; to eliminate distribution of liquor to Indians; and to civilize Indians. The factory at Arkansas Post was established in 1805 by Treat. He served as factor, or agent, until the federal government closed the factory in 1811. For a discussion of this and other factories in Arkansas, see Wayne Morris, *Traders and Factories on the Arkansas Frontier, 1805–1822*, 28 ARK. HIST. Q. 18 (1969).



eight of those Suits are quashed, or directed to be discontinued. One Lawyer, or Attorney: or one pretending to be such Perly Wallis it is believed is the only person who in those different causes has been consulted and employ'd.--In one cause it can be proven, and if required shall be proven by both Plaintiff and Defendant that in the Causes then particularly depending between them each party have as his Client paid him Fees as demanded by said attorney to quash and discontinue the suit as has been done.--

This conduct is judg'd to be highly improper as it tends to destroy all confidence that any Citizen could wish, or ought to have when employing or advising with any counsel in matters relating to his personal liberty, reputation, or interest, that the man who will take fees on both sides cannot be of sufficient moral principle or integrity and therefore deserves not the Confidence of any public body as a Lawyer, or Attorney, and ought not to be admitted to practice as such.<sup>89</sup>

Treat seems to be accusing Wallis of representing both plaintiff and defendant in the same lawsuit, of perhaps instituting the lawsuit, and later urging the parties to discontinue the suit in court and to settle. In such an instance, Wallis would have been entitled to attorney's fees. The record book, which at this time listed the names of counsel, does not bear out Treat's charge, however.<sup>90</sup>

Treat had a personal complaint as well—that between terms of the court Wallis had issued a summons to Treat to attend some depositions at “Ouachita, a place out of the territory.”<sup>91</sup> Only a judge had the power to issue a summons. Treat's charge against Wallis, although not stated in the records, seemed to be usurpation of authority.<sup>92</sup> The clerk's treatment of this case is interesting. In the space where the crime would normally be written, the page is blank.<sup>93</sup> Instead of the grand jury finding a “true bill,” it found

89. *Wallis v. Treat*, Complaint to the Grand Jury, April 1809 (reproduced as part of the record in the later *Wallis v. Treat* slander case), Missouri State Archives, Jefferson City.

90. But others seemed to share Treat's low opinion of Wallis. In 1819 Wallis ran against five other candidates for the office of territorial delegate to Congress. The official count stated that Wallis received four votes out of a total of over one thousand voters. LONNIE J. WHITE, *POLITICS ON THE SOUTHWESTERN FRONTIER: ARKANSAS TERRITORY 1819-1836* 22 (1964).

91. *Wallis v. Treat*, Complaint to the Grand Jury, *supra* note 89. This reference was to *Hook v. Treat*, a debt case in which Wallis was representing the plaintiff and Treat was the defendant. Treat ultimately lost.

92. “No person shall take upon himself to exercise or officiate in any office or place of authority in this territory, without being lawfully authorized thereto; and if any person shall presume so to do, he shall upon conviction thereof be fined in a sum not exceeding one hundred dollars.” Act of Nov. 4, 1808, Laws, *supra* note 32, ch. 65, § 26, at 209, 216.

93. Quarter Sessions, *supra* note 2, at 26.

the complaint “just.”<sup>94</sup> Since Treat’s assistant at the factory, James B. Waterman, was a grand juror, perhaps his presence partially explains why the jury was persuaded by John Treat.<sup>95</sup> At Wallis’s motion, the court postponed consideration of the presentment until the next day.<sup>96</sup>

On April 5, 1809, after four trials, Wallis’s case was called. Again, unusually, the record book does not indicate the charge. Wallis moved that the case be thrown out of court for lack of a prosecutor (he being the prosecutor!), whereupon John B. Treat came forward, and the court permitted him to prosecute. Twelve jurors were sworn in: Daniel Mooney, Jeremiah Monroe, Joseph Dardenne, Pierre Pertuis, Joseph Bion, John Hadley, Samuel Prior, Morgan Donoho, Swanson Yarborough, Martin Surrano, Nathaniel Porter and James Scull (Wallis was simultaneously serving as prosecutor against Pertuis and Hadley, which brings to mind an interesting ethical question—if juror A is a criminal defendant in another case, and A’s prosecutor B is the one being tried in the case at bar, would A be less likely to find B guilty?). Wallis moved that the jury be “composed of Men entirely who understand the English language.” Treat objected, and Wallis withdrew the objection. The jury found the Deputy Attorney General not guilty.<sup>97</sup>

The following week, after the adjournment of court on April 13th, Perly Wallis promptly filed a complaint against John Treat for slander. Wallis alleged that the reason for Treat’s defamation of him was a lawsuit of Wallis’s client George Hook against Treat, and “if what the said Treat had so maliciously stated been true and his said cause in the Common Pleas been just he had nothing to fear.” Wallis claimed damages of \$2,000. Pursuant to the complaint, the court issued a writ of *capias*<sup>98</sup> on April 15. Not to be outdone, on April 17<sup>th</sup> after being brought in by the *capias* writ, Treat filed a complaint against Perly Wallis for detention and false imprisonment. Both of these cases were set to be heard at the next term of the court in August. However, by August John Honey had left Arkansas; and as a result, for want of a clerk, the court did not meet.

In October 1809, the General Court issued a subpoena for both John Treat and the records of the *Wallis v. Treat* lawsuit to be brought before the court in Ste. Genevieve on the “first Monday in May next.” Treat’s brother Samuel, his attorney in fact, produced the two writs at the December Term of the Court of Common Pleas at the Post. They would have had the effect

---

94. *Id.* at 14.

95. *Id.* at 4.

96. *Id.* at 14.

97. *Id.* at 26–28.

98. Literally, “*capias*” means “you shall seize.” BLACK’S LAW DICTIONARY 199–200 (7th ed. 1999). *Capias* writs were issued to take the defendant into custody to ensure his presence in court to defend a suit, or to jail a defendant who owed a judgment. In either case the defendant could avoid imprisonment by posting a bond or paying the judgment.

of removing the case to the General Court. Removals in civil cases were allowed:

when either of the parties shall fear that he will not receive a fair trial, in the court wherein it is depending on account of one of the judges of the court where the suit is depending is interested or prejudiced, or that the sheriff, or (if he be of party) the coroner is interested or prejudiced, or that the adverse party has an undue influence over the minds of the inhabitants of the district where the suit is depending or that the petitioner is so odious that he cannot expect a fair trial.<sup>99</sup>

The judges, however, refused the writs, incorrectly stating that the term of the General Court was already past (in fact it would not end until the following May).

Wallis faced his first, albeit weak, competition during the December 1809 Term, in the person of Patrick Darby, who presented a power of attorney to represent George Hook (also a client of Wallis). At the following term in April 1810, more would-be attorneys appeared. Hezekiah Kirkpatrick and J.L. Henderson were licensed in the Territory of Orleans, but not, apparently, in any state, nor in the Louisiana Territory. They petitioned the court to be able to represent parties “pro tempore until a sufficient number of licensed attorneys shall appear in the said Court to enable each of said parties to engage some regular attorney in his favor.”<sup>100</sup> The court refused “for reason that no atty shall be allowed to plead until he comes forward qualified as the law directs.”<sup>101</sup> Also at this term, James B. Waterman (the assistant Indian factor) assumed the position of court clerk.<sup>102</sup> This was a common practice in government employment at the time—a single position was seldom full-time, and seldom paid enough to support a person—so often the same individual filled a number of different positions.

Once again, Wallis served as prosecuting attorney and also represented parties on the civil side of the court. At this term, Samuel Treat moved to postpone the slander case against his brother until the next term since “he is ignorant of the law himself and had not the benefit of Counsel.”<sup>103</sup> Ironically, in his attempt to obstruct the first lawyer at the Post, John Treat found himself in need of a lawyer. The court appointed J.L. Henderson to represent him, notwithstanding this was a civil trial.<sup>104</sup> The debt case of George Hook against John Treat was called for trial. An evidentiary question arose:

99. Act of July 3, 1807, Laws, *supra* note 32, ch. 38, § 32, at 105, 117.

100. Common Pleas, *supra* note 2, at 19.

101. *Id.*

102. *Id.* at 20.

103. *Id.* at 22.

104. *Id.* at 22–23. Statutes entitled persons accused of crimes to counsel “learned in the law” but no such right inhered to civil defendants. Laws, *supra* note 32 § 37, at 65.

Henderson requested the court to admit oral evidence of a judgment, and the court properly refused. The jury found Treat liable for the debt of \$1,377 and costs,<sup>105</sup> for a total of \$1,800.<sup>106</sup>

During this term Henderson again presented the two writs from the General Court in the cases of *Wallis v. Treat* and *Treat v. Wallis*, and again the court refused to act on them.<sup>107</sup> Shortly thereafter, however, the judges changed their minds. During the week following the end of term, the clerk certified the record and sent it off to the General Court.<sup>108</sup> Meanwhile, however, the cases were continued in the Court of Common Pleas! In addition, Treat appealed his loss to Hook.<sup>109</sup> The record book does not state the outcome of the appeal, but does state that Treat lost title to 117,000 arpents of land to pay off Hook's judgment.<sup>110</sup>

More harassment between Wallis and his competition took place during this term. Patrick Darby complained to the grand jury, unsuccessfully, that Wallis was wrongfully assuming the authority of deputy attorney general,<sup>111</sup> and Wallis complained to the grand jury, successfully, that Darby had wrongfully accused him. Darby pleaded not guilty and "put himself upon God and his Country," in other words, requested a jury.<sup>112</sup> He was tried on the morning of Wednesday, April 4, 1810, and found guilty.<sup>113</sup> He was fined \$5.00 and the costs in both actions.<sup>114</sup>

At the August 1810 term, the grand jury brought a presentment against Wallis for selling two hats without a license, but this time Wallis was successful in quashing it for lack of a prosecutor; he could hardly prosecute himself.<sup>115</sup> On August 10, the judges ordered that Patrick Darby be "Excluded in future from Pleading at this bar under any Pretence whatsoever

105. Common Pleas, *supra* note 2, at 23–24.

106. *Id.* at 35.

107. *Id.* at 25.

108. *Treat v. Wallis* and *Wallis v. Treat*, Certification of Records, April 1809, Missouri State Archives, Jefferson City.

109. Common Pleas, *supra* note 2, at 35–36.

110. *Id.* at 137.

111. Quarter Sessions, *supra* note 2, at 43.

112. *Id.* at 44–45. Defendants who put themselves "upon the Court" received a bench trial.

113. *Id.* at 45. Darby's jurors were Sherad Hadley, Sylvanus Phillips, Peter Edwards, Henry Cassidy, Martin McWilliams, Christopher Kauffmann, William Mabbett, Willis Lemons, William H. Glass, Abraham Casey, William Gates, and John Madox. *Id.* Note the complete absence of any French names on this jury. Arnold theorizes that both French reluctance to become involved with the legal system and American desires to exclude the French were the causes. ARNOLD, *supra* note 4, at 162–63. At the same time, juror Kauffmann, represented by Perly Wallis, was suing juror Mabbett, represented by Darby, in a completely unrelated lawsuit.

114. Quarter Sessions, *supra* note 2, at 44–45.

115. *Id.* at 49.

under Power of attorney or otherwise for his repeated contempt of the court."<sup>116</sup> Their ire was short lived, however, because on the following day on motion of Kirkpatrick the court reversed its order, stating, "the said Darby having made such acknowledgments as are satisfactory to the Court . . ."<sup>117</sup>

At the December 1810, April 1811, and August 1811 Terms, Francois Vaugine was the sole judge present.<sup>118</sup> During this time period, Vaugine did accept from Perly Wallis an official license to practice from the General Court, and another commission authorizing Wallis to be Deputy Attorney General. But the court could do no business with only one judge and it was adjourned, illustrating one of the problems of frontier courts—distance, as yet unconquered by time, and the difficulty of travel. Joseph Stillwell's plantation was out of town several miles upriver and Benjamin Fooy, at Hopefield, lived even farther away. Roads were little more than paths; watercourses were the chief highways. Even if roads were passable, malaria and other illnesses characterized as "agues" and "fevers" often incapacitated people and prevented them from traveling.

In December 1811, two new judges joined the bench: Samuel Mosely and Henry Cassidy.<sup>119</sup> In addition, three more attorneys were admitted to practice: Anthony Haden, Alexander S. Walker, and John Miller.<sup>120</sup> Little is known about these three men.<sup>121</sup> During this session, *Wallis v. Treat* (the slander case) was tried.<sup>122</sup> Haden represented Treat. Fewer Frenchmen served on this jury.<sup>123</sup> One juror, Sylvanus Phillips, was contemporaneously

116. *Id.*

117. *Id.* at 50.

118. Common Pleas, *supra* note 2, at 53.

119. *Id.* at 55. The Cassidy brothers, Henry and Patrick, probably came to the Post from Missouri. A Patrick Cassidy is listed as a resident of New Madrid in 1797. Louis Houck, *2 A History of Missouri*, 156 (1908). Henry Cassidy was commissioned as a justice of the peace in the District of Cape Girardeau in 1806. 13 TERRITORIAL PAPERS, *supra* note 13, at 546. In 1807 John B. Treat complained that Henry Cassidy had been appointed deputy surveyor for the Wachita District, remarking that "the bestowing of a place, requiring any confidence on a person generally thought to be wholly undeserving of trust: may cause unsuitable impressions. and I feel confident would never have been the case had his character been truly known—." John B. Treat to the Secretary of War (Oct. 29, 1807), in 14 TERRITORIAL PAPERS, *supra* note 13, at 150–51.

120. Common Pleas, *supra* note 2, at 54.

121. Anthony Haden had previously served as captain in the Cape Girardeau District. Secretary Browne to the President (July 14, 1806), in 13 TERRITORIAL PAPERS, *supra* note 13, at 549. Walker later achieved prominence as a territorial legislator. He is mentioned in that venerable source, WILLIAM F. POPE, *EARLY DAYS IN ARKANSAS* 68–70 (1895). John Miller may have come from Missouri—he presented a license from Judge John B.C. Lucas of the General Court at St. Louis. Quarter Sessions, *supra* note 2, at 65.

122. Presumably because the General Court had refused to hear it.

123. Charles Bougie and Pierre Lefevre were the only French jurors. Quarter Sessions, *supra* note 2, at 65.

a client of Wallis's.<sup>124</sup> The jury found for Wallis; Treat was liable for \$750 plus costs.<sup>125</sup> Treat moved for a new trial,<sup>126</sup> and Wallis responded with a bill of exceptions.<sup>127</sup>

Plaintiff Tendered a bill of exception to the opinion of the Court in granting the New trial which the Court refuses to sign because it stated that the Court would not suffer the Plaintiff to Proceed nor read the Law in his behalf, which is false as the objection was argued by Wallis—Miller & Tayler and Several Cases Cited.<sup>128</sup>

Wallis argued that the court would not let him argue precedent as authority, but the court disagreed and—in the only instance between 1808 and 1814—the clerk even noted the name of one case argued by Wallis. These judges cared little for precedent. Statutes were occasionally referred to, by name, only.

At the April Term of 1812, both trials were finally put to rest. Miller, representing Wallis in *Treat v. Wallis*, moved to quash the suit and the court granted his motion. Treat was granted his new trial and was again found guilty.<sup>129</sup> Three years after their instigation, the trials ended. The Indian factory was ordered closed in 1810, but did not actually shut down until 1811.<sup>130</sup> Treat left the Post afterwards.

Wallis's career at the Post is representative of frontier practice. In addition to practicing law, he acted as a land agent, and even sold hats. Wallis held the government position of deputy attorney general, and attempted to represent so many people that conflict of interest was rampant and led to his prosecution at the hands of John Treat. On the other hand, he was extremely successful in litigation during this time period, winning nearly every one of his cases.

---

124. Common Pleas, *supra* note 2, at 64, 67.

125. *Id.* at 67.

126. *Id.* at 74.

127. A bill of exceptions was used at common law to record the objections to decisions, rulings, or instructions of the judge. It would be signed by the judge, if accurate, and entered in the record for purposes of appeal. BLACK'S LAW DICTIONARY 156 (7th ed. 1999).

128. Common Pleas, *supra* note 2, at 79–80.

129. *Id.* at 103–05. The trial actually was two trials. When the jury returned the morning after the first to give its verdict, juror Christopher Kauffman was missing. The court ordered a new trial immediately with the same jury, except that James Crafts replaced Kauffman. The defense unsuccessfully objected.

130. Myers, *supra* note 56, at 141.

## IV. CHEROKEES AND SLAVES IN FRONTIER COURTS

## A. Cherokees and the Courts

The ethnic mix at Arkansas Post extended beyond French, German, and Anglo-Irish-American. By 1810, there was increased involvement with the courts by the Cherokees from the settlements on the St. Francis, including one of the most prominent figures in Arkansas Cherokee history—Connetoo, or Connitue, who had led the Cherokee migration to the St. Francis in the 1790s.<sup>131</sup> During the December 1811 term, “John Hill” served on two juries, one for an alleged assault and battery.<sup>132</sup> John Hill was Connitue’s American name. At the very same term, Jesse Isaacs filed suit “for the use of Robert Clary” against John Hill, “alias Connitue,” for an action of trespass on the case.<sup>133</sup> Isaacs alleged an injury of \$408 and damages of \$1,000.<sup>134</sup> The case was continued over to the next term. During that term, Hill served on a third jury, for a robbery trial, in which the defendant was found guilty on April 1, 1811.<sup>135</sup> Three days later in the civil case, defendant Connitue argued that he was a Cherokee and thus not under the court’s jurisdiction.<sup>136</sup> The court agreed. John Miller, Isaacs’s attorney, presented a bill of exceptions that the judges refused to sign because it embraced more matter than was contained in their decision.<sup>137</sup> At the August 1812 term, Miller presented a writ of error from the General Court, and a transcript was prepared for an appeal.<sup>138</sup> Hill served on no more juries. The status of Cherokee, which he no doubt invoked to avoid being sued, precluded him from further jury duty.

Whites living among the Cherokees also appeared in court. John W. Hunt was a white trader who had lived with the Chickamaugas in Tennessee and crossed the Mississippi with some Cherokees when they moved to the St. Francis River around 1796. He remained with them, despite being whipped by a government agent at one point, as part of the futile effort to keep whites off of Indian lands.<sup>139</sup> As early as April 1809, Hunt served as a juror in several criminal trials.<sup>140</sup> Hunt served on grand juries and on at least

---

131. *Id.*

132. Quarter Sessions, *supra* note 2, at 57, 62. The record book does not state the alleged crime for the other trial.

133. Common Pleas, *supra* note 2, at 71.

134. *Id.* at 89.

135. Quarter Sessions, *supra* note 2, at 69–70.

136. Common Pleas, *supra* note 2, at 89.

137. *Id.* at 90–91.

138. *Id.* at 126–27. The outcome of the appeal is not known.

139. Myers, *supra* note 56, at 151.

140. Quarter Sessions, *supra* note 2, at 12, 17, 22, 26. The defendants were David Yarborough for assault and battery on John Hadley, John Hadley for assault and battery on Dud-

one civil petit jury during the April 1810, December 1811 and April 1812 terms.<sup>141</sup>

John D. Chisholm, another well-known figure in Cherokee history, also appears in these records. Born in Scotland, he emigrated to the United States in the 1790s and was involved in a number of questionable, speculative land deals. He had several wives (perhaps some at the same time), at least one of whom was a Cherokee. He represented the Cherokees on a number of occasions at treaty signings.<sup>142</sup> In January 1811, Robert Clary<sup>143</sup> filed suits against John D. Chisholm and Dennis Chisholm (probably John D.'s son) for debt. Surviving in the University of Arkansas at Little Rock Pulaski County Law Library's collection are the files for these two suits. Ultimately, Clary discontinued the suit against Dennis and won the suit against John D.<sup>144</sup> The nature of Dennis's debt has not survived, but a list of supplies purchased by John D. does exist.<sup>145</sup>

A Peggy Chisholm was indicted for assault and battery in December of 1811.<sup>146</sup> She was not arraigned until April 1812, but she, like Connitue, used her Cherokee identity to evade the jurisdiction of the court and was discharged.<sup>147</sup> Further research will determine whether other Cherokees from the St. Francis settlement and farther west were involved in lawsuits and trials at the Post. The St. Francis Cherokees' hitherto unexamined relationship with this court evidences a desire for involvement with, and an understanding of, white institutions, as well as a willingness to use their legal status to their advantage.

ley Glass, Elijah Carson for assault and battery on Philip Huffman, and Samuel Hensley for assault and battery against Isaac Rider. Also during that term Hunt was appointed an assessor for a road from the Post to "a place called the Bay . . ." *Id.* at 29. Assessors assessed "on each able bodied male person of full age a certain number of days, to labour on the public roads." Act of July 9, 1806, Laws, *supra* note 32, ch. 28, § 3, at 86, 87.

141. Quarter Sessions, *supra* note 2, at 40, 53, 64; Common Pleas, *supra* note 2, at 103.

142. See Myers, *supra* note 56, at 131; John D. Chisholm, at <http://www.ctc.volant.org/home/genea/chis/html/1049.html> (last visited April 30, 2004) (providing information on John D. Chisholm's life and sources used). Chisholm is mentioned in a number of books about the Cherokees; notably STANLEY W. HOIG, THE CHEROKEES AND THEIR CHIEFS: IN THE WAKE OF EMPIRE (1998).

143. At this point not much is known about Robert Clary, although Thomas Nuttall, who visited Arkansas in 1819, mentions a "Clary" who led a gang of "swindling robbers" around the mouth of the Arkansas, up until the year 1811. THOMAS NUTTALL, A JOURNAL OF TRAVELS INTO THE ARKANSAS TERRITORY 227 (Readex Microprint, 1966) (1821).

144. The case files, transcripts and abstracts can be viewed at <http://arcourts.ualr.edu/case-006.6.1t.htm> and <http://arcourts.ualr.edu/case-007/7.1t.htm> (Sept. 1, 2002).

145. The list can be viewed on the net at <http://arcourts.ualr.edu/case-007/7.3S4.pdf> (Sept. 1, 2002).

146. Quarter Sessions, *supra* note 2, at 61.

147. *Id.* at 69.



## B. A Petition for Freedom

There were of course slaves at the Post. They had been introduced by John Law's French colonists in 1721.<sup>148</sup> In 1805 Treat wrote to his superior that "divided amongst those in this Neighbourhood, are sixty Blacks, seldom more than three in a Family, and with one, or two exceptions, the whole of them are Slaves."<sup>149</sup>

A territorial statute gave slaves the right to petition for freedom.<sup>150</sup> On December 6, 1811, Perly Wallis appeared as counsel for Martin Barker. Wallis possessed documents purporting to be signed by Barker's former owner, Louis Barker. In opposition, ex-judge Joseph Stillwell claimed that Barker was his slave. Wallis moved that Barker be allowed to sue "as a poor person" for his freedom. The court declined to issue such a ruling, stating that "there are not sufficient matters set forth in said petition to authorize the interference of the Court."<sup>151</sup> This was the only freedom petition at the Post from 1808 to 1814. Unfortunately the file has not survived, and the only extant evidence of its occurrence is the record book. Perhaps Barker was Stillwell's slave. Or, as happened frequently, perhaps Barker was really free and Stillwell was seizing an opportunity to enslave him. African-Americans had much less, if any, opportunity to use the justice system to their own advantage.

## V. THE MILLER-CASSIDY DISPUTE

The status of a slave was an element in another series of proceedings, the Miller-Cassidy disputes, that further illustrates some of the weaknesses of the American justice system in a small frontier community. Henry Cassidy and John Miller both appeared in the record book of the court at the December 1811 term, Cassidy as judge and Miller as attorney. Miller, though, did not present his license until the April 1812 term, in the form of a letter from Judge B.C. Lucas of the General Court.<sup>152</sup> Miller was also appointed Deputy Attorney General for the April 1812 term.<sup>153</sup>

The origin of the Miller-Cassidy dispute is not clear. During the April term, the case of *Peeler v. Phillips* was called.<sup>154</sup> Richmond Peeler was an

148. ARNOLD, *supra* note 4, at 9.

149. John B. Treat to the Secretary of War (Nov. 15, 1805), in 13 TERRITORIAL PAPERS, *supra* note 13, at 276, 279.

150. Act of June 27, 1807, Laws, *supra* note 32, ch. 35, at 96. Recently, records from freedom suits in Missouri have been posted on the Internet at <http://stlcourtrecords.wustl.edu/about-freedom-suits-series.cfm> (last visited Apr. 30, 2004).

151. Common Pleas, *supra* note 2, at 60.

152. Quarter Sessions, *supra* note 2, at 65.

153. *Id.*

154. Common Pleas, *supra* note 2, at 91, 92.

agent for James Killgore, a planter on the Bayou Boeuf in the Parish of Rapides in the Territory of Orleans. Killgore, through Peeler, claimed that his slave, Sam, had been enticed or stolen away by a man named Moses Harris. Phillips claimed to be a bona fide purchaser. He pleaded that Robert Clary had obtained a writ of execution against Moses Harris, a constable had sold Sam at auction, and that he had purchased Sam at the auction with no knowledge of Sam's status. Peeler sued for "detention of a negro."<sup>155</sup> Ultimately, Phillips would be tried twice and twice found not guilty.<sup>156</sup> This case would be appealed to the General Court.<sup>157</sup> As was common, Phillips would in turn sue Peeler, but that is another story.

In the *Peeler v. Phillips* trial, Anthony Haden represented Peeler; Perly Wallis and John Miller were counsel for Phillips. Henry Cassidy sat as a judge, but he had served as the surety for Richmond Peeler's bond in the case of *Peeler v. Phillips*. Miller objected to Cassidy acting as judge because he was the surety for the plaintiff, and thus conceivably might be biased towards an outcome in favor of Peeler. As the case continued, each time it was called Cassidy apparently attempted to remain on the bench, for each time Miller had to object, and each time Cassidy stepped down.<sup>158</sup> Another cause for animosity between the two men was their competing claims for a potentially huge Spanish land grant from the Spanish governor to Elisha Winter and his sons in 1797. The grant was an issue in Miller's allegation a few weeks after the end of term that Cassidy slandered him:

Shortly after the end of term, on May 10, on the Tenth day of May one thousand Eight hundred and twelve at village of arkansas in the District and Territory afsd, in a certain Discourse which he the afsd Henry Cassidy then and their had with a member of the good Citizens of the district of Arkansas & Territory afsd of and concerning the aforesaid John Miller Esqr in the Presence and hering of Divers good and respectable Citizens of the District aforesaid, then and their falsely and maliciously Said, rehersed and Proclaimed and Loudly Published these false, feigned, and Scandalous, malicious, and opprobrious English words following, to, of and concerning the Said John Miller, in the Presence and hering of those Citizens that is to say he (meaning the said John Miller Esqr) is a thief, and stole my table (meaning a table of his the afsd Henry Cassidy) and I meaning himsele will Prosecute the afsd Miller for stealing my table (and he Still meaning the afsd John Miller Esqr is a thief and Stoa[t] [stole] all the Books he has in his Library marked with the name of Peter Walker from the Shelves of the afsd Peter Walker Decd and meaning him selfe will Prove it (And he still meaning the afsd John

---

155. *Id.*

156. Common Pleas, *supra* note 2, at 93–95, 115–118.

157. *Peeler v. Phillips*, Declaration, Plea (Missouri State Archives, Jefferson City).

158. Common Pleas, *supra* note 2, at 93, 95, 115.

Miller Esqr is a theaf and Stoa[t] two Deeds the one for twenty Thousand acres of Land given to Peter Walker Esqr by Elisha Winters the other an agreement for the Quantity afsd given by the afsd Henry Cassidy to the aforesaid Peter Walker Esqr and he still meaning the afsd John Miller Esqr Stoa[t] the afsd Books and Deed from amongst the effects of Peter Walker, and I meaning him selfe will Prosicute him meaning the afsd Miller for Larceny, and he Still meaning the afsd Miller is a Swindeller and obtained a negrow named Sam from Sylvenus Phillips by Swindelling and Perjury and I meaning him sefe the afsd Henry Cassidy will Prove it And after wards (to wit, on the Same day and year aforesaid at village of Arkansas in the District and territory afsd in a certain other Discourse which the said Henry Cassidy then and their had with Divers other good and worthy Citizens of the District and Territory<sup>159</sup>

Before the next term of the court, which would be in August, the disagreement between the two men escalated. Miller alleged that:

Henry Cassidy on the Eighth Day of July in the year of our Lord one thousand Eight hundred and twelve at the Clerks [the clerk was Patrick Cassidy, Henry's brother] office in the village and District of Arkansas and Territory aforesaid and within the proper Jurisdiction of this Court an assault did make in and upon the Body of him the aforesaid John Miller and with a certain gun commonly called a shot gun which he the Said Henry Cassidy then and there held in both his hands loded with Powder and Shot did then and there Deliverately Shoot at the wound him the said John Miller in the Left Breast Side neck and Sholder of him the aforesaid John Miller making in all twenty one wounds by Reason of which Said Shooting and wounding he the said John Miller was in great Danger of Losing his Life and still continued Disabelled in his Left arm and Breast and he the aforesaid John Miller was then & there putt to great expence and Cost by Reason of the aforesaid shooting and wounding . . . .<sup>160</sup>

Miller filed a declaration of libel against Cassidy before the grand jury at the August Term. The judges present at this term were Francois Vaugine, Samuel Mosely, Henry Cassidy and a new judge, James Scull,<sup>161</sup> a trader.

---

159. Miller v. Cassidy, Complaint (Missouri State Archives, Jefferson City). The wording of the declaration demonstrates the "elaborate and absurd jargon of recitals and explanations which obscure the real issues to be tried almost as effectually as if the pleadings were still drawn in Latin." BENJAMIN J. SHIPMAN, HANDBOOK OF COMMON-LAW PLEADING 219 (Henry Winthrop Ballentine ed., 3d ed. 1923). A declaration of slander had to contain an inducement, a colloquium, publication, innuendoes, and damages to meet the technical pleading requirement. *Id.*

160. Miller v. Cassidy Complaint, *supra* note 159.

161. Quarter Sessions, *supra* note 2, at 71.

The grand jurors delivered three indictments against Cassidy: one for "a libell against John Miller and his wife Phebe Miller," and two others for assault and battery (the victim's name is not listed).<sup>162</sup> No doubt Miller was able to assist the grand jury in its deliberations, for during this term of court he was again the prosecuting attorney.<sup>163</sup> Cassidy pleaded guilty to the charge of assault and battery and was fined twenty-five cents<sup>164</sup>—clearly a miscarriage of justice if this was the penalty for the shooting. Cassidy pleaded not guilty to the second charge of assault and battery, was tried on August 5<sup>th</sup>, and found not guilty the same day.<sup>165</sup> Later that day the grand jury presented charges of perjury and felony—apparently assault—against John Miller. Since it was the last day of term, the libel, perjury, and felony cases would be continued at the December term. Before adjourning "until Court in Course," the judges ordered that Anthony Haden serve as prosecutor in the charges involving John Miller.<sup>166</sup>

The Court of Common Pleas had not yet adjourned, however, and on August 7, Cassidy appeared to make bond for \$400 premised on his keeping the peace "towards all the good citizens of the United States & more especially towards John Miller of the District of Arkansas."<sup>167</sup> On August 13, Miller petitioned the court to divide the Winter grant and designate 20,000 arpens for him, which he claimed under a deed from Winter to Peter Walker, and assigned by Walker to Phebe Thornburg, Miller's late wife. Cassidy, another claimant to the Winter grant, objected that Miller had no right to the land "because the assignment said to be made from said Walker to the aforesaid Phebe is not proved according to law, the Court have concluded not [to] decide either for or against the [m]otion till they can get advice."<sup>168</sup> On Sept. 12, Miller sued Cassidy for trespass on the case and for slander.

Meanwhile, Judge Henry Cassidy had decided to become a lawyer. At that time, there were three routes open to those who wished to practice. First, they could attend a law school. Although a law degree is required in virtually all jurisdictions today, in 1812 there were only a handful of schools offering study in law. The school closest to the Arkansas Post was Transylvania University in Lexington, Kentucky. The second route, followed by Abraham Lincoln, was to read law on one's own. The third and most com-

---

162. *Id.* at 73, 76.

163. *Id.* at 79.

164. *Id.* at 77.

165. *Id.* at 78.

166. *Id.* at 79.

167. Common Pleas, *supra* note 2, at 111.

168. *Id.* at 124. In addition, the United States had not ruled in favor of their claims. The Board of Land Commissioners had rejected the Winters' claims once in 1808 and twice in 1811. 1 CENTENNIAL HISTORY OF ARKANSAS, *supra* note 50, at 127.

mon was to apprentice to a lawyer. There were still only a handful of lawyers at the Post, and no law-trained judges.

Thus, on October 27, 1812, Perly Wallis addressed a letter to "all whom it may concern" recommending Henry Cassidy to study law in St. Louis. The following day "A. H.," certainly Anthony Haden, wrote a similar letter.<sup>169</sup> The letters stated that Cassidy had studied with both of these lawyers,<sup>170</sup> and they found their way to Rufus Easton, a prominent St. Louis attorney and judge, who wrote the following April to William Sprigg that Henry Cassidy had studied law with him for two months.<sup>171</sup> This two month course of study—bolstered, of course, by the time Cassidy had spent on the bench—was sufficient to allow Cassidy to obtain admission to the bar from Judge John B.C. Lucas.

Meanwhile, on November 30, John Miller appeared in court at the Arkansas Post to defend himself against Cassidy's lawsuits.<sup>172</sup> However, the courts did not meet for the December Term; the required quorum of two judges was not present. In fact, the next time a court of record would hold trial at the Arkansas Post would be in September 1814 as the General Court of Arkansas County, under Judge George Bullitt, a lawyer. Thus for the time being, Miller and Cassidy could not pursue their lawsuits at the Post.

Not to be deterred, Miller attempted to remove his lawsuits to the General Court in St. Louis. He filed both the slander and assault declarations in St. Louis, seeking \$10,000 in damages for the assault and together with affidavits stating that a fair trial could not be had in the District of Arkansas where the cases were pending because

[t]he said defendant being one of the judges of the said court of Common Pleas of the said District of Arkansas is both interested and prejudiced and has undue influence over the other judges and because the Sheriff of the Said District is related to the Said defendant & the Clerk of the said court is a brother of the Defendant and because Samuel Moseley—one of the judges of the said Court is prejudiced against the said plaintiff . . . .<sup>173</sup>

A sheriff tried to serve process on Henry Cassidy twice. The first time the sheriff looked for him in the County of St. Louis and could not locate him.<sup>174</sup> The second time, in the spring of 1814, the outcome appears in the sheriff's return on the cover sheet of the *capias*: "I could not Execute this

---

169. BANNER, *supra* note 21, at 107 n.44.

170. A judge studying law with two of the lawyers who appeared before him in court is yet another example of conflicts of interest at the Post.

171. *Id.* at 107 n.45.

172. Quarter Sessions, *supra* note 2, at 81.

173. Miller v. Cassidy, Affidavit (Missouri State Archives, Jefferson City).

174. *Id.* at Return of the Sheriff.

writ the Defendant kept me off with force and arms and his Brother Patrick Cassidy told the Defendant that I was the Sheriff and to take care of himself.”<sup>175</sup> It appears from the file as though the General Court never tried the cases. Interestingly, on this *capias* at the bottom is written “Miller, Carr and Scott attorneys.” Most likely the two latter names are those of William C. Carr, one of the most prominent attorneys in St. Louis at the time, and John Scott, former Attorney General for the territory. It does not appear as though Miller remained to practice in St. Louis, however.

The old courts of common pleas and general quarter sessions met one more time in March of 1814, under Judges Joseph Stillwell, Samuel Mosely and Francois Vaugine, although a regular term of court was not held because of “the parties not being timely noticed.” Henry Cassidy duly presented his license from Judge Lucas to practice law in all the courts of record in the territory and was admitted to practice. Cassidy was also commissioned to serve as Deputy Attorney General.<sup>176</sup>

In 1814, Congress established a unique court for the new Arkansas County. Styled the General Court (by now the Missouri Territory’s highest court had been renamed the Superior Court), it had full jurisdiction of both common pleas and superior court matters. Appeal was allowed to the Missouri Territory Superior Court.<sup>177</sup> On September 5, 1814, Judge George Bullitt called the General Court to order. Bullitt was a lawyer who previously had presided over a court at Ste. Genevieve and was not a member of the Arkansas Post community. Henry Cassidy was again served as Deputy Attorney General.<sup>178</sup> He and Miller had not abandoned their suits, which were both called and both continued over till the next term.<sup>179</sup> On April 4, 1815, however, Judge Bullitt discontinued all suits and process which were begun prior to the dissolution of the District of Arkansas.<sup>180</sup>

Henry Cassidy went on to a successful next few years as a lawyer. He later represented Arkansas County in the Missouri territorial legislature. Miller never appeared as counsel again in the Arkansas General Court. Given his alleged injuries, his health may have prevented him from practicing law. And yet there is one tantalizing bit of evidence, however, that can perhaps serve as an epilogue. On page 401 of volume 19 of *Territorial Papers* begins a letter from a “John Miller” to Josiah Meigs, then Commissioner of the General Land Office. Miller is writing from Phillips County on

---

175. *Id.*

176. Common Pleas, *supra* note 2, at 150.

177. 3 Stat. 95 (1814).

178. General Court Records, District of Arkansas, at 150 (available at the Arkansas History Commission on microfilm). The page numbering picked up where Common Pleas left off, because the court used the same physical book.

179. *Id.*

180. *Id.* at 171.

February 4th, 1822, at the "fourth Chickey Saw Bluffs." He claims 40,000 acres of the Winter grant—the same amount that Cassidy claimed John Miller stole in 1812—and is willing to give up his claim if his two sons can be granted "a certain Island Known by the name of Millers Island Number 34 on the mississippi river and one Thousand acres opposit the Lower point of sd [said] Island on the Arkensaw Shore." In return, he is also willing to share information about the Winter grant. It seems somehow fitting that his letter ends with a nota bene: "If I have no Chance of receiving a Donation I wish you to Destroy my Letter as I have been advised to write in this way to you under the impression that I would Get my request complied with J Miller."

## VI. CONCLUSION

Arkansas's "frontier court" shared many characteristics of other such courts. Lay judges and a shortage of attorneys made for simpler pleading and procedure. The court met only intermittently due to the twin difficulties of traveling long distance and the illnesses that plagued the Arkansas settlers. On the other hand, some facts distinguish it from other frontier courts. As the farthest court from St. Louis, the seat of government, justice in Arkansas was hindered by governors who periodically shut down the courts at the Post. The Cherokees had a connection, hitherto unknown, with this court, at least during the period they lived on the St. Francis. Arguably, conflicts of interest were even more prevalent at the Post because of the small size and isolation of the community. Finally, even during this period, the Miller-Cassidy dispute evidences the resort to revenge (shooting) outside of the legal system for perceived wrongs (a slander lawsuit) that the legal system could not or would not punish—a hallmark of 19th century Southern society.