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Aiding an Overburdened Court

by Andy D. Bennett

When the Constitution of 1870 was being debated, the docket of the Tennessee Supreme Court was overburdened. As a result, Section 2 of the Constitution's Schedule stated:

> *At the first election of Judges under this Constitution there shall be elected six Judges of the Supreme Court, two from each grand division of the State who shall remain unfilled and the court shall from that time be constituted of five Judges. While the Court shall consist of six Judges they may sit in two sections, and may hear and determine causes in each at the same time, but not in different grand divisions at the same time.*
>
> *When so sitting, the concurrence of two Judges shall be necessary to a decision.*

Thus, the Tennessee Constitution provided for a temporary sixth judge and allowed the existing Court sit in two sections. There is, however, no certainty about how and when they sat in two sections. "No separate court minutes were kept; all six judges signed the minutes as if all had heard and disposed of the appeals *en banc*."[1] It also did not solve permanently the problem of an overworked court.

Other efforts were made over the years to give aid to the overburdened Supreme Court. *McElwee v. McElwee*[2] indicates that because the dockets of the Supreme Court had been overburdened with appeals, "Intermediate Courts have from time to time been created and vested with power more or less extensive — such as the Commission Court, the Court of Referees, [and] the Arbitration Court... . " According to Judge Williams, the first Arbitration Court was created in 1873[3]. Arbitration Commissions were created for the Supreme Court at Jackson by 1875 Chapter III and 1877 Chapter LXIX. Another was created at Nashville by 1877 Chapter LI and one was created for each grand division by 1879 Chapter CLXXX. They were all of limited duration and the members were appointed by the Governor. Clearly, they were not courts as envisioned by the constitution.There was no appeal to the commissioners, rather the parties appealed to the Supreme Court and then agreed to have the commissions hear their cases. As early as 1881, Governor Albert Marks observed "Those courts performed their duties ably and faithfully, but as their jurisdiction depended upon consent, as the cases were comparatively few where both parties were in quest of speedy justice, they were without the power to accomplish the design for which they were intended."[4] Governor Marks went on to recommend a court of appeals for equity cases.

In his legislative message of February 8, 1883, Governor William Bate recommended an intermediate court of appeals for each grand division.[5] As of December 1, 1882, the Nashville docket had 1,736 pending cases.[6] As of January 1, 1883, the Knoxville docket had 250 pending cases and the Jackson docket 554.[7] Instead the legislature passed 1883 Chapter CCLVII, which provided for a Commission of Referees. The judges of the Supreme Court were to appoint three persons per grand division for a two-year term to hear cases the Court referred to them, except revenue cases. These panels did their jobs well, but the large backlog of cases in Nashville required the legislature in 1885 to extend the Commission for the Middle grand division in 1885 Chapter 94.

In 1893 Governor Peter Turney, a former Chief Justice of the Tennessee Supreme Court, urged the legislature to create an intermediate court.[8] This proposal was defeated in the legislature. However, in 1895 the legislature enacted Chapter 76, which created the Court of Chancery Appeals, the first true intermediate appellate court. The reasons recited of the act were the impossibility of the Supreme Court keeping its dockets clear, the delays in consideration of cases and the great amount of time the Court spent on voluminous records in chancery cases. The act provided for three

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judges, one from each grand division, to be elected to eight-year terms. The jurisdiction of the court was appellate only, for all equity cases, except those involving revenue. Appeals from their decisions would go to the Supreme Court.

In 1907 the Court of Chancery Appeals was changed. Chapter 82 added two additional judges and changed the name of the Court of Chancery Appeals to the Court of Civil Appeals. The jurisdiction of the Court was extended to include not only equity cases but to all civil cases tried in the Circuit and Common Law Courts, with certain exceptions.[9] Decisions of the court could be reviewed by the Supreme Court by certiorari. The Court of Civil Appeals could also certify to the Supreme Court any case as to which the court desired the decision and opinion of the Supreme Court. The successor court, the Court of Appeals, was created by 1925 Public Chapter 100.

In 1967 Public Chapter 226, the General Assembly created the Court of Criminal Appeals as the intermediate appellate court for criminal cases. This created a similar appellate system for criminal cases as for civil. The number of judges on both the criminal and civil intermediate appellate courts has been increased over the years to deal with growing caseloads.

Public Chapter 952 of 1992 is the most significant recent legislative attempt to assist the Supreme Court with its caseload. Known as the "Appellate Courts Improvements Act of 1992," the law required almost all cases, with the exception of workers' compensation cases and cases in which the Supreme Court "reached down" and assumed jurisdiction, to go through the intermediate appellate courts first. By reducing the number of cases that qualified for a direct appeal from the trial court to the Supreme Court, the legislature gave the Supreme Court greater control over the size and content of its docket.

Notes

[1]Samuel C. Williams, *Phases of Tennessee Supreme Court History*, 18 Tenn. L. Rev. 329, 323 (1944).

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An Open Letter

October 18, 2005

Board of Directors
Tennessee Supreme Court Historical Society
4528 Beacon Drive
Nashville, TN 37215

Re: Tennessee Supreme Court records

Ladies and Gentlemen:

The purpose of this letter is to urge the Tennessee Supreme Court Historical Society to take on a project of preparing a Handbook of Research in Early Tennessee Supreme Court Opinions and Records. The idea is to take an inventory of the opinion books and material relating to the Supreme Court now housed in the State Library and Archives, as well as the courthouse in Jackson and Knoxville and describe each item so that a researcher can expect to locate such things as unpublished opinions by using the Handbook. To prepare a proper Handbook it will be necessary to locate and determine the contents of the various books and loose records of the Supreme Court that seem scattered with little way of knowing where to find what.

Let me explain. My research into death penalty cases in Tennessee has produced a very distressing conclusion: Many Supreme Court opinions affirming death penalty sentences simply cannot be located, especially for East Tennessee for the period 1883-1903! And I'm sure there were opinions in each of the cases because the newspaper describing the man's execution will often say the exact date the Supreme Court announced its decision, and sometimes naming the judge who gave it.

Since 1829 the Supreme Court has been required to render written opinions. And in 1949, the court said that its opinions were part of the record. Taylor v. State, 225 S. W.2d 822 (1949), but when a researcher examines the technical record (bill of exceptions) in a case located at the State Library and Archives, he discovers that the opinions have never been included in the files. So where are they, especially the unpublished opinions?

I discussed this issue in the June 2005 issue of the Nashville Bar Journal. I wrote that all of the known opinions should be compared to published opinions in Tennessee Reports, etc. Any "missing" ones should be at least indexed and if typewritten, digitized. Then the card catalog of Supreme Court records should be keyed and cross-referenced to the opinions. It's a big job, but once it is done, we will all be proud to say that history has truly been preserved in Tennessee.

Another reason for preparing a researcher's Handbook is this: Some of the opinions are known to be "missing." For example, my own work shows that the December Term (Nashville) 1918 and 1924 opinion books are literally gone. By that I mean gone with the wind-this on top of the fact that the Knoxville opinions for 1869-1890 have been missing for decades. It's time to take charge of this matter and I think the Tennessee Supreme Court Historical Society should lead the way.

I'll be glad to help!

Best regards,
Lewis Laska

Lewis Laska is a Nashville attorney, a widely-recognized legal historian, and a founding member of the Society. President-Elect Andy Bennett has responded that the Society is aware of this concern and plans to address it as a project in 2006.

Samuel Cole Williams Came to My House

by Andy D. Bennett

Samuel Cole Williams came to my house on May 13, 2005. No, he was not some apparition walking down my hallway. He was not some fever-induced hallucination. Judge Williams arrived via a book he had written and signed over sixty years ago.

I am not a frequent Ebay purchaser, but I could not resist bidding on a signed copy of Judge Williams' 1944 book *"Phases of the History of the Supreme Court of Tennessee."* My delight at winning was only tempered by the fact that I was the only bidder. Did I miss something? No. Judge Williams provides a fascinating account of the early court system of Tennessee along with accounts of the lives of some of the giants of Nineteenth Century Tennessee jurisprudence — David Campbell, Hugh Lawson White, John Haywood and Nathan Green — along with other so-called "dim figures" of our judicial past — persons such as Howell Tatum, Thomas Emmerson, Parry Humphreys and William Cooke. He also offers many fascinating insights into the history of the Tennessee Supreme Court — who had the longest and the shortest service on the court, where the court met, who were the most productive opinion writers, and when they began to wear robes.

Samuel Cole Williams was by any measure a remarkable man. Born in 1864 in Gibson County, Tennessee, he attended Vanderbilt University's School of Law, graduating in 1884. In 1882 Williams moved to Johnson City. In 1912 he became Chancellor of First Chancery Division of Tennessee. In 1913 he became a justice of the Tennessee Supreme Court where he served until 1918. From there, he became the First Dean of Lamar School of Law at Emory University. He was the compiler of Williams Annotated Tennessee Code of 1934. As chairman of the Tennessee Historical Commission, Judge Williams encouraged the placing of markers at Tennessee historical sites. By his death in 1947 he had authored 14 books on Tennessee history and over fifty articles.

I found Judge Williams in this book. Not only did he actually hold and sign it, but left us insights into himself. In this book, he implanted his love of history. He displayed his joy at sharing our Tennessee legal history with others. He left his respect for those who came before who created what we have today. Judge Williams wrote nothing about himself in this book, yet he is there. On every page.

Michael Crichton once wrote, "If you don't know history, you don't know anything. You're a leaf that doesn't know it's part of a tree." Books like this one help me feel more connected to our great Tennessee legal heritage. It will occupy an honored place in my home along with Joshua Caldwell's *"Sketches of the Bench and Bar of Tennessee"*, John W. Green's *"Lives of the Judges of the Supreme Court of Tennessee 1796-1947,"* and, of course, *"A History of the Tennessee Supreme Court"* edited by Professor James Ely and sponsored by the Tennessee Supreme Court Historical Society. These books are more than a compilation of names, cases and dates. They tell us how we got to where we are. They connect past to present and offer, to those who choose to consider them, building blocks of the future.

Thanks for dropping by, Judge Williams. I hope you'll stay a while.◆

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[2]97 Tenn. 649, 658 (1896).

[3]It was created by 1873 Resolution 45. The Governor was to appoint two competent persons who where to sit on the Board of Arbitration with Chief Justice A. O. P. Nicholson. Williams, supra at 337. This board was for the Middle Division and heard only cases willingly submitted to them by the parties. Chief Justice Nicholson had suffered an accident and could not travel. 1873 Resolution 45.

[4]6 *Messages of the Governors 1869-1883,* 623 (White, ed. 1963).

[5]7 *Messages of the Governors 1883-1899,* 61 (White, ed. 1967).

[6]Id., at 60.

[7]Id., at 60.

[8]7 *Messages of the Governors,* at 475.

[9]The exceptions were equity "cases in which the amount involved, exclusive of costs, exceeds one thousand dollars, and except cases involving the constitutionality of the statutes of Tennessee, contested elections for office, State revenue, and ejectment suits." 1907 Chapter 82, Section 7.◆