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A Picture of the New York Court of Appeals at the Time of *Wood v. Lucy, Lady Duff-Gordon*

Meredith R. Miller*

Give me the old road still,
With its zigzag fence and its chestnut trees,
And its springtime mud to the horse's knees –
Give me the old road still!

—John Jerome Rooney, *The Old Road*
(poet and counsel to Otis Wood)¹

*Wood v. Lucy, Lady Duff-Gordon*² is an enduring part of the contracts canon. A symposium addressing the legacy of the case would be incomplete without a picture of the New York Court of Appeals at the time the case was decided and a discussion of the oft-neglected role that court rules and administration play in the development of the law. Thus, it is the aim of this short essay to place *Wood* in the context of the court's history, and to explore how structural and jurisdictional changes to the court could have had an impact on the decision of the case.

This essay will begin by describing the court's move to its new quarters on Eagle Street shortly before hearing oral argument in the *Wood* case. After setting the scene, the jurisdiction and structure of the court will be explored and some brief biographical information about the judges will be provided. A theme at the turn of the century was the court's extraordinary

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1. COLLECTED POEMS OF JOHN JEROME ROONEY 16 (Dodd Mead & Co. 1938).

2. 118 N.E. 214 (N.Y. 1917). This essay will assume familiarity with the facts and holding of the case.

backlog of cases.³ With the steadily growing population of New York State came an increasingly burdened court docket.⁴ To address the backlog, constitutional and legislative changes were made to the court's composition and jurisdiction. This essay will place *Wood* in the timeline of these changes and suggest that it was possible that Judge Benjamin Nathan Cardozo might not have been assigned to the panel that heard the case. Further, it will suggest that, had the case come later in the evolution of the court's jurisdiction, the appeal might not have even been heard by the court. Finally, it will acknowledge that this case presents a mystery: with the court's intense backlog of cases, it is not certain why the *Wood* appeal was decided in just under six months, while the average case took roughly two years from the date of filing to reach oral argument.

Setting: The Move to Eagle Street

The year 1917 was a dynamic time in the history of the New York Court of Appeals. Since 1884, the court had been housed in the southeast corner of the third floor of the New York State Capitol, directly above the Executive Chamber.⁵ The courtroom design was planned by a prominent architect, H.H. Richardson.⁶ The Richardson Courtroom was described in an 1890 magazine article:

The Court of Appeals has the finest quarters of any court in the world, so Lord Coleridge says. They are on the third floor of the Capitol, extending across the eastern front of the south wing and of the centre. The chamber for arguments is on the southeast corner, with three great windows on the east and two on the south, commanding an extensive view of the beautiful Hudson River valley. The chamber is of moderate size, well proportioned and of good acoustic qualities. Its walls are paneled from floor to ceiling in oak, and the ceiling is heavily timbered with oak. The bench is elaborately carved along the front, showing grotesque heads, among other ornaments, which may be symbolical of the success-

3. FRANCIS BERGAN, *THE HISTORY OF THE NEW YORK COURT OF APPEALS, 1847-1932*, at 224 (Columbia University Press 1985).

4. *Id.*

5. THERE SHALL BE A NEW YORK COURT OF APPEALS 28 (1997), http://www.courts.state.ny.us/history/pdf/Library/Courts/There_Shall_Be.pdf (last visited Mar. 13, 2008) [hereinafter "THERE SHALL BE"].

6. *Id.*

ful and unsuccessful suitors or counsel. On the walls are thirty-three portraits of deceased judges of the State, nearly all of this court, but embracing. [sic] Jay and Nelson. Over the bench hang portraits of Walworth, Kent, Spencer, Church, Jay and Folger, the three former to the lower row, and the three latter to the upper and arranged in the order named from left to right[.] Over the fireplace hangs a superb portrait of the elder Peckham. The fireplace is a magnificent structure of the choicest Mexican onyx. Between the south windows stands a bronze statue, of heroic size, of Chancellor Livingston, the work of our distinguished Albany sculptor, Palmer, and a duplicate of one in the Capitol at Washington.

The only unpleasant object to lawyers) [sic] in the room is a tall clock in a carved oaken case. The judges look at it oftener than the lawyers. The judges' consultation-room, libraries, and toilette-rooms are north of the chamber, communicating with it by a door behind the bench. Through this door at ten o'clock the judges enter in their gowns while the bar rise and stand until the crier opens court and the judges take their seats. There is a daily calendar of eight causes, and the judges sit until two o'clock. Across the hall, on the south, is a large room for the bar, hung with portraits of great dead lawyers, pre-eminent among them Nicholas Hill, at full length, and in the hall hang full-length portraits of two of the greatest living lawyers, David Dudley Field and William M. Evarts.⁷

Despite the grandeur of the courtroom, "the accommodations in the Capitol had become inadequate" and, in 1909, the New York State Legislature authorized State Hall as the new location for the court.⁸ Designed by architect Henry Rector, and completed in 1842, State Hall was intended to house State offices.⁹ This Greek revival building was renovated and, in 1917, renamed Court of Appeals Hall.¹⁰ It has

five-foot-thick walls of marble, quarried and fashioned at Mount Pleasant (Sing Sing), New York, and transported by riverboat and oxen; foundation stones that were the largest that could be procured; ceilings arched to supersede the use of timbers and make

7. *Id.* at 29 (quoting Irving Browne, *The New York Court of Appeals*, *The Green Bag* (1890)).

8. *Id.* at 30.

9. *Id.*

10. *Id.*

the building fireproof; marble flag floors and stairs; and a copper-sheathed roof and dome.¹¹

On January 14, 1917, the court held its first session in its new home in this building on Eagle Street.¹²

The courtroom is a near exact reproduction of the majestic Richardson Courtroom from the State Capitol.¹³ All of the Richardson courtroom, except the ceiling, was carefully dismantled and transported to the new building.¹⁴ A newspaper account of the court's 1917 dedication ceremony observed:

It is [a] somewhat larger titan the old one, and the blinding light from the south windows which the judges always have faced has been eliminated. The carved woodwork of the old room was removed piece by piece and set up in the new wing of the state house, however. Oil paintings of former judges panel the four sides of the room, being held in by carved oak frames. Even the onyx and bronze fireplace from the Capitol was transplanted so the "atmosphere" of the old hearing room would be maintained in the new quarters. A subdued lighting system arranged by the state architect gave the room a calm dignity which brought forth much comment from the judges themselves and many others present.¹⁵

In a presentation about the court, a noted Albany architect described the detailed wood carvings of faces that remain a hallmark of the magnificent courtroom today:

And this is clearly the Capitol craftsmen, I believe, sculpting one another in parody. There are very humorous little things that peer out at you here. And unlike later architecture which became almost a machine-repetition of traditional motifs, you look nearly in vain for the same pattern twice in this room. There is always a feast for the eye, wherever [sic] you look. It is of the finest quality materials they could have of the day and, yet, a very quiet design that has survived well over time.¹⁶

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.* at 30-31 (quoting unidentified newspaper account) (italics omitted).

16. *Id.* at 31 (quoting John Mesnick, Address at Making History Together: The New York State Court of Appeals in Albany's Tricentennial Year (1986)) (italics omitted).

Indeed, this architect remarked that, “to truly appreciate this room, you have to approach the Bench on your hands and knees.”¹⁷

It is in the “calm dignity” of this setting that the court heard and decided *Wood v. Lucy, Lady Duff-Gordon*, and continues to hear and decide cases today.

The Structure and Composition of the New York Court of Appeals in 1917

Today, the New York Court of Appeals is composed of six associate judges and one chief judge.¹⁸ When *Wood* was decided, the court’s structure was different, with a roster of seven permanent, elected judges and up to four additional, temporary judges designated by gubernatorial appointment. In 1899, with an increasing caseload, there was apprehension about the functionality of a court of seven judges.¹⁹ That year, with the people’s overwhelming support, the Judiciary Article of the New York Constitution was amended to allow for temporary judges.²⁰

Pursuant to this amendment, the New York Court of Appeals can certify to the governor that, because of a backlog of cases, it is unable to hear and decide the cases on its docket “with reasonable speed.”²¹ Upon this certification, the governor can then appoint from the New York Supreme Court up to four temporary judges who will serve until the docket is reduced to 200 cases.²² This amendment, however, did not change the number of judges that hear and decide a case—that remains at seven.²³

At the time *Wood* was decided, the court was comprised of ten judges—seven permanent, elected members, and three temporary judges designated by gubernatorial appointment.²⁴ Of

17. *Id.*

18. N.Y. CONST. art. VI, § 2(a).

19. BERGAN, *supra* note 3, at 224.

20. *Id.* at 224-25.

21. *Id.* at 224.

22. *Id.*

23. *Id.* at 225. Five judges would constitute a quorum.

24. The court’s Chief Judge was Frank Harris Hiscock. The court’s other popularly elected judges were Benjamin Nathan Cardozo, William Herman Cuddeback, Chester Bentine McLaughlin, Cuthbert Pound, Frederick Collin and John

those ten judges, it appears that the seven-judge panel for any given case was composed based on a rotation system. Research did not reveal much discussion of how the seven-judge panel was constituted. Nevertheless, some clues are provided by an *Albany Law Journal* article, written in 1900, just after the Judiciary Article was amended to permit then-Governor Theodore Roosevelt to appoint temporary judges to the court.²⁵ Roosevelt designated three (rather than four) judges; the article provided:

The court will convene on the 9th inst., and, according to the plan adopted, all of the judges of the original court will sit for the first two weeks; then three of the associate judges will go off the bench for the purpose of writing opinions, their places being taken by three new judges. At the end of two weeks more the other three associate judges will go off the bench and their places will be taken by the three judges who first went off. At the end of six weeks the court will take a week's recess, and this plan will be followed throughout the year. Thus, in every seven weeks the court will be in session six weeks, and each judge will serve four weeks on the bench, with three weeks in which to write opinions.²⁶

It is likely that the *Wood* court followed this or a similar rotation to compose its seven-judge panel. And, however it was constituted, one cannot ignore that, unlike today, all of the court's judges did not sit on every case. The *Wood* panel was composed of Judges Cardozo, Cuddeback, McLaughlin, Andrews, Hiscock, Chase and Crane. But, given the court's structure at the time, it is quite possible that Judge Cardozo might not have been assigned to the panel that decided the *Wood* case. By 1923, there were no longer any temporary judges sitting by gubernatorial appointment, and no temporary judges have been designated since.²⁷

W. Hogan. The temporary judges were William S. Andrews, Emory Albert Chase and Frederick Evan Crane.

25. *Current Topics*, 61 ALB. L.J. 3 (Jan. 6, 1900).

26. *Id.*

27. BERNARD S. MEYER, BURTON C. AGATA & SETH H. AGATA, *THE HISTORY OF THE NEW YORK COURT OF APPEALS, 1932-2003*, at 2 (Columbia University Press 1st ed. 2006).

The Judges of the *Wood* Panel

It is simply impossible to capture the life and achievements of the judges of the court in such a short essay.²⁸ The panel of judges that decided the *Wood* case were divided among the Republican and Democratic parties, and hailed from various geographic regions of the state. It should also be noted that, in some cases, their paths to the court were rather entangled. At the time (and, indeed, until a 1977 constitutional amendment),²⁹ aside from temporary gubernatorial appointments, New York Court of Appeals judges were popularly elected. Some of the judges that came to form the *Wood* panel had, at one time or another, run against each other for a coveted seat on the court. For example, Republican Judges Hiscock and Chase were defeated in the 1912 election by Democratic Judges Cuddeback and Hogan (Hogan was a member of the court at the time, but did not serve on the *Wood* panel).

The most well-known judge of the *Wood* panel is obviously Benjamin Nathan Cardozo, the author of the decision. These brief pages cannot do justice to a biography of Judge Cardozo,

28. It is trusted that much will be said during this symposium about the colorful Lady Lucy, but a few notes about the parties' lawyers seems warranted.

The lawyers who represented the parties in this case were true Renaissance men. John Jerome Rooney, who represented Otis Wood, left a legacy not only as an attorney, but as a poet as well. His poems, many about the U.S. military and Irish struggle for independence, were widely published in newspapers and magazines. In 1938, in an introduction to a collection of Rooney's poetry that was published posthumously, his friend and noted poet Edwin Markham wrote:

John Jerome Rooney spent his life in two chief directions—in the joyful and effective practice of the noble art of poetry, and in the practice of law for thirty-five years, during which he was a Special Counsel to the City of New York and Presiding Judge of the New York State Court of Claims.

COLLECTED POEMS OF JOHN JEROME ROONEY, *supra* note 1, at vii.

Similarly, William Matheus Sullivan, who represented Lady Lucy, also took an interest in the arts. Through a 1956 bequest he established the Sullivan Foundation, which identifies "talented young singers and help[s] them develop professional careers through a unique program providing continuing financial support over a period of five years." The Sullivan Foundation, <http://www.sullivanfoundation.org/about.html> (last visited Mar. 13, 2008). Sullivan was a prominent Manhattan socialite, and when he hosted guests, the parties made the pages of the *New York Times*. He hosted guests such as distinguished violinist Fritz Kreisler and the governor of Maryland, Albert Cabell Ritchie. *Kreisler is Honored at Birthday Party*, N.Y. TIMES, Feb. 3, 1943, at 15; *Reception for Gov. Ritchie*, N.Y. TIMES, Apr. 11, 1928, at 26.

29. MEYER, AGATA & AGATA, *supra* note 27, at 2-3.

and there are numerous quite lengthy works devoted admirably to his life.³⁰

Cardozo was born to a Sephardic Jewish family in New York City in May 1870.³¹ He graduated from Columbia University in 1889 at the age of 19. He enrolled in Columbia Law School, but he withdrew one year before graduation to work in his brother's law practice.³² In 1903, just a few years into his practice of law, Cardozo published the first edition of his book *The Jurisdiction of the New York Court of Appeals of the State of New York*.³³ In 1909, at age 39, Cardozo was sought out for a federal district court appointment, which he declined for financial reasons.³⁴ Nearly four years later, he successfully ran as a Democratic candidate for a State Supreme Court seat (a trial court judgeship in New York).³⁵ But before he even wrote an opinion, in February 1914, Governor Martin Glynn designated him to a temporary position on the Court of Appeals.³⁶ In January 1917, Governor Glynn appointed Cardozo to fill a vacancy created when Judge Samuel Seabury resigned to run as the Democratic candidate for Governor of New York.³⁷ Later that year, Cardozo retained the seat by winning election to an associate judge position.³⁸ Of course, he went on to become Chief Judge of the New York Court of Appeals, and left the court in 1932 to become a Justice of the Supreme Court of the United States.

Of his work during his time on the New York Court of Appeals, Chief Judge Kaye has eloquently noted:

Cardozo advocated for sparse statements of fact in judicial decisions, and his opinions prove that this approach can yield arresting results. Who, after all, can forget the defendant who "style[d]

30. Chief Judge Judith S. Kaye, *Benjamin Nathan Cardozo*, in *THE JUDGES OF THE NEW YORK COURT OF APPEALS: A BIOGRAPHICAL HISTORY* 377, 390-93 (Albert Rosenblatt ed., Fordham University Press 2007) (biography of Cardozo by Chief Judge Judith S. Kaye); see, e.g., ANDREW L. KAUFMAN, *CARDOZO* (Harvard University Press 1998).

31. Chief Judge Judith S. Kaye, *supra* note 30, at 378.

32. *Id.* at 378, 380.

33. *Id.* at 380.

34. *Id.*

35. *Id.* at 380-81.

36. *Id.* at 381.

37. *Id.*

38. *Id.*

herself 'a creator of fashions,'" whose "favor help[ed] a sale?" Or the sketch of events on the Long Island Railroad platform that immortalized Helen Palsgraf? Or the terse account of George Kent's pursuit of plumbing perfection for his pricey country residence? The wealth of detail in [Professor Andrew] Kaufman's book gives a glimpse of the types of facts Cardozo left on the cutting room floor: that Mrs. Palsgraf's principal injury was a stutter allegedly caused by the accident, that Mr. MacPherson suffered his accident while driving a sick neighbor to the hospital. While some judges might have opted for more atmospheric, Cardozo knew when too many facts impeded the force of his legal argument.

Time and again throughout his opinion, Cardozo shows not only an ability to perceive precisely the right balance that will "settle and declare the law" but also a gift to articulate it persuasively, in words that fix the princip[le] forever. A lawyer's lawyer, he thought rigorously and wrote vigorously—what better description of a jurist's jurist.³⁹

Indeed, it was with this simultaneous discipline and flare that he penned the *Wood* decision, with its indelible instruction on implied promises:

It is true that [Wood] does not promise in so many words that he will use reasonable efforts to place [Lady Duff-Gordon's] indorsements and market her designs. We think, however, that such a promise is fairly to be implied. The law has outgrown its primitive stage of formalism when the precise word was the sovereign talisman, and every slip was fatal. It takes a broader view to-day. A promise may be lacking, and yet the whole writing may be 'instinct with an obligation,' imperfectly expressed. If that is so, there is a contract.⁴⁰

Judges McLaughlin, Cuddeback and Andrews joined Cardozo in this view to form a majority. Less is popularly known about these judges who served in Cardozo's shadow, but they formed an interesting group.

Judge Chester Bentine McLaughlin was apparently "a man of striking personality, a rugged and picturesque appearance, [and] was known to his associates and old friends to possess a kindly nature, a fun loving disposition of a quiet sort, a fund of

39. *Id.* at 384 (footnotes omitted).

40. *Wood v. Lucy, Lady Duff-Gordon*, 118 N.E. 214, 214 (N.Y. 1917) (citations omitted).

native humor and a disposition to be just human.”⁴¹ He was born in 1856 in Moriah, Essex County, New York, and graduated from the University of Vermont in 1879.⁴² He apprenticed with B.B. Bishop at the firm of Waldo, Tobey & Grover in Port Henry, and was admitted to practice in September 1881.⁴³ McLaughlin worked in private practice and was Chairman of the Essex County Republican Committee, which elected him a delegate to the New York State Constitutional Convention of 1894.⁴⁴ He was elected County Judge and Surrogate of Essex County in 1891, where he served for five years.⁴⁵ He resigned from this position as county judge and ran unopposed as a Republican candidate for the Supreme Court.⁴⁶ In 1898, he was appointed by Governor Frank S. Black to the New York Appellate Division, First Department.⁴⁷ In January 1917, Governor Charles S. Whitman appointed McLaughlin to fill an associate judge vacancy created when Judge Hiscock was elected as Chief Judge.⁴⁸

Perhaps of most interest to those who study contract law is that, on June 1, 1918, one of Judge McLaughlin's sons, then a Harvard Law School student, was married to Professor Samuel Williston's daughter.⁴⁹ Presumably, the two proud fathers did not exchange words at the wedding about the *Wood* decision's characterization of formalism as “primitive.”

Judge William Herman Cuddeback was born in Cuddebackville, Orange County, New York.⁵⁰ He graduated from Cornell University in 1874.⁵¹ He studied law in Goshen in the office of Judge Gedney, and was admitted to practice in 1876.⁵²

41. James Costello, *Chester Bentine McLaughlin*, in *THE JUDGES OF THE NEW YORK COURT OF APPEALS: A BIOGRAPHICAL HISTORY*, *supra* note 30, at 419 (quoting *Obituary of Chester Bentine McLaughlin*, *THE ADIRONDACKS RECORD-ELIZABETH-TOWN POST* (Au Sable Forks, Essex County, N.Y.), May 1, 1929, at 1).

42. *Id.* at 419.

43. *Id.*

44. *Id.* at 420.

45. *Id.*

46. *Id.*

47. *Id.* at 421.

48. *Id.*

49. *Id.* at 424.

50. Linda Griggs, *William Herman Cuddeback*, in *THE JUDGES OF THE NEW YORK COURT OF APPEALS: A BIOGRAPHICAL HISTORY*, *supra* note 30, at 343.

51. *Id.* at 343-44.

52. *Id.* at 344.

He worked in private practice, relocating to Buffalo in 1885.⁵³ In Buffalo, from 1898-1902, he served as Corporation Counsel for the City.⁵⁴ He was active in the Democratic party there and, in 1912, he was elected to the court.⁵⁵ Although he was on Governor William Sulzer's ticket, shortly after his appointment to the court, he voted "guilty" on each of the three articles of impeachment against the Governor.⁵⁶

Judge William Shankland Andrews was the son of Chief Judge Charles Andrews, who served on the court from 1870-1897.⁵⁷ He was born in Syracuse in September 1858, and graduated from Harvard College in 1880 and Columbia Law School in 1882.⁵⁸ He worked in private practice until he received the Republican nomination for supreme court judge, to which he was elected in 1900.⁵⁹ Judge Andrews gained national attention when he presided over a libel suit brought by a former Republican leader William Barnes against then-former President Theodore Roosevelt.⁶⁰ Barnes alleged that the President had improperly linked Barnes to the corruption of Tammany Hall.⁶¹ Shortly after this trial (which the president won), Governor Charles S. Whitman appointed Andrews to a temporary position on the Court of Appeals.⁶²

In 1921, Andrews sought the Republican nomination to fill an Associate Judge vacancy on the court.⁶³ His nomination was controversial because he had recently authored a decision holding that a bill providing for a \$45 million bonus payment to state veterans was unconstitutional.⁶⁴ Republican nominators were concerned that World War I veterans would vote against him because of his decision.⁶⁵ Nevertheless, he received the

53. *Id.*

54. *Id.*

55. *Id.* at 344-45.

56. *Id.* at 343.

57. Brian Quinn, *William Shankland Andrews*, in *THE JUDGES OF THE NEW YORK COURT OF APPEALS: A BIOGRAPHICAL HISTORY*, *supra* note 30, at 435.

58. *Id.*

59. *Id.*

60. *Id.* at 436.

61. *Id.*

62. *Id.*

63. *Id.* at 436.

64. *Id.*

65. *Id.*

nomination and managed to eke out an election victory.⁶⁶ He is perhaps best known for his dissent in the *Palsgraf* case;⁶⁷ in *Wood*, he sided with Cardozo.⁶⁸

The *Wood* dissenters included Chief Judge Frank Harris Hiscock and Judges Emery Albert Chase and Frederick Evan Crane. There is no writing explaining the dissenters' view, which appears to have been common practice at the time. In the years 1916-1918, of the some 305 opinions and memoranda that had dissenting votes, only 38 provided a written explanation of the dissent's view.⁶⁹ Indeed, in 1917, there were 92 decisions that had a dissenting vote and only seven provided a writing supporting the dissent.⁷⁰

Chief Judge Hiscock was born in April 1856 in Tully, Onondaga County.⁷¹ He graduated from Cornell University in 1875 at the age of 19 and went on to obtain his law degree from Columbia University.⁷² He worked in private practice until his 1896 gubernatorial appointment to the New York Supreme Court; later that year, as a Republican candidate, he was elected to a full time judgeship.⁷³ In 1900, Governor Roosevelt appointed him to the New York Appellate Division, Fourth Department.⁷⁴ In 1906, Governor Frank W. Higgins appointed him to the court as a temporary judge.⁷⁵ In 1912, he ran for an associate judge position, but was defeated by Democrats William Cuddeback and John Hogan; he won a seat on the court in 1913, and was elected Chief Judge in 1916.⁷⁶ He served as Chief Judge until his retirement from the court in 1926.⁷⁷ It has been noted that "[h]is decade as chief was no ordinary one"

66. *Id.*

67. *Palsgraf v. Long Island Railroad Co.*, 162 N.E. 99 (N.Y. 1928) (Andrews, J., dissenting).

68. Brian Quinn, *supra* note 57, at 436-37.

69. These figures are based on a review of the New York Reporter volumes containing cases decided in the years 1916-1918.

70. *See supra* note 69.

71. Albert M. Rosenblatt & Timothy M. Kerr, *Frank Harris Hiscock, in THE JUDGES OF THE NEW YORK COURT OF APPEALS: A BIOGRAPHICAL HISTORY*, *supra* note 30, at 363.

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.* at 364-65.

because of "the demands made upon [the court] in a growing commercial and industrial era."⁷⁸

Judge Emory Albert Chase was born in August 1854 in Hensonville, Greene County, New York.⁷⁹ In his late teens, he taught in the Village Schools in Greene County, working during the summers on his father's farm and as a carpenter.⁸⁰ In 1877, he studied law as an apprentice with two practitioners in Catskill, and by 1880 was admitted to practice.⁸¹ Active in the Republican party, he was elected to the New York Supreme Court in 1896.⁸² In 1901, Governor Benjamin B. Odell appointed Chase to the Appellate Division, Third Department.⁸³ In 1906, Governor Frank W. Higgins appointed Chase to a temporary position on the court.⁸⁴ In 1912, with Hiscock, Chase ran unsuccessfully as a Republican candidate for an associate judge position.⁸⁵ Chase ran unsuccessfully again in 1913 and in 1914.⁸⁶ It has been observed that, "[n]evertheless, he remained on the Court of Appeals as an additional judge by gubernatorial appointment. Considering that these appointments ran from 1906 to 1920, through successive governors and with bar association and editorial page sponsorship, it is difficult to conclude that his tenure rested on anything other than merit."⁸⁷ Finally, in 1920, with Judge Crane, Chase ran as a Republican candidate and won the election to the court.⁸⁸ Though, he would only serve one more year and a half until his "sudden and unexpected death" in his sleep, due to a blood clot at his heart.⁸⁹

Judge Frederick E. Crane was born in Brooklyn in March 1869.⁹⁰ He graduated from Columbia Law School in 1889, and

78. *Id.* at 365.

79. Albert M. Rosenblatt, Timothy M. Kerr & Kristin Mattiske, *Emory Albert Chase*, in *THE JUDGES OF THE NEW YORK COURT OF APPEALS: A BIOGRAPHICAL HISTORY*, *supra* note 30, at 335.

80. *Id.* at 336.

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.* at 336-37.

88. *Id.* at 337.

89. *Id.*

90. Barbara B. Mistishen, *Frederick Evan Crane*, in *THE JUDGES OF THE NEW YORK COURT OF APPEALS: A BIOGRAPHICAL HISTORY*, *supra* note 30, at 427.

was admitted to the bar the following year.⁹¹ He worked in private practice for several years, then served as Assistant District Attorney in Kings County.⁹² In 1901, he was elected County Judge in Brooklyn; in 1906, he was appointed to the Appellate Division, Second Department.⁹³ In 1917, Governor Whitman appointed him to a temporary position on the court.⁹⁴ In 1920, along with Judge Chase, he was elected to a full term as an associate judge.⁹⁵ Judge Crane served on the court for 22 years.⁹⁶ He described the court as a place where “no man would be happy . . . who did not find his chief enjoyment and satisfaction in the work.”⁹⁷

The Court’s Jurisdiction in 1917

Background: The 1915 Constitutional Convention

It is quite possible that, had the *Wood* case come at a later date, an appeal to the court would not have been permitted. *Wood* was decided during the early evolution of the court’s modern jurisdiction.

In 1913, the New York political scene was in turmoil. Governor William Sulzer was impeached and removed from office on October 13, 1913, after only eleven months in the position.⁹⁸ That same year, the twenty-year cycle required by the New

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.* at 427-28.

96. *Id.* at 428.

97. *Id.* (citing Hon. Frederick E. Crane, Judge, New York Court of Appeals, An Address Before the Phi Delta Phi Association of New York: *Detail Work of the New York Court of Appeals*, in 5 New York State Bar Association Bulletin 5 (December 1933), available at http://www.courts.state.ny.us/history/pdf/Library/courts/detail_work_of_NYCOA.pdf (last visited Mar. 3, 2008)).

98. Sulzer was impeached on charges of misappropriating campaign contributions. See Sam Roberts, *Hevesi Trial? Senate May Look to a 1913 Impeachment*, N.Y. TIMES, Oct. 30, 2006, at B7; *First Impeaching of a Governor Since ‘29*, N.Y. TIMES, Feb. 6, 1988, § 1, at 15.

William Sulzer, elected New York’s Governor in 1912, was ousted in 1913 after being impeached and found guilty of misappropriating funds. Governor Sulzer, a product of Tammany Hall, snubbed the machine’s patronage demands after he was elected and launched an investigation of corruption. Annoyed legislators then dredged up charges of financial irregularities.

Id.

York Constitution necessitated a submission to voters of the question whether to hold a constitutional convention.⁹⁹ The people of New York voted in the affirmative, and a convention was convened in 1915.¹⁰⁰ Under the able direction of Elihu Root, the Convention identified some proposed solutions to problems facing the New York Court of Appeals.¹⁰¹

One of the most significant problems facing the court was the extraordinary backlog of cases.¹⁰² In May of 1915, over 600 cases were pending before the court.¹⁰³ The 1915 Convention recognized the need to propose compositional and jurisdictional changes to the court to address this backlog—indeed, at the time, given the rate of intake and disposition of cases, the court's backlog was growing at a rate of 100 cases a year.¹⁰⁴ The Convention proposed a two-division court with a core of ten permanent judges.¹⁰⁵ Unlike previous New York constitutional conventions, the 1915 proposed amendments were overwhelming rejected by the people.¹⁰⁶

The 1917 Legislative Amendments

At the time, the Judiciary Article of New York Constitution gave the legislature the unrestricted authority to limit the

99. See BERGAN, *supra* note 3, at 253.

100. *Id.*

101. *Id.* at 254.

102. *Id.*

103. *Id.*

104. *Id.* at 254-55.

105. *Id.* Judge Bergan explained:

The judiciary committee's solution of the court's calendar problem turned back to a two-division court, but on a model designed to use a central core of permanent judges to maintain consistency of decision and the equality of stature of both divisions. It first increased the roster of permanent judges from seven to ten, incorporating into the regular court the three temporary judges who had been regularly assigned.

When the second division was convened, not fewer than four nor more than six supreme court justices were to be assigned to the Court of Appeals—not to the second division, but to the court generally. Those assignments were to be made by the court itself and not by the governor. If four were assigned, which seemed the normal expectation, there would be a full complement of two complete courts of seven, since the new permanent membership of the court would now be ten, who could constitute a majority in either division.

Id.

106. *Id.* at 257.

court's jurisdiction.¹⁰⁷ On April 30, 1917, just ten days after the appellate division's unanimous reversal of the trial court judgment in *Wood*, the New York State Legislature enacted significant limitations to the New York Court of Appeals' jurisdiction.¹⁰⁸ The new limitations were "so numerous and extensive" that it was "impracticable [for its drafters] to indicate the changes made."¹⁰⁹ Indeed, with the court's docket still overburdened, the legislature eliminated appeals as of right in most civil cases, effective on June 1, 1917.¹¹⁰ It is interesting to note that Wood's notice of appeal to the New York Court of Appeals was dated June 19.¹¹¹

The 1917 statute eliminated civil appeals as of right in most cases. An appeal was not permitted as of right unless the appeal was from a judgment or order that "finally determines an action" and (1) it directly involved a constitutional question or (2) a disagreement in the courts below was indicated by an appellate division reversal, modification or dissent.¹¹² Otherwise, an appeal from any other final order would require the appellate division's certification of a question of law.¹¹³ Or, if the appellate division did not grant permission to take the appeal, the Court of Appeals could grant permission if the appeal was "in the interest of substantial justice."¹¹⁴ The statute further limited the court's review to questions of law¹¹⁵ and prohibited the court from hearing appeals from "unanimous decision[s] of the appellate division of the supreme court that there is evidence supporting or tending to sustain a finding of fact or a verdict not directed by the court."¹¹⁶

107. MEYER, AGATA & AGATA, *supra* note 27, at 38.

108. See 1917 N.Y. Laws 996-97 (amending sections 190 and 191 of the New York Code of Civil Procedure).

109. *Id.* at 996 n.1 (as indicated in the footnote to the preamble: "The amendments effected by this act are so numerous and extensive that it is impracticable to indicate the changes made.").

110. *Id.* at 996-97.

111. Notice of Appeal to Court of Appeals (June 19, 1917), in 3 RECORDS AND BRIEFS OF LANDMARK BENJAMIN CARDOZO OPINIONS, document 36, at 18 (William H. Manz ed. William S. Hein & Co., Inc. 1998) [hereinafter "Manz"].

112. 1917 N.Y. Laws 996 (§ 190(1)).

113. *Id.* (§190(3)).

114. *Id.* at 997 (§ 190(4)).

115. *Id.* (§ 191(2)).

116. *Id.* at 997 (§ 191(3)).

Otis Wood was presumably permitted to appeal to the court as of right because the appellate division reversed the trial court.¹¹⁷ It is interesting to note that the 1917 jurisdictional changes are an early incarnation of the contemporary limitations on the court's jurisdiction, which no longer permit civil appeals as of right on this basis.

In 1925, the people approved amendments to the Judiciary Article of the New York Constitution that tracked the jurisdictional limits enacted by the 1917 legislation.¹¹⁸ Thus, the New York Constitution allows for an appeal as of right from a judgment or order of reversal or modification.¹¹⁹ However, the constitution permits the legislature to eliminate such an appeal as of right if the appeal does not directly involve a question of constitutional interpretation.¹²⁰ Because there were a number of appeals on the basis of appellate division reversals, in 1969, the New York Legislature amended the Civil Practice Law & Rules ("CPLR") to require that the modification of the appellate division decision be "substantial."¹²¹ The number of appeals based on reversals and modifications nevertheless remained high—constituting 66 percent of the civil appeals decided by the court in 1984.¹²² Thus, in 1985, the Legislature amended the CPLR to abrogate all appeals as of right based on appellate division reversal or modification.¹²³ Appeal from a modification or reversal is now only reviewable upon permission granted by the court or the appellate division.¹²⁴

Presently, an appeal as of right can be taken from a final order or judgment of the appellate division only where there is a double dissent at the appellate division concerning a question of law,¹²⁵ or a substantial constitutional question is directly in-

117. See *Wood v. Lucy, Lady Duff-Gordon*, 164 N.Y.S. 576 (App. Div. 1917).

118. ARTHUR KARGER, *POWERS OF THE NEW YORK COURT OF APPEALS* § 2.4, at 26-27 (Thomson West 3d ed. 2005).

119. MEYER, AGATA & AGATA, *supra* note 27, at 61; N.Y. CONST. art. VI, § 3(b)(1).

120. N.Y. CONST. art. VI, § 3(b)(8).

121. MEYER, AGATA & AGATA, *supra* note 27, at 62 (citing 1969 N.Y. Laws ch. 999).

122. *Id.* at 62.

123. *Id.*

124. N.Y. C.P.L.R. § 5602 (McKinneys 1995).

125. *Id.* § 5601(a); see also KARGER, *supra* note 118, § 33, at 210-19.

volved.¹²⁶ Neither of these narrow grounds for an appeal as of right was present in the *Wood* case. Tellingly, in 2006, of the 143 notices of appeal filed with the court, only 17 were retained.¹²⁷ Consequently, today, *Wood* would have needed to move the Appellate Division or Court of Appeals for leave to appeal.¹²⁸ In the Court of Appeals, leave to appeal is granted in only the rarest of civil cases—for example, in 2006, of the 1,017 civil motions for leave, the Court granted only six percent.¹²⁹ Accordingly, *Wood*'s appeal would have faced tough odds of being heard by today's New York Court of Appeals.

The Timing from Appeal to Disposition

In January 1917, when the court began hearing cases at Eagle Street, 860 cases were pending on its calendar.¹³⁰ The calendar reduced in size due at least in part to the United States' entrance into World War I in April 1917.¹³¹ Indeed, during the same month that the appellate division unanimously reversed in the *Wood* case, the United States entered into World War I. While the court's docket did see a sharp decline in cases, it still had some 696 cases one year later in January 1918.¹³² Given the woes of the court's backlog and the estimated two years from the filing of an appeal to oral argument,¹³³ it is a mystery why *Wood*'s appeal was decided in just under six months. The notice of appeal was dated June 19,¹³⁴ argued on

126. N.Y. C.P.L.R. § 5601(b)(1) (McKinneys 1995); see also KARGER, *supra* note 118, § 37[b], at 238-39; §§ 38-39, at 244-59 (direct involvement); § 36, at 240-42 (substantiality).

127. STUART M. COHEN, ANNUAL REPORT OF THE CLERK OF THE COURT TO THE JUDGES OF THE COURT OF APPEALS OF THE STATE OF NEW YORK 3 (2006), <http://www.courts.state.ny.us/ctapps/news/annrpt/AnnRpt2006.PDF> (last visited Mar. 5, 2008) (note, the statistics do not specify how many of those appeals were in civil cases).

128. N.Y. C.P.L.R. § 5602 (McKinneys 1995).

129. COHEN, *supra* note 127, at 6.

130. BERGAN, *supra* note 3, at 262; see also *Report of Committee to Confer with the Court of Appeals and to Recommend Measures for the Relief of the Congested Calendar of that Court*, 1917 NYSBA PROC. 430, 431 (Jan. 11-12, 1918).

131. BERGAN, *supra* note 3, at 262.

132. *Id.*

133. *Id.* at 254.

134. Manz, *supra* note 111.

November 14 and decided on December 4¹³⁵—a turn around that is rather swift even by today's standards.

It is not clear why the appeal was decided relatively quickly. At the beginning of the research for this essay, it was thought that perhaps the case received something known as a "preference"—a clerk's practice that placed cases on an expedited review.¹³⁶ However, research revealed that it is rather unlikely that the case received such a designation.

Rule XIV of the 1916 Code of Civil Procedure provided that "[n]o causes are entitled to any preference upon the calendar except such as is given by law or the special order of the court."¹³⁷ It further provided that "[a]ny party claiming a preference must so state in his notice of argument to the opposite party and to the clerk; and he must also state the ground of such preference, so as to show to which of the preferred classes the cause belongs."¹³⁸ Research did not turn up a copy of Wood's notice of argument, so it is not known whether he made such a request.

It does not appear, however, that the grounds for a preference would have been met in *Wood*. The civil actions entitled to preference were set forth in section 791 of the Code of Civil Procedure, in order of preference.¹³⁹ Actions by or against the peo-

135. *Wood v. Lucy, Lady Duff-Gordon*, 118 N.E. 214, 214 (N.Y. 1917).

136. WILLIAM RUMSEY, *THE PRACTICE IN CIVIL ACTIONS IN THE COURTS OF RECORD OF THE STATE OF NEW YORK UNDER THE CODE OF CIVIL PROCEDURE* 865 (Banks & Company 2d ed. 1902-1904) ("preferred cases are put ahead of the general calendar, in the prescribed classes of preference, being arranged in the several classes according to the dates of the filing of the returns").

137. GEORGE CHASE, *THE CODE OF CIVIL PROCEDURE OF THE STATE OF NEW YORK* 1425 (Banks Law Publishing Company 1916); see also BENJAMIN N. CARDOZO, *THE JURISDICTION OF THE COURT OF APPEALS OF THE STATE OF NEW YORK* 209 (Banks & Company 2d ed. 1909).

138. CHASE, *supra* note 137, at 1425; see also *Taylor v. Wing*, 83 N.Y. 527, 528 (1881).

[I]t is . . . necessary for a party claiming a preference in this court to comply with the directions of Rule 20. He must, therefore, in his notice of argument state such claim, and the other facts mentioned in that rule. In omitting these things the plaintiff erred, but it was evidently through misconception of the extent of the statute, and the cause may now take the preference to which it is entitled.

Id.

139. CHASE, *supra* note 137, at 204.

ple were of first priority.¹⁴⁰ For example, other preferences were assigned to appeals from a judgment ordering a statute unconstitutional, or where a party had died pending the action and the pendency of the action prevented the final settlement of the decedent's estate.¹⁴¹ A preference was even given in actions for slander or libel and in certain instances where the appellate division unanimously affirmed.¹⁴² Of this list of some thirteen preferences, however, Wood's case does not even arguably fall into one.

Do other explanations exist for the relative promptness of the court's disposition of the case? As evidenced by the three-judge dissent, the speed of the court's disposition certainly is not explained by saying the case was "an easy one." Quite possibly the clerk was star-struck by Lady Lucy. Maybe Cardozo's work ethic aided in disposing of the cases most efficiently. Alternatively, it could simply be that the parties perfected the appeal in an expeditious manner.¹⁴³ At the time, there was no rule requiring the parties to perfect the appeal within a certain number of days of the filing of the notice of appeal. Thus, if an appellant was not diligent in pushing the appeal, it could languish unperfected for months or even years.

Conclusion

Especially in light of the contemporary composition and jurisdiction of the New York Court of Appeals, one should not ignore the role of happenstance in the decision in *Wood* and, more generally, in the development of the doctrinal law. As this essay has shown, it is possible that Cardozo might not have been assigned to the panel that heard the *Wood* case. Had this happened, in light of the unexplained three-judge dissent, a different standard concerning implied promises may have evolved or, perhaps, strict formalism would have prevailed. Moreover, it is possible that, had the case come at a later time, the court might not have heard the appeal. Had the course of history of the New York Court of Appeals' composition and jurisdiction been even

140. *Id.* (§791(1)).

141. *Id.* (§791(3a, 4)).

142. *Id.* (§791(11, 12)).

143. I am thankful to Paul J. McGrath, Chief Court Attorney at the New York Court of Appeals, for this suggestion.

slightly different, perhaps we would be congregating to celebrate a different legacy in this symposium, or perhaps we would not be congregating at all.

