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Post-Reconstruction Justice: The Prosecution and Trial of Francis Lewis Cardozo

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**POST-RECONSTRUCTION JUSTICE:
THE PROSECUTION AND TRIAL OF FRANCIS
LEWIS CARDOZO©**

W. LEWIS BURKE*

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* Professor of Law, Department of Clinical Studies, University of South Carolina School of Law. This Article is an expansion of a paper presented at the Annual Meeting of the American Society for Legal History in October 2000 at Princeton. A different version of this Article, entitled "Reconstruction Corruption and the Redeemer's Prosecution of Francis Lewis Cardozo," will appear in the Autumn 2002 issue of the English Journal, *American Nineteenth Century History*. This Article is also a portion of a longer book project on post-Reconstruction "corruption" prosecutions in South Carolina. I want to express appreciation to my colleagues Vance Cowden, Bill McAninch, Herb Johnson, Dennis Nolan, Michael Mounter, and Jim Underwood, to Michael Curtis of Wake Forest Law School, to historians John Oldfield of Southampton University, Lou Falkner Williams of Kansas State University, Christopher Waldrep of California State University, and Joel Williamson of the University of North Carolina for their comments and assistance. I also owe great thanks to my research assistants, Justin Werner, Steve Bates, and Josh Williams. Finally, much appreciation to my wife, Anne, for both her support and editorial work. Of course, all mistakes are without question mine.

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[W]e have been cheated out of our rights for two centuries, and . . . I want to fix them in the Constitution in such a way that no lawyer, however cunning or astute, can possibly misinterpret the meaning. If we do not do so, we deserve to be, and will be, cheated again. Nearly all the white inhabitants of the State are ready at any moment to deprive us of our rights, and not a loop-hole should be left that would permit them to do it constitutionally.

Francis L. Cardozo¹

I. INTRODUCTION

Impartial justice is the quintessential ideal of the American judicial system. When justice is perverted for political purposes, the Constitution and justice suffer multiple wounds. The robe of justice is stained, the Constitution is denigrated, and history is distorted. Still, the pathology of political perversion of law recurs throughout American history and is a constant threat. While much has been written about these perversions in the nineteenth century Supreme Court cases on race, running from *Dred Scott v. Sandford*² to *Plessy v. Ferguson*³ and the cases in between, few scholars have looked at these perversions at the trial level. So the trial of Francis L. Cardozo in South Carolina in 1877 is not an isolated story with no relevance to contemporary American society, law, and history. Instead it is a reminder of the illness that has long infected our system of justice. Just as physicians learn to recognize illness by case studies, lawyers, legal historians, and judges need to be reminded of this pathology at all levels of the judicial system so that they will

1. 1 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF SOUTH CAROLINA 354 (Arno Press and the New York Times 1968). This quote is from the debate concerning the wording of the Bill of Rights in the South Carolina Constitution of 1868.

2. 60 U.S. 393 (1856).

3. 163 U.S. 537 (1896).

recognize it and respond appropriately. It is unquestionably true that distorted history perverts our interpretation of justice.

The 1877 trial of Francis Lewis Cardozo, his predetermined conviction, and his pardon present a choice example of this perversion at the trial level. To the lawyer and judge, the political machinations are a chilling story. To the historian familiar with Reconstruction and its demise, the conviction is not surprising, but the facts of the actual trial and conviction are truly an untold example of post-Reconstruction injustice.⁴ Moreover, examining this trial should encourage us to begin to fully re-evaluate our notion of Reconstruction corruption. Cardozo's trial was the first and most important in a series of three political show trials intended by the South Carolina Redeemer Democrats⁵ to prove that Reconstruction was legally and morally corrupt. The three resulting convictions were the only ones obtained by the Redeemer Democrats in their massive post-Reconstruction corruption investigation.⁶ Cardozo's conviction was a personal tragedy not only because it stained his reputation, but also in that he was the only South Carolina Reconstruction politician who served any significant time in jail. Moreover, the conviction was a great symbolic victory for the Redeemer Democrats, as they were able to legitimize the charge that all African American and Republican officials were crooks and scoundrels thus perpetuating the myth of the depravity of Reconstruction governments in the South for decades.

In fact, Cardozo was so vilified that he was the inspiration for the chief villain, black leader Silas Lynch, in D.W. Griffith's film, *The Birth of a Nation*.⁷ Undeniably, Griffith's fallacious film helped to immortalize many

4. The trial received a paragraph of coverage in Edward F. Sweat, *Francis L. Cardozo: Profile of Integrity in Reconstruction Politics*, 46 J. NEGRO HIST. 217, 231 (1961). Much more extensive coverage was given to the trial in John E. Farley, Francis L. Cardozo 128-37 (1949) (unpublished B.A. thesis, Princeton University) (on file with author). However, Farley relied almost exclusively on one newspaper's account of the trial and did not review any of the other materials that provide the actual details of the evidence presented at the trial. A more critical analysis of some of the original evidentiary sources was made in JOEL WILLIAMSON, AFTER SLAVERY 388, 415-16 (1965).

5. The term "Redeemer" refers to those Democrats who claimed to have redeemed the South in the 1870s from the control of African Americans and Republicans. See JOEL WILLIAMSON, THE CRUCIBLE OF RACE 51, 82 (1984); see also C. VANN WOODWARD, ORIGINS OF THE NEW SOUTH: 1877-1913 ch. 1 (1951) (discussing the impact of the "Redeemers" on race, politics, economics, and law in the modern South).

6. See REPORTS AND RESOLUTIONS OF THE GENERAL ASSEMBLY OF THE STATE OF SOUTH CAROLINA AT THE REGULAR SESSION, 1877-78 (Columbia, S.C., Calvo & Patton 1878), which exceeds 1700 pages in length.

7. See Farley, *supra* note 4, at i-ii. *The Birth of a Nation* is based on THOMAS DIXON, JR., THE CLANSMAN (1905). Dixon's work was prominently attributed on posters for the film. See Tim Dirks, *The Birth of a Nation*, at <http://www.filmsite.org/birt.html> (last visited Jan. 8, 2002) (displaying a poster for *The Birth of a Nation*, stating that the film is based on Thomas Dixon's *The Clansman*). A review of *The Clansman* verifies the Farley conclusion. The story was set in South Carolina, and Silas Lynch was a college-educated missionary, a mulatto, the head of the Union League, the owner of a summer home near Charleston, a great orator, a man of imposing physical presence, and the most powerful black man in the state. All of these characteristics

racist fables about Reconstruction in the popular mythology of American culture and to resurrect the Ku Klux Klan in 1915.⁸ The climax to *The Birth of a Nation* has the white female heroine rescued by the Ku Klux Klan from the sexual assault by the black Cardozo figure, Silas Lynch.⁹ This scene in the classic American film stands as one of the preeminent examples of biased history by which justice is perverted. Even the racist histories before *The Birth of a Nation* portrayed the story of Reconstruction as one of simple political corruption.¹⁰ However, with the wide dissemination of the film *The Birth of a Nation*, the story of Reconstruction was morphed into a story of sexual perversion.¹¹ The popular, racist culture of the times began to assume that rampant sexual depravity characterized Reconstruction, even though there appear to be no recorded cases of sexual assaults of white women by black political figures during that time.¹² Modern scholarship has, in fact, thoroughly

match Cardozo. See also ERIC FONER, FREEDOM'S LAWMAKERS 39 (1993). Austin Stoneman, the Republican congressman who sends the Cardozo character South to lead the freedmen, had a mulatto mistress named Lydia. Lydia was Cardozo's mother's name. The major difference between Cardozo and the Lynch character was that Cardozo was only asked to run for lieutenant governor whereas Lynch actually held the office. Also unlike Lynch, Cardozo was never even accused of any sexual impropriety. South Carolina had two African American lieutenant governors, Richard H. Gleaves and Alonzo Ransier. While both men were mulattoes, neither was college-educated, a missionary, a leader of the Union League, or considered a powerful leader. See *id.* at 87, 176-77. Confirming the common belief that Cardozo was the model for Silas Lynch, a Columbia, South Carolina newspaper thought it ironic that *The Clansman* (the original title of *The Birth of a Nation*) was being produced in Washington, D.C., at the same time a public school was being named for Cardozo in the district. Zach McGhee, *F.L. Cardozo's Fame Here and Elsewhere*, THE STATE (Columbia, S.C.), Mar. 18, 1906, at 15.

8. CHESTER L. QUARLES, THE KU KLUX KLAN AND RELATED AMERICAN RACIALIST AND ANTISEMITIC ORGANIZATIONS 53-54 (1999); GLENN FELDMAN, POLITICS, SOCIETY, AND THE KLAN IN ALABAMA, 1915-1949 12-13 (1999).

9. THE BIRTH OF A NATION 149 (Robert Lang, ed., 1994).

10. See, e.g., HILARY A. HERBERT, ET AL., WHY THE SOLID SOUTH? 88-110 (Negro Univ. Press 1969) (1890); FREDERIC A. BANCROFT, A SKETCH OF THE NEGRO IN POLITICS 23-33 (AMS Press 1976) (1885); JOHN W. BURGESS, RECONSTRUCTION AND THE CONSTITUTION 261-64 (1902). Of course, these histories ignored the beneficial aspects of Reconstruction.

11. The chief literary works of this popular racist culture were *The Leopard's Spots* and *The Clansman* (1905), both written by Thomas Dixon, Jr. As noted previously *The Clansman* was the literary basis for *The Birth of a Nation*. DIXON, *supra* note 7. According to Joel Williamson, Dixon reached millions of Americans with his racist stories. WILLIAMSON, *supra* note 5, at 141.

12. For a discussion of rape during Reconstruction and the remainder of the 19th century, see MARTHA HODES, WHITE WOMEN, BLACK MEN 151-208 (1997). While it is true that Hodes found cases during Reconstruction in which black men were lynched or mutilated by the Klan because they were Republicans, the Klan often alleged sexual impropriety as an excuse for the attack. *Id.* at 151-59. Even early historians such as Frederic A. Bancroft opined that blacks and whites were assaulted by the Klan during Reconstruction solely for political reasons. BANCROFT, *supra* note 10, at 55. The other attempted rape scene of *The Birth of a Nation* depicted a black militia member as the culprit. THE BIRTH OF A NATION (1915). This scene has been called "baseless." Bernard A. Weisberger, *The Dark and Bloody Ground of Reconstruction Historiography*, 25 J. S. HIST. 427, 432-33 (1959).

debunked the racist sexual mythology of “Birth of a Nation.”¹³ However, the mythology of political and financial corruption is still a mainstay of the legal history of Reconstruction.

These images of political corruption have also been perpetuated by historians. Early historians, fixed on the notion of the “prostrate state,” assumed that all Republican office-holders in Reconstruction South Carolina, including Cardozo, were corrupt, lining their pockets with embezzled state funds.¹⁴ Some modern historians have appropriately pointed out that Reconstruction corruption in the South was consistent with the American political culture of that era involving whites, blacks, Democrat and Republican politicians.¹⁵ Yet, no legal analysis has ever been done on Cardozo’s trial nor any other Reconstruction-era corruption trial to test the validity of the verdict.¹⁶ In this regard, Cardozo’s trial presents a unique opportunity.

Cardozo did not flee from prosecution. He did not plea bargain, and even after his conviction, he turned down a pardon to try and vindicate himself on appeal. There is a wealth of material from which to examine his case. Using the indictment against Cardozo, one prosecutor’s trial notes, the purported “diary” of the chief prosecution witness, Cardozo’s appellate brief, newspaper accounts, and the governor’s pardon file, as well as other documents and letters, this Article will examine Cardozo’s trial and conviction in depth.

These sources reveal the various intersections between politics and justice in Reconstruction South Carolina and Redeemer South Carolina. Often bizarre, and continually shifting, these connections and disconnections among South Carolina’s politicians and lawyers do not lend themselves to easy analysis. Conundrums abound. How and why was Cardozo, perhaps the most influential African American in the state, an impeachment target in 1875 by members of his own race and his own party? And why after the Compromise of 1877, when Redeemers took power, would prominent white Democrat politicians who had supported him during his impeachment cut deals with the corruptionists of 1875 to obtain Cardozo’s conviction for corruption in 1877? Was he targeted because of his leadership role? If so, then why was he pardoned in 1879 with the support of some of his chief adversaries, even though his trial had been the

13. See, e.g., Peter Noble, *The Negro in The Birth of a Nation*, in FOCUS ON THE BIRTH OF A NATION 125-32 (Fred Silva ed., 1971).

14. See generally JAMES S. PIKE, *THE PROSTRATE STATE: SOUTH CAROLINA UNDER NEGRO GOVERNMENT* 122-79 (New York, Appleton & Co. 1874) (observing the session of the Legislature in February and March of 1873); JOHN S. REYNOLDS, *RECONSTRUCTION IN SOUTH CAROLINA* 86-88 (Negro Univ. Press 1969) (1905) (commenting on the corruptive practices of some of the Republican nominations).

15. ERIC FONER, *RECONSTRUCTION* 386-90, 465-69, 572-75 (1988).

16. Credit is due historian Joel Williamson, who questioned not only Cardozo’s guilt but also the veracity of the chief witness against him. See WILLIAMSON, *supra* note 4, at 415-16. Additionally, John Farley questioned Cardozo’s guilt in his unpublished B.A. thesis. Farley, *supra* note 4. Farley primarily based his thesis on the erroneous assertion that Cardozo was tried only on charges that were defeated in an impeachment effort. *Id.* at 131-37.

centerpiece of the Redeemers' systematic campaign against ex-Republican officials, and his conviction one of their greatest legal victories?

II. FRANCIS LEWIS CARDOZO

Francis L. Cardozo was born in 1836 in Charleston, South Carolina to a free black mother and a Jewish father.¹⁷ He attended schools for the free African American Charleston community.¹⁸ He was trained as a carpenter and shipbuilder¹⁹ and had saved enough money to travel to Scotland in 1858 to be educated at the University of Glasgow and to study at seminaries in Edinburgh and London.²⁰ After this, he returned to the United States, was ordained a minister,²¹ went to Charleston to teach for the American Missionary Association, and founded Avery Normal Institute which became the major school for preparing future African American leaders for South Carolina.²²

He was soon selected as a delegate to the South Carolina Constitutional Convention of 1868 and was a leader in the convention.²³ Following the convention, he was nominated by the state Republican party to run for secretary of state, and with his election in April 1868, he became the first African

17. See FONER, *supra* note 7, at 39. The sources differ between 1836 and 1837 as Cardozo's year of birth. A family tree supplied to the author by a Cardozo family member, Elise Taylor Goins, identifies his mother as Lydia Williams. The "Williams" identification is followed by a question mark. A family tree in the Library of Congress identifies his father as Isaac Cardozo and his mother as Lydia Williams. See Papers of Francis Lewis Cardozo (on file with the Manuscript Division, Library of Congress, Washington, D.C.).

18. Joe M. Richardson, *Francis L. Cardozo: Black Educator During Reconstruction*, 48 J. NEGRO EDUC. 73, 73 (1979).

19. FONER, *supra* note 7, at 39.

20. The records of the University of Glasgow indicate that Cardozo was a student in the faculty of arts during the 1858-59 and 1859-60 sessions. See Letter from Mrs. Smith, Secretary to the Principal, The University of Glasgow, to William Cardozo, Esq. (Nov. 10, 1930) (on file with the Manuscript Division, Library of Congress, Washington, D.C.). The records at New College, University of Edinburgh indicate that Cardozo attended the United Presbyterian Hall in the 1861 session. E-mail from Irene Ferguson, Assistant to University Archivist, University of Edinburgh, to W. Lewis Burke, Professor of Law, University of South Carolina School of Law (Apr. 12, 2001, 11:52:06 EST) (on file with author).

21. FONER, *supra* note 7, at 39.

22. EDMUND DRAGO, INITIATIVE, PATERNALISM & RACE RELATIONS: CHARLESTON'S AVERY NORMAL INSTITUTE 46, 48 (1990).

23. *Id.*; see also James Lowell Underwood, *African American Founding Fathers: The Making of the South Carolina Constitution of 1868*, in AT FREEDOM'S DOOR 2, 3, 8, 9, 14 (James Lowell Underwood & W. Lewis Burke, Jr. eds., 2000) (discussing Cardozo's role in the convention). Presumably, Cardozo was chairman of the education committee since his name is listed first in committee memberships in the convention proceedings. See Edward F. Sweat, *The Public Career of Francis Louis Cardozo* 24 (1948) (unpublished M.A. thesis, Indiana University) (copy on file with author) (citing PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF SOUTH CAROLINA 56 (Charleston, S.C., Denny & Perry 1868)).

American ever elected to statewide office in United States history.²⁴ In 1872, he was elected state treasurer defeating the incumbent Niles G. Parker, who was considered the most corrupt state treasurer in South Carolina history.²⁵

In a time of economic depression and at a time when the Republican Party was under vicious attacks for its corruption, Cardozo's election was not surprising. Throughout his political career he had enjoyed a reputation for honesty. A reform party had been formed in 1870 to run against the Republican ticket.²⁶ While this group was dominated by white conservatives, it had nominated Cardozo as its candidate for lieutenant governor because he was an "honest, capable colored man," but Cardozo declined the nomination and remained loyal to the Republican party.²⁷ Early in his political career he had resigned from the Land Commission Advisory Board to protest corruption in that agency.²⁸ When, as secretary of state, he gained control of the Land Commission, he reorganized it and is credited with eliminating the corruption that had been rampant there.²⁹

Throughout Reconstruction, the white conservatives had used the charge of corruption as their rallying cry to justify Klan violence and political attacks against the Republicans. So-called taxpayer conventions in 1871 and 1874 had condemned state government as full of corruption and fraud.³⁰ In 1872, when Cardozo was elected state treasurer, Republican Franklin J. Moses, Jr. was elected governor.³¹ Moses was a South Carolina native, ex-slaveowner, Confederate veteran, and the person credited with lowering the stars and stripes at Fort Sumter.³² Historians seem unanimous in believing that the junior Moses was one of the most corrupt politicians during Reconstruction.³³ But as state treasurer, Cardozo's performance drew praise from both Republican and

24. FONER, *supra* note 7, at 39. See REYNOLDS, *supra* note 14, at 86-87 (noting that Cardozo was the only "colored" on the Republican ticket). This ticket was elected in elections held on April 13, 14, and 15 in 1868. RICHARD ZUCZEK, *STATE OF REBELLION* 50 (1996). Cardozo achieved this "first" by only two days, as Oscar J. Dunn was elected lieutenant governor of Louisiana in that state's elections held on April 16 and 17 in 1868. See JOE GRAY TAYLOR, *LOUISIANA RECONSTRUCTED* 156-57 (1974).

25. See FRANCIS BUTLER SIMKINS & ROBERT HILLIARD WOODY, *SOUTH CAROLINA DURING RECONSTRUCTION* 114, 116 (1932); ALRUTHEUS AMBUSH TAYLOR, *THE NEGRO IN SOUTH CAROLINA DURING THE RECONSTRUCTION* 224-25 (Russell & Russell 1969) (1924).

26. SIMKINS & WOODY, *supra* note 25, at 447-48.

27. *Id.* at 448 n.25.

28. CAROL K. ROTHROCK BLESER, *THE PROMISED LAND: THE HISTORY OF THE SOUTH CAROLINA LAND COMMISSION* 89 (1969).

29. See FONER, *supra* note 15, at 375; see also ROBERT SELPH HENRY, *THE STORY OF RECONSTRUCTION* 445 (1938) (describing Cardozo's role in discovering corruption in a state land distribution project).

30. SIMKINS & WOODY, *supra* note 25, at 157-59, 182-84.

31. WILLIAMSON, *supra* note 4, at 399.

32. PEGGY LAMSON, *THE GLORIOUS FAILURE* 53 (1973).

33. These appraisals run from the radical W.E. BURGHARDT DUBOIS, *BLACK RECONSTRUCTION IN AMERICA* 413-14 (1935) to the conservative 3 DAVID DUNCAN WALLACE, *THE HISTORY OF SOUTH CAROLINA* 292-93 (1934).

Democratic newspapers.³⁴ In one instance, he foiled an attempt by Governor Moses to steal \$25,000.³⁵ With the election of D.H. Chamberlain in 1874, Cardozo had a governor as determined as he to rid the state of corruption.³⁶ As state treasurer, Cardozo could not stop all corruption, but he tried to tighten the state's purse strings.

Those legislators aggrieved by his tight money management soon brought impeachment proceedings against Cardozo.³⁷ One newspaper opined that "[t]he Treasurer has doubtless mortally offended a number of his present accusers by refusing to be a party to their schemes."³⁸ The list of charges against Cardozo was lengthy but based on only three issues. First, Cardozo was charged with illegally funding \$978,500 in state bonds; second, he was charged with paying fraudulent pay certificates; and third, he was charged with paying the legislature out of taxes collected for other purposes.³⁹ Cardozo prepared a lengthy and detailed seven point letter in his defense which was published in the local press.⁴⁰ As to the bonds, Cardozo correctly pointed out that he had inherited the bonded indebtedness problem, and he had paid valid state bonds pursuant to a legislative bond consolidation plan.⁴¹ He further asserted that the legislative investigating committee had misunderstood how bonds were issued and paid.⁴² In reference to the fraudulent certificates, he said he had warned the legislature of their over-issuance, and, that pursuant to state law, he had to pay certificates that appeared valid on their face.⁴³ As to the claim that he had paid the legislature out of revenues designated for other purposes, he admitted that

34. *The Political Chadbands*, THE DAILY UNION-HERALD (Columbia, S.C.), Feb. 21, 1875, at 2 (reprinting an editorial from the Democratic NEWS & COURIER (Charleston, S.C.)); see also *What a Northern Bond-Holder Thinks of the Monetary Condition of This State*, THE DAILY UNION-HERALD (Columbia, S.C.), Feb. 5, 1875, at 1.

35. See VICTOR ULLMAN, MARTIN R. DELANY: THE BEGINNINGS OF BLACK NATIONALISM 435 (1971).

36. See WALTER ALLEN, GOVERNOR CHAMBERLAIN'S ADMINISTRATION IN SOUTH CAROLINA 8-9 (New York, G. P. Putnam's Sons 1888).

37. *Id.* at 80-87.

38. *Treasurer Cardozo and the Legislature*, THE PRESS AND BANNER (Abbeville, S.C.), Mar. 3, 1875.

39. *South Carolina Legislature*, YORKVILLE ENQUIRER (S.C.), Mar. 4, 1875. At the time Cardozo took office the state bonded indebtedness exceeded \$22 million, and an effort at consolidating this debt was begun which proved quite successful, reducing the debt to about \$7 million. See SIMKINS & WOODY, *supra* note 25, at 161, 168. A legislative committee accused Cardozo of consolidating \$978,500 in bonds that they claimed "should not have been funded." *Id.* at 168. The issue of which bonds should or should not have been consolidated was not resolved for years. The legislature created a special court of claims to hear the claims of the various bond-holders, and this court declared in 1879 that most of the consolidation bonds were issued unconstitutionally. *Id.* at 172-73. However, the validity of the bonds was still being contested as late as 1881. *Id.* at 174-75.

40. F.L. Cardozo, *Reply of the State Treasurer to the Special Joint Committee*, THE DAILY UNION-HERALD (Columbia, S.C.), Mar. 3, 1875.

41. *Id.*

42. *Id.*

43. *Id.*

he had done so under advice of counsel and that no account had suffered a deficiency in revenues because of his action.⁴⁴ Cardozo's impeachment failed when it was defeated by a coalition of reform Republicans and conservative whites in the General Assembly.⁴⁵ Governor Chamberlain was quoted as saying that "to my knowledge, [Cardozo] has never done a dishonest act."⁴⁶ Though Cardozo had been charged with violating the law, the *New York Times* failed to understand how "the State ha[d] suffered any loss by the acts imputed to him, or that he ha[d] himself gained anything by them."⁴⁷

Cardozo was treasurer from 1872-1877⁴⁸ and served as the chief political adviser to Governor D.H. Chamberlain, who considered him his "wisest and truest adviser."⁴⁹ Cardozo may have been the most powerful African American in South Carolina. In addition to his elected positions, Cardozo was president of the Union League state council,⁵⁰ the most influential organization among the African American voters, and a major leader in the Republican party and in Governor Chamberlain's campaigns and administration.⁵¹ Cardozo had probably been the mastermind behind the integration of the University of South Carolina and certainly was mentor to many of the African Americans who enrolled in the university and its law school.⁵² In fact, he attended the University of South Carolina School of Law and graduated in December of 1876.⁵³ He was admitted to the bar by the Supreme Court in April of 1876.⁵⁴

Although Cardozo had achieved a leadership role in public life and maintained his reputation for honesty with the defeat of the impeachment effort in 1875, he experienced additional struggles in his political life. The election of 1876 signaled the beginning of the end of Reconstruction and the end of Cardozo's political career. In this election, the white Democrats ran their first slate of candidates for statewide offices since the start of Reconstruction.⁵⁵ The Democrats nominated ex-Confederate general Wade Hampton and organized the infamous Red Shirts to run a paramilitary campaign of intimidation and fraud to redeem the state for the white minority; this was based on a similar

44. *Id.*

45. See ALLEN, *supra* note 36, at 86.

46. *Id.* at 269.

47. N.Y. TIMES, Mar. 16, 1875.

48. FONER, *supra* note 7, at 39.

49. See LAMSON, *supra* note 32, at 215.

50. SIMKINS & WOODY, *supra* note 25, at 77; see also F.L. Cardozo, President, Address Before the Grand Council of the Union Leagues Annual Meeting (July 27, 1870) (transcript available at the South Caroliniana Library, University of South Carolina).

51. ALLEN, *supra* note 36, at 47-48, 80, 397, 482-83.

52. See W. Lewis Burke, Jr., *The Radical Law School: The University of South Carolina School of Law and Its African American Graduates, 1873-1877*, in AT FREEDOM'S DOOR, *supra* note 23, at 90, 100.

53. *Id.* at 101.

54. Roll of Attorneys, South Carolina Supreme Court (1876) (on file with South Carolina Supreme Court, Columbia, S.C.).

55. See SIMKINS & WOODY, *supra* note 25, at 481-82.

successful plan used in Mississippi to oust the Republicans.⁵⁶ After election day, Wade Hampton claimed victory, but so did the incumbent Republican, D.H. Chamberlain.⁵⁷ Hampton's claim to office required the inclusion of returns from Edgefield and Laurens Counties; these, however, had been thrown out by the state Board of Canvassers.⁵⁸ Because the canvassers refused to certify these fraudulent returns, they were briefly jailed for contempt of court, and Cardozo was one of those jailed.⁵⁹ Two days later the canvassers were freed by a federal judge.⁶⁰ But even with the stuffed ballot boxes from Edgefield and Laurens, Cardozo had still won re-election as state treasurer.⁶¹ Only after the Compromise of 1877, settling the Hayes-Tilden presidential election of 1876, was Democrat Wade Hampton able to assume office as governor.⁶² In exchange for the electoral votes of Florida, Louisiana, and South Carolina, Hayes agreed to withdraw the federal troops from around the statehouses of Florida, Louisiana, and South Carolina.⁶³ The absence of these troops allowed the Democrats to gain control of South Carolina.⁶⁴ After the removal of the troops, Governor Hampton's private secretary sent Cardozo and other elected African American officials threatening letters demanding that they vacate their offices.⁶⁵ Cardozo and the others relinquished their offices on May

56. WALTER EDGAR, *SOUTH CAROLINA: A HISTORY* 402-04 (1998); ZUCZEK, *supra* note 24, at 159-74; Richard Gergel & Belinda Gergel, "To Vindicate the Cause of the Downtrodden: Associate Justice Jonathan Jasper Wright and Reconstruction in South Carolina," in *AT FREEDOM'S DOOR*, *supra* note 23, at 36, 51-52.

57. EDGAR, *supra* note 56, at 404.

58. See LAMSON, *supra* note 32, at 254; see also Gergel & Gergel, *supra* note 56, at 51-54 (discussing the election fraud in the Red Shirt Campaign of 1876). Cardozo was one of the election commissioners who tried to throw out the returns and was jailed for contempt of the Supreme Court for not reporting all of the returns. *Id.* at 55-56.

59. *Further News From Columbia*, *NEWS & COURIER* (Charleston, S.C.), Nov. 27, 1876, at 1.

60. *A Federal Judge Invoked to Nullify a Supreme Court Sentence*, *NEWS & COURIER* (Charleston, S.C.), Nov. 28, 1876, at 1.

61. Letter from Francis Lewis Cardozo, Treasurer, South Carolina, to Wade Hampton, Governor, South Carolina (Apr. 16, 1877), in *Papers of Leroy Franklin Youmans, Scrapbook: 1876-1885* (available at the South Caroliniana Library, University of South Carolina) (pointing out that he (Cardozo) had been re-elected even with the inclusion of the contested ballots). When a legal action was brought by the Democrats in December of 1876 to enjoin Cardozo from issuing checks as state treasurer, the petitioners attacked the lawfulness of his bond rather than his re-election. See *Petition, The State ex rel. William H. Wallace, et al. vs. The Carolina National Bank, et al.* (on file with the Library of Congress in the Daniel A.P. Murray Collection, Washington, D.C.).

62. See SIMKINS & WOODY, *supra* note 25, at 540-41.

63. See FONER, *supra* note 15, at 581-82; WOODWARD, *supra* note 5, at 24.

64. *Id.* at 582.

65. Letter from Wade Hampton, Governor, South Carolina, to Francis Lewis Cardozo, Treasurer, South Carolina (Apr. 14, 1877) (on file with the South Carolina Department of Archives and History, Columbia, S.C.). Cardozo replied to this letter directly to Hampton accusing him of threatening violence and not living up to his personal representations that Cardozo could continue to occupy the office of treasurer until the courts had decided who was the rightful claimant. See Letter from Francis Lewis Cardozo, *supra* note 61.

1, 1877.⁶⁶ Although the threat of violence had ended his career, Cardozo played a conciliatory role. He advised Governor Chamberlain to withdraw as being in the best interest of the people and to avoid bloodshed, and he arranged an orderly transition of the treasurer's office to his successor.⁶⁷

Despite his abdication, Cardozo was targeted by the Democrats for prosecution.

III. INVESTIGATION

On June 8, 1877, the new Democratic-dominated legislature appointed a committee to investigate corruption.⁶⁸ Prior to this investigation, the legislature asked President Rutherford B. Hayes to grant clemency to all the white Democrats charged with federal crimes involving election fraud and violence against black citizens.⁶⁹ Hayes responded by ordering the prosecution of only three white Democrats.⁷⁰ Hayes' reply began the chess match that consumed Cardozo's life for the next two years.

Cardozo was called before the committee on July 19 and arrested on July 21, 1877 on the spurious charge of misappropriation of state funds by paying a creditor with designated tax revenues.⁷¹ Subsequently, he was indicted on seven other charges.⁷² One historian describes this prosecution as part of a systematic attempt by the Democrats "to blacken the reputation of those who governed the state from 1868 to 1877."⁷³ Indeed, the prosecuting Democratic

66. See REPORT OF THE ATTORNEY GENERAL TO THE GENERAL ASSEMBLY OF SOUTH CAROLINA FOR THE FISCAL YEAR ENDING OCTOBER 31, 1877, REPORTS AND RESOLUTIONS OF THE GENERAL ASSEMBLY OF THE STATE OF SOUTH CAROLINA AT THE REGULAR SESSION: 1877-78 318 (Columbia, S.C., Calvo & Patton 1877) [hereinafter ATTORNEY GENERAL REPORT FOR 1877]

67. ALLEN, *supra* note 36, at 482-83; see also THE PRESS (Philadelphia, Pa.), May 2, 1877 (reporting that the work of transferring Cardozo's office would probably take a week or ten days). *Id.*

68. CONCURRENT RESOLUTION TO APPOINT JOINT COMMITTEE OF INVESTIGATION, JOURNAL OF THE SENATE OF THE STATE OF SOUTH CAROLINA, EXTRA SESSION 407-09 (Columbia, S.C., Republican Printing Co. 1877).

69. See HAMPTON M. JARRELL, WADE HAMPTON AND THE NEGRO 175-76 (1949) (quoting letter from Governor Hampton to President Hayes conveying the South Carolina legislature's request). *Id.*

70. *Id.* at 176. Hayes agreed that while a general amnesty should extend to most political cases, it should not extend to those of the "gravest character."

71. *Cardozo Caught at Last*, NEWS & COURIER (Charleston, S.C.), July 23, 1877. In a letter to *The Press*, Cardozo defended himself by asserting that the payment to T.W. Price & Co. for printing had been approved by the legislature in legislation that had not specifically included Price's name. *An Atrocious Outrage*, THE PRESS (Philadelphia, Pa.), Aug. 1, 1877, at 2. In fact, Price had done the work in 1874 and again in 1875 but did not get paid until 1876. *Id.* Cardozo concluded the letter by noting that "Price did the work at about one-third the price it had previously cost the State." *Id.*

72. *The Case of Ex-Treasurer Cardozo*, COLUMBIA REGISTER (S.C.), July 24, 1877.

73. See EDGAR, *supra* note 56, at 410.

Attorney General James Conner admitted that the indictments were intended "to politically guillotine" the Republican Party.⁷⁴

As a result of the legislative investigation fewer than twenty Republicans were indicted, and only three were brought to trial.⁷⁵ Numerous factors coalesced to place these three on trial. It was no coincidence that the South Carolina Democrats tried three Republicans after President Hayes ordered the prosecution of three white Democrats. Cardozo's political power, his role as an election commissioner in 1876, and his reform efforts against legislative corruption made him a great symbolic target for the Democrats and a desirable target for those who wished to seek revenge. While others who were indicted were protected by immunity agreements, resignations from public office, and flight, Cardozo was a very proud man who refused to cooperate or run.⁷⁶ In fact

74. See WILLIAMSON, *supra* note 4, at 415 (quoting an August 24, 1877 letter from James Conner to W.D. Simpson, the lieutenant governor). Conner may have also been reluctant to pursue a full airing of the fraud because many Democrats would have been implicated. One upstate newspaper opined that

so many leading Democrats (Fusionists) are implicated in the revelations made before the committee, that an organized effort, having the sanction of the highest authority, is being made to suppress the whole matter, and let the prosecutions already begun against Republicans hang over them as an inducement to leave the State a[n]d hush their mouths concerning their Democratic accomplices.

Moses in the Witness Box, THE INTELLIGENCER (Anderson, S.C.), Aug. 18, 1877.

75. See ATTORNEY GENERAL REPORT FOR 1877, *supra* note 66, at 321-27. While there were only three trials prosecuted by the attorney general as a result of the committee's work, there were some local prosecutions in various counties. In Aiken County, Henry Sparnick, the probate judge and publisher of an Aiken newspaper, was charged and found guilty of embezzling \$2,700. THE BEAUFORT TRIB. & PORT ROYAL COMM'L (S.C.), Sept. 13, 1877. The county commissioners of Williamsburg County were tried for misconduct, but the proceeding ended in a mistrial. *A Sensation in Court*, NEWS & COURIER (Charleston, S.C.), Oct. 9, 1877. The Republican mayor of Columbia was convicted of mistreating a drunk, but pardoned. *Justice in South Carolina*, COLUMBIA REGISTER (S.C.), Apr. 6, 1878, at 1. There were some later cases such as that of probate judge Samuel Lee of Sumter, who was charged with "official misconduct" for closing his office. *Sam Lee Convicted of Official Misconduct*, NEWS & COURIER (Charleston, S.C.), Feb. 11, 1879, at 1. Lee had closed his office and was in hiding because of threats on his life by whites; nevertheless, he was convicted. *Id.*

76. See Letter from William E. Earle to D.T. Corbin (Mar. 9, 1878) (on file with the Rutherford B. Hayes Presidential Center Library, Fremont, Ohio). In this letter Earle claims Governor Hampton said that Cardozo insisted on being tried, and "it was not expected or desired to have had the trials that were had. Cardozo surrendered himself and had to be tried." *Id.* Of course, this letter was written in 1878 as Hampton was still trying to obtain a general amnesty and was allegedly still holding out for prosecution of former United States Senator James J. Patterson and Hiram Kimpton, former financial agent for the State on Wall Street. By October of 1877, it was clear that Patterson would never be returned to South Carolina for prosecution. *State and National News*, THE PEOPLE (Barnwell, S.C.), Oct. 11, 1877. Historian Frederic Bancroft, writing in 1885 of the corruption indictments, stated that "[i]t was frequently understood that a withdrawal from the State or from active politics would sufficiently satisfy the indictment." BANCROFT, *supra* note 10, at 74.

one newspaper opined that until a major carpetbagger could be had, "Cardozo is our speciality."⁷⁷

In addition to Cardozo, Congressman Robert Smalls and former Congressman and newspaperman L. Cass Carpenter were tried. Smalls, a former slave and Civil War hero, was the congressman from a heavily African American congressional district.⁷⁸ While the Democrats had systematically forced the resignations of virtually all Republican office holders, Smalls, one of three remaining black congressmen, not only refused to resign but also remained extremely popular with the voters and the Republicans in Congress.⁷⁹ Carpenter was a white Republican from the North, a newspaper owner, and a very short-term congressman,⁸⁰ who was especially disliked by the press.⁸¹ His testimony about the fraud and violence of the Hampton campaign before congressional committees investigating the 1876 election helped lead to the indictment of a number of Hampton's supporters, including the three that President Hayes ordered tried.⁸²

So, the three men tried and convicted were Republicans—two black natives and one white carpetbagger. Despite the Democrats' constant complaints about the corrupt carpetbaggers and scalawags, not a single scalawag nor prominent carpetbagger was brought to trial. With Cardozo, Smalls, and Carpenter, the Redeemers had the three men they needed to convict.

77. *Where is Kimpton?*, CHARLESTON J. OF COM. (S.C.), Oct. 6, 1877, at 2.

78. FONER, *supra* note 7, at 197-98. See generally EDWARD A. MILLER, JR., GULLAH STATESMAN (1995) (examining Smalls' life and career from slavery to Congress).

79. *Id.* at 111, 127. For an account of the continual efforts of the white Democrats to prevent Smalls from serving in Congress, see GEORGE BROWN TINDALL, SOUTH CAROLINA NEGROES: 1877-1900 34-35, 72-73 (1952).

80. BIOGRAPHICAL DIRECTORY OF THE AMERICAN CONGRESS: 1774-1996 784 (Joel D. Treese ed., 1996). Carpenter was born in Connecticut, served as state inspector of schools in New Jersey, worked as newspaper man in New York, and attended law school in Washington, D.C. *Id.* After moving to Charleston in 1876 he became editor of the *Charleston Courier* and helped establish the *Charleston Republican*. *Id.* Between 1868 and 1873, he worked for a United States Senator in Connecticut, and then was elected to Congress from South Carolina in 1874 to fill the unexpired term of Robert Brown Elliott. *Id.* He served fewer than five months in Congress. *Id.*

81. Before his trial, one newspaper described him as a "sorrell-headed hypocrite" who "outraged all decency [sic] by his contemptible charlatanism and treachery." THE ABBEVILLE MEDIUM (S.C.), Sept. 5, 1877. When Carpenter was convicted, a Charleston newspaper expressed "genuine pleasure" because Carpenter "combined hatred with robbery, and abused the white citizens of this state with bitter tongue . . ." L.C.C., NEWS & COURIER (Charleston, S.C.), Nov. 15, 1877, at 2.

82. TESTIMONY TAKEN BY THE SELECT COMMITTEE ON THE RECENT ELECTION IN SOUTH CAROLINA BEFORE THE U.S. HOUSE, 44 CONG. REC. 17, 46 (1877); SOUTH CAROLINA IN 1876 224-26 (Washington, D.C., Gov't Printing Office 1877) (testimony taken before the U.S. Senate, Dec. 19, 1876). These hearings led to the indictment of a number of Hampton's supporters, including the three that President Hayes had ordered tried. *Id.*

IV. THE INDICTMENT

The first six counts of the indictment against Cardozo had been the basis of the claims made against him in the impeachment effort of 1874.⁸³ The seventh count was yet another claim that Cardozo had paid a legitimate debt of specifically appropriated state funds.⁸⁴ Of course, a similar specious charge had failed in 1874.⁸⁵

So, the only new charge against Cardozo was the eighth count. It charged Richard H. Gleaves, Samuel J. Lee, Josephus Woodruff, A.O. Jones, and Cardozo with conspiracy to cheat by means of a fraudulent legislative pay certificate for \$4,000 in favor of C.L. Frankfort, a fictitious person.⁸⁶ Before the Red Shirt overthrow, Gleaves had been lieutenant governor and presiding officer of the state senate,⁸⁷ Lee had been speaker of the state house of representatives,⁸⁸ Woodruff was clerk of the senate,⁸⁹ and Jones was clerk of the state house of representatives.⁹⁰

83. See REPORT OF THE SPECIAL JOINT COMMITTEE, REPORTS AND RESOLUTIONS OF THE GENERAL ASSEMBLY OF THE STATE OF SOUTH CAROLINA AT THE REGULAR SESSION: 1874 777-82 (n.p.n.d.) [hereinafter REPORT OF THE SPECIAL JOINT COMMITTEE]. These charges were also the subject of serious political infighting. One newspaper reported that many Democrats in Charleston held these consolidation bonds and that Governor Wade Hampton supported the policy of validating all of these bonds. *South Carolina's Bonds*, THE INTELLIGENCER (Anderson, S.C.), Aug. 23, 1877. This infighting certainly suggests that either Cardozo had done nothing wrong in regard to the consolidation bonds, or that too many of Hampton's supporters would have lost large sums of money if these charges had been pursued and the consolidation bonds declared invalid as a consequence of a criminal conviction of Cardozo.

84. REPORT OF THE SPECIAL JOINT COMMITTEE, *supra* note 83, at 782; see also COMMUNICATION FROM THE STATE TREASURER IN REPLY TO REPORT OF SPECIAL JOINT COMMITTEE, REPORTS AND RESOLUTIONS OF THE GENERAL ASSEMBLY OF THE STATE OF SOUTH CAROLINA AT THE REGULAR SESSION: 1874 713-19 (n.p.n.d.). The reply to the report contains the correspondence between Cardozo and C.D. Melton, as well as Cardozo's explanation of his operations of the state treasury. *Id.* In his report to the Legislature for 1875, Cardozo stated that he had been following a liberal interpretation of the Act allowing him to temporarily borrow from one account to pay a debt on an account with a deficiency. See REPORT OF THE TREASURER OF THE STATE OF SOUTH CAROLINA FOR THE FISCAL YEAR ENDING OCTOBER 31, 1875, REPORTS AND RESOLUTIONS OF THE GENERAL ASSEMBLY OF THE STATE OF SOUTH CAROLINA AT THE REGULAR SESSION: 1875-76 4 (Columbia, S.C., The Republican Printing Co., 1876). Cardozo stated that if the legislature preferred a strict construction, it should enact the appropriate legislation. *Id.* Cardozo's letter in response to this charge in *An Atrocious Outrage*, THE PRESS (Philadelphia, Pa.), Aug. 1, 1877, at 2 (explaining that the accused "division of funds" was the use of tax funds to pay the charge for which they were earmarked).

85. See *supra* notes 37-47 and accompanying text.

86. See ATTORNEY GENERAL REPORT OF 1877, *supra* note 66, at 321-23.

87. TAYLOR, *supra* note 25, at 210.

88. See ISABEL R. VANDERVELDE, BIOGRAPHY OF SAMUEL JONES LEE 1 (1997).

89. MARION STAR (S.C.), Nov. 28, 1877 (noting that all charges were dropped against Jones and Woodruff at the same time). Although charged with multiple counts of fraud, Woodruff was not compelled to resign from his job as senate clerk until after the trials of Cardozo, Smalls, and Carpenter. *Id.*

90. TAYLOR, *supra* note 25, at 271.

V. THE TRIAL

After posting bond and moving his family to Washington, D.C., Cardozo returned to Columbia in early October to prepare for the trial.⁹¹ On October 5, he was reported to be in the state treasurer's office at work on the state's financial records.⁹² But his bail was unexpectedly withdrawn, and he was immediately jailed.⁹³ Only two days prior to the trial, the attorney general announced that Cardozo was to be tried first on the new charge, the Frankfort certificate count.⁹⁴ Over Melton's objection that he needed more time to defend against this new count and to obtain witnesses who were abroad, the judge set the trial for November 2, 1877.⁹⁵

The trial drew extensive coverage. Its national significance was evidenced by coverage in the major national and regional newspapers,⁹⁶ and its importance in South Carolina was borne out by both the extensive and gleeful coverage by the local press.⁹⁷

VI. THE CONFLICT OF INTEREST

Cardozo's only lawyer was Samuel W. Melton, former attorney general, Confederate veteran, former slave owner, and dedicated Republican.⁹⁸ Melton faced an array of lawyers for the state. The lead prosecutor was Attorney

91. *Cardozo Lodged in Jail*, NEWS & COURIER (Charleston, S.C.), Oct. 5, 1877.

92. *Quiet Columbia!*, NEWS & COURIER (Charleston, S.C.), Oct. 6, 1877.

93. *Cardozo Lodged in Jail*, ABBEVILLE MEDIUM (S.C.), Oct. 10, 1877. The bondsman was Republican state senator W.B. Nash. *Id.* Nash was later forced to resign for taking a bribe, but not until after Cardozo's trial. *See Investigating Committees*, SPARTANBURG HERALD (S.C.), Nov. 7, 1877.

94. *Trial of the Ex-Officials*, COLUMBIA REGISTER (Columbia, S.C.), Oct. 31, 1877.

95. *Id.*

96. *See, e.g., An Unexpected Verdict*, ATLANTA CONST., Nov. 7, 1877 at 3; *South Carolina Steals*, CHICAGO TRIB., Nov. 4, 1877; *The Cardozo Trial*, DAILY PICAYUNE (New Orleans, La.), Nov. 3, 1877; *The South Carolina Frauds*, N.Y. TIMES, Nov. 2, 1877; *The Trial of Ex-Treasurer Cardozo*, N.Y. TRIB., Nov. 2, 1877; *The South Carolina Trials*, THE NAT'L REPUBLICAN (Washington, D.C.), Nov. 6, 1877.

97. The major Charleston newspaper titled its initial article on the trial, *Crushing Evidence of His Guilt as a Public Robber*, NEWS & COURIER (Charleston, S.C.), Nov. 2, 1877. *The Abbeville Medium*, anticipating the trial, published an article titled *The Floodgates of Justice*, ABBEVILLE MEDIUM (S.C.), Oct. 17, 1877. *The Charleston Journal of Commerce* delighted at Cardozo's revocation of bail with a headline entitled, *Cardozo Caged!*, CHARLESTON J. OF COM. (S.C.), Oct. 5, 1877, at 1.

98. *See* SIMKINS & WOODY, *supra* note 25, at 127-28; 1 U.R. BROOKS, SOUTH CAROLINA BENCH AND BAR 187-90 (1908); 1 CYCLOPEIDA OF EMINENT AND REPRESENTATIVE MEN OF THE CAROLINAS OF THE NINETEENTH CENTURY 98 (Madison, Wis., Brant & Fuller 1892); *see also* Letter from S.W. Melton, Esq. to Rutherford B. Hayes, President of the United States of America (May 22, 1878) (on file with the Rutherford B. Hayes Presidential Center Library, Fremont, Ohio) (urging amnesty for Republicans in South Carolina).

General James Conner.⁹⁹ He was assisted by Assistant Attorneys General LeRoy F. Youmans, Charles Richardson Miles, L.E. LeConte, and Solicitor John Abney.¹⁰⁰

The presence of Leroy F. Youmans and James Conner as prosecutors in Cardozo's 1877 criminal trial posed a serious question. W.D. Porter, a law partner of both Youmans and Conner, had served as defense counsel for Cardozo during his impeachment in 1875.¹⁰¹ Now, two years later, Conner as attorney general, and Youmans, as assistant attorney general, were prosecuting Cardozo on charges similar to those raised during the impeachment.¹⁰² Was their representation of the state in the prosecution a conflict of interest?

99. William Lewis Burke, Jr., *A History of the Opening Statement From Barristers to Corporate Lawyers: A Case Study of South Carolina*, 37 AM. J. LEGAL HIST. 49 (1993). Conner had been United States Attorney before the Civil War and had written the first practice manual for South Carolina lawyers. *Id.* But Conner was more than just a capable lawyer. He was dedicated to the redemption of South Carolina. He had served as a Confederate general during the Civil War, and had been the state leader of rifle clubs used to intimidate black voters during Wade Hampton's campaign. *See* ZUCZEK, *supra* note 24, at 152, 169. While Conner had the manners of a Charleston gentleman, he was considered by some "the very quint-essence of concentrated hate and malignity." *See* Letter from William E. Earle, *supra* note 76. Apparently Conner was one of a group of native whites who had benefitted from the work of the infamous "Railroad Ring" in the early years of Reconstruction. *See* LAMSON, *supra* note 32, at 139-40.

100. *The Trial of Cardozo*, COLUMBIA REGISTER (S.C.), Nov. 2, 1877. Youmans was an experienced prosecutor. 6 J. C. HEMPHILL, MEN OF MARK IN SOUTH CAROLINA 425 (1909). Youmans succeeded Conner as attorney general. *Id.* Some identified Youmans as a member of the most racist element of the Hampton campaign. *See* Letter from William E. Earle, *supra* note 76. Charles Richardson Miles was an experienced prosecutor. He prosecuted cases as an assistant attorney general after his admission to the bar in 1851. 1 CYCLOPEDIA OF EMINENT AND REPRESENTATIVE MEN OF THE CAROLINAS OF THE NINETEENTH CENTURY 661 (Madison, Wis., Brant & Fuller 1892). He served as Confederate district attorney for the State of South Carolina during the Civil War. *Id.* at 662. One biographical sketch said his early prosecutorial experience "fitted him for the leading part he took in the political trials that ensued during the infamous rule of negroes and strangers in the state, and in the overthrow of that government." *Id.* at 663. LeConte had been admitted to the bar in 1871. Roll of Attorneys, Supreme Court of South Carolina (1871) (on file with South Carolina Supreme Court, Columbia, S.C.). LeConte appears to have played no active role in the trial of the case. *The Trial of Cardozo*, NEWS & COURIER (Charleston, S.C.), Nov. 2, 1877. Abney was admitted to the bar in 1873. Roll of Attorneys, Supreme Court of South Carolina (1873) (on file with South Carolina Supreme Court, Columbia, S.C.). As the local prosecutor, he assisted in the selection of the jury for Cardozo's trial. *See The Trial of Cardozo*, COLUMBIA REGISTER (S.C.), Nov. 2, 1877.

101. *The Issue with Cardozo*, NEWS & COURIER, (Charleston, S.C.), Mar. 10, 1875.

102. Conner and Porter practiced law together from 1866 until 1875. *See* Conner Family Papers in LETTER PRESS BOOK (on file with the South Carolina Historical Society, Charleston, S.C.) [hereinafter Conner Family Papers]. Their partnership may have ended sometime in 1875 or 1876, but they were practicing together through much of 1875. *Id.* The impeachment proceedings were in March of 1875. Why had Porter even represented Cardozo? It is one of these unanswerable questions about the intersections of the lives of the Republicans and Democrats, the blacks and the whites, and the conservatives and the radicals in South Carolina during Reconstruction. Porter was a conservative Democrat who refused the gubernatorial nomination in 1868, because the Democrats' convention had approved of black suffrage. SIMKINS & WOODY, *supra* note 25, at 110; ZUCZEK, *supra* note 24, at 49.

While there was no direct authority in South Carolina that applied to this conflict, the prohibition on undertaking representation adverse to a former client was not new. Professor David Hoffman, an early legal ethics commentator, wrote in 1836 that “[i]t is a poor apology for being found on the opposite side, that the present is but the *ghost* of the former action.”¹⁰³ By the 1870s, a number of jurisdictions around the United States had reached a consensus in prohibiting the kind of aisle-crossing representation undertaken by Youmans and Conner. In 1852, the Georgia Supreme Court disqualified a former prosecutor from representing a defendant he had helped indict.¹⁰⁴ In 1861, the Indiana Supreme Court prohibited an attorney who had represented the defendant just long enough to have become acquainted with the defendant’s version of the charged events from assisting in the prosecution.¹⁰⁵

In the 1871 decision of the New York Superior Court in *Hatch v. Fogerty*,¹⁰⁶ Judge Monell wrote that “an attorney . . . should not use any information which he has derived from his client, to the prejudice or injury of his client; and especially, that he shall not act in opposition to his client’s interests.”¹⁰⁷ In 1872, the Supreme Court of the Territory of Washington laid down a similar rule in *Nickels v. Griffin*.¹⁰⁸

Under the rules of these other jurisdictions, Youmans could have been disqualified from prosecuting Cardozo. However, in 1877 there was no South Carolina authority that imputed such a conflict of interest to Conner because his partner had represented the opposing party.¹⁰⁹ However, Youman and Porter’s representation of Cardozo in the 1875 impeachment effort constituted legal representation in which Cardozo had a right to expect confidentiality. However, Youmans’ participation in the prosecution of the 1877 trial placed him in a position where he could have used confidentially-acquired information to the disadvantage of Cardozo, his former client.

Cardozo was tried only on the Frankfort certificate conspiracy count, and no charges from the 1875 impeachment had directly accused Cardozo of this particular conspiracy.¹¹⁰ However, in the impeachment proceedings, it had been alleged that Cardozo had conspired to issue a fraudulent certificate known as the F.L. Christopher certificate.¹¹¹ The state’s very first witness was asked to

103. DAVID HOFFMAN, A COURSE OF LEGAL STUDY 753 (Arno Press, Inc. 1972) (2d ed. 1836).

104. *Gaulden v. State*, 11 Ga. 47, 50 (1852).

105. *Wilson v. State*, 16 Ind. 392, 395-96 (1861).

106. 40 How. Pr. 492 (N.Y. Sup. Ct. 1871).

107. *Id.* at 503.

108. 1 Wash. Terr. 374, 377 (1872).

109. Of course, such authority exists today. See MODEL RULES OF PROF’L CONDUCT R. 1.10 (2001); see also ROBERT M. WILCOX, SOUTH CAROLINA LEGAL ETHICS ch.10 (1992) (discussing disqualification imputed to an entire firm).

110. As previously noted, the other charges were not dismissed. The solicitor had chosen only to try Cardozo on the conspiracy count. See *supra* notes 83-86.

111. See THE FAIRFIELD HERALD (Winnsboro, S.C.), Mar. 10, 1875.

recount what he knew about Cardozo and the Christopher certificate conspiracy.¹¹²

There is no record that Cardozo's counsel objected to the conflict. Did Melton simply not see the objection? His prior representation of the chief witnesses for the state¹¹³ and his prior service as the attorney general¹¹⁴ during the impeachment may have inhibited him from thinking he could object to Youmans and Conner. Did Melton's close friendship with Youmans affect the aggressiveness of Melton's defense?¹¹⁵ Did the dearth of South Carolina law on the point inhibit Melton from making the motion? Unfortunately, these questions cannot be answered, and it is not clear that Cardozo would have gotten any relief had the issues been raised.

VII. THE JUDGE

Although Charles Pinckney Townsend was a Republican judge, he was not a friend to Cardozo. Townsend was born in South Carolina, educated at South Carolina College,¹¹⁶ admitted to the bar in 1857, elected to the legislature in 1858, re-elected during the Civil War while serving in the Confederate army, selected equity commissioner in 1866 by a Democratically-controlled legislature, and elevated to a circuit judgeship in 1871.¹¹⁷ Although elected to his judgeship by a Republican-dominated legislature, Townsend was only ostensibly a Republican. During Reconstruction, one conservative newspaper described the judge as a "faithful and devoted . . . son" of South Carolina.¹¹⁸ After Reconstruction, Townsend practiced law with a number of Democratic politicians and was even re-elected to the legislature as a Democrat.¹¹⁹ His rulings and remarks throughout the trial indicated his Republicanism was merely a charade, or perhaps he was trying to save his judgeship by helping the Redeemers obtain their conviction.

112. *The Trial of Cardozo*, NEWS & COURIER (Charleston, S.C.), Nov. 2, 1877.

113. Melton had represented A.O. Jones in his negotiation for immunity. See Conner Family Papers, *supra* note 102.

114. BROOKS, *supra* note 98, at 187.

115. Melton and Youmans had attended college together, and Youmans wrote a eulogistic profile of his friend for a bench and bar book. *Id.* Of course, a friendly, collegial relationship among the white native members of the bar was not unusual.

116. South Carolina College was rechartered as the University of South Carolina in 1906. *Carolina—A Historical Note*, at <http://president.sc.edu/history.htm> (updated Sept. 12, 2000).

117. See 4 HISTORY OF SOUTH CAROLINA 155 (Yates Snowden ed., 1920).

118. *Judge Townsend*, THE CHESTER REP. (S.C.), Feb. 18, 1875.

119. See 2 BIOGRAPHICAL DIRECTORY OF THE SOUTH CAROLINA SENATE 941, 1008, 1392 (N. Louise Bailey et al. eds., 1986). He also practiced law with W.J. McKerral, the editor of a newspaper which declared that the idea of conservatives supporting Cardozo was "puerile and unmeaning." *The Trial of Cardozo*, MARION STAR (S.C.), Mar. 17, 1875. McKerral and Townsend went into practice together after Townsend left the bench. See advertisement in MARION STAR (S.C.), Apr. 17, 1878.

A review of the trial records reveals that Cardozo's lawyer won only two motions during the trial and lost all evidentiary objections. His first win came early, when Melton moved that a juror be put upon his *voir dire* (questioned by the judge as to any prejudice against the defendant).¹²⁰ Melton's second win did not come until the very end of the trial, when the judge granted one of his thirteen requests for additional charges to the jury.¹²¹

VIII. THE JURY

Jury selection did not go well for Cardozo. The first two jurors called were black and were peremptorily struck by the state.¹²² The next two jurors called were white, and when Melton attempted to peremptorily strike them, the judge ruled that the defense could not object to jurors substituted for those struck by the state.¹²³ Next, Melton moved to strike the entire panel of jurors because they had been improperly substituted by the Democrats for jurors who had been properly selected earlier in the year by local Republicans.¹²⁴ He lost this objection.¹²⁵ With the next juror, Halcott P. Green, Melton successfully overcame the state's objection and had the juror *voir dired* by the judge.¹²⁶ When no cause for exclusion was established by the judge, Melton had to use one of his five peremptory strikes.¹²⁷ Melton used the remainder of his peremptory strikes on the next four jurors, including one who was black.¹²⁸

The newspaper accounts report that the jury was predominantly black.¹²⁹ Some reported that the jury had as many as eight black jurors.¹³⁰ This exaggeration of the number of black jurors was apparently intended to convince

120. *The Trial of Cardozo*, NEWS & COURIER (Charleston, S.C.), Nov. 2, 1877.

121. See *infra* notes 324-28 and accompanying text.

122. See *The Trial of Cardozo*, COLUMBIA REGISTER (S.C.), Nov. 2, 1877. According to the newspaper the two men struck were Andy Hunter and Peter Shiver. *Id.*

123. *Id.*; see also Charles Richardson Miles, Handwritten Trial Notes 1 (1877) (available at the South Caroliniana Library, University of South Carolina) [hereinafter Trial Notes]. These are the handwritten notes apparently taken during the trial. While the notes could have been written after the trial in preparation for the appeal, there are no references to evidence folios as are found in Cardozo's appellate brief, and the final word of Miles's notes is guilty in quotation marks. *Id.* at 32.

124. *The Trial of Cardozo*, NEWS & COURIER (Charleston, S.C.), Nov. 2, 1877.

125. *Id.*

126. COLUMBIA REGISTER (S.C.), Nov. 2, 1877. Green was a Confederate veteran who had been pardoned by President Andrew Johnson on October 9, 1865. See Andrew Johnson, President of the United States, Pardon of Halcott P. Green (Oct. 9, 1865) (copy on file with author). The original pardon is in the possession of Adjunct Professor of Law Halcott P. Green of the University of South Carolina.

127. *The Trial of Cardozo*, COLUMBIA REGISTER (S.C.), Nov. 2, 1877.

128. *Id.* Melton used his last peremptory strike to eliminate Gilbert Bynum, who was identified as "colored" in the newspaper account. *Id.*

129. *Radical Rascals*, THE PEOPLE (Barnwell, S.C.), Nov. 15, 1877.

130. See *The South Carolina Frauds*, N.Y. TIMES, Nov. 2, 1877; *Trial of Ex-Treasurer Cardozo*, YORKVILLE ENQUIRER (S.C.), Nov. 8, 1877; *The Trial of Ex-Treasurer Cardozo*, NEWS & HERALD (Winnsboro, S.C.), Nov. 6, 1877.

the country and the black population that Cardozo was receiving a fair trial.¹³¹ In fact, the jury had no more than six black jurors.¹³² As many as nine of the jurors could not read or write. The press presumed that the presence of even one black juror would assure at least a mistrial for Cardozo.¹³³ But as will be

131. For example, in a post-trial story, one newspaper specifically stated that the composition of the jury should allay the fears of black people that the prosecution's purpose was to obtain control of the government and deprive blacks of their political leader and their civil rights. *See Conviction of Cardozo*, PICKENS SENTINEL (S.C.), Nov. 15, 1877.

132. Cardozo Jury Data:

Name	Race	Literate	Occupation (From City Directory or Census)
George	Black	No	Farm Hand/Carpenter
Henry Williams	Black	Possibly	Turpentine
Francis Hammond	White	No	Farmer
Joseph Walker	Black	No	Laborer/Asylum Keeper
W.P. Jacobs	White	Possibly	Turpentine Farmer
Vince Thompson	Mu.	No	Farmer
Edward Tucker	Black	No	Farm Laborer/Farmer
Simon Jenkins	Black	Yes	Former County
Wm. T. Martin	White	Yes/No	Compositor/Farmer
Samuel W. Rowan	White	Yes	Clerk of Market/Bookkeeper
John S. Wiley	White	Yes	Clothier [Foreman of the
John Field	White	No	Farm Laborer/Farmer

See COLUMBIA REGISTER (S.C.), Nov. 2, 1877 (providing the names of the jurors); *see also* U.S. BUREAU OF CENSUS, POPULATION SCHEDULES, CITY OF COLUMBIA sched. 1, at 24 (1870) (on file with the South Carolina Department of Archives and History, Columbia, S.C.); BEASLEY & EMERSON'S COLUMBIA DIRECTORY 59, 71, 99 (1875-76) (providing occupations of some jurors); REPORT OF THE ATTORNEY GENERAL TO THE GENERAL ASSEMBLY OF SOUTH CAROLINA, REPORTS AND RESOLUTIONS OF THE GENERAL ASSEMBLY OF THE STATE OF SOUTH CAROLINA AT THE REGULAR SESSION: 1877-78 328 (Columbia, S.C., Calvo & Patton 1878) (describing the makeup of the jury). Note that Henry Williams was a very common name. Six men named Henry Williams are listed in the city directory for 1879-80. *See* BEASLEY & EMMERSON'S COLUMBIA DIRECTORY 134 (1879-80). All six were listed as "colored." *Id.* The 1870 census lists five. U.S. BUREAU OF CENSUS, POPULATION SCHEDULES, CITY OF COLUMBIA sched. 1, at 24 (1870) (on file with the South Carolina Department of Archives and History, Columbia, S.C.). All of those over the age of twenty were illiterate, and all were black, except one who was listed as "mulatto." *Id.*

133. *See, e.g., South Carolina Trials*, N.Y. TIMES, Nov. 6, 1877 ("A mistrial is expected by the public, from the composition of the jury."); *Trial of Ex-Treasurer Cardozo*, N.Y. TRIB., Nov. 7, 1877 ("An agreement is not expected, it being thought that the jury is equally divided."); *Will*

discussed, the presence of six white jurors and even one unfriendly black juror would prove sufficient to seal Cardozo's fate.¹³⁴

At the end of the first day, Attorney General Conner moved, over defense objections, to sequester the jury, and Judge Townsend granted the request.¹³⁵ Given the presence of black jurors, joint sequestration was not easily accomplished. Hotel after hotel refused to house the black and white jury, and late in the evening the sheriff had to call upon the attorney general to make an "urgent application" to the Columbia Hotel to feed and house them.¹³⁶ But the integrated jury did not get to sleep in hotel rooms or eat in the dining room; they were housed in the billiard room of the hotel¹³⁷ under the constant guard of the sheriff.¹³⁸ This extra vigilance may have been occasioned by a recent "official misconduct" trial of the county commissioners of Williamsburg County.¹³⁹ In that proceeding, after the mixed race jury had announced their guilty verdict, the jury was polled. When two black jurors said they did not agree with the verdict, a mistrial was declared, and the two jurors were arrested.¹⁴⁰ Sequestration of a jury can prevent tampering from such outside pressures as employers, neighbors, and others. But pressure can also be accomplished inside the jury, and with a jury under white guards and populated with white employers,¹⁴¹ undue influence was present in the jury room and in the billiard room.

IX. THE STATE'S CASE

James Conner opened the state's case by arguing:

It involves no nice point of law; no fanciful construction of statutes. It is a common, unfortunately too common, case of theft, in taking that which belongs to another. It is one upon the character of which good men cannot think. It is an offense prohibited by a law older far than human statutes; a law which finds its first expression in the divine commandment "Thou shall not steal[.]"¹⁴²

Cardozo Escape?, NEWS & COURIER (Charleston, S.C.), Nov. 7, 1877 (noting the headline: "The Case Given to the Jury and the Jury Unable to Agree").

134. *See infra* text accompanying notes 330-38.

135. *The Trial of Cardozo*, COLUMBIA REGISTER (S.C.), Nov. 2, 1877.

136. *Id.*

137. *The Trial of Ex-Treasurer Cardozo*, NEWS & HERALD (Winnsboro, S.C.), Nov. 6, 1877.

138. *The Cardozo Trial*, N.Y. TIMES, Nov. 4, 1877; YORKVILLE ENQUIRER (S.C.), Nov. 8, 1877.

139. *A Sensation in Court*, NEWS & COURIER (Charleston, S.C.), Oct. 9, 1877.

140. *Id.*

141. *See supra* note 131.

142. *See The Trial of Cardozo*, COLUMBIA REGISTER (S.C.), Nov. 2, 1877.

X. THE TESTIMONY

Conner called the former speaker of the South Carolina House of Representatives, Samuel J. Lee as his first witness.¹⁴³ Lee was an African American politician whose probable father,¹⁴⁴ Samuel J. McGowan, was a Confederate general and later a state supreme court justice.¹⁴⁵ Lee had served with McGowan during the Civil War and claimed to have been wounded in battle.¹⁴⁶ Despite his power as a Republican leader, Lee had been convicted in 1871 of issuing fraudulent county checks as a county commissioner.¹⁴⁷ Not long before Cardozo's trial, he had been the solicitor (or prosecutor) in Aiken, South Carolina, but had resigned at the behest of the investigating committee.¹⁴⁸ Lee was no friend to Cardozo. He had once been physically assaulted by Cardozo,¹⁴⁹ and he had served as counsel to the investigating committee leading to the impeachment trial of Cardozo.¹⁵⁰ While Lee had been indicted as a co-conspirator with Cardozo for issuing the fraudulent "Frankfort" pay certificate,¹⁵¹ he also faced other charges for issuing fraudulent pay certificates of over \$29,000 and had confessed to stealing even more.¹⁵² Lee suffered no legal ramifications for these indiscretions. In fact, he may have been rewarded by the white establishment in post-Reconstruction South Carolina. He was appointed a general in the state "colored" militia and was the most successful

143. *Id.*

144. See J.R. Oldfield, *A High and Honorable Calling: Black Lawyers in South Carolina, 1868-1915*, 23 J. AM. STUD. 395, 400 (1989).

145. 1 BROOKS, *supra* note 98, at 75-77.

146. See VANDERVELDE, *supra* note 88, at 1-2. Vandervelde includes a group photograph of McGowan's regiment that shows an armed Lee in a Confederate uniform. *Id.*

147. See *Court Term in Edgefield*, AIKEN COURIER J. (S.C.), Nov. 13, 1875.

148. See Trial Notes, *supra* note 123, at 2-4.

149. See Josephus Woodruff, Diary (Aug. 14, 1874), in JOINT INVESTIGATIVE COMMITTEE RECORDS OF THE SOUTH CAROLINA GENERAL ASSEMBLY (on file with the South Carolina Department of Archives and History, Columbia S.C.) [hereinafter Woodruff Diary, Joint Records]; R.H. Woody, *Behind the Scenes in the Reconstruction Legislature of South Carolina*, 11 J.S. HIST. 78, 86 (1936).

150. See REPORT OF THE SPECIAL JOINT COMMITTEE, *supra* note 83, at 723.

151. Lee, Senate clerk Josephus Woodruff, House clerk A.O. Jones, and Lieutenant Governor R.H. Gleaves were all indicted together, but Gleaves had fled. See Trial Notes, *supra* note 123, at 1. Lee, Woodruff, and Jones were indicted with Cardozo. All three had apparently agreed to testify against Cardozo. *Id.* at 2, 4, 13; see also *Hell Broke Loose in Columbia!*, MARION STAR (S.C.), Aug. 1, 1877, at 1 (reporting that Gleaves fled).

152. See *Hell Broke Loose in Columbia!*, MARION STAR (S.C.), Aug. 1, 1877, at 1. In addition, on October 3, 1877, Lee testified that he had conspired with Gleaves, Moses, Hoge, and Cardozo to divide \$20,000 withheld from an appropriation to pay banker Hardy Solomon, and he further testified that he had taken a bribe of \$5,000 from Solomon for the services he had rendered in the passage of Solomon's appropriation. See REPORT OF THE JOINT INVESTIGATING COMMITTEE ON PUBLIC FRAUDS, REPORTS AND RESOLUTIONS OF THE GENERAL ASSEMBLY OF THE STATE OF SOUTH CAROLINA AT THE REGULAR SESSION: 1877-78 1563 (Columbia, S.C., Calvo & Patton 1878). The conspiracy was corroborated by the testimony of ex-Governor F.J. Moses. *Id.* at 1564. Why was Cardozo not indicted for this conspiracy? Did the state not believe Lee and Moses?

black lawyer in South Carolina in the nineteenth century.¹⁵³ He made an unprecedented twenty or more appearances before the state supreme court and was frequently victorious against white lawyers, including nearly half of his criminal appeals.¹⁵⁴

Lee's testimony was anything but straightforward. After preliminary matters, Conner had Lee identify and read the Frankfort certificate.¹⁵⁵ According to prosecution trial notes, Lee tried to explain the history of the document by stating that in the fall of 1873, during the extra session of the legislature, Cardozo had informed him of a \$4,000 surplus in the treasury.¹⁵⁶ According to an apparently verbatim newspaper account, Lee testified that he was informed of the balance after the extra session had ended.¹⁵⁷ On cross examination, Lee clarified his testimony by vigorously stating that Cardozo had said there was a treasury surplus of \$4,000 in undrawn certificates of indebtedness.¹⁵⁸

When asked who had told him about the surplus, Lee said "the President of the Senate," and then adding as if as an afterthought "and Cardozo, also."¹⁵⁹ He then said their agreement was that a certificate would be drawn and divided into five equal parts, with shares going to Lieutenant Governor Gleaves, Cardozo, Lee, A.O. Jones, and Josephus Woodruff and that Gleaves would have it drawn up at his house.¹⁶⁰ Lee testified that Gleaves had said Woodruff would take care of naming the payee for the certificate.¹⁶¹ He further claimed that "between the 8th and 14th of December," he and Gleaves went to Cardozo's house where they were paid by Cardozo in groups of certificates totaling \$800 each, and they had joked about what a nice Christmas dinner they would have now.¹⁶² He ended his direct testimony by saying that as far as he

153. See John Oldfield, *The African American Bar in South Carolina*, in *AT FREEDOM'S DOOR*, *supra* note 23, at 116, 122-25. Within a year of the Cardozo trial, Lee was successfully practicing law in Charleston. For example, he, along with his white co-counsel R.W. Seymour, won an acquittal in a murder case where their black clients had been charged with killing a white man. See "*The Tripe Row Murder*", *NEWS & COURIER* (Charleston, S.C.), June 8, 1878, at 1.

154. See Oldfield, *supra* note 153, at 122. Lee's victories in the following cases were against white lawyers. See, e.g., *State v. Williams*, 40 S.C. 373, 19 S.E. 5 (1893); *State v. Ezekiel*, 33 S.C. 115, 11 S.E. 635 (1890); *State v. Brown*, 24 S.C. 224 (1886); *State v. Haines*, 23 S.C. 170 (1885); *Brown v. Buttz*, 15 S.C. 488 (1881); and *State v. Gathers*, 15 S.C. 370 (1881). All of these cases were decided while Samuel J. McGowan was a member of the state supreme court.

155. Trial Notes, *supra* note 123, at 2.

156. *Id.*

157. *The Trial of Cardozo*, *NEWS & COURIER* (Charleston, S.C.), Nov. 2, 1877.

158. Points and Authorities Submitted on Behalf of the Appellant at 3-4, *State v. Cardozo*, 11 S.C. 195 (1878) (available in the Frederick Douglass Papers (on file with the Library of Congress, Washington, D.C.)) [hereinafter Points and Authorities].

159. *The Trial of Cardozo*, *COLUMBIA REGISTER* (S.C.), Nov. 2, 1877.

160. *Id.*; Trial Notes, *supra* note 123, at 2.

161. *The Trial of Cardozo*, *COLUMBIA REGISTER* (S.C.), Nov. 2, 1877.

162. Trial Notes, *supra* note 123, at 3.

knew there was no such person as C.L. Frankfort and that the name had been laughed about as a joke.¹⁶³

On cross examination, Lee conceded that he and the Clerk of the South Carolina House had drawn many fraudulent certificates before, that these certificates were often divided four ways, that many were drawn even before some appropriation bills had been passed, and that there was no way to know if certificates were issued in excess of appropriations because their books were never balanced.¹⁶⁴ Lee admitted that Cardozo had warned him that the South Carolina House officers were over-issuing pay certificates.¹⁶⁵ Lee testified that before he appeared before the investigative committee, he talked with the chairman of the committee, but he was not sure he told the chairman about the Frankfort transaction.¹⁶⁶

On re-direct, Conner asked Lee about the "F.L. Christopher" certificate.¹⁶⁷ This fraudulent \$2,000 certificate had been discovered during Cardozo's impeachment trial and had been used to pay the expenses of Republican politicians who traveled to Washington, D.C., in response to white conservatives lobbying there against the Republican administration in South Carolina.¹⁶⁸ Lee admitted that he could not say whether Cardozo had been involved in the Christopher certificate conspiracy.¹⁶⁹ According to the prosecution's trial notes, Lee said "F.L. Christopher" was a name "devised" by Josephus Woodruff.¹⁷⁰

If anyone had conspired to convict Cardozo, it was the star witness for the State, Josephus Woodruff, with his shorthand diary. Woodruff had been a reporter,¹⁷¹ and he was still Clerk of the South Carolina Senate,¹⁷² a position he did not relinquish until December of 1877.¹⁷³ He had worked for the state land commission before it was "cleaned up" by Cardozo.¹⁷⁴ As the senate clerk and owner of the Republican Printing Company, Woodruff was at the center of most legislative corruption schemes, and as one newspaper proclaimed, "Woodruff is still for sale, but who will buy him?"¹⁷⁵ The state was willing to

163. *The Trial of Cardozo*, NEWS & COURIER (Charleston, S.C.), Nov. 2, 1877.

164. *Id.*

165. Trial Notes, *supra* note 123, at 3.

166. *Id.* at 4.

167. *The Trial of Cardozo*, COLUMBIA REGISTER (S.C.), Nov. 2, 1877.

168. *See id.*

169. *The Trial of Cardozo*, NEWS & COURIER (Charleston, S.C.), Nov. 2, 1877.

170. Trial Notes, *supra* note 123, at 5.

171. E. CULPEPPER CLARK, FRANCIS WARRINGTON DAWSON AND THE POLITICS OF RESTORATION 72 (1980).

172. *The Trial of Cardozo*, NEWS & COURIER (Charleston, S.C.), Nov. 2, 1877.

173. THE PEOPLE (Barnwell, S.C.), Dec. 6, 1877 (describing Woodruff's resignation as clerk).

174. In 1876, Woodruff had been called as a witness before a committee investigating the land commission frauds. *See Woodruff Diary*, Joint Records, *supra* note 149, Mar. 10, 1876, entry.

175. *J.W.*, NEWS & COURIER (Charleston, S.C.), July 31, 1877.

buy him. In July 1877, Woodruff had testified before the investigative committee implicating numerous officials in various fraudulent schemes, but not Cardozo.¹⁷⁶ Soon Woodruff and Jones were indicted for numerous counts of fraud, but Woodruff fled from the state before he could be arrested. However, his flight and destination were well-recorded by the local press, and he was returned to Columbia within five days.¹⁷⁷ By August 7, 1877, the state had agreed to terms to obtain the testimony of Woodruff.¹⁷⁸

On the witness stand, Woodruff testified that Lieutenant Governor Gleaves had told him to prepare a pay certificate for \$4,000 because the state treasurer had said there was a \$4,000 surplus in unexpended legislative appropriations and that it would be divided five ways.¹⁷⁹ He said he invented the name "C.L. Frankfort, and he intended it to indicate F.L. Cardozo."¹⁸⁰ Woodruff tried to clear up the confusion left by Lee's testimony as to whether the conspiracy involved a legislative pay certificate or the issuance of certificates of debt. Woodruff explained that he prepared the legislative pay certificate and gave it to Gleaves and that he next saw it when he gave Cardozo \$2,400 of his company's certificates of indebtedness in exchange for the certificate.¹⁸¹

176. See REPORT OF THE JOINT INVESTIGATING COMMITTEE ON PUBLIC FRAUDS, *supra* note 152, at 1034, 1041-93.

177. See *The Flight of Woodruff*, NEWS & COURIER (Charleston, S.C.), July 26, 1877; *The Arrival of the Sneak Thief at Columbia*, NEWS & COURIER (Charleston, S.C.), July 31, 1877.

178. See *Woodruff & Jones Make the Amends and Do the State Some Service*, CHARLESTON J. OF COM. (S.C.), Sept. 3, 1877, reprinted in MARION STAR (S.C.), Sept. 4, 1877 (reporting the terms of Woodruff's immunity agreement). The deal required Woodruff to forfeit all printing claims of his company, to surrender all state pay warrants he held, to surrender a state note and warrant in the amount of \$139,000, to convey to the state a lot on Richardson Street in Charleston, to give the state his Adams printing press, to complete his testimony before the investigating committee, and to appear when called as a witness for the State. *Id.* In exchange, the State would *not* prosecute the indictments against Woodruff and indemnify him from all civil and criminal proceedings against him by the State. *Id.*; see also Letter from James Conner to C.H. Simonton and T.Y. Simon (Aug. 7, 1877), Conner Family Papers, *supra* note 101. While this deal appears to provide a substantial reimbursement from Woodruff, this may not have been the case. The \$139,000 warrant had been purchased by Woodruff for \$250. See *The Trial of Cardozo*, NEWS & COURIER (Charleston, S.C.), Nov. 5, 1877. Also, Woodruff was allowed to keep his mansion in Charleston for which he had paid \$10,000 and to which he had made extensive improvements. See bond dated August 1, 1877 (on file with the South Carolina Register of Mesne Conveyances, Charleston County, Book G, Folio 61) (showing that Woodruff and his wife put up their home at 191 Meeting Street, Charleston, S.C., as security in the amount of \$10,000). This bond was satisfied by the attorney general on Nov. 19, 1877. *Id.* See also mortgage dated May 1, 1873 (on file with the South Carolina Register of Mesne Conveyances, Charleston County, Book I, Folio 125) (executed by Catherine Woodruff in the amount of \$13,464). This mortgage was satisfied on May 7, 1875. *Id.* One newspaper reports that Woodruff paid more than \$10,000 for the home and claims that "a large amount of Woodruff's ill gotten gains was put into the property, in the shape of improvements, repairs and furnishing." *Woodruff's Palace—It Belongs to the Taxpayers*, NEWS & COURIER (Charleston, S.C.), Aug. 1, 1877.

179. *The Trial of Cardozo*, NEWS & COURIER (Charleston, S.C.), Nov. 2, 1877.

180. *Id.*

181. *Id.*

Then Woodruff bolstered his testimony with his diary and his printing company books. Melton objected to the use of the printing company's ledgers because Woodruff had not prepared them and because there was no showing that the bookkeeper who had prepared them was unavailable.¹⁸² The attorney general argued that the book should be admitted as a business record, but the judge allowed the book to be admitted as an admission of a co-conspirator.¹⁸³ The ledger showed entries of payments to a "C.L.F." in a section of the book entitled the "Sunday School fund."¹⁸⁴ Woodruff claimed this section indicated "presents" to public officials.¹⁸⁵ Despite objection by Melton, Woodruff was allowed to read one entry dated December 23, 1873, which recorded a payment of \$9,750 to "C.L.F."¹⁸⁶ Woodruff claimed the entry indicated a payment to Cardozo, but he could not remember any of the particulars of why he would have paid that sum to Cardozo.¹⁸⁷ The cash receipt book also contained entries which were supposed to indicate credits to Woodruff and Jones of \$800 each from the Frankfort certificate.¹⁸⁸

Next came testimony through Woodruff's diary, a little brown book in shorthand. According to Woodruff, he had invented this shorthand by combining three shorthand methods.¹⁸⁹ Melton objected to the diary, but Judge Townsend ruled that the witness could use it to refresh his memory.¹⁹⁰ Under South Carolina precedent, a witness having memory failure could refresh his

182. *Id.*

183. *Id.*

184. *The Trial of Cardozo*, NEWS & COURIER (Charleston, S.C.), Nov. 3, 1877.

185. This book entry is not supported by entries in Woodruff's diary. See discussion *infra* notes 189-202 and accompanying text.

186. See Trial Notes, *supra* note 123, at 6.

187. *The Trial of Cardozo*, NEWS & COURIER (Charleston, S.C.), Nov. 3, 1877.

188. *Id.*

189. Trial Notes, *supra* note 123, at 6; see also NEWS & COURIER (Charleston, S.C.), Oct. 9, 1877 (reporting Woodruff's testimony that he combined the methods of Pittman, Graham, and Morrison). In Robert Smalls' preliminary hearing, Woodruff first testified that only a Mr. Shaffer could read his shorthand. He was probably referring to B.G. Shaffer. See Woodruff Diary, Joint Records, *supra* note 149, Oct. 26, 1875, entry. Melton did not explain at the Cardozo trial why he did not use Shaffer to translate the diary. Shaffer may have been unavailable. At the start of the trial Melton had been surprised that the eighth count of the indictment would be tried first, and he had complained that a witness was out of the country. It is possible that this witness was Shaffer. Since the diary and the translation were not available to Melton, he had no way to use the diary to prepare for the trial. It is unfortunate that Melton did not have the translation to examine or have someone versed in various shorthand methods to examine the diary. This author has had two people examine the only known surviving examples of Woodruff's shorthand. The samples of Woodruff's shorthand are from notes he took as clerk of the Senate. See Senate Clerk Shorthand Notes, Records of the South Carolina General Assembly (on file with the South Carolina Department of Archives and History, Columbia, S.C.). Both of these individuals, Jane Johnson and Anne Morrison, are law school graduates with training in shorthand. Ms. Johnson reads and writes Pittman, and Ms. Morrison reads and writes Gregg. Both of them were able to translate most of what they were provided. Would anyone trained in shorthand have been able to translate the Woodruff diary in 1877? If so, it would have provided another basis for challenging Woodruff's credibility since he claimed only Shaffer could translate the diary.

190. See Trial Notes, *supra* note 123, at 6.

memory from contemporaneously-prepared notes and testify from his refreshed memory.¹⁹¹ However, Woodruff had no memory failure, and the court still allowed him to read his translated diary excerpts to the jury,¹⁹² thus admitting them into evidence. These excerpts were from a “translation” of the diary Woodruff had prepared for the legislative investigation committee after weeks of work in September 1877.¹⁹³ In October when Melton sought to inspect the records of the committee, the chairman refused his request.¹⁹⁴ Obviously, these translations would have been an immense help to Melton in his trial preparation.

The shorthand diary has not been found, and the only portions of Woodruff’s translation that can be located cover the time periods from July 1874 to October 1874 and from August 1875 to December 1876.¹⁹⁵ Some earlier excerpts were printed by the joint investigative committee and are dated from January 1873.¹⁹⁶ Most of the diary entries introduced into evidence are missing. Without these portions, it is impossible to fully read the diary in context. R.H. Woody opined that these portions were missing because they were never returned by the printer.¹⁹⁷ Considering that the State refused access to the diary to Melton and that the portions covering the period of January to July 1874 are missing, there is fuel for a more sinister explanation. By early 1874, the effort to impeach Cardozo had begun in earnest.¹⁹⁸ Woodruff’s animosity toward Cardozo is documented in many places in the surviving diary translation and indicates that he may have been a leader in the effort to impeach Cardozo.¹⁹⁹ Historian Joel Williamson questioned the veracity of the translation in *After Slavery*, suggesting that the translation had pagination errors and that it used terminology that would not have been current at the time the original diary was written.²⁰⁰ In fact, Woodruff was translating the diary at a time when he was still clerk to the South Carolina Senate and wanted to keep his job with the Democratically controlled senate, and his translation suggests that his

191. See *State v. Rawls*, 11 S.C.L. (2 Nott & McC.) 331, 334 (1820).

192. See *Trial Notes*, *supra* note 123, at 6-7.

193. See Letter from Josephus Woodruff to Chairman, Legislative Investigation Committee (Sept. 11, 1877) (available in Joint Investigative Committee Letter File) (on file with the South Carolina Department of Archives and History, Columbia, S.C.). The letter noted, “The extracts are very full but all surplus matter can be erased. Will try to condense.” *Id.*

194. See Joint Investigative Committee Letter File (on file with the South Carolina Department of Archives and History, Columbia, S.C.).

195. See Woodruff Diary, Joint Records, *supra* note 149. The portions of this document dating from July 1874 to Dec. 31, 1875 were published in Woody, *supra* note 149.

196. See REPORT OF THE JOINT INVESTIGATING COMMITTEE REPORT ON PUBLIC FRAUDS, *supra* note 152, at 1233.

197. Woody, *supra* note 149, at 79.

198. See *The Coming Battle*, THE DAILY UNION-HERALD (Columbia, S.C.), Feb. 23, 1875.

199. See, e.g., Woodruff Diary, Joint Records, *supra* note 149, Aug. 26, 1873, Aug. 11, 1874, Aug. 19, 1874, Aug. 25, 1874, and Sept. 2, 1874, entries.

200. See WILLIAMSON, *supra* note 4, at 388 n.67.

sympathies lay with the “Democrats” even as early as 1874.²⁰¹ As Richard Zuczek points out, the term “Democrat” had fallen out of favor during Reconstruction and was not in common use again until early 1876.²⁰² Thus, one must wonder how much of the translation Woodruff invented. If these missing portions of the diary had been available to Melton, his cross examination of Woodruff might have been devastating.

Even so, Melton’s cross examination was effective. Woodruff replied “Yes sir,” to Melton’s first question, “You had a great many fraudulent transactions?”²⁰³ Woodruff had to admit that his “large business” of fraud as clerk dated from 1868, and that during every session of the legislature he had issued at least \$100,000 in fraudulent pay certificates.²⁰⁴ Then came a startling revelation. On direct, Woodruff had used the books of the printing company to establish two \$800 entries of payments to himself and Jones, confirming they had gotten their share of the Frankfort certificate.²⁰⁵ But Melton demonstrated with a magnifying glass that the Woodruff entry had been altered by the insertion of the number “eight” in a handwriting that Woodruff claimed was unfamiliar²⁰⁶ and that the Jones entry appeared to have been entirely inserted in the same unfamiliar handwriting.²⁰⁷

As the cross examination continued, Woodruff admitted that Gleaves had told him that the treasurer said there was a \$4,000 balance in the legislative appropriation.²⁰⁸ He also admitted that while it was his job to inform the treasurer of the amount of certificates drawn by the legislature, he never did it, and that there was no way for Cardozo to know if there was a surplus or not.²⁰⁹ Melton concluded this series of questions by asking: “Well, suppose I were to tell you that at that time not one cent had been drawn?”²¹⁰

Then Melton asked Woodruff if he had tried to bribe Cardozo with a legislative certificate payable to and endorsed by R.T Merriam and signed by Gleaves, Lee, Woodruff, and Jones in the amount of \$5,000 shortly after Cardozo took office.²¹¹ After Woodruff admitted he had carried the Merriam certificate to Cardozo, Woodruff claimed Cardozo tore the certificate up.²¹² Woodruff denied “positively” that Cardozo had demanded that he write “cancelled” on the certificate and sign it.²¹³ Then Melton dramatically produced

201. See Woodruff Diary, Joint Records, *supra* note 149, Aug. 2, 1874, Aug. 17, 1874, and Sept. 10, 1874, entries.

202. See ZUCZEK, *supra* note 24, at 161.

203. *The Trial of Cardozo*, NEWS & COURIER (Charleston, S.C.), Nov. 3, 1877.

204. *Id.*

205. See Trial Notes, *supra* note 123, at 6.

206. *Id.* at 8.

207. See Points and Authorities, *supra* note 158, at 34.

208. *Id.* at 4.

209. *Id.* at 5.

210. *Id.* at 6.

211. *Trial of Ex-Treasurer Cardozo*, YORKVILLE ENQUIRER (S.C.), Nov. 8, 1877, at 2.

212. *Id.*

213. *Id.*

the certificate, and Woodruff admitted that he had signed and cancelled the certificate.²¹⁴

Continuing, Woodruff acknowledged that Cardozo had refused to pay \$90,000 in certificates of indebtedness to Woodruff's printing company as authorized by the legislature in 1873-74, and that after Cardozo refused a bribe offer of 20-25%, Woodruff had unsuccessfully sued Cardozo to force payment to the printing company.²¹⁵ Because Cardozo fought the printing company so vigorously, Woodruff was never paid,²¹⁶ despite the issuance of a writ of mandamus by the state supreme court.²¹⁷

The final witnesses for the State's case in chief were minor. One, James D. Wells, a clerk in the treasurer's office, tried to explain how there could have been a surplus of \$4,000 in the legislative expenses appropriation.²¹⁸ However, on cross examination this witness had to admit that the appropriation had a surplus of \$74,615 on the first day of January 1874.²¹⁹ Another minor witness should have been a major star for the State. As the Clerk of the South Carolina House, A.O. Jones was the fourth signatory on the Frankfort certificate, but Jones denied any knowledge of the conspiracy and testified that he had first heard of the \$4,000 certificate in the summer of 1877.²²⁰

XI. THE DEFENSE

The defense began with Cardozo, who recounted how Woodruff had tried to bribe him with the Merriam certificate and then testified that "Woodruff had made repeated overtures to him in order to try and get payment of his appropriation for printing before the work was done."²²¹ Cardozo denied any knowledge of the Christopher certificate²²² and supported his denial of participation in the Frankfort certificate conspiracy by intricately going over the records of the treasurer's office to contradict the two versions of conspiracy

214. *Id.*

215. *The Trial of Cardozo*, NEWS & COURIER (Charleston, S.C.), Nov. 3, 1877.

216. *Id.*

217. See *State v. Cardozo*, 5 S.C. 297, 313-14 (1874), in which the state supreme court issued a number of writs of mandamus to compel Cardozo to pay myriad parties who held claims against the State. One of these claims was to pay to the Republican Printing Company a total of \$79,000 under an act passed on March 9, 1874, for appropriations for the fiscal year commencing Nov. 1, 1873. *Id.* at 314. See also *Frazee v. Cardozo*, 6 S.C. 315 (1875), in which the state supreme court held that it had no authority to hold Cardozo in contempt for failure to respond to the mandamus orders issued in *State v. Cardozo* because Cardozo had appealed to the U.S. Supreme Court, and such an appeal acted as a *supersedeas*. *Id.* at 316.

218. *The Trial of Cardozo*, NEWS & COURIER (Charleston, S.C.), Nov. 3, 1877.

219. *Id.*

220. *Id.* The state also called Senator John Cochran, who had served as chairman of the legislative investigating committee. His testimony was used only to demonstrate that the Frankfort and Christopher certificates were found in the vault of the state treasurer's office. See Trial Notes, *supra* note 123, at 14.

221. *The Trial of Cardozo*, NEWS & COURIER (Charleston, S.C.), Nov. 3, 1877.

222. *Id.*

presented by Lee and Woodruff.²²³ As to the Lee scenario involving certificates of indebtedness for printing, Cardozo demonstrated that the legislature had authorized printing certificates of \$231,996, that these certificates were not received until December 11, 1874, and that the entire issue was not received until after Christmas.²²⁴ The American Bank Note Company printed \$235,000 in certificates, because the printing plates could not print the odd amount of \$231,996, and upon receipt of these certificates, Cardozo immediately cancelled the overage.²²⁵ When asked where these cancelled certificates were, Cardozo said, "I think they are in the southwest corner of the Treasury on one of the shelves," and a clerk soon produced them in court.²²⁶ This evidence demonstrated that Cardozo could not have predicted a \$4,000 surplus of certificates of indebtedness and that in fact no such surplus had existed. As to Woodruff's conspiracy involving a surplus of \$4,000 in the appropriation for the extra legislative session, Cardozo presented evidence that he could not know if there was a legislative surplus. While the appropriation was approved on November 19, 1873, the taxes to fund the appropriation were not levied until December 22, 1873, and according to treasury records only \$385 was paid out of this appropriation in the entire month of December 1873.²²⁷ By the end of January 1874, there was still a surplus in this appropriation of \$42,243.²²⁸ Thus, based on the treasury records there was never a \$4,000 surplus in the legislative appropriation at least through January 1874.²²⁹

On cross examination of Cardozo, the attorney general attempted to obtain an admission that Cardozo knew there were illegal over-issues of legislative certificates.²³⁰ Cardozo admitted that there were over-issues, but that he could "not know that some were illegal but thought so."²³¹ He also said he "never paid certificates he knew or strongly suspected to be fraudulent."²³² At this point Conner interjected the inflammatory issue of politics by asking Cardozo to admit that, although he suspected Franklin J. Moses of issuing fraudulent certificates as Speaker of the South Carolina House, he had voted for Moses for governor.²³³ Cardozo said he voted for Moses because he was the Republican

223. See Points and Authorities, *supra* note 158, at 6-8; see also Trial Notes, *supra* note 123, at 15-16.

224. See Points and Authorities, *supra* note 158, at 6; see also Trial Notes, *supra* note 123, at 15-16.

225. See Points and Authorities, *supra* note 158, at 6-7; see also Trial Notes, *supra* note 123, at 15-16.

226. *The Trial of Cardozo*, COLUMBIA REGISTER (S.C.), Nov. 4, 1877.

227. Points and Authorities, *supra* note 158, at 8.

228. *Id.*

229. *Id.*

230. *The Trial of Cardozo*, NEWS & COURIER (Charleston, S.C.), Nov. 3, 1877.

231. Trial Notes, *supra* note 123, at 19.

232. *Id.*

233. *The Trial of Cardozo*, NEWS & COURIER (Charleston, S.C.), Nov. 3, 1877.

nominee.²³⁴ As a loyal Republican, Cardozo had no other choice in the election of 1872.²³⁵

Changing subjects, Conner asked Cardozo whether he had admitted to banker Hardy Solomon²³⁶ that he withdraw some certificates for payment that lacked proper documentation and whether Cardozo suggested that Solomon substitute other certificates for the invalid ones.²³⁷ Melton objected on relevance, but the judge overruled the objection, and Cardozo denied the allegation.²³⁸

Conner tried to rehabilitate Woodruff by asking Cardozo to explain why he had kept the Merriam certificate for five years without exposing the officers of the General Assembly, the clerks of the two houses, and Woodruff.²³⁹ Cardozo responded that although Woodruff had offered him bribes, Cardozo never accepted, and since Woodruff had not gotten any more money than was appropriated by the legislature, Cardozo saw nothing to be gained by turning in Woodruff.²⁴⁰

On re-direct Melton introduced a report issued by Cardozo as treasurer admonishing the legislature for the over-issuance of certificates.²⁴¹ Cardozo continued testifying that Woodruff had sued him because, on the advice of the

234. Trial Notes, *supra* note 123, at 19.

235. The only other gubernatorial candidate in the 1872 race was James L. Orr, who had served as governor during Presidential Reconstruction, who had opposed the adoption of the Fourteenth Amendment of the U.S. Constitution, and supported a moderate version of the so-called "Black Codes." See SIMKINS & WOODY, *supra* note 25, at 58-59, 62, 464-66.

236. Hardy Solomon, who was called as a rebuttal witness for the state, was a merchant and banker in Columbia. Through his grocery, Solomon sold liquor and other supplies to Woodruff, who then provided them to the legislators. See Woodruff Diary, Joint Records, *supra* note 149, Feb. 29, 1876, Mar. 1, 1876, Mar. 8, 1876, and Mar. 9, 1876, entries; see also 2 HISTORY OF SOUTH CAROLINA 919 (Yates Snowden & H.G. Cutler eds., 1920). Solomon was very active in party politics and at various times had been rumored to be a candidate for governor and treasurer. See Woodruff Diary, Joint Records, *supra* note 149, Sept. 8, 1874 and Sept. 8, 1875, entries. According to Woodruff, Senator John Cochran told him that Solomon could never be elected because he was a Jew. *Id.* Solomon had been the state's banker during the Moses administration. See ALLEN, *supra* note 36, at 88. His bank, the South Carolina Bank and Trust Company, collapsed on July 2, 1875, resulting in a loss to the state of over \$200,000. See *id.* at 145. Cardozo had tried to prevent this loss by withdrawing state funds from the bank, but he had been overruled by the board of deposit. See TAYLOR, *supra* note 25, at 217; 2 HISTORY OF SOUTH CAROLINA, *supra* at 932-33. Solomon was an avowed enemy of Cardozo, and the two had come to blows at one point. See *How the State of South Carolina Lost Over \$100,000*, MARION STAR (S.C.), Oct. 3, 1877.

237. See Trial Notes, *supra* note 123, at 22.

238. *Id.*

239. *Id.* at 19-20.

240. *Id.* at 20.

241. *The Trial of Cardozo*, COLUMBIA REGISTER (S.C.), Nov. 3, 1877; see REPORT OF THE TREASURER OF THE STATE OF SOUTH CAROLINA FOR THE FISCAL YEAR ENDING OCTOBER 31, 1874, REPORTS AND RESOLUTIONS OF THE GENERAL ASSEMBLY OF THE STATE OF SOUTH CAROLINA AT THE REGULAR SESSION: 1874 16 (n.p.n.d.) [hereinafter 1874 TREASURER'S REPORT].

attorney general, S.W. Melton, he refused to pay the claims of the printing company.²⁴²

On cross examination, Conner had tried to create the impression that Cardozo had been in league with Governor Moses. Since Cardozo was no friend of Moses, Melton had not prepared Cardozo for this line of questioning. Therefore, he had to lead Cardozo to recount that he had referred three cases involving county treasurers for prosecution, and that despite convictions, Moses had pardoned two of them.²⁴³ Cardozo also recounted his futile efforts against former state treasurer, Niles G. Parker.²⁴⁴ There are no reports that Melton had Cardozo testify of his success at preventing Moses from stealing \$25,000 in 1872.²⁴⁵

Since Conner had cross examined Cardozo about Hardy Solomon, Melton proceeded to offer evidence in reply. First, Cardozo denied that he had ever advised Solomon to withdraw invalid claims and substitute others.²⁴⁶ Cardozo clarified that Solomon had offered him a bribe of \$5,000 which he refused and that he had not paid two bills presented by Solomon because his clerk, T.J. Minton, said they were invalid.²⁴⁷ Then "Solomon got mad, and wanted to fight and shoot," but afterwards Solomon found the valid voucher "and the Legislature ordered it paid, and I paid it."²⁴⁸

Former treasury department clerk, T.J. Minton, was the only other witness for the defense. Minton testified that as clerk he had usually paid certificates without knowing whether the endorser's signature was genuine, but what was important was whether the certificates bore the genuine signatures of the appropriate officers of the legislature.²⁴⁹ Therefore, if the Frankfort certificate had had the appropriate signatures, he would have paid it. Minton testified that he had paid thousands of "persons whose handwriting he did not and could not know."²⁵⁰ On cross examination, he vehemently denied the suggestion by the attorney general that Cardozo had told him it was none of his business when Minton questioned a certificate presented by L.N. Zealey, a clerk of Solomon's bank.²⁵¹ Minton answered adamantly "no such transaction ever occurred."²⁵²

The defense rested.

242. *The Trial of Cardozo*, NEWS & COURIER (Charleston, S.C.), Nov. 4, 1877. This was an ingenious method to put Melton on the witness stand without his testifying. As counsel, he would not have been permitted to be a witness in his client's trial. See *Price v. Moses*, 44 S.C.L. (10 Rich.) 454, 458 (1857).

243. *The Trial of Cardozo*, COLUMBIA REGISTER (S.C.), Nov. 4, 1877.

244. *Id.*

245. See WILLIAMSON, *supra* note 4, at 399.

246. *The Trial of Cardozo*, COLUMBIA REGISTER (S.C.), Nov. 4, 1877.

247. *Id.*

248. *Id.*

249. *The Trial of Cardozo*, NEWS & COURIER (Charleston, S.C.), Nov. 5, 1877.

250. Trial Notes, *supra* note 123, at 27.

251. *Id.* at 26.

252. *Id.*

XII. THE REBUTTAL EVIDENCE

The State began its rebuttal by recalling Josephus Woodruff, who gave evidence that indicates two major flaws in the State's case. First, Woodruff testified that the Merriam certificate was backdated, and the attempted \$5,000 bribe had taken place in December of 1873, the same month in which the Frankfort certificate was supposed to have been issued.²⁵³ Earlier in the trial, Woodruff had offered his printing company records to claim that he had paid "C.L.F." \$9,750 in December 1873.²⁵⁴ All of this testimony seems incredible. Why would Cardozo refuse a \$5,000 bribe in the same month in which he was supposed to have taken a \$9,750 bribe? And more incredibly, why would Cardozo enter into a conspiracy in which his share would have been only \$800? Next, Woodruff read from his diary a lengthy list of instances in which he claimed he had paid money to Cardozo.²⁵⁵ Woodruff stated vehemently that he had offered a fraudulent certificate to Cardozo on only one occasion and that was the Merriam certificate.²⁵⁶ Woodruff then added that he paid Cardozo the percentages in currency.²⁵⁷ Conner then asked him, "No checks passed between you, and you always paid him in currency?" Woodruff answered, "Yes, sir."²⁵⁸ When asked if he had any means of proving that, Woodruff read the January 13, 1873 diary entry, in which he had written, "I paid Cardozo \$3,000 in currency."²⁵⁹ In fact, one of the few surviving diary "translations" used at the trial does not mention "in currency," and actually states that Woodruff had a check for \$3,000 for Cardozo.²⁶⁰ Therefore, to cover deficiencies in the State's case, Woodruff conveniently invented the words "in currency."

The State then re-called A.O. Jones.²⁶¹ Jones had denied any involvement in the Frankfort conspiracy when first called as a witness.²⁶² He now testified that Woodruff had told him that Cardozo had taken \$12,000 or \$15,000 from Woodruff and Jones after passage of an appropriation of \$250,000 and that Cardozo had regretted to Jones that he had ever taken any money from them.²⁶³

As anticipated, banker Hardy Solomon was called by the State in rebuttal. Solomon denied that he had offered a \$5,000 bribe to Cardozo, but he admitted paying other bribes to Cardozo.²⁶⁴ Then Solomon recounted a story of presenting a claim of \$103,000 to Cardozo, which Cardozo refused to pay unless Solomon gave Governor Moses and Cardozo \$35,000.²⁶⁵ However,

253. *Id.* at 27.

254. *Id.* at 7; see *supra* notes 182-87 and accompanying text.

255. *The Trial of Cardozo*, NEWS & COURIER (Charleston, S.C.), Nov. 5, 1877.

256. *Id.*

257. *Id.*

258. *Id.*

259. *Id.*

260. See REPORT OF THE JOINT INVESTIGATING COMMITTEE ON PUBLIC FRAUDS, *supra* note 152, at 1234. Legrand Benedict was Woodruff's nephew and the business manager of the Republican Printing Company. Woody, *supra* note 149, at 255 n.113.

261. *The Trial of Cardozo*, NEWS & COURIER (Charleston, S.C.), Nov. 5, 1877.

262. See *supra* note 219 and accompanying text.

263. *The Trial of Cardozo*, NEWS & COURIER (Charleston, S.C.), Nov. 5, 1877.

264. *Id.*; see also Trial Notes, *supra* note 123, at 30.

265. Trial Notes, *supra* note 123, at 30; *The Trial of Cardozo*, NEWS & COURIER (Charleston, S.C.), Nov. 5, 1877.

Solomon's story became confusing in its arithmetic and logic when he explained that he paid out \$20,000 in response to this demand by paying \$7,000 to the Governor Moses, \$5,000 to Speaker Lee and \$5,000 to Lieutenant Governor Gleaves, and \$3,000 to Cardozo.²⁶⁶ Why would Solomon pay \$20,000 in response to Cardozo's demand for \$35,000 and give half to Gleaves and Lee? On cross examination, Solomon was forced to admit that he blamed the bankruptcy of his bank on Cardozo, and that Cardozo had always been his enemy.²⁶⁷ Solomon also admitted that he had not testified about the \$20,000 bribe before the legislative investigating committee in 1877.²⁶⁸ The State then re-directed Solomon to assert that he had testified about the bribe before a legislative committee in 1875.²⁶⁹ On re-cross, Melton produced Solomon's testimony before that committee, and Solomon had to admit that he had not, in fact, testified that he had bribed Cardozo.²⁷⁰ However, when Melton tried to use the 1875 report to further impeach Solomon's testimony as to the dollar amount of the alleged bribe, the prosecution objected and the judge sustained the objection.²⁷¹ Solomon had testified in 1875 that he had paid between \$15,000 and \$17,000 to Moses, Gleaves, and Lee,²⁷² but in the trial, he appears to have conveniently added \$3,000 so that he would have an amount with which to allegedly bribe Cardozo.

The State concluded with two minor witnesses. L.N. Zealey, an employee of Hardy Solomon's bank, testified that Cardozo ordered T.J. Minton to pay a fraudulent Solomon claim.²⁷³ The final witness was Senator John Cochran, chair of the investigating committee, who testified that he found the Solomon claims in the treasurer's office.²⁷⁴

The case was now closed.

266. *The Trial of Cardozo*, NEWS & COURIER (Charleston, S.C.), Nov. 5, 1877.

267. COLUMBIA REGISTER (S.C.), Nov. 4, 1877.

268. *The Trial of Cardozo*, NEWS & COURIER (Charleston, S.C.), Nov. 5, 1877.

269. *Id.*

270. See Trial Notes, *supra* note 123, at 31; see also REPORT OF THE SPECIAL JOINT COMMITTEE TO INVESTIGATE THE FAILURE OF THE SOUTH CAROLINA BANK AND TRUST COMPANY, REPORTS AND RESOLUTIONS OF THE GENERAL ASSEMBLY OF THE STATE OF SOUTH CAROLINA AT THE REGULAR SESSION, 1875-76 885, 927-37 (Columbia, S.C., Republican Printing Co. 1876).

271. *Proceedings of the Court*, COLUMBIA REGISTER (S.C.), Nov. 17, 1877.

272. See REPORT OF THE SPECIAL JOINT COMMITTEE TO INVESTIGATE THE FAILURE OF THE SOUTH CAROLINA BANK AND TRUST COMPANY, *supra* note 270, at 931.

273. *The Trial of Cardozo*, NEWS & COURIER (Charleston, S.C.), Nov. 5, 1877.

274. See Trial Notes, *supra* note 123, at 32. Cochran had also testified for the State in its case in chief that he had found the Frankfort certificates in the vault of the state treasurer. *The Trial of Cardozo*, COLUMBIA REGISTER (S.C.), Nov. 3, 1877. John Cochran was a minor witness for the State in its case in chief and in rebuttal. However, he was not a minor figure in Reconstruction or in the investigation of Cardozo. Cochran was an Abbeville native and a Confederate veteran. See 1 BIOGRAPHICAL DIRECTORY OF THE SOUTH CAROLINA SENATE 314-15 (N. Louise Bailey et al. eds. 1986). He had been active in Republican party politics since 1872, served on the staff of Governor Franklin I. Moses, and was elected from Anderson County as a representative in 1872 and as a senator in 1874 and 1876. *Id.* at 314. Despite the fact that he had been implicated in a fraudulent transaction with the state land commission, he was appointed by the Democratically-controlled legislature to chair the Joint Investigating Committee in 1877. *Id.* at 314-15. Of course, his fraudulent land transaction was ignored in the committee's report. He had also been tried and acquitted of murder in early 1877. *Id.* at 315. Thus, Cochran was not a statesman of unblemished reputation.

XIII. CLOSING ARGUMENT

On November 5, 1877, the court heard closing arguments. Under South Carolina trial procedure, the State was entitled to “open and close” the arguments since the defendant had presented evidence.²⁷⁵ C.R. Miles argued for two hours, S.W. Melton argued for five hours, and Attorney General Conner closed in reply for two and a half hours.²⁷⁶ The only reports of these lengthy orations are summaries in the newspapers. While the newspaper coverage of the trial was often incomplete and erroneous, these press accounts do highlight the approaches of the State and the defense.²⁷⁷ Cardozo’s brief also offers a glimpse of the approach Melton may have taken in his arguments.

Miles began by characterizing the State’s case as a simple matter of fraud and robbery, and then he attacked the defense as one based on collateral matters (*i.e.*, politics).²⁷⁸ Miles provided a long list of his legal authorities and then returned to the State’s original factual scenario that there had been an appropriation of \$75,000 for the extra session of 1873. Miles stated that

[w]hen all the certificates had been drawn, it was found that four thousand dollars remained undrawn. At the invitation of the treasurer the officers of the two houses met the treasurer in his office, and there it was arranged that a certificate should be drawn for that amount and exchanged for a certificate of indebtedness to the Republican Printing Company.²⁷⁹

In response to Cardozo’s defense that the stories of Lee and Woodruff did not match and that Cardozo could not have known the balance in the legislative accounts, Miles claimed that it did not matter who originated the scheme, whether Cardozo had known what the balance was, whether the conspirators received any money, whether the pay certificates were actually made, or whether any overt act had been committed; all that mattered was that Cardozo

275. *See* *State v. Brisbane*, 2 S.C.L. (2 Bay) 451, 452-53 (1802) (explaining that if the defendant had presented no evidence, defense counsel would still have had the right to deliver the first closing argument and the rebuttal).

276. *See* Trial Notes, *supra* note 123, at 32. It should be noted that an 1868 Act prohibited counsel from arguing any matter for longer than two hours without special permission of the court. *See* 1868 S.C. Acts 46 § 8. The record does not provide any report of counsel seeking permission to argue for more than two hours, and even a decade later the Act was liberally construed by the courts. *See* *State v. Jones*, 29 S.C. 201, 221 (1888).

277. This account of these arguments is based on the reports given in *The Trial of Cardozo*, NEWS & COURIER (Charleston, S.C.), Nov. 6, 1877 and *The Trial of Cardozo*, COLUMBIA REGISTER (S.C.), Nov. 6, 1877.

278. *The Trial of Cardozo*, COLUMBIA REGISTER (S.C.), Nov. 6, 1877.

279. *The Trial of Cardozo*, NEWS & COURIER (Charleston, S.C.), Nov. 6, 1877.

had entered into an agreement to defraud the State.²⁸⁰ He denied that the State's case was political; he said it was based on the testimony of Lee and Woodruff and could never have been proved without Woodruff's diary.²⁸¹

Miles continued to attack the defense by asserting that it was oath against oath and that Cardozo had no corroboration.²⁸² Miles attacked Cardozo for testifying on his own behalf since "the law has only lately allowed the accused to testify in his own case,"²⁸³ and because Cardozo had not explained, but only denied.²⁸⁴ He then defended the State for calling Hardy Solomon as a witness, asserting that Cardozo had put his character into question, thus allowing the State to call Solomon.²⁸⁵ Miles claimed that if Solomon was truthful, his testimony convicted Cardozo of not only lying, but also of conspiracy, fraud, and the basest betrayal of the public's trust.²⁸⁶ Miles ignored the fact that Solomon's allegations were not introduced by the defense, but by the State.²⁸⁷ Finally, Miles ended his closing by condemning Cardozo for bringing dishonor on his own race, state, and religion.²⁸⁸

Melton immediately began his closing argument with an attack on the political nature of the State's case. *The News & Courier* decried that "[h]e began with the usual appeal to the feelings of the jury, with a flowery and pathetic description of how history repeats itself, and that when one party goes up another goes down, and the rising party ever inscribe upon their banners 'Retribution and Revenge.'"²⁸⁹ Melton argued that Cardozo, the leader of his party, was being prosecuted while the real thieves had been allowed to escape justice.²⁹⁰ He stated that the greater proof of Cardozo's innocence was his voluntary return to South Carolina to be tried.²⁹¹ "[Cardozo] would rather run the gauntlet than go to anywhere in the world and have the slow moving finger of scorn pointed at him and those he loves."²⁹² Melton continued this argument

280. *Id.* "Conspiracy is a combination between two or more persons to accomplish a criminal or unlawful act, or to do a lawful act by criminal or unlawful means." ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 681 (3d ed. 1982). This modern definition is consistent with that of nineteenth century courts. *See State v. Cawood*, 2 Stew. 360, 363 (Ala. 1830); *State v. Ripley*, 31 Me. 386, 389 (1850). At the time of the Cardozo trial there was no applicable South Carolina case on point. However, *State v. De Witt*, 20 S.C.L. (2 Hill) 282, 284-86 (1834) held that a conspiracy to harm the public was an indictable offense, but did not define conspiracy.

281. *The Trial of Cardozo*, COLUMBIA REGISTER (S.C.), Nov. 6, 1877.

282. *Id.*

283. *Id.*

284. *Id.*

285. *Id.*

286. *Id.*

287. *See* Trial Notes, *supra* note 123, at 22.

288. *The Trial of Cardozo*, NEWS & COURIER (Charleston, S.C.), Nov. 6, 1877.

289. *Id.*

290. *The Trial of Cardozo*, COLUMBIA REGISTER (S.C.), Nov. 6, 1877.

291. *Id.*

292. *Id.*

by telling the jury that Cardozo wanted their justice, not their mercy.²⁹³ While Melton agreed that Lee and Woodruff stole from the state, he stressed that they had exchanged their testimony for freedom and that the State had not proved that Cardozo had stolen anything.²⁹⁴

In response to the attack on Cardozo for voting for Franklin J. Moses for governor, Melton admitted that he too had voted for Moses, but he explained that one could not be tried for that.²⁹⁵ As proof of Cardozo's reform efforts, he pointed out that the state debt had fallen from \$21,000,000 to less than \$7,000,000 during Cardozo's term as treasurer.²⁹⁶

Melton attacked the State's claim that Cardozo was responsible for every fraudulent certificate. "It was impossible for him to know whether the endorsements were true," and when he refused to pay fraudulent certificates he incurred the enmity of all.²⁹⁷ He supported his argument by reading the state statutes that compelled Cardozo to pay any certificate presented to him bearing the signatures of the appropriate officers.²⁹⁸ According to one press account, Melton made a detailed attack on the State's evidence.²⁹⁹ Furthermore, his brief on appeal contained a detailed and meticulous attack on the facts of the State's case, and one would assume that he made these same attacks in his five-hour speech. In particular, the brief picks apart the inconsistencies in the testimonies of Lee and Woodruff.³⁰⁰ Moreover, the newspapers recount Melton's attacks on the credibility of these two witnesses. Melton pointed out that Lee was facing life in prison and had traded Cardozo's life for his own.³⁰¹ Melton simply called Woodruff, with "his little whirligig book," a liar.³⁰² As to the uncorroborated testimony of Hardy Solomon, Melton asserted that Cardozo could not be guilty of taking bribes when it was Cardozo alone who brought down Solomon's fraudulent bank.³⁰³

293. *Id.*

294. *Id.*

295. *The Trial of Cardozo*, NEWS & COURIER (Charleston, S.C.), Nov. 6, 1877.

296. *The Trial of Cardozo*, COLUMBIA REGISTER (S.C.), Nov. 6, 1877.

297. *The Trial of Cardozo*, NEWS & COURIER (Charleston, S.C.), Nov. 6, 1877.

298. *Id.*

299. *Id.*

300. See Points and Authorities, *supra* note 158, at 4-10.

301. *The Trial of Cardozo*, COLUMBIA REGISTER (S.C.), Nov. 6, 1877. Lee faced a number of larceny charges which were felonies and could result in a life sentence. See *Hell Broke Loose in Columbia*, MARION STAR (S.C.), Aug. 1, 1877. For a discussion of the classification of crimes as felonies or misdemeanors in South Carolina, see Note, *Classification of Crimes as Felonies or Misdemeanors*, 5 S.C.L.Q. 59 *passim* (1952). The South Carolina Supreme Court has noted that the only way to determine whether a crime is a felony or misdemeanor is by reference to the history of the crime. *State v. Breuer*, 113 S.C. 177, 178, 102 S.E. 15, 16 (1920). At trial, Cardozo only faced the conspiracy count, which was a misdemeanor. Conspiracy has always been classified as a misdemeanor. See *State v. Ferguson*, 221 S.C. 300, 306, 70 S.E.2d 355, 358 (1952). Also note that Judge Townsend referred to conspiracy as a "serious" misdemeanor. *The History of a Crime*, THE INTELLIGENCER (Anderson, S.C.), Dec. 6, 1877.

302. *The Trial of Cardozo*, COLUMBIA REGISTER (S.C.), Nov. 6, 1877.

303. *The Trial of Cardozo*, NEWS & COURIER (Charleston, S.C.), Nov. 6, 1877.

As he concluded, Melton brought his client to tears as he told the jury, "I grant you I am paid for talking here. Yes; I have taken the very roof that covered the heads of the defendant's wife [and] children to pay my fee, for it was all he had. But I have a feeling of gratitude toward him when I remember how he stood by me in fighting the fraudulent claims against the State."³⁰⁴

Attorney General James Conner concluded the arguments by accusing Melton of confusing the issue by bringing up politics and then proceeded to assert that Cardozo's defense was based on the theory that former Governor Franklin J. Moses was a bigger reformer than Cardozo.³⁰⁵ Conner then "dissected [Moses' career] thoroughly and showed the shameless frauds that characterized his political administration."³⁰⁶ This argument was intended to inflame the political prejudices of the jury. Unfortunately, Conner's argument probably confused the jury, since Moses was not on trial. Furthermore, Cardozo had attempted to criminally charge Moses for his thievery.³⁰⁷

Conner then began a series of arguments that must have been in response to unreported defense arguments. Conner countered Melton's argument that Cardozo would not stoop so low as to steal a mere \$800 by reminding the jury that the Vice President of the United States, Schuyler Colfax, had been shamed by a bribe of the insignificant sum of \$1,000.³⁰⁸ This was another specious political attack. As a radical Republican and strong supporter of congressional Reconstruction, Colfax was no hero to white South Carolinians. Moreover, the alleged bribe was \$4,000, and Colfax was never charged nor convicted.³⁰⁹ Conner asserted that Lee and Woodruff corroborated each other, and denied that Lee and Woodruff had colluded in their stories, because that would require believing that the legislative investigating committee had colluded with them.³¹⁰

Conner next attacked Melton for asking the whereabouts of Benedict, the bookkeeper for the Republican Printing Company.³¹¹ This was an unreported Melton argument, but it is logical that he would have asked the question since he had objected to use of the printing company records without their bookkeeper present to verify them. An angry Conner continued saying:

Did [Melton] know that Benedict came after the State closed?
And if I had offered to put him up when he came, he would
have objected to our doing so then, because we had not put
him up before. I will not tell you whether he was here or not,
because I have no right to testify any more than defendant's

304. *The Trial of Cardozo*, COLUMBIA REGISTER (S.C.), Nov. 6, 1877.

305. *Id.*

306. *Id.*

307. See WILLIAMSON, *supra* note 4, at 399.

308. *The Trial of Cardozo*, NEWS & COURIER (Charleston, S.C.), Nov. 6, 1877.

309. See WILLARD H. SMITH, SCHUYLER COLFAX: THE CHANGING FORTUNES OF A POLITICAL IDOL 392, 399 (1952).

310. *The Trial of Cardozo*, NEWS & COURIER (Charleston, S.C.), Nov. 6, 1877.

311. *The Trial of Cardozo*, COLUMBIA REGISTER (S.C.), Nov. 6, 1877.

counsel could tell you what the law is. The law must come from the judge and the facts from the witnesses. The learned counsel has no right to throw his personal influence into the scale in favor of the prisoner. . . . I might as well tell you that you must find the defendant guilty because I believe him guilty.³¹²

Since the State was entitled to the last argument, the defense had no way to rebut the outrageous and improper implication by Conner that the bookkeeper would have been a witness for the State but had arrived too late. Also, the defense had no way to counter Conner's back-handed, improper argument that the attorney general believed Cardozo guilty.³¹³

Conner ended his argument with an assault on Cardozo's message to the jury that he did not want mercy. Conner tried to turn the statement into a plea for mercy. He said, "If he is innocent, mercy is a reproach and a shame. . . . It is only to the erring and the sinful that the claim for mercy goes out."³¹⁴

XIV. THE CHARGE

On Tuesday, November 6, Judge Townsend charged the jury for more than two hours.³¹⁵ The judge's bias was obvious. *The Columbia Register* provided the most complete account.³¹⁶ In it, the newspaper reported that Townsend concentrated on the facts of the case and spent little time on the law other than to charge the law of conspiracy and inform the jury that Melton had erred in his argument on that issue.³¹⁷ The judge charged the facts fully for the State, including the rebuttal evidence, but mentioned none of the discrepancies of the State's case.³¹⁸ Ignoring the documentary evidence in support of Cardozo, Judge Townsend opined to the jury that Cardozo's defense was based simply on his denial.³¹⁹ He then dissected the defendant's case, pointing out that a misdemeanor could be tried without the defendant present and that therefore, it was not remarkable that Cardozo had returned to face the charges against him.³²⁰ Of course, the judge ignored the fact that Cardozo did not know until two days before trial that he was going to be tried only on the misdemeanor

312. *The Trial of Cardozo*, COLUMBIA REGISTER (Columbia, S.C.), Nov. 6, 1877.

313. However, neither Conner nor Melton was permitted to offer an opinion on any of the evidence, much less the guilt or innocence of the defendant. See *Price v. Moses*, 44 S.C.L. (10 Rich.) 454, 460 (1857).

314. *The Trial of Cardozo*, COLUMBIA REGISTER (S.C.), Nov. 6, 1877.

315. See Trial Notes, *supra* note 123, at 32. According to one account, the judge charged for "three solid hours." NEWS & COURIER (Charleston, S.C.), Nov. 11, 1877.

316. *The Trial of Cardozo*, COLUMBIA REGISTER (S.C.), Nov. 7, 1877.

317. *Id.*

318. *Id.*

319. *Id.*

320. *Id.*

count.³²¹ Since the attack on Cardozo's defense was a judicial opinion on the facts of the case, Judge Townsend appears to have violated the state constitutional ban on judges charging on the facts of a case.³²²

Following the charge, Melton requested the court to make additional charges. A Charleston newspaper reported that Melton used this opportunity to summarize his whole case again while requesting thirty-seven more charges.³²³ The newspaper further reported that while Conner protested the irregularity of this tactic, he had consented to the additional charges to provide "the fairest trial that could possibly be desired."³²⁴ The newspaper reported that Judge Townsend then proceeded to ram "down the old points on top of the new until the jury was crammed to the full."³²⁵ However, according to *The Daily Register* and Cardozo's appellate brief, Melton requested no more than thirteen charges, and Conner did not consent to any of them.³²⁶ Judge Townsend rejected all of the requested charges except one regarding accomplice testimony.³²⁷

After eleven and a half hours of arguments and charge, the case was now in the juror's hands.³²⁸ As one newspaper observed "the jury [was] probably at a loss to know who was on trial, the treasurer, the counsel, the judge, themselves or the witnesses."³²⁹

XV. THE VERDICT, SENTENCE, AND BAIL

After twelve hours of deliberations, the jury returned a verdict of guilty.³³⁰ On hearing the verdict, Cardozo's "eyes became dilated, and his whole visage denoted his grief. He was a picture of despair. Melton was almost as visibly affected as he, and without a word they marched out of court together."³³¹

321. No other defendants charged with corruption, such as Gleaves, were tried in their absence.

322. S.C. CONST. art. IV, § 26 (1868) (The South Carolina Constitution of 1868 provided that "Judges shall not charge juries in respect to matters of fact, but may state the testimony and declare the law").

323. *Will Cardozo Escape?*, NEWS & COURIER (Charleston, S.C.), Nov. 7, 1877.

324. *Id.*

325. *Id.*

326. See *The Trial of Cardozo*, COLUMBIA REGISTER (S.C.), Nov. 7, 1877; Points and Authorities, *supra* note 158, at 38-39.

327. *The Trial of Cardozo*, COLUMBIA REGISTER (S.C.), Nov. 7, 1877.

328. See Trial Notes, *supra* note 123, at 32.

329. *Will Cardozo Escape?*, NEWS & COURIER (Charleston, S.C.), Nov. 7, 1877.

330. See THE WEEKLY UNION TIMES (S.C.), Nov. 9, 1877; Trial Notes, *supra* note 123, at 32.

331. See *The Trial of Cardozo*, YORKVILLE ENQUIRER (S.C.), Nov. 15, 1877.

According to the press, the verdict was met with surprise by everyone.³³² There was delight in the white community and dissatisfaction in the black community.³³³ From the perspective of the local press, the verdict was surprising because it seemed unlikely that a jury composed partly of blacks would ever convict the leader of the Republican party.³³⁴

Melton committed what was probably his greatest blunder when he heard the verdict and did not request to have the jury polled. During post-trial motions in the Robert Smalls case, just five days after the Cardozo verdict, Melton suggested to the court that the jury had agreed among themselves to abide by a majority vote, and thus Melton requested that the jury be polled.³³⁵ A unanimous jury verdict was a common-law right that had never been abrogated in South Carolina.³³⁶ When Melton tried to have the jury polled in the Robert Smalls case, Judge Townsend denied the motion because it was brought after the discharge of the jury.³³⁷ Since the Cardozo jury had been dismissed five days before, it was clearly too late to make the same motion in the Cardozo case.³³⁸ By failing to move to have the jury polled, however, Melton forfeited Cardozo's right to appeal on the ground that the jury had decided the case by a majority vote.

Cardozo's motion for a new trial was denied on November 16, 1877,³³⁹ and his motion for an arrest of judgment was denied on November 26, 1877.³⁴⁰ On November 26, in a scathing speech, Judge Townsend condemned Cardozo as a member of that class whose "watchwords . . . were plunder and oppression, and its cardinal principles aggrandizement of self to the utter exclusion of a

332. *The Chester Reporter* stated that the verdict "caused genuine surprise, inasmuch as the public mind was prepared for a mistrial, the Jury being composed of four whites and eight colored." *THE CHESTER REP. (S.C.)*, Nov. 17, 1877. *The Phoenix* reported that Cardozo and Melton entered the courtroom "looking highly pleased" as they did not expect a guilty verdict. *THE PHOENIX (Columbia, S.C.)*, Nov. 8, 1877. Earlier, *The New York Tribune* had reported that "[a] mistrial is expected by the public, from the composition of the jury." *Delinquent South Carolina Officials*, *N.Y. TRIB.*, Nov. 6, 1877.

333. *The Trial of Cardozo*, *YORKVILLE ENQUIRER (S.C.)*, Nov. 15, 1877.

334. *THE CHESTER REP. (S.C.)*, Nov. 17, 1877.

335. *Lewis Cass Carpenter*, *COLUMBIA REGISTER (S.C.)*, Nov. 13, 1877.

336. See *State v. Harden*, 17 S.C.L. (1 Bail.) 3, 4 (1828); see also William S. McAninch, *Criminal Procedure and the South Carolina Jury Act of 1731*, in *SOUTH CAROLINA LEGAL HISTORY* 179, 186-87 (Herbert A. Johnson ed., 1980).

337. *Lewis Cass Carpenter*, *COLUMBIA REGISTER (S.C.)*, Nov. 13, 1877.

338. However, Cardozo had no absolute right to have the jury polled. See *State v. Allen*, 12 S.C.L. (1 McCord) 525, 526-27 (1822). But since *State v. Harden* provided that Cardozo was entitled to a unanimous verdict, Melton should have made the motion; although he would have lost, he could have preserved the ground for appeal. *State v. Harden*, 17 S.C.L. (1 Bail.) 3, 4 (1827). By failing to make the motion and except to its denial, Melton waived Cardozo's right to appeal on that ground. See *Shelton v. Maybin*, 4 S.C. 541, 541 (1873); see also R.W. SHAND, *A MANUAL CONTAINING THE CONSTITUTION OF SOUTH CAROLINA, THE RULES OF COURT, AND THE FEE BILL* 51 (Charleston, S.C., Walker, Evans & Cogswell 1882).

339. *Proceedings of Court*, *COLUMBIA REGISTER (S.C.)*, Nov. 27, 1877.

340. *Id.*

single consideration of the public good.”³⁴¹ Judge Townsend then sentenced Cardozo to two years in jail and a \$4,000 fine with an additional year if the fine was not paid.³⁴²

Many historians assume that Cardozo was pardoned by Governor Wade Hampton shortly after the trial based on an agreement between Hampton and President Rutherford B. Hayes whereby the federal government dropped prosecutions against Democrats for election fraud.³⁴³ L. Cass Carpenter, the only white person of the three people convicted of corruption, received a pardon from Hampton in February of 1878.³⁴⁴ But for Cardozo and Robert Smalls, the benefits of the agreement were slow in coming. According to Melton, Cardozo refused a pardon because he wanted a “fair trial.”³⁴⁵ Cardozo could not make his bond of \$35,000³⁴⁶ and spent nearly seven months in jail.³⁴⁷ Cardozo’s desire for a fair trial only played into the hands of the Democrats since Hampton and Hayes were still negotiating. In March of 1878, Hampton had written President Hayes, pointing out that he had pardoned Carpenter and had taken no action on Cardozo because his appeal was still pending.³⁴⁸ Hampton further reiterated that

[t]here are but three men from this State now in the Albany Pent. on the Ku Klux charges and I have already asked you to pardon them Let me renew this request, and ask you to issue a Proclamation of pardon to those who were charged with complicity in the Ku Klux cases. Several of these men have left the State and they are anxious to return and I feel sure that you could do nothing which would be more grateful to our people.³⁴⁹

341. *Id.*

342. *Id.*

343. See TAYLOR, *supra* note 25, at 285; THOMAS HOLT, BLACK OVER WHITE 210 (1977); TINDALL, *supra* note 79, at 19; WILLIAM J. COOPER Jr., THE CONSERVATIVE REGIME: SOUTH CAROLINA, 1877-1890 32 (1968); EDGAR, *supra* note 56, at 409.

344. PICKENS SENTINEL (S.C.), Feb. 28, 1878.

345. See Letter from S.W. Melton, Esq. to Rutherford B. Hayes, President of the United States of America (April 8, 1878) (on file with the Rutherford B. Hayes Presidential Center Library, Fremont, Ohio).

346. *The Court in Columbia*, NEWS & COURIER (Charleston, S.C.), Dec. 4, 1877.

347. Cardozo had been jailed a month before his trial. See *South Carolina News*, YORKVILLE ENQUIRER (S.C.), Oct. 11, 1877. He was not released until April of 1878. See *South Carolina News*, YORKVILLE ENQUIRER (S.C.), Apr. 11, 1878.

348. See JARRELL, *supra* note 69, at 179.

349. *Id.*

In April of 1878 Cardozo's bond was reduced to \$8,000, and he was released.³⁵⁰ Hampton was demanding in his negotiations. In May, either in appreciation or as a *quid pro quo* for the reduced bail, Cardozo wrote President Hayes giving credit to Hampton for the reduction in his bail, and urging the President to grant Hampton's requested pardon for the three Klansmen.³⁵¹ In a June 1878 letter Hampton informed the brother of one of the Klansmen that President Hayes had assured him his brother could return to the state.³⁵² That Klansman was Dr. Rufus Bratton, who had fled to Canada to avoid charges of conspiracy to murder a black man in 1871.³⁵³ By July 1878, Hayes had pardoned all the Klansmen being prosecuted in the federal courts of South Carolina,³⁵⁴ while Cardozo still waited for his "fair trial."

XVI. THE APPEAL

Meanwhile Cardozo's appeal to the South Carolina Supreme Court was heard at the April 1878 term of the court, but the decision was not rendered until November 29, 1878.³⁵⁵ Samuel Melton continued to represent Cardozo on appeal and C.R. Miles argued for the state.³⁵⁶ While Melton had appealed on numerous grounds,³⁵⁷ only one ground found support from any of the three supreme court justices.

350. His appeal bond had originally been set at \$10,000 and his bond on the other pending charges increased it to \$35,000. Through friends he had been able to raise only \$8,000 by April of 1878 when the bond was reduced. See *South Carolina News*, YORKVILLE ENQUIRER (S.C.), Apr. 11, 1878.

351. See Letter from F.L. Cardozo to Rutherford B. Hayes, President of the United States of America (May 7, 1878) (on file with the Rutherford B. Hayes Presidential Center Library, Fremont, Ohio). One has to believe that Cardozo was not expressing his real feelings. In 1872, Senator Charles Sumner read a letter from Cardozo to the United States Senate opposing amnesty for Confederate veterans citing Klan violence in South Carolina. In that letter, Cardozo stated that the black citizens of the state surely did not support amnesty "when they see their leading men assassinated, their wives and children brutally whipped in the dead of night by Ku Klux, a band of the most cruel conspirators that ever disgraced any civilized society." THE CONG. GLOBE, 42th Cong., 2d. Sess., 430 (1872).

352. See JARRELL, *supra* note 69, at 181.

353. For a more comprehensive discussion of these charges and subsequent events, see LOU FALKNER WILLIAMS, THE GREAT SOUTH CAROLINA KU KLUX KLAN TRIALS: 1871-1872 77, 105, 171 (1996).

354. See JARRELL, *supra* note 69, at 185.

355. *State v. Cardoza*, 11 S.C. 195 (1878).

356. *Id.* at 213.

357. *Id.* at 204-13; see also Points and Authorities, *supra* note 158, at 10-39. Among other issues, Cardozo asserted that the indictment was defective in that it had not spelled out that the object of the conspiracy was criminal in nature. *Id.* at 17-20. Cardozo also appealed the trial judge's denial of his right to challenge two jurors. *Id.* Many of Cardozo's arguments were very technical and were not warmly received by the court. Melton even anticipated this reception as the last line of his brief read "[a]nd enough has been presented to exhaust all the patience of the most patient Court. Another line of argument or authority would be a wanton waste of words." *Id.* at 39.

That strongest ground of the appeal was from the opening moments of the trial, after the state struck the first two jurors presented who were black, and the judge refused to allow Melton to strike the jurors called as replacements who were white.³⁵⁸ Melton's position was that the peremptory challenges were improperly denied, and to him, the issue was resolved in the statutory language that granted the right of preemptory challenge in criminal cases and the legislative intent behind that language.³⁵⁹ An 1871 statutory provision governing preemptory challenges in criminal trials had eliminated the distinction between felony and misdemeanor cases, thereby granting Cardozo the unfettered right to strike those two jurors.³⁶⁰ The State's position was that an 1841 statute still controlled because the trial judge had followed the procedure outlined in the old statute for the selection of the jurors, and according to civil precedent under that statute, the defendant could not strike replacement jurors until the entire original venire had been gone through.³⁶¹ The replacement jurors were chosen from a second panel of jurors.

The court was divided. The court's opinion was written by Chief Justice Amiel J. Willard, a Republican judge who had sided with the Democrats in all the cases in which they had sought to oust Republicans from office and install Hampton's administration in 1877.³⁶² However, in his opinion Judge Willard agreed with Melton's argument and opined that Cardozo's challenge to the two jurors had been improperly denied.³⁶³ Agreeing with Melton, Willard based his opinion primarily on the 1871 "Act to Regulate the Manner of Drawing Juries" as codified in the Revised Statutes of 1873.³⁶⁴ "By the terms of the present law," he wrote, "no limitation, except as to number, is imposed upon challenges in criminal cases."³⁶⁵ However, the two Democratic members of the court did not join in that portion of Willard's opinion. Justice Henry McIver³⁶⁶

358. *See* Points and Authorities, *supra* note 158, at 14-15; *State v. Cardoza*, 11 S.C. at 201.

359. *See* Points and Authorities, *supra* note 158, at 14-17.

360. *See* S.C. REV. STAT. ch. CXL, § 3, at 747-48 (1873) (current version at S.C. CODE ANN. § 14-7-1110 (West Supp. 2000)).

361. *State v. Cardoza*, 11 S.C. at 218-19.

362. *Id.* at 222; *see* Gergel & Gergel, *supra* note 56, at 53-54, 62-64.

363. *State v. Cardoza*, 11 S.C. at 229 ("It must be concluded that the challenges were improperly refused.").

364. *Id.* at 228.

365. *Id.*; *see also* S.C. REV. STAT. Ch. CXI, §§ 14-30, at 521-23 (1873) (current version at S.C. CODE ANN. § 14-7-1110 (West Supp. 2000)); S.C. REV. STAT. ch. CXL, § 3, at 747-48 (1873) (current version at S.C. CODE ANN. §§ 14-7-1110 to-430 (West Supp. 2000)).

366. McIver was a Democrat, a delegate to the secession convention of 1860, a Confederate veteran, and the first supreme court judge elected by the Democrats after the withdrawal of the federal troops. *See* 1 BROOKS, *supra* note 98, at 58-62; REYNOLDS, *supra* note 14, at 460. He was a Red Shirt and had campaigned for Hampton by participating in the Red Shirt plan of insisting on the right to speak at or disrupting Republican rallies. *See* ALFRED B. WILLIAMS, HAMPTON AND HIS RED SHIRTS 188, 312 (1935).

and A.C. Haskell³⁶⁷ concluded “that the ruling of the circuit judge, in refusing to allow the defendant to challenge peremptorily the two jurors, Wiley and Fields, was correct, whatever differences of opinion may exist as to the reason given for such ruling.”³⁶⁸

Melton had been convinced of the merits of his case and had predicted in a letter to President Hayes that despite the political makeup of the court, he had no doubt that Cardozo “will have a new trial.”³⁶⁹ But he was wrong, because the two former Hampton cohorts would not support Cardozo’s right to a “fair trial.” It is also clear that the jury selection issue was one on which each of the judges could support his position with some authority and logic. Therefore, Cardozo simply could not win on such an issue. Thus, he lost.

XVII. THE AFTERMATH

Before Cardozo’s appeal was denied by the state supreme court on November 28, 1878, he had obtained employment with the federal government in Washington, D.C.,³⁷⁰ but under threat of arrest, he returned to South Carolina and was jailed on March 24, 1879.³⁷¹ In February, Cardozo’s brother, the Reverend Henry Cardozo, had obtained petitions supporting a pardon signed by many prominent citizens and by ten of the twelve jurors from the trial, and in a letter to Governor William D. Simpson which accompanied the petitions, Henry Cardozo urged consideration of the fact that his brother’s wife was an invalid with five living children under the age of 12.³⁷² Finally, Governor Simpson pardoned Cardozo and Robert Smalls on April 23, 1879,³⁷³ but only

367. A.C. Haskell had been a Red Shirt and had led a group called Haskell’s Raiders that harassed Republican rallies. One friendly biographer described Haskell as “a terror to the Radicals in those dark days.” See 1 BROOKS, *supra* note 98, at 71. Haskell was an avowed “straight-out” Democrat and a white supremacist. See ZUCZEK, *supra* note 24, at 61, 162.

368. See *State v. Cardozo*, 11 S.C. at 246.

369. Letter from S.W. Melton, *supra* note 98.

370. According to John Farley, Cardozo applied for a job with the treasury department in June of 1878 and was sworn in “as a 1st class clerk in the 6th Auditors Office” on July 1, 1878. Farley, *supra* note 4, at 141-42; see also *The First to Suffer*, KEOWEE COURIER (Walhalla, S.C.), Dec. 5, 1878.

371. See *South Carolina News*, YORKVILLE ENQUIRER (S.C.), Mar. 27, 1879; see also Petition for the Pardon of F.L. Cardozo (available in the Governor W.D. Simpson Papers (on file with the South Carolina Department of Archives and History, Columbia, S.C.)).

372. Letter from H. Cardozo, Reverend to W.D. Simpson, Governor of South Carolina (Feb. 12, 1879) (located in the Governor W.D. Simpson Papers (on file with the South Carolina Department of Archives and History, Columbia, S.C.)). After his final release, Cardozo had spent nearly nine months in total in jail.

373. See Letter from J.E. Dent, Sheriff, to Wade H. Manning, private secretary to Governor Simpson (Apr. 23, 1879) (located in the Governor W.D. Simpson Papers (on file with the South Carolina Department of Archives and History, Columbia, S.C.)).

after the United States Attorney for South Carolina had *not* prossecd all of the pending election fraud cases against white Democrats in South Carolina.³⁷⁴

After his release from jail, Cardozo returned to Washington, D.C. According to a letter from Judge Samuel Shellabarger to John Sherman, Cardozo had "lost every dollar of an estate of about \$10,000 and is now living here, poor and with a family."³⁷⁵ This letter, and what other evidence can be found of Cardozo's financial dealings, support the belief that Cardozo had not acquired great wealth during his tenure in public office. During the trial, South Carolina newspapers reported that either Cardozo's wife or another family member claimed that Cardozo had plenty of money in England.³⁷⁶ However, while Cardozo lived in South Carolina, his land holdings never exceeded \$7,000 in value at any one time, and the majority of his land transactions took place before he was state treasurer.³⁷⁷ Cardozo made only two real estate purchases while he was treasurer, together costing \$2,250.³⁷⁸ By early 1878, the Cardozo's had lost all of their property except one piece.³⁷⁹ On the eve of Cardozo's trial, they sold their home and land in Columbia for \$4,500, and lost their property in Washington D.C. to foreclosure a few months after he was jailed.³⁸⁰ They apparently rented homes in Washington, D.C. until they were able to finance the purchase of a home in 1886.³⁸¹

Secretary of Treasury John Sherman employed Cardozo in the U.S. Treasury for six years.³⁸² After his move to Washington, D.C., Cardozo did not

374. See Telegram from L.C. Northrup to Attorney General Devens (Apr. 22, 1879), in Correspondence of the U.S. Attorney for South Carolina (on file with the Department of Justice, Washington, D.C.).

375. See Farley, *supra* note 4, at 143 (quoting a letter from Samuel Shellabarger, former Congressman and member of the Civil Service Commission, to John Sherman, Secretary of the Treasury).

376. NEWS & HERALD (Winnsboro, S.C.), Nov. 10, 1877; *Proceedings of the Court*, COLUMBIA REGISTER (S.C.), Nov. 8, 1877.

377. See Appendix A at nos.1-21.

378. See Appendix A at nos.22-23. Considering that as a state official, Cardozo's annual salary was between \$2,500 and \$3,000 from 1868 to 1877, these real estate purchases do not seem extravagant. See REPORT OF THE COMPTROLLER GENERAL OF THE STATE OF SOUTH CAROLINA: REGULAR SESSION OF 1872-73, REPORTS AND RESOLUTIONS OF THE GENERAL ASSEMBLY OF THE STATE OF SOUTH CAROLINA: 1872-73 395 (Columbia, S.C., Republican Printing Co. 1873) (listing salaries of government officials in 1872); 1874 TREASURER'S REPORT, *supra* note 241, at 100.

379. They kept their property at Sullivan's Island until July 12, 1881, when they sold it to Elizabeth Hunter. See Appendix A at no.24.

380. See Appendix A at nos.25-27.

381. See Appendix A at no.28.

382. See Farley, *supra* note 4, at 141, 144. Sherman had been a leader of the Union League movement and may have known Cardozo from his activities with the league. See Clement Mario Silvestro, None But Patriots: The Union Leagues in Civil War and Reconstruction (1959) (unpublished Ph.D. dissertation, University of Wisconsin) (on file with University Microfilms, Inc., Ann Arbor, Michigan). A Cardozo family story tells that some Republican party leaders presented Cardozo to President Hayes to seek employment and that when Hayes offered Cardozo a job cleaning spittoons in the Treasury Department, Cardozo turned on his heels and walked out

pursue an active role in politics, other than to use his political connections in pursuit of advancement in government service.³⁸³ Prior to his conviction, Cardozo had been a leading national figure in Republican and African American politics, but when national conventions of African Americans were held in 1879 and 1883, Cardozo did not participate.³⁸⁴ Cardozo clearly had no further use for the South.³⁸⁵ After a speaker at the Bethel Literary Society cited the growing population of African Americans in the South as a harbinger of a political future for the African American in the South, Cardozo described the idea as a chimera.³⁸⁶ Ultimately he grew so embittered by the status of his people in the United States that he advocated emigration to Haiti or Liberia.³⁸⁷

When Democrat Grover Cleveland was elected to the presidency in 1884, Cardozo lost his job with the Treasury Department.³⁸⁸ When, as Secretary of State, Cardozo had tried to resign in 1871 to teach at Howard University, he had written, "I did this under a profound conviction that I can be of more service in the great work of reconstruction in the South by occupying such a position, where I can prepare the rising generation, of my own race especially, for the honorable discharge of the important duties resting upon them as American citizens."³⁸⁹ In 1884, Cardozo returned to the classroom for good and drew praise as an educator. For example, the *Colored American* reported that the high school he served as principal "seemed to take on a new life, and in a

on the President. See Eslanda Robeson Papers (available in the Moorland-Spingarn Collection, Family Papers, Box 1 (on file with Howard University Archives, Washington, D.C.)). However, Hayes wrote Secretary Sherman a letter on August 9, 1877, urging him to offer employment to Cardozo if practicable. See Farley, *supra* note 4, at 141.

383. See, e.g., Letter from D.H. Chamberlain to F.L. Cardozo (Aug. 21, 1893); Letter from D.H. Chamberlain to William McKinley, President of the United States of America (Mar. 1, 1897) (available in Eslanda Robeson Papers, Moorland-Spingarn Collection, Family Papers, Box 1) (on file with Howard University Archives, Washington, D.C.) (relative to possible diplomatic appointments for Cardozo); Farley, *supra* note 4, at 144 (quoting a letter from Chamberlain to C.J. Folger, Secretary of Treasury).

384. See *Reports of Committees Made and Adopted at the National Conference*, THE PEOPLE'S ADVOCATE (Washington, D.C.), May 16, 1879, at 1; *The Convention—Its Work*, THE PEOPLE'S ADVOCATE (Washington, D.C.), Oct. 6, 1883, at 1 (reporting on attendees of the convention). But see PROCEEDINGS OF THE NATIONAL CONVENTION OF COLORED MEN HELD IN THE CITY SYRACUSE, N.Y., 4, 29 (1864) (Cardozo represented Connecticut at this meeting that included such leading men as Fredrick Douglass and John M. Langston and was elected one of the vice presidents).

385. See A.J. Hilyer, *On the Advantages Which the South Offers Over the North for Our Colored Young Men*, THE PEOPLE'S ADVOCATE (Washington, D.C.), Dec. 8, 1883 (stating that the North was more favorable to the African American than the South).

386. *Bethel Library*, THE PEOPLE'S ADVOCATE (Washington, D.C.), Jan. 5, 1884, at 1.

387. *Bethel Library*, THE PEOPLE'S ADVOCATE (Washington, D.C.), Mar. 1, 1884.

388. See WILLIAM J. SIMMONS, *MEN OF MARK: EMINENT, PROGRESSIVE AND RISING* 430 (Arno Press & The N.Y. Times 1968) (1887).

389. See REPORT OF THE SECRETARY OF STATE, REPORTS AND RESOLUTIONS OF THE GENERAL ASSEMBLY OF THE STATE OF SOUTH CAROLINA AT THE REGULAR SESSION: 1871-72, 193 (n.p. 1872).

few years it had grown beyond the limits of the building . . .³⁹⁰ But some critics, such as newspaperman Calvin Chase of *The Washington Bee*, never let Cardozo or the people of the District of Columbia forget Cardozo's conviction or political past.³⁹¹ In fact, Chase campaigned for years to have Cardozo fired by the school board.³⁹² Cardozo taught in the public schools of Washington, D.C. until he resigned for health reasons on June 10, 1903.³⁹³ He died on July 22, 1903.³⁹⁴ Francis L. Cardozo High School in Washington, D.C. was named in his honor in 1906.³⁹⁵

XVIII. CONCLUSION

It would be disingenuous not to answer the question of whether Cardozo's conviction was the result of his guilt or the result of political expediency. This author is convinced of Cardozo's innocence. Perhaps a scholar should be reluctant to draw such a conclusion, when a full recantation by one of the State's witnesses has not been found and today's writer obviously has no ability to personally observe the demeanor of the witnesses. But, weighing all the evidence with my limitations, I do believe Cardozo was innocent.

As to the easier question of whether Cardozo should have been convicted, as a legal scholar I can conclude that the State did not prove its case beyond a reasonable doubt. Cardozo was convicted by the testimony of witnesses who had motives of revenge and self-preservation. The evidence of these supposed co-conspirators was conflicting, and in large measure, impossible to believe. Official records proved that the State's case was simply not based on the facts. Moreover, the witnesses for the State were caught in contradictions and lies. Finally, either the State or its witnesses manufactured and created evidence. Cardozo should not have been convicted.

So why was Cardozo found guilty? That question widens the penumbra of the conviction. How legitimate was the trial? Cardozo was prosecuted by lawyers with conflicts of interest and with political motives. The trial was presided over by a judge who demonstrated his bias again and again. The jury selection had been manipulated by the Democrats after their ascension to power. The actual verdict of the jury was contrary to state law. The chance of

390. See *COLORED AMERICAN* (Washington, D.C.), Feb. 17, 1894.

391. See, e.g., *Counsels Excluded*, *THE WASHINGTON BEE*, Oct. 13, 1888 (Washington, D.C.); *Future Events*, *THE WASHINGTON BEE* (Washington, D.C.), June 27, 1891.

392. See *Our Schools*, *THE WASHINGTON BEE* (Washington, D.C.), June 29, 1889, at 2; *THE WASHINGTON BEE*, Dec. 6, 1890; *Our Public Schools*, *THE WASHINGTON BEE* (Washington, D.C.), June 20, 1891; Prof. H.M. Brown, *Cardozo Must Apologize*, *THE WASHINGTON BEE* (Washington, D.C.), Apr. 9, 1892, at 1; *Corbstone Chit and Chat*, *THE WASHINGTON BEE* (Washington, D.C.), Nov. 25, 1893, at 1; *THE WASHINGTON BEE* (Washington, D.C.), Feb. 3, 1899, at 1.

393. *COLORED AMERICAN* (Washington, D.C.), June 20, 1903.

394. *Died*, *THE WASHINGTON POST* (Washington, D.C.), July 23, 1903.

395. Zach McGee, *F.L. Cardozo's Fame Here and Elsewhere*, *THE STATE* (Columbia, S.C.) Mar. 18, 1906, at 15.

intimidation by the jailers and the white jurors was enhanced by the sequestration of the jury. Historians have reported that black jurors had been easily controlled by white jurors even during Reconstruction,³⁹⁶ and the chance of a black juror's being intimidated after the election of 1876 was even more likely. After his conviction, L. Cass Carpenter claimed that he had affidavits from two jurors who swore they voted to convict him because they feared for their lives.³⁹⁷ Additionally, the black voters in Richland County were not monolithically Republican.³⁹⁸ The Redeemers needed only one black juror to vote for conviction since we now know that the jury decided the case by a simple majority. Instead of legitimacy and legality, the trial demonstrates a perversion of justice.

Was Cardozo nothing more than a political pawn? To the Redeemers who had cried corruption, Cardozo was the ideal target. He was considered the most honest man of his party and race. He had been the treasurer for six years, and the leader of his party in large measure since 1868. The press ensured that his trial would be a political show. The arguments at the trial were permeated by political overtones. The Redeemers convicted Cardozo, but to do so they had to work hand in hand with admittedly corrupt Republicans.

Hampton and the Redeemers could not claim they cleaned up state government. The Democrats recovered little or no recompense in dollars for the state. They had obtained only three convictions. Cardozo was the only statewide office holder they convicted. They never obtained the conviction of a major scalawag or carpetbagger, much less any Democrats implicated in corruption. The Redeemers needed Cardozo's conviction. They had intimidated most Republican politicians into resigning, and it would have served no purpose to obtain convictions of minor political figures such as the legislators who may have taken small bribes. In fact, the jailing of hundreds would probably have created an enormous backlash. Prosecuting prominent scalawags and carpetbaggers would have meant trouble for many leading Democrats who had participated in various financial schemes during Reconstruction. In addition, many of these carpetbaggers had fled so there was little reason to make the effort to obtain their convictions.

Even if Cardozo had not been targeted, his insistence on being tried played right into the hands of the Redeemers by providing them with a valuable political pawn in their negotiations with President Hayes. The Redeemers had to match the moves of the Hayes administration. First, it was three prosecutions

396. See SIMKINS & WOODY, *supra* note 25, at 145.

397. *Justice in South Carolina*, COLUMBIA REGISTER (S.C.), Apr. 5, 1878.

398. Edmund L. Drago posited the view that many black Democrats unwittingly "abetted" the Democrats in their drive for white supremacy. Of the seven black Democrats cited by Drago in his study of their conduct during the 1876 election and post-Reconstruction, three were from Richland County. See EDMUND L. DRAGO, *HURRAH FOR HAMPTON* xi, 57, 59, 62 (1998). Probably the leading black Democratic orator for Hampton was Styles Linton Hutchins, who also resided in Richland County and briefly served as a trial justice by appointment of Hampton. See Burke, *supra* note 52, at 106-07.

for three prosecutions. Then the stakes grew even larger with the trials of Cardozo and Smalls. As a result, innumerable Klansmen and other whites who had committed violence and election fraud were freed from prosecution and even prison in exchange for Cardozo and Smalls. Thus, justice did not prevail in the Cardozo trial. This was the paradox of the Southern judicial system. Christopher Waldrep observed that “[b]lack’s embrace of objective justice may have made it easier for whites to reject that paragon.”³⁹⁹ Cardozo’s own idyllic view of the law is consistent with Waldrep’s observation. The post-Reconstruction justice that convicted Cardozo was not objective; rather, it was cynical and racist. This form of justice soon led to Jim Crow, and its roots spread across America.

How much did racism pervert the outcome of Cardozo’s trial? Cardozo was a powerful African American leader. He was the only black man elected to statewide office in every single election during Reconstruction in South Carolina. Even in the election of 1876, Cardozo had not lost at the polls. Such a man had to be defeated, and convicting him was the sure way to eliminate him as a threat to white domination. Moreover, Cardozo had been the leading black reformer of the Republican party. To convict him would prove evil every black elected Reconstruction official. Cardozo was also considered the brightest man of his race in South Carolina. He had been educated at finer institutions than virtually anyone else in the state. Beating down such a man was essential to those trying to prove the innate inferiority of the black race. Convicting Cardozo demonstrated to their satisfaction that a well-educated, successful, proud, and even elitist black man could be corrupt.

The Redeemers accomplished their goals. On the most personal of levels, they victimized Cardozo. His conviction broke him in wealth and spirit. But worse, the Redeemers made their case to the state, the nation, and to history for many years that the Republicans and the African Americans were corrupt and inferior. Now with this in-depth look at the Cardozo prosecution, legal scholars and historians should more carefully focus on Reconstruction corruption and its resulting trials and ask if perversions such as Cardozo’s conviction were the norm of post-Reconstruction justice.

399. See CHRISTOPHER WALDREP, *ROOTS OF DISORDER: RACE AND CRIMINAL JUSTICE IN THE AMERICAN SOUTH 1817-1880* 173 (1998).

APPENDIX A

LAND TRANSACTIONS OF F.L. CARDOZO

No	Instrument	Conveyor	Conveyee	Price	Location of Property	Date	Location of Instrument ⁴⁰⁰
1	Deed	Master in Equity	Cardozo	\$900	home at Rutledge Street, Charleston	Apr. 18, 1868	Book D15 p. 169 Charleston
2	Deed	Everlina Johnson	F.L. Cardozo	\$400 plus mortgage	58' x 105' lot, bounded on E by Sumter St.	Jan. 7, 1869 (recorded Jan. 11, 1869)	Book D p. 419 Richland
3	Mortgage	F.L. Cardozo	Everlina Johnson	\$600	above lot	Jan. 11, 1869	Book D p. 485 Richland
4	Mortgage	William Simons	F.L. Cardozo	\$600	above lot	Apr. 3, 1869	Book D p. 520 Richland
5	Satisfaction of Mortgage	Everlina Johnson	F.L. Cardozo		above lot	Mar. 24, 1869	Book D p. 554 Richland
6	Deed	F.L. Cardozo	William Simons	\$500	above lot	Apr. 3, 1869	Book D p. 633 Richland
7	Deed	Thomas E. Wannamaker	F.L. Cardozo	\$1000	64' E-W, 208' 3" N-S; W fm. McMaster, N Estate of Charles Beck, E fm. Col. John English, S Plain St.	June 22, 1869	Book E p. 30 Richland
8	Mortgage	F.L. Cardozo	Thos. Wannamaker	\$1000	above lot	June 22, 1869 (satisfied in July 1870)	Book E p. 31 Richland
9	Release	O.C. Nichols	Cardozo	\$1800	N-E intersection of Marion and Plain; front Marion 208' 4", Plain 89' 2"; N Clarissa May, E Cardozo, S Plain St., W Marion St.	June 20, 1870 (recorded July 8, 1870)	Book F p. 50 Richland

400. The instruments are located at the following offices: (1) Charleston—Charleston County Register of Mesne Conveyances; (2) Richland—Richland County Register of Mesne Conveyances; and (3) Washington—Recorder of Deeds, Washington, D.C.

No	Instrument	Conveyor	Conveyee	Price	Location of Property	Date	Location of Instrument
10	Mortgage	F.L. Cardozo	James M. Allen	\$4000	lot described at row 7	May 3, 1870 (satisfied in Sept. 1871)	Book F p.161 Richland
11	Assignment of Mortgage	F.L. Cardozo	James Allen		lot described at row 7	Nov. 14, 1870 (satisfied in Sept. 1871)	Book F p.161 Richland
12	Deed	F.L. Cardozo	E.L. McKinney (wife of C.C.)	\$1500	N-E intersection of Marion and Plain; 208' 4" on Marion, 72' on Plain	Mar. 15, 1871	Book F p. 246 Richland
13	Deed	C.C. McKinney	F.L. Cardozo	\$800	60' N-S, 208' 8" E-W; N Estate of Beck, E fmnr. G.G. Newton, S Plain St., W Cardozo	May 16, 1871	Book G p. 189 Richland
14	Deed	F.L. Cardozo	J.H. Taylor	\$900	Rutledge Street home in Charleston	June 4, 1871	Book A p. 61 Charleston
15	Deed	S.J. Glass	Catherine Romine Howell Cardozo ⁴⁰¹	\$2400	lots 16 & 17 in Howard U. subdivision	Nov. 3, 1871	Liber 661, folio 146 Washington
16	Deed	F.L. Cardozo	Henry Cardozo	\$750	lot described at row 13	May 20, 1872	Book H p. 191 Richland
17	Deed	F.L. Cardozo	C.C. McKinney	\$5000	E-W 75', N-S 208' 8"; S Plain St., W C.C. McKinney, N Estate of Beck, E fmnr. Col. John English	June 1, 1872	Book H p. 192 Richland
18	Deed	Henry Cardozo	Catherine R. Cardozo	\$800	N-S 60', E-W 208' 8"; N Beck, E Newton, S Plain St., W fmnr. F.L. Cardozo	July 3, 1872	Book H p. 262 Richland

401. Mrs. Cardozo was commonly known as Minnie so as not to confuse her with her sister-in-law, Catherine F. Cardozo, wife of Henry Cardozo.

No	Instrument	Conveyor	Conveyee	Price	Location of Property	Date	Location of Instrument
19	Deed	C.C. McKinney	Catherine R. Cardozo	\$5500	E-W 75', N-S 208' 8"; S Plain, W C.C. McKinney, N Beck, E English	Oct. 5, 1872	Book H p. 320 Richland
20	Deed	C.R.H. Cardozo	Amzi Barber	\$2750	lots 16 & 17 in Howard U. Subdivision	Nov. 27, 1872	Liber 703, folio 88 Washington
21	Deed	Catherine Cardozo (this could be Catherine F.)	Joseph H. Rainey	\$1000	N Beck, E Newton, S Plain St., W fm. F.L. Cardozo	Sept. 24, 1872	Book H p. 321 Richland
22	Deed	Jos. H. Rainey	F.L. Cardozo	\$1250	above lot	Aug. 15, 1874	Book J p. 458 Richland
23	Deed	Wm. Carrington	Minnie Cardozo	\$1000	lot on Sullivan's Island	Feb. 12, 1875	Book R16 p. 257 Charleston
24	Deed	Catherine R. Cardozo	Eliz. Hunter		above lot	July 12, 1881	Book Y p. 129 Charleston
25	Deed	F.L. Cardozo	Anna H. Taylor	\$500	lot described at row 21	Oct. 6, 1877 (recorded Nov. 2, 1877)	Book L p. 172 Richland
26	Deed	Catherine R. Cardozo	Anna H. Taylor	\$4000	lot described at row 21	Oct. 6, 1877 (recorded Nov. 2, 1877)	Book L p. 173 Richland
27	Foreclosure Deed				property in Howard University Subdivision	Apr. 18, 1878	Liber 885, folio 262 Washington
28	Deed	Joseph Morris	Minnie H. and Francis L. Cardozo		home at 1463 Pierce Place, Washington	July 21, 1886	Liber 1192, folio 253 Washington

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