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DELAWARE LAWYER

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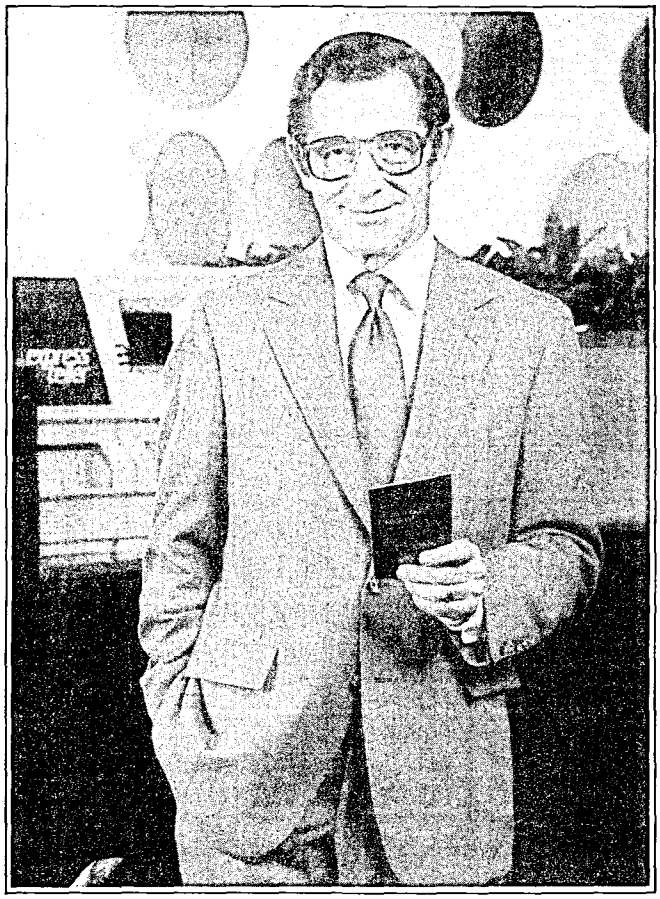

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VOL. 2 NO. 3
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Contents

Our Cover:

We thank Chancellor Grover C. Brown for his kind permission to reproduce the seal of the Court of Chancery. "Reproduce" is perhaps not quite the word we want. "Reconstruct" is more like it. No printed impression of the seal could be found, but with the imaginative help of Mrs. Eleanor Riley and Mrs. Jane Koke, of the Office of the Register in Chancery in Wilmington, we made a variety of impressions, some with carbon paper, others on bond, and finally, a couple on gilt paper seals the court uses. The seal, dull from long use, posed all kinds of problems for our artist, Rex Beaton, who wound up recreating it by a series of photo and light source trickeries and other graphic wiles. When the court decides it wants a new seal, we shall be happy to return the kindness of the Chancellor, Mrs. Riley, and Mrs. Koke.

DELAWARE LAWYER is published by Delaware Bar Foundation as part of its commitment to publish and distribute addresses, reports, treatises and other literary works on legal subjects of general interest to Delaware judges, lawyers and the community at large. As it is one of the objectives of DELAWARE LAWYER to be a forum for the free expression and interchange of ideas, the opinions and positions stated in signed material are those of the authors and not, by the fact of publication, necessarily those of Delaware Bar Foundation or DELAWARE LAWYER. All manuscripts are carefully considered by the Board of Editors. Material accepted for publication becomes the property of Delaware Bar Foundation. Contributing authors are requested and expected to disclose any financial, economic or professional interests or affiliations that may have influenced positions taken or advocated in the articles. That they have done so is an implied representation by each author.

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BAR FOUNDATION CORNER

At this writing, the leadership of Delaware Bar Foundation are so engaged in seeking to apply IOLTA funds to the effective service of the public that none among them has had the time or inclination to fill this space. As space is tight, we usurp it for a good story well suited to our Chancery issue. (Deft and shameless usurpation is the mark of an editor.) The story below has been submitted anonymously, accompanied by threats of violence on our person should the author's identity be disclosed. Accordingly, the official lie is that the following story was found in a bottle floating on the Brandywine.

It is no disservice to retired Chancellor William Marvel to suggest that his very good best was not always displayed in the courtroom. A self-effacing, reflective man, he much preferred the contemplative atmosphere of his chambers where he could smoke his pipe and draft his opinions with quiet care and thoughtfulness. His disdain for the hurly-burly give-and-take of the courtroom manifested itself occasionally in impatience at what he felt was the waste of time which inevitably accompanies extended courtroom proceedings. He would become especially irritated at contentiousness and hyperbole which shed more heat than light on the issues before him. But, courteous gentleman that he is, he would attempt to disguise his annoyance through gentle wit.

About twenty years ago, an elderly out-of-state lawyer named Lewis Dabney came to the courtroom of then Vice Chancellor Marvel to oppose a proposed settlement of stockholder litigation. Dabney's contention was that the settlement, which called for the defendants to surrender a block of stock in their corporation in return for absolution from a laundry list of alleged misdeeds, was akin to extracting a fee for surrendering one's seat at the Captain's Table on the Titanic, since, in Dabney's view, the corporation in question was about to go into bankruptcy and hence the stock being surrendered was valueless.

Dabney was of the pot-bellied, drooping galluses, gravy-on-the-vest, down home school of courtroom demeanor. Indeed the story, perhaps apocryphal, was that he had started practice as a clerk with the legendary Clarence Darrow. Moreover, to Dabney, one courtroom was the same as any other courtroom,— *viz.*, a theatrical setting in which to weave his oratorical fancies — and he appeared acutely unaware that the object of his persuasive powers in the Chancery Court was to be a scholarly, experienced jurist and not the twelve old boys of a small town jury, with which he was perhaps more familiar. At least that was the pose he strove to project.

Dabney opened his presentation with a flair. Seizing upon the fact that the corporation had been late in publishing its financial reports, he opined expansively that this circumstance allowed for but one of two possible explanations. The first was that the defendants were trying by delay to hide the truth about the precarious nature of the corporate finances which Dabney was about to disclose. As for the alternative — there was a dramatic pause as Dabney spun on his heels, forefinger pointing toward the spectator section of the courtroom — "Mr. Ackerman back there is balking at committing perjury for his employers!" The target of Dabney's finger was the corporate comptroller, a polite young man who had testified earlier in the proceedings, but whose curiosity had kept him, perhaps unfortunately, in the courtroom.

Sensing what Dabney's ploy portended, Vice Chancellor Marvel attempted to head it off. With a light smile he interrupted, "Why, Mr. Ackerman, 'twould be a far, far better thing you did than you had ever done before." A courteous, if cautious, set of chuckles emanated from those assembled.

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EDITORS' PAGE

We focus in this issue upon the Delaware Court of Chancery — a unique forum that, at one and the same time, is a historical vestige of a judicial tradition whose origins lie in the household retainers of medieval English monarchs, and a modern institution which stands on the cutting edge of the law in important areas of present-day local and national concern. Chancery Court has a broad impact upon the lives of Delawareans who invoke its specialized jurisdiction to resolve a broad range of legal problems that arise in day-to-day life, and it exercises a broad national, indeed international, influence in its judicial function as the overseer of the internal affairs of the many corporations who have incorporated under Delaware General Corporation Law and through its interpretations of that important statute. To provide some fresh understanding of the multi-faceted character of the Court of Chancery, this issue of DELAWARE LAWYER approaches its subject from several angles:

The history is dealt with in a trio of articles. Ed Ianni traces the Court to its source as an ecclesiastical arm of the English judicial structure in the time of the Plantagenets. One noteworthy fact not mentioned by Ed is that an early Chancellor was Thomas Beckett who left the office to become Archbishop of Canterbury, and thereafter achieved sainthood as the victim of one of history's most notorious political assassinations. If there is a lesson there, it apparently has been lost on our second historian, Bill Quillen, also a former Chancellor — and Supreme Court Justice as well — who has similarly committed his future to the political arena, as candidate for the Governorship of Delaware. Bill has taken time from the campaign trail to condense his learned Master's thesis on equity practice in Colonial Delaware. Rounding out the historical perspective is Mike Hanrahan, whose article brings the Court from its creation in 1792 into the Twentieth Century.

Having thus arrived in modern times, we examine the present-day Court from both within and without. The inside view comes in the form of reminiscenses by three former Chancellors, who, with Bill Quillen and Chancellor Grover Brown, the present incumbent, represent all of the holders of the office since 1951. Leading off is Chief Judge Collins J. Seitz of the U.S. Third Circuit Court of Appeals who was Chancellor from 1951 to 1966. Judge Seitz's observations take the form of an interview conducted by Bruce Stargatt, a distinguished member of the Bar. Retired Supreme Court Justice William Duffy, Jr., who was Chancellor from 1966 to 1973 and Retired Chancellor William Marvel, who held the Chancellorship from 1976 to 1982 after a 22-year term as Vice-Chancellor, have written articles setting out insights gleaned from their years in office.

Finally, there is the view from the outside, which comes in two forms. Sidney B. Silverman, a distinguished New York practitioner, who has appeared in the Court of Chancery with notable success and occasional failure on many matters, provides an immensely readable, personal reflection on his experiences before the Court. Professor (and lawyer) Donald Schwartz of Georgetown Law School, a recognized authority in the field, reflects on the national impact of the Court on corporate governance.

David A. Drexler

This issue, largely devoted to our Court of Chancery, is the handiwork of fellow-editor David A. Drexler, for whose labors heartfelt thanks are owed and hereby paid. Dave has conscripted, badgered, and cajoled as distinguished a body of legal writers as have ever appeared collectively in these pages.

The Editors

Janet Rontz, who painted the Delaware Twin Bridge cover for our Fall/Winter issue, has sent me a delightful report to the effect that those of us who sponsor, edit, and publish DELAWARE LAWYER may have feet of clay. It seems Janet has a neighborhood newspaper boy who pops in once a week to collect for his deliveries. He is devoted to Janet's paintings (as are we) and always asks to see the latest on her easel. She recently showed him the cover of DELAWARE LAWYER, and announced that Delaware Bar Foundation had bought the original for its permanent collection. Art-loving newsboy was deeply impressed. A week later, concerned about the unworldly and trusting nature of artistic types, newsboy demanded to know if she had been paid.

"Oh, no. I want to frame the picture properly and deliver it to the Foundation before I touch a penny of their money."

"You sure you gonna get paid?" demanded the Fourth Estate. (Newspaper types are so persistent and skeptical.)

"Why, of course. Mr. Wiggin and the Board of Directors of Delaware Bar Foundation are the soul of honor," she replied, not realizing the depths of cynicism to which a 15 year old is capable of descending.

"You better get after them turkeys. I don't want you to get ripped off."

Perhaps this confirms what Peter Megargee Brown tells us elsewhere in these pages: Never has our profession enjoyed lower public esteem.

For the record: "them turkeys" are, among other desperadoes and low types, an Associate Justice of our Supreme Court, the President Elect of the Delaware State Bar Association, at least one former president of the Association, and, of course, that most slippery and shifty-eyed editor of your periodical, who remains

Yours squalidly,
William E. Wiggin

Letters

Dear Sir:

Being something of an historian (amateur) and nostalgia buff, I read with enjoyment Part II of Dave Drexler's Reminiscenses of the Late Chief Justice Pennewill.

Because, as was explained, the late Chief Justice chose not to speak of those still living, or recently deceased, it was not perplexing to me that there was no reference to Chancellor John R. Nicholson. Chancellor Nicholson must have still been living, or only very recently deceased, in 1934. I remember him as a white-whiskered little figure around the streets of Wilmington, always wearing a dark blue suit and black hat. (He might also have worn a string tie, but, if so, you couldn't see it for the beard.)

The Chancellor was obviously quite elderly at the time I speak of; there was a trolleycar motorman on the Washington Street line who was always very friendly and accommodating to the passengers, and I can remember him being solicitous toward Chancellor Nicholson when the latter got on or off the trolley (although he was quite spry, even then).

John M. Bader

Continued from Page 4

Undaunted, Dabney forged ahead. For more than two hours, his rhetoric reverberated. Hyperbole abounded. Blackboards were filled with columns of numbers. Financial records were flourished, all in an effort to show that the defendants, undoubtedly the most notorious malefactors since Cain, were attempting to hoodwink the Court into approving the most nefarious financial chicanery since the South Seas Bubble. Through it all Vice Chancellor Marvel sat impassively, never interrupting, apparently absorbing with thoughtfulness the oratorical bombardment with not so much as a flinch. Thus tacitly encouraged, Dabney intensified his theatrics.

At last as luncheon recess neared, and as Dabney was winding up — or down, either preposition was apt — the Vice Chancellor's demeanor suddenly brightened. He smiled, snapped his fingers, and muttered under his breath to no one in particular, but in a voice plainly audible to those sitting closest to the Bench: "Dickens. 'A Tale of Two Cities'." And with that he declared the proceedings adjourned.

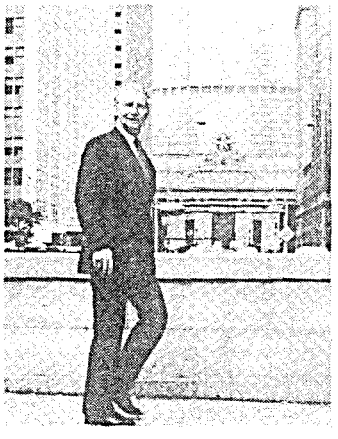
P.S. Dabney won his case. See *Steigman v. Beery*, 203 A.2d 463 (Ch. 1964).

The Decline of Lawyers' Professional Independence

PETER MEGARGEE BROWN

This article originally appeared in somewhat different form in the November 1983 issue of the New York State Bar Journal.

Mr. Brown was the guest speaker at the Delaware State Bar Association's celebration of Law Day, held in the Gold Ballroom of the Hotel DuPont on May 1.



The author, caught by photographer Michael Dunne in the enviable act of leaving his office early. His article suggests that we might all do well to follow his example occasionally, and use the stolen hour to reflect on our profession and the social utility of what we do.

Peter Megargee Brown, a graduate of the college and Law School of Yale University, has a long and distinguished career of service to the nation, his state, and our profession. He is a past president of the Federal Bar Council. He served as Assistant Counsel of the New York State Crime Commission in the early 1950s under John Marshall Harlan, later a Justice of the United States Supreme Court. He also served as Assistant United States Attorney in charge of federal waterfront prosecutions in the mid-50s. He is a fellow of the American College of Trial Lawyers. Now in private practice in the firm that bears his name and that of his partner, Whitney North Seymour, Jr., he finds time for useful and lucid writing on the state of the profession, as evidenced here. Mr. Brown is a former partner and head of litigation with the firm of Cadwalader, Wickersham & Taft. Although he practices in wicked Gotham, we claim him as an Honorary Delawarean: he is a graduate of St. Andrew's School in Middletown.

Elsewhere in this issue, as in Bruce Stargatt's interview with Judge Seitz and the concluding segment of chief Justice Pennewill's memoirs, we celebrate the high quality of professional skill, character, and devotion to the public good displayed by the Delaware Bar over the last century. While these are good and reassuring words to hear, the following discussion of trends in the profession—at least nationally—should prompt concern and self-scrutiny. If our past as a profession has been exemplary, and it has been, it is up to us to be worthy of that past. Mr. Brown tells us, sub silentio, *that sensible men do not indulge in self-congratulation while guests at Belshazar's feast.*

Thirty six years ago George Orwell published his novel *1984,* warning of the dehumanization of mankind: men becoming mere appendices to the production and consumption process.

1984 is now upon us. Has Orwell's prediction come true for the Bar? Has the practitioner changed in recent years from an officer of the court to appendage age of business, controlled and guided by business interests and motivated solely by the desire to make money? Are lawyers no longer obligated as officers of the court to serve both private clients and the public interest? Has the unique function of the American lawyer as an independent advocate and counselor in our democratic society started to erode?

For 200 years and more, American lawyers have provided the leadership in government, institutions, business and public opinion — as well as providing objective advice to private clients. The founders of our Republic were lawyers. The independent advocacy of lawyers historically has served to preserve our liberty. Our fundamental documents — the Declaration of Independence, the Constitution and the Bill of Rights — are primarily the work of lawyers. Rarely has there been as keen an observer of America in 1830 as Alexis de Tocqueville. In his *Democracy in America* (Mayer ed. #1969, at 268) he declared: "It is at the bar or the bench that the American aristocracy is found." It was an aristocracy of ability, quality and independence.

The preamble to the Model Rules of Professional Conduct (Proposed Final Draft, May 30, 1981), which was adopted by the House of Delegates on August 2, 1983, recites what needs to be read as a warning: "To the extent that lawyers meet the obligations of their professional calling, the occasion for government regulation is obviated. Self-regulation also helps maintain the legal profession's *independence* from government domination. An *independent* legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are *not dependent* on government for the right to practice." That this even needs to be said is cause for alarm. Anyone who doubts the importance of a professional and independent legal profession should read Dina Kaminskaya's recent book, *Final Judgment* (1983), in which Kaminskaya chronicles her work as a trial lawyer in the Soviet Union for 37 years. For her persistence in attempting to exercise professional independence she was expelled from her country.

The professional independence of the practicing lawyer is the single most important element in providing the legal profession with its strength, character, and integrity. "A lawyer can't give objective advice to a client or true advocacy for his cause *unless* the lawyer is independent," said Powell Pierpoint recently, former President of the New York Legal Aid Society and a distinguished member of the New York City Board of Ethics. "The lawyer must be free to tell his client 'No'."

I view independence even more broadly: a lawyer is independent where free to perform his or her professional obligations *objectively* - not only to clients but also to the court and to the public interest. Each generation of lawyers faces its own pressures and challenges to professional independence. Much more should be done to pass on to new generations the lessons and examples of our tradition of a strong independent bar.

The point of this article is the cumulative evidence of a serious decline in the American lawyer's professionalism and independence in the last ten years. This erosion has brought about a crisis in the American legal community and may, unless checked, bring about a crisis in American life. These developments are not so much the fault of the American legal system or of American law school training, as of short-sighted *attitudes* and *perspectives* of a growing number of American lawyers who practice law as a business rather than as a profession.

The shift in attitude and perspective is subtle. The genius of the law profession has shifted its attention to marketing and productivity. The lawyer delivers the product. Professional intangibles are irrelevent. A distinguished lawyer and public servant, John V. Lindsay, recently stated: "What the present-day American law profession has become, in many respects, is a bottom line business, with most lawyers, young and old, strapped to the rack of chargeable time and engulfed in computer printouts. The only thing that counts is winning. Anything else is losing. There's no such thing as standing for a principle that's going to lose. We live in a 'me' not a 'we' society today."

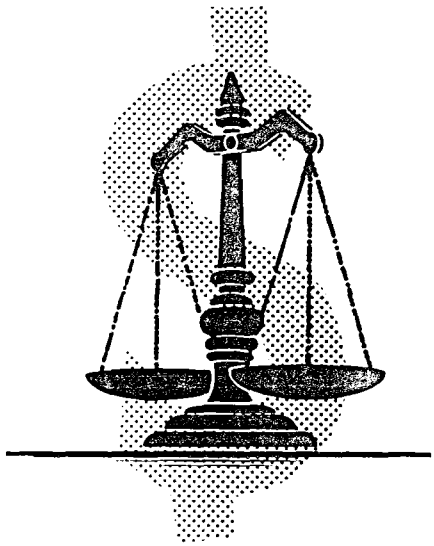
Origins of Decay

The causes of the decline of professional independence are many and complex but essentially reflect the *attitudes* and lack of vision of a significant group of American lawyers who view the practice of law principally as a business and a source of revenue. Other contributing causes: economic pressures on lawyers and law firms, large and small (generally unknown outside the profession), which have contributed to a "business" orientation; a remarkable increase in the sheer *number* of lawyers; the competition "for business," bringing aggressiveness and incivility; the growth of lawyer advertising, soliciting and plain hucksterism; the pyramiding trends toward multi-state and multinational law firm partnerships; the clients' revolt against excessive fees; the narrowing of the lawyers' education* and forced specialization; the perceived failure to discipline lawyers for myriad abuses — to each other, to the courts, to the client, and to the public interest; the general decline of trust and confidence in American society; and the influence of heavy-handed administrative bureaucracies upon lawyers employed in government agencies, within corporation counsel staffs, and, in more and more law firms themselves. These factors have produced the dreary metamorphosis of the American legal profession into a business.

Many lawyers today openly boast that they are engaged in "business for commercial profit" with "markets to carve out," concentrating on "the bottom line." They are not only content to give lip service to the lawyer's professional obligation for service to the public, they penalize associates and partners who do public interest work and give help to less affluent clients.

There is an obvious analogy here to the execution of the golden goose.

* Narrowing of lawyers' education. At high school they take "pre-law." At college they take "pre-law." At law school they rat-race for marks. Sir Walter Scott noted in 1815 that "A lawyer without history or literature is a mechanic, a mere working mason; if he possessed some knowledge of these he may venture to call himself an architect."



The lawyer's monopolistic license to practice our profession stems from our traditional commitment to public service. As we become more profit-oriented we are bound to come under increased governmental regulation. Non-lawyers will increasingly fill the void in the legal system and take away a larger and larger portion of the lawyer's traditional rewards and perquisites. There is already much evidence today that the federal and state legislatures, along with the courts, will continue to expand their regulation and control over lawyer conduct and their legal fees.

The Flood of Lawyers

Has this new business atmosphere of the legal profession affected the number and attitudes of its members? The American Bar Association estimates that there are now at least 600,000 lawyers in the United States. Every year over 35,000 new lawyers are added to the rolls. At the current rate of growth, by the year 2000 America will have a million lawyers.

One hundred years ago, in 1878, 60,000 lawyers served a U.S. population of 50 million. Today's census of ten times that number of lawyers serves a nation of 233,000,000. For the half century from 1920 to 1970, there was one lawyer for every 750 persons. There is now one lawyer for every 388 persons.

The average age of the American lawyer is only 38. It is estimated that about half the lawyers in the United States have practiced less than 10 years. About one-third of American lawyers probably have been in practice *less than five years.*

Harvard President Derek C. Bok spoke on November 9, 1982 at the annual Benjamin N. Cardozo lecture before the Association of the Bar of the City of New York (38 Rec.A.B.City N.Y. 12(1983)). He observed that the American legal system is "grossly inequitable and inefficient" and called for fundamental changes in how lawyers practice and how they are trained. President Bok was distressed that so many of America's elite scholars now are going to law school: "If these observations are even half true, our legal system leads to much waste of money that could be put to more profitable uses. But even greater costs result from the diversion of exceptionally talented people into pursuits that often add little to the growth of the economy or the pursuit of culture or the enhancement of the human spirit. I cannot make this point too strongly." (p. 17).

Such declarations are eloquent, but they miss the point — which is *not* elitism. It is just the opposite. I believe it is fair to say that students entering our law schools today are influenced to some extent by the reports of selective incidents of lawyers' huge incomes and by reports of the new business atmosphere of the legal profession. Too few law students are developing their skills to "help people" or pursue careers in public service. Many recent law school graduates, I fear, do not subscribe to the traditional - and truly elite - professional values.

Chief Justice Warren Burger issued an early alarm in 1977: "We may well be on our way to a society overrun by hordes of lawyers, hungry as locusts, and brigades of judges never before contemplated." His observation was generally hooted as hyperbole.

Lawyers Multiply In Corporations, Too

The new business atmosphere of the legal profession has also prompted the growth of in-house legal staffs in corporations. The public has been unaware of the growth of legal departments *within* corporations in America. According to the 1983-84 Directory of Corporate Counsel, American Telegraph & Telephone has 914 lawyers in its in-house legal department; Exxon has 447 lawyers; General Electric has 318 lawyers; Mobil Corporation has 232 lawyers. Law firms have been losing legal work to in-house legal departments of corporations and are receiving far tighter supervision on those cases still farmed out. While the in-house legal staff boom has leveled off, some experts attribute the slowdown to the recent recession.

Law Firms Explode

The new business atmosphere of the legal profession has affected the size and structure of our law firms. In 1963 there were only about 10 law firms in the country with more than 100 lawyers. Today about 50 law firms have over 200 lawyers. At last count one firm has 658 lawyers, along with hundreds of supporting staff, including paralegals, accountants, business-trained administrators, librarians, public relations specialists, and technicians.

Law Profession Into Business

The New York Times Business Section ran a featured article in January, 1983 on the impact of recession, high costs, and stiff competition on the "top" (meaning large) law firms. The article was entitled "A Gentlemanly Profession Enters a Tough New Era" (January 16, 1983, §3, at 1) and said that large firms were "*hustling* for clients." The writer observed that: "For these firms, a new era has dawned, one in which the practice of law has ceased to be a gentlemanly profession and instead has become an extremely competitive business."

The *Times* reporter said that the legal profession is becoming "much like business in any field." The focus

of law firms today is on fees, expenses, and profits, he said. Law firms are even hiring public relations firms to handle "news contacts." Most law firms have revamped formulas for distribution of profits to partners, giving more weight to "generation of business" and "hours billed." The reporter also noted that law firms are now raiding each other's key specialists, looking upon such hirings as a sort of "corporate acquisition" with high earning potential.

Samuel Murphy, Jr., presiding partner at Donovan, Leisure, Newton & Irvine, (founded by Wild Bill Donovan and George Leisure, both respected for their extensive public service) was quoted in the article as follows: "It was a lot more fun in the old days.... It was more relaxed and gentlemanly. We all believed we were engaged in a profession that was a little different. In the last 10 years the fundamental change is that what we're doing has become a business."

The article ended with a quote from a 39-year old partner in what was once an old-line Wall Street firm: "I'm ecstatic that we're now thinking about where our practice is going and how much money we should be making next year."

The *Times* article underscored the plain fact that lawyers in many large law firms have been transformed from a learned profession rendering legal advice to clients along with service to the community into an organization marketing business service to customers who can afford to pay top dollar.

A similar article in *Fortune* Magazine (April 19, 1982, at 84) entitled "Profit Pressures on the Big Law Firms" quoted a senior partner of a major New York law firm as aspiring to create the "Bloomingdale's of the law business - a group of specialty boutiques all under one shingle."

The Editor of *The American Lawyer,* Steven Brill, a law school graduate, wrote in May 1983 that increasing numbers of law firms are "issuing press releases and otherwise peddling themselves." In the July/August 1983 issue (p.13), he went further: "I guess I, too, am a sucker for the proposition that law firms should not be office-sharing arrangements for individual entrepreneurs — that for lawyers, intangible values, like 'soul', should still play some role in management."

A member of our profession should be something more than a lawyer. He may be interested in his business first but his State and County should follow close. The lawyer has had much to do with the making of our government and should feel an equal interest in its preservation and success.

Several years ago a former Deputy U.S. Attorney General, counsel to a Wall Street law firm, in a *Time* magazine article (April 10, 1978, at 56), lamented: "The legal process, because of its unbridled growth, has become a cancer which threatens the vitality of our form of capitalism and democracy."

The shift of the public responsibility of the bar has of course been noted before. A Harris poll a few years ago rating public confidence in sixteen institutions placed law firms at the very bottom. Watergate had much to do with this public attitude. Media coverage of lawyer perfidy was extensive. Recall President Nixon's counsel John Dean's question: "How in God's name could so many lawyers get involved in something like this?"

These are troubled times for the legal profession. We witness an emerging crisis in the quality of the American legal system. Something has gone wrong. Intelligent observers and soothsayers have recommended a variety of reforms. My view is simply that mechanical, structural, financial or technical remedies will not do the job. The need is for a fundamental change of *attitude* and *perspective* on the part of a significant portion of the American bar.

The themes for this attitude and perspective can be found in a statement by a leading lawyer and public servant of this century, Henry L. Stimson. In the introduction to his book *On Active Service in Peace And War* (1948), Stimson stated that: "Through many channels I came to learn and understand the noble history of the profession of the law. I came to realize that without a bar trained in the traditions of courage and loyalty our constitutional theories of individual liberty would cease to be a living reality. I learned of the experience of those many countries possessing Constitutions and Bills of Rights similar to our own,whose citizens had nevertheless

lost their liberties because they did not possess a bar with sufficient courage and independence to establish those rights by a brave assertion of the writs of habeas corpus and certiorari. So I came to feel that the American Lawyer should regard himself as a potential officer of his government and a defender of its laws and Constitution. I felt that if the time should ever come when this tradition had faded out and the members of the bar had become merely the servants of business, the future of our liberties would be gloomy indeed."

Morris Harrell, immediate past president of the A.B.A., made the point in the July, 1983 issue of the A.B.A. Journal (p.864) that: We must not permit the practice of law to become just another business.... [I]f we are to retain our status as a respected profession, the essential role of the lawyer as advisor, counsellor, teacher, and friend must not change."

Necessity does not require us to discard centuries of professionalism. "The measure of a civilization," Lord Moulton observed, "is the degree of its obedience to the unenforceable."

Over the last decade there has been a significant step towards blending the roles of lawyers and businessmen. Lawyers have taken over part of the traditional functions of businessmen.

We lawyers are spending too much of our time and energies on ways to serve business and to increase profits through management techniques, marketing and technology. Not enough of our time is being devoted to the traditional values of our profession including professional independence and responsibility We must address this issue, lest something valuable be lost.

The necessity of today's economic situation does not require us to discard centuries of professionalism. As William Pitt put it in a speech before the House of Commons in 1783: "Necessity is the plea for every infringement of human freedom. It is the argument of tyrants; it is the creed of slaves."

Efficient management and economics are obviously useful, but they should not be exalted to the exclusion of traditional professional values. To stress money as the primary goal of law practice turns the professionalism of law on its head.

What the law profession needs most is a return to traditional values through leadership and inspiration, not new ways to serve business interests and new profit-oriented management techniques.

Leaders of the bar can maintain a vigilant self-policing system. Lawyers should enforce their own codes and rules.

Above all, young people coming to the bar should be taught by example that lawyers are professionals who must serve the public interest as well as the private client.

In the final analysis, professionalism and independence of lawyers are synonomous. If the American bar does not do its duty to the public good, the administration of justice, and the aspirations of the profession, it will be viewed from the outside as serving only its own interests as an appendage to business; its trust will be taken away; and public regulation will soon be making decisions for the profession that the profession should be making for itself. □

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The Editors.

English Origins of Chancery Court and Sir Edward Coke's Challenge

EDMOND M. IANNI

Our author, Ed Ianni, is a native Wilmingtonian. After graduating from Archmere, he proceeded to Princeton for a B.A. in politics and philosophy, from there to Oxford for a B.A. in jurisprudence, then on to the University of Virginia School of Law for his doctorate, and finally home to Wilmington and practice at the firm of Skadden, Arps, Slate, Meagher & Flom. Although Ed is a very recent admittee to practice before the courts of Delaware, he has achieved a substantial body of learned writing in the law, published in journals no less prestigious than the distinguished firm where he now engages in a largely corporate practice.

The following article combines scholarship with a rousing judicial adventure story, and serves in our judgment to illuminate the origins and powers of the court we celebrate in this issue.

One certainly would be alarmed if our Chancellor were a bishop or abbot in the Catholic Church who not only presided ecclesiastically over issues of faith and morals but administered the executive affairs of our state. Although this collage of creed and statecraft seems unlikely (and perhaps Orwellian) today, it is characteristic of Chancery's feudal heritage. Modern Chancery, in short, is an institution considerably different from its royal predecessor of the English Middle Ages.

Chancery In Feudal England

Chancery evolved from the king's chapel in feudal England. By the time of the Norman Conquest of England in 1066, the king's royal court — i.e., his administrative entourage — had been traditionally established. The royal court was responsible for the administration of the king's affairs, including, for example, maintaining the royal accounts and conveying the crown's orders to local regions. The king was more than a feudal overlord: he was not only crowned and anointed by the church, but also, in theory, the ultimate landholder of all England.

Much of the work of the royal court was performed by priests (who were the more learned members of feudal society) in the king's chapel and chamber. In general, the chapel superintended the issuance of official documents such as writs and charters and maintained certain records, whereas the chamber managed the royal finance and military equipment. The chapel and chamber (and their respective clerks or *clerici*), therefore, were central to the king's household and royal administration.

The members of the king's household constituted, in large part, his "Lesser Curia," as historians have labeled it, in contrast to his Great (or Magna) Curia. A *curia* of the king consisted technically of individuals holding estates directly from him, i.e., his tenants-in-chief, and was functionally a council of advisors. Whereas the Great Curia consisted mostly of greater nobility (the magnates), the Lesser Curia included those immediately surrounding the king, such as his household, family, and special officials. The feudal king conferred with the Magna Curia for advice on matters of government (the dialogue between them was called in French a "parlement," and in English a "parliament") and sought its counsel and consent for changing the law and establishing new rules. The Magna Curia in the fourteenth century developed essentially into a legislature and in the fifteenth century became the upper house (the House of Lords) of a bicameral legislature, the Parliament. The Lesser Curia not only was a group of selected officials who advised the king but also, unlike the Magna Curia, served as the crown's administrative machinery, which managed and performed the business of government.

Separation of functions within the Lesser Curia, the king's household, led to the development of specialized departments. The Exchequer, a development of the king's chamber, managed the royal finances, overseeing the collection (by sheriffs) of dues and fines owing to the crown. The Exchequer acquired incidental judicial functions, but its jurisdiction developed oddly. During the twelfth century, it heard a wide variety of cases, whether they concerned the revenue or not; however, during the next century, the Exchequer confined its jurisdiction to the crown's financial claims. The Court of Common Pleas also evolved from the Lesser Curia. In order to perform in part his personal duty of rendering justice among his subjects, the king dispensed commissions of representatives (Itinerant Judges) to resolve civil and criminal disputes throughout his dominion. As pleas brought directly before the king became too numerous during the twelfth century for him to decide personally, he designated a special group of his Lesser Curia, Common Pleas, to handle them; thus, this judicial body (composed largely of priests until the end of the thirteenth century) presided over the common litigation of the realm and thereby helped administer the king's justice. Similarly, King's Bench, the third principal outgrowth of the royal household, was established by the king to handle important criminal matters, which had become too numerous and time-consuming for his personal attention. By extensive use of legal fictions, King's Bench also acquired complete civil jurisdiction. These outgrowths of the royal household — Exchequer, Common Pleas, and King's Bench — were the three royal, common law courts of England, which generated the bulk of civil and criminal law.

Chancery, too, developed from the king's household: as noted earlier, it originated as the royal chapel, which not only served as the king's spiritual

needs but also performed important governmental functions. Chancery, not surprisingly, was staffed by learned priests, and its head, the Chancellor, was usually a high-ranking priest such as a bishop or abbot.[1] The Chancellor, the most important official in the king's court, served as chief supervisor of royal business and sealed all documents issuing in the king's name. As custodian of the king's Great Seal, the Chancellor controlled the issuance of royal documents such as writs and warrants. Very little official business could be transacted, therefore, without authorization from the Chancellor. He thus functioned, in a practical way, as the king's alter ego.

The Chancellor's unique power to issue writs enabled him to exercise substantial control over the royal administration. The operation of all royal courts depended on writs, letters issued by the Chancellor directing named individuals to perform certain functions. In the case of Common Pleas, for example, litigants first had to obtain (by purchase) a writ from the Chancellor before their case could be judicially heard. A writ issued by the Chancellor was requisite to commencing an action in the royal, common law courts, and by his power to issue writs, the Chancellor regulated the transaction of royal business.

The Chancellor's royal authority was enhanced by the abolition of the Justiciar in the thirteenth century and the frequent absence of the king. The Justiciar had been the king's immediate representative who helped dispense the crown's justice and ruled the kingdom in the king's absence. When this office disappeared in the thirteenth century, the Chancellor rose to even greater importance in the royal administration. At the Justiciar's extinction, the duty of dispensing the king's justice fell upon the Chancellor, and his official duties expanded from administering royal business to royal justice. Furthermore, the king's frequent absence gave the Chancellor, acting in his stead, greater opportunity of initiative and, consequently, broader discretion in administering his affairs.[2] The Chancellor therefore became the king's representative in both the Lesser and Great Curiae and the official spokesman of his policies and commands. As the Chancellor's responsibilities grew, it became necessary for him to delegate more to his deputy clerks. Increased delegation of executive business within Chancery enhanced its already powerful position as an arm of the king's government and contributed to its institutionalization.

The Chancellor's principal judicial role (in addition to issuing writs to other royal courts) was to correct denials of justice among the king's subjects. Most failures of justice arose from impeded access to the common law courts due to, for example, a claimant's lack of money or time to sue in those courts, fraud or coercion, and procedural difficulties peculiar to those courts. Petitions to the Chancellor for corrective justice were addressed to his discretion. Intervention by the issuance of a writ, therefore, was not a matter of the petitioner's right, but depended on the Chancellor's conscience. As the seventeenth century jurist, John Selden, cynically described in his *Table Talk: "Equity is a roguish thing. For law we have a measure, know what to trust to; equity is according to the conscience of him that is Chancellor, and as that is larger or narrower, so is equity. 'Tis all one as if they should make the standard for the measure we call a foot a Chancellor's foot; what an uncertain measure would this be! One Chancellor has a long foot, another a short foot, a third an indifferent foot. 'Tis the same thing in the Chancellors conscience."*

Before the sixteenth century, however, "equity," which basically meant justice, was not considered the exclusive domain of Chancery. Both the common law courts and Chancery were regarded as equitable bodies, i.e., dispensers of justice. Pleas to Chancery for redress were not originally based on the absence of an adequate remedy in the common law courts — as the law of Chancery and the law of the common law courts were originally the same[3] — but rather on a *de facto* inability to get a remedy from those courts. In practice, Chancery became an attractive forum because it offered a procedure more expeditious than that of the common law courts. Chancery did not follow the technical rules of pleading and procedure of the law courts but pursued a more informal path to justice. Not only did Chancery provide an efficient procedure, but the initiating "bill" was in English (rather than Latin, the language of writs in common law courts) and the proceedings themselves were conducted in English (rather than Law-French).

As the king's closest official and representative, the Chancellor was a powerful servant of the crown. He was necessarily an apologist for royal policy and a jealous guardian of the king's interests. His royal allegiance and discretionary power of corrective justice enabled Chancery to expand its jurisdiction. A significant part of that jurisdictional expansion was Chancery's increasing interference with the common law courts. For example, upon petition by a defendant in a case already pending in a common law court, Chancery would order the plaintiff to discontinue his

proceeding in that court. Occasionally Chancery would try *de novo* — and often decide differently — a case which already had been decided by a common law court. These acts of jurisdictional imperialism were only feebly criticized until the early seventeenth century.

Coke's Challenge

Sir Edward Coke (1552-1634), Chief Justice of King's Bench, was the preeminent opponent of Chancery's widening jurisdiction in early Stuart England. A former Attorney General under Queen Elizabeth, Chief Justice of Common Pleas, and scholarly author of, among other works, the widely used *Reports,* Coke championed the common law, which he regarded as empirically rooted in tradition and superior to natural law. He believed that sovereignty was not above the common law (by natural or divine right) but should be subject to it. According to Coke, the royal "prerogative" — the king's self-proclaimed power to act according to his absolute, unfettered discretion — should not transgress the limitations of the common law, and Chancery, the king's shadow, similarly should respect its administration in the common law courts.

Coke's opposition to Chancery's interference in the workings of the common law courts and to the king's absolute prerogative culminated in 1616 on two dramatic occasions. In February of that year, two jewel merchants fraudulently obtained judgment in King's Bench, requiring the defendant purchasers to pay excessive prices for their merchandise. The purchasers appealed to Chancery and obtained restitution, thereby undoing the final judgment of King's Bench. Affronted by Chancery's intervention, King's Bench under Chief Justice Coke resurrected the old law of premunire — which prevented appeal from English courts to the Pope as an offense against king and government — and broadly interpreted it as prohibiting appeals to any court other than the High Court of Parliament. Grand jury proceedings for indictments of premunire were started against the purchasers and the members of Chancery who had participated in the appeal. Nineteen grand jurors carefully reviewed the facts but decided that the charges of premunire were groundless and returned their bills of indictment properly marked *Ignoramus.* Profoundly displeased, Coke ordered the jury to reconvene, admonishing them that the common law of England would be overthrown unless an example was made of the accused. The jury, after having redeliberated, again returned an *Ignoramus.* (Only two jurors had changed their original decision.) Coke intended to empanel a new grand jury during the next judicial term to rehear the case, but it was never held because King's Counsel (which included, among others, Attorney General Francis Bacon, a staunch supporter of the crown and Coke's longtime foe) had addressed the issue and decided that Coke was wrong and that Chancery had rightfully received an appeal from King's Bench. Chancery's broad jurisdiction and judicial superiority to the common law courts were thereby vindicated.

Coke's second major confrontation in 1616 occurred in the *Case of Commendams,* a suit brought in Exchequer Court where he did not sit. Plaintiff's counsel in that case, Serjeant Chibborne, argued that King James I lacked authority to grant a benefice *in commendam* (i.e., an appointment to ecclesiastical office with the right to receive revenues). Upon learning of this audacity, James commanded Coke to have his common law brethren in Exchequer discontinue proceedings until they conferred with the King. Coke refused to heed the command on the ground that a royal order to restrain the judiciary must come from the King's Attorney General but not from the Chief Justice. Attorney General Bacon therefore immediately wrote letters to the Exchequer (and also to King's Bench and Common Pleas) ordering the judges to halt proceedings. However, on the following day, the Exchequer defiantly tried the *Case of Commendams,* after which twelve common law judges signed a letter to King James, penned by Coke, which stated in part: "*We, your Majesty's Justices of the courts of Westminster . . . hold it our duties to inform your Majesty that our oath is in these express words: 'That in case any letters come unto us contrary to law, that we do nothing by such letters, but certify your Majesty thereof, and go forth to do the law, notwithstanding the same letters.' We have advisedly considered of the said letter of Mr. Attorney [Bacon] and with one consent do hold the same to be contrary to law, and such as we could not yield to the same by our oath. . . .*"

This was a bold assertion of judicial independence and of the common law's fundamental supremacy over royal command. Sovereignty itself, as James and other absolutists conceived it, had been seriously challenged. James therefore dispatched a rebuking reply: "*Ye might very well have spared your labour in informing us of the nature of your oath. For although we never studied the common law of England, yet are we not ignorant of any points which belong to a*

*King to know.** ... *But we cannot be contented to suffer the prerogative royal of our crown to be wounded through the sides of a private person: We have no care at all which of the parties shall win his process in this case, so that right prevail. ... We are therefore to admonish you, that since the prerogative of our crown hath been more boldly dealt withal in Westminster-Hall during the time of our reign than ever it was before in the reigns of divers princes immediately preceding us, that we will no longer endure that popular and unlawful liberty. ... Our pleasure therefore is, who are the head and fountain of justice under God in our dominions, and we out of our absolute power and authority royal do command you, that you forbear to meddle any further in this plea till our coming to town, and that out of our own mouth you may hear our pleasure in this business; which we do out of the care we have that out prerogative may not receive an unwitting and indirect blow. ... So we heartily wish you well to fare."*

Coke and the other judges who had "boldly dealt" with the royal prerogative subsequently were summoned before the King, Lord Chancellor Ellesmere, and the Lords of Privy Council. James angrily asked the judges why they had condoned Serjeant Chibborne's impudence and disobeyed the King's command, whereupon the judges admitted that their letter was defective "in form" and begged for royal pardon. Coke, however, courageously added that the stay ordered by James was tantamount to a delay of justice and therefore contrary to law and the judges' oath. Resentful of Coke's "sophistry," James submitted the issue to Chancellor Ellesmere who, after an intervening denunciation of the judges' conduct by Bacon, opined that James's command had not contravened the judges' oath. Each judge thereafter was asked his opinion, and each one, except Coke, concurred with Ellesmere that it is judicial duty to obey a royal order to stay proceedings. Coke's defiance of Chancery and the Crown was fatal to his judicial career, for in November 1616 James by *supersedeas* dismissed Coke from the bench.

The premunire case and the *Case of Commendams* illustrate the struggle between Chancery and the common law courts and between the judiciary and the king. In the former, Chancery prevailed; in the latter, the king. In each case Chancery's importance was evident: the premunire case signified Chancery's position of judicial superiority to the common law courts whereas James' solicitation of Chancellor Ellesmere's opinion in the *Case of Commendams* bespoke the Chancellor's continued preeminence in the conduct of the crown's affairs. Although Coke valiantly tried to insulate the common law courts from Chancery's jurisdictional intrusion, he could not overcome the historical momentum of judicial and political power, which had germinated centuries earlier in the king's chapel.

Like their Bourbon counterparts in post-revolutionary France two centuries later, the Stuarts never deigned to understand the people they ruled. After the death of Elizabeth I, her heir, James, made a happy progress from Scotland to London to claim his crown. At one stopover where he was hailed by his subjects, a pickpocket was apprehended in the crowd. James graciously ordered that the offender be hanged forthwith. Local officials explained — no doubt a bit nervously — that this was not possible under the laws of England. The suspect was entitled to a trial. Well, of all pettifogging nonsense! If the teachings of Miranda *had been in force, James would doubtless have turned around and stomped back to Edinburgh in a regal snit. His successors, especially his son, Charles I, and his grandson, James II, were if anything even more obtuse than James when it came to grasping the English legal temperament. For a delightful (if mildly dishonest) account of English legal proceedings under the later Stuarts, consult Macauley's* History of England.

The Editors

Epilogue

Coke's struggle with James I and his appendage, the Chancellor, reflects the broader political challenge to seventeenth century monarchical power, which eventually led to the demise of the Stuart monarchy and the rise of parliamentary power. Unbridled royal authority had run its course as Parliament assumed a greater role in government and Locke's liberal thought (expressed in his *Two Treatises of Government*) revolutionized political thinking. This erosion and public distrust of absolute monarchy also pervaded the American colonies where royal prerogative became synonymous with tyranny. Although the colonies borrowed substantially from England in establishing their own legal systems, most distrusted the institution of Chancery as an extension of royal prerogative. Consequently, some colonies (e.g., Massachusetts) did not have courts of equity, while others (e.g., Delaware, New Jersey and New York) initially gave equity jurisdiction to other courts without establishing separate chancery courts. In Delaware, for example, the Court of Common Pleas, a common law court, sat four times a year as an equity court. (A separate Court of Chancery in Delaware was first established by the State's Constitution of 1792, i.e., sixteen years after the Declaration of Independence.) Thus, the political struggle that had begun in Stuart England led to Chancery's unpopularity, and consequently retarded its growth in colonial America. Chancery's survival in Delaware as an independent and powerful institution therefore has run against a strong tide. Our aberrational good fortune in having this important court is addressed elsewhere in these pages. □

NOTES

1. The office of Chancellor was traditionally held by an ecclesiastic until the appointment to that position in 1529 of Sir Thomas More, one of the most learned lawyers of his time. When King Henry VIII was unable to obtain papal annulment of his marriage to Queen Catherine of Aragon (for her failure to bear a son), he dismissed then-Chancellor Cardinal Wolsey and appointed More as his successor.
2. Although the Chancellor became the functional representative of the king after the Justiciar's extinction in the thirteenth century, the Treasurer was technically the king's immediate representative — even at the close of Edward I's reign (1272-1307).
3. Specific performance and injunction were used by both Chancery and the common law courts. While the early common law courts, as a means of enforcing their decrees, issued specific orders to defeated litigants to perform or to forbear, those remedies (of specific performance and injunction) traditionally were confined to land interests. The common law courts, however, eventually discontinued these two remedies, whereas Chancery continued to provide them and also offered similar "equitable" remedies in personal actions.

Sir Thomas More, the first lay Chancellor of England. (More may not have been a cleric, but he attained Sainthood in 1935.)

EQUITY JURISDICTION IN DELAWARE BEFORE 1792

WILLIAM T. QUILLEN

In less than twenty years, Bill Quillen has served successively as a Judge of the Superior Court, as Chancellor of Delaware, as a banking executive, and as an Associate Justice of the Supreme Court of Delaware. He now practices law with that fortunate Wilmington firm, Potter, Anderson & Corroon, and he may be the next Governor of our State. A career of such dizzyingly swift distinction leaves us inarticulate, and we content ourselves with describing it with that fine old bromide, "meteoric". In addition to a succession of precocious achievements calling to mind the younger Pitt, Bill's accomplishments include the soundest, most thorough scholarship of Delaware law in the 17th and 18th centuries being exercised today.

The following article is a tantalizing peek at a much larger work that will probably come to be regarded as the premier study of Chancery. "An Historical Sketch of Equity Jurisdiction in Delaware" may be examined at the library of the Historical Society of Delaware in Wilmington.

Bill's article is of particular interest to us because his minute examination of obscure sources has, in at least one instance, dramatically changed our understanding of the role of the Court before its present incarnation under the first Delaware Constitution: it exercised a hitherto unsuspected jurisdiction over marital controversies in colonial times.

The first sentence of Article VI, Section 14 of the second Delaware Constitution, the Constitution adopted in 1792, provides:

"The equity jurisdiction heretofore exercised by the Judges of the Court of Common Pleas, shall be separated from the common law jurisdiction, and vested in a Chancellor, who shall hold Courts of Chancery in the several counties of this state."

The sentence is interesting in two respects. First, it created prospectively the position of Chancellor and County Courts of Chancery. Second, it recognized expressly that equity jurisdiction had been "heretofore" exercised by the Judges of the Court of Common Pleas. Thus, at birth in 1792, the Court of Chancery had not only a future but also a specific Delaware heritage.

Three Sovereigns (1609-1682)

Before the English came the Dutch and the Swedes. The latter made the first permanent settlement in Delaware at Fort Christiana in 1638. The Governor of New Sweden was a ruler with great discretion, both in commission and in circumstance.[1] He was restrained by only the most general instructions in matters of courts and the administration of justice. To the extent that judicial restraint came from the wise "associate judges" who served as his counsellors, it came from counsellors the Governor chose and who served at his pleasure. Cases were heard before multiple fact-finders but the Governor would act as both prosecutor and judge. In short, governance was local and autocratic, with power centrally reposed in the royal governor, a power benevolent or malevolent depending on the direction of its exercise. In English form, it was more equitable than legal.

The period of Dutch domination — 1655-1664 and briefly in 1673-1674 — had greater long-term impact on government, including judicial structure. The second sovereign added important elements in judicial affairs: a more established local court structure, an active local court (52 cases in the period from December 18, 1655 to April 25, 1657), an appellate structure from 1655 to 1661, the idea of limited jurisdiction, and, as the City's colony, local magistrates chosen with citizen input. The unbridled discretion of the

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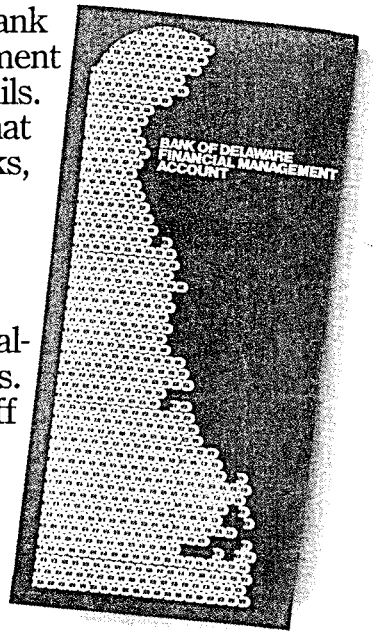

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Swedish governor gave way to modest citizen self-rule kept within bounds by the discretionary oversight of a central authority, which remained open to petition and appeal.[2]

It is of course possible to make too much of the Swedish and Dutch contributions to the development of equity. In a sense a similar contribution is inherent in the beginning of any judicial system. But one Delaware commentator has noted:

"Even the early Dutch and Swedish settlement courts of the 1640's and 1650's contained an element similar to early equity practice, in that men untrained in law, as Wolsey and other early English chancellors had been, attempted to do what common sense and fairness said was right."[3]

There was a common sense justice administered in the name of the ultimate authority of a central sovereign. While the form of the court varied, it was nonjury and dominated by a single agent of central authority. Thus, the comparison to the development of the Court of Chancery in England is legitimate. The chief difference is the absence of the equivalent of the English common law courts, which in Delaware came later. But a frontier equity came first and was, for a while, exclusive.

The dominant characteristic of the Duke of York's rule after the English victory over the Dutch in 1664 was evolution. The Swedes and Dutch simply became citizens of an English colony. In anticipation of the passage of sovereignty from Crown to Parliament, English equity had moved to the threshold of the grand equitable era of great lawyer Chancellors. For the sake of survival, the Chancellors wisely began to eschew the royal and divine in favor of the political and legal. The colonies on the Delaware, newly English, however, were not ripe for such systematization, and the older simplicities prevailed.

The leading published work on the early courts suggests "the intention to administer equity, in the popular sense of that word, through the court of assizes" at New York and cites three equitable references to laws in the 1660s.[4] It is difficult to put these references neatly into the English common law—equity context. The signals are confused. The first appears to expressly recognize a central appellate supervisory jurisdiction, criminal as well as civil, without giving it an equity definition. The second comes in a procedural context, including answer under oath, and recognizes an "Originall Point" equity jurisdiction in the Court as Assizes. The third ties equity to minor damage suits at the local level and probably refers to nonjury trials. If the references are viewed as a means of exercising control, or more charitably as filling a void in the name of order, the early purpose of English colonial equity becomes clearer. In any event these three English legal authorities in combination do give an express recognition to equitable jurisdiction at the lowest and highest levels of magistrate courts in various locales and in the central court of assizes in New York.

But there was surprisingly little immediate change in the government or local administration of justice as a result of English takeover. Dr. Munroe writes that "during the years that immediately followed the conquest the English hand lay light on this colony, and local customs and local officials—Swedish or Dutch — were left as they had been found in 1664." There was in particular no abrupt introduction of

of the common law of England, with its essential institution, the jury trial, let alone its structured equity overlay.[5]

Although the Duke of York's Laws [Duke's Laws] were in theory to be used in Delaware, a copy was not even received in New Castle until 1678. Munroe reports that "there is no evidence that the justices of the other courts ever did receive a copy." A reference to equity in a 1676 ordinance appears jurisprudential, distinct from law and without a jury. But in practice the reference still means something quite different from the English institution that evolved during the turbulent seventeenth century. Along the Delaware, equity, before the arrival of William Penn in 1682, was not specialized, but general. It took the form of a supervisory nonjury review over actions of law.

Part of the equitable role stemmed from the authoritarian tradition of royal and company governors and the location of the seat of power in New York. The Governor reserved the right to supervise the administration of justice throughout the colonies by hearing petitions for relief at the central equity court in New York. In a printed version of an 1868 lecture, *Equity in Pennsylvania,* William Henry Rawle noted:

"In 1676, Sir Edmund Andross granted, in New York, an injunction to stay execution on a judgment at law in the court of New Castle, upon security being given, 'and all proceedings, writings and proofs to be transmitted to New York for a final determination in equity.'"[6]

But a local, noncentralized equity was also exercised in the period before William Penn. The same case demonstrates its use. Two 1676 entries in the published court records of New Castle show the Governor referred the appealed case back to the New Castle Court.[7] It is unfortunately not clear why the Governor referred the case back to the New Castle Court to be heard in equity. But the reference procedure suggests a discretion in the Governor to choose the local court in equity as distinct from a prior jury damage action.

Finally, another entry from the Records of the Court of New Castle shows still another procedure that did not involve the Governor at all. A disappointed suitor in an action on the case, after adverse judgment, craved to be heard in equity, presumably in the same court and before the same judges who presided at a jury trial. Two entries of a session of June 13 and 14 in 1682 in the court records of Sussex (then Deal) County, shortly before the arrival of William Penn, confirm the practice of rehearings in equity after a jury trial at law.[8]

In any event, before the arrival of William Penn, there was equity jurisdiction. In a sense, it was royal in that it reflected natural justice as seen by the Governor. In a sense it was juristic, a recognition that normal process may not have operated properly in a given case. But it was not a replay of the kind of legalistic competition that the Chancellor had with the common law courts in England. And it was not a separate area of specialization. It operated at the local level through local judges as well as centrally through the Governor and the Court of Assizes. The role of equity was control and review.

The Pennsylvania Period (1682-1704)

Under the Duke of York and his Governors, the historical evolution had been slow. But the close relationship of the liberal Penn family with the royal Stuarts brought about two remarkable and radical changes in 1681-1682. First, the King's grant of vast woodlands to the north of New Castle plus the transfer to William Penn of the Duke's title to the land of the lower three counties on the west bank of the Delaware was an impressive real estate assemblage in any league. Second, the introduction of joint representative government for the Province of Pennsylvania and the Territories, as the lower three counties on the Delaware were sometimes called, was a profound political change. There was both an ending of an old order and the clear start of a revolutionary new phase.

On October 27, 1682, William Penn arrived in New Castle and established his claim. On November 2, 1682, he made a public speech in open court, reflected in the published court records, wherein he continued the Duke's laws pending an independent assembly, assured the inhabitants of the lower counties the same privileges as enjoyed by the inhabitants of the Province, and promised representative government. The lower counties formally united with Pennsylvania through the Act of Union and the implementing Act of Settlement by the end of 1682.

The fascinating history of the relationship of the Province and "the Territories" is necessarily beyond the immediate inquiry. Suffice it to say that Penn by Codicil to the written frame of government, permitted in 1701 the Province and Territories to have separate assemblies.[9] By 1704, disagreements between the Assemblymen from the two sections over equality of legislative representation and the need for military defense along the River seemed beyond compromise. At the end the expanding Pennsylvanians seemed more eager for separation than the Delawareans. In any event, whether by way of secession or expulsion, Delaware held its first separate Assembly in New Castle in the fall of 1704.

The statutory details of court structure during the Pennsylvania period are also necessarily beyond the scope of this short article, but two highlights, dating from 1684, are worthy of mention. First, quarter sessions were to be held by the local justices in every county, and each quarter session was to "be as well a court of equity as law." Second, a provincial court of five judges was established with jurisdiction including appeals from inferior courts.[10] The Assembly, in giving county quarter sessions courts sitting in equity direct review over judgments at law, confirmed the equitable role the county courts had in fact been playing.

In 1701, at the same legislative session that considered the Charter of Privileges, which included Penn's famous Codicil, the Assembly enacted a comprehensive revision of the court system. It provided a more structured procedure for the local courts and gave the county courts full equitable powers,

". . . *wherein the proceedings shall be by bill and answer,* with such other pleadings *as are necessary in Chancery Courts,* and proper in these parts; with power also to the same justices to force obedience to their decrees in equity by imprisonment or sequestration of lands, as the case may require."

The express establishment of equity jurisdiction by these colonial enactments should once more be placed in an operational perspective. The general impression of the scholars in the field is uniform. As one wrote in 1895 about the two 1684 statutes relating to equity:

". . . But is believed that very little business was transacted under either of them. It is also probable that any equity that was administered at this time was not the technical and scientific equity of lawyers, but sort of natural equity, consisting largely of the amendment of judgments at law which were considered too harsh. The judges had great discretionary powers, and were usually laymen. In fact there were very few trained lawyers in the Colony."

It is also interesting to note that the Earl of Bellomont, Governor of New York, wrote to the Lords of Trade: "There is a great want of a Court of Chancery here, but nobody here understands it rightly."

While there was steady discontent with the equitable, nonjury role of equity in the Province, it does not appear that equity at any level gave rise to complaint in the Territories. Loyd particularly noted the "sometimes" practice of having a bench trial instead of a jury even in matters of law, "particularly in the lower counties". It is therefore at least open to good speculation that the lower three counties did not have the same difficulty with equity referrals as did the Province. Thus, notwithstanding all the governmental ferment caused by the arrival of Penn, there was up to 1702 little practical change with regard to equity jurisdiction.[11]

The published court records of this period generally confirm this view of equity jurisdiction. In his survey of the published records, Lunt found "twelve references to proceedings in the appellate court", eight of which were perfected. Of the eight, five involved appeals taken to the "next Provincial Court in Equity". Thus, the practice of appeals from jury verdicts to a higher court in equity continued.[12]

A search of the published records disclosed eight instances in Kent County of appeals from jury verdicts to the next county court in equity and evidence of similar practice in Sussex. Sometimes the "Court of Equity" agreed with the prior jury verdict. In *Brown v. Laughan,* a 1699 case, the jury awarded damages for a defendant's provoking and overriding a horse he had borrowed from the plaintiff. It was alleged that the horse "dyed" from the overexertion. At the next County Court in Equity, the court in the "appeale" ordered and decreed damages in the same amount. Sometimes the "Appeale" to the Court of Equity altered the result, as it did in *Richardson v. Hill Administrator,* a 1699 suit on account against a decedent.

In another horse borrowing case in March of 1698, *Dubrois v. Hudson,* the plaintiff alleged the horse had not been returned and the jury, after being charged by the court, returned a verdict for the plaintiff. On the appeal to the County Court of Equity, after "Evidences being Examined to the truth of which They could say Upon Oath", entered the following:

"The Order and decree of this Court is that the said John Dubrois shall for Euer be debarred of any ways molesting or troublinge the said Robert Hudson about or Concerninge the said horse and beare the loss thereof him selfe. And that the said Robert Hudson shall pay and discharge all Costs and damages Expended about Suinge for the said horse both in Law and Equity."

Thus, here was a touch of an equitable injunction added to a touch of barnyard equitable justice on the "Appeale" to the County Court in Equity.

The Kent records yield one other case particularly worthy of note. The statute of 1701 signaled a change in equity jurisdiction. The county courts were empowered to hear "all such matters and causes of equity as shall come before them in said courts, wherein the proceedings shall be by bill and answer, with such other pleadings, as are necessary in chancery courts and proper in these parts". This statute should be compared with the earlier statute of the Penn period enacted in 1684, wherein quarter sessions was made "as well a court of Equity as Law, Concerning any Judgment given in Cases by Law capable of Triall in the respective County Sessions and Courts."

While an earlier 1665 ruling of the Court of Assizes during the Duke of York period had provided "[w]here the Originall Point is a matter of equity the proceedings shall bee by way of Bill and delivering in Answers upon Oath and by the Examination of witnesses, in like manner as is used in the Court of Chancery in England", it appeared to have little, if any, impact on the Delaware insofar as "Originall Point" jurisdiction is concerned. Moreover, Loyd found "no trace of any proceedings had under [the authority of 1701 equitable grant]" and noted the complaint of Chief Justice Guest in 1703 that there had "been no such courts as yet held". And Loyd notes that the equity provisions of the 1701 Act were the cause of its repeal.

"This act, which was repealed by the queen in council on February 7, 1705, because the lords commissioners for trade conceived that so far from expediting the determination of lawsuits it would impede the same, [footnote citing 2 *Statutes at Large* 481] attempted to introduce a more elaborate procedure without actually committing the courts to the English practice, and like all half measures, would have led to confusion and litigation. One can imagine the unlearned judges of the county courts deciding how much chancery pleadings was 'proper in these parts.'"[13]

But Chief Justice Guest, the Queen in Council and Loyd can be disputed. The published Kent records show a "Court of Chancery" was held on May 14, 1702. The name itself is important because heretofore the reference was to a Court of Equity. One suspects the designation was intentional if the one case on the docket that day is analyzed. The "Bill Exhibited into Court" was brought by an attorney on behalf of two orphans who were "Admitted to Prosecute this Suit...there Next friend and Guardian". The defendants were the orphans' mother who had been administratix of the deceased father's estate, as well as the executors of her first successor husband and her second successor husband. Subpoenas were ordered to be issued to compel the defendants to answer the bill and several routine entries indicate that the colonial court had mastered the delays for which its English forefather was infamous.

The final two entries in the printed record, however, show expedition. At a "Court of Equity" on November 19, 1705, an inventory of the orphans' father's estate, evidently previously prepared for probate purposes, offered on behalf of deceased husband number two, was rejected as a "lawfull Inventory" but allowed as an "appraisement" for so much as it showed. An inquisition by twelve lawful and honest men was directed to ascertain what goods of the deceased husband came into the hands of the deceased first successor husband when he was married to the widow. A "Court of Equity" was held on the day set for the return of the inquisition, December 15, 1705. As a result of the return and the court proceeding, the executors of the first successor husband were directed to pay the guardian a fixed sum "for the use of the said Orphans as their full Part of the Personall Estate" of their father.

Thus, there was an original equitable bill, in the nature of a fiduciary accounting, brought in Kent in 1702 and litigated through 1705. "[U]nlearned judges", using "half measures" were not doing badly. Colonial equity was becoming English Chancery.

The Lower Three County Period (1704-1776)

The record of the development of an independent court system for the Lower Three Counties after 1704 is somewhat confused. As has been noted, a comprehensive revision of the court system was enacted by the last joint Assembly in 1701. Shortly after the first separate assembly of the Lower Three Counties, the Queen in Council on February 7, 1705 disallowed and repealed the 1701 enactment. Thus, the status of judicial organization was in some turmoil at the time the Lower Three Counties began to exercise an independent government.

Not only is there confusion in regard to the legal status of the judicial structure after 1704 but the history before Governor Patrick Gordon has been the subject of a rather pointed dispute. It is clearly established that during the period of Governor Gordon (1726-1736) a comprehensive act establishing "courts of law and equity" was passed and at least one source has placed the date in 1732. Owing to the uncertainty of the date, the statute will be referred to as the Gordon Statute.[14] The Gordon Statute clearly created an independent

A NEW AVIGNON?

Marie Shultie, Director of the Division of Corporations, tells us that during the recent crunch of filings at the Division, the staff nonetheless continued to function with their usual courtesy and aplomb. During the height of their press of business somebody phoned in to inquire whether the Vatican was incorporated in Delaware. The Division promptly instituted a computer search and replied in the negative. Name reservation, anyone?

Supreme Court for the Lower Three Counties. But before that time the matter remains far from clear.[15]

It would appear that with or without a proper statutory base, Delaware had an operating Supreme Court based on commissions. Indeed, the Gordon Statute expressly provided in Section 13 that "no cause...now depending" in the Supreme Court should be discontinued. And, as interesting as this historical dispute is, and even though the dispute necessarily attaches to the statutory base for the county courts as well, it perhaps does not matter too much with regard to the exercise of the equity jurisdiction. While the record is scant, the commentators seem to conclude that Delaware accepted the basic court structure contained in the statute of 1701 until the Gordon Statute. Indeed, it may be that a 1704 enactment confirming laws previously enacted by the joint Assembly was deemed sufficient to continue the 1701 court system. Under that system, broad equity jurisdiction lay in the county courts with an appeal to the Provincial Court. After its own separate 1710 statute, Pennsylvania went through a lengthy period wherein equity jurisdiction was only exercised by the Supreme or Provincial Court or by the Governor, and not by the county courts. Thus, Delaware parted company with Pennsylvania at that stage in the evolution.

Unfortunately, the published court records terminate at approximately the same time the separate Assembly for the Lower Three Counties began to function, and it is difficult to trace the development of equity in Delaware from 1705 to 1732. There does exist, however, at the State Hall of Records in Dover, a record book of certain proceedings in Kent County from 1718 to 1720. It records a portion of four equity proceedings, noting particularly that the county court was sitting as a "Court of Equity".

The first, relating to the estate of one Benjamin Punly, resulted in an order of the Court, consisting of four county Justices, compelling the executors of an inheritance beneficiary to pay to another beneficiary a sum of money, which was a condition of the former's inheritance. The second was a 1718 "Bill of Complaint" by one Joseph Growdon which sought to have the court determine the amount due on a mortgage and have the land released. The third, a 1719 case, resulted in a default judgment because of the defendant's failure to file his "plea" pursuant to the Rules of the Court.

The record of the fourth, *Barrat v. Willson,* relates two items. First, there was a 1720 attachment of contempt issued against the respondent who had failed to appear after having been "subpoenaed". Second, there was a petition recorded in 1721 which recited an agreement for the purchase of the services for two years of an indentured servant by the petitioner from the respondent. The respondent thereafter apparently released the servant in conflict with the agreement. The petition alleged in a usual custom that the "Orator" was "remediless by the Strict Rules of the Common Law". It further noted that the witnesses to prove the promises were "either Dead or in Some remote lands unknown to your Orator". The petitioner thus needed the compulsive process of equity to get the respondent to answer under oath concerning the agreement and release of the servant.

These fragments of history show several important things about equity in the Lower Three Counties before the Gordon Statute. First, equity was clearly being administered in the county courts before the resident Justices. Second, equity had made the transition to a court of original jurisdiction in conformance with the statute of 1701. The Barrat petition demonstrates these items clearly: it was addressed "To the Honorable Judges of His Majesties' Court of Chancery for the County of Kent upon Delaware." Third, the business of the Court of Equity in Kent County was probably very small. Four cases in four years made the record book.

In the development of equity jurisdiction in Delaware, the Gordon Statute is the most important single enactment. The Statute legislatively confirmed the lower counties' commitment to local courts of equity by establishing "a Court of Equity, held by the Justices of the....respective

County Court of Common Pleas four times a year", with proceedings "by bill and answer". There can be no doubt about the existence of a separate Delaware Supreme Court after this Act. Moreover, the Supreme Court was modern in one sense, its judges being prohibited from sitting in the "Courts of Common Pleas, Quarter Sessions, or any other inferior court of this government." As a reminder of the colonial context, it also should be noted that the Act expressly saved the right of ultimate appeal to his "Majesty in Council". When the county judges sat on the equitable side, the broad statutory reference was to "the rules and practice of the High Court of Chancery in Great Britain". This reference and the rather broad deference to common law courts contained in Section 25 incorporated not only a court system but also potentially the combative disputes between law and equity that had been waged in England for over two centuries.

Whether all of this verbiage was necessary or desirable is certainly debatable in light of the more primitive colonial society and especially now in the retrospective light of court reform in the nineteenth and twentieth centuries. But the operational structure was simple: county trial courts and the Supreme Court for appeals and capital trials. During the balance of the colonial period, there were other statutes that touched upon judicial affairs, but they did not change the basic court structure of the Lower Three Counties. The equitable focus then switched to the exercise of equitable jurisdiction granted by the Gordon Statute.

It is interesting to note the express items of equitable jurisdiction in the statute: the power "to grant injunctions for staying suits at law, and stopping waste". While such express power was clearly not exclusive, it presumably discloses that the legislature had some of the equity jurisdiction in mind. It is also an indication of a particularized equitable jurisdiction distinct from common law. The provision, still part of Delaware law, now appears at 10 *Del.C.* §343.

Unfortunately again there are no published records of the court proceedings from the Gordon Statute until the revolution, and for a short time thereafter. There are, however, in two cardboard filing boxes at the Hall of Records in Dover handwritten fragments of over one hundred Kent County equity cases of the 1700s, the earliest in the 1730s, which have been placed in alphabetical order and indexed in a modest fashion. While these records are fragmentary, they appear to be the best source of information about what courts of equity did under the Gordon Statute.

The earlier cases up to 1753 include many contract cases of specific performance, some cases relating to estate settlement, cases involving fraud with regard to debt claims, a case to sell the property of a ward, a trustee's accounting, and include applications for injunctions to stay proceedings at law. One case, *James Edwards v. William Farson* (1746 indexed as E-1) involved a note given for a contract of the purchase of the services of a slave. The petitioner alleged breach of the agreement due to the slave's bad health and consequent inability to provide service (he was subject to convulsions and fits) and sought an injunction against a suit at law on the note. In another, *William Curry v. William Smith* (1748 indexed as C-17), it was alleged that a servant was being held "contrary to law and without rights". In *John Ensor and Thomas Clifford v. Peter Watson et ux* (1742 indexed as C-14), sureties on a bond sued to stop a second husband from converting the inheritance of minor children.

There are also available in unindexed form fragments of case records from New Castle County, also illustrating an independent equity jurisdiction. For example, a case in 1734, *John William Lerkin Giles v. Hen Colesbury Jr.,* dealt with fraud and breach of trust in a land sale and noted the allegations were "only receivable in A Court of Equity where matters of Fraud & breach of Trust are proper to be redressed." Similarly, there is found, in *Tetford v. McFarland,* a 1741 petition to stay waste of a life dower interest, coupled with a suit at law for rents and profits. And, in 1752, in *John Goldsmith v. John McCoole,* we see a classic dispute between an alleged mortgagor claiming a deed absolute on its face was in reality a mortgage. And, to prove old habits die hard, in 1742, we find in *John Reddick v. Abraham Lockerman,* an appeal to the "inferior Court in Equity" seeking relief against a bond which the Court referred to a citizen panel to arbitrate.

A few eighteenth century cases filed from New Castle and Sussex Counties have been indexed at the Hall of Records. The earliest documentary fragment in this group is the Sussex case of *John May v. Christopher Tophan,* a 1721 proceeding to cancel a bond. Two more Sussex cases of unusual interest date from the 1740s.

The first, *Eleonor Fisher v. William Fisher* (1743), is a petition for separate maintenance. The petition recited an eight year marriage and alleged the husband left the wife for one Agathy Light. In particular, it was alleged that the husband "unjustly apply & Wast his Substance on the said Agathy". The petition prayed for a sum of money yearly. Notwithstanding the fact that, because of the legal unity of husband and wife, neither could sue the other at common law, the appearance of a petition for separate maintenance this early is surprising. It has been generally thought that Delaware had no early history of equity jurisdiction in separate maintenance.

The second Sussex case of special interest is *Samuel Edwards v. Samuel Rowland Sr. and Samuel Rowland Jr.* (1744). It was a suit to compel completion of an apprenticeship contract. It was alleged that Mr. Rowland, Jr. in return for being taught

the trade of a River and Bay Pilot agreed to serve Mr. Edwards for four years and left after serving only two years and seven months.

There was one statutory development in equity in the late colonial period worth noting. In 1753, a statute was enacted "prescribing an easy and summary method to perpetuate the testimony of witnesses, relating to the bounds of lands within this government." It provided that the "Justices of the Court of Chancery" could for reasonable cause issue commissions to take the depositions of such witnesses.

This statutory development was in a sense merely declaratory of the English equity practice of perpetuating testimony and assisting legal proceedings by discovery. It was thus consistent with the general equitable powers conferred by the Gordon Statute. In fact, there are instances of petitions to perpetuate testimony concerning land boundaries before the statute was adopted.

It appears, however, that the statute gave rise to a modest wave of activity. Using the Kent fragments as a representative barometer, from 1753 to 1769, about two-thirds of all Chancery cases would have been petitions to perpetuate testimony with regard to boundaries. A book labeled Kent County Court Records 1736-1785, located at the Hall of Records, contains in an unusually handy form a record of over fifteen of these proceedings.

Another interesting record at the Hall of Records is the collection of colonial dockets beginning in 1749 of equity cases in Sussex County. The first, labeled "Court of Equity Doggets 1749" runs into the 1770s. It shows that bills in chancery were denominated "In Cancellaria" throughout the period and the second docket beginning in 1772 shows the practice continued through 1782. A docket entry in May 1774, in *Benjamin Burton v. Peter Robinson and James Perry,* shows an action for "Ne exeat provincia" against Robinson. Historically, this proceeding was a form of civil bail in equity. Again the entry shows the broad substantive range of petitions that the County courts would receive. Numerically, the dockets show that the equity practice in Sussex County was slight, four cases pending in the year beginning with May 1749.

Other Sussex County cases show a continuation of a broad exercise of equity jurisdiction. Three cases, *Frances Haverloe v. James Haverloe* (1755), *Mary Humphrys v. Thomas Humphrys* (1759) and *Adah Boyd v. James Boyd* (1770) demonstrate that separate maintenance actions continued, particularly if the wife had enjoyed a separate estate before marriage. The 1749 docket shows the *Haverloe* case in 1756 was prosecuted to a final decree with an "Attachment to Issue to inforce obedience". In 1766, the Sussex Court in *Re Ann Burton, lunatic* received the petition of William Burton on behalf of his sister, Ann, who was alleged to be "Non Compos Mentis" from birth. The Court by five justices entered an order on September 2, 1766 authorizing William to take charge of his sister's money by putting it out to interest and to place her where he thought best. And, in *James Thompson v. Nehemiah Field* (1774), there was a proceeding for a partnership accounting, which included a commission for the taking of testimony and an ultimate entry in the docket on February 7, 1781 showing a plaintiff's judgment.

The Lower Three Counties as a whole were touched by one court case. Indeed, other than legislative independence in 1704 and the American Revolution, it can be argued that the most important event of eighteenth century Delaware history culminated in an opinion of the English Chancellor, Lord Hardwicke in the High Court of Chancery. The case of *Penn v. Lord Baltimore,* 1 Veasey Senior 444 (Chancery 1750) finally settled the boundary dispute with Maryland. The Chancellor's order at 3 Veasey Senior 194 (Chancery 1750) specified the necessary survey work and, in 1775, the Assembly for the Lower Three Counties passed an act fixing

the State and county boundaries. The period of delightful colonial independence under the benign Penn proprietors was to end on a happy note of land boundaries established by the long arm of the equity jurisdiction of England.

The Delaware State (1776-1792)

The Lower Three Counties, less burdened than some other colonies by conflicts with England, moved slowly toward separation. But the ferment of Revolution finally carried the Lower Three Counties. On June 15, 1776, now commonly called Separation Day in Delaware, the Assembly voted to sever all relations with England and the Delaware delegates to the Continental Congress meeting in nearby Philadelphia "were freed of any requirement to seek reconciliation." Rodney rushed to Philadelphia and, by a 2-1 margin, Delaware was included on the side of independence. Once the decision had been made, George Read signed the Declaration as well.

Caesar Rodney then called the Assembly that ordered a delegate election for a state constitutional convention, the first of its kind among the states. Ironically, Rodney was defeated in the election and the "presiding officer and dominant figure in the convention" was George Read. The representatives, who met in August 1776, created "The Delaware State". The Convention was a conservative one and the product of the Convention, the Constitution adopted on September 20, 1776, fairly reflected the temper of its members.

Aside from provision for a more professional Judiciary to be appointed "by joint ballot" of the President and General Assembly, and a short-lived creation of a State Judge of Admiralty, the Constitution retained a basic three tier structure in the judicial branch. The first change was significant: no longer were the Court of Common Pleas and Orphans Court composed of a group of Justices of the Peace. The offices became independent, with a Chief Justice and three judges in each county. The separate Supreme Court was retained. And, to replace the "powers heretofore given by law in the last resort to the King in Council under the old government", the Court of Appeals, consisting of the President and three nominees from each house, was added for appeals from the Supreme Court.[16] Article 13 dealt with equity jurisdiction in the following manner of continuity: "The Justices of the Courts of Common Pleas and Orphans Courts shall have the power of holding Inferior Courts of Chancery as heretofore, unless the Legislature shall otherwise direct."[17] In short, equity was to carry on as before. The basic jurisdictional reference was therefore the Gordon Statute and all equity jurisdictional matters were expressly made subject to legislative discretion.

The rather skimpy equity fragments found in the Kent County records during the 1770s suggest two things. First, the activity in the Court of Equity fell dramatically, as would be expected during the Revolution. Second, what activity there was tended to be before 1776 and consisted almost exclusively of petitions to perpetuate testimony of land boundaries.

There is also a suggestion that the situation changed in the decade of the 1780s. That decade yields more case preserved records than any other in the eighteenth century, including the 1790s. There are some forty Kent equity case fragments from the 1780s at the Hall of Records, a substantial increase but still not a significant caseload, an average of four filings a year. Two overlapping Sussex dockets show six equity cases filed in 1788, an increase over earlier mid-century patterns, but hardly dramatic. What is more important is that these cases show a change in the nature of the caseload. Of the forty Kent cases, only six are petitions to perpetuate testimony of land boundaries. Over fifteen are actions seeking injunctions to stay actions at law, suggesting that equitable defenses may have taken on greater significance during the hardship of the financial turbulence of the Revolution. In New Castle County, there were several cases concerning the value of Continental currency, *Conrad Gray v. Robert Pearce* (1785-86); *James Anderson & Charles Heath v. Leonard Vandegrift & John Hyatt, admrs of John McLean* (1786); *James Armstrong v. James Patridge* (1789); *William Patterson v. Samuel Barr* (1790). As would be expected in independent equitable actions, the Kent records show actions for specific performance of contracts were the most frequent. The balance include an action to stay waste, a slave's petition for freedom, and an estate settlement suit.

In light of subsequent Delaware legal history, where the existence of separate maintenance jurisdiction has been questioned, the most interesting equity case of the decade in the Kent records is a 1783 proceeding by Elizabeth Robinson against her husband

for separate maintenance. The unusually complete record includes the answer by the husband wherein he denied the allegations that his wife always "demeaned and behaved herself as a sober, faithful, virtuous and industrious Wife taking the greatest Care of his the said Defendant's Family and Children and laboring at all Manner of work as well out of as within Doors". He also denied the Wife's allegations that he had treated her with cruelty and inhumanity. There are also depositions of witnesses of quite normal flavor for domestic relations conflicts.

The decree directed that the husband should pay the wife fifty pounds for the period they had been separated (February 14, 1782 to August 13, 1784) and pay further biannual payments of ten pounds each, twenty pounds yearly, until he received his spouse "as wife and treat her with becoming tenderness and humanity". The payments were for "support and maintenance".

The records further show that James Robinson, the husband, by petition, appealed the decree "To the honorable the Judges of the Supreme Court for this Delaware State, on the Equity Side thereof--'. Unfortunately, while some Supreme Court records exist concerning the case, no record of any disposition on appeal has been found and the docket suggests that the appeal was abandoned.

The Sussex county docket also confirms the early Delaware use of Chancery in marital matters. On February 9, 1785, a "Petition for Alimony" was filed in the case of *Sarah Smith v. James Smith*. The complainant alleged that after nine years of marriage her husband "the said James took up with other women and began to use her very ill and gave her several severe whippings and obliged her to leave his House and go to the Neighbors for Protection." Moreover, the husband was allegedly using property which had been inherited by the wife. The case was abated on the death of the complainant.

A New Castle County case, *Martha Dick v. James Dick* (1791-92), evidences yet another separate maintenance action, thus establishing that separate maintenance actions were brought in all three counties before the Constitution of 1792. The petition alleged repeated beatings, culminating , after an attempted reconciliation between the spouses with the wife's forcible removal from the house by the husband without "a single farthing for her Support." The wife prayed for a yearly allowance. The defendant alleged his wife "by the visitation of God [had become] deranged" and "[would hide] herself at times in the Swamps". He admitted he did "bull whip and correct the said Complainant

as by Law he conceives he well might" and it was necessary to force her into his home or her father's home to get her out of the snow. The husband also alleged he forced her out of his own house when he found her in bed with another man. It thus appears that separate maintenance jurisdiction in equity was rather fully developed in the eighteenth century.

There is also another example of a lunatic proceeding in the New Castle County records. In *Re Rees Enoch* (1786), it was alleged by John Stapler that Mr. Enoch had "been a Lunatick" in Mr. Stapler's care and prayed for a change of custodian. Personal care and custody and care and management of Mr. Enoch's estate were transferred to one Joseph Stedham.

A sampling of other unindexed New Castle County case materials, appearing in a box marked New Castle County Court of Chancery 1776-1822, shows a petition to redeem a mortgage (*John Sherman v. John Toppin* 1782), a suit to get a debt acknowledged, since among other things, a seal had been taken off a bond (*Robert Smith and Mary Smith v. Samuel Smith* 1784) and a suit to stop enforcement of a judgment against an estate and to inquire into a debt, the judgment allegedly being fraudulently obtained (*Joseph Lawyer et al v. John Leuden* 1790). Procedurally, one interesting New Castle County file shows the Clerk of the Supreme Court itself, by the authority of Chief Justice William Killen, issuing an injunction to stop waste during the pendency of an appeal of an ejectment action (*Solomon Blackstone, Lessee, v. Patrick Loyen* 1781).

Thus the period of The Delaware State shows some post-Revolutionary increase on the equity side but no dramatic onslaught of cases. While most of the cases demonstrate routine equity jurisdiction such as enjoining waste and suits at law where equitable defenses might be appropriate, there is more than a hint in the earlier Sussex ne exeat case and in the marital and lunatic cases that the equity jurisdiction was viewed broadly and would respond broadly to appropriate petitions.

Prior to the creation of the Office of Chancellor in 1792, the equity

jurisdiction indeed had been "heretofore" exercised. From its primitive beginnings, it had evolved into a separate branch of jurisprudence. It can be argued that, when invoked, Delaware equity jurisdiction was in practice, as well as theory, as broad as English Chancery jurisdiction. The strong equity tradition runs deep in Delaware history. □

The professional student and the historian may wish to consult Justice Quillen's intermediate draft of this article, which contains a wealth of citations and references, excluded here by the exigencies of space.

The Editors

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1. The instructions from the five man Swedish Council of State to Governor Johan Printz, the most forceful of the Swedish Governors, can be found in Israel Acrelius, *History of New Sweden*, translated by William M. Reynolds, 38-39 (Historical Society of Pennsylvania 1874). This work was originally published in Stockholm in 1759. See generally Christopher Ward, *The Dutch and Swedes on the Delaware*. 1609-64 (1930).
2. See H. Clay Reed, *The Early New Castle Court*, IV No. 3 Delaware History: New Castle Tercentenary Issue 1651-1951, 227, 228-33 (June 1951) (hereinafter cited as Reed, *The Early New Castle Court*). The same article gives specific details of the Dutch court at New Amstel and describes the transition from the Dutch to the English. It was the custom for the Director to choose the Schepens or magistrates from a double number chosen by the citizenry. See also Munroe, *Colonial Delaware*, 46 (KTO Press, Millwood 1978).
3. This quotation is from page 3 of an excellent unpublished article, *The Delaware Court of Chancery; Delaware's Peculiar Institution*, by Michael Hanrahan, Esquire, a member of the Delaware Bar.
4. William H. Loyd, *The Early Courts of Pennsylvania* 162-163 (1910).
5. Reed, *Early New Castle Court* at 228-42. In 1669, there was a single show trial which introduced the twelve man English jury. The defendant was Marcus Jacobson, "the long Finn", who agitated for restoration of Swedish rule, and is described by Reed as "an object lesson to the Dutch and Swedish populace in English judicial procedure, and, so far as the records disclose, the first of its kind on the Delaware." *Id.* at 238.
6. Rawle, *Equity in Pennsylvania* 4 (Philadelphia 1868). See also Loyd, *supra*, at 164-65.
7. I *Records of the Court of New Castle on Delaware* 1676-1681, 15, 28-29 (Colonial Society of Pennsylvania, Lancaster 1904).
8. Turner, *Some Records of Sussex County, Delaware* 75, 76 (Philadelphia 1909) (hereinafter cited as *Records Sussex*). The first entry confirms the early use of a seven man jury. The Duke of York's Laws provided: "Noe Jury shall exceed the number Seaven nor be under Six, unless in Special Cases of upon Life & death The Justice shall think Fitt to appoint Twelve." I *Statutes at Large of Pennsylvania* 28-29, 95 (Beckman ed., 1976) (hereinafter cited as I *Statutes at Large*). William Penn in England on May 5, 1682 published certain "laws agreed upon in England" for Pennsylvania, one of which provided "That all Tryals shall be by Twelve Men". *Id.*, at 122. The second entry is interesting in the context of a retrial because of its emphasis on a local equity trial "by bill and answer as is use in the Court of Chancery in England". This provision suggests that the equitable practice of rehearing might have had a trial, as distinct from an appeal, purpose due to the incompetency of parties as witnesses at law.
9. See 1 *Del. Laws* Appendix 37, 43. The Governor's letter to the Assembly on the eve of a departure to England is reproduced in the same appendix at 45-46. In modernized form it reads: "Friends — Your union is what I desire; but your peace and accommodating of one another is

what I must expect from you: The reputation of it is something, the reality much more. And I desire you to remember and observe what I say: Yield in circumstantials to preserve essentials; and being safe in one another, you will always be so in esteem with me. Make me not sad, now I am going to leave you, since it is for you as well as for Your Friend and Proprietary and Governor, William Penn."

10. Rawle, *supra,* at 9. The number of judges on the Provincial Court was reduced to three in 1685 but restored to five in the 1690s. Loyd, *supra,* at 57-58. The number was significant because of the policy that two judges would ride circuit and sit in the various counties and on occasion it was difficult to get them to go to the lower counties. It is interesting to note that the court sat in panels of three in Philadelphia, just as does the five member Delaware Supreme Court today. See Supreme Court Rule 4. The body of the two bills is reproduced in I *Statutes at Large,* at 166. See also Loyd, *supra,* at 49-57. Notwithstanding the creation of the Provincial Court, the Governor and Council (the upper legislative body) continued to play the supreme judicial role within Penn's domain until 1701. And, in theory at least, under Penn's Charter, there was an ultimate appeal to the King in Council in England. Loyd, *supra,* at 71-72; I *Statutes at Large,* at 113. For general statutory history see Fisher, *The Administrative of Equity Through Common Law Forms in Pennsylvania,* I Law Quarterly Review 455-465 (1895), reprinted in II Select Essays in Anglo-American Legal History 810, at 811-812 (1908).
11. Loyd writes: "The relief given under the name of equity would seem to have been similar to the discretionary powers of the courts now exercised on rules to open judgments, or in controlling verdicts on motions for new trials and there is no trace of formal chancery proceedings." Loyd, *supra,* at 169.
12. Lant, *Tales of the Delaware Bench and Bar* 69 (University of Delaware Press 1963). See, for examples *Court Records of Kent County, Delaware 1680-1705,* 180-81 (L. DeValinger, Jr. ed. 1959) and *Records Sussex,* at 97. The appellate cases there noted include a combination of legal and equitable relief with some discretionary injunctive tones.
13. Loyd, *supra,* at 170.
14. The Gordon Statute appears at 1 *Del. Laws,* Ch. LIV, 121. The first two volumes of *Del.Laws* were printed by Samuel and John Adams in 1797 based on a revision by George Read. The Gordon Statute is commonly and awkwardly called the Act of 1726-1736. The 1732 date comes from Chief Justice Gilpin in *Flanagin v. Daws,* Del.Ct.Err.&App., 2 Houst. 476, 495 (1862). The enactment has been placed earlier at 1726 or 1727. I Scharf, *History of Delaware,* 1609-1888 (1899) 133. It is interesting to note that a 1752 compilation of *Laws of the Government of New-Castle, Kent and Sussex upon Delaware,* which was "Published by Order of the ASSEMBLY" and "Printed and Sold by B. FRANKLIN and D. HALL", lends support for the earlier date by its reference, at the page where the Gordon Statute ends, to the thirteenth year of the reign of King George, George I was king from 1714 to 1727.
15. Judge Richard S. Rodney was of the view that Delaware had a separate Supreme Court a quarter of a century before 1732. Judge Rodney's essay, *Early Delaware Judges,* now appears in published form as part of *The Collected Essays of Richard S. Rodney on Early Delaware,* 241, 242-43 (G. Gibson ed. 1975) (hereinafter cited as Rodney, *Early Delaware Judges).* Judge Rodney's view was subsequently disputed by Dudley Lunt who concluded on the meager evidence that the courts of the Lower Three Counties functioned solely from commissions issued without enabling legislation.
16. *Delaware Constitution of 1776,* Art. 17. The Court of Appeals evidently had no activity. Rodney, *Early Delaware Judges,* at 251.
17. The word "inferior" originated in Section 10 of the Gordon Statute which provided: "That none of the Judges of said Supreme Court, shall sit judicially in any of the said Courts of Common Pleas, Quarter Sessions, or any other inferior court of this government." 1 *Del.Laws* Ch. LIV, at 127. Thus, it originally attached to trial court jurisdiction generally. The use of "inferior" has changed somewhat in the subsequent evolution (see Art. IV, §28 *Constitution of 1897*) but it is important to note, as to the equity jurisdiction, it does not suggest a special or limited jurisdiction.

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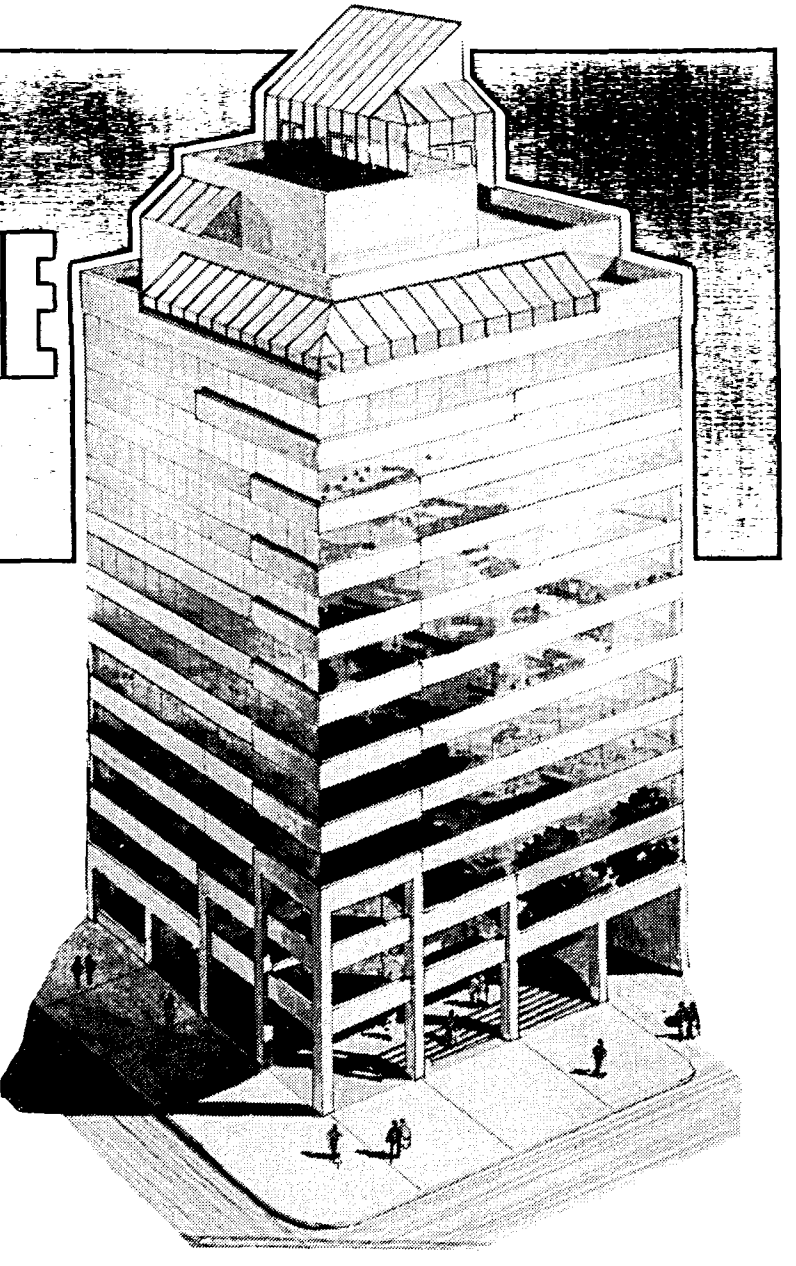

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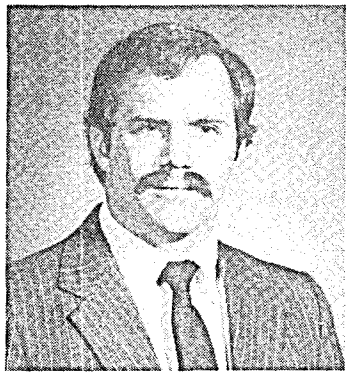
The Development Of The Delaware Court Of Chancery As A Corporate Forum

MICHAEL HANRAHAN



Mike Hanrahan is a transplanted New Yorker who is a graduate of Salesianum School ('70) and Columbia University (B.A. '74, M.B.A. '78, J.D. '78). He became an associate at what is now Prickett, Jones, Elliott, Kristol & Schnee in 1978 and a member of the firm in 1981. Mike is a member of the Delaware Corporation Law Committee and the ABA's Committee on Class Actions and Derivative Suits. In collaboration with Bill Prickett, he wrote "Weinberger v. UOP: Delaware's Effort to Preserve A Level Playing Field for Cash-Out Mergers", which will appear in the Delaware Journal of Corporate Law. For the past two years, Mike has been a member of the Board of Directors of Delaware Special Olympics, Inc.

The Delaware Court of Chancery is widely known for resolving corporate disputes. Although the creation of the Court in 1792 was by no means motivated by any need for a corporate litigation forum, the emergence of Chancery as the state court most influential in corporate matters is in many ways a natural outgrowth of its equity jurisdiction.

Creation of the Court

The Court of Chancery was established by Article VI, Section 14 of the Constitution of 1792 which vested in it the equity jurisdiction previously exercised by the Court of Common Pleas.[1] The Court acquired thereby all of the general equity jurisdiction of the High Court of Chancery of Great Britain at the time of the separation of the colonies,[2] subject to the statutory proviso that no adequate remedy exist at law.[3]

Delaware's creation of a Court of Chancery contradicted both the historical opposition to such courts in America and the post Revolutionary trend toward consolidation of equity and law. Most of the original thirteen states never had courts of chancery, or they abolished those courts before or during the revolution because such courts were resented as instruments of the royal prerogative and viewed as an attempt by the Crown to establish control over colonial justice: in many colonies the question of how and by whom equity should be administered was part of the political struggle between Crown and colonist.

Equity in colonial Delaware, however, derived from legislative authority, not Royal prerogative, and the equity power was exercised by the common law courts, not by a Royal Governor.* Consequently, there was no residual hostility to a Court of Chancery. Another factor that may have led Delaware to establish a chancery court in 1792 was the rapid growth in population and industry that followed the Revolution, which may have required equitable remedies to cope with expanded social and economic complexities. Moreover, in 1792 Delaware was a stronghold of the conservative Federalists, who were more sympathetic to English institutions.

A more direct explanation is that the Court was created for practical political reasons. The story goes that in 1792 the Federalists wished George Read to replace William Killen, a

* But see former Justice Quillen's analysis elsewhere in this issue.

The Editors

Whig and later a Democrat, who had served as Chief Justice of the Delaware Supreme Court since June 6, 1777. However, Read refused to displace Killen, whose acceptance of the post during the revolution had placed his life in jeopardy, and whose administration of the Court had been generally satisfactory. To induce Read to become Chief Justice, Killen was "promoted" to Chancellor, the titular head of the new judicial system.[4]

Development as a Corporate Forum

Chancery practice in nineteenth century Delaware included many of the remedies sought and defenses raised in the court today. From these and from the equitable principles underlying them, the Court's current corporate jurisdiction evolved.[5] For example, in a number of trust cases, the Court's rulings were founded on principles now important in corporate law. In *Richards v. Seal,* 3 Del. Ch. 266 (1861), the Court established that mere negligence of a trustee, not just active default, may be a breach of trust. The Court held a trustee liable for her co-trustee's retention of trust funds because her ignorance of his wrongdoing resulted from a lack of diligence. The Court's rulings foreshadow the duty of due care now imposed on directors of a Delaware corporation. *Gimbel v. The Signal Companies, Inc.,* Del. Ch. 316 A.2d 599, *aff'd per curiam,* Del. Supr., 316 A.2d 619 (1974).

Similarly, the duty of complete candor owed by majority stockholders and directors of Delaware corporations[6] may be viewed as an outgrowth of *McClary v. Reznor,* 3 Del. Ch. 445, 465, (1870), which held that a fiduciary relationship between the parties to a transaction creates a duty* to disclose facts that may influence the other party.

* In a sense Delaware had something very much like Rule 10b-5 long before the S.E.C. proclaimed it (in the far less felicitous language of Federal bureaucracy).

During the nineteenth century the Court heard a number of corporate cases that would be likely to find their way into the Court today: *McDowell v. The Bank of Wilmington and Brandywine,* 2 Del. Ch. 1 (1833) (enforcing a certificate provision restricting transfer of shares of a stockholder who was indebted to the corporation); *Logan v. McCallister,* 2 Del. Ch. 176 (1858) (acceptance by incorporators of legislative charter sufficient to establish corporate existence); *Colbert v. Sutton,* 5 Del. Ch. 294, 296 (1880) (stock certificates only represent evidence of title to stock); and *Allen v. Stewart,* 7 Del. Ch. 287 (1895) (injunction against sale of attached stock because judgment creditor's transfer of the stock to a third party was effective, though not recorded on the corporation's books).

In the late nineteenth century the legislature began to shift from legislative issuance and amendment of certificates of incorporation toward a general corporation law. In the process, the legislature made the Court of Chancery the forum for some corporate matters.[7] For example, the general provisions concerning corporations enacted in 1883 gave the Chancellor jurisdiction over dissolution proceedings and concurrent jurisdiction with the Superior Court to order corporate books brought to Delaware. 17 Del. Laws Ch. 147, §§27, 35-36.

While Delaware's General Corporation Law, enacted in 1899, did not add significantly to the Chancery Court's corporate jurisdiction, it eventually made Delaware the premier state for incorporation and, consequently, the site of frequent corporation litigation. During the twentieth century, the legislature has continued to make Chancery the forum for actions under the statute, including actions to compel a stockholders' meeting;[8] to determine the validity of corporate elections,[9] and for appraisal of stock affected by corporate mergers.[10] As part of the 1967 revision of the General Corporation Law, jurisdiction over enforcement of stockholders' rights to inspect corporate books and records

was transferred to Chancery from Superior Court. See 8 *Del.C.* §220.

The Court's primary role in corporate litigation derives not so much from statutory authority as from the suitability of its principles and powers as a court of equity for resolving issues arising in corporate disputes. In *Cahall v. Lofland,* Del.Ch., 114 A.224 (1921), *aff'd* Del.Supr., 118 A. 1 (1922) the Court applied the equitable principles governing trustees' conduct to corporate directors and imposed a fiduciary duty of loyalty and frankness. The Court also established that equity would protect stockholders' beneficial interests in corporate assets by permitting stockholders to sue derivatively on the corporation's behalf when corporate management refuses to protect the company's rights. *Harden v. Eastern States Public Service Co.,* Del.Ch., 122 A.705 (1923); *Fleer v. Frank H. Fleer Corp.,* Del.Ch., 125 A.411 (1924).

The development of Chancery's corporate jurisdiction through application of equitable principles and remedies continues even today. For example, the Supreme Court recently relied on equity's traditional trust and accounting jurisdiction in holding that the Court of Chancery had exclusive jurisdiction over a minority stockholder's breach of fiduciary duty claim. *Harman v. Masoneilan International, Inc.,* Del. Supr., 442 A.2d 487, 498-500, 503 (1982). While the Court certainly was not created with corporate litigation in mind, flexible and broad use of equitable conceptions has enabled the Court to evolve into a forum capable of effectively establishing and enforcing rules of fair play for corporate conduct. □

1. Parts of this article are drawn from unpublished papers I wrote about ten years ago: *The Delaware Court of Chancery: Delaware's Peculiar Institution; Colonial Opposition to Chancery Courts;* and *Reasons for the Survival of the Delaware Court of Chancery in the Nineteenth and Twentieth Centuries.* I am indebted to Honorable William T. Quillen's excellent *Historical Sketch of the Equity Jurisdiction in Delaware.*

2. *Glanding v. Industrial Trust Co.,* Del.Supr., 45 A.2d 553, 557-58 (1945); *DuPont v. DuPont,* Del.Supr., 85 A.2d 724, 727 (1951); *Webb v. Diamond State Telephone Co.,* Del.Ch., 237 A.2d 143, 146 (1966). The Constitution of 1831, Art. VI §5 and the present constitution, that of 1897, Art. IV §10 provide that the Court shall have all jurisdiction vested in it by the laws of the State. The current statutory provision granting the Court jurisdiction over all matters and causes in equity is 10 *Del.C.* §341.
3. This statutory limitation first appeared as Section 25 of the Colonial Act of 1726-1736. 1 Del.Laws Ch. 54. Currently, this limitation is contained in 10 *Del.C.* §342.
4. Justice Quillen has argued in support of this theory, (*A Historical Sketch,* pp. 114-126), while I have disputed the idea that the Court was established as a retirement home for Chief Justice Killen. (*Delaware's Peculiar Institution,* pp. 53-58).
5. See e.g.: *Houston v. Hurley,* 2 Del.Ch. 247 (1860) (rescisson); *Kinney v. Redden,* 2 Del.Ch. 46 (1837) and *Burton v. Adkins,* 2 Del.Ch. 125 (1846) (specific performance); *Farmers and Mechanics Bank of Delaware v. Polk,* 1 Del.Ch. 167 (1821), *rev'd on other grounds,* Del.H.Ct. E & App., 1 Del.Ch. 176 (1822) (accounting); *Warner v. Allee,* 1 Del.Ch. 49 (1818) (laches); *Wilds v. Attis,* 4 Del.Ch. 253 (1871) (estoppel).
6. See: *Lynch v. Vickers Energy Corp.*, Del.Supr., 383 A.2d 278 (1977); *Weinberger v. UOP, Inc.,* Del.Supr., 457 A.2d 701 (1983).
7. These general incorportion laws also placed some jurisdiction in the Superior Court. See: 15 Del.Laws Ch. 119 (1875); 17 Del.Laws Ch. 147 (1883).
8. 22 Del.Laws Ch. 166, §31 (1901). The current provision is 8 *Del.C.* §211.
9. 33 Del.Laws Ch. 104 (1923). Current provision: 8 Del.C. §225. This jurisdiction at one time belonged to Superior Court. 17 Del.Laws Ch. 147 §24 (1883).
10. 44 Del.Laws Ch. 125 (1943). Current provision: 8 *Del.C.* §262.

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The Editors.

JUDGE SEITZ REMEMBERS

An Interview conducted by

BRUCE M. STARGATT

Collins J. Seitz was graduated from the University of Delaware and the University of Virginia Law School. He was admitted to the Delaware Bar in 1940. He practiced law in Wilmington until he was appointed Vice-Chancellor on February 1, 1946. On June 19, 1951, he was appointed Chancellor of the State of Delaware. He was reappointed Chancellor in 1963.

In July of 1966 he became a United States Circuit Judge for the United States Court of Appeals for the Third Circuit. On June 1, 1971, he became Chief Judge of that Court, a position he still holds.

Collins J. Seitz is preeminent among Delaware judges in the second half of the twentieth century. Indeed, his 38 years of continuous service as, successively, Vice Chancellor and Chancellor of Delaware and Judge and Chief Judge of the United States Court of Appeals for the Third Circuit are virtually unrivalled anywhere. Judge Seitz agreed recently to participate in an on-the-record conversation about his experiences as a judge, with particular reference to his 20-year tenure in Chancery, which he has described as his first love.

Judge Seitz is a native of Wilmington. A 1937 graduate of the University of Delaware, he received his legal education at the University of Virginia Law School, where he received high academic honors as an editor of the Virginia Law Review, and member of Order of the Coif. Returning to Wilmington, he engaged in private practice for several years, serving also as a part-time New Castle County attorney. Taking a strong interest in what has since become known as the delivery of legal services, he was instrumental in the formation of the Legal Aid Society and the Delaware Lawyers Reference Bureau.

On February 1, 1946 he was designated Vice Chancellor. At 31, he was the youngest Delaware judicial appointee in over 100 years. In June, 1951 he was named Chancellor and served in that position until July, 1966, when he was appointed by President Johnson as Judge of the Third Circuit Court of Appeals. He became Chief Judge of that Court in 1971, the position he presently holds. He is now the ranking Chief Judge in the country.

While serving on the Court of Chancery, Seitz found himself on the cutting edge of the earliest efforts to eliminate racial segregation as a legal institution in Delaware. An early Seitz decision when he was still Vice Chancellor enabled the first blacks to enter the University of Delaware. An appeal from one of his subsequent decisions was consolidated into what became the landmark U.S. Supreme Court case, *Brown v. Board of Education,* in which his observation that separate institutions were inherently unequal institutions was proclaimed the law of the land. At the same time, he was rendering opinions in corporation law of such strength and importance

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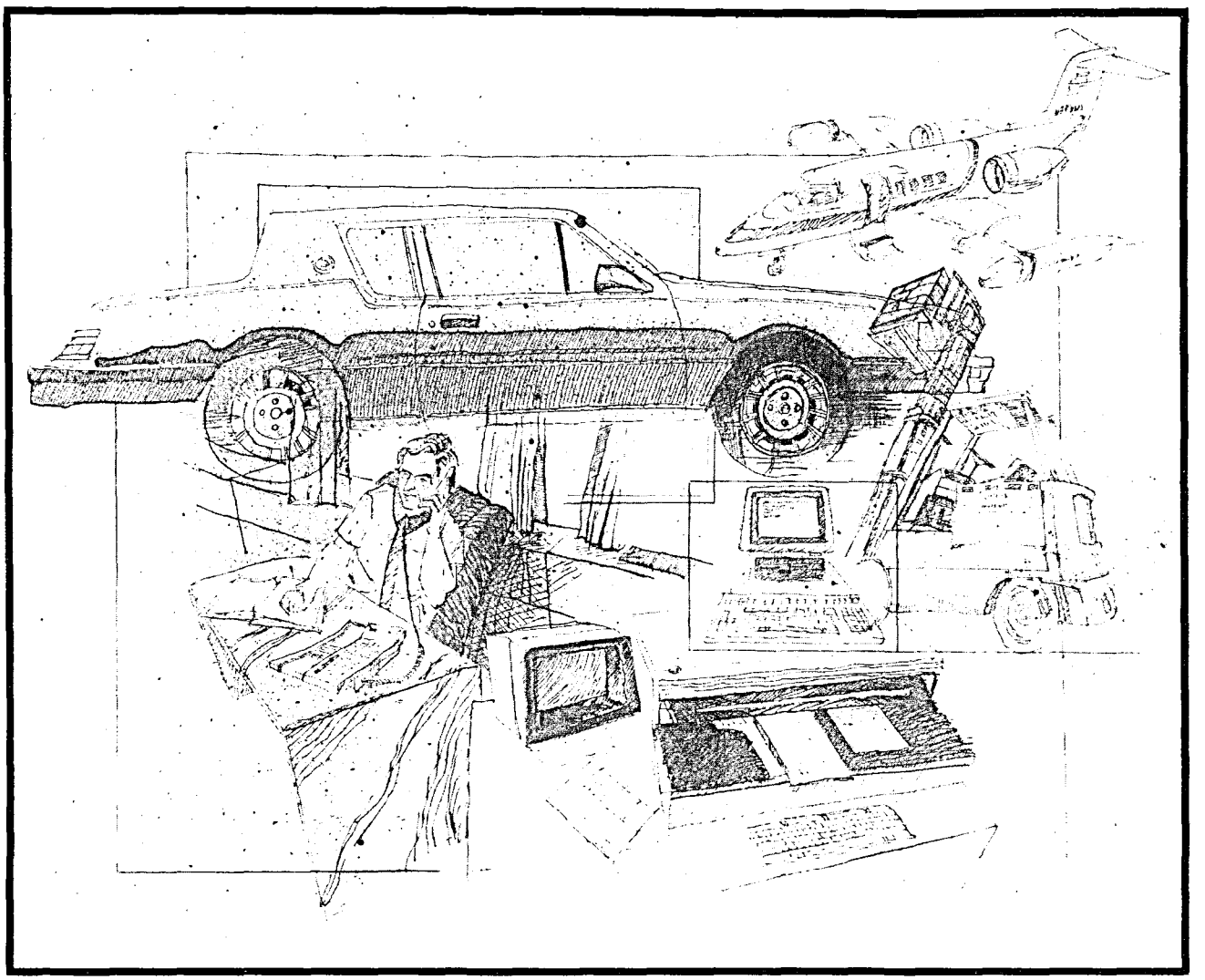

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that those bellwether decisions have found their way into standard law case books. Later, as Judge of the Court of Appeals, he was the author of the now famous *"Lindy"* opinion *(Lindy Bros. Builders of Philadelphia, Inc. v. American Radiator and Standard Sanitary Co.,* 482 F.2d 161 (1973)), which has achieved the marks of a national standard for calculating awards of counsel fees to prevailing parties in class actions and public interest litigation.

Judge Seitz's efforts as a jurist and his tireless efforts in support of racial equality and the sound administration of justice have earned him numerous civic awards, including the *News Journal* Award for Distinguished Citizenship and the First State Distinguished Service Award of the Delaware State Bar Asoociation. He has been awarded honorary Doctor of Laws degrees by the University of Delaware and Widener University.

Judge Seitz's long and distinguished career and his comparative youthfulness have occasionally inpired a sense of bewilderment in younger lawyers unfamiliar with his record. Judge Seitz likes to tell of a lawyer, who, arguing before him in the Court of Appeals, referred to an earlier Seitz Chancery Court decision as a learned opinion "by your distinguished father."

Judge Seitz has three daughters and a son, three of whom are presently in law school, holding out the promise that the Seitz family contribution to Delaware and American jurisprudence will long continue.

Delaware Lawyer's interview with Judge Seitz was conducted by another distinguished Delaware lawyer, Bruce M. Stargatt. Bruce is a graduate of the University of Vermont and Yale Law School. A senior partner in the firm of Young, Conaway, Stargatt & Taylor, Bruce is generally acknowledged to be one of Delaware's most formidable trial lawyers. Bruce has matched his success in private practice with public service. He served as Chairman of the Commission that completely overhauled the Delaware Criminal Code, is Vice Chairman of the Supreme Court Rules Committee, a Fellow of the American College of Trial Lawyers and a member of the American Law Institute, and, in 1981-82, was President of the Delaware Bar Association.

Stargatt: It was as a very young lawyer, six years after your admission to the Bar, that you accepted an appointment as Vice Chancellor of the Delaware Court of Chancery. What was it that made you decide to take the Bench?

Seitz: To get a little bit of experience.

Stargatt: What started in 1946 as a short excursion became a long trip.

Seitz: Indeed. Indeed it did. I loved what I was doing.

Stargatt: Did you expect when you first took the Bench to have the sort of zest and feel for it that you developed later on?

Seitz: Yes. I had some fixed views of what a judge should be like.

Stargatt: What were those?

Seitz: As a young lawyer when I came into the courts, a lot of the older lawyers were permitted by the judges to sort of dominate the proceedings so that you didn't feel that you had the same attention and respect from some of the judges as the older members of the Bar. The Brahmins of the Bar would talk you down, interrupt you with tacit judicial approval. That was one of the things I immediately corrected in my court in 1946. So the litigants who were in Court and observing what was going on had a sense that their attorney — old, young, what have you — had the same shake as the most respected members of the Bar. And I have been observing that principle ever since. In a big case in the Court of Appeals a few years ago everyone in the courtroom was appalled when I addressed a former Judge as "Mr." throughout. The law clerks couldn't understand it. And I said "that's another one of my foibles". Every lawyer who enters my Court comes in with the same status. I don't want it to appear

that the Bench is saying "Judge so and so" to counsel on the one side as opposed to the lawyer on the other side. Litigants don't understand that. I understand that there is not full agreement with my approach. I believe very strongly in the appearance of justice as well as justice in fact.

Stargatt: When you first became Vice Chancellor, who appointed you?

Seitz: Chancellor Harrington. In those days there was only one Vice Chancellor, and he was appointed by the Chancellor. Burt Pearson was the first Vice Chancellor, and I succeeded him when he went on the Superior Court Bench. The Vice Chancellor served at the pleasure of the Chancellor and had no term. I had anticipated only staying for four years until Chancellor Harrington's term ended in 1950. I figured when he stepped down as Chancellor I'd come back to practice law. Then the General Assembly passed a constitutional amendment effective in 1949 which created the position of Vice Chancellor as an independent office appointed by the Governor, with the same stature as any other state judge. It bestowed a full twelve year term on me. Under the old system the state trial judges also constituted the Supreme Court. So I became a member of the Supreme Court. I had an opportunity to perform the reviewing function, as well as to attend to the regular business of the Chancery Court.

"Equity is a great jurisdiction. It provides the flexibility to adjust rights and disputes as the society becomes more complex. This may seem strange to the layman, because most people think about courts and money. In a complex society injunctions are invaluable."

Stargatt: Did you enjoy the mix of cases you had to work on in Chancery?

Seitz: I did, indeed. You could go one day from a dispute about access to an alley here in Wilmington or easement on land in Sussex County. The next day you might be tackling a battle in one of the largest corporation cases in the country. A lot of people are not aware of the fact that it was probably not until the end of the Second World War that the battle royal started over title to much of the lands abutting the ocean and bay in Sussex County. Consequently, when land values started to rise astronomically, litigation accompanied it because the titles were far from clear and there were a lot of squatter's rights, easement cases and so forth. So I think at one time or another I passed on title to most of the land along the bay and the ocean in Sussex County. When you get into litigation over the title to land the parties get out the family bible and the family pictures to try to show what land they occupied for the required number of years. One of the important elements of proof sometimes was where the privy was located. I became a master of the privies in Sussex County. Then Chief Justice Southerland loved to josh me about it.

Stargatt: From the ridiculous to the sublime, or maybe the other way around, one of the participants in *Campbell v. Loew's,* [Del. Ch., 134 A.2d 852 (1957)] wrote a book in which he discussed it . . .

Seitz: Great case.

Stargatt: Great book?

Seitz: I've no comment on that, but it was a great case. It was a power struggle, and they're exciting. That's why I love corporation law. It had a lot of sex appeal for me. A big fight. And this was a fight of giants who had brought in a lot of legal talent. They went at it hammer and tongs. I think it's probably known in the scuttlebutt of the Bar that although he didn't get the credit, the principal argument that was persuasive was made by the late Clair Killoran. His argument prevailed in that case. He was prepared to the hilt and made a beautiful argument. It still sticks in my mind.

Stargatt: Another of your decisions known to every corporate lawyer was your opinion in the *Ringling Brothers* case. [*Ringling v. Ringling Bros.-Barnum & Bailey Combined Shows, Inc.,* Del. Ch., 49 A.2d 603 (1946), *aff'd,* Del. Supr., 53 A.2d 441 (1947).]

"The knowledgeability of the Delaware Chancery Court has to be a big reason why there are so many Delaware corporations."

Seitz: That also sticks in my mind not just for the legal issues but because of the personalities involved. The aspect of the case in most of the case books in law school is the legal issue — the validity of a pooling agreement. Nice problems about whether you could imply proxies and things of that sort. But the people were interesting. They were really characters of the first order. There was a vice president who didn't much care about how the case came out as long as the decision didn't interfere with his right to retain his private car on the circus train. What I can remember most about the case was the hearing in which the witnesses were the people who were in charge of signing the circus acts and so forth. The litigation was casting a pall over who was going to control signing up the new acts for the circus for the next year. And I remember vividly one of the members of management saying on the witness stand, "We don't particularly care, Your Honor, which way you decide it, but we want you to decide it promptly so we know who goes to Europe to sign up the acts for the circus for next year."

Another great case involved the Bata Shoe Company. [*Bata v. Hill,* Del. Ch., 139 A.2d 159 (1958), *mod.,* Del. Supr., 163 A.2d 493 (1960), *rearg. den.,* 130 A.2d 711 (1961),

cert. den., 366 U.S. 964 (1961).] I believe it was the longest trial in the State's history — 100 trial days, not an American citizen was involved, and it retraced a great deal of the history of the Nazi Germany takeover of Czechoslovakia. The Delaware corporation law was the reason it was tried in Chancery.

Stargatt: Circus acts to one side, how did you view your role in terms of the promptness of decision making?

Seitz: I think that may be the most important thing of all. I came on the Bench in the midst of a tradition of leisureliness with respect to dispositions. I was not satisfied with the speed with which cases were handled. So I really whipped them out. Like the witness in *Ringling Brothers,* I've always believed, particularly in commercial transactions, that it's almost as important to decide it promptly as how you decide it. I gave all matters apppropriate consideration. But I got the opinions out. And I still feel strongly about that. Historically as you know going back to the English Court of Chancery, Chancery never had a great reputation for getting its work out promptly. Remember Dickens's *Jarndyce* case in *Bleak House* which went on for years in English Chancery. So that was a key element. Prompt dispositions.

But I do want to make it clear that Delaware Chancery has had a great tradition for a long time. I think it is due in part to the sophisticated type of litigation. I think people from other parts of the country are constantly amazed at the pleasant, sophisticated atmosphere of the Court of Chancery. And in corporate litigation, particularly. The knowledgeability of the Delaware Chancery Court has to be a big reason why there are so many Delaware corporations.

Stargatt: We now take equal access to public schools for granted. What do you remember about the University of Delaware desegregation case? [*Parker v. University of Delaware,* Del. Ch., 75 A.2d 225 (1950).]

Seitz: Well, you remember this was before *Brown v. Board of Education.* [347 U.S. 483 (1954).] The action was to desegregate the University of Delaware primarily because under *Plessy v. Ferguson* [163 U.S. 537 (1896)], Delaware State College, which was required to be all black under the State Constitution, was separate but not equal. In any event that action was filed in the Delaware Court of Chancery. An interesting part of that, now that I think of it, was that the trustees of the University of Delaware were defendants and Chancellor Harrington was a trustee. And so I was hearing a case where the Chancellor who had appointed me Vice Chancellor was a defendant. I held the institutions were not equal and issued an injunction against the trustees of the University of Delaware prohibiting them from discriminating on account of race in admission policies.

Stargatt: Why was your decision not appealed?

Seitz: There was no way the decision could be meaningfully appealed. The facts showed overwhelmingly that the disparity was pervasive. It's all in the reports. Let me just add a little footnote to that. I still remember that Chancellor Harrington and I had offices in the courthouse, and I walked into his Chambers and I handed him a copy of my opinion. I said "Here, Chancellor, I just enjoined you."

Stargatt: Did he take it with good humor?

Seitz: Yes, he laughed. He was a great person, a great human being.

Stargatt: What about the second desegregation case? [*Belton v. Gebhart,* Del. Ch., 87 A.2d 862 (1952), *aff'd,* Del. Supr., 91 A.2d 137 (1952), *aff'd,* 347 U.S. 483 (1954).]

Seitz: That was in 1952 and involved the Hockessin Elementary and Claymont High Schools. Two theories there, one that segregation itself was unconstitutional and in any event they were not equal. They were long, hard-fought cases. I remember visiting all the schools that were involved, going through them and inspecting them. And it was tried in a very professional manner considering the emotional environment. In my opinion I said that I thought segregation by law was unconstitutional, but it was for the Supreme Court to say so, as it later did as part of *Brown v. Board of Education.* Then I went on to hold that the schools were not equal and again enjoined the segregated operation of those schools.

Stargatt: Did you get any pressure or ill feeling from either of those decisions from the public?

Seitz: Yes, mostly anonymous letters. It wasn't too bad. I don't think the people fully appreciated what was going on at that time. I really don't. Incidentally as I look back on it, in those days the whole thrust was desegregation. In other words, that it was just illegal for the law to segregate.

Stargatt: But this was an early step?

Seitz: This was a first step.

Stargatt: It's hard for many people, even lawyers who lived through those times, to appreciate the differences between society as it is now and as it was then.

Seitz: No way. No way. The same, although in a very different manner,

is true with respect to the attitude toward women. It's changed so markedly. It is hard to believe. Just as lawyers practicing in Delaware cannot understand the atmosphere in the years when I started to practice law in the early forties. Very different.

Stargatt: How?

Seitz: Well, there was a group, which I will not name, which dominated society in Delaware. Dominated the Bench and the Bar. The passing years have given us a remarkably open society. I'm delighted.

Stargatt: How would you compare the work that you've been doing sitting on the Court of Appeals since 1966 with your service on the Court of Chancery from 1946 to 1966?

Seitz: Being a trial judge if you like people is much more exciting than being an appellate judge. The difference, I guess, is between being a lay person and being in a monastery. In the trial court you have daily constant contact with lawyers, seeing live people on the witness stand. In the Court of Appeals, you deal with lawyers and papers. Very different world. I'm not unhappy being an appellate judge. It is exhilarating being in a position of reviewing someone else's work.

Stargatt: How about the difference in administrative responsibility?

Seitz: Of course they're light years apart because of the tremendous volume now. I love court administration because I can see what it means in terms of efficient disposition of cases and so forth. So it's been no burden to me. Twenty-seven years I've been chief of one court or another. But the subject matter of the Court of Chancery was much more interesting than the subject matter of the Court of Appeals.

Stargatt: Why do you say that?

Seitz: Because we have great variety for one thing in the Court of Chancery. Corporations to trusts to injunctions. In a complex society, despite the desire for money, a lot of people today really need an injunction and go to Chancery to get an injunction. Consequently, equity gets into a great variety of cases. The most exciting thing I did in the Court of Chancery was framing decrees. There are so many ways to mold a decree to effectively adjust rights of litigants. And I loved that. That's the most creative side of the Court of Chancery. Equity is a great jurisdiction. It provides the flexibility to adjust rights and disputes as the society becomes more and more complex. This may seem strange to the layman, because most people think about courts and money. In a complex society injunctions are invaluable.

Stargatt: How would you rate Delaware lawyers with other lawyers from other jurisdictions?

Seitz: Generally every bit as high. In the areas of sophisticated corporate litigation, trust litigation and so forth, superior to most lawyers I've seen. I have held a high opinion of Delaware lawyers while I was Chancellor for many years, and I feel the same about the Delaware lawyers appearing in the Court of Appeals.

Stargatt: Is there any explanation for it that you can think of?

Seitz: The best explanation I can think of is that the Delaware lawyers, when they're of the caliber to become involved in this type of litigation, seem to hone their analytical and forensic skills to a high level. I'm not trying to run down other lawyers in other places because there are a lot of terrific lawyers everywhere. I take a lot of kidding from the other judges when I express my view about Delaware lawyers. But I really think they agree with me. There is something special about the Delaware Bar. □

THE DUFFY YEARS IN CHANCERY

The Honorable William Duffy

William Duffy devoted more than twenty years to judicial service before his retirement in 1982. The range of his exposure to the common law (Judge and President Judge of the Superior Court), equity (Chancellor), and the appellate process (Associate Justice of the Supreme Court of Delaware) enriched a fundamental wisdom and a careful sobriety of even-handed judgment. Deeply respected and profoundly well liked, our Mr. Justice Duffy has become a popular ornament of his profession. We find his following words charming, characteristically charming.

A popular perception of the Court of Chancery has a Chancellor at one end of a modest courtroom, facing a battalion of Wall Street lawyers, each wearing a dark suit, white shirt and conservative tie. There are, of course, piles of paper everywhere.

Well, from time to time the Court of Chancery does look like that — although the lawyers often come from Houston, Chicago or Los Angeles to join their colleagues from New York City and Wilmington. In that scenario, the case is almost certain to involve a complex corporate issue of great importance to the parties, with some fallout which will affect how many large businesses across the country conduct their intra-corporate affairs. But the Court of Chancery is also a people's court and any study of the cases filed will undoubtedly show that a substantial majority of them (about 75%) involve only Delaware parties and issues. They include controversies over such matters as land titles, zoning, picketing in labor disputes, and property rights under wills and trusts. With the corporate litigation, it adds up to a rich and diverse subject matter jurisdiction.

One of the first cases I tried in the Court of Chancery involved a petition for appointment of a guardian for an 83-year-old man who had sold several parcels of property to non-relatives for substantially less than their fair market value. A guardianship was sought on the ground that the old fellow was doing what he did because of advanced age or mental infirmity and thus was unable to care for his own property. But a psychiatrist testified that he had a Utopian philosophy and wanted other people to benefit from what he had and the lure of making more money than he believed to be "just" had no attraction for him. Indeed, while employed, he had refused a pay raise and suggested that his employer use the money to raise the salaries of other people in the office. Later, he accepted only a third of a pension to which he was entitled. That kind of conduct may be not reasonable for present realistic life, as one psychiatrist put it, but a litigant living by standards with an "out-of-this world" quality usually found only in a Christmas play (*Miracle on 34th Street,* for example) was found, alive and well, in the Court of Chancery.

A day or two after I had taken the oath as Chancellor, I was working in my office when my secretary, Ruth Laird, came in and said that Robert Richards, Jr., was waiting to see me. Bob had not called for an appointment

so I did not know what he had in mind. He came in, but not alone; with him were his daughter Jane (Roth) and his son, Robbie, both of whom were also members of the Bar. Bob and his children had walked across Rodney Square, not to deliver a letter, but to make a personal courtesy call on the new Chancellor. In so doing, Bob explained, he was continuing a tradition to which *his* father had introduced him. In Delaware we have a pleasant custom of writing a brief note to a newly appointed judge, and many members of the Bar attend the ceremony during which the judge takes the oath of office. Those create treasured memories for a new judge and his family. But a personal courtesy call in Chambers was a graceful reminder to me that the Office of Chancellor has long had a special significance for our Bar.

Before the separate Supreme Court was created in 1951, the Chancellor held the highest judicial office in the State. And while the primacy of the Office in the Delaware judicial system is now limited to the trial courts, the Delaware Chancellor is widely regarded as the Chief Judge of one of the most important trial courts in the country.

But it does not follow that everyone knows what a Chancellor does. Some years ago, I carried a judicial tag on my car. I remember stopping for gasoline and chatting with the service station attendant while he was filling the tank. He was obviously curious about the "W.D." lettering and the word "Chancellor" below the letters on the plate. He looked at the tag, then at me, then back to the tag. He was plainly puzzled. But then his face brightened—he had the answer. Smiling he turned to me and said, "I get it, you're Chandler the undertaker!"

Well, a Chancellor does not bury people, but some of the things he is called on to do are directly related to a cemetery. Another day I was working away in my office when a Delaware lawyer called and said he had a somewhat unusual problem. But that was not unusual because the Court specializes in the unusual. Indeed, the basic premise of all equity jurisdiction, current and historic, is that "sufficient remedy" for the litigant is not available in any other court. My caller soon appeared and he had with him a copy of John M. Clayton's will. As every learned lawyer knows, Mr. Clayton was one of Delaware's great public figures: United States Senator, Secretary of State, Chief Justice of Delaware, negotiator of the Clayton-Bulwer Treaty, and so on. But he had died in 1856, and here I was reading his will in 1970.

The problem was this: In his will Mr. Clayton, who is buried in a churchyard in Dover, had left detailed instructions for a rather elaborate arrangement over the family grave—marble pillars, a vaulted marble roof, and similar appurtenances. All of that had been completed long ago but time had taken its toll: the foundation was crumbling and there was concern that the large marble structure might fall and do great bodily harm to someone. Would the Chancellor consider the matter and perhaps permit some change to be made to the structure? Of course he would. After studying the will, the plot plan and photographs of the site, the Court approved a redesign of the memorial which honored Mr. Clayton's intention and yet was consistent with safety requirements. An order was entered and trustees were then appointed to carry out the plan.

So, 114 years after John M. Clayton died, a Delaware judge, for the first time, was reading his will, trying to divine his intention as to the gravesite, and then ordering changes that would accommodate his wishes to present conditions at the cemetery. I think this illustrates that the useful function of the Court of Chancery in Delaware life is not limited to what goes on in the courtroom or to what appears in the Atlantic Reporter.

I was surprised to learn how few persons had occupied the Office of Chancellor. From the time when the

Union began in 1789 until 1973 when I left the Court of Chancery, Delaware had had 58 Governors. But during that span of almost 200 years the State had had only 15 Chancellors. Long tenure of some of them and the separate and specialized character of the Court undoubtedly were significant in bringing stability and prestige to the office. The unique responsibility that the Court has had in this century for hearing and deciding intra-corporate disputes (and the resulting effect of that on the commercial life of the country) no doubt played a part, too. But, in my judgment, the strength and prestige of the Office had evolved largely from the character and competence of the men who had administered it during its emergence as a "national" court, that is, from about 1920 to 1965.

And that reminds me of a somewhat different aspect of judicial life within the Court, as I experienced it. The Superior Court, on which I first served, had (and still has) a remarkable collegiality among most of the judges who share their learning as well as their companionship. In the Supreme Court, some matters (almost exclusively procedural) are decided by a single Justice but a final judgment is made only by a three-member panel (or by the Court *en banc*), and any such action taken by the Court is the responsibility of all the Justices. A Chancellor, however, usually works alone and, while he may consult another judge from time to time, he is a more solitary figure than in either of the other Courts. That can be a very lonesome position under many circumstances, particularly when all parties are joined in making a critical application: for example, in a derivative action which is being settled without objection, or in a request for counsel fees to which all of the parties have agreed but for which Court approval is required, and so on.

One naturally is reluctant to raise an issue when there does not appear to be one, or to second-guess experienced lawyers who, as adversaries, have negotiated an arms-length settlement. But when public policy, for whatever reason, requires Court approval of an agreement otherwise complete, the Court's independent judgment is necessary. It is in that context, which is little publicized and often goes unnoticed, that the Chancellor performs some of his most significant duties.

In my experience, only a modest percentage (about 25%) of the cases filed in the Court of Chancery involved corporate matters. Many of the other cases involved real property issues. And one would think that after more than three hundred years all land title problems would have been settled in this small State. Alas! Not so — they still go on and on.

The beachfront land south of Rehoboth has been the subject of much litigation in recent years. In at least one case the significant issue ultimately required consideration of the quality or nature of William Penn's title. Penn had received two deeds from the Duke of York in 1682 and generations of litigation followed. The deeds included all land in what is now Delaware. But what sort of title did Penn have? Was he an owner in the same sense as an English sovereign? Well, Penn could make laws, appoint judges, and do other things that only a king or a government could do. Or was he a private owner—just like any other person who held title to real property? The issue was crucial, because if Penn's title was governmental rather than private, then any land which he had not deeded passed to the State of Delaware on July 4, 1776.

To my surprise (and disappointment), after all the litigation and the scholarly writings over almost three centuries, a Court had not determined the nature of Penn's title. That is no longer true. Historians may continue to differ but, for title purposes, the question is no longer open. In the 1970s Delaware twice decided, first in the Court of Chancery and then in the Supreme Court, that Penn's title was essentially governmental.

Corporate litigation gives the Court of Chancery its national character, but its role is vital in the settlement of intra-State disputes. Such controversies include all aspects of land title and use, from a review of "adjustment" decisions made by administrative agencies to zoning litigation; and geographically the disputes involve the entire State, from the "foreshore" on the Delaware River at Claymont to riparian rights on the ocean at Fenwick Island. In sum, the subject matter jurisdiction of the Court of Chancery is a legal mosaic of many textures, colors and characters. It is fascinating, and it continues to enlarge, as it must, to serve the State as new problems arise from changes in our culture and technology.

A few months ago, over an extra cup of morning coffee, I was reading the morning paper when I spotted a report about a recent decision by the Court of Chancery. I was indulging the right of a citizen to disagree with the result, and the more I read the more I disagreed. And then I turned to the inside page where the story was continued. You guessed it. The Court had relied wholly and entirely—with quotations at length—on a decision by Chancellor Duffy! And then, thus enlightened, I had a second thought about the news story. "Well, you know, " I said to myself, "that ruling wasn't so bad after all!" □

MINSKY JURISPRUDENCE

Our spies at offices of the Newsletter published by the Delaware State Bar Association tell us that the Editor of that august periodical, David Ripsom, recently received from the Administrative Office of the Courts a request to print some court rule changes. The cover memorandum explained the urgency of prompt dissemination to the Bar: "Pasties will be delayed due to lack of funds". Those of us who misspent our college days haunting burlesque houses will surely be aghast at the thought of our impoverished courts naked to their enemies.

MARVEL PRESIDING

An acute observer surveys the Court during a period of its great activity

CHANCELLOR WILLIAM MARVEL

Those of us Delaware practitioners now mouldering into late middle age share the recollected pleasures of repeated appearances before Chancellor William Marvel during his long and eloquent tenure. The atmosphere in his courtroom was one of exceptional civility and wit, the kind of wit one encounters only in an accomplished and civilized man. We cannot resist citing one example.

The author of this prefatory folderol appeared on behalf of a plaintiff before Marvel in the early 1960s. The defense, very ably represented, accused plaintiff of concealing a material witness, a Mrs. Burnham. This supposed dereliction prompted defense counsel to a positively Mosaic torrent of denunciation and (well-controlled) righteous wrath.

"We have sought again and again to depose Mrs. Burnham, but the plaintiff will not disclose her whereabouts. Mrs. Burnham is a vital, a material witness. I ask you, where is Mrs. Burnham?" Defense counsel then hauled off and let fly with some souped-up rhetorical flourishes worthy of a road company King Lear.

"Mrs. Burnham is concealed from us. I ask you again, WHERE IS MRS. BURNHAM?" Counsel paused to permit the full force of his cunning theatricality to sink in. (His presentation would have been devastating before a jury.) The Chancellor thought for a moment and then made a helpful suggestion.

"Perhaps she went to Dunsinane."

Chancellor Marvel, now in vigorous and most useful retirement, continues to serve the court on which he sat. He has found time to favor DELAWARE LAWYER with the assorted reminiscences below.

In reflecting on my years as Vice Chancellor and Chancellor, I came to the conclusion that my first and second reported opinions, *Weinberg v. Baltimore Brick Company,* Del. Ch., 108 A.2d 81 (1954), *aff'd,* Del. Supr., 114 A.2d 812 (1955), and *Simmons v. Steiner,* Del. Ch., 108 A.2d 1973 (1954), *reversed,* Del. Supr., 111 A.2d 574 (1955), set a discernible pattern for my subsequent rulings, which have tended to be protective of claims to property and at the same time receptive to civil rights claims guaranteed by the equal protection clause of the Fourteenth Amendment.

The first case dealt with sources for the payment of corporate dividends; the second with the right of black students, enrolled in a previously all white school, to remain in that school in light of their scholastic potential. *See also Burton v. Wilmington Parking Authority,* Del. Ch., 150 A.2d 197 (1954), *reversed,* Del. Supr., 157 A.2d 894 (1960), *reversed,* 365 U.S. 715 (1960).*

THE IRONIES OF PROTRACTED LITIGATION

In retrospect, the case that haunts me most, which was docketed in the Court of Chancery in 1962, persists there, and is now entitled *Trans World Airlines, Inc. v. Summa Corporation and William R. Lummis, Delaware Ancillary Administrator of the Estate of Howard R. Hughes,* C.A. 1607. It is just *now* being readied for trial. The long delay in the progress of this case calls for stricter control of the court's docket in situations such as this, in which counsel of record permit a case to drag interminably.

* Chancellor Marvel's decision, repudiated by our Supreme Court, was reinstated by the United States Supreme Court. To the extent there is a last word on anything in a very wordy profession, the Marvel decision is now the last word on the subject. It blew the whistle on a devious and distasteful conduct: the practice of racial discrimination camouflaged as "private" dealing by a discriminator whose business was pervasively benefited by its link to public authority.

When this case was filed, companion litigation between the same parties was pending in the District Court of the United States for the Southern District of New York. Both cases charged defendant, the late Howard Hughes, who held a majority interest in the plaintiff, and Hughes's wholly owned corporation, then known as Hughes Tool Company, with breach of a fiduciary duty to the plaintiff, in failing to provide it, on the advent of the jet age, with a fleet of jet-propelled aircraft sufficient for successful competition with other domestic airlines. (There was also a charge that such conduct constituted a violation of the federal antitrust laws.)

Defendant Hughes failed to appear in the New York action and his co-defendant Hughes Tool made a so-called business decision to default rather than produce Hughes, its president, for pre-trial discovery. A default judgment was entered in favor of plaintiff Trans World. After a hearing before a special master, plaintiff received a $45,870,278.65 award before trebling, as provided under the federal antitrust laws. The judgment was approved by the District Court of the United States for the Southern District of New York and affirmed by the United States Court of Appeals for the Second Circuit. In 1973, the case went, for the second time, to the Supreme Court of the United States, which decided, as a matter of federal law, that approval by the Civil Aeronautics Bureau of defendants' acquisition of control of Trans World barred any recovery under the antitrust laws and set aside the default judgment. 409 U.S. 363 (1973).

As the parties now prepare for trial here in Chancery, plaintiff announces that it will prove by defendants' admission that had Trans World been free to place its own orders for a jet fleet paid for out of its own resources, it would have benefited financially. In other words, Trans World's damage claims, which it now wishes to litigate, arise from an alleged policy of the defendants that required plaintiff to receive jet aircraft under a leasing arrangement controlled by Hughes Tool. Plaintiff seeks reimbursement for the extra expense incurred in leasing aircraft from Hughes Tool, and damages flowing from the asserted inadequacy of the aircraft fleet ultimately made available to it.

This case is notable not only for its age but also because of its use of sequestration as a means of bringing an additional party into the case to defend a counterclaim, and as a means of seeking to compel the appearance of a non-resident director of Trans World by seizure of his stock in Ford Motor Company, a corporation which had, has, and, will presumably have, nothing to do with the matter in issue. I would guess that the limits to which sequestration was allowed to proceed in this case probably played some part in the decision of the Supreme Court of the United States in holding the Delaware sequestration statute unconstitutional in *Shaffer v. Heitner,* 433 U.S. 186 (1977).

COURTROOM ODDITIES

I remember two unusual courtroom incidents during my term in office. The first took place in the old courtroom of the Court of Chancery on the second floor of the New Castle County Courthouse. I had disallowed a proposed settlement of a stockholders' derivative action. A lawyer who had argued in favor of the settlement approached the bench, proposed order in hand, and persisted in arguing in favor of the settlement. He pursued me to the very door leading to chambers, still arguing, and I just managed to get into chambers before shutting the door in his face. Fortunately, at this point he gave up the chase.

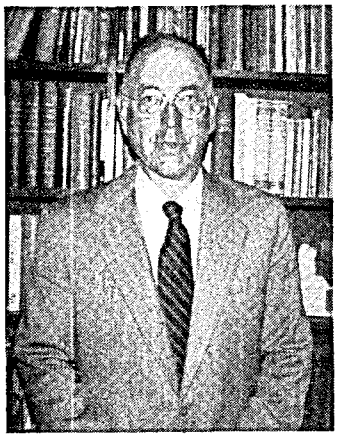
Another unusual incident occurred many years ago downstate. A trial lawyer appeared on time for his case but dressed in hunting clothes. Conceding that it was the opening day of duck season, I excused his dress, but he never appeared before me again other than in formal courtroom attire. □

Chancellor Marvel's reminiscences display the quality of his tenure, conspicuous for decorum, good courtroom manners, laconic wit, and deft rulings that conceal a fierce concern for individual rights and fair play. *Vide Burton v. Wilmington Parking Authority,* above.

With characteristic modesty, Chancellor Marvel has declined to comment on what many consider to be one of his most important rulings: *Condec Corporation v. The Lunkenheimer Company, et al.,* 230 A.2d 769 (Chancery 1967). That decision, a model of no-nonsense lucidity proscribes manipulative issuances of corporate securities, technically lawful under the General Corporation Law, where the motive is selfish and unrelated to the business purposes of the issuing company. This decision announced in the clearest language that what you *can* do is not necessarily that which you *may* do when a court of conscience is looking over your shoulder. *Condec* is widely and regularly cited. We don't think it is going too far to suggest that *Condec* did much to enhance the good name of our Corporation Law and of the Court that scrutinizes transactions under that law.

The Editors

AN OUTSIDER LOOKS AT CHANCERY



Sidney Silverman, a most accomplished corporate lawyer of the New York Bar, is well and favorably known to Delaware practitioners and to the Court of Chancery. A graduate of Colgate University and of Columbia Law School, Mr. Silverman is a partner in the New York firm of Silverman & Harnes.

SIDNEY B. SILVERMAN

My first three years as a lawyer in New York City were spent writing memos and briefs. I wanted to argue cases as well as prepare papers and was eager to advance the time when I would be tasting fire and not merely smelling smoke. Another young lawyer, who shared my ambition, suggested that we form our own firm to specialize in stockholder actions, a field in which we both had gained some experience. Under the law, any stockholder may bring an action on behalf of a corporation to recover the corporation's money or assets from its management, if the management has caused or permitted the assets or funds to be wrongfully diverted or misused. The theory is that a management that has participated in wrongful conduct causing loss to its corporation obviously will not sue itself to recover these losses.

From the perspective of the lawyer who represents the complaining stockholder, this kind of litigation is a chancy proposition. If the stockholder's action results in the return of funds to the corporation, the judge presiding over the case will award a fee out of the fund created by the successful lawsuit to the attorney bringing the suit. However, if the stockholder is unable to prove his claim, there is no recovery for the corporation and no fee for the stockholder's lawyer, even though enormous time and effort may have been expended.

Although I recognized that I was embarking on an endeavor involving a great personal risk, the opportunity to try my own cases in court proved irresistible. I accepted my colleague's proposal and in 1960 we began our practice, specializing in stockholder actions.

Corporations are chartered under the laws of a state selected by their organizers. Delaware is a popular choice. It is estimated that Delaware can lay claim to half of the Fortune "500" and one-third of the corporations traded on the New York Stock Exchange. Because of the large number of Delaware corporations, many stockholder actions are commenced there and under long-standing principles of practice are tried in the Court of Chancery. Hence, it was not surprising that my first court appearance was made not in my home state of New York, but in the Delaware Court of Chancery.

The case involved a proposed settlement of a stockholder's action brought on behalf of Schenley Industries, Inc. Unlike conventional private suits, stockholders' actions cannot be settled without court approval. The interests of all stockholders of the corporation are affected and a private settlement with the plaintiff stockholder offers a potential for abuse. To prevent it, a notice describing the lawsuit and the terms of settlement must be mailed to each stockholder of the affected corporation. The notice also informs stockholders that they may appear in court

at a fixed day and time and, through counsel of their choice, present arguments as to why the settlement is not fair to the corporation or its stockholders. As I was soon to learn, opposing a settlement is often a foolhardy undertaking. By the time a settlement is proposed, the former adversaries — that is, the stockholder's lawyer who brought the suit and corporate lawyers who defended it— are allied in wanting it approved by the court and view an objector as an unwanted interloper. Nonetheless, when a friend dissatisfied with the proposed settlement sent us his copy of the Schenley notice, we had our first client and our first case.

On the day set for the hearing on the settlement, my partner and I appeared in Chancery Court. The hearing was conducted by Vice Chancellor William Marvel. Although the Vice Chancellor had been on the Bench only a few years, his bearing and demeanor made it seem as though he had been a judge all his life. The hearing lasted the entire day. Arrayed against us were prominent New York attorneys and the legendary Delaware lawyer, Aaron Finger.

One of the New York attorneys for the defendants stressed during the course of his argument my inexperience, pointing out that I had not made my mark in the liquor industry, nor even as an attorney. Accordingly, he contended that the Court should place no weight on anything I might say. In reply, I admitted that I lacked experience both in business and in law, but that the genius of our system of justice was that a case is determined on the strength of the arguments, and not on the experience, or lack of it, of the counsel making the argument. I thought that my reply evoked an approving smile from Vice Chancellor Marvel.

After a luncheon recess, Mr. Finger began his presentation. His tack was different. He started by magnanimously conceding that there was apparent merit in a few of my points, but, he assured the Court, only apparent merit. He then proceeded to demolish, by references to decided cases, each and every point I had made. It was the rapier that Mr. Finger wielded so effectively, rather than the bludgeon used by the New York attorney, that, I believe, carried the day. My opponents were so confident of obtaining court approval after Mr. Finger's argument, that at the conclusion, they presented to the Vice Chancellor a form of judgment approving the settlement. In view of Mr. Finger's persuasive argument, it was probably only to spare my feelings that Vice Chancellor Marvel delayed signing of the judgment. He announced that he had been given a lot to think about and was not ready to make an immediate decision. A few days later, I received notice that the Vice Chancellor had approved the settlement. Nonetheless, we walked away with the feeling that we had been treated fairly and courteously.

Since many corporations organized as Delaware corporations are based elsewhere and are sued in the Court of Chancery by stockholders who are also non-residents of Delaware, a practice has developed, which enables the out-of-state attorneys representing both the corporation and the litigating stockholders to participate actively in the case along with Delaware counsel. The trial of a case is generally a joint effort, between Delaware counsel and out-of-state counsel on both sides, and in my experience it has never made a difference whether it was my Delaware co-counsel or I who was taking the active role in a particular facet of a case.

The Delaware lawyers who represent the corporate defendants have developed a vast amount of expertise. Based on experience, they are often able to predict at the early stages of a case the likely outcome and, should the case go to trial, the decision proves them good prophets far more often than not. Hence, acting on the advice of Delaware counsel, defendants have for many years usually settled the meritorious plaintiff cases and prevailed after trial in the less troublesome ones.

As a general proposition, the settlement of a case goes largely unnoticed in the legal community beyond, of course, the actual participants. There is no written opinion to be reported to the profession. However, when a case is tried, a comprehensive decision, setting forth the judge's findings of fact, reasoning and conclusions, is published. Since, for years only the weak cases, on advice of Delaware counsel, were tried, law professors, who had no actual experience in Chancery Court, read decision after decision finding against the plaintiff-stockholder in the Delaware law reports, and leapt to the conclusion that the Court of Chancery had a bias in favor of corporate defendants. One law professor wrote a widely-publicized article in which he linked this purported bias to Delaware's dependence upon corporate franchise tax revenues, and concluded that Delaware had somehow corrupted its courts and had thereby won "the race to the bottom" in pandering to corporate interests at the expense of stockholder rights.

Some out-of-state defense attorneys, unfamiliar with the integrity of the Court of Chancery, accepted this ill-formed opinion of the legal scholars that Delaware favored the vested interests and ignored the advice of the true experts, the Delaware attorneys who practiced before the Court. Those who chose to ignore the latter's advice received a rude shock when, in 1977, a trio of decisions written by Supreme Court Justice and former Chancellor William Duffy, made it plain that Delaware provided no "safe harbor" for those who would abuse the responsibility of high corporate office. The decisions were regarded as high water marks of enlightened judicial treatment on the subject of corporate governance, and were, ironically, favorably commented upon by the very same scholars who had several years before vehemently criticized the Delaware courts. Those decisions reinforced my view, based upon many personal experiences, that the Delaware Court of Chancery presents an even-handed forum to advocates of stockholder interests.

While my choice of career has placed my heart on the side of the

plaintiff, I remain envious of defendants' attorneys who receive their compensation directly from their clients, whereas I, as a plaintiff's lawyer, have to apply to the court for my fees. Since the prosecution of a stockholder's case often requires several years of concentrated effort, it is not unusual for the stockholder's lawyer's request for fees after a successful outcome to exceed by a multiple the annual salary of the judge who must pass upon the application, a fact which can hardly escape notice by the judge. I can recall a New York judge informing me that his salary, based on the hours he spent on the job, came to about $15 per hour, and he saw no reason to compensate me at a higher rate. Like many lawyers, I am more comfortable arguing a client's cause than my own, and in the case mentioned, I was ultimately awarded what I believed to be an unfairly low fee.

In Delaware, by contrast, the plaintiff's lawyer is not made to feel like a mendicant. I recall Chancellor Duffy's putting me at ease on one such occasion, saying that it was a happy day in his life as a judge when he had the opportunity to award attorneys' fees.

Many judges are overworked as well as undercompensated. As a result, the lawyers who appear before them are often forced to adapt their schedules to that of the Court's, often at great inconvenience. The Chancellor and Vice Chancellors of Delaware, although as busy as any in the country, find the means to extend a courtesy to New York lawyers. Aware that the loneliness and expense of a night's lodging away from home can be avoided by making a slight adjustment in the order in which cases are heard, the Court of Chancery generally accommodates New York attorneys by scheduling their appearances late in the morning to allow for timely arrival on a morning train. Such courtesy, which is the rule in Delaware, is the exception in many other states. Recently, I left home early on the Sunday of Thanksgiving weekend, cutting short my time with my children who were home from school for the brief holiday, in order to be in court in a distant state to start a trial scheduled for Monday morning at 9:00 A.M. When I arrived in court with witnesses in tow, I was advised to return after 2:00 P.M., since the judge was busy with other matters. The case was finally heard the next day. As is usual in such situations, the lawyers accepted the delay without comment to the judge, and the judge offered no apology for the inconvenience caused clients, witnesses and attorneys. Such practice is, unhappily, the accepted norm in many courts.

The Delaware Court of Chancery is different. I remember Vice Chancellor Isaac D. Short, II once asking counsel if it would be all right with them if he ended the court day an hour earlier than usual. He explained that his son was scheduled to pitch a night game in Philadelphia and that he wished to have an early dinner and attend. He offered in exchange to start one hour earlier on the next day and stay late on that day, if necessary, to conclude the trial. That night, in my hotel room, I listened to the Phillies and cheered for Chris Short who pitched a fine game and won. The next day, the trial started an hour earlier and was completed by the end of the day.

There are many reasons suggested why corporations incorporate in Delaware. To my mind, one reason appears paramount: the competence of the Court of Chancery. Directors and officers, by subjecting themselves to the well-defined body of law in Delaware, can be assured that their transactions will be judged on established precedent. Investment bankers, who raise money for corporations through the sale of stock to the public, can be assured that their customers will be protected in those isolated cases where there is fraud or over-reaching on the part of corporate management. Out-of-state lawyers, who are often influential in the selection of Delaware as the state of incorporation, know that if called upon to appear in the Delaware

courts, they will receive courteous treatment from the Delaware Bar and a sound determination of the dispute from experienced and knowledgeable arbiters.

In almost twenty-five years of representing stockholders, I have appeared many times in Chancery Court. The young associates who assisted the senior partners in the great Delaware firms when I began practicing are now themselves the seniors in those firms. Former Chancellors have moved on to other positions or have retired. Although time has wrought changes, the gracious and scholarly atmosphere of the Delaware Court of Chancery has remained constant. Like a torch, it has passed from one generation to the next, and burns as bright and true today as when I first appeared there in 1960. □

Mr. Silverman, exercising admirable delicacy, has not identified the professorial detractor of Delaware law and the Delaware courts. We, however, in the interest of a good story, choose to be indelicate: the referance is plainly to the late Professor William Cary, a brilliant and distinguished lawyer, teacher, legal writer, and former Chairman of the Securities and Exchange Commission, whose lucid intellect was nevertheless subject to one idée fixe, *an implacable hostility to the General Corporation Law of the State of Delaware. To hear him on that topic was rather like listening to Madelyn Murray O'Hare on the subject of God. When it came to talking about Delaware and things Delawarean, Professor Cary's formidable powers of righteous invective were not shackled by the artificial constraints of good taste. On one unforgettable occasion at a Practicing Law Institute forum in New York, the Professor indignantly branded Delaware as "a pygmy state, interested only in revenues".*

Occasionally, the Professor had a kind word for Delaware. The rendition of our Supreme Court's opinion in Singer v. Magnavox Co., *380 A.2d 969 (Del. Supr. 1977), which Mr. Silverman discusses without naming, examines sensitively the position of a minority stockholder holding his investment at the whim of a majority juggernaut. Briefly — very briefly — Professor Cary mellowed, announcing at the same PLI meeting that with* Singer, *"the Delaware Supreme Court has hit the sawdust trail". Professor Cary died before* Weinberger v. UOP, Inc., *457 A.2d (Del. Supr. 1983), and was spared the wounding spectacle of judicial recidivism.*

Singer *came as a nasty shock to many of the corporate Bar. Grandees of the big Wall Street firms began telephoning their Delaware cronies, with but a single question on their lips, "Has your Supreme Court gone crazy?" In a word, no. It became apparent that* Singer *was becoming more a toe trap for legitimate corporate planning than a shield for minority owners. In* Weinberger, *our Supreme Court drew* Singer's *pious fangs and set about fashioning more precise, yet more flexible, devices for discriminating between corporate sheep and goats.* Singer, *like Little Nell, was probably too pure to live, at least in all its celestial radiance. When* Weinberger *came along, it provided the occasion for the Supreme Court to proclaim "Enough, already!" But during its years of prosperity,* Singer *and those cases which derived from it (invariably referred to as "*Singer *and its progeny") enjoyed a considerable vogue. The word "progeny" always jarred us a bit: the thought of anything of such exaggerated purity as* Singer *stooping to the earthy mechanics of the reproductive process is incongruous, but then* Singer, *like man, proved mortal.*

W.E.W.

THE DELAWARE CHANCERY COURT: A NATIONAL COURT OF CORPORATE LAW

DONALD E. SCHWARTZ

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No one disputes Delaware's leadership in corporate law. It is the home of most of the major corporations in our country and the source of most corporate law. The reasons for this leadership are several. The Delaware legislature has been responsive to changing conditions and the General Corporation Law has been modernized as circumstances required. The intelligence and leadership of the Delaware Bar, as advisors to the legislature as well as to their clients, is widely recognized. But commendable as these attributes are, they are capable of emulation elsewhere.

The unsurpassability of Delaware's leadership as the source of corporate law comes from the courts, and principally the Court of Chancery. True, the high quality of the Delaware Bench and Bar could be matched in other states, but the long and well-developed history of judicial decisions that have shaped corporate law is now beyond the reach of all other jurisdictions. Corporate managers and their lawyers seek predictability. Transactions are planned to contain as few surprises as possible. Managers demand opinions from their lawyers that give them a fair idea of the risks and the exposure from their acts. Since corporate law is at least as much a function of judicial decisions as legislative enactment, lawyers must rely on what the courts have said in similar contexts in order to render those opinions. There is, by an order of several magnitudes, a larger body of case law from Delaware than there is from any other jurisdiction, enabling not only lawyers who practice in Delaware, but lawyers everywhere who counsel Delaware corporations to be able to render opinions with some confidence. As the Court of Chancery has increasingly published more of its opinions, or as Delaware lawyers share these opinions with their foreign friends, this confidence grows.

Delaware law is influential on the corporate law of other jurisdictions as well. This influence is mainly a function of courts relying on opinions of Delaware courts for authority, where little or no authority is available from their own courts. Delaware corporate law, therefore, approximates national law.

As the court of first, and most powerful, impression, it is the Court of Chancery that is the most important oracle of this national corporate

law. At its roots, much of corporate law is equitable. Apart from the unique procedural devices, such as the shareholder derivative suit whereby most cases are tried by judges not juries, the basic governing principle in corporate law is a fiduciary duty drawn from analogies to trust law. Chancery is where such principles are developed. Moreover, the Delaware chancellors and vice chancellors have heard more controversies and developed more experience in sensing wrongs that must be righted than their counterparts elsewhere. A number of them have become widely acclaimed jurists. In recent years, the names of Wolcott, Seitz, and Quillen come quickly to mind. The system and the traditions of the Chancery Court have produced a tribunal that many believe is the best mechanism for resolving the most important and difficult questions of corporation law throughout the country.

The main issues that courts must resolve concern the proper exercise of power by corporate officers and directors. The issue is rarely one of legal authority to act. Rather, it is the propriety of the conduct — whether the official has been faithful to the trust and confidence the shareholders have reposed in him, or, in spite of technical compliance, whether he has abused the trust. The fundamental arrangement between shareholders and corporate fiduciaries was explored by the Chancery Court in *Campbell v. Loews,* 36 Del. Ch. 563, 134, A.2d 352 (1957) where the chancellor found that shareholders had inherent power to oust unfaithful managers and replace them. That was a complex dispute and its resolution was immeasurely assisted by the deliberative style of the Chancery Court and by the chancellor's grasp of the workings of the corporation. The decision in that case stands as a beacon in corporate law.

It was clear in *Campbell,* as it has been clear in thousands of other cases, that simple legal rules cannot alone provide the answer to complex corporate questions. Equitable principles must be developed case by case. Louis Nizer, the prominent New York trial lawyer, describes the preparation for his successful argument in *Campbell v. Loews* as an effort to graphically and exhaustively present the facts to an understanding and knowledgeable Chancellor Seitz. His confidence was borne out that a proper understanding of what had occurred would lead to the result he desired.

Undoubtedly, Chancery has interpreted Delaware law consistent with the legislative goal of making Delaware hospitable to corporations and to make it the choice of incorporation by corporate managers and their lawyers. Delaware law competes with other jurisdictions for the incorporation business and a Court of Chancery hostile to the viewpoint of corporate managers would render Delaware uncompetitive with other states. The spirit of Delaware law is one of

"enablingism," as is the case in virtually every other state. While some have described the process as a "race for the bottom," the remarkable fact is that Delaware has retained its monopoly postion while its courts have established a relatively demanding standard of responsibility on the part of corporate fiduciaries. While one can criticize the general state of American corporation law, it is probably more accurate to say of the decisions of the Delaware courts and the standards that they have created for officers and directors, that they are closer to the state of the art than mired at the bottom. By and large the credit for elevating those standards belongs to the Court of Chancery.

No principle in corporate law is more important than the business judgment rule, which respects the human fallability of men and women when making business decisions. Courts decline to second guess the wisdom of those judgments and refuse to make diligent directors responsible for them when they are wrong. This rule is not found in statutes. The draftsmen of the Model Business Corporation Act, in the revised version that will appear in 1984, found it virtually impossible to legislate the rule despite a two-year effort to do so. The rule has developed in the great tradition of the common law, case by case. The Delaware Court has articulated it more often than other courts because it is the critical element in a very large number of cases. The key questions involve the degree of care that is required of officers and directors under the circumstances, compared to that which was rendered by directors, and whether the directors were required, in good faith, to have had a rational basis for their decisions. The Delaware Chancery Court has had scores of opportunities, especially in recent years, to apply the principles in concrete situations. Probably no case in the country has been referred to more often than *Gimbel v. The Signal Companies,* 316 A.2d 599 (Del. Ch. 1974) for an understanding of the business judgment rule.

It is not the business judgment rule but the principle of fairness that governs transactions between corporations and their managers and directors. Early in this century courts abandoned the rule that prohibited self-dealing transactions and replaced it with a rule of fairness. Fairness cannot be generalized very well but its example can be imitated. Thus, the Delaware Supreme Court's decision in *Guth v. Loft,* 23 Del. Ch. 271, 5 A.2d 510 (1939) is cited by all courts everywhere, but no single decision, just as no single rule, says all. It remains for lower courts to provide the meaning of the rule. A range of Chancery Court decisions has developed an understanding of fairness that has become the standard for that principle, including such old decisions as *Bodell v. General Gas & Elec. Co.,* 15 Del. Ch. 119, 132 A.2d 442 (1926) which applied fairness in the context of stock issuance, to *Puma v. Marriott,* 283 A.2d 693 (Del. Ch. 1971) (a decision which has strongly influenced the reporters for the American Law Institute Project on Corporate Governance), to the modern context in *Lynch v. Vickers Energy Corp.,* 351 A.2d 570 (1976) sustaining going private as a proper business transaction.

Corporate acquisitions can be shaped in many forms, having identical economic effect but significantly different legal consequences. Delaware's Chancery Court has affirmed the notion that different statutory provisions have independent legal significance. A sale of assets is not treated as a merger, despite the similarities. In *Hariton v. Arco,* 40 Del. Ch. 326, 182 A.2d 22 (1962) the Chancery Court rejected the *de facto* doctrine that had been followed in several other states, and by doing so probably checked the development that was beginning in that direction.

Self-dealing issues are at the forefront in mergers and Delaware Supreme Court pronouncements are the most significant in this area of the law: *Sterling v. Mayflower Hotel Corp.,* 33 Del. Ch. 293, 93 A.2d 107 (1952) followed by *Singer v. Magnavox Co.,* 380 A.2d 969 (1977), and more recently, *Weinberger v. UOP, Inc.,* 457 A.2d 701 (1983). But these decisions only draw the contours of the painting. The real work of art lies within, and Chancery has been painting on this landscape for years. All of the important appraisal rights cases in the country have been the decisions made over the last fifty years of the Delaware Chancery Court. *Weinberger* has altered the contours in significant ways, but no clear picture will emerge until Chancery has had a chance to add its refining brush work.

Clearly, what will be done in Delaware with respect to appraisal rights will reverberate throughout the country. The same is true with respect to determinations by Chancery as to the fairness of process in parent and subsidiary mergers. The Delaware courts have rejected the proposals of Professors Brudney and Chirelstein, advocating so-called fair shares in mergers, and have employed their standards for fairness. It is probably correct to say that the influence of Chancery has been stronger than that of the academic voices.

Preservation of control is one of the most hotly discussed legal issues today. What can managers do to fend off an unwanted takeover bid? Some have argued that once the managers have decided, in the exercise of their business judgment, that the takeover bid was not in the best interest of the corporation, any defensive measure is proper. It is unlikely that attitude has gained firm footing in the law — probably because *Delaware* has not embraced the notion. One of the most important decisions on this point is *Condec v. Lunkenhiemer,* 230 A.2d

769 (1967), which prevented a corporation's issuance of its own shares that would have totally thwarted a takeover bid. A case-by-case analysis, rather than a carte blanche to directors and managers is probably the prevailing legal view in the country today. Much litigation of this sort is conducted in the federal courts, which have exclusive jurisdiction to enforce the Securities Exchange Act of 1934. That act contains the provisions of the federal tender offer rules. The federal courts have also adjudicated the state-based claims dealing with allegations of breach of fiduciary duty relating to defensive measures that altered a takeover bid, with a loss of potential premium to shareholders. A special application of the business judgment rule is in the process of developing, and will require more judgments by the Delaware Chancery Court, since the majority of the takeover candidates, as it would seem, are Delaware corporations.

Delaware law is almost pervasive in governing the larger publicly owned corporations in our country. The Delaware Chancery Court has a nation-wide impact and responsibility in shaping and defining corporation law, since it is the tribunal of first impression that finds the facts and initially disposes of the cases. Thus, the role of Chancery is the key to the application and development of Delaware and indeed national corporation law. □

ADVERTISER INDEX

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The Memoirs of Chief Justice James Pennewill, Part III

DAVID A. DREXLER

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Chief Justice James Pennewill delivered the last of his three "Recollections of Bench and Bar" to the annual dinner of the Delaware Bar Association in Rehoboth on June 16, 1934. The occasion was more ceremonial than in either 1931 or 1933. In 1933 Pennewill had retired after 36 years as a member of the Delaware judiciary — the last 24 as Chief Justice — and the 1934 dinner was in honor of his 80th birthday, as well as a testimonial to what is still the second longest tenure of any Delaware state judge. Pennewill recognized that he was delivering a valedictory to his colleagues. His comments were more insightful and less anecdotal. He lived only another 18 months.

Pennewill had been born in Greenwood, Sussex County. He received his secondary education at a private academy in Wilmington, after which he attended Princeton, graduating in 1875. He read law under N. B. Smithers in an office that still stands on Dover Green. Admitted to the bar in 1878, he engaged in private practice in Dover for almost 20 years, associating during that time with a number of prominent attorneys, including George V. Massey, later general counsel of the Pennsylvania RR., and James L. Wolcott, later Chancellor and founder of a distinguished line of Delaware jurists. Pennewill's family were prominent and active Republicans. A younger brother, Simeon, served as Governor from 1909 to 1913. In 1897 Pennewill was appointed a Superior Court Judge. He became Chief Justice in 1909 and served two terms, retiring in 1933.

In his first two talks, Pennewill had reminisced about Delaware lawyers and judges whom he had known before the turn of the century. To round out this theme, he devoted a portion of the 1934 talk to noting the careers of lawyers and judges who had been Delawareans by birth or legal training but who had achieved prominence elsewhere. As few of these men left any mark upon the practice of law in Delaware, this portion of Pennewill's talk is omitted. Most of his address, presented here in excerpted form, was more general. He reflected upon what it had been like to live and practice law in Delaware before the arrival of what he termed modern technology, and ruminated over the changes — not all for the better in Pennewill's opinion — that this technology had brought about during his lifetime.

The changes in the day-to-day life of lawyers, which Pennewill had experienced during his 56 years at the bench and bar, are mindboggling. Today's lawyers accept and use with ease and relative equanimity the improvements that modern technology has brought about. Almost without a blink, we accept into our lives and practices such tools as video recorders, computers, high speed copiers, and word processors. We avail ourselves of efficiencies and increased mobility afforded by jet aircraft, superhighways, and teleconferencing, hardly noticing that we are doing so. This is understandable because all of these developments, wondrous as they are, are merely refinements of or improvements upon a base of technology, which has in fact existed through our entire lifetimes. Chief Justice Pennewill, on the other hand, witnessed the creation of the fundamental technology during his professional career. When he began practice in 1878, there was no electricity, no telephone, no automobile, no radio, no typewriter; indeed, the only devices for communication and recordation of ideas within a law office were the human voice and the pen and pencil. Communication among lawyers, judges and clients was by fact-to-face meeting, hand-penned correspondence, or in rare circumstances, by telegraph. What we now

to be the basic tools by which we practice — typewriters, telephones, dictating equipment, duplicators, and copying machines — did not exist when Pennewill began to practice law, barely more than a century ago.

Judging by his remarks, the greatest impact of the new technology upon Pennewill seems to have been the automobile. The automobile, he laments, cost him the camaraderie and social contacts which he treasured with his brethren and the people of the communities in which Court was held. Instead of spending the days or weeks of a Court term actually living away from home in Georgetown, Dover, or Wilmington, judges were now spirited home each night. Pennewill dismisses the rest of the new technology with a backhanded wave. It had not, Pennewill observed, produced better lawyers or better law. The major complaints against the law — delay and expense — seemed as troublesome to him in 1934 as they had been in 1882. Things change, but they also stay the same.

In summing up his career, Pennewill gave his audience just about what one would expect from a patriotic old gentleman who had been successful at the practice of law and in public service, and who saw in his own path guideposts for younger men to follow. His somewhat platitudinous appeals to patriotism and to service to one's fellows may seem out of date in an America tarnished by Vietnam and Watergate, but the views he expressed he truly believed and felt. It is to be doubted that the cynicism that infects both public and private behavior today provides as satisfying a base for measuring the rewards of professional achievement.

Justice Pennewill:

Fifty-six years as a member of the Bar is a good long while in the life of any lawyer. Because of such extended experience on the Bench and at the Bar, I have seen many Judges and other members of the Bar come and go and most of them much younger than I.

I speak of the Delaware Bench as a whole when I say that in character, industry and accomplishment it compares favorably with any other of which I have had personal knowledge. I do not mean that every judge appointed under our present Constitution has been an outstanding lawyer and conceded to be such. The Bench would probably not have functioned as well and been as efficient as it has been if all its members had been leaders of the Bar. There would probably have been some lack of patience, tolerance and consideration that a judge should be always willing to extend, even though it is not sometimes easy to do. However, we have never had such a Bench and never will because the judicial salary is not attractive to all outstanding members of the Bar.

It is hardly fair to compare the Bench of one period with that of another, because conditions greatly change. In the last fifty years the business of the Courts has largely increased, the character of the business has considerably changed, and the duties of the judge are more exacting than they used to be.

I am glad of the opportunity to say this about the Delaware Bench: I have never known a judge to be influenced in his decision by any consideration other than the law and the facts of the case. He may sometimes have been wrong in his conclusion but not in his intention. It ought to be and is a cause for individual and State pride that no member of our Court has ever disgraced his high office or brought discredit on the fair name of his State. There has never been a judge and never will be who can please all counsel in a case, but there have been judges and many of them who were able by their opinions to convince unsuccessful counsel that his argument has received careful consideration and that the decision was the conscientious conviction of the Court.

What shall I say about the Bar of today and the administration of the law as compared with former times? There has been such a great advance during the last half century in many lines of human endeavor we are apt to believe that great progress has been made in every line. But the advance has been in the field of science more than anywhere else.

I have great admiration for our profession and particularly for the Delaware Bar. It is very efficient and reliable but I cannot say that in knowledge of the law and in strength of argument it is superior to the Bar of fifty years ago. There were lawyers even then of marked ability, knowledge and learning in every county of the State. They did not have all the advantages that are available now. And fortunately, perhaps, they did not have all the diversions and distractions that are common now. Their chief diversion was reading and discussing the law.* They were held close to home and office because the means of traveling were crude and slow. Few of them had the benefit of law school instruction but they did as a rule have the benefit of instruction and training in the office of a busy lawyer and that, to my mind, was and still is an almost indispensable aid. Of course, it is best when the two are combined but the one without a reasonable amount of the other leaves something lacking in the equipment of the student for the practice of the law. Certainly the one gives something that the other cannot supply. The personal contact of the student with a preceptor who is interested in the young man's success, and the practical knowledge, help and encouragement he receives in the office cannot be furnished by any college, no matter how eminent in the profession its teachers may be.

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* Another diversion, apparently, in the late nineteenth century was participation by members of the bar in public spelling bees. In reminiscing about Francis Shunk Brown, a Kent County lad who achieved great prominence as a lawyer in Pennsylvania in the 1920's, Pennewill recounted the following tale:

"Brown asked me recently if I remembered a spelling match in Dover in which he participated a long while ago. I remember it very well. It was at a time when spelling bees were popular throughout the country. Smithers and Massey were the captains of the respective sides, and Brown was in the Smithers team. He won the prize by spelling the word 'GNEISS' which had floored the others. Smithers presented the prize, which was a large cake, with this remark: 'Anyway, it is very appropriate, for it is both tall and brown.'"

I know that the character of the lawyer's business has changed from what it was and that it has been restricted to some extent by other agencies. The work in the office is greater by far now than in the Court, and it is quite possible that the ablest lawyers of former times might not be so successful in solving such difficult problems as confront the busy lawyers of the present time. Executive ability, business knowledge, quick decision, and rapid execution are now as essential to success as much as learning, and today wisdom as well as knowledge is required.

There has been for a long time one continuous criticism of our profession that is not entirely undeserved. It is based on what is commonly called the "law's delay". It is a reproach that has some foundation in fact. Sensible and successful businessmen cannot understand why it should take two or three years and sometimes longer to reach the final determination of a case. Certainly the law has not kept pace with business in speed and generally speaking, it is doubtful that its speed has been accelerated at all in recent years.

There has been a great deal written and spoken respecting the law's delay, but is is largely academic for nothing is done about it. Apparently no one has found a way to correct the evil, and probably no one can. No doubt the unreasonable delay in impaneling juries and disposing of preliminary and dilatory motions will continue indefinitely in some jurisdictions, and very extended opinions involving much time and labor will continue to be handed down. I have often wondered whether a very early, well considered decision (in a *nisi prius* Court) is not more important than an able and learned opinion long delayed.

But I am bound to say, and proud to say, that the criticism and reproach mentioned above has comparatively little fitness or application in this State. Our practice is not perfect I admit, but the delay is not appalling. I do not recall any case, however important or sensational, in which more than half a day was consumed in impaneling a jury and as a rule a much shorter time is required. I hope the word "continued", so often heard when calendaring cases for trial, and perhaps not displeasing to the court, means "for settlement" rather than "for delay". And I am sure that demurrers and other motions that go not to the merits are now disposed of speedily and without opinion more than they used to be.

In my former addresses I failed to mention a prominent member of the New Castle County Bar — Samuel Harrington. Samuel was the son of Judge, Chief Justice and Chancellor Samuel M. Harrington[1] who, I need not tell you, was one of the most distinguished judges the State has ever had. As a Court Reporter certainly he was supreme. He was appointed to the bench as Associate Justice when not yet thirty years of age and doubtless there were many lawyers who were skeptical about his judicial success because of lack of experience at the Bar. But he soon removed all such doubts and gave ample proof of his ability and fitness for the high position to which he was called.

In order to obtain more information than I had respecting the judge and his son, Samuel, I called on Mrs. A.E. Watson, my next door neighbor and asked her to tell me all she knew. I have a right to speak of Mrs. Watson in this address because of her marital relations to our profession. She has had three husbands, each of whom was a member of the Kent County Bar, two of whom were U.S. District Attorneys, and the last of whom, Beniah Watson, died about thirty years ago. She is ninety years of age.

I learned that Judge Harrington's home was where the Dover Opera House now stands, and Mrs. Watson's father, William Walker, lived just across the street. There were eight children in the Harrington family and six in the Walker home. The Judge was of medium size, with very thin face, very dark complexion and straight black hair. He was exceedingly affable, easily approachable and liked by everyone. Judge Harrington was a public spirited citizen as well as judge, and of great value to the state in many ways. Probably more credit was due to him than to anyone else for the building of the Delaware Railroad through the state. It would have come later to be sure, but his influence had much to do with it at the time. Judging from his law reports he was certainly one of the most industrious judges the state has known.

Samuel Harrington, oldest son of the judge, died when still a young man but not before he had made a reputation as an able lawyer and capable of coping with the leading members of the New Castle Bar. Judge Harrington's next oldest son was Frederick, who is now a retired Admiral of the Navy and ninety years of age. He is very proud of his position and record, remarkably sound mentally and physically, and says he is busy all the time. He and Mrs. Watson who are about the same age, sometimes meet and discuss the people and events of long ago.

I doubt that many women of better mind and memory than Mrs. Watson have ever lived in our State. She has not engaged in political activities but in women's clubs has been an active and conspicuous leader for many years. Her versatility is remarkable. She is a fine conversationalist, speaks with unusual clearness, and writes without much effort beautiful and appropriate verse as friendship and occasion may suggest. She has been made Poet Laureate of the State Federation of Women's Clubs. Even in her advanced age her mind is alert as ever and she still walks in the streets unassisted and unafraid. She is known to her friends as "Miss Lizzie" and is close to the hearts of the people.

I cannot close my recollections of the Bench and Bar without saying something about our Court Stenographer, Edmund C. Hardesty. His services covered a longer period than my services on the bench. For forty-two years he was good and faithful in the performance of his duties and an almost indispensable aid to the Court. I never knew him to be angry, ruffled or even impatient in his work, or dissatisfied with the treatment he

received from Court and counsel, which was not at all times as considerate as that received from him. Mr. Hardesty has recently retired from his position because of age, after making a record of which any court officer might well be proud.

There was another man, now deceased, whose good qualities impressed me so much on and off the bench that I cannot refrain from speaking of him briefly before concluding this address. I mean Judge Rice[2], than whom I never knew a better man or friend. He had, to as great an extent as anyone I have ever known, what may be called the "human touch". He was wholly unselfish and generous to a fault. His greatest pleasure was found in helping others, particularly the younger members of the Bar, and I hope they remember him kindly as they should and as I do. It is not easy to describe in words a person's good qualities; they can be better felt than expressed. You have known persons who naturally and spontaneously won your confidence, esteem, and love. That is a fair description of Judge Rice. In him there was not a vestige of pretense or guile. I have not heretofore spoken of those living with us, or of those who have recently died, but I could not refrain from speaking these words in memory of one I dearly loved.

In thinking about our courts of thirty and forty years ago I cannot help recalling some of our experiences. The accomodations were vastly different from what they are now and the means of traveling bore no resemblance to those of the present time. There was no automobile, and the trains did not run so as to enable the judges to spend the night at home. They left on Monday morning and returned Friday evening and sometimes on Saturday.

I shall not say anything against the hotel accommodations of those times because we had not known any better and thought they were very good. The food was heavy but abundant and the bed was fair. The sleeping room was cold but we did not mind that. It is astonishing how comforting and even pleasing a situation may be if you never knew anything better. The last meal was "supper" in the old days and the hours spent afterward around a hot stove in the waiting room or office of the hotel were delightful in a way.

There was usually some local character there who was an excellent entertainer. Neither his thoughts nor language were refined but you did not leave on that account. The best of those entertainers was found in the "Brick" hotel at Georgetown. He was Colonel Joseph, the prince of harmless liars, and devoted to his church. He could easily have been elected president of any tall stories club. Strangers would look at the Colonel with amazement and wonder if he was telling the truth. It was usually midnight when the crowd dispersed. The Colonel was seated in a certain chair when the others retired, and was sitting in the same chair in the early morning before breakfast was served. I never knew where he slept or when.

I remember one dish that was then popular in Sussex County — "hog's jowl and turnip greens". Judge Cullen[3] did not have much respect for a man who refused that dish. It is still popular in the lower county and also in Kent.

Another pleasing custom in those days was for the judges to call every evening on one or more families in the town. It was all very delightful, and sometimes stimulating too. In those days a judge was regarded by many as something greater than he really was. And so I say that while we travel faster, go farther and see more than we used to, I am not certain the judge has more real pleasure, sees more of real life and commands as much respect as he did in former years.

The automobile was a great invention, indispensable now, but we got along very well and were reasonably contented before it came. The people as a rule were just as happy and satisfied and I suspect they were as "well off" financially, if the truth could be known. I express no opinion on the question whether the wonderful inventions and discoveries of the last fifty years have added much to the real welfare and happiness of the people. I know they are no better satisfied. A few are much richer and many are much poorer than in former times. The automobile is the most popular invention of all, but I want to tell you that for certain purposes it is not as good as the horse and carriage of long ago.

In Dover, the judges were entertained for a long time at the Capitol Hotel on The Green. That hotel was burned to the ground one bitter cold winter night a good while ago and was rebuilt, but has recently been converted into offices. Mr. A. B. Richardson, father of the late Senator Richardson, wanted to build a fine hotel on the same site. He was unable to buy the ground from the owner for any reasonable sum and was much disappointed and disgusted, as were very many other citizens of the town.

Consequently the canning factory of Richardson and Robbins was demolished and the Hotel Richardson erected on the point of the land where it stood. It was very expensively and beautifully furnished and while Mr. Richardson and his good and wonderfully popular wife lived there it was as fine a place of public entertainment as could be found in the country anywhere. And there is where the judges, including Lore,[4] Spruance,[5] and Grubb,[6] rested when their labors were over for the day. But after the automobile came the judges were spirited away every afternoon.

I have spoken before of the old "Clayton House" in Wilmington, which stood at Fifth and Market Streets where the Queen Theatre now stands, and where entertainments of a different character are given. Judge Boyce[7] and I spent many weeks and months in that hotel with much pleasure and satisfaction, for it was the best the city afforded, and the luxuries of the Hotel Du Pont were not dreamed of then.

Gentlemen of the Delaware Bar, it is not for me to suggest what your Association shall do but I may express the hope that the summer meetings at Rehoboth shall continue from year to year. These meetings have been a distinct success in a social way. Indeed it is the only time when a goodly number of the bar meet in a friendly way. Your other meetings are purely business affairs, and promote the fraternal spirit not at all. This much can be said about our profession; while lawyers fight vehemently in Court, and with seeming hostility, when the trial is over they are as good friends as they ever were. It seems to me that there could be no better place to gather once a year than in this part of the state which is physically and historically so interesting. It is here, as nowhere else, that we can meet on common ground and with an equal chance.

And now permit me to make a few general remarks before reaching the close of what to me has been a very happy occasion. My first thought resulting from a long experience, is this: there is something in life more important and satisfying than fortune or fame acquired in profession or trade, no matter how pleasing such acquisitions may be. If you can feel at its close that your life has not been a selfish one, that you have never consciously injured any man, that you have made the road easier for those less fortunate than you, that you have done your duty as best you could, then I say you will have reached the end of a perfect day. This may be impossible of attainment, but it is the way that all of us instinctively feel and the goal we would all like to reach.

My second thought is somewhat akin to the first: A member of our profession should be something more than a lawyer. He may be interested in his business first but his State and County should follow close. The lawyer has had much to do with the making of our government and should feel an equal interest in its preservation and success. I have no thought of politics or party in what I say and it would be in exceeding bad taste if I had. Neither am I thinking of any visionary and impractical scheme. What I have in mind is that: It might be wonderfully helpful if all men and women in public life would make the welfare of the country paramount to everything else. I know that the lot of the office-holder today is a hard one and that the people are difficult to please, so large is our country and so diverse are the interests of its different parts.

We know we are living in a transition period nationally and are not certain where we shall go, but we can hope that when the emergency has passed, the country will be happier than it is. As lawyers and citizens it is our duty to help make it so. I do not think that many sensible people believe we are in much danger of socialism, communism, fascism or dictatorship. The great majority of our people are not made that way. The country has been in greater danger before more than once. Certainly it has never been in such peril as it was at Valley Forge. It was preeminently there that the unconquerable spirit of America was shown and Washington was supremely great. There have not been and will not be any darker days than those and so I say, no matter how bad conditions may be, the fine spirit and good sense of our people will surmount all difficulties and perhaps be instrumental in saving the civilization of all the world. In every time of national stress the lawyer has had a work to do and has done it well. His services were never more needed than now. He need not seek political office but he should not fail in his civic duty no matter how inconvenient or troublesome it may be.

Finally, I want to say: Lawyers as well as other people sometimes minimize the good they can do. Some persons are more richly endowed than others both physically and mentally and more is expected of them. But everyone can do something for the public good. All that can be expected of any man is that he shall do the best he can. No judge or other public official can receive greater praise than this: he was honest in all his work and performed his duties according to the best of his ability. That is the best that can be said of any man. □

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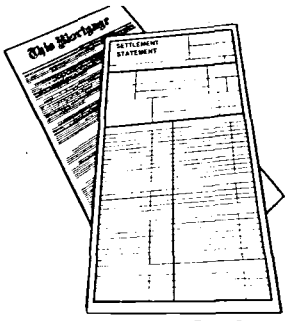
1. Samuel M. Harrington, Chief Justice of the Supreme Court from 1830 to 1832, Associate Judge of the Superior Court from 1832 to 1855, Chief Justice again from 1855 to 1857, and Chancellor from 1857 to 1865. His "demotion" in 1832 came about because a new Constitution abolished the then Court of Common Pleas. Its Chief Justice, Thomas Clayton, who was senior to Harrington in judicial service, became Chief Justice.
2. Herbert L. Rice, Associate Judge of the Superior Court from New Castle County from 1911 until his death in 1932.
3. Charles M. Cullen, Associate Judge of the Superior Court from 1890 to 1897.
4. Charles B. Lore of New Castle County, Chief Justice from 1893 to 1909.
5. William G. Spruance of New Castle County, Associate Judge of the Superior Court from 1897 to 1909.
6. Ignatius C. Grubb of New Castle County, Associate Judge of the Superior Court from 1886 to 1909.
7. William H. Boyce of Sussex County, Associate Judge of the Superior Court from 1897 to 1921.



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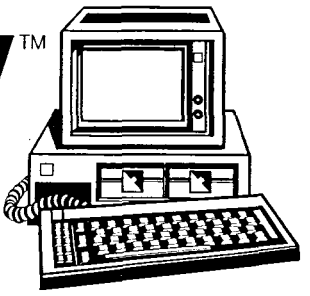

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