PROFESSOR LEVIN: Now this afternoon we are going to be investigating corporation law and the Delaware judicial system. Our two panelists to make this presentation are Mssrs. David Drexler and Bruce Stargatt.

MR. DREXLER: Thank you, Professor. In formulating our section of the program, Bruce and I have decided that I will give some general views with respect to the judicial system in Delaware as a lead-in to a more specific discussion by Bruce of the new consent statute and the problems raised by the recent decisions in that area.

Last Tuesday afternoon during the noon hour, Lou Finger, whom I think you met this morning, and I were standing and talking on the corner of 11th and Market Streets when up the street came our Chief Justice, Daniel Herrmann, with something of a twinkle in his eye. He came over toward us and said, "I guess I know what you fellows are talking about. It's Singer¹ and Tanzer² and Lynch v. Vickers."³ Well, we sort of allowed as how we were considering that topic, and at that point there was sort of a pregnant pause, because Lou and I had just received word that we were on the losing end of the Lynch v. Vickers case, and we were considering the opinion in what might not be flattering terms. So to fill up the obvious gap in the conversation, the Chief Justice said brightly, "Well, at least there'll be some food for discussion at the corporation seminar this week." To which the rejoinder came, "That may be true sir, but nobody knows exactly what to say."

I think that episode indicates something that I have found to be most pleasurable about the practice of law in Delaware. I'm originally from New York, where I had a few years of practice before I came to Delaware. One of the things that I have found most gratifying and rewarding about the practice here is the comfortable and easy comradery among the lawyers between the bench and bar. I think it not only makes it easy for us as lawyers to practice here, but I think the underlying reliance upon one another and friendship, genuine friendships, that people have for one another serve the causes of our clients as well.

In a seminar in which I appeared a few years ago before the American Association of Law Schools in which I was trying to defend the proper position of Delaware in the corporate law firmament against the onslaughts of Professor Cary at that point, I pointed out what I thought were three aspects of a favorable corporate climate which I felt that Delaware had and which I thought served the national interest. These were basically fair and consistent taxation; a corporation law which permits a majority of the stock and the management elected by that majority to conduct corporate business with a minimum of red tape, confusion and procedural expense; and third, a court system which brings to the consideration of the often complex internal problems of corporations an understanding and sophistication based on sound reasoning and broad experience and which has the capacity and willingness to respond to these problems with dispatch, decisiveness and with reasonable consistency and with appropriate fairness to all interests before it. There is no doubt that there are some of you that would think these decisions rendered by the Delaware Supreme Court in the last several days may have cast some considerable doubt upon the validity of that third proposition. In defense of the court, I would say now, and I think we'll get into this more tomorrow, that they are obviously in the process of rethinking some fundamental propositions. The rethinking did not originate in this court but originated in other courts, and while there may be a period of some uncertainty, I think in the long run as these propositions are sifted through a few more decisions, the principles will be better defined and a system all of us can live with will have been fleshed out. I think the second case, the Tanzer v. IGI case, which you now have before you came down subsequent to the Singer case, is at least a tentative step in that direction.

However, my function here today is not to appeal to this body from Singer v. Magnavox, as much as I would like to because I have the feeling I might win here, but to discuss broadly the court system of Delaware as a predicate to the discussion of the new jurisdictional statute which Mr. Stargatt will present in more detail. I might also add that I was glad to be able to come back this morning and sit in, at least in part, on Mike Goldman's presentation because I planned to say a lot of what Mike said. This way I will not be unknowingly repetitive. I may be repetitive, but I know I'm repetitive. As Mike

6. See address by Mr. Goldman, this issue, p. 191 supra.
stated, I think Delaware is significant as we are the only state that continues to maintain a strict dichotomy between law and equity by court system. Other states, New Jersey, Mississippi and others, do try to maintain a chancery side and a law side of their courts. In the sense that we have specific judges specifically assigned for virtually all purposes to a specific court, I think Delaware remains unique. As Mike mentioned, the superior court is the court of general law jurisdiction. It hears conventionally criminal cases, torts, breaches of contracts, and therefore it is unlikely that any case of major corporate significance will arise in the superior court. Some of the corporate remedies used to find their way in there because there was no statute. Only under the old special writs, particularly mandamus, could one seek a stock list or compel certain other corporate activities. In the 1967 amendment, a conscious effort was made to shift that jurisdiction by statute over to the chancery court for reasons of the feeling that the chancery court had the expertise in the whole area of corporations.

There is one gap I think we've discovered which may lead some cases to remain in superior court, and that is in the area of a director's demand for books and records or a director's demand for stock lists. On this, it is not totally clear, but the old common law remedy for both stockholders and directors was mandamus. The statute section 220 shifts specifically the jurisdiction over stockholders' demands to the chancery court. It does not speak to directors, so the inference, perhaps proper, is that if you are suing qua director and the director does have a common law right to inspect books and records, you may still have to take it to superior court. Of course, in such instance a director is likely to be a stockholder and the chances are that when that case comes up they avoid the potential jurisdictional complications merely by suing and asking for your records in the status of stockholder. But in any event as I say, it is unlikely these days except for that area, and there may be others that will only occur as the situation arises, that an important matter of corporation law will arise in the superior court.

The chancery court is, of course, the court which hears most corporate cases. This is either because of their form — the stockholder derivative suit was determined by law to be an equitable cause of action and many of the suits were at one point stockholder cases. It may be because of the subject matter of the litigation. Generally speaking, equity has jurisdiction over claims of breach of fiduciary obligation, of fraud, of breach of trust, or other

8. Id.
conventional causes of actions which are alleged in stockholder-type litigation, or it may be because of the remedies sought — injunctions, specific performance, rescission are all, as we all know, classic equitable remedies and these remedies are often sought, at least in part, in the chancery court, or in corporate litigation, those actions tend to lie in the chancery court. The result of this has been that over the last fifty or sixty years, with the rise of Delaware as the home base for many corporations and the focus of the litigation on the equity side of the Delaware court, the Delaware Court of Chancery has become the forum of much of the corporate law learning that has found its way into the law schools and oddly enough, into Professor Cary's case book.9

Fleshing out the system, we have a one-tier appeal system. There is a direct appeal from the chancery to the highest court in the state which is the supreme court, which is presently a three-man court. There is a constitutional amendment pending to increase the number of judges to five, and for reasons I'll get into a little later, the Delaware Bar is taking the lead in trying very hard to get that amendment adopted and the court expanded in order to break what has become a log jam.

As I stated, because of our peculiar position in the corporate world and because of the peculiar position of the court of chancery within Delaware, and because of the comparative longevity of several of our chancellors in office, the impact of a number of our judges has been very marked upon the development of the Delaware Corporation Law. I thought that we could briefly go into that. During the 1920's and 1930's, the chancellor was Josiah Wolcott, who was the father of Justice Daniel Wolcott who subsequently served a short term as chancellor and then had a distinguished term as an associate justice and chief justice during the 20's and 30's. That was the time when many corporate law doctrines were in the crucible and as a result Chancellor Wolcott stands very high in the development of the corporation law in the decisions that he rendered. It's been said of him, however, that he was a great proponent of the business judgment rule — that is, as we all know, the rule that says that where a disinterested board makes a judgment or a decision, that decision cannot be challenged merely because it turns out to be a wrong decision. It's been said that Chancellor Wolcott in the first paragraph of an opinion would often say that this case is governed by the business judgment rule and then he would spend about twenty pages trying to demonstrate to the disgruntled shareholder

that the judgment was not only wise but it was eminently in plaintiff's best interest. However, he did write many distinguished opinions, and his lower court opinion in *Guth v. Loft*\(^{10}\) is still, I think, the definitive case in the area of corporate opportunity.

In the 1940's, 50's and 60's, first as vice chancellor and then as chancellor the office was held by that eminent jurist, Collins Seitz. Aside from the corporate field, Judge Seitz predated the Supreme Court of the United States by a couple of years in declaring that separate but equal was inherently unequal. In the corporate field, his reputation is without par. He participated on the trial level in many distinguished cases and in many important cases — the *Ringling*\(^{11}\) case, *Sterling v. Mayflower*,\(^{12}\) *Campbell v. Loews*,\(^{13}\) *American Hardware*,\(^{14}\) and any number of now standard textbook decisions. Judge Seitz is now the Chief Judge of the United States Court of Appeals for the Third Circuit, and an opinion he wrote a couple of years ago in the *Lindy Brothers*\(^{15}\) case, I think has become the Bible on the issue of attorney's fees to plaintiffs in class action litigation.

Following Chancellor Seitz was Chancellor Duffy, who has now after four or five years as Chancellor moved up to the Supreme Court of Delaware where he has been the author of these most recent decisions as well as other important decisions in the area. Justice Duffy was followed as chancellor by Bill Quillen, who I thought would be here, because I was prepared to say that Bill had a well-deserved reputation in the five or six years for well-rounded and thoughtful opinions, including the *Gimbel v. Signal*\(^{16}\) case which was an important case and which has been discussed. If he was here, I would have said he had a couple of noticeable lapses in cases where my client ended up on the losing side, but since he's not here I won't get into that. Chancellor Quillen resigned a little over a year ago and was replaced by William Marvel who sat as the vice chancellor for more than twenty years prior to his promotion to chancellor, and as such participated in many important cases, especially a whole series which have become the corporate control

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cases — Kors,\textsuperscript{17} Propp\textsuperscript{18} and Condec \textit{v.} Lunkenheimer.\textsuperscript{19} I think the feeling among Delaware lawyers is one of great affection and respect for Chancellor Marvel. There is a residual feeling that he learned sentence structure from William Faulkner, but generally speaking his opinions touch all the bases and we respect him as being usually sound in his judgments. Filling out, we have two vice chancellors, the first one was created in the 1940’s, and the second vice chancellorship in the early 1960’s. The vice chancellors now are Grover Brown, who has been on the bench three or four years and has written very thoughtfully in corporate areas. Our new vice chancellor, Maurice Hartnett, who is with us today, has been on the bench just about a year now, and I think really the luck of the draw has been such that he really hasn’t gotten his teeth into corporate law problems, but I’m sure that when he does, the quality of his work will be up to the others.

The supreme court, as I mentioned, is a three-man court. Chief justice is Chief Justice Hermann, who had the distinguished career first as superior court judge, and then after resigning he earned deserved eminence as a practicing lawyer. About twelve or thirteen years ago, he went on the supreme court as an associate justice and became chief justice two or three years ago. I think he’s gaining eminent respect both as a judicial administrator and for the quality of his work. I have mentioned Justice Duffy. The third justice is John McNeill who had a long career as a superior court judge but who has written, in the few opinions that he’s dealt with corporations, gained some respect. I’m thinking particularly of the Fleigler \textit{v.} Lawrence\textsuperscript{20} case, which he wrote on corporate opportunity, and the concurring opinion in the recent Singer \textit{v.} Magnavox\textsuperscript{21} case which won the favor of at least the one commentator.

I guess the point I would like to make about our judges, because I think it is one that is important in light of the controversy that has swirled about the Delaware court and the Delaware Corporation Law,\textsuperscript{22} is that I firmly believe that, while abilities vary, each man is a man of great personal integrity who tries in every way and without deviation to do his job and treat each case on its merits in the best way he knows how. These attacks on the judiciary that were started

\begin{footnotes}
\item[17.] Kors \textit{v.} Carey, 39 Del. Ch. 47, 158 A.2d 136 (Ch. 1960).
\item[18.] Propp \textit{v.} Sadacca, 40 Del. Ch. 113, 175 A.2d 33 (Ch. 1961), \textit{aff’d in part, rev. in part sub nom.} Bennett \textit{v.} Propp, 41 Del. Ch. 14, 187 A.2d 405 (Sup. Ct. 1962).
\item[19.] Condec Corp. \textit{v.} Lunkenheimer Co., 43 Del. Ch. 353, 230 A.2d 769 (Ch. 1967).
\item[20.] 361 A.2d 218 (Del. 1976).
\item[21.] No. 289, 1976, slip op. at 40.
\end{footnotes}
by Professor Cary and picked up by Ralph Nader,\textsuperscript{23} that somehow there is an overriding inclination to decide cases on what is in the best interests of the Delaware corporation law tax revenues and the incomes of practitioners in Delaware, borders on the libelous. Unhappily, I guess, there is no such thing as “truth in consumer-ism.”

Well, anyway, so much for the personalities of our judges and who they are. I would like to focus now on the jurisdiction of the court and on this I will be brief because Mike covered much of what I intended to say. As I stated, there is this overriding common law jurisdiction based on the form of the action, the nature of the claim or the form of relief sought, and that I think is the fundamental jurisdiction. There is also the statutory jurisdiction which Mike mentioned. There is both summary and plenary. This phrase “summarily orders” as Mike mentioned is present in a number of sections of our law, and as he pointed out there are no rules calling for the court to respond and will treat those matters as expeditiously as they warrant. I enjoyed Mike’s presentation. I guess maybe I’ve been on the defendant side more than the plaintiff side, so I cannot wholeheartedly subscribe to everything that he has said. But I will say this. The court reacts to the need of the situation, and if a plaintiff comes headlong into court warrantedly, if there’s time, the court will balance the considerations and hear the matters — this not only goes to summary matters, this goes to any matter — with the dispatch and the exigency that the matter requires.

One area Mike didn’t mention that ought to be is this area of equity receiverships. They are not often employed anymore because seeking an equity receivership is an act of bankruptcy, as you probably know, and usually there is a creditor who finds it in its own interest to oust the equity court or the court of chancery of jurisdiction over such a receivership in favor of Chapter X, XI or straight bankruptcy, and since the bankruptcy laws do take precedence, any equity receivership is subject to being terminated. However, in recent years, it has seen some valuable service, particularly in the liquidation of failing brokerage houses. Bruce Stargatt, who is my fellow panelist here, has done yeoman service as the receiver for McDonnell & Company. In that instance, for reasons peculiar to the type of transaction, everybody involved has found it convenient and desirable to use the court of chancery and a receiver operating under its authority as the vehicle for sorting out the interests of the parties involved.

\textsuperscript{23} See R. Nader, M. Green & J. Seligman, \textit{Taming the Giant Corporation} (1976).
With respect to procedure, as Mike mentioned, the procedure of the chancery court are the federal rules with a few variations. I won't repeat concerning rules to show cause or the *ex parte* orders, because it would just be repeating what Mike said. As Mike said, and I will reemphasize, the value here is the responsiveness of the court, and I would reenforce what Mike and others have said about the constant availability of our judges, chancellors and supreme court judges, to be available for office conferences, for hearings, on very short notice to render prompt decisions when they are called for. In this area, I would say unhappily one exception has developed. As I mentioned, our supreme court is greatly overburdened. At the time they started as a three-man court in the early 1950's when the court was first created, I think they had a case load of twenty or thirty cases a year. It's more than tenfold that now, but yet they still have the three justices and the ordinary appeal now, unhappily, takes perhaps more than a year to present and perhaps even longer to decide. They are still available in the emergency situation. If there is an injunction case or something imminent, the justices will put themselves out, but if you have an appeal in the ordinary course, unhappily you are in for something of a lengthy delay. One illustration might be the three cases that are foremost in consideration of many of us today — the *Singer*, 24 *Lynch* 25 and *Tanzer* 26 cases were each argued on a special accelerated argument schedule in a single week last March, and yet it took more than six months for the court to render its opinion, although I think it recognized the importance of the issue and the fact that many people were concerned about getting a definition of the law in that area.

I might add just as a sidelight, in connection with injunctions, it is almost the invariable rule that our chancery court will not enjoin a meeting as part of a challenge to a proposed corporate transaction. There, of course, are exceptions, but the general rule that we operate under is that a meeting will be permitted to go forward and the vote taken, and if the court feels that an injunction is warranted, it will step in at that stage and say don't file the certificate, or we enjoin the filing of the certificate or the consummation of the transaction. But quite often, parties go in and they want to hit the transaction at the earliest possible time, and they may seek to enjoin the conduct of the stockholder meeting. The general rule, as we understand it, is that the meeting will be permitted to go forward even though the outcome is a foregone conclusion. The court may indulge the

presumption that if the proposal was voted down, the problem will go away, even though you may realistically know that the matter is not going to be voted down. Because of that, quite often the practitioners have found it convenient to stipulate if there is no great need to consummate a merger today or tomorrow or within a week or two, but there is reluctance to hold up the meeting. Quite often when such a controversy arises, the parties will agree, the vote will be taken, but by stipulation the action will be postponed. Then you can usually get a date for final hearing almost as soon as you might have gotten a hearing on preliminary injunction, and you can have the matter finally resolved within a few days of the time it might have been resolved on preliminary injunction, without everybody having to run around and go through a preliminary injunction stage and then perhaps repeat it all on final hearing later on.

One point I'd like to mention with respect to discovery, because it often comes up and it's a question when we get involved in litigation that is put to us quite frequently, almost the first question put to us by forwarding attorneys when we get a case, and that is this: We have the federal rules of discovery exactly, but there are no rules of priority in Delaware. Counsel are expected to work out priority or the succession of discovery on their own. There is no rule, as there is in some jurisdictions, as to who comes first and who comes second. Secondly, parties are expected to bear their own expenses of discovery in the first instance, absent some showing of hardship. Thirdly, defendants can insist and if they do so will be granted the right of being deposed either at their place of residence or their place of business. Plaintiffs on the other hand can be compelled to come to Delaware to submit themselves to depositions. As Mike pointed out, there are exceptions, and you might not want to rely upon these rules. Often, defendant does want to have his deposition in Delaware so you can seek rulings from our court promptly, but as I understand it, those rules as I stated them are the rules we generally operate on with respect to discovery.

One other difference where we differ with the federal rules is slightly in connection with the class action rule, which is rule 23.1. As any of you who have been involved with them know, in the federal courts a meritless class action — and by that I mean one in which the plaintiff is prepared to throw in the sponge — is one that is very difficult to dispose of because of the requirement that there shall be no dismissal without notice to the class. Recently, I had a case where the plaintiff picked up the wrong annual report and named a fellow by mistake who had retired from the board some months prior to the transaction which was being challenged, and he was down fishing in Florida without a care until the process server
showed up and told him he was a defendant in this suit challenging a transaction that he knew nothing about. He felt that it would disturb his fishing to have even this meritless claim hanging over him and, after we pointed this out to the plaintiff, the plaintiff too was willing to dismiss the case. We had a tough time doing it, we virtually had to have a hearing on the merits because of the requirement of rule 23 that there shall be no dismissal or compromise without notice.

The chancery court rule is different in one small regard. It states that a case can be dismissed without prejudice or with prejudice as to the named plaintiff only, upon a showing, usually by affidavit, that no consideration has flowed either to the plaintiff or the plaintiff's attorney because of the dismissal. So therefore, the meritless claim, the claim that the plaintiff is willing to throw in the sponge on, can be resolved with ease without notice, without expense, merely by the filing of an affidavit showing that it is a voluntary act, it's only binding as to this plaintiff, and that he's not being paid directly or indirectly any consideration for his determination. I would strongly urge that any of you who have some influence in this area might urge such a change in the federal area. I think it would make life easier for a lot of us in that forum.

Turning now to the last topic, it has to do obviously with the jurisdiction of the court over persons and corporations. The fundamental basis for equity jurisdiction is in personam jurisdiction and over corporations it's done generally by service upon their registered agent. There is a provision for service upon certain foreign corporations by service upon the Secretary of State. With respect to Delaware residents, obviously the sheriff can reach them. The problem has been non-residents of Delaware who get involved in transactions which are being challenged in the Delaware courts. The traditional form of the remedy here was the foreign attachment quasi in rem procedure known as sequestration. It flowed from antiquity in the English system. It had been given apparent validity in the United States about a century ago in Pennoyer v. Neff27 and apparently reaffirmed about 1920 in Ownbey v. Morgan.28 The right to get personal jurisdiction by seizing property and then telling the person that as a condition of having that property released, you must enter a personal general appearance. That's basically what quasi in rem was. The hold of Delaware, in addition to whatever physical property a defendant might have in Delaware in debts owed by Delaware corporations or other conventional attachable property,

27. 95 U.S. 714 (1877).
was our situs statute, section 169 of title 8 of the Delaware code,\textsuperscript{29} which said that stock in a Delaware corporation had a situs here. The view is now expressed that this is an anomaly unique to Delaware, which is what it turned out to be, but in point of historical fact that had been the law in virtually every state around the turn of the century. It was through the adoption of the Uniform Stock Transfer Act and subsequently the adoption of the Uniform Commercial Code that other states for the sake of negotiability, had repealed their situs statutes, but Delaware kept its. It seems to have been given renewed validity by the \textit{Hanson v. Denchla}\textsuperscript{29} case in the 1950's. However, all this, as Mr. Stargatt will talk about in more detail, was turned upside down by the action of the Supreme Court in \textit{Shaffer v. Heitner},\textsuperscript{31} and the action in the Third Circuit Court of Appeals in \textit{U.S. Industries v. Gregg},\textsuperscript{32} in which, it seemed to me, an exception that has been forged to leave a gap in the existing structure. Namely, the \textit{International Shoe}\textsuperscript{33} case is now viewed as swallowing up the whole system. Obviously, that case leaves the state of the law in this area very unsettled. The \textit{in rem} question is still wide open. There has been the \textit{Barber-Greene}\textsuperscript{34} decision, which perhaps Mr. Balotti\textsuperscript{35} will allude to, which raises some question about that, but it's important to know that the Supreme Court did not invalidate the situs statute \textit{per se}. It merely put another requirement on the right of foreign attachment, namely, attachment alone was not enough, you needed some other minimum contact.

All I can say is that this whole area seems open. The best analogy I can think of is that it is as if the Supreme Court abolished our system of measurement — because there had been an internal mathematical logic that went to foreign attachment — but instead of saying, "you will now use the metric system," they said, "Well, we'll deal in smidgeons, globs and lots, and what that means we'll tell you later when the problem arises." As a result, I think a lot of money is going to be wasted in getting solutions to jurisdictional problems, that heretofore have at least been certain. I would note in parting that in Law Week last week I saw that a New York federal court\textsuperscript{36} had concluded that the \textit{Heitner} case did not overrule the so-called \textit{Seider-Roth} doctrine, which is that doctrine which says that you can

\begin{itemize}
  \item 357 U.S. 235 (1958).
  \item 433 U.S. 186 (1977).
  \item 540 F.2d 142 (3rd Cir. 1976).
  \item See address by Mr. Balotti, this issue, p. 230 \textit{infra}.
\end{itemize}
get jurisdiction over a nonresident defendant by attaching his insurance proceeds or attaching his insurance proceeds in an insurance company that's doing business in your state. There may be some validity left there. In any event, as Mr. Stargatt will now state, even though Heitner may have raised more questions than answers, it does point the way to a sounder basis for jurisdiction in Delaware over matters involving the internal affairs of a Delaware corporation. To present that problem, I'd like to turn the microphone over to my friend, colleague and often more than worthy opponent, Bruce Stargatt.