A SHORT HISTORY OF THE DELAWARE COURT OF CHANCERY—1792-1992*

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INTRODUCTION

The 200th Anniversary of the Court of Chancery of the State of Delaware is testimony to the Court’s ability to adapt principles


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of equity developed centuries ago to ever-changing economic circumstances and legal relationships. While the Court's role as arbiter of the corporation takeover fights of the past decade brought it national prominence even beyond the corporate bar,¹ the Court's decisions largely turned on application of an ancient trust concept of fiduciary duty. Unlike its extinct English ancestor, the High Court of Chancery of Great Britain, Delaware's Court of Chancery has never become so bound by procedural technicalities and restrictive legal doctrines that it has failed the fundamental purpose of an equity court—to provide relief suited to the circumstances when no adequate remedy is available at law. The historical roots are deep but the Delaware bloom remains fresh.

No short historical essay can capture fully the rich history of the Court of Chancery. The attempt is to provide perspective through historical glimpses, emphasizing different factors at different times with no pretense of completeness. In particular, this short essay neglects the nuts and bolts of equitable jurisprudence—the broad nature of injunctions, injunctive relief against torts, specific performance, equitable conversion, rescission, reformation, and restitution. An essay is a personalized accounting with limitations of experience and prejudice. Our experience is what it is as of now and our prejudice is our fondness for the Court.

**English Origins**

The earliest roots of the Delaware Court of Chancery reach back to the King's Chapel in feudal England. From its role in issuing official documents, such as royal writs initiating common law proceedings,² the Chapel evolved into a Court of Chancery which provided judicial relief to those left remediless because of the procedural rigidity, corruption, and inadequate enforcement machinery of the common law courts.³ This emphasis on providing a remedy despite procedural or practical problems remains a central feature of Delaware's Court of Chancery. For example, in *Weinberger v. UOP, Inc.*, Del.Ch., C.A. No. 5642, Brown, C. (Jan. 30, 1985), slip op.

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¹ The Court has been the subject of numerous profiles in the national press and national news and business magazines.
at 21, the Chancellor explained his monetary award for a breach of fiduciary duty where precise quantification of damages was impossible:

Quite simply, equity will not suffer a wrong without a remedy.

Chancery's early jurisdiction was broad and imprecise because it derived from royal prerogative. Early Chancery procedure mirrored the flexible and simple procedure of ecclesiastical courts. The English Chancellor relied heavily on the common law, but would do what his conscience perceived was morally right where the common law would cause hardship in a particular case. During the fifteenth and sixteenth centuries, equity's most important legal doctrine, the trust, developed, as did its most important remedies, specific performance, the injunction, and judicial administration of estates. By the end of the eighteenth century, chancery practice became as intricate and inflexible as that of the common law courts. The effort to systemize Chancery's rules and formalize its equitable doctrines undermined the fundamental purpose—to do equity in the particular case. In the 1800s the High Court of Chancery died a slow death caused by its rigidity and the repressive image of the English Chancellors. Parliament dismantled it altogether in 1875.

The role of procedural and doctrinal inflexibility in the decline of England's Chancery Court contrasts with the determination of Delaware's Chancellors over two centuries to eschew broad rules in favor of specific holdings and carefully crafted remedies that address the particular circumstances of the case at hand. The secret of Delaware equity rests in two old concepts, both English in origin. First, equity is a moral sense of fairness based on conscience. Second, equity is the recognition that the universal rule cannot always be justly applied to the special case. Equity is the flexible application

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5. It is important to remember the cleric origin of the English Chancellor. It was not until 1529 that the English Chancellorship was held by a lawyer. St. Thomas More (1529-1532) was the first lawyer Chancellor. He succeeded Cardinal Wolsey (1515-1529) described by Maitland as "the last of the great ecclesiastical Chancellors." The last ecclesiastic was Dr. Williams, Bishop of London (1621-1625) and the last non-lawyer was Anthony Ashley Cooper, Earl of Shaftesbury (1672-1673). See F.W. Maitland, Equity 1-11 (Cambridge University Press ed. 1920).

6. Note the comment of Chancellor Ellesmere in The Earl of Oxford's Case, 21 Eng. Rep. 485, 486 (Ch. 1615): "The Cause why there is a Chancery is, for
of broad moral principles (maxims) to fact specific situations for the sake of justice. Delaware has preserved the essence.\textsuperscript{7}

\textbf{Equity in Delaware Before 1792}

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

\begin{quote}
\textit{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.}
\end{quote}

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 has 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.

Equity in colonial Delaware had two distinct phases: primitive equity and English Chancery.\textsuperscript{8} Primitive equity related to common law and was largely corrective. In Delaware from 1664 through 1701, a primitive equity in the early English tradition was administered through three means. First, there was an equity, royal in nature, through the Governor and the Court of Assizes in New York and later through the Provincial Council in Philadelphia, which was the equivalent of a discretionary appeal in both civil and criminal cases.\textsuperscript{9}

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\textsuperscript{7} For a recent example of the Court applying broad principles of fairness in determining that a transaction could not in equity be allowed to stand, see Chancellor Allen's recent opinion in Ryan \textit{v. Wiener}, Del.Ch., C.A. No. 12,178, Allen, C. (May 13, 1992).

\textsuperscript{8} The discussion of colonial equity is based on a thesis submitted in partial fulfillment of the requirements for the degree in Master of Laws in the Judicial Process at the University of Virginia. See W.T. Quillen, \textit{A Historical Sketch of the Equity Jurisdiction in Delaware} (hereinafter Quillen, \textit{Historical Sketch}). A shorter published article, W.T. Quillen, \textit{Equity Jurisdiction in Delaware Before 1792} appears at 2 Del.Laws 18 (Spring 1984).

\textsuperscript{9} Rawle, \textit{Equity in Pennsylvania} 4-9 (Philadelphia 1868); Loyd, \textit{The Early Courts of Pennsylvania} 49-58 (1910) (hereinafter Loyd). Both sources also point out a Provincial Court established in 1684 had appellate jurisdiction "in equity." This new jurisdiction was used. See Lunt, \textit{Tales of the Delaware Bench and Bar} 69 (University of Delaware Press 1963) (hereinafter Lunt).
Second, there is evidence that at least the Governor in New York did on occasion remand a judgment to the local County Court for a determination in equity, that is a determination by the local Justices of the Peace without a jury as a means to correct apparently erroneous results by the jury. Finally, in addition to nonjury trials "in equity" in minor damages suits, there was a procedure, codified during Penn's time, where disappointed litigants after an adverse judgment before a jury could crave to be heard in equity at the next term of court, that is, a de novo hearing before the local Court without a jury.

Thus, primitive equity was used in colonial Delaware as a means of royal power to reflect natural justice as seen by the Governor and as a means to control both at the appeal level and at the local level the erratic swings of the jury. There was up to 1702 little practical change with regard to equity jurisdiction. "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." In Pennsylvania the nonjury corrective role of equity was creating the first wave of antichancery political ripples. But in Delaware there was little complaint about the corrective nonjury role of equity. Indeed, perhaps due in part to Delaware's Swedish and Dutch heritage, the indications are that bench trials remained common in the first instance notwithstanding the Duke's Laws and William Penn's charter.

But the nature of equitable jurisdiction changed in 1701 with a general court reform statute that included original point jurisdiction by way of a bill and an answer under oath and by examination of witnesses by deposition as had developed in England. The same Pennsylvania statute provided for a Supreme Court along more modern lines of a court structure and away from lines of royal


11. Lunt, supra note 9, at 69-70; I Records New Castle, supra note 10, at 54; Turner, Some Records of Sussex County, Delaware 75-76 (Philadelphia 1909); Court Records of Kent County, Delaware 1680-1705 at 135, 142-43; at 137-38, 151; at 141, 159; at 117, 123 (L. DeValinger, Jr., ed. 1959).

12. Loyd, supra note 9, at 169.

13. An earlier 1665 ruling of the Court of Assizes during the Duke of York period had attempted to introduce Chancery practice with no evident effect. See Loyd, supra note 9, at 162-63, 167, 170.
dispensation. While the statute was repealed by the Queen in Council, the Lower Three Counties (Delaware) evidently continued to accept its structure after Penn permitted their legislative separation by his famous 1701 Codicil.  

In any event, it is clear that in 1726 or 1727 the Delaware Colonial Assembly enacted a comprehensive "Act for the establishing courts of law and equity," commonly called the Gordon statute because it was enacted during the Governorship of Patrick Gordon. The Act specifically established "a Court of Equity, held by the Justices of the said respective County Courts of Common Pleas . . . observing, as near as may be, the rules and practice of the High Court of Chancery in Great Britain . . . ." Section 25 of the Act provided a traditional equitable maxim that nothing in the statute gave equitable authority in any matter "wherein sufficient remedy may be had in any other court or before any other magistrate or judicature . . . either by the rules of the common law or according to the tenor and directions of the laws of this government . . . ." Section 25 would be the focus of landmark litigation over 200 years later concerning the scope of the Court of Chancery's jurisdiction. The statutory creation of a direct and more accessible appeal route made the corrective role of equity less pressing and an original jurisdiction of English Chancery came into its own. There is record of an original equitable bill in the nature of a fiduciary accounting brought in Kent County in 1702 and litigated through 1705. There followed colonial cases involving: an equitable lien on an inheritance; a bill to equitably redeem land subject to a mortgage; bills for specific performance; a bill for liberty by an indentured servant; a bill to enjoin enforcement of a note given in contract for an unhealthy slave; cases relating to an estate settlement; petitions to sell property


15. 1 Del.Laws. c. LIV, §1. There is some uncertainty about the date of the Gordon statute in case law. Our conclusion is based on dates found in Laws of the Government of New-Castle, Kent and Sussex, Upon Delaware (Philadelphia: Printed and Sold by B. Franklin and D. Hall at the New-Printing Office, in Market Street 1752). See Quillen, Historical Sketch, supra note 8, app. at x-xi, E-1 to E-15.


of a ward; trustees' accountings; breaches of trust petition in a land sale; a petition to stay waste by a life tenant; and, a petition to cancel a bond. There existed a surprising separate maintenance jurisdiction, including a case as early as 1743 which cited an eight-year marriage where the husband had left the wife for one Agathy Light, it being particularly alleged that the husband did "apply and Wast his Substance on the said Agathy." There was a petition to compel completion of an apprentice contract of a river and bay pilot and, most important in the colonial economy, numerous commissions to take depositions of witnesses primarily to perpetuate their testimony as to land boundaries. In a 1774 record there can be found an action of ne exeat provincia, the historic equitable remedy in the nature of civil bail, and as early as 1766, a Sussex lunatic proceeding. The first Delaware State Constitution in 1776 specifically continued the practice of the law courts, still called Courts of Common Pleas, holding Courts of Chancery "as heretofore." Chancery continued to grow with Continental currency questions coming to the fore in the post-Revolutionary days along with separate maintenance cases, lunatic proceedings, actions on mortgages, and specific performance actions.  

Equitable jurisdiction was rather fully developed by 1792; it had indeed been "heretofore exercised."

Creation of the Delaware Court of Chancery

When Delaware created its Court of Chancery in 1792, it contradicted a historical trend in eighteenth century America away from chancery courts. Some states had abandoned their chancery courts during the colonial period or at the time of the Revolution, and still others never established a separate court of chancery at all. After the Revolution most states began moving toward consolidation of jurisdiction so that the same judges would sit in equity and law. Yet Delaware, which had consolidated jurisdiction throughout its colonial history, suddenly decided in 1792 to establish a separate Court of Chancery. Delaware's decision appears to stem from two factors: Delaware's unique colonial history produced a compatible

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18. The cases in this paragraph are discussed in some detail at Quillen, Historical Sketch, supra note 8, at 51-61, 87-94, 106-112. The original case records are in the Hall of Records in Dover.
political climate; and, the status of Chief Justice William Killen provided the particular political impetus.

Early colonists in Delaware and elsewhere had a philosophical prejudice against arbitrary and concentrated power that naturally made them suspicious of an institutionalized chancery tied to the royal prerogative. Unlike other colonies, however, Delaware never had an institutionalized chancery during the colonial period. Rather, equity in Delaware was based and administered in a manner that eliminated the reasons for the ideological and political opposition to chancery courts that developed in other colonies. Equity in Delaware, at least after 1701, was founded on statute, not the royal prerogative. Hence, courts of equity in Delaware were not viewed as instruments of the Crown. Because a royal governor never exercised general equity jurisdiction in Delaware, equity never became an element in the political power struggle between the governor and the assembly. Instead, the legislature vested equity jurisdiction in the same judges who occupied the Court of Common Pleas. Hence, equity was never in competition with the common law. Equity in colonial Delaware existed quietly and consequently attracted little attention and no opposition. As a result, Delaware developed no long lasting prejudices against equity and chancery courts.20

The absence of philosophical and political bias against chancery made Delaware's political climate more agreeable to a court of chancery. Delaware's growth in population and industry during the last quarter of the eighteenth century,21 may also have helped raise equity from its long period of dormancy:

[A]s the increasing population of the new country begot new relations, there arose controversies and contests growing out of business, and the necessities for the redress of injuries which resulted from the breach of duties or the non-performance of obligations that called for the use of the means to enforce observance through ancient remedies.22

American society had become more complex with the result that numerous and frequently occurring equitable relationships not present

20. Much of the material in this paragraph is based on Mr. Hanrahan's paper, The Delaware Court of Chancery: Delaware's Peculiar Institution (hereinafter Hanrahan, Delaware's Peculiar Institution).


22. I V. Woolley, Practice in Civil Actions and Proceedings in the Law Courts of the State of Delaware, Sec. 57, at 35 (1906).
during colonial times developed. The injunction, trust, and other instruments of equity were more necessary as Delaware became socially and economically complex. By 1792, the Chancery concept of equity was certainly useful to the proper functioning of the judicial system. Once wrenched from a political context by the Revolution, chancery courts lost their power to stir revolt. Since Delaware had never had a chancery court before, its post-revolution creation could be viewed as a sophisticated step forward rather than a royal step backward.

The creation of the Delaware Court of Chancery in 1792 was also a result of individualized political circumstances. There was no apparent problem with the administration of equity matters by the Common Pleas judges under the Gordon Statute, or, for that matter, by the regular law courts dating back to the Duke of York. According to the folklore of the Delaware bench and bar, the impetus for creating a Court of Chancery was to provide a new judicial seat for Delaware’s first Chancellor, William Killen.

William Killen was Irish, Presbyterian, a Whig and later a Democrat. He was Chief Justice of the Supreme Court under the Constitution of 1776 and had served since his appointment on June 6, 1777. However, during the 1790s, “Delaware was a rockribbed Federalist stronghold.” 23 When the judiciary was reorganized by the 1792 Constitution, there was necessarily some discussion as to what role Chief Justice Killen, the Democrat, would play. The Killen theory is largely based on the following excerpt from a sketch of Chancellor Killen’s life “made from the recollections of the late Judge Hall, who was the Chancellor's son-in-law.” 24

Under the new Constitution of 1792, it became necessary to reorganize the courts. The offices of Chief Justice of the Supreme Court and of the Court of Common Pleas became very important, from an accumulation of business after the war. It was of much public concern how, properly, to fill them. Richard Bassett, of Kent County, was settled upon as the most suitable person for Chief Justice of the Common Pleas; while such was the high estimation in which George Read, of New Castle, was held for ability and integrity, that his appointment as Chief Justice of the Supreme Court was deemed

24. 1 Del.Ch. 481 app. (1876). The reporter for this volume was Chancellor Daniel M. Bates, Delaware's sixth Chancellor.
indispensable to the character and influence of the new judiciary. But Mr. Killen had previously been Chief Justice of the Supreme Court, and to take the office would, in appearance be superseding him. To this Mr. Read would not consent. But the Chancellor was to be the official head of the new judiciary. To appoint Mr. Killen to that office would be a promotion; and in that case, Mr. Read was willing to accept the office of Chief Justice of the Supreme Court. The party in power was strongly opposed to the party of which Mr. Killen had always been an uncompromising member. There were members of the party in power seeking the appointment of Chancellor; but Mr. Read was resolute, and Mr. Killen was appointed. The motive which influenced Mr. Read to this course was once stated by him, in a conversation with the late Judge Hall, from whom these recollections were obtained. Mr. Read said, that Mr. Killen had accepted the office of Chief Justice, and had discharged its duties with firmness, in dangerous times; if the mother country had succeeded in suppressing the rebellion, his life might have been the forfeit; his administration of the office had given general satisfaction; and he ought not to be cast off. This incident is certainly worth preserving; it is honorable alike to both the parties concerned.25

Judge Ignatius Grubb, in his 1896 paper presented to the Historical Society of Delaware, echoed the earlier account. Speaking of George Read's appointment as Chief Justice of the Supreme Court, Judge Grubb said:

As a historic fact Mr. Read was selected and against his wishes, owing to the inadequate compensation, especially because of his recognized pre-eminent legal qualifications for the successful discharge of the duties of that particular office. This reason really led, it is said, to the creation by the convention of 1792, of the separate Court of Chancery. For Mr. Killen, the chief justice under the constitution of 1776, was 70 years of age. The duties of the chief justice, owing to the controversies arising out of the Revolutionary war and other causes, were then very arduous, and a more vigorous occupant of the office was required. Accordingly said convention created the office of chancellor and made him also president of the Appellate Court, so that Mr. Read might be appointed chief justice of the Supreme Court.

25. 1 Del.Ch., at 482-83 app. The account is reproduced at 1 Scharf, History of Delaware, 1609-1888 (1889).
Court and Chief Justice Killen appointed chancellor with due deference to his age and long service on the bench.26

The full extent of the conclusions in the sketch of Chancellor Killen’s life and in Judge Grubb’s paper are difficult to document. But the basic facts—as to William Killen’s Revolutionary War service as Chief Justice during a period of risk, as to his age, as to the creation of the office of Chancellor, as to the relative burden of the office of Chancellor in comparison to the other chief judgeships and as to Killen’s appointment as Chancellor in 1793—are clearly accurate. There can be added two personal relationships that are also clear.

The President of the 1791-1792 Constitutional Convention was John Dickinson, who among numerous high positions in governments and constitutional conventions in two States and nationally, had been President of The Delaware State from 1782-1783. Dickinson became ill before the work was done. But crucially, for present purposes, it should be noted that, as a youth, Dickinson grew up in Dover and, in the 1740s, had as his tutor none other than a young immigrant Irishman named William Killen.27

Second, the relationship between Killen and Read was at least one of the most cordial respect. There is no question that Chief Justice Killen held George Read in high esteem and accorded Read considerable deference at the time Killen undertook his duties as Chief Justice. By letters to Read dated July 19, 1777 and August 9, 1777, he sought Read’s advice as to affairs of Court in New Castle.23 On the other side, at the time Read accepted the position of Chief Justice of the Supreme Court in 1793, after being offered his choice of either Chief Justiceship or the Chancellorship by Governor Joshua Clayton, he was solicitous about Chief Justice Killen. He wrote to the Governor on August 20, 1793:

28. William Thompson Read (grandson of George Read), Life and Correspondence of George Read 264-67 (Philadelphia 1870) (hereinafter Read).
Among other things that suggested themselves to my mind as to my acceptance of the seat in the supreme court was that of its being presently filled by Mr. Killen, a professional man, for a long time, in whose original appointment I had concurred; as one of the three electors under the old constitution of this State, I felt a compunction in contributing perhaps to his removal therefrom. You, sir, may, in some future communication with him, represent this in such a manner as to secure me from plausible censure by him, which I leave to your own better opinion.  

This letter, of course, can be read to show that Read "was not terribly hurt at the thought of displacing Chief Justice Killen." But it can also be read to confirm some unwritten understanding that the outgoing Chief Justice was to be accorded the full respect that was due.

The sketch of Killen's life, however, must be put in some perspective from a letter written by Judge Hall to William Thompson Read under the date of December 26, 1857 wherein Hall said that he "settled in this State in 1803." This letter would at least suggest that Judge Hall never met George Read, who died in 1798, and would further suggest, admittedly more speculatively, that Hall's information about Chief Justice Killen's appointment as Chancellor came from none other than Chancellor Killen himself.

But the nature of politics is strange and some things are not written. It certainly is not farfetched that the personal ties of Dickinson, Read and Killen bridged party lines to achieve a result. Perhaps the Governor was the last to know. One more delightful piece of political manners, eight years later, can be added from the sketch on Chancellor Killen's life:

He resigned the office in December 1801, understanding that Nicholas Ridgely, then Attorney General of the State, would be appointed to succeed him. Governor [David] Hall had been elected by the democratic party, and was to come into office in the January following. Mr. Killen was censured for not deferring his resignation, so that Governor Hall might appoint his successor. His answer was, that he restored the office to the party from which he had received it; that he considered it his duty to do so, although himself a democrat. Probably his

29. Id. at 549.
30. See Hanrahan, Delaware's Peculiar Institution, supra note 20, at 29.
knowledge that the appointment of Mr. Ridgely was the best that could be made, and the importance of making a good appointment, had a proper influence.32

One suspects the creation of the office of Chancellor had much to do with its first occupant.

DELAWARE CHANCERY IN THE NINETEENTH CENTURY

Though unique political history and circumstances converged in 1792, the survival of the Delaware Court of Chancery was by no means assured. However, the highly qualified nineteenth century chancellors in this small conservative state not bothered by urban or agrarian radicalism33 developed the principles, procedures, and practice that enabled the Court to evolve into a forum nationally recognized for resolution of corporate disputes.

Like Lord Nottingham of the English High Court of Chancery, Chancellor Nicholas Ridgely, who succeeded Chancellor Killen in 1801, organized the procedural and substantive rules of Delaware equity and successfully integrated Chancery into Delaware’s judicial system.34 Chancellor Ridgely rightly deserves to be called “Father of Delaware Equity.” Kensey Johns, Sr., Kensey Johns, Jr., Samuel M. Harrington, Daniel M. Bates, Willard Saulsbury and James L. Wolcott, highly talented legal scholars, each in turn followed Ridgely as Chancellor. As a result of the efforts of these able and respected jurists, Delaware did not resort to code pleading, where all distinctions between law and equity are abolished, or to a single court system with an equity and common law side.35 The preface to Chancellor

32. 1 Del.Ch. at 484 app. William Thompson Read helps complete the story: In the graveyard of the Presbyterian church, Dover, Delaware, which I lately visited to see the monuments of two distinguished citizens of my native State, recently erected there, while scanning with interest (July 5th, 1859) the tombs around me, I came upon an ancient stone, which covers the grave of William Killen, and read upon it that “he was born in Ireland A.D. 1722; landed in America A.D. 1737; was first Chief Justice of the Supreme Court of Delaware under her Constitution adopted A.D. 1776, and until the adoption of her second Constitution A.D. 1792; and then Chancellor of Delaware until he resigned this office A.D. 1802. Died October 5th, 1807, aged 85 years.”

Read, supra note 28, at 267-68 n. The resignation year should be 1801. The stone is still in the graveyard but unfortunately it is now largely illegible.


34. III Conrad, Historical of the State of Delaware 924 (Wilmington 1908).

Bates' 1868 revision of the Rules of Equity Practice discussed procedural issues that are still discussed: the inadequacy of written interrogatories for cross-examination; the difficulty in assessing ex parte affidavits during the preliminary injunction stage; and, of course, the expediting of causes to a hearing. The modernization of judicial procedure was being accomplished by equitable innovation.

Other circumstances contributed to Chancery's survival in the nineteenth century. Delaware's basic conservatism remained intact since the State had no cities with large working class populations and no frontier. The egalitarian movement of the 1840s and 1850s never gained momentum in Delaware and there was a strong conservative influence from mercantile interests. Moreover Delaware's small size enabled equity to be efficiently administered in a single, centralized chancery court, unlike large states where it was more practical to administer equity in county courts.

The rise of the corporation as the preferred form of business organization and the subsequent incorporation of numerous corporations in Delaware was, of course, critical to the Court's evolution and survival. Equally important, however, was that the Court, through its equitable doctrines and remedies, was able to provide an excellent forum for resolution of corporate internal controversies. Chancery practice in nineteenth century Delaware already included many of the remedies sought and defenses raised in corporate disputes. From these remedies and from the equitable principles underlying them, the Court's jurisdiction in corporate matters developed.

In Richards v. Seal, the Court held that lack of diligence, not just active default, may be a breach of trust. The Court's rulings foreshadow the duty of due care now imposed on directors of a Delaware corporation. Similarly, the duty of disclosure owed by majority stockholders and directors of Delaware corporations may

36. Rules of Practice in the Court of Chancery of the State of Delaware, Preface (James Kirk Dover 1868).
38. 2 Del.Ch. 266 (1861).
40. See, e.g., In re Vitalink Communications Corp. Shareholders Litig., Del.Ch., C.A. No. 12,083, Chandler, V.C., slip op. at 26-32 (Nov. 8, 1991).
be viewed as an outgrowth of *Maclary v. Reznor*\(^{41}\), which held that a fiduciary relationship between the parties to a transaction creates a duty to disclose facts that may influence the other party.

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. 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. McAllister*, 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).

Delaware's emergence as the premier state for incorporation also has roots in the nineteenth century. During most of that century, incorporation in Delaware was accomplished by special legislative charter. *Dartmouth College v. Woodward*, 4 Wheat. 518 (1819), temporarily reduced legislative control of corporate charters by holding that a corporate charter was a contract that a future legislature could not unilaterally change. However, the states regained their authority by including in each charter, and later in general corporation laws and state constitutions, provisions expressly reserving the state's right to amend corporate charters.\(^{42}\)

Article II, Section 17 of the Delaware Constitution of 1831 required the concurrence of two-thirds of both houses of the legislature for corporate charters "with a reserved right of revocation by the legislature." Acts of incorporation other than those for public improvement were not to last longer than twenty years unless reenacted by the legislature. Section 17 also authorized a general corporation law:

> The legislature shall have power to enact a general incorporation act to provide incorporation for religious, charitable, literary and manufacturing purposes, for the preservation of animal and vegetable food, building and loan associations, and for draining low lands;

\(^{41}\) 3 Del.Ch. 445, 465 (1870).

and no attempt shall be made, in such acts or otherwise, to limit or qualify the power to revocation reserved to the legislature in this section.

Another development during the late nineteenth century was that the legislature began to designate the Court of Chancery as a forum for certain corporate matters. 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.\(^{43}\) The trend to make Chancery the forum for actions under the corporate statute continued into the twentieth century, including actions to compel a stockholders’ meeting.\(^{44}\) Thus, in the nineteenth century, the Court began to emerge as a forum for various statutory and equitable claims relating to Delaware corporations.

**Transition into the Twentieth Century**

The transition from the nineteenth century into the twentieth century was an exciting period for Delaware law, reflecting the ferment of industrialization and politics that characterized the time.

There was a new Chancellor, John R. Nicholson, first appointed in 1895, who fitted well the tradition of capping a distinguished public career, which had included service as Dover town attorney, Kent County attorney, and Attorney General, with service as the State’s highest judicial officer. Chancellor Nicholson, also in traditional pattern, possessed a family heritage that valued public service; his father had served in Congress and a great-great-grandfather on his mother’s side was none other than Chancellor Killen.

After years of effort, a new Constitution was promulgated by a Constitutional Convention in 1897. The Constitution of 1897 eliminated the time honored and highly political process of creating corporations by special legislative act and provided for incorporation only under general law.\(^{45}\) Pursuant to this constitutional provision, a new general corporation law was enacted in 1899.\(^{46}\) The new law

\(^{43}\) 17 Del.Laws c. 147, §§27, 35-36.

\(^{44}\) 22 Del.Laws c. 166, §31. The current provision is 8 Del.C. §211.

\(^{45}\) Del. Const. of 1897, Art. IX, §1.

\(^{46}\) 21 Del.Laws c. 274, §§1-139. See Arsh, *A History of Delaware Corporation Law*, 1 Del. J. Corp. L. 1 (1976), for an excellent and mercifully brief account. The authors are grateful to S. Samuel Arsh, Esquire (Mr. Arsh) and The Honorable G. Burton Pearson, Jr. (Judge Pearson), for sharing valuable thoughts about the Court of Chancery and its history in the twentieth century. In addition, Mr. Arsh was kind enough to read and make editorial comments on an early draft.
took full advantage of liberal enabling breadth offered by the Constitution: perpetual corporate existence and broadly stated general powers became the corporate norms. In essence, Delaware law recognized that the American corporation had been largely transformed to a decidedly free wheeling, private enterprise mode; it had lost its original prime character as a state instrument for public improvement. Indeed, the passage of the law itself was generally attributed to the prospect of a new private enterprise, the corporation service company.\textsuperscript{47} The business and legal change was not lost upon commentators and, in an inkling of things to come, Delaware was promptly criticized as a "little community of truck-farmers and clam-diggers . . . determined to get her little, tiny, sweet, round, baby hand into the grab-bag of sweet things before it is too late."\textsuperscript{48} Thus, even as the starter's gun went off, Delaware was already being accused of participating in a "race to the bottom."

Matters affecting the judiciary had been debated open endedly at some length at the Constitutional Convention. On February 9, 1897, the initial report of the Committee on the Judiciary, when referred to the Committee of the Whole, led to spirited debate on: the name of the State's highest court (changed from Court of Errors and Appeals to Supreme Court); the elimination of a prohibition against an Associate Judge of the Superior Court sitting in the county in which he resided (a change said to "restore to him a part of his manhood"); the method of selection and tenure of judges—appointed by the Governor with or without Senate confirmation or elected (appointed judges for twelve year terms with Senate confirmation by simple majority ultimately chosen); and general jurisdictional matters.\textsuperscript{49} By March 15, 1897, when the second report of the Judiciary Committee was presented, the format of the Judicial Article had become pretty firmly set.\textsuperscript{50}

Under the 1897 Constitution, the Chancellor remained the sole judge holding the Court of Chancery. Provision was made for the

\textsuperscript{47} Larcom, \textit{The Delaware Corporation} 9 (Johns Hopkins Press 1937). Larcom is very helpful in explaining the competitive aspects of the 1899 statute. \textit{Id.} ch. I.

\textsuperscript{48} \textit{Little Delaware Makes a Bid for the Organization Trust}, 33 Am. L. Rev. 418, 418-19 (1899).


\textsuperscript{50} \textit{Id.} at 1510-17.
Chief Justice (the chief law judge) to sit in matters of chancery jurisdiction in which the Chancellor was interested or otherwise disqualified. After a surprisingly heated debate, the Chief Justice was authorized "in the absence of the Chancellor from the State or his temporary disability, to grant restraining orders and preliminary injunctions, pursuant to the rules of the Court of Chancery; provided that nothing [in the provision was to be] construed to confer general jurisdiction over the case." 51 The discussion and limited result demonstrated the high regard favoring the personal jurisdiction of the Chancellor. William G. Sprunce, a New Castle County delegate, and later a Superior Court judge, countering the suggestion that having the Chief Justice act only temporarily under the Chancellor might demean the Office of Chief Justice, reacted in following language:

*Does any man think that any Chief Justice would consider himself demeaned by reason of the fact that this Constitution conferred upon him, in a certain contingency, high judicial functions which, but for that provision, would reside only in the Chancellor of the State? I think not. He would rather consider his office was magnified. That is the way I should look at it.* 52

The Chancellor's position as the presiding judge of the newly named Supreme Court preserved his rank as the State's highest judicial officer. Since there was still only one Chancery judge, the anomaly of having only law judges sit in Chancery appeals was also necessarily preserved. 53

Delaware, prior to 1897, had been unique among the states in granting the Governor unfettered power to make judicial appoint-

51. See Del. Const. of 1897 (as originally adopted), Art. IV, §§10, 16 & 17, as set forth in *V. Constitutional Debates 1897*, *supra* note 49, at 3490-92. The new temporary restraining order and preliminary injunction provision also empowered the senior Associate Judge to act if the Chief Justice was out of the State or disabled. The discussion included hypothetical visits of the Chancellor to Saratoga, Atlantic City, and Wanamakers in Philadelphia, the view being expressed that "the Chancellor should not be tied home like a dog . . . ." III id. at 1719-25; IV id. at 2659-74. It is clear from the last citation at 2359 that Chancellor Nicholson participated by discussing the matter with two of the Constitutional Convention delegates.

52. *IV Constitutional Debates 1897*, *supra* note 49, at 2667.

53. See Del. Const. of 1897 (as originally adopted), Art. IV, §§13-14, as set forth in *V. Constitutional Debates 1897*, *supra* note 49, at 1391. The 1897 Constitution prohibited any judge who sat below from sitting on appeal. Strangely, at least to the modern view, this prohibition had not been the case with respect to writs of error at law under the 1831 Constitution. *Ste Del. Const. of 1897*, Art. VI, §7.
ments which carried life tenure. Chancellor Nicholson’s life term was eliminated as of the effective date of the new constitution because it provided that the old courts “shall be abolished, and the offices of the . . . Chancellor and judges shall expire.” But the new Judicial Article had a proviso which stated “that the Chancellor, Chief Justice and Associate Judges first to be appointed under this amended Constitution, shall be appointed by the Governor without the consent of the Senate, for a term of twelve years.” Chancellor Nicholson, originally appointed by Acting Governor William T. Watson (a Democrat Senator who had succeeded to office on the death of Republican Governor Joshua H. Marvil), was promptly reappointed Chancellor on June 10, 1897, by Governor Ebe Walters Tunnell, the Democrat elected in 1896. He, thus, became the first Chancellor with a fixed term, twelve years, but he did not become the first subject to Senate confirmation.

Chancellor Nicholson’s stewardship appears to have been a smooth one. In 1908, he reported that only one case had been appealed during the first five years of his Chancellorship. One case shepherded

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54. The Chancellor and judges held their offices “during good behavior” and the Governor made all appointments for offices established under the earlier Constitutions. Del. Const. of 1831, Art. VI, §14, and Art. III, §8; Del. Const. of 1792, Art. VI, §2, and Art. III, §8. The original 1776 Constitution gave the President and General Assembly joint power to appoint judges. Del. Const. of 1776, Art. 12. The unique power of the Governor of Delaware under the 1831 Constitution was noted early in the debates. II Constitutional Debates 1897, supra note 49, at 952. There was strong sentiment for Senatorial confirmation and fixed terms at the convention. There was considerable debates on whether confirmation should require a supermajority (ultimately rejected); and on whether there should be a limit on the number of judges from one political party (ultimately approved for law judges). See, e.g., IV id. at 2757-70. A supermajority provision for Senate confirmation had been included in the original draft of the Judiciary article and the Chancellor had also been included in the political balancing. See Draft of Judiciary Article §3, at II Constitutional Debates 1897, supra note 49, at 940, 1511. The Chancellor was excluded early on during the subsequent debates. III Constitutional Debates 1897, supra note 49, at 1764-70. It seemed to be assumed that the Chancellor would be of the same political persuasion as the party holding the appointive power. See particularly the comments of Woodburn Martin. Id. at 1766-67.


56. Del. Const. of 1897 (as originally adopted), Art. IV, §3, as set forth in V Constitutional Debates 1897, supra note 49, at 3489.

57. This report is made in the preface of Volume VIII of the Delaware Chancery Reports. The case is Lieberman v. First Nat’l Bank of Wilmington, 8 Del.Ch. 229, 40 A. 382 (Ch. 1898), modified, 8 Del.Ch. 519, 45 A. 901 (Supr. Ct. 1900). The courts agreed on the substantive issues raised by a suretyship contract on a
by Chancellor Nicholson has an interesting connection with Delaware history, the *Mayor & Council of Wilmington v. Addicks*. John Edward Addicks, "Gas Addicks" as he was called, tried in the decade between 1895 and 1905 to use a fortune built from gas companies to purchase a seat in the United States Senate. In the City of Wilmington's suit to enjoin Addicks and his individual colleagues from excavating the city's streets in order to lay gas pipes, the Chancellor initially determined that the case, originally filed in 1891 and assigned to a Chancellor *ad litem*, was, on June 10, 1897, appropriately transferred to the regular docket under Section 9 of the Schedule included in the promulgated 1897 Constitution. *Mayor & Council of Wilmington v. Addicks*, 8 Del.Ch. 147, 68 A. 52 (Ch. 1897). When Addicks and his colleagues raised as a defense that all their actions were taken as officers, agents, and employees of a properly authorized gas company, the focus shifted to whether the company, chartered while the 1831 Constitution was in effect, was a common business corporation or one for public improvement, the latter having perpetual existence under the 1831 Constitution. The Chancellor found the company to be one for public improvement and a necessary party to the litigation. But, pursuant to "the practice of the Court of Chancery in such cases not to dismiss the bill," he gave the City leave to amend the bill. *Mayor & Council of Wilmington v. Addicks*, 8 Del.Ch. 310, 344, 43 A. 297, 305 (Ch. 1899).

Chancellor Nicholson expressed a significant view on equity jurisdiction in *Equitable Guarantee & Trust Co. v. Donahoe*, 8 Del.Ch. 422, 431, 45 A. 583, 585 (Ch. 1900). The bill sought Chancery teller's official bond after the teller's defalcations. Both opinions are thorough explorations of agency, reasonable reliance in fraud, and the effect of alleged negligence in supervision (good faith and not diligence was required). The point of difference related to date from which interest was allowed. Chancellor Nicholson's note as reported as 8 Del.Ch. 537-38, suggested *sub silentio* that he remained unpersuaded on "the precise point in which the decree of the Chancellor was varied by the decree of the Supreme Court . . . ."

EDITORIAL NOTE: Beginning with 8 Del.Ch. (cases from 1895) and continuing through 43 Del.Ch. (the last volume of Del.Ch. which includes cases into 1968), the official state reports included Supreme Court decisions on appeal from Chancery. The former practice was to include the court (Ch. or Sup. Ct.) with the date in the case citation. For the purposes of this essay, we thought the Del.Ch. citation was a useful record so we followed the former practice. But we chose the modern Delaware usage (Supr. Ct.) for the Supreme Court.

58. See the account of Addicks' political career in John A. Munroe's, *History of Delaware* 175-80 (Associated University Presses, Inc. 1979) (hereinafter Munroe, *History of Delaware*).
jurisdiction to prevent a multiplicity of suits in the enforcement of certain gas legislation which involved the complainant in multiple individual and fiduciary capacities. The Chancellor found the remedy at law adequate. In view of the power of the Superior Court to sit en banc and settle the legal point precedentially, the complainant was not "shown to be in actual danger of being forced into more litigation." In discussion of the issue, the Chancellor commented on the "sufficient remedy" limitation of Section 25 of the Gordon statute:

Thus, while all the powers of the English Court of Chancery were vested in our Court of Chancery by the Constitution and laws of this State, the most effective barrier against possible encroachment, either upon other tribunals or the rights of individuals, was not left to be drawn from English precedents or general principles, but was explicitly expressed as words of limitation or prohibition in the very statute which conferred the general powers.

Chancellor Nicholson thus placed himself in the corner of those who believed the Gordon statute applied a specific statutory limitation on equity jurisdiction beyond the general principles of English law.59

A final "turn of the century" event worth noting is the publication in 1906 of Victor B. Woolley's landmark two volume work, Practice in Civil Actions and Proceedings in the Law Courts of the State of Delaware. Judge Woolley, while emphasizing law, did not neglect the Court of Chancery:

The Constitution of 1792 created a Court of Chancery and the office of Chancellor. It divorced the equity from the law courts and created a separate jurisdiction, vesting in the Chancellor the equity jurisdiction theretofore exercised by the Judges of the Court of Common Pleas. The powers and jurisdiction of the court of equity, held by the justices of the Courts of Common Pleas, being identical as far as conformable with our institution, with the English Court of Chancery, were doubtless more extensive than the uses to which they were put would lead one to imagine. It may safely be affirmed that the

59. Other early cases seemingly in line with Chancellor Nicholson's view were: Beeson v. Elliott, 1 Del.Ch. 368, 386 (1831) (Johns, Sr., C.) and Jefferson v. Tunnell, 2 Del.Ch. 135, 139 (1847) (Johns, Jr., C.). Early cases seemingly taking the opposite view were: Fox v. Wharton, 5 Del.Ch. 200, 224 (1878) (Saulsbury, C.); Walker v. Caldwell, 8 Del.Ch. 91, 98-104, 67 A. 1085, 1086-88 (Ch. 1896) (Nicholson, C.) (including some helpful language from Chancellor Ridgely).
whole body of equity principles, both of right and remedy, was brought hither by our ancestors, together with the common law, on their emigration from England, as a part of their heritage of liberty. Much of it, no doubt, lay dormant for a long period, no occasion or demand for a resort to portions of it for many purposes having arisen, but gradually as the increasing population of the new country begot new relations, there arose controversies and contests growing out of business, and the necessities for the redress of injuries which resulted from the breach of duties or the non-performance of obligations, that called for the use of the means to enforce observance through ancient remedies. Hence the Court of Chancery of the State of Delaware inherited its equity jurisdiction from the English courts; and in its organization and proceedings, especially in matters of pleading, practice and evidence, the Court of Chancery of the State of Delaware, has adhered more closely to the English Court of Chancery and to English precedents, than those of any of her sister States.60

From 1909 to Mid-Century: Personal Chancellorships and Corporate Litigation

The arrival of the new century brought a period of Republican ascendancy in Delaware’s gubernatorial politics (nine straight election victories starting in 1900 and ending in 1932). When the first judicial constitutional terms expired in 1909, Governor Simeon S. Pennewill appointed Republican Charles M. Curtis to be Chancellor for a twelve year term succeeding Chancellor Nicholson. Chancellor Curtis presided over a different court than his predecessors. Volume noticeably increased. Chancellor Curtis conscientiously reported his opinions in four volumes of the Delaware Chancery Reports noting somewhat conspicuously in each that a certain void in the Court’s reports lingered from his predecessor’s term.61 Procedure was given heavy emphasis particularly with regard to the testimony of witnesses moving from the traditional equity focus of written interrogatories

60. Victor B. Woolley was for years a lecturer on Delaware Practice at the University of Pennsylvania Law School. He later served as an Associate Judge of the State Superior Court and United States Circuit Court of Appeals Judge. The quotation appears at page 35 of Volume I. One of his students was Judge Pearson and Woolley recommended Pearson to Chancellor William Watson Harrington for appointment as Vice Chancellor in 1939.

61. See the Preface in each of the volumes covering the period of the Curtis Chancellorship. Delaware Chancery Reports, Volumes IX-XII.
before a commissioner to oral testimony before the Chancellor. In 1917, shortly following a revision of Federal equitable rules, Chancellor Curtis prepared and promulgated the first complete revision in the rules since 1868 touching trustees' accounts, insolvent corporations, expedited trials, lunatics and masters in chancery.62

But the most dramatic change in the decade from 1910 to 1920 was the advent of major corporate litigation. Hugh M. Morris singled out eight cases for special mention in his memorial tribute to Chancellor Curtis including: Harned v. Beacon Hill Real Estate Co., 9 Del.Ch. 232, 80 A. 805 (Ch. 1911), aff'd, 9 Del.Ch. 411, 84 A. 229 (Supr. Ct. 1912) (extending the statutory power to appoint a receiver); Waller v. Peninsula Cut Stone Co., 9 Del.Ch. 348, 82 A. 689 (Ch. 1912) (director not deemed an employee for wage lien purposes); Martin v. The D.B. Martin Co., 10 Del.Ch. 211, 88 A. 612 (Ch. 1913) (disregarding the corporate entity in cases of fraud or illegality); In re International Radiator Co., 10 Del.Ch. 358, 92 A. 255 (Ch. 1914) (illegal to purchase shares if purchase would cause an impairment of capital); Butler v. New Keystone Copper Co., 10 Del.Ch. 371, 93 A. 380 (Ch. 1915) (sustaining charter provision authorizing sale of all assets by three-quarters stockholder vote); and Lippman v. Kehoe Stenograph Co., 11 Del.Ch. 190, 98 A. 943 (Ch. 1916), aff'd, 11 Del.Ch. 412, 102 A. 988 (Supr. Ct. 1918) (upholding out-of-state directors' meeting authorized in the certificate of incorporation but not in by-laws, pursuant to the statutory authorization). The crafting of modern corporate law by tailored judicial decree had begun in earnest.

The Chancellorship became embroiled in politics at the end of Chancellor Curtis' term. Josiah O. Wolcott, son of the eighth Chancellor and a leading Democrat, who had become the first popularly elected United States Senator in 1916, was ambitious to be Chancellor and Republican Governor William D. Denny was friendly towards him. Chancellor Curtis, a man of extraordinary character with a devout interest in his church, higher education and service to youth, was popular among the bar and petitions of deeply felt tribute were circulated in support of his reappointment. But certain Republicans were not enamored with Chancellor Curtis, primarily due to one decision, John W. Cooney Co. v. Arlington Hotel Co.63 Delaware Re-

62. See the memorial tribute to Chancellor Curtis by Hugh M. Morris in 32 Del.Ch. 605, 609 app. See also III Bevins, History of Delaware, Past and Present 37, 38 (1929).
63. 11 Del.Ch. 286, 101 A. 879 (Ch. 1917).
publicans also had a strong desire to have a Republican United States Senator during a period when the Republicans controlled the national Senate. What became known in newspaper parlance as the "Dirty Deal" was struck when Democrat Wolcott was appointed by Republican Governor Denny, confirmed and assumed the Chancellorship on June 30, 1921—and a prominent Republican, T. Coleman du Pont, was appointed United States Senator to fill the Wolcott vacancy.64

If the political undertones of the dispute were unfortunate, a magnificent tribute to the office was rendered. Two men, both extremely well qualified and richly deserving of judicial office, were in competition for a state judicial position at the sacrifice of other prestigious and lucrative options. Daniel O. Hastings commented on the aftermath:

The great body of lawyers who had insisted that Curtis be reappointed soon became satisfied, and as time went on they began to realize that they were trying cases involving facts and law before a Chancellor who had every single quality that great office required. He was patient, tolerant, in hearings before him, but only so long as you undertook to develop facts and argument on the question he was called upon to decide. He made a record that probably has not been equaled in any Court anywhere. He served for seventeen and a half years as Chancellor, and many appeals from his decisions went to the Supreme Court, and he was reversed only once.65

Indeed, from Chancellor Wolcott's first reported Chancery case [In re Gulla, 13 Del.Ch. 1, 114 A. 596 (Ch. 1921) (upholding, without a review on the merits, Chancellor Curtis' exercise of discretion in summarily ordering an election of directors by the appointment of a master on a stockholder's ex parte application without notice)] to

64. Prime reliance is placed on Daniel O. Hastings' delightful short book Delaware Politics 1904-1954, at 37-41 (1961) (hereinafter Hastings, Delaware Politics). See also Munroe, History of Delaware, supra note 58, at 182-83; Morris, Charles Minot Curtis, Delaware Tenth Chancellor, 32 Del.Ch. 607-11, app. Hastings, a Republican U.S. Senator from Delaware from 1928 to 1937, characterized Wolcott as the Democrats' "young idol." Wolcott was reappointed by another Republican Governor, C. Douglas Buck, in 1933. The Arlington Hotel case, 11 Del.Ch. 286, 101 A. 879 (Ch. 1917), aff'd with exceptions, 11 Del.Ch. 450, 106 A. 39 (Supr. Ct. 1918), was a bill to assess stockholders for unpaid subscriptions; the most conspicuous errant stockholder was T. Coleman duPont.

65. Hastings, Delaware Politics, supra note 64, at 40. Senator Hastings' comment about Chancellor Wolcott's reversal record is not totally accurate but, for present purposes, close enough.
his last [Loft, Inc. v. Guth, 23 Del.Ch. 138, 2 A.2d 225 (1938), aff'd, 23 Del.Ch. 255, 5 A.2d 503 (Supr. Ct. 1939) (the landmark Pepsi-Cola case on fiduciary duty and corporate opportunity)], his spectacular judicial industry and craftsmanship still, over a half century later, do not lend themselves to easy summary. E. Ennalls Berl spoke movingly in memorial tribute of Chancellor Wolcott’s “equitable instinct” and concluded by introducing a timeless excerpt from Allied Chemical & Dye Corp. v. Steel & Tube Co. of America, 14 Del.Ch. 64, 122 A. 142 (Ch. 1923):

Although the philosophy of this equitable instinct is felt rather in a Chancellor’s general conduct and treatment of causes than found in the words of his opinions, some idea of it may be sensed from the following excerpt:

In analyzing the statute, it would, therefore, appear that the right of the specified majority to sell all the assets is absolute insofar as the fact of sale and whether one should be made, is concerned. Upon the question of terms and conditions, however, the expediency thereof and whether they are for the best interests of the corporation must be honestly and in good faith considered. While it is the right of the majority to practically desert the corporate venture by selling out its assets, and thereby, in the case of a highly profitable concern, deprive their associates of the opportunity to reap gains in the future by continuing in business, yet this right cannot be exercised except upon terms and conditions that are fair to the corporation. The price to be paid, the manner of payment, the terms of credit, if any, and such like questions, must all meet the test of the corporation’s best interest.

The majority thus have the power in their hands to impose their will upon the minority in a matter of very vital concern to them. That the source of this power is found in a statute, supplies no reason for clothing it with a superior sanctity, or vesting it with the attributes of tyranny. When the power is sought to be used, therefore, it is competent for any one who conceives himself aggrieved thereby to invoke the processes of a court of equity for protection against its oppressive exercise. When examined by such a court, if it should appear that the power is used in such a way that it violates any of those fundamental principles which it is the special province of equity to assert and protect, its restraining processes will unhesitatingly issue.66

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66. See E. Berl, Chancellor Josiah Oliver Wolcott, 23 Del.Ch. 387, 394-95 app.
S. Samuel Arsht recalls an incident in *Philadelphia Storage Battery Co. v. Radio Corp. of America*, 22 Del.Ch. 211, 194 A. 414 (Ch. 1937), aff'd, *Radio Corp. of America v. Philadelphia Storage Battery Co.*, 23 Del.Ch. 289, 6 A.2d 329 (Supr. Ct. 1939) which illustrates the Wolcott control. John W. Davis, prominent Wall Street lawyer and the 1924 Democratic Presidential nominee, represented RCA and Hugh M. Morris represented PSB. Mr. Davis called the first witness and, after a slight interlude, Judge Morris objected to a question. In a short time, there was an occasion for another objection followed by some squabbling by counsel. Chancellor Wolcott intervened and pointedly suggested to counsel they were "acting like ordinary lawyers." The point was made and the trial proceeded in a more gentlemanly professional manner.\(^67\)

While he was known as a tough taskmaster, every biographical account of Chancellor Wolcott speaks of his love of "the human associations of life,"\(^68\) one commenting "[i]t was not inappropriate" that the Chancellor died at home "shortly after returning from a hunting trip."\(^69\)

Chancellor Wolcott died November 11, 1938. Lawyers of that generation recall the date easily because it was Armistice Day. In one sense, his death signaled the beginning of the end of an era when one judge personified the judicial system. Again, Colonel Berl captures the gist by quoting Chancellor Wolcott's regrets, expressed to newly admitted lawyers, that some regard the practice of law "more as a business than a profession or a calling" never catching "the vision of its ideals..."\(^70\)

Chancellor Wolcott's vision and his presence were both highly personal:

*Unaided he coped with this endless mass of work and disposed of all of it. His opinions he wrote out laboriously in long-hand without the aid of a stenographer—eleven volumes of them—and he disposed as well of the matters in Chambers, hardly less burdensome than*

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\(^{67}\) Conversation with Mr. Arsht, June 9, 1992.

\(^{68}\) Berl, 23 Del.Ch. at 389.


\(^{70}\) Berl, 23 Del.Ch. at 398.
the decision of cases, with the practical equity that marked his incumency of the Chancellorship.71

The reference to “Chambers” brings forth the personal nature of the jurisdiction. Since 1867, the Chancellor by statute was expressly given power to act “at chambers.”72 Mr. Arsht recounts chambers practice in the 1930s. Chancellor Wolcott, who lived in Dover during the period of his Chancellorship, would come to Wilmington on Wednesdays, and hear counsel in chambers, beginning with uncontested matters, and then moving on to contested matters not requiring the testimony of witnesses. Only trials where witnesses testified were not heard in chambers. Such trials were heard in the old Chancery Courtroom, later known as Courtroom number 2, and were stenographically recorded by the Chancellor’s court reporter, Bert Massey. If the Chancellor did not finish all the business, he would stay the night and return to Dover on Thursday.73 The portrait is one of counsel doing the client’s business under a loving but watchful eye. It is also a picture of judicial competence, performing the court’s business with dignity but without the sanctuary of the bench or even a robe.74

71. Id. at 397. Judge Pearson recalls that Chancellor Wolcott did not even have an office in Dover, his home county, but rather worked at a table in the basement stacks of the law library. Chancellor Wolcott’s daughter, Rebecca Dashiell Wolcott Terry, through a letter dated June 19, 1992, pinpoints the “office” as a room with a long table in what is now the Visitors’ Center behind the Old State House, the building at the time being connected by passageway to the Old State House. Chancellor Wolcott had no secretary and relied on his court reporter, Albert L. Massey, who was stationed in Wilmington, to type his letters and opinions. Judge Pearson feels that Chancellor Wolcott was deterred from asking for the help he needed and deserved by his hurt from the negative “Dirty Deal” publicity in 1921. Mr. Massey was an institution himself. He came to Chancery with Chancellor Nicholson in 1903 and held office until 1951 during the tenure of Josiah Wolcott’s son, Chancellor Daniel F. Wolcott. “Mr. Chancery,” as Mr. Massey was informally titled, was compelled to retire by the state pension law and Collins J. Seitz included a retirement tribute to him at 32 Del.Ch. 613, app.


73. Conversation with Mr. Arsh, Apr. 7, 1992.

74. Chambers practice remains important today, particularly for battles over expedited scheduling and the form of order to be entered on an opinion. Sometimes after more routine matters are dealt with in Chambers, the Chancellor or Vice Chancellor will have an informal chat with counsel, often about matters unrelated to the specific case. Many lawyers remember such sessions with Chancellor Brown very fondly. Mr. Hanrahan recalls with enjoyment a recent office conference at which former Chancellor Brown and Vice Chancellor Jacobs swapped stories about past cases and personalities.
A somewhat related story, but with the added dimension of lack of pretension, is told by a prominent New York lawyer not unfamiliar with Delaware courts. Arriving in Dover early in order to get his bearings for an argument in Chancery and finding the courthouse locked, the prominent visitor was relieved when an informal man, presumably a county employee, appeared to open the door. When court began, the New York lawyer realized his rescuer was none other than the nationally renowned Chancellor Wolcott, who had duly ascended the bench. The impression one gleans over fifty years later is a very personal (and a very busy) Chancellorship. One wonders how one person could have done so much and so well, and he did it with a support staff of only one, who served as his secretary, court reporter, bailiff and keeper of the calendar.

Change, hardly recognizable at first, began in the year after Chancellor Wolcott’s death. Tradition was honored by the December 7, 1938, appointment of William Watson Harrington, the distinguished resident law judge in Kent County, as Chancellor. Chancellor Harrington, sixty-four years old at the time of his appointment, having served over seventeen years as a law judge, fitted well the Killen mold of judicial promotion. But Chancellor W.W. Harrington knew it was “too big a job for one man,” and people got into the act for immediate expansion through a route that did not require a constitutional amendment. Shortly thereafter a modest change suggested the future would be different than heretofore.

On May 12, 1939, the office of Vice Chancellor of the State of Delaware was created. The Vice Chancellor was to be appointed by and serve at the pleasure of the Chancellor. The precise statutory language describing the formation of the new statutory office was interesting.

Section 2. The Chancellor may refer to the Vice-Chancellor any cause or other matter which at any time may be pending in the Court of Chancery. Any cause or other matter so referred to the Vice-Chancellor shall be heard by him for the Chancellor, and he shall report thereon to the Chancellor and advise what order or decree should be made.

75. Conversation with the lawyer at a social event at Metropolitan Museum of Art in New York, May 2, 1988. Only the name of the lawyer eludes Chancellor Quillen.
77. 42 Del.Laws c. 148 (1939).
therein. The Chancellor may by general rule of Court provide for the reference to the Vice-Chancellor of causes, matters and proceedings pending that in the future may come before the Court of Chancery. Any matter, cause or proceeding referred to the Vice-Chancellor pursuant to any general rule made by the Chancellor shall be heard by the Vice-Chancellor, as heretofore provided. (Emphasis added.)

Later in the same year George Burton Pearson, Jr. was appointed to the office where he served for over six years before being elevated to a full constitutional judgeship in the Superior Court. Judge Pearson recalls no decision "advised" by him that was changed in result by Chancellor Harrington. To succeed Judge Pearson as Vice Chancellor, a very young Wilmington lawyer was appointed. On February 1, 1946, Collins J. Seitz, began a remarkable twenty years at the Court of Chancery. Seitz was appointed as a statutory Vice Chancellor under the 1939 statute by Chancellor Harrington.

A highlight of Chancellor Harrington's watch in corporate law was the insider trading case of *Brophy v. Cities Services Co.*, 31 Del.Ch. 241, 70 A.2d 5 (Ch. 1949) (holding that an employee who purchased the stock of a corporation after learning inside information of an impending repurchase program by the corporation must account to the corporation for his profits on subsequent sales). Chancellor Harrington was a student of local history and his tenure was characterized by his Kent County warmth and simplicity. Collins Seitz reported perhaps the most telling story about Chancellor Harrington:

*I recall how he complained to me one day about the fact that his handy man who took care of stoking his coal furnace at home was not always on the job. I asked him why he didn't put in an oil burner. He said he couldn't do that because it would put his handy man out of a job.*

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78. Conversation with Judge Pearson, May 12, 1992. Judge Pearson loved being Vice Chancellor and did not want to leave Chancery. But, when Governor Walter W. Bacon refused to reappoint Judge Richard S. Rodney, many advised Pearson that he had no choice since it was necessary to have an experienced judge not only in the Superior Court but also in Chancery appeals and other appeals in the Supreme Court. Fortunately for the State, Judge Rodney's enormous judicial talent was saved by his appointment to the United States District Court.


80. See the Proceedings in Memory of the Late Honorable William Watson Harrington in 5 Delaware Reporter; Chancellor Seitz' comment appears at page 9 of the Proceedings.
THE EMERGENCY OF THE MODERN COURT OF CHANCERY

The mid-century period (1945-1951) surpassed the turn of the century period for major changes in the Court of Chancery. In 1948, when Elbert N. Carvel became only the second Democrat elected Governor in the twentieth century, change was necessarily imminent and six events highlighted the change. First, in 1949, a Constitutional Amendment was passed making the statutory office of Vice Chancellor a constitutional one and creating a twelve year term for the “present incumbent” (Vice Chancellor Seitz) commencing “from the date of his original appointment.” Thus, the Vice Chancellor ceased to have the attributes of a master and became a full fledged, independent constitutional judge. Second, when the aging Chancellor Harrington’s term expired in 1950, Governor Carvel appointed Daniel F. Wolcott, the son and grandson of former Chancellors, Josiah Wolcott and James L. Wolcott, to be the new Chancellor. But a constitutional change, creating a new separate three member Supreme Court, was anticipated, having passed its first legislative leg during the 1949-50 session of the General Assembly. Wolcott was to serve only six months as Chancellor and he was to report only ten Chancery opinions. But his brief service provided him with deeply felt satisfaction at being the third generation Wolcott to serve the State as its highest judicial officer through the Chancellorship. Third, the Constitutional Amendment creating a separate Supreme Court became effective on May 14, 1951. Except for special assignment for Supreme Court quorum needs, the Chancellor was now exclusively a trial court judge. Fourth, Chancellor Wolcott was among the three appointees to the new Supreme Court as a Justice and, in one sense, this elevation was a demotion because he was no longer the State’s highest judicial officer. He was, however, quite content to serve under the Chief Justiceship of Clarence A. Southerland, who had been his senior partner in the practice of law. To say the least, his appointment to the Supreme Court created a strong voice for the equity tradition in the new tribunal.

81. 47 Del.Laws c. 177 (1949).
82. The Wolcott Chancery opinions all appear in Volume 32 of the Delaware Chancery Reports.
83. 48 Del.Laws c. 109, §§1-55. The three new Justices took office in June 1951.
The fifth noteworthy mid-century development was the jurisdictional case law. While the creation of the separate Supreme Court was an institutional as well as a personal limitation on the Chancellorship, there was contemporaneous case law that cemented the role of the Court of Chancery as a permanent constitutional fixture. In particular, in the cases of Glanding v. Industrial Trust Co., 28 Del.Ch. 499, 45 A.2d 553 (Supr. Ct. 1945) and duPont v. duPont, 32 Del.Ch. 413, 85 A.2d 724 (Supr. Ct. 1951), the Supreme Court determined that the Court of Chancery constitutionally possesses the general equity powers of the High Court of Chancery in Great Britain as they existed at the time of the 1776 separation and, further, that such constitutional jurisdiction, established in the Delaware Court of Chancery in 1792, cannot be removed by legislative whim. The historic equitable power of the Court of Chancery can only be removed by legislation which places the jurisdiction exclusively in another court and gives that other court the full equitable remedial power. Only then is there an adequate remedy at law. And it is the Court not the legislature that determines adequacy. In the words of Justice (former Chancellor) Daniel F. Wolcott, three successive Constitutions—1792, 1832 and 1897—intended “to establish for the benefit of the people of the state a tribunal to administer the remedies and principles of equity” and the Constitutional provision establishing the Court of Chancery was a “guarantee to the people of the State that equitable remedies will at all times be available for their protection.” And in particular, the Court determined that the “sufficient remedy” statutory proscription “represents nothing more than a legislative direction or declaration of what would have existed without it, and did not operate as a restriction or limitation of the exercise of equitable jurisdiction.”

85. The old Supreme Court sat in Glanding and the new Supreme Court sat in duPont.
86. duPont, 32 Del.Ch. at 422-23, 85 A.2d at 729-30. Justice Wolcott’s view was predictable given his earlier Chancery opinion in Delaware Trust Co. v. McCune, 32 Del.Ch. 113, 80 A.2d 507 (Ch. 1951). Chancellor Curtis’ and Chancellor Harrington’s views appear the same. Kahn v. Orenstein, 12 Del.Ch. 344, 114 A. 165 (Ch. 1921), rev’d on other grounds, 13 Del.Ch. 376, 119 A. 444 (Supr. Ct. 1922); Bovey v. H.M. Bylesby & Co., 26 Del.Ch. 69, 22 A.2d 138 (Ch. 1941); First National Bank of Frankford v. Andrews, 26 Del.Ch. 344, 28 A.2d 676 (Ch. 1942). See also Chancellor Josiah Wolcott’s opinion in Hollis v. Kinney, 13 Del.Ch. 366, 368-69, 120 A. 356, 358 (Ch. 1923). See also supra note 59 for earlier cases.
87. Glanding, 28 Del.Ch. at 508, 45 A.2d 557.
was imposed beyond the ancient maxim that equity does not act
where there is an adequate remedy at law.

Sixth and finally, no comment about mid-century developments
would be complete without noting the special role of Collins J. Seitz,
who was appointed Chancellor in June 1951 to succeed Chancellor
Daniel F. Wolcott and who served on the Court as statutory Vice
Chancellor, constitutional Vice Chancellor and Chancellor for over
twenty years from 1946 to 1966. As Vice Chancellor, it was he who
initially upheld the jurisdiction of the Court of Chancery in the duPont
case. But his unique contribution came in the field of civil rights
where as Vice-Chancellor in 1950 he enjoined the University of
Delaware, then exclusively white, and its trustees, including Chan-
cellor Harrington, from considering race in processing applications
for admission to the University. And, in Belton v. Gebhart, 32 Del.Ch.
343, 87 A.2d 862 (Ch. 1952), aff'd, 33 Del.Ch. 144, 91 A.2d 137
(Supr. Ct. 1952), Chancellor Seitz made it clear that the separate
but equal doctrine of Plessy v. Ferguson, 163 U.S. 577 (1897), cried
for reexamination and then went on to hold, in painstaking factual
detail, that the public schools in question were not equal. But most
importantly, he ordered immediate integration. "To postpone such
relief is to deny relief . . . ." The defendants appealed the case to
the United States Supreme Court as part of the four case litigation
The Delaware case was the only one that was affirmed. Brown v.

The Seitz years had many highlights but perhaps the most
memorable occurred while he was Vice Chancellor. He decided the
landmark stockholder pooling agreement case, Ringling v. Ringling
Bros.-Barnum & Bailey Combined Shows, Inc., 29 Del.Ch. 318, 49 A.2d
603 (Ch. 1946), while serving as a statutory Vice Chancellor. Al-
though the Supreme Court in its modifying decision rejected the
Seitz view that the voting agreement was specifically enforceable,
610, 53 A.2d 441 (Supr. Ct. 1947), the Seitz view ultimately pre-

88. duPont v. duPont, 32 Del.Ch. 56, 79 A.2d 680 (Ch. 1951).
89. Parker v. University of Del., 31 Del.Ch. 381, 75 A.2d 225 (Ch. 1950). See
Seitz, Segregation: What is Past is Prologue, XXIV Delaware History 217 (Fall Winter
90. 32 Del.Ch. at 359, 87 A.2d at 870.
vailed, at least by clear implication, in the 1967 statutory revision.91 Another early Seitz case was Security Trust Co. v. Sharp, 32 Del.Ch. 3, 77 A.2d 543 (Ch. 1950), an opinion and decision upholding the validity of the assignment of trust income which ultimately added some fifty million dollars to the University of Delaware Endowment Fund. And no mention of Chancellor Seitz’ career would be complete without noting Bata v. Hill, 37 Del.Ch. 96, 139 A.2d 159 (Ch. 1958), probably the longest trial in the State’s history (100 days). Not one party was an American and the governing law was primarily Czech.

The Seitz years were busy for the Court. The first reported Seitz opinion, Beuno v. Farmer Bank,92 a 1946 will construction case, appears in Volume 29 of the Delaware Chancery Reports and his last reported Chancery opinion is In re Estate of McCracken,93 a 1966 intestacy inheritance case, which appears in Volume 43. Seitz left a twenty year legacy which will forever be a standard for courageous equitable judging. The Seitz years in Chancery came to end on July 17, 1966, when he resigned to assume a position on the United States Court of Appeals for the Third Circuit, where he still serves with distinction some forty-six years after his initial appointment as Vice Chancellor.

Howard W. Bramhall from Sussex County was appointed Vice Chancellor in 1951 only to be elevated to the Supreme Court in 1954.94 Bramhall was succeeded as Vice Chancellor by William Marvel, whose remarkable tenure on the Court was to span from September 8, 1954, until May 1, 1982, almost twenty-eight years, a tenure second only to Chancellor Ridgely’s. In 1961, a second

91. See 8 Del.C. §218(c) and II Folk on the Delaware General Corporation Law §218.3 (3d ed. 1992) (hereinafter Folk).
92. 29 Del.Ch. 87, 46 A.2d 549 (Ch. 1946).
93. 43 Del.Ch. 132, 219 A.2d 908 (Ch. 1966).
94. Vice Chancellor Bramhall’s opinions in Chancery are thoroughly reported in Volumes 32 through 34 of the Delaware Chancery Reports. Because the period is compact, they present a handy capsule of the scope of mid-century litigation. In addition to corporate cases [e.g., Elster v. American Airlines, Inc., 34 Del.Ch. 94, 100 A.2d 219 (Ch. 1953), and 35 Del.Ch. 500, 106 A.2d 202 (Ch. 1954)], one finds cases involving partnership, wills including the rule against perpetuities, the law of charities, school elections, school construction, residential building restrictions, easements, health codes, marital agreements, landlord and tenant rights, fiduciary accountings, street dedication, trust construction, specific performance, joint ventures, lost instruments, labor relations, municipal corporations, adverse possession, and trademarks. The general equity jurisdiction was certainly alive and well. Proceedings in Memory of the Late Honorable Howard W. Bramhall are reported in 4 Delaware Reporter.
Vice Chancellor was authorized and the appointment of Isaac D. Short, II from Sussex County gave downstate Delaware a renewed presence on the Chancery bench.

William Duffy in 1966 had the unenviable task of following Chancellor Seitz. Transferring from a distinguished career in the Superior Court, including the President Judgeship, Chancellor Duffy brought to the Chancellorship "a careful sobriety of even-handed judgment." His bearing and manner added a dimension to his wisdom; he was as Chancellor, and still is "[d]eeply respected and profoundly well liked."  

While Chancellor Duffy was intricately involved in corporate law and highly sensitive to rights of individual shareholders (Delaware's meticulous legal editor, William E. Wiggin, Esquire, once described a Duffy corporate decision "like Little Nell . . . probably too pure to live, at least in all its celestial radiance"), the Chancellor himself always preferred to emphasize the general equity jurisdiction of his Chancellorship, pointing out that about seventy-five percent of the cases on the Chancery docket "involve only Delaware parties and issues" including "land titles, zoning, picketing in labor disputes, and property rights under wills and trusts."  

Chancellor Duffy got particular pleasure from reviewing a copy of John M. Clayton's will. The former Secretary of State of the United States had died in 1856.

_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_

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96. The quoted phrases are those of the Delaware Lawyer, presumably of William E. Wiggin, Esquire. 2 Del.Law. 44 (Spring 1984). This edition (Volume 2, Number 3) is devoted to the Court of Chancery and a fruitful source of valuable information.
98. See Duffy, The Duffy Years in Chancery, 2 Del.Law. 44 (Spring 1984).
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 what appears in
the Atlantic Reporter.99

Chancellor Duffy’s other delight was land title cases, particularly the
Sussex County cases dealing with the nature of William Penn’s title,
governmental or private. But Chancellor Duffy’s most notable equity
opinion was not written until 1980 when, as a Justice of the Supreme
Court, he wrote for that Court on a certified question from Chancery
in the case of Severns v. Wilmington Medical Center, Inc., Del.Supr.,
421 A.2d 1334, 1347-48 (1980):

Parenthetically, it is beyond dispute that, in the Delaware judicial
system, no other Court has the power, under the common law or
by Statute, to grant a “sufficient remedy” to the guardian concerning
the withdrawal of life-support systems which now sustain Mrs.
Severns. 10 Del.C. § 342. The situation in which Mr. Severns
finds himself, then, is this: his wife has a constitutional right to
accept or reject medical assistance; she is unconscious and, for that
reason, she cannot assert that right; under the ruling made herein,
he is the guardian of his wife’s person, with standing to assert the
right which she cannot voice; there is not a Delaware statute providing
for the kind of relief he seeks; he cannot assert his wife’s constitutional
right in any law Court of this State. Of course, the Court of Chancery
will grant him relief under those circumstances, if he proves his right
to it. That is what equity jurisdiction has been all about since its
beginnings.

The historic jurisdiction of the Court of Chancery is described in
Glanding and more recently, in duPont v. duPont, . . . but nothing

99. Id. at 46.
in either of those cases indicates that the fashioning of relief is limited to that which was available in 1776. On the contrary, the very essence of our system of equity, as Pomeroy states in discussing its inherent power to meet social needs, is to render the "jurisprudence as a whole adequate to the social needs . . . . [I]t possesses an inherent capacity of expansion, so as to keep abreast of each succeeding generation and age."

The Court of Chancery had of course ceased being the sole province of the Chancellor and had become an institution with three judges. The Vice Chancellors, independent constitutional judges, made equal contributions as illustrated by Vice Chancellor "Ike" Short's opinion in Puma v. Marriott, Del.Ch., 283 A.2d 693 (1971), a business judgment opinion that still receives national respect with regard to the importance of independence of outside directors. Sidney B. Silverman recounted another remembrance of Short:

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.100

Chancellor Short retired after one term and he was replaced in early 1973 by Grover C. Brown, of Dover, who had been serving on the Family Court.

On July 10, 1973, Chief Justice (Former Chancellor) Daniel F. Wolcott died giving rise to a "musical chair" version of judicial promotion. And, since Democrat Sherman W. Tribbitt had been elected Governor in 1972, the movement had a Democratic tune, Supreme Court Justice Daniel F. Herrmann was named Chief Justice;101 Chancellor Duffy was named to the Supreme Court to

100. Silverman, An Outside Looks at Chancery, 2 Del.Law. 50, 52 (Spring 1984).
succeed the new Chief Justice; and Superior Court Judge William T. Quillen was named Chancellor, joining Vice Chancellors Marvel and Brown on the three member court. Herrmann, Duffy and Quillen were Democrats. 102

The Quillen Chancellorship was characterized by informality and an open door policy. Chancellor Quillen viewed the trial role of the Chancellor as a liberating advantage because he was free of the ultimate disciplinary responsibility over the bar and this freedom permitted him as Chancellor to assist lawyers with ethical and other problems. He worked hard at making the Court a genuine partnership (absolute random assignment of cases on an equal basis) and the three chancery judges were very compatible. Quillen's most publicized opinion was Gimbel v. Signal Cos., Del.Ch., 316 A.2d 599, aff'd, Del.Supr., 316 A.2d 619 (1974), wherein the court reviewed the standards for preliminary injunctions, fixed an unprecedented security for the issuance of a preliminary injunction, held that the sale of a single business by a multi-industry company did not require stockholder approval and discussed at some length the business judgment rule. Other notable Quillen decisions included the invalidation on the basis of constitutional infirmity of a municipal annexation election due to weighted voting by real estate assessment (Kelly v. Mayor & Council of Dover, Del.Ch., 314 A.2d 208 (1973), aff'd, Del.Supr., 327 A.2d 748 (1974)) and, in a series of tailored opinions, the holding of a teachers' union in contempt for disobeying an injunction during a celebrated illegal strike (Howell v. Wilmington Federation of Teachers, Del.Ch., C.A. No. 4876 (Sept. 10, 1975, Sept. 23, 1975, & Oct. 7, 1975)). Quillen left the Chancellorship in the summer of 1976 to return to private life, ending his final reported Chancery opinion with a familiar farewell—"SHALOM." 103

102. Delaware's Constitution provides that not more than a bare majority of all constitutional court judges may be of same political party. The same restriction applies individually to the Supreme Court and the Superior Court. But it has never been applied individually to the Court of Chancery, notwithstanding the fact that Chancery has become a multi-judge court. See Del. Const. of 1897, Art. IV, §3.

In September 1976 Governor Tribbitt appointed then Vice Chancellor William Marvel as Chancellor and, at the same time, brought Maurice A. Hartnett, III of Kent County to the bench as Vice Chancellor. The dual appointments proved to be a fortunate combination as the younger Hartnett was devoted to the older Chancellor (who had his sixty-seventh birthday on the day he assumed office). Marvel relished being Chancellor, a goal set for him decades before by his father as a suitable alternative to being chief executive officer of the DuPont Company. Even in his seventies Marvel would drive himself to Georgetown at least once a month to hold "Orphans Court," always taking Mary Hill, the Chief Deputy Register in Chancery, a red rose.


104. The authors are grateful to Vice Chancellor Hartnett for sharing some of his memories of William Marvel; these appear without isolated attribution in the mix that follows.
Marvel was a walking encyclopedia on equitable jurisprudence. It would be hard to imagine that any judge in any court at any time had more experience in trust law than Chancellor Marvel, certainly no Delaware judge.

Marvel, a friend of F. Scott Fitzgerald, wrote in a literary style seldom seen in the late twentieth century. Indeed there was a style about Marvel generally that was different. He was casual and strong willed, but with just a touch of healthy insecurity that enabled him to defer to others in a gentle manner. With Marvel, the burden was on the visitor to pick up the signals. On one occasion, while listening to an out-of-state lawyer in a repetitive and boring argument in the Wilmington Court House, he heard the fire engines roll from the fire house nearby. He promptly got up from the bench—to the chagrin of the lawyer who was still speaking—and walked over to the window. After the last engine whizzed by, he remarked, “I’ve always loved to watch fire engines” and reascended the bench. The lawyer, ignoring the message that Chancellor Marvel was trying to send him, then droned on for another thirty minutes.

Chancellor Marvel had an interesting internalized relationship with the Supreme Court. He had absolutely no ambition to be on the Supreme Court, which he respectfully viewed as a necessary nuisance, so there was never any trace of envy. Marvel was content that he had the better, and the more important, job. Indeed, he quietly bristled with royal and possessive indignation when his Court was called the “Chancery Court” in appellate opinions. Before the Supreme Court was enlarged to five members, Chancellor Marvel, at least monthly and often more frequently, was asked to sit on the Court to fill a quorum. While the Chancellor was honored to be chosen, it often required a considerable amount of rescheduling of a busy Chancery schedule to accommodate the Justices. The Chancellor usually sat with two Supreme Court Justices and sometimes it must have seemed to him that his views were not given sufficient consideration. Once when receiving a call to serve in a few days and finding that he had to reschedule several matters already scheduled, he remarked, “Maybe I’ll just paint my face on a balloon and send it over.”

In September 1989, over 130 guests gathered happily at the Vicmead Hunt Club at a black tie dinner dance to honor retired Chancellor Marvel on the occasion of his eightieth birthday. There were numerous tributes and the Chancellor, somewhat physically weakened but mentally sharp, took to the dance floor with aged
grace. Chancellor Marvel said the next morning: "Father would have been pleased." Indeed, any Father would.

THE COURT OF CHANCERY IN THE TAKEOVER DECADE

The post-Marvel Court has had a decade highlighted by judicial expansion and a litigation thicket. Governor Pierre S. duPont in 1982 selected Vice Chancellor Brown as Chancellor and Superior Court Judge Joseph S. Longobardi as Vice Chancellor. Brown was the first Republican Chancellor since Chancellor Curtis; over sixty years had passed. In 1984, the Court was expanded to four by the addition of a third Vice Chancellor and Governor du Pont happily took the opportunity to appoint Carolyn Berger of New Castle County as the first woman judge on the Court of Chancery. Vice Chancellor Longobardi's Chancery term was quickly cut short by his appointment to the Federal District Court in 1984 (where he now serves as Chief Judge). Superior Court Judge Joseph T. Walsh succeeded Longobardi. Chancellor Brown left the bench in early 1985 to return to private practice.

Brown's twelve years on the Court as Vice Chancellor and Chancellor were a marked success. To Chancellor Brown, there was no small case. His opinions dealt thoroughly with the factual details and dissected the legal issues methodically. There was no mush in a Brown opinion and the conclusion, after detailed factual and legal analysis, stood plain for all to see. If there was an appeal, there may have been a change in the result but there was no escape by either side from the issue game plan as presented by Chancellor Brown. He was a lawyers' judge.

Chancellor Brown always characterized himself as a "country lawyer" and he would closet himself in a downstate law library and write his opinions alone in longhand in the fashion of Josiah Wolcott a half century earlier. In 1978, he declined the opportunity to go on the Supreme Court. The Chancellor was cordial to everyone and out-of-state counsel loved his courtesy. Nor was his cordiality re-

105. 64 Del.Laws c. 218.
106. Governor duPont had been so impressed by Ms. Berger when he interviewed her for another state position that he declined to name her to that position and waved her for a constitutional court vacancy.
107. Among the significant cases decided by Vice Chancellor Longobardi during his brief tenure was American Pac. Corp. v. Super Foods Serv., Inc., Del.Ch., C.A. No. 7020, Longobardi, V.C. (Dec. 6, 1982), granting a preliminary injunction to preserve plaintiff's ability to wage a fair proxy contest.
stricted. There was during the period one nonlawyer who had taken it upon himself to represent the interests of men in domestic relations cases and who had founded an organization to further that purpose. Most judges and lawyers were less than enthusiastic about the man’s activity. But Brown kind of enjoyed him and, after a case in which the man was involved, Chancellor Brown personally delivered the opinion to the man’s office as a matter of courtesy. As illustrated by the following, Chancellor Brown let his magnificent sense of humor shine from the bench and through his opinions:

In more than nine years as a member of the Court of Chancery I have noticed that each year seems to bring forth several new shareholder-related suits brought in the name of Harry Lewis. Over the same period, however, because of settlements, voluntary dismissals, mooted actions and the like, I have never had the good fortune to actually lay eyes on anyone claiming to be Harry Lewis. From time to time I would check with other members of the Court. As best I can tell, none of them has ever seen this apparent champion of the minority shareholders either. I must facetiously admit that more than once the suspicion crossed my mind that perhaps no such person as Harry Lewis actually existed, that perhaps he was merely a fiction—a “street name” if you will—utilized at random by various counsel for the purpose of bringing class and derivative actions for the needed protection of shareholders interests.

Then one day not long ago I chanced to meet a respected member of the Delaware corporate bar who, apparently having become aware of my tongue-in-cheek concern, felt constrained to tell me that he had only recently attended a deposition in New York at which Harry Lewis was also in attendance. Thus, I proceed on the assumption that, in fact, Harry Lewis lives.


Governor Michael N. Castle in 1985 appointed scholarly William T. Allen to succeed Brown. Shortly thereafter, in the same year, Vice Chancellor Walsh was appointed to the Supreme Court and Jack B. Jacobs became a new Vice Chancellor. Though elevated

108. Vice Chancellor Jacobs was an experienced corporate practitioner and he (similar to the earlier experience of Vice Chancellor Berger) had applied for another State position only to be told that Governor Castle wanted him to be available for subsequent consideration as a Vice Chancellor. It is also interesting to note that Vice Chancellor Jacobs originally came to Delaware in 1966 to serve as a law clerk with the Superior Court for Chancellor Quillen, then a Superior Court Judge.
to the Supreme Court, Justice Walsh continued to sit by designation in the Court of Chancery in order to wrap up a number of important cases, most notably the Trans World Airlines, Inc. v. Summa Corp. litigation, which had extended over a period of nearly twenty-five years. In affirming the various opinions of the Court of Chancery, including Justice Walsh’s decisions after trial and on the award of interest, the Delaware Supreme Court noted that in length of time, though not in other respects, the litigation almost seemed reminiscent of Jarndyce and Jarndyce, the interminable litigation described in Dickens’ Bleek House. Summa Corp. v. Trans World Airlines, Inc., Del.Supr., 540 A.2d 403 (1988).

The final judicial structural change of the eighties came with yet another legislative expansion of the Court. William B. Chandler, III, a Sussex Countian who had been serving on the Superior Court, was appointed in 1989 to fill the new fourth Vice chancellorship. Chandler shortly thereafter was offered a position on the United States District Court but, after a period of federal bureaucratic delay, he asked that his name be withdrawn because he would prefer to remain in Chancery.

The litigation barrage that hit Chancery in the 1980s was unprecedented. In retrospect, it is not hard to understand, given the corporate litigation boom largely caused by the takeover wars, the continuing expansion of statutory remedies using the Court and the normal processing of an expanding number of cases within the traditional equity jurisdiction.

In the past decade, the Court has been called upon to implement and develop significant changes or refinements in Delaware’s corporate law. The Delaware Supreme Court’s revitalization of the demand requirement in derivative suits generated more than a hundred Chancery opinions on whether demand was excused or refused or the Special Litigation Committee was confused. Each Chancellor and Vice Chancellor had to wade into the procedural thicket or Rule 23.1.

110. 67 Del.Laws c. 1.
111. At a 1985 seminar on Chancery Practice and Procedure, well over 100 statutory references were collected to demonstrate the statutory jurisdiction of the Court.
113. See Stepak v. Dean, Del.Ch., 434 A.2d 388 (1981) (Chancellor Marvel);
In his usual insightful but good humored way, Chancellor Brown pointed out in *Kaplan v. Wyatt*, Del.Ch., 484 A.2d 501, 509 (1984), *aff'd*, Del.Supr., 499 A.2d 1184 (1985), that the demand issues were "fraught with practical complications at the trial court level." After describing the operation of a Special Litigation Committee under *Zapata*, the Chancellor commented:

*If the foregoing analysis of Zapata seems like a legal mouthful, it is because it is.*

Id. at 509. However, he acknowledged that because *Zapata*’s procedure provided a means "to throw a derivative plaintiff out of Court before he has an opportunity to engage in any discovery whatever in support of the merits," the Court must not take the procedure lightly. *Id.* The Chancellor could not resist pointing out that, while the object of *Zapata* (and later *Arsonson*) may have been to reduce the expense and inconvenience of derivative litigation to the corporation, the result was three new layers of procedural hearings unrelated to the merits (i.e., the length of the stay of proceedings while the special committee conducts its investigation, the scope of discovery into the committee’s report and activities and the merits of the committee’s motion to dismiss). With tongue in cheek, the Chancellor described the tendency of the Special Litigation Committee to take on a life of its own:

*To begin with, the developing rule of thumb in this jurisdiction would appear to be that a report by a Special Litigation Committee recommending dismissal of a derivative suit must be at least 150 pages in length, exclusive of appendices and attachments. Presumably, length is thought to be supportive of thoroughness and good faith on the part of the Committee. Correspondingly, it is apparently feared that a shorter report might be thought to be indicative of the converse.*

Id. at 510.

Chancellor Brown's concerns about 23.1 spawning a tangle of procedural issues unrelated to the merits were echoed in Vice Chancellor Jacobs' opinion in Grobow v. Perot, Del.Ch., 526 A.2d 914 (1987), aff'd, Del.Supr., 539 A.2d 180 (1988). In granting a motion to dismiss the Complaint for failure to make a demand, the Vice Chancellor commented:

First, nothing in this Opinion is intended to suggest any view, one way or another, on the merits of this admittedly controversial transaction. A perhaps unfortunate by product of Aronson is that its very application to a specific set of pleaded facts may be misinterpreted as a judicial stamp of approval or disapproval of the transaction itself. In fact, this decision, like any demand-futility adjudication, represents nothing more than a determination that the facts in a given derivative complaint are (or are not) sufficient to excuse the making of a demand.

Id. at 928-29. The Vice Chancellor's comments seem particularly appropriate in the context of the litigation surrounding General Motors' buy out of Ross Perot, since the various cases surrounding that transaction may set a record for most opinions on demand related issues. The concerns of the Chancellor and the Vice Chancellor are consistent with the historical roots of Chancery as a court of equity that should not get bogged down in procedural matters, but should focus on what justice requires in the particular case.

In the takeover field, the Court had to apply the doctrines enunciated in Unocal Corp. v. Mesa Petroleum Co., Del.Supr., 493 A.2d 946 (1985), Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., Del.Supr., 506 A.2d 173 (1986), and other Delaware Supreme Court cases to an ever-changing array of takeover transactions and defenses. In addition to his opinion in Revlon enjoining a white knight transaction based on its lock-up option and bust-up features, Justice Walsh during his relatively brief stay in Chancery upheld the poison pill rights plan as a takeover defense in Moran v. Household International, Inc., Del.Ch., 490 A.2d 1059, aff'd, Del.Supr., 500 A.2d 1346 (1985). Chancellor Brown let Bendix hold a rapid stockholders' meeting as part of its defense against Martin Marietta's Pac-Man takeover attempt, which in turn was a defense to Bendix' tender offer for


As takeover fever continued to mount and the array of takeover techniques and defenses continued to expand, the Court was called upon to arbitrate marathon takeover battles with multiple expedited applications for equitable relief. From December 1988 through June 1989, it seemed each month brought forth at least one new opinion from Vice Chancellor Hartnett in the Holly Farms/Tyson Foods takeover battle. In the MacMillen takeover fight, Vice Chancellor Jacobs wrote opinion after opinion as one hostile bidder followed on the heels of another. The contests not only got longer, but the transactions got larger, as illustrated by Chancellor Allen’s opinions on the mega-mergers of R.J. Reynolds with Nabisco and Time-Warner. In re R.J.R. Nabisco, Inc. Shareholders Litig., Del.Ch., C.A. No. 10,389, Allen, C. (Jan. 31, 1989); Paramount Communications, Inc. v. Time, Inc., Del.Ch., C.A. No. 10,866, Allen, C. (July 14, 1989), aff’d, Del.Supr., 571 A.2d 1140 (1989).

The fever finally broke in the early 1990s. However, the Court’s body of opinions deciding, usually within a few days, complex legal issues arising from extremely complicated transactions stands as a remarkable judicial achievement. Under intense scrutiny, the Court proved it was up to the task of deciding quickly and coherently whatever corporate America and its advisors could concoct.

The Court approached these modern takeover fights with the “let ‘em play” attitude of a good NBA basketball referee, ignoring the “incidental contact” inevitable in such contests and only “blowing the whistle” when a participant was unfairly impeded from the goal. Like all referees, the Court was subject to second guessing by the players, their “coaches” and commentators. The opinions of the Court115 deciding the ultimate questions without an advocate’s free-

115. Other referees don’t have to issue detailed written opinions explaining their “calls.”
dom to take a position or a commentator's opportunity for leisurely analysis are the best refutation of such criticisms.

During the 1980s and 1990s, applying fiduciary duty concepts to mergers and other fundamental transactions has continued to be a significant part of the Court's corporate role. Vice Chancellor Hartnett's seven year series of opinions in the Shell Petroleum litigation, from *Joseph v. Shell Oil Co.*, Del.Ch., 482 A.2d 335 (1984), through the several opinions recently affirmed in *Shell Petroleum, Inc. v. Smith*, Del.Supr., No. 350, 1991, Moore, J. (Apr. 23, 1992), and *In re Appraisal of Shell Oil Co.*, Del.Supr., No. 351, 1991, Walsh, J. (May 26, 1992), provide a comprehensive view of the range of fiduciary duty issues of disclosure, fair dealing and fair price that frequently confront the Court. The Court's energy in resolving corporate disputes is illustrated by Vice Chancellor Berger's performance in a series of seven opinions written in under a year which were affirmed in *Anadarko Petroleum Corp. v. Panhandle Eastern Corp.*, Del.Supr., 545 A.2d 1171 (1988).

One shift in the Court's approach to fiduciary duty cases is the increased emphasis placed on the significance of full disclosure of all material facts. Consistent with its desire to let business decisions be made by the directors and stockholders of Delaware corporations rather than by the Court, there has been enhanced focus on whether the stockholders have been provided with the information needed to make an informed choice. Consistent with equity's traditional emphasis on the individual case, the particular circumstances and disclosures control.

While the Court's corporate opinions have attracted the most attention, the Court continues to function as a traditional court of equity. The Court still determines whether specific enforcement of an agreement is warranted. It still decides applications for a con-

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117. Vice Chancellor Jacobs' opinion in *Sealy Mattress Co. v. Sealy, Inc.*, Del.Ch., 532 A.2d 1324, 1335 (1987), provides in a single opinion a similar comprehensive review based on a case the Vice Chancellor described as "a textbook study on how one might violate as many fiduciary precepts as possible in the course of a single merger transaction . . . ."


structive trust\textsuperscript{120} and issues injunctions in noncorporate matters.\textsuperscript{121}

The Court will still fashion an equitable remedy suited to the circumstances when there is no adequate remedy at law. Each of the judges of the Court is a chancellor doing equity according to long established maxims and principles. The Court’s willingness to devote its careful attention to and ability to provide justice in simple cases involving ordinary people is as important a justification for its survival as a court of equity as its capacity to decide corporate disputes.

Chancellor Allen has completed his seventh year and has proven an outstanding success. Erudite and engaging, Chancellor Allen has achieved a national reputation that makes him a frequent invitee to scholarly symposia, professional conferences, and university campuses. He enriches professional life at the bar through his challenges in substantive ethics. His opinion writing reflects his intellect and his appreciation of his Court’s heritage. See \textit{E.I. duPont de Nemours \& Co. v. HEM Research, Inc.}, Del.Ch., C.A. No. 10,747, Allen, C. (Oct. 13, 1989) (discussing the distinctions between common law rescission and equitable rescission); \textit{Ryan v. Weiner}, Del.Ch., C.A. No. 12,178, Allen, C. (Mar. 13, 1992) (citing Justice Story’s 1835 treatise, \textit{Commentaries on Equity Jurisdiction}, a 1750 case of Lord Hardwicke and innumerable American and English case authorities in three centuries on the subject of unconscionable contracts). The Court’s heritage, to say the least, is in good hands.

\textbf{Conclusion}

It is interesting to note that the \textit{de facto} modern 1992 Court of Chancery (one Chancellor, four Vice Chancellors at least one resident in each county) is quite similar to the \textit{de jure} Superior Court model in the original 1897 Constitution (one Chief Justice, four associate justices at least one resident in each county). No longer is the Court the Chancellor working in solitude. Like its English ancestor, the Delaware Court of Chancery has matured. Growth is necessary for survival in a complex world. But the English lesson is clear. Survival is useless if it comes at the sacrifice of the reason for being. Equitable


judging still requires an individual craftsman to analyze the facts, apply the ancient principles, carve the specific remedy and communicate the result. The product is human art; it cannot be scientifically produced. As the Court of Chancery enters its third century, its art is a scarce commodity in a coarse, crowded and complex world. For a positive contribution to life in 1992, we salute today’s artists: Chancellor William T. Allen; Vice Chancellor Maurice A. Hartnett, III; Vice Chancellor Carolyn Berger; Vice Chancellor Jack B. Jacobs; and Vice Chancellor William B. Chandler, III.