most public dramas to come to Rodney Square. Corporate America is grateful for the years of the Chancellor’s public service.

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THE ONCE AND FUTURE JUDGE?

BY STEPHEN E. JENKINS*

Since announcing his retirement from the bench, Chancellor William T. Allen has received accolade upon accolade from lawyers, judges, and public officials not only in Delaware, but throughout the United States. The sense of their remarks has been that a Delaware bench filled with stars was losing a superstar whose like would not be seen again soon. Kind words, of course, often accompany judicial retirements; more than occasionally they contain some overstatement and hyperbole. But, this time even the most glowing tributes could not fully capture the extraordinary nature of the judge being honored.

The Court of Chancery before and during Chancellor Allen’s tenure had a remarkable array of judges who formed the judicial front line during a fundamental restructuring of American commerce and who, in dealing with those changes, helped to remake and reform the corporate law. Their work load was staggering, the intellectual demands on them were intense, and the pace was frenetic, yet they successfully met the challenge. It was an accomplishment largely hidden from public view. As time has gone by, it has gradually become recognized by lawyers across the nation. Of course, the Court of Chancery was not alone. The

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1During the 1980s — the decade of heaviest pressure — in addition to Chancellor Allen, those judges were Chancellor William Marvel, Chancellor Grover C. Brown, now Delaware Supreme Court Justices Maurice T. Hartnett, Carolyn Berger, and Joseph T. Walsh, Vice-Chancellor Jack B. Jacobs, now-Chancellor William B. Chandler III, and now-Senior United States District Court Judge Joseph L. Longobardi.
Delaware Supreme Court and various federal district courts also contributed much to that effort. But it was the Court of Chancery that bore the brunt of the day-to-day work, and it was Chancellor Allen who, more than any single other judge, led the court and wrote the opinions that solidified the law.\(^2\)

And what opinions they are. Many chancery judges have been outstanding writers and deep thinkers, but Chancellor Allen surpassed them all in his ability to analyze a problem and explain its solution. Even the great Josiah Wolcott, whose opinions still resonate brilliantly sixty years after his death,\(^3\) and Collins Seitz, the Chancellor who created the Court of Chancery’s modern reputation,\(^4\) did not write with quite the same persuasive force and eloquence reflected in Allen’s best work. Indeed, although in many senses Chancellor Wolcott invented Delaware corporation law, and Chancellor Seitz reinforced it, it is probable that Chancellor Allen had a greater effect on a wider range of commercial law\(^5\) topics.

It is not possible to summarize briefly all of Chancellor Allen’s contributions, but it is possible to provide a taste of them. To

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\(^2\)One interesting issue that is beginning to attract academic attention, not least from Chancellor Allen himself, is the extent to which legal regimes affect economic activity. There is an increasing consensus that the sometimes wrenching restructuring of American industry that took place in the 1980s and early 1990s has led to increased competitiveness and productivity, which in turn has helped the overall American economy. Other nations (Japan, Germany, and France being notable examples) have legal systems that have placed legal and other restrictions in the way of such restructurings, or the corporate takeovers that helped to prompt them, and their economies are now subject to a variety of difficulties. An interesting question is whether by creating rules that focused primarily on the interests of corporate shareholders rather than those of managers or other “constituencies,” the Delaware courts deserve some credit for the United States’ relative economic success.

\(^3\)See, e.g., Italo Petroleum Corp. of Am. v. Producers’ Oil Corp. of Am., 174 A. 276 (Del. Ch. 1934); Allied Chem. & Dye Corp. v. Steel & Tube Co. of Am., 120 A. 486 (Del. Ch. 1923). Allen has described Wolcott’s opinions as “masterful.” See William T. Allen, Speculations on the Bicentennial: What is Distinctive About Our Court of Chancery?, in COURT OF CHANCERY OF THE STATE OF DELAWARE, 1792-1992, at 13, 18 (Historical Society of the Court of Chancery of the State of Delaware 1992).

\(^4\)Chancellor Seitz went on to become the greatly respected Chief Judge of the United States Court of Appeals for the Third Circuit, in which position he continued to write authoritative opinions on Delaware corporate law. See, e.g., Lewis v. Curtis, 671 F.2d 779 (3d Cir. 1982). Allen is an admirer of both Wolcott and Seitz; he has described Seitz as “our greatest living Chancellor.”

\(^5\)“Commercial Law” is a term often used by American lawyers to refer only to legal matters involving the Uniform Commercial Code. I use the term here in a broader sense to encompass all types of law dealing with commercial matters, including corporation and partnership law and the equitable duties of fiduciaries.
nonpractitioners some of those contributions might seem slight, yet they had significant effects on how law is practiced. One notable example was the Chancellor’s clarification of the standards for granting temporary restraining orders (TROs), which are often sought in litigation over corporate control. Prior to Chancellor Allen’s accession, the Court of Chancery — which unlike courts in other states will rarely grant an ex parte restraining order — treated TROs much as it would preliminary injunctions, applying largely identical standards to the two remedies. As a result, it was difficult to obtain pretrial injunctive relief in a very short time frame. Several weeks usually elapsed while a discovery record was created, sometimes resulting in the creation of truly irreparable harm.

Chancellor Allen changed that in a series of decisions, most notably including Cottle v. Carr, where he explained how a TRO was functionally different from a preliminary injunction, and held that the standard for granting one was also different. Rather than proving a "likelihood of success on the merits" — often a difficult task for a party who has not yet received discovery — Allen held that a plaintiff need only show a "colorable claim" on the merits. Thus, the focus of the application became whether the plaintiff could make out a convincing case of truly irreparable harm. This seemed an outlandish concept to Court of Chancery practitioners at first, but it restored the temporary restraining order to its rightful place within equity’s remedies — a fact that had to be taken into account in subsequent takeover battles. Cottle is unlikely to become the focus of any law school case book, but its effect on the practice of law in the Court of Chancery was significant.

Allen himself was scornful of ex parte orders; he rejected requests for them in most instances as being nothing more than an attempt to gain an unfair advantage. Allen discussed the legal standards for granting an ex parte temporary restraining order at some length in Delaware Concrete & Masonry, Inc. v. Smith, No. 8820, 1987 Del. Ch. LEXIS 375 (Del. Ch. Jan. 27, 1987), reprinted in 13 Del. J. CORP. L. 269 (1988).


It is always difficult to measure the effects a change in a legal rule has on the subsequent behavior of litigants. Based upon my observations, I would say that the introduction of the Cottle rule made litigators more confident that they could obtain immediate injunctive relief in the right circumstances, and accordingly made some parties less willing to try to force through dubious measures in the hope that the courts would not be able to react in a timely fashion. Chancellor Allen’s rather low tolerance for corporate machinations (sample remark addressed to defense counsel in an initial office conference when defendants had clearly engaged in egregious behavior, "Tell me, Mr. X, what possible defense do you have to these claims?") probably added an additional deterrent effect.
Allen’s influence on contract law has been little noted but was profound. Allen’s approach — like contract law itself\textsuperscript{10} — was in many senses old fashioned but it demonstrated a remarkable clarity of vision. In an era of confusion (and decidedly odd court decisions and jury verdicts), even the simplest contract law principles appeared to be crumbling. An example of Allen’s adherence to, and understanding of, basic principles came in \textit{Leeds v. First Allied Connecticut Corp.}\textsuperscript{11} In \textit{Leeds}, Allen strongly restated the existing — but threatened — "objective theory" of contract law; in determining whether a contract has been formed, "[a] court . . . does not attempt to determine the subjective state of mind of either party, but, rather, determines this question of fact from the overt acts and statements of the parties."\textsuperscript{12}

In the same decision, Allen addressed another pressing issue of contract law that was then bedeviling transactional lawyers. Traditional wisdom had been that no contract was formed in negotiating a corporate merger until a final merger agreement had been signed and approved by both parties’ directors. Recent court actions in other jurisdictions had severely shaken that understanding, threatening far-reaching consequences as parties began to claim that some fairly preliminary agreements constituted binding "contracts." Allen would have none of it. In \textit{Leeds}, he not only placed Delaware fairly on the side of the traditional understanding, he underscored the point. According to \textit{Leeds}, no complex contract was formed until "all of the points that the parties themselves regard as essential have been . . . resolved . . . Negotiation of complex, multifaceted commercial transactions could hardly proceed in any other way."\textsuperscript{13} The message was clear — the Court of Chancery


\textsuperscript{11}521 A.2d 1095 (Del. Ch. 1986).

\textsuperscript{12}Id. at 1097.

\textsuperscript{13}Id. at 1102 (citation omitted). As demonstrated by the above quotation, Allen’s opinions seldom lacked certainty and conviction, and he was at times criticized for that. But, certainty and conviction help lead to predictability, which is enormously important in commercial law. Allen recognized that point in one of his most important early opinions, \textit{Speiser v. Baker}, 525 A.2d 1001, 1008 (Del. Ch. 1987), where he noted that certainty and predictability in judicial interpretation of statutes are vital if commercial law is to be useful:

As a general matter, those who must shape their conduct to conform to the dictates of statutory law should be able to satisfy such requirements by satisfying the literal demands of the law rather than being required to guess about the nature and extent of some broader or different restriction at the risk of an \textit{ex post facto} determination of error.

Allen returned to the point almost 10 years later in \textit{Uni-Marts, Inc. v. Stein}, Nos. 14,713, 14,893, 1996 Del. Ch. LEXIS 95, at *28-29 (Del. Ch. Aug. 9, 1996), where he discussed the
utility of formality in corporate law:

Formality in the analysis of intellectual problems has been largely out
of fashion for much of this century, and Delaware corporation law has
sometimes been criticized for its reliance on formality. But the entire field of
corporation law has largely to do with formality... Formality has significant
utility for business planners and investors. While the essential fiduciary
analysis component of corporation law is not formal but substantive, the utility
offered by formality in the analysis of our statutes has been a central feature
of Delaware corporation law.
The distinction between formal analysis of statutes and substantive analysis of fiduciary duties
lies at the heart of much of Allen's corporate law jurisprudence. See Speiser, 525 A.2d at 1011
("[O]ur law is the polar opposite of technical and literal when the fiduciary duties of corporate
officers and directors are involved."). Although that distinction had existed prior to Allen's
tenure, Allen was the first to articulate it in such a clear and forceful manner.

14Some might question whether the result was correct. Under traditional legal
principles, might not an important contract sometimes be formed before a document is signed?
Perhaps, but the clear legal rule in Leeds helped provide the certainty transactional lawyers
need, and stopped much litigation before it started. Allen, who tended to look at commercial
law matters from an economic utilitarian perspective, and who understood the very large
systemic costs imposed by uncertainty and confusion, clearly intended such a result.

15508 A.2d 873 (Del. Ch. 1986). Katz, which was written during Allen's first year on
the bench, was an early example of his intensely intellectual approach to judging. Its first
sentence is classic Allen: "A commonly used word—seemingly specific and concrete when
used in everyday speech—may mask troubling ambiguities that upon close examination are seen
to derive not simply from casual use but from far more fundamental epistemological problems."
Id. at 875 (discussing the plaintiff's "coercion" theory).

16Id. at 879.

17Id. (footnote omitted). Allen thereafter explored the point in greater length in Simons
was extended to the preferences (but not the underlying stock) of preferred stockholders in *Jedwab v. MGM Grand Hotels, Inc.*,\(^{18}\) and option holders in *Glinert v. Wickes Cos.*\(^{19}\)

These opinions reflected long-standing commercial law orthodoxy, albeit at a time when it seemed that new legal principles would engulf commercial law. Allen's opinion in *Credit Lyonnais Bank Nederland, N.Y. v. Pathé Communications Corp.*,\(^{20}\) by contrast, originally seemed to be so unorthodox that it came as a thunderclap to lawyers, and especially bankruptcy practitioners, nationwide. The law had long recognized that in cases of insolvency — when for economic purposes there simply was no remaining equity in a corporation — directors owed their fiduciary duties to creditors rather than shareholders. The rationale for that rule is simple. If stockholders no longer have an economic interest in an enterprise, they have no property left for a fiduciary to protect, and their role is therefore assumed by creditors. In *Credit Lyonnais*, Allen addressed the issue of what duties were owed to whom when a corporation was in the "vicinity of insolvency" — that is, no one is quite sure whether there is any equity left in the entity.\(^{21}\)

Of course, that uncertainty is a relatively frequent occurrence in bankruptcy situations. Corporate valuation is an art, not a science, and it is thus often difficult to know whether the corporation is insolvent or not. Under those circumstances, how is a director to know to whom his or her duties lie? Allen reached a pragmatic, but novel, conclusion. He held that "where a corporation is operating in the vicinity of insolvency, a board of directors is not merely the agent of the residue risk bearers, but owes its duty to the corporate enterprise."\(^{22}\) Thus, rather than owing duties to a corporation and its stockholders, as is the normal case, or a corporation and its bondholders, as is the case during insolvency, Allen held that in the twilight zone between the two, a board should look only at the interest of the corporate enterprise as a whole, which in turn should eventually inure to the benefit of whomever was finally determined to have the right to control the enterprise. In a lengthy footnote discussing the economics of "zone of insolvency" cases, Allen laid out a convincing case why that conclusion must be correct. Although *Credit Lyonnais*

\(^{18}\)509 A.2d 584 (Del. Ch. 1986).


\(^{21}\)Id. at *108 & n.55, reprinted in* 17 Del. J. Corp. L. at 1155 & n.55.

\(^{22}\)Id.
appeared almost revolutionary at the time it was issued, upon closer examination it became clear that Allen stayed well within the accepted framework of corporate governance by emphasizing the directors' existing duty to the corporation rather than, for example, attempting to develop a test that would balance competing duties to stockholders and creditors.

Chancellor Allen's opinions on fiduciary duties in more normal settings also brought him repute. Allen was a firm proponent of the "business judgment rule" in which courts will not second guess corporate boards unless there is evidence that the directors had not been acting in a good faith pursuit of corporate purposes. Although the business judgment rule has often been criticized by persons who believe that the Delaware courts give far too much deference to management, Allen was an unapologetic defender of it. As he said in *Gagliardi v. TriFoods International, Inc.*, when rejecting a claim that directors should be held liable for "mismanagement":

The rule could rationally be no different. . . . Shareholders don't want (or shouldn't rationally want) directors to be risk adverse. . . . But directors will tend to deviate from . . . rational acceptance of corporate risk *if* in authorizing the corporation to undertake a risky investment, the directors must assume some degree of personal risk relating to *ex post facto* claims of derivative liability for any resulting corporate loss. . . . If . . . corporate directors were to be found liable for a corporate loss from a risky project on the ground that the investment was too risky (foolishly risky! stupidly risky! egregiously risky! — you supply the adverb), their liability would be joint and several for the whole loss (with I suppose a right of contribution). Given the scale of operation of modern public corporations, this stupefying disjunction between risk and reward for corporate directors threatens undesirable effects.

Allen went on to note that far from being designed as a management protection measure, the business judgment rule "*protects shareholder
investment interests against the uneconomic consequences that the presence of such second-guessing risk would have on director action and shareholder wealth.\textsuperscript{25}

That did not mean, however, that Allen necessarily deferred to incumbent boards of directors or blindly applied the business judgment rule. Concomitant with the rule that directors should not be held liable for making foolish choices is the principle that the stockholders must be able to choose new directors if they are dissatisfied with the current board. In \textit{Blasius Industries, Inc. v. Atlas Corp.},\textsuperscript{26} Allen held that the business judgment rule did not shield a decision by a corporate board of directors to increase the number of directors in order to prevent a takeover of the board by an insurgent faction of shareholders. Allen accepted that the board in \textit{Blasius} was truly acting in good faith and out of the belief that the insurgents would harm the company. Nevertheless, he held that the business judgment rule did not — indeed could not — apply to a decision by a board to insulate itself from ouster. Thus, just as it is not the role of the courts to prevent directors from making foolish choices, so is it not the role of directors to prevent stockholders from exercising their franchise in a foolish manner.

Similarly, Allen, who well understood that breaches of fiduciary duty could be disguised by skilled advisors, cast a skeptical eye in cases where a corporation’s management sought to buy out the other

\textsuperscript{25}Id. Commentators eager to pigeonhole judges as "pro-shareholder" or "pro-management," often found Allen maddeningly unpredictable. As this snippet demonstrates, Allen simply did not see the world in the same way as those commentators because he believes the interests of shareholders and managers are largely intertwined. He also realized, however, that management could take actions harmful to the stockholders and he believed in policing that behavior where the benefits of doing so would outweigh the costs.

\textsuperscript{26}564 A.2d 651 (Del. Ch. 1988). \textit{Blasius} contains what might be the single most succinct statement on the importance of shareholder voting rights: "The shareholder franchise is the ideological underpinning upon which the legitimacy of directorial power rests." \textit{Id.} at 659. The impact of that one statement has been great. Lawyers and judges dealing with stockholder voting rights had been used to dealing with issues based on prior opinions — directors could not take unreasonable steps to restrict the stockholder’s ability to oust them in a proxy contest because Schnell v. Chris-Craft Indus., Inc., 285 A.2d 437 (Del. 1971), and Lerman v. Diagnostic Data, Inc., 421 A.2d 906 (Del. Ch. 1980), said it was inequitable to do so.

In \textit{Blasius}, Allen reminded us that legal rules have purposes, and the rule against directors taking inequitable action to thwart their ouster was not based simply upon judges’ gut feelings of fairness, but rather stemmed from the very nature of Anglo-American corporation law. As \textit{Blasius} demonstrates, Allen was not only able to understand corporate law problems at their most fundamental level, he was able to communicate that understanding to others.
shareholders. As he stated in *In re Fort Howard Corp. Shareholders Litigation*:

Rarely will direct evidence of bad faith — admissions or evidence of conspiracy — be available. Moreover, due regard for the protective nature of the stockholders’ class action, requires the court . . . to be suspicious, to exercise such powers as it may possess to look imaginatively beneath the surface of events, which, in most instances, will itself be well-crafted and unobjectionable.27

Nor would Allen tolerate actions that attempted to make corporate managers unaccountable to the board of directors. In *Grimes v. Donald*,28 Allen examined a chief executive officer’s employment contract that purported to allow the CEO to receive large payments from the corporation if the board of directors unreasonably interfered with him when he was carrying out his responsibilities. Allen dismissed the complaint, finding that there was little likelihood of real harm to the corporation, but took direct aim at the language of the contract, which he found to be "foolish," "unskillful," and "ill-conceived."29 According to Allen, it was the board that managed the business and affairs of a corporation, and the idea that it could "unreasonably interfere" with the corporation’s management demonstrated that the drafters of the contract "fundamentally misunderstood the basic structure and requirements of the

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I note parenthetically that plaintiffs in this suit dismiss this claim of "culture" as being nothing more than a desire to perpetuate or entrench existing management disguised in a pompous, highfalutin’ claim. I understand the argument and recognize the risk of cheap deception that would be entailed in a broad and indiscriminate recognition of "corporate culture" as a valid interest that would justify a board in taking steps to defeat a non-coercive tender offer. Every reconfiguration of assets, every fundamental threat to the status quo, represents a threat to an existing corporate culture.

Although Allen refused to rule out the possibility that protection of a corporate culture might not be a legitimate interest, he clearly was skeptical of the concept.


29Id. at *35-35, reprinted in 20 DEL. J. CORP. L. at 777.
law governing corporate organization and governance.\textsuperscript{30} The contract survived, but a powerful message had been sent to others negotiating chief executive officer contracts.

Allen also laid down stern rules for fiduciaries of trusts and partnerships. For example, in two cases decided the same day, \textit{Price v. Wilmington Trust Co.}\textsuperscript{31} and \textit{Reed v. Delaware Trust Co.},\textsuperscript{32} Allen held that trustees could rely upon the statute of limitations only in limited circumstances because:

\begin{quote}
[t]he institution of trusts is understandably protective of beneficiaries because trusts are often established when, at least in a settlor's mind, the beneficiary needs a competent and reliable trustee to care for the beneficiary's interests. The institution of trusts condones, if not encourages, dependence by the beneficiaries on their trustees; it is predicated upon trust, not vigilant self protection by trust beneficiaries.\textsuperscript{33}
\end{quote}

Similarly, in \textit{Reed}, Allen wrote:

The trust relationship has utility only if beneficiaries feel at ease confiding in and relying upon the trustee. . . . This reasoning is equally applicable to a claim of fiduciary negligence. While beneficiaries cannot close their eyes to that which is quite obvious, they should not be expected to monitor the trustee's actions diligently; trust law has developed to eliminate a need for such scrutiny.\textsuperscript{34}

Allen wrote a number of significant decisions affecting limited partnerships, but perhaps the most important came in \textit{In re USACafes, L.P. Litigation.}\textsuperscript{35} Most publicly held limited partnerships have as their general partner a corporation or other entity. Prior to Allen's decision in \textit{USACafes}, most practitioners assumed that the directors of a corporate

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\bibitem{30}Id. at *35, reprinted in 20 Del. J. Corp. L. at 777.
\bibitem{31}No. 12,476, 1995 Del. Ch. LEXIS 65 (Del. Ch. May 19, 1995).
\bibitem{32}No. 12,645, 1995 Del. Ch. LEXIS 69 (Del. Ch. May 19, 1995).
\bibitem{34}\textit{Reed}, 1995 Del. Ch. LEXIS 69, at *8-9.
\bibitem{35}600 A.2d 43 (Del. Ch. 1991).
\end{thebibliography}
\end{flushright}
general partner owed no fiduciary duties to the limited partnership or the limited partners – their duties ran to the general partner, and its shareholders, alone. In *USACafes*, Allen disagreed. After a scholarly discussion about the origin of fiduciary duties, Allen held that such a director "surely [had] ... the duty not to use control over the partnership's property to [his] advantage ... at the expense of the partnership." In explaining the rationale for that result, Allen posited the following hypothetical:

[A]ssume that a majority of the board of the corporate general partner formed a new entity and then caused the general partner to sell partnership assets to the new entity at an unfairly small price, injuring the partnership and its limited partners. Can it be imagined that such persons have not breached a duty to the partnership itself? And does it not make perfect sense to say that the gist of the offense is a breach of the equitable duty of loyalty that is placed upon a fiduciary?

The logic of Allen's argument now seems firmly established.

And those are just a few of the subjects that Allen touched in his twelve years on the court. He also explained the theoretical basis for management defensive actions in takeover attempts and the limitations

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36 See generally Martin L. Lubaroff & Paul M. Altman, Delaware Limited Partnerships § 11.2.11 (Supp. 1997). The authors disagree with Allen's holding in *USACafes*, believing instead that the previous understanding was satisfactory. One may question whether they adequately deal with the various hypothetical examples posed in *USACafes*. In any event, while Allen agreed that it was proper to construe statutes literally, he rejected that concept when it came to fiduciary duties. In many ways, his decision in *USACafes* was foreshadowed by the distinction he set down in Spiser v. Baker, 525 A.2d 1001 (Del. Ch. 1987).

37 See *In re USACafes*, 600 A.2d at 48-49.
38 Id. at 49.
39 Id.
on that power.\textsuperscript{41} He clarified how the statute of limitations applied in the Court of Chancery\textsuperscript{42} and explained how both limited partnerships and corporations could wind up their affairs.\textsuperscript{43} He wrote on wills, trusts, and guardianships, as well as administrative and election-law questions. In


Allen's opinion in \textit{Trans World Airlines} rebuffed a claim that a "special committee" of supposedly disinterested directors had properly approved a merger with a controlling shareholder. \textit{See} \textit{In re} Trans World Airlines, Inc. Shareholders Litig., No. 9844 (Cons.), 1988 Del. Ch. LEXIS 139 (Del. Ch. Oct. 21, 1988), \textit{reprinted} \textit{in} 14 DEL. J. CORP. L. 870 (1989). The committee had not attempted to gain the highest price possible from the controlling shareholder, but instead limited itself to determining whether the price offered by that shareholder was fair. Allen held that in order to be effective, such a special committee must attempt to obtain the best available price for the minority shareholders, and a committee that merely considered the fairness of an offer would not serve to allow a transaction with a controlling shareholder the benefit of the business judgment rule rather than the far more stringent requirement that the controlling shareholder prove the "entire fairness" of the transaction. \textit{Trans World Airlines} became the opinion handed out by Delaware counsel to counsel for special board committees as a object lesson of how not to conduct a special committee.

\textsuperscript{42}Kahn v. Seaboard Corp., 625 A.2d 269 (Del. Ch. 1993). Besides being a remarkable piece of historical scholarship, \textit{Kahn} expresses Allen's view on how a court must deal with the law (as well as his sometimes novel use of adverbs):

\begin{quote}
Modernly in law, as in much else, we tend to think functionally rather than metaphysically. The intricacies of 18th and 19th century equity jurisprudence are of intellectual and historical interest, but our law today must be explained and justified in terms that seem operationally significant to people today, whose interests are to be determined by that law.
\end{quote}

\textit{Id.} at 275. Part of the reason of why Allen's opinions are so persuasive is precisely his ability to explain the law in functional terms.

all he wrote close to 500 opinions, many of which are small masterpieces, and had a hand in a fair number of the decisions of his colleagues as well.

Many of those decisions only directly affected a minor area of the law. Collectively, however, they have already had a great impact on the way commercial lawyers and judges view cases, in part because of the extraordinary level of fluency Chancellor Allen brought to his decisions. In opinion after opinion, Chancellor Allen explained the origins and purpose of a legal doctrine in a way that brought fresh light to the subject. Lawyers have a tendency unthinkingly to use legal doctrines as "pigeonholes" into which facts are stuffed. As a result, over time doctrines often get warped to the point that they no longer make much sense. As demonstrated by some of the previous quotations, Chancellor Allen's greatest strength might have been his ability to strip away years of encrusted doctrine in order to allow a legal rule to once more serve the purpose for which it was originally intended.

That is not to say that Chancellor Allen was without critics. His approach to the law necessarily gave relatively little deference to stare decisis. There are more than a few attorneys who confidently predicted victory to their clients, only to have the Chancellor reject what appeared to them to be controlling precedent. And, as he often admitted from the bench, he was not overendowed with an important judicial virtue — patience. Many lawyers felt the sting of his words.44 But, Allen also had a noticeably rare balancing virtue; no matter how much he had made up his mind on an argument, it was still possible to persuade him to change his opinion if you provided him with a concise, logical, and compelling reason to do so. He also understood the wider responsibilities of his role; while he regarded complex commercial cases as important, he thought that his duties in cases involving real people — guardianships, will contests and the like — were of at least equal dignity.45
In describing Winston Churchill's brilliance, one of his colleagues said that Churchill had a "zigzag streak of lightning in the brain." Few lawyers meet that test, but William Allen is one of them. Even his critics realized that he had an extraordinary mind. Indeed, looking at both his virtues and faults, one is struck by his resemblance to Learned Hand, a judge greatly admired by Allen, who was probably the most important commercial law judge of this century. Like Allen, Hand gained a national reputation from an "inferior" court. And like Allen, Hand could craft masterful opinions that changed the law through their persuasive force alone. Indeed, with due regard to the scholars who make the Seventh Circuit an intellectually dominant court, of all of the commercial law judges this century, only Learned Hand produced a body of work that equals that produced by Chancellor Allen.

And now he is, to use his own phrase, off to the "groves of academe to instruct the young." Perhaps that is where he will stay. But perhaps, if the nation is fortunate, some President will find a political benefit in nominating a judge's judge of commanding ability to the United States Supreme Court, and William Allen will be offered the opportunity that was inexplicably denied Learned Hand. It would be a forum worthy of his abilities.

parents and religious community perhaps will treat her with some distance as a result of her having been imposed upon in this way. As the child is raised as a Jehovah's Witness, as I expect will occur, she may even come to doubt her own spiritual well-being. One would hope, however, that those eventualities will not develop and that compassion, a virtue no doubt appreciated by members of the parents' religion, will allow for forgiveness. The infant has, of course, no capacity to choose, and her parents' contested this application strenuously.

Id. at *10-11.


47For a recent biography of Learned Hand, see Gerald Gunther, Learned Hand (1994).

48Solash v. Telex Corp., [1987-1988 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 93,608, at 97,726 (Del. Ch. Jan. 19, 1988), reprinted in 13 Del. J. Corp. L. 1250, 1261 (1988). The context is somewhat different. In Solash, a noted corporate raider had threatened Telex with a takeover but had left the scene after making a large profit on his shares. That individual was also in the news at the time because he was teaching a business school class and had offered his students $100,000 if any could identify a successful takeover target. Allen summed up his feelings about such behavior with one, devastating, sentence.