

INTRODUCTION: A BRIEF HISTORY OF THE DELAWARE COURT OF CHANCERY

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I was privileged to be asked to introduce my former colleague, William B. Chandler, III, who is one of two persons who will be at the center of this remarkable event sponsored by Columbia Law School. To put Bill into the perspective that he rightly deserves, I would like to tell you, very briefly, a short story about the institution on which he served for twenty-two years, during fourteen years of which he served as Chancellor. The institution, of course, is the Delaware Court of Chancery.

In the beginning—that is, when the Court was founded in 1792—it bore no resemblance to what it is today. Essentially, the Court was a constitutionally separate court of equity in a small rural state. Ironically, its creation was counter-historical, since not long thereafter, most other states abolished their equity courts and merged them into their courts of law. For its first 150 years, the Court of Chancery had only one judge—the Chancellor—and its caseload consisted more of local property, will, trust and minor contract disputes than of business law. Although the Chancellors who held that office were eminent jurists, their eminence did not radiate beyond the borders of the state, since in that era there was no event or development that thrust the Court onto a wider stage. Nor did that even begin to occur until the early 20th century, after Delaware had supplanted New Jersey as a favorable place for businesses to incorporate.

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During the 1920s, there occurred a series of railroad reorganizations. Because the railroads were incorporated in Delaware, the reorganizations fell under the jurisdiction of the Court of Chancery. These matters were quite complex, but the Chancellors quickly proved that they were up to the task, by deciding those matters in a sophisticated and efficient way. That made an impression, since not long thereafter, many New York lawyers began bringing stockholder derivative actions in Chancery, to circumvent New York's security-for-costs statute.¹ Delaware had no such statute. This injection of new corporate cases enabled the Chancellor to develop—and to display—his ability to decide complex cases in a manner that was both fair and satisfactory to the corporate legal and business community, including the plaintiffs' bar. It is from that point forward that the Court began to develop a reputation that transcended the borders of Delaware.

Admittedly, the trajectory of the Court was, like many things, somewhat a product of historical accident—in particular, the talents and personalities of those who occupied the Chancellor's chair beginning in the 1940s. If there was one person who elevated the court to an institution of national stature, most would agree that it was Chancellor Collins Seitz, who was appointed to that position as a very young man, and who singlehandedly (i.e., without any colleagues or legal staff other than his secretary) decided every major corporate case brought in that court for more than twenty years. Many of those cases we cannot help but be familiar with, if only because they have appeared in every law school corporations textbook printed since the 1950s. Not until 1962 did Chancellor Seitz even have a law clerk,

¹ Former Section 61-b of the New York General Corporation Law authorized a court to require a derivative plaintiff to give security for expenses which the corporation might incur in the action. N.Y. GEN. CORP. LAW § 61-b (1929). Section 627 of the New York Business Corporation Law contains the current provision, allowing the corporation in whose right the derivative action is brought to require plaintiffs to post security for expenses unless the plaintiffs own more than five percent of the corporation's shares. N.Y. BUS. CORP. LAW § 627 (2012).

and it was only shortly before then that two new Vice Chancellor positions were created, to handle the ever-increasing corporate caseload. By the time Chancellor Seitz departed the court to join the Third Circuit, where he later became Chief Judge, the Court of Chancery had become a highly-regarded court known for its corporate law jurisprudence.

By the time I came to Delaware in 1967, three eminent judges sat on the Court of Chancery—Chancellor William Duffy (who was later elevated to the Delaware Supreme Court), and two Vice Chancellors, William Marvel (who later became Chancellor) and Isaac Short. Over the next eighteen years, while I was a practitioner in Wilmington, the reputation of the Court was solidified under the administration of these judges and their successors.

During that period, two important events caused the Court's stature to be elevated to an even higher level. The first was the United States Supreme Court's 1978 decision in *Santa Fe v. Green*,² which held that cases attacking the substantive fairness of a corporate securities transaction (including mergers and acquisitions) could not be brought in federal court under Rule 10b-5, unless the complaint alleged deception.³ *Santa Fe* led to a complete reallocation of corporate litigation from the federal to the state courts—particularly to the courts of Delaware, where most of the nation's public companies were incorporated. That case also meant that many of the highest profile hostile takeover litigations, beginning in the 1980's, would be centered in the Delaware Court of Chancery.

² *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462 (1977).

³ Securities and Exchange Commission Rule 10b-5 prohibits nondisclosure or misrepresentation in securities transactions, as well as any "artifice to defraud" or any act "which operates or would operate as a fraud or deceit." 17 C.F.R. § 240.10b-5. The *Santa Fe* plaintiffs argued that a transaction that otherwise conformed to Delaware's short-form merger statute violated the rule because its sole intent was to eliminate minority shareholders and it therefore had no valid business purpose. In rejecting this argument, the Supreme Court held that Rule 10b-5 does not create a private federal cause of action for shareholders and that their remedy is available only under state law.

The second historical event was the appointment in 1985 of William T. Allen as Chancellor. Together with *Santa Fe*, the appointment of Chancellor Allen made the Court of Chancery the central focus of much of modern corporate law. The takeover cases led to the development of an entire new body of state corporate law—an area that until then had been largely dormant, in contrast to federal securities law jurisprudence. Indeed, so all-consuming was the hostile takeover case load that it resulted in the expansion of the Court from three to five judges, the fifth judge being Bill Chandler, who was appointed in 1989. During his twelve years in office, Chancellor Allen was the impetus, the driving force, behind the Court's enhancement, not only because his opinions were groundbreaking and crafted at the highest conceptual level, but also because he created a bridge between the Delaware Chancellors and Supreme Court Justices and the legal academy—a bridge that has survived and flourished to this very day, as evidenced (among other things) by this Symposium.

That short history brings me to Chancellor Allen's successor, William Chandler, whose accomplishments as Chancellor attest that there was no more worthy successor to fill Bill Allen's shoes. Bill Chandler did that almost effortlessly. Not only did he continue and embellish the Court's tradition of high quality of judicial and academic craftsmanship, but he also innovated in a separate sphere that was sorely needed. Every institution that grows beyond its humble roots at some point requires both physical and human infrastructure support, to enable it to carry out its greater mission. Bill created that infrastructure. To name just a few highlights: he was the driving force behind the building of a new Chancery Courthouse in his home county. He professionalized the position of Court of Chancery Master, and thereby created a new level of judicial support and expertise within the court. The most telling evidence of Bill Chandler's success in that realm is the presence at this Symposium of former Master, and now Vice Chancellor, Sam Glasscock. Bill also innovatively increased the efficiency of the Court of Chancery without detracting from its

collegiality, by persuading the Delaware Legislature to authorize a second law clerk for each member of the Court. The only alternative would be to add new judicial positions, which would have been more costly and would have diluted the collegiality of that court. These accomplishments (and I have highlighted only a few) are, of course, separate and apart from the hundreds of superbly crafted opinions that Bill authored during the years that he led the Court.

As we know, Bill stepped down only a few months ago, and is succeeded by his colleague, Chancellor Leo E. Strine, Jr. In another setting, an observer might say of this: "The king is dead, long live the king." But, in Bill's case, the king is very much alive and well, but by choice he is ruling over a different kingdom. Please now join me in congratulating former Chancellor William Chandler.