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THE MENACE OF *JARNDYCE AND JARNDYCE*[1]

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"Never can there come fog too thick, never can there come mud and mire too deep, to assort with the groping and floundering condition which this High Court of Chancery, most pestilent of hoary sinners, holds, this day, in the sight of heaven and earth."[2]

It is a little staggering to realize that these words were written more than eighty years ago in condemnation of practices in which the State of West Virginia and the members of its bar are still indulging. It is even more amazing to consider that the country which gave these practices to the world long since aban-

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[1] This paper was written at the request of the editor. This is stated not by way of apology but rather by way of putting forward a reason why this subject is once more placed before the profession by myself. For the past seven years I have devoted a considerable amount of time and space to this subject and its reiteration may posssibly become monotonous. Nevertheless, the subject is a very important one and one which, it is believed, has the silent approbation of the bar but needs active effort for its accomplishment. It is with the hope that something along this line may be done at our next legislative session that the above is submitted.

The paper, "Procedure in Chancery Causes", read at the 1926 meeting of the West Virginia Bar Association was, however, on entirely different lines from this. At that time the Association was unanimously on record in favor of the open court procedure. Accordingly, the purpose of that paper was to outline the procedure and, at the same time, tender a bill for legislative enactment. The long discussion on the part of several members of the bar in connection with that paper and the report of the Committee on Judicial Administration and Legal Reform in favor of the rule-making power of the courts are, as far as the records show, the last public discussion of this subject by the Association. This discussion will be found in the 1926 year book of the Association, pages 125-149. It is on that discussion that the small part of this article devoted to the voiced objections is based. It was not considered necessary at that time to make an argument in favor of open court hearings, as that argument had been made briefly by Mr. Kemble White before the Association in 1925 and the Association had unanimously endorsed his findings.

[2] BLEAK HOUSE, c. 1.

doned them and that West Virginia, then non-existent, should to this day be carrying them on.

The reason for this apparently fixed adherence to a course of procedure so antiquated and so iniquitous is not ready to the seeking. One hesitates to accuse even individuals of corrupt intent and to bring such a charge against an entire bar would be a most foolish act of injustice. Certainly in retaining our present chancery practice we are adhering — and most slavishly — to the performance of one duty of a lawyer — to discourage litigation. Unfortunately, we discourage it not by leading our clients away by the paths of peaceful compromise but by holding out no hope for proper judicial adjustment of difficulties. We take part in a performance which cries out for us — if we lack the honor ascribed by Dickens to chancery practitioners of his day — "Suffer any wrong that can be done you, rather than come here!"

It is probably true (this statement can be only an assumption) that we have in West Virginia today no causes of half a century's duration and certainly none involving costs of seventy thousand pounds. This does not mean that *Jarndyce and Jarndyce* is not a reality. It is "changed not in kind but in degree"; and, even if we have no such case corresponding in every detail with fiction's horrible example, the full reality of that example is a constant menace. Under our statutes, *Jarndyce and Jarndyce* may be reenacted at any time. If it is not reenacted that fact will probably be due to a lack of public patience; but here is possibly the root of the difficulty — our public patience today will not permit a case to be dragged out for fifty years but it will permit a system that encourages such dragging and it will further actually allow twenty or even twenty-five year cases.

Much of the evil formerly complained of under the general head of the law's delay has been eliminated. Some of this elimination has been done by statute, some by judicial legislation, some by common sense on the combined part of bench and bar. In some fields much may be accomplished without bothering the legislature. This is another way of saying that some procedural statutes provide more annoyance than hindrance. For instance, our present law of instructions to juries lays a considerable burden on the shoulder of the conscientious jurist, eager for his juries to be properly advised; nevertheless, he can sustain that burden. In the matter of hearing chancery causes he is helpless. All his ingenuity avails him nothing. Here is a procedure which hinders — nay more — obstructs justice. Only with the consent and co-

operation of counsel for all concerned may the court help — and this privilege the court and counsel have possessed, at least in theory, from the first session of the first court of chancery.

It has long been admitted, insofar as bench and bar have been at all vocal on the subject, that there is no reason for the continuance of the deposition and every reason why the hearing of chancery causes should take place in open court. The deposition remains. This is true in spite of the great increase of disputes requiring chancery intervention. The great preponderance in importance of chancery over law today need only be mentioned. At the same time it is well known that there exist today intelligent persons — potential clients, if you will — who consistently refuse to enter a court of chancery as plaintiffs. Involuntary appearances as defendants they may make, but they will indeed suffer any wrong rather than submit it to the interminable processes of equity. The very existence of a condition that allows this is one of the shames of the profession. It is as though a patient should say he would endure any loathsome disease rather than enter a hospital. In both cases the public suffers — and the profession loses.

In considering an indictment of this kind it may be well to know what is the attitude of other judicial systems. In this connection some attention has been given to the several procedures of the other states. The summary which follows is based entirely on examination of the statutes except, unfortunately, in a few instances where the absence of a definite statutory enactment apparently makes necessary the conclusion that the old practice still prevails. From this last statement it may be inferred that the list of states assembled under the head of those continuing the old equity practice is probably longer than would be a list properly determined from the various state practice works not available to the writer.

The states, in addition to West Virginia, which seem to continue the old equity practice are:—[3]

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[3] The bar and the writer are indebted to Mr. George W. McQuain and Mr. Kingsley R. Smith of the Senior Class of the West Virginia University College of Law for the collection of statutes on which the tabulation in the text was made.

See ALA. CODE ANN. (Michie, 1928) p. 1947; ARIZ. CODE (Struckmeyer, 1928) §§ 4421, 4422; ARK. DIG. STAT. (Crawford & Moses, 1921) § 4205; DEL. REV. CODE (1915) § 3858; D. C. CODE (1925) § 1061; FLA. COMP. LAWS (1927) §§ 4921, 4922; ILL. REV. STAT. (Cahill, 1929) c. 51, §§ 24, 38; IND. ANN. STAT. (Burns, 1926) §§ 256, 460, 488; KAN. REV. STAT. ANN. (1923) §§ 60-201, 60-202, 60-2819 *et seq.*; ME. REV. STAT. (1916) c. 82, § 20; MD. ANN. CODE (Bagby, 1924) § 268; MASS. GEN. LAWS (1921) c. 233, § 67;

Alabama, Arkansas, California, Colorado, Connecticut, Georgia, Iowa, Kentucky, New Hampshire, New Jersey, Rhode Island, Tennessee and Texas.

The states which have adopted the plan now suggested for West Virginia or a plan similar thereto are:—

Massachusetts, Michigan, Mississippi, New York, Ohio, Oregon, Pennsylvania and Vermont.

Swinging to the other extreme, with the abolition of the difference between actions at law and suits in equity, are:—

Arizona, Idaho, Indiana,[4] Kansas, Louisiana, Minnesota, Missouri, Montana, Nebraska, Nevada, New Mexico, North Carolina, North Dakota, Oklahoma, South Carolina, South Dakota, Utah, Washington, Wisconsin and Wyoming.

A few of these require special comment.

Thus, the Arkansas statute provides "Deposition may be used upon the trial of all issues and upon all motions in actions by equitable proceedings, except where the court otherwise directs on an issue tried by a jury". It has been assumed that this statute means that the state proceeds under the old practice. The word *may* possibly indicates otherwise.

The New Jersey statute providing that all examination of witnesses hereinafter to be taken and made use of at the hearing of any cause in the court of chancery, except such as shall be taken before the chancellor, vice-chancellor, or an advisory master, *etc.*, implies that some of their causes are heard in open court, but it is impossible to determine from the codes at hand what these are.

MICH. COMP. LAWS (1915) § 12489; MINN. STAT. (1913) § 8683; MISS. CODE ANN. (1930) § 400; MO. REV. STAT. (1919) § 1153; MONT. REV. CODE (Choate, 1932) § 1921; NEB. COMP. STAT. (1922) §§ 8503, 8874, 8880; NEV. REV. LAWS (1912) §§ 4943, 5454; N. H. PUB. LAWS (1926) c. 337; N. J. COMP. STAT. vol. 1, p. 423; N. M. STAT. ANN. (Courtright, 1929) §§ 101, 105; NEW YORK CIVIL PRACTICE ACT, 1921 §§ 8, 288 *et seq.*; N. C. CODE ANN. (Michie, 1927) §§ 399, 1821; N. D. COMP. LAWS ANN. (1913) §§ 7355, 7880, 7883; OHIO GEN. CODE (Page, 1926) §§ 11521, 11525; OKLA. COMP. STAT. ANN. (Bunn, 1921) §§ 178, 606, 612; ORE. LAWS (Olson, 1920) § 405; PA. STAT. (West, 1920) § 1732; S. C. CIV. CODE (1922) § 308; S. D. COMP. LAWS (1929) §§ 2260, 2750; UTAH COMP. LAWS (1917) §§ 6442, 7178; VT. GEN. LAWS (1917) § 1511; VA. CODE ANN. (Michie, 1930) § 6228-a; WASH. COMP. STAT. (Remington, 1922) §§ 153, 1321; WIS. STAT. (1929) §§ 260.08, 326.07; WYO. COMP. STAT. (1920) §§ 5555, 5831.

Observe that here the statutes of ten states are not cited and of these nine are put into the old grouping while Louisiana is the only one placed in the extreme. This placing of Louisiana is made with reasonable authority. The placing of the other nine is open to some question.

[4] See Pittsburgh, *etc.*, Railroad Co. v. Home Insurance Co., 183 Ind. 355, 108 N. E. 525 (1915). This case supplements the statute by placing its intent beyond question.

The state of Mississippi admirably separates the two procedures by a simple statute providing that the methods of adducing testimony and examining witnesses in the chancery court shall be the same as that in the circuit court, with the same rules prevailing. As the chancery court excludes the jury, this is probably as near to the ideal as possible.

The plain statute of the state of New York[5] simply abolishes the distinction between actions at law and suits in equity. However, it is well known that the jury is not ordinarily employed in New York equity suits.

Pennsylvania is governed by the rules of practice in equity prescribed by the Supreme Court of the United States unless otherwise provided by act of the Assembly or altered by the Supreme Court of the Commonwealth. However, the practice is open court hearings.

Vermont, while having the open court hearings, has a special provision in regard to the appointment of a master. This provision doubtless exists in many other states.

Missouri, like many others, holds to the distinction between legal and equitable rights, but apparently with no distinction between the procedures at law and in equity.

Idaho, while abolishing the distinction, has this clause in its statute "provided, that in all matters not regulated by this code, in which there is any conflict or variance between the rules of equity jurisprudence, and the rules of common law, with reference to the same matter, the rules of equity shall prevail". Another section provides that in matters triable by the court the judge may order the testimony taken before himself, a referee appointed by the court, or a special judge agreed to by the parties.

North Carolina and Wisconsin both have very elaborate statutes on depositions, allowing them for causes other than those ordinarily permitted in actions at law; this, however, does not seem to take them in any sense out of their general class.

It will now be noted that the jurisdictions adhering to the old procedure (always remembering that this class is very likely to be larger than is justified by the facts) number fourteen, including West Virginia. Those following the approved procedure number only eight, while twenty have gone to the other extreme. This leaves six states and the District of Columbia not falling directly within any of these classes.

[5] See Lattin v. McCarty, 41 N. Y. 107 (1869).

Delaware confides the whole matter to the discretion of the chancellor.

Illinois permits oral testimony when desired by either party.

Florida provides for oral examinations before the court only after order to that effect made by the court upon motion by either party. Apparently this is not demandable as a matter of right, but the matter rests within the discretion of the court.

Maine allows the evidence to be "presented wholly or partly by oral testimony", or by depositions. The statute does not say who makes the decision.

Maryland provides that the court shall, on application of either party, or may of its own motion, order an oral hearing in open court in lieu of depositions.

Virginia allows the court in its discretion to order the whole or any part of the evidence to be taken and heard orally before it except in cases for the sale of lands of infants and insane persons. The mother state has gone a long way beyond us.

The District of Columbia provides for hearings according to the rules of the Supreme Court of the United States for practice in equity and of the Supreme Court of the District of Columbia not inconsistent therewith; but the statute further provides that the court may, in its discretion, for proper cause shown, order the testimony to be taken orally in its presence or under a commissioner, according to the uses of chancery, or before examiners, upon reasonable notice as the court may order and direct.

It might be said that the state of West Virginia comes within this special class, inasmuch as it permits hearings in open court on consent of the court and of counsel for all concerned. It is submitted that this statute does not alter the old procedure, as the right to hearing under special procedure by consent always existed in theory.

If we note the great number of states going to the new extreme, this classification will serve to point out what seems to be a danger. When a state breaks away from its old procedural moorings it is likely to head for the uncharted seas. Observe that the largest group above listed has gone to the full extreme — the abolition of the distinction between actions at law and suits in equity. Nothing could be farther than this from the purpose of this paper. If this is our alternative it might well be argued that we should find our last estate worse than our first. Our purpose should be by all means the adoption of a plan similar to that of Massachusetts and the others of that group. One would indeed

have to be an ardent advocate of the jury system to urge this extension of it. For our present purposes it is believed it may reasonably be taken for granted that our bar does not wish to increase jury powers.

Why should we adopt the Massachusetts plan, or any one similar thereto? Presumably one writing on this subject should answer that question; yet to answer it seems almost wholly fatuous. It is indeed difficult to find anything resembling a sound objection. It cannot even be argued that this method has ancient sanction. The "depositions on interrogatories only", taken over into English chancery procedure from the civil law, were far removed from our present system. That system as it stands today is simply the finished product of the abuses of that ancient one. There early grew up the custom of appointing commissioners to take the answers to these interrogatories. Later the power of these commissioners was extended to discretionary examination. Our present practice of turning counsel loose without let or hindrance with no one in charge except a notary public whose functioning ceases after the oath is administered is simply an example of chancery procedure run wild.

It should not be necessary to repeat what has been so often said about the enormous records in chancery cases today — about the clouding of the issues and the difficulty of separating the wheat from the chaff. This has been, is and always will be the result of such unlimited questioning as this. Nor should it be necessary to point out the infinitely greater speed with which litigation can be terminated under the proposed system. In this connection, however, one thing can be pointed out. That is that the abolition of the chancery deposition will remove for West Virginia the only substantial cause of delay *now in the law itself.* Delays by dilatory counsel and indolent judges we shall always have. This is no reason for continuing a statutory impediment. The plain and necessary delay that will always be had by reason of the difficulty of assembling all counsel concerned — particularly when we remember that in the chancery case of importance many parties are joined and consequently many counsel appear — is a delay that can be eliminated by adopting this new procedure. Under the open court plan, there will, if ever, be a difficulty in assembling them once and once only. Under our present practice, every new witness may require a long delay for getting together all counsel concerned.

The present great expense, to be very substantially diminished by the proposed change, is another point often brought forward in favor of open court hearings. This will be brought about not only by the avoidance of a great number of transcripts and the shortening of practically all the rest but by a diminution in the number of appeals as well. The more intelligent handling and decision of causes under the open court plan is bound to result in greater satisfaction with results obtained in circuit courts. Nevertheless, the mere elimination of the expense of the huge transcripts now required should not be overlooked. It need not be argued.

The matter of exclusion of immaterial testimony at the time when offered is always put forward by advocates of the change but its full importance is not always brought out. There is much more to this than speed, shortening the record and reducing expense. There is a further important matter of trial psychology. The long and constant introduction of irrelevant testimony in time wears down the resistance of opposing counsel. He ceases to object. Worse, he fails to press his already taken objections before the chancellor. Even if he does press them, the chancellor is bound to read the irrelevant mass and the immunity of chancellors from being swayed by the incompetent is at least open to question. In a well-remembered case a certain item — clearly inadmissible — was introduced over formal objection. It was casually mentioned on submission but served only to provoke a smile from counsel. Nevertheless, when the opinion appeared, a very able chancellor chose to rest his decision largely on this item. He knew better. He would never have dreamed of admitting it in an action at law; yet there it was and he not only considered it but allowed it great weight, although no reason for its admissibility could be imagined. Counsel should not have introduced it? True. They would not have attempted it before the chancellor in open court.

Of course, this is only one of the many matters which lead to what is possibly the strongest argument of all in favor of open court hearings — the more intelligent decision of causes. A shorter record, a record from which immaterial matter is, as far as possible, excluded — both of these work toward diminishing the complexity of the problem to be presented and so clarify things for the court. Not less important than these is the opportunity to see the witnesses. No one has ever contended that this opportunity is a hindrance to justice. Certainly the printed page is not as

helpful to the judge as is the hearing of oral testimony — another point that needs no argument.

There is a statute to which attention should be called. Section three, article four, chapter fifty of the West Virginia Official Code of 1931 provides "in a suit in equity a deposition may be read if returned before the hearing of the cause". It is sometimes argued from this that a plaintiff cannot be compelled to file his depositions until the cause is ready for hearing, that is, until the defendant has completed his testimony and all rebuttal and so on is ended. In other words, according to this argument, even if defendant is of opinion that plaintiff has made no case, he must nevertheless take his depositions or demand submission and be precluded, thereafter, from taking testimony. As to the correctness of this proposition, the writer naturally prefers to express no opinion. It is undecided — it may have to be decided. Certainly it is arguable. If the contention is sound, the plight of an oppressed defendant is indeed a sad one. Once in chancery he must go through to the end, however frivolous the complaint. This could not happen in open court.[6]

It is essential to consider the probable effect the proposed change will have on litigation. Here, it is submitted, there can be little doubt. It will encourage litigation in the one way in which litigation should be encouraged, — with the increase of assurance of *speed to an intelligent adjustment at a minimum of expense.* Our present procedure, as already pointed out, discourages all attempts to submit matters cognizable only in chancery. This is not only not the way to discourage litigation but is also a positive public wrong. It is providing a very inferior type of public machine when a much better one is available.

The profession will do well to realize that the present plan is entirely out of keeping with our present times. Other professions have recognized the necessity of keeping pace with the advancement of public knowledge and with the need for greater celerity in business transactions. The public is losing confidence in the legal profession by reason of this very failure to keep pace. It is high time that this fault on the part of the profession should be corrected.

Doubtless other arguments will suggest themselves. Equally doubtless they are unnecessary.

[6] This statute should be clarified. The possibility pointed out contains sufficient danger to make correction imperative, even if one does not agree with the main purpose of this article.

Against these arguments, it is interesting to note that only one objection has ever been advanced by our lawyers. That is that the new procedure will overwork the judges. It is rather idle to set up this particular man of straw in order to knock it down; but, as it has been gravely advanced by eminent attorneys, it may be once more pointed out that this is no objection. The fact that a reform as important as this will necessitate the appointment of extra judges is no reason to retard the reform; but, as must be obvious, this is unimportant for the objection is untrue as well as unsound. Its untruth is readily demonstrable. Take any ten chancery causes from any court. Estimate the amount which would be eliminated by open court hearing. Then compare the probable time of hearing with the time actually taken in reading the record.

Ordinarily, at the close of a hearing, the mind of the court is well made up on questions of fact. There is no necessity for review and re-review. The whole case is much more clear in the mind of the chancellor than any case can possibly be after even a very careful reading of transcribed testimony. Thus it will be seen that the actual hours of labor spent in hearing chancery causes will not be increased, even in a case where the testimony is not shortened.

That it may increase the number of chancery causes is true. It is even to be hoped that it will. If it does, it will be a vindication of the soundness and efficacy of this form of litigation. This will not unduly burden the court. It will take an increase beyond all probability to offset the labor saving. In this connection our ample experience with the change in divorce procedure must be considered. We cannot overlook the fact that a court may now, without undue exertion, dispose of twenty-five or more of these cases in a day. To have disposed of twenty-five cases by chancery record in a day is an unheard-of boast. At the same time, on the practical side, the fees of counsel in divorce proceedings have not diminished while their work is much less.

While no objection other than the overburdening of judges has been urged against the change, there was an objection made to the proposed bill of some years ago. That bill provided that, on proper showing, the court might refer the cause to a master. It was urged that this would resolve the whole matter into a question of the personal reaction of the judge, — that many judges would solve the problem by referring everything. Of course this cannot follow in its entirety. Many chancery causes cannot be

twisted, even by the most ingenious of the indolent, into matters proper for reference. It may be granted that some incompetent or lazy jurists will try to evade their proper share of duty; but there is no apparent reason, logical or practical, why the entire state should labor under an antiquated code of procedure simply because some circuits place incompetents on the bench. There is no good cause shown why all our laws relating to courts should be designed to protect an electorate of intelligence insufficient to realize that good jurists are desirable. Altogether too many of our laws are already shaped to that end. Our judges are given less authority than umpires and find crippling statutes at every turn. Small wonder indeed if the man in the street considers the office unimportant and is indifferent as to who occupies it.

So much for the voiced objections. What of the unvoiced? What are the real underlying causes which have made our state a backward one for so many years? It is not easy to answer. One may guess at dishonest reasons, but it is very difficult to argue that they really affect the bar. The probability is that inertia is the chief objection. Usually this is known as the spirit of conservatism. It is an excellent *nom de plume,* for nearly all lawyers wish to be considered conservative, and that desire is a worthy one. It is only when pure inertia starts masquerading as conservatism that we should be careful to recognize it and throw it out.

The obvious dishonest objection is that the hearing in open court will shorten the litigation — hence the lawyer can no longer charge the fees to which he is now accustomed. There is no reason why a dishonest objection should be met but this can be easily disposed of. The new plan will never deprive the laborer of his proper hire. The client should still pay what the services are worth. He will so pay. True, in some instances it may take a little education to let a client know that he is really better off by having only two months' service than he would be by carrying on for fifteen years; but the fee in every substantial case has to be fixed by the value of the services to the client, and this he must learn. If the long drawn out hearings require that a lawyer give more time to a case than that case can be worth to his client, the system is wrong, and the lawyer should not complain if he is given an opportunity to shorten his labors and adjust his fee to its proper proportions — not below them. In addition to all this, the all-important answer to this objection is that the profession will be immeasurably benefited by the increase in chancery litiga-

tion. Given a clean and effective way of settling business disputes, the public is sure to respond. It is not too much to hope that it will restore in some measure what confidence, in both bench and bar, has been lost by our dereliction. It is for us to deserve that restoration.

Another loss to the dishonest practitioner will be that of the opportunity to wear out his opponent, plaintiff or defendant. The chancery war is frequently a war of attrition. The possession of substantial means by one party when the other is less favorably situated in that respect is nowhere of greater advantage. The plaintiff wearies of prosecuting his right or the defendant gives up in despair. To this objection no answer can, let us hope, be made.

The remedy is quite simple. The value of the first part of the present West Virginia statute, providing that chancery causes may be heard in open court on agreement of all parties, is purely educational. This is not said flippantly. It has a genuine educational value in calling the possibility of this procedure to the attention of bench and bar. It has had effect. We have a few open court hearings; but we are a long way from the goal. We may cut straight through to it by a simple modification of this section so that it shall begin "Chancery causes shall be heard and determined in open court".

With this should come the logical supplement fixing the use of depositions. That use should be confined to cases where depositions are proper for reasons sufficient in actions at law unless it should be considered desirable to give a little leeway to the judge to allow them for good cause. It is submitted that this saving clause is not necessary, particularly if the saving clause hereinafter referred to should be adopted. Our rules in regard to depositions in actions at law have generally been found satisfactory and there is no apparent reason why law and equity should here part company.

The saving clause that seems to be necessary is a provision to allow the chancellor, on proper showing that it will be impossible or impracticable to hear any particular cause in this manner, to refer such cause or any part thereof to a master. There are two reasons for this. In the first place, the theory of open court hearings does not include the idea of doing away with special masters or commissioners for purposes of accounting. It is doubtful if that theory includes even the idea of diminishing the work of such masters or commissioners, however much it may

practically reduce it. There is no profit in turning our courts into accountants. The cases to which this reason applies will, however, generally come first before the court. The court will determine, by testimony if necessary, whether or not there should be a reference. There should be a substantial diminution in the number of those cases which are referred to commissioners for no other reason than that the court believes that, under certain conditions a reference will be necessary and therefore refers it, not only to determine what a reference should determine, but even to determine the necessity of reference itself.

The second reason for the saving clause is more arguable. It is found in the belief that there are certain chancery causes which cannot possibly be heard within reasonable limits; that in this respect they differ from actions at law and that, therefore, it is impracticable for a court to take the time to hear them. That there are cases which do so consume time is true; but whether the necessity of such consumption of time is fact or superstition is open to question. Of course many cases require much time in the hearing; but is this any more true in chancery than at law? Surely this may be doubted, particularly in a state that has recently witnessed a proceeding at law protracted over more than thirteen weeks. These matters are mentioned merely to show that the case is arguable and, therefore, the saving clause giving the chancellor power to throw the whole cause into the lap of the master should be regarded as experimental. If a fair trial shows that it is useful to avoid clogging the courts, it should be retained; if it serves no useful purpose, but serves only to give incompetent or indolent chancellors an opportunity to postpone labor, possibly in the hope that its hour may never arrive, it should be deleted.

If this saving clause is adopted, the statute should be drawn so as to vest in the master the ordinary powers of a court. These should include the right to rule on the admissibility of evidence. He should have the right — possibly within limitations — to obtain a summary ruling from the court or judge on evidential questions. He should report conclusions of law as well as of fact and *should indicate the character of decree that should follow.* In other words, he should be the court's substitute and the judge's authority should be merely supervisory or, in effect, appellate. His power to determine law and indicate decree might not necessarily apply to those cases corresponding to those where reference

is made today, but only to those cases where the court actually substitutes the master for itself; but surely this one matter might be left to the courts' discretion.

There are matters of detail to be considered — the use of transcripts, the time for requiring or filing them and the like, but these are details and do not properly belong to the present discussion.[7]

There is a possible compromise. It may be dangerous to suggest it, as the situation does not call for compromise; yet the long-continued failure to secure this reform must be taken to indicate some measure of opposition as well as of indifference, so it may be we shall have to content ourselves, for a time, with the half-loaf. That compromise is the Maryland plan. Let an open court hearing be *demandable* by either party as well as subject to order of the court. If either clause must be omitted, strike out the one giving power to the court. The court's power is only an emergency provision to prevent abuses. If either, that is to say, *any,* party has the right to demand that the court hear the cause, a party has only himself or his counsel to blame if he does not avail himself of this opportunity. True, it leaves the way open for combinations of unscrupulous counsel, but these combinations will be rare. So, assuming that this is easier of legislative enactment than the straight prescription of procedure, this improvement, rather than nothing at all, should be obtained.

There should be no compromise. West Virginia should take its proper place among those states which have done away with the impediments to the administration of justice.

The old ideal of the judicial inquiry still prevails. A trial is not, in theory at least, a battle of lawyers' wits but is a simple seeking after the truth — an endeavor to find the facts concerning which there is a controversy. There is no place where this ideal may be more nearly approximated than in the open court of chancery. The whole-hearted adoption, on the part of the whole bar and with the cooperation of the bench, of this system should have a

[7] It is probably unnecessary to point out that the Code, c. 51, art. 1, sec. 11, conferring some rule-making power on our Supreme Court, is not helpful even in the detail of this plan. As the power of the Supreme Court is confined to providing rules not in conflict with existing statutes, it is evident that the power of that court is carefully limited to making rules concerning matters for which the legislature has not provided. As anything along this line would be squarely in conflict with c. 56, art. 6, sec. 38, of the Code, the only remedy is legislatve.

cleansing effect on litigation generally. It should facilitate the search for truth.

Nothing new has been herein set forth. Everything that can be said on this subject has been said many times, and the present purpose is not to attempt to say something new but to restate all the old arguments, with such new light as may possibly be thrown on them, in order once more to place before the bar the necessity for action. Meanwhile, the profession pays.