REPORT

ON

PLEADINGS AND PRACTICE IN EQUITY

OF

The Commissioners,

Appointed by the General Assembly of Maryland,

TO REVISE, SIMPLIFY AND ABRIDGE

THE RULES OF

Practice, Pleadings, Forms of Conveyancing,

AND

PROCEEDINGS OF THE COURTS OF THE STATE.

PREPARED BY

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ONE OF THE COMMISSIONERS.

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To the Honorable,

The General Assembly of Maryland:

The Commissioners, appointed to revise, simplify, and abridge the Rules of Practice, Pleadings, Forms of Conveyancing and Proceedings of the Courts of this State, respectfully submit the following:

REPORT ON PLEADINGS AND PRACTICE IN EQUITY.

SOURCES OF INFORMATION.

There is no available source, from which aid in our labors could be obtained, that has not been resorted to, for help in the consideration of the subject of this Report. The whole course of practice in Chancery in England, including all the changes which have, in successive ages, been made by the respective Lord Chancellors, from the rules announced by Lord Bacon in his majestic speech, at the taking of his place in Chancery, the 7th of May, 1617, and the celebrated ordinances thereupon established by him, to the General Orders of Lord Cottenham, established in April, 1850, have been carefully considered. We have also examined all the reforming Acts of Parliament, passed at the sessions of 1852, 1853, and 1854, in pursuance of the Reports of the British Commissioners appointed to revise the Chancery Practice of England. We have, too, carefully considered what has been done in those States of our Union where the attempt has been made to abolish Equity as a separate jurisdiction, and to enforce its principles as a part of the law in one common course of procedure. The modern practice in Admiralty has also been re-

sorted to, as perhaps furnishing some rule or device that might be used with advantage in the kindred pratice in Equity. Suggestions, derived from these several sources, have contributed their aid in our labors.

THE PRINCIPLES OF REFORM.

The first step in our work is to ascertain the direction in which experience shows reforms should proceed. The progress of reform must take the direction in which it has hitherto proceeded. The changes, which have, from time to time, been made in our chancery practice by legislation, have been suggested by evils that needed remedy. And in the long run, it will be found, that there are some common principles directing and governing the changes. We must, therefore, ascertain these principles and follow them as our guides in all attempts at reform. As we proceed in this Report, we will point out these principles, and show that all the reforms, proposed by us, are in conformity with them; so that the General Assembly may see that we follow no fanciful theories, but walk in the footsteps of experience in all we propose.

LAW AND EQUITY.

The jurisprudence of Maryland is separated into two great departments, Law and Equity. This peculiar division of administrative justice has, like our political institutions, come to us from England. It is part of the heritage from our ancestors. The new Constitution of Maryland, while it bestows, on the same judges, both common Law and Equity jurisdictions, manifestly designed that, as heretofore, the

two jurisdictions should be exercised as separate functions. Maryland has wisely eschewed the attempt to make law and equity one, to be administered by a common mode of procedure. Though the new constitution does not prescribe, that law and equity *procedure* shall, as heretofore, be different, yet such is clearly the purpose of the constitution. For the peculiar rules of decision upon the rights and grievances of parties are not a more essential part of equity, than its *peculiar mode of procedure.* We are, therefore, astricted by the new constitution, to the mere simplification of Equity procedure. The distinctive features of Equity Pleadings and Practice we are constrained to preserve.

EQUITY JURISDICTION.

Though our commission is limited in its labors to Equity procedure, yet in order to give the General Assembly a definite notion of Equity procedure, it is necessary to present some account of the nature of Equity jurisdiction.

It has been no less authoritatively than truly said, by our Court of Appeals, that "the principles and powers of the Court of Chancery in England, at the time of the revolution, not altered by our legislation, nor inapplicable to our political institutions, are the same by which the Court of Chancery in Maryland is governed." In order, therefore, to understand our chancery system we must examine that of England.

The office of Chancellor in England originated in fabulous ages of British history. The Chancellor was the keeper of the King's conscience, and his office was the fountain of justice. No suit could be

instituted, in a Court of Law, without a writ first obtained from him for the purpose. The Chancellor's duties thus divided themselves into two great occupations: One, the supplying writs to suitors who wished to litigate in other courts; the other, the decision of a peculiar class of suits, as judge. This last branch of his duties is what is meant by his Equity jurisdiction; and the principles of his decisions as judge, and his peculiar modes of procedure, constitute Equity jurisprudence.

From a very early period in our colonial history Maryland had a Chancellor, whose duties, however, were for the most part, but not entirely, confined to the second branch of the English Chancellor's duties—trying causes in a peculiar class of suits. His jurisdiction extended over the whole State. By Acts of Assembly, passed in 1814 and 1815, concurrent Equity jurisdiction, with that of the Chancellor, was conferred on the County Courts throughout the State, within their respective counties. This distribution of Equity jurisdiction continued until the new constitution went into operation. The office of Chancellor is, by the new constitution, abolished; and the judges of the Circuit Courts, which have succeeded to the County Courts, are, within each county of their respective circuits, clothed with exclusive Equity jurisdiction, with an appeal to the common appellate Court of the State. Equity is now separated from the other duties of the Chancellor. The system, therefore, should, we think, no longer be called Chancery, but Equity; the Equity powers alone, in our opinion, of the Chancellor being conferred on these Courts.

Mischief does sometimes result from this system of several distinct courts proceeding on different, and in some cases antagonistic principles. It is important, therefore, in presenting to the General Assembly the nature of Equity jurisdiction, to exhibit the principles which render distinct courts necessary, in order that the jurisdictions of the two classes of courts, as far as practicable, may, in the course of time, be so adjusted, that in every case, the court which has the cognizance of the matter in dispute shall be able to give complete relief. This cannot be done without a distinct apprehension of the difference between cases properly belonging to a Court of Law, and the cases properly belonging to a Court of Equity. According to the present adjustment between the jurisdictions of Law and Equity, it sometimes happens, that parties, under the advice of the ablest counsel, lose their suits, and incur heavy costs, because, although they are entitled to redress, they have brought an action at law, when their remedy is in equity. There is sometimes great difficulty in determining on which side of the boundary line, between law and equity, a given case lies. Sometimes the difficulty is in ascertaining the facts with sufficient precision; sometimes in making out, whether, on a given state of facts, an action at law is maintainable, or whether the relief is in equity. The plaintiff in equity is sometimes defeated at the hearing of the cause, after the expense of the suit has been incurred; by its being shown, that under the circumstances appearing on the evidence, there might be redress at law, which his counsel had thought too

doubtful to recommend, or perhaps had not thought of at all. And the plaintiff in a Court of Law is sometimes non-suited at the trial, upon the existence of some relation of partnership or of trust appearing unexpectedly on the evidence. And it sometimes happens that parties, in the course of the same litigation, are driven backwards and forwards from a Court of Law to a Court of Equity, and from a Court of Equity to a Court of Law. This is certainly an evil.

It seems to be becoming a quite prevalent opinion, that the remedy for the evils resulting from the separate jurisdictions of law and equity, is to abolish the distinction between law and equity, and blend the courts into one jurisdiction. In considering this question, it should be remembered, that the distinction between law and equity has prevailed in the jurisprudence of England from the earliest times, and has been transplanted to Maryland; and that the abolition of the distinction, even if advisable, could only be effected by a revision of the whole body of our laws. The distinction pervades the whole administration of justice; and is so interwoven with the system of our laws, both common and statute, as to regulate rights and property, in the business of the community, to a vast extent. The mere fact, that the distinction between law and equity has been so long established as to pervade the whole system of property, presents a great obstacle to the blending of the Courts into one of universal jurisdiction.

But this is by no means the only or the principal difficulty in the way to such a consummation. The

distinction between law and equity is not an artificial one, devised by a technical jurisprudence, but results from the very nature of administrative justice applied to human transactions. While, on the one hand, it is necessary to have Courts of Law governed by strict legal rights, it is, on the other, expedient at least, to have Courts of Equity acting on the conscience of the parties, and administering rules more ethical in their character than those of strict law.

There are certain transactions which can be judically investigated, and the justice applicable to them administered, better according to the principles and the modes of procedure of the law; and there are other transactions which can be judicially investigated, and the justice applicable to them administered, better according to the principles and modes of procedure of equity. And this results, not from any mere arbitrary distinctions, but from the difference in the nature of the transactions, and the rights and liabilities involved in them. In some cases a general and unqualified judgment is all that justice requires; and such cases are infinite in number, and are the proper objects of law jurisdiction, as they can be better adjusted by the principles of the law and its peculiar modes of procedure than in any other way. Law jurisdiction is confined to cases in which there are but two interests—where all the plaintiffs, whether one or more than one, have one and the same right, and the defendants are subject to the same liability. The one party seeks to recover, from the other, a sum of money or specific goods or land, (which we have

shown in our first Report are the three great objects of law procedure;) and there is a simple judgment that the plaintiff recover, or that he fail.

But there is another class of cases of litigation in which "some modification of the rights of both parties (says Story,) may be required, some restraints on one side or on the other, or perhaps on both sides; some adjustments involving reciprocal obligations or duties; some qualifications or conditions, present or future, temporary or permanent, to be annexed to the exercise of rights or the redress of injuries." In matters of trust, for instance, the Court has to ascertain the conduct and acts, as well of all persons in a fiduciary position, as of all their cestuisque trust, and to adjust the several claims and liabilities, making all just allowances under the special circumstances of every transaction. So likewise in the exercise of jurisdiction for the protection and administration of estates, where there are various classes of parties having different and antagonistic interests, creditors are to be ascertained, assets to be got in, orders are to be made, and directions to be given from time to time in regard to the property and its distribution amongst the parties entitled. It is sufficiently manifest, that such cases as these can not be resolved into simple issues, like the class of cases, where there are only two interests, and a simple judgment, that the plaintiff recover or fail, does complete justice. An entirely different mode of procedure is necessary for these cases. The judgment or decree has to be directory, and sometimes reciprocal. The equity mode of

procedure has been provided for this class of cases. Such cases belong intrinsically to equity jurisdiction.

We have vindicated at large, in our first Report, the excellence of the common law procedure in the cases litigated in Courts of Law. That procedure will not suit the cases which we have described as within equity jurisdiction. Equity cannot, therefore, be thrown into Courts of Law, without a change of its procedure. Shall we then frame a mixed procedure, to suit the mixed jurisdiction of law and equity? This question is, we think, sufficiently answered, by the late attempt in New York to amalgamate law and equity. It was clearly the purpose, of the Legislature of New York, to abolish the distinction between law and equity, and to administer them in the same jurisdiction by one common mode of procedure. But such has been the practical difficulties in the Courts under this new state of the law, that while some judges have adhered to the manifest purpose of the legislature, others have maintained that no such impracticable purpose was intended by the reforming statutes. Mr. Justice Sill, in the case of Milligan vs. Cary, 3d Code Rep. 250, maintains that the "distinction between the pleadings in actions at law and those in suits in equity" is abolished, and the same pleadings should be used in all cases. On the other hand, Mr. Justice Welles, in Burget vs. Bissel, 5th Pr. Rep. 194, maintains the opposite opinion. "The only difference (says he,) between the mode of stating a case (or defence) in an action (or defence) formed upon legal principles, and one rest-

ing upon the rules in equity, is, that generally, in the former, the facts to be stated in the complaint are such, as by the common law rules of pleading, the declaration was required to contain; that is, issuable facts essential to the cause of action, and not those facts and circumstances or the evidence of facts which merely go to establish such issuable facts; while in the latter, the plaintiff is at liberty to follow the rules of pleading formerly prevailing in the Courts of Chancery. The learned judge says, that these views apply only to cases, where it is clear whether the party's remedy is at law or equity. But, that, where there is a doubt, whether an action or defence is of an equitable nature, the Court should give the party pleading the benefit of the doubt, and not strike out a pleading, which if the action or defence were clearly of an equitable nature would be good. Such is the perplexity, as to procedure, occasioned in the New York Courts, by the amalgamation of equity with law in the same tribunal and jurisdiction. The current of decisions shows, that after all attempts to force them into one, equity and law will, practically, be maintained as separate jurisdictions. But great evil must result from the fact, that law and equity are disposed of before a jury. That the nature of the questions, which properly belong to equity jurisdiction, requires a Court without a jury, we cannot doubt. The rights involved in such questions are complicated by so many different claimants, and conditioned by so many counter rights and obligations founded in natural justice, that in order to adjust

them in good conscience, what are called *the equities of the case* become controling considerations. A jury cannot understand these equities. They form too complex a question, or series of questions, to be appreciated by a jury in the hurry and bustle of a trial. And besides, none but minds disciplined in that peculiar casuistry, called equity jurisprudence, can properly appreciate what are the equities of cases. If questions of this character are given to a jury, under the direction of the Court, they are thrown upon the winds; and if they are reserved and determined by the judge, he is, to all intents, a chancellor, and the distinction between law and equity is still preserved, however bunglingly.

The necessity for equity, as a separate jurisdiction, is also shown, by the judicial experience of Pennsylvania. This, combined with the experience in the Courts of New York, has great force; because in Pennsylvania, equity was never a well defined system as in New York; and, therefore, we have the experience of Courts placed in different circumstances corroborating that of the Courts of New York. In that masterly forensic argument, so full of rare and various legal learning, and elegant historical and ethical disquisition, the speech of Mr. Binney in the Girard Will case, the evil of the want of the machinery of chancery procedure to enforce equity principles is clearly evinced. "All the principles of English equity (says Mr. Binney,) belong as much to Pennsylvania as to England. Gentlemen, not familiar with our system perplex themselves by occasional cases which

show the want of equity *powers* in the tribunals of that State—or rather of *equity forms and modes of administration.* In an early stage of the colony, there were Courts of Equity, with all the usual powers.—They ceased to exist. Certain equity powers were afterwards used by the common Law Courts, without legislative authority. They were indispensable and the right to use them became established by time.—Others were subsequently given by the legislature under the authority of the State constitution, and in certain cases all the powers of chancery have been given by recent laws. But equity *principles* have never fluctuated with these powers. From the first day of the colony to the present hour, they have been acknowledged, adopted and applied universally, sometimes, it must be admitted, defectively, because the power of application was defective. From 1720 to 1736 Pennsylvania had Courts of Chancery, and exercised equity powers generally to enforce equity principles. Most of the powers were lost with the loss of the Courts; but the loss of the powers never impaired the use of the principles in any case where the principles *could be otherwise carried into effect.*—The common law powers of our Courts have been invariably applied, *whenever practicable*, to enforce the principles of equity. Specific performance is obtained through conditional or cautionary verdicts. The action of ejectment is, in all cases that call for it, a bill in equity." This succinct judicial history shows, with singular force, the necessity for equity forms of procedure. Courts of Equity were thrown aside in

Pennsylvania before they had taken deep root, and administrative justice was confined to Courts of Law. Principles of equity, as indispensable to doing right in many cases, were enforced by the machinery of law procedure. The action of ejectment was employed to enforce the specific performance of a contract for the sale of land! What a commentary, are these bungling devices of Courts of Law to enforce equitable principles, upon the pretended wisdom of those who oppose equity as a separate jurisdiction! The necessities of remedial justice are fast restoring, in Pennsylvania, Courts of Equity. The thing is inevitable.

We see then, that Pennsylvania, who threw aside Courts of Equity, before they had ramified through her judicial system, is being constrained to establish them; and that the evidences are strong, that New York, where Courts of Equity had grown into full maturity, and then were abolished, must go back to them. The notion that law and equity ought to be amalgamated and put within one jurisdiction, originates, we think, in a misapprehension, to a great degree, of the true nature of equity as understood in England and America. The common meaning of equity is natural justice; and this is the meaning which is, for the most part, given to it, by those who think that it is absurd that law and equity should be separated in administrative justice. Those, who entertain this opinion, seem to suppose, that Courts of Law never form their judgments with any reference to principles of natural justice, but exclusively, to

rigid, severe and inflexible rules which forbid all consideration of special circumstances. This is a great mistake. Natural justice, as we have shown in our first Report, is one of the great principles upon which Courts of Law have always based their judgments where no rule of positive law forbids it. It is the only rule in cases entirely without precedent. And in cases where there are rules of positive law, natural justice is the standard of their application. In statutes, for example, all cases to which they are applicable cannot be foreseen, or if foreseen, cannot be expressed; some cases will arise that do not come within, and others will arise that do come within, the letter, but yet are not within the meaning of the statute. In such cases natural justice is the standard of interpreting the statute, and the cases out of the letter are put within, and cases within the letter are put out of, the meaning of the statute. This interpretation and application is called the equity of the statute.

We see then, that in Courts of Law, there is no divorce of law from natural justice, no antagonism between the two. Law is natural justice modified by circumstances of convenience and expediency. So likewise is equity, natural justice modified by the circumstances of the peculiar division of cases belonging to its jurisdiction. A Court of Equity is not a Court solely of natural justice, any more than a Court of Law is. "The very terms of a Court of *Equity* and a Court of Law as contrasted to each other are (says Blackstone,) apt to confound and mislead us; as if the one judged without equity, and the other

was bound by no law." We have shown that the former does not judge without equity or natural justice; we will now show that the latter does not judge without law.

"Equity follows the law," is a fundamental maxim of equity jurisprudence. A Court of Equity is just as much bound by a statute as a Court of Law is. It cannot interpret it more liberally. The rules of interpretation are the same in both Courts. "There is not (says Blackstone,) a single rule of interpreting laws, whether equitably or strictly, that is not equally used by the judges in the Courts, both of law and equity; the construction must in both be the same; or if they differ, it is only as one Court of Law may also happen to differ from another. Each endeavors to fix and adopt the true sense of the law in question; neither can enlarge, diminish or alter that sense in a single title." And Courts of Equity are equally bound by precedents with Courts of Law. In fact, equity is based upon the same foundations with the common law. "Equity jurisprudence may, therefore, (says Story,) properly be said to be that portion of remedial justice which is exclusively administered by a Court of Equity, as contradistinguished from that portion of remedial justice which is exclusively administered by a Court of Common Law."

What has been called equity, in all systems of jurisprudence, but the English, is little else in spirit, though more in scope, than what we have shown is meant, in our Common Law Courts, by equity in the interpretation of statutes and other positive rules of

law, in enlarging or narrowing the letter in order to give more scope to the spirit of the rule. In the tenth chapter of the fifth book of Aristotle's Nichomachean Ethics, we find the following: "And this is the nature of "the equitable" that it is a correction of law, whereever it is defective, owing to its universality. This is the reason why all things are not according to law, because on some subjects it is impossible to make law. So that there is need of a special decree; for the rule of what is indeterminate is itself indeterminate also, like the leaden rule in Lesbian buildings; for the rule is altered to suit the shape of the stone, and does not remain the same; so decrees differ according to circumstances." In the Roman civil law the same meaning is attached to equity. In the first book of the Pandects, is the following:— "Neither the laws, nor the decrees of the Senate can be so written as to comprehend all cases which may happen; but it is sufficient that they contain those which commonly happen." To supply this deficiency in the law, the Prætor's jurisdiction was established. In the first book of the Pandects it is written: "That is prætorian law, which the Prætors have introduced, for the sake of aiding, supplying and correcting the civil law, on account of public utility." The prætorian law has often been said to correspond with our equity. But it is manifest, by these citations from the Roman law, that it is more akin to what we mean by equity in the interpretation of positive rules of law; though it differs from it, in that it adds rules of its own; and in this it is like our equity. But it differs

from our equity, in not being confined to a peculiar class or classes of matters of litigation. It is true that the Prætor's jurisdiction was, at first, distinct from that of the civil law, but it did not take cognizance of different matters of litigation, but only applied either a different rule or a modification of the civil rule. In the progress of change, however, the Prætor's jurisdiction was blended with the civil law jurisdiction; and the edicts of the Prætor became part of the general system of law. In the second book and tenth title of the Institutes of Justinian it is written: "When the civil and prætorian laws began to be blended together, partly by usage, and partly by the emendation made by the imperial constitutions, it became established that the testament should be made all at the same time in the presence of seven witnesses, (two points required by the civil law,) with the subscription of the witnesses, (a formality introduced by the constitutions,) and with their seals appended, according to the edict of the prætor. Thus the law of testament seems to have had a triple origin. The necessity for witnesses, and their presence to give the testament the requisite formality, at one continuous time are derived from the civil law; the subscriptions of the testator and witnesses, from the imperial constitutions; and the seals of the witnesses and their number, from the edict of the prætor." By this citation from the Institutes, it is seen, that the edicts of the Prætor were engrafted on the civil law, superadding requirements of their own to those of the civil law. In the course of time the prætorian law gave

character to the great body of the Roman law, and constitutes, with the commentaries, the largest portion of the Pandects and the Institutes. It is the discretionary character, imparted by the prætorian law to the great body of the Roman law, that has contributed so much to that fluctuation in the application of its principles, which we have, in our first Report, signalized as its cardinal defect, in comparing it with the certainty in practice of the rules of the common law. The tendency of the prætorian law was to make rules bend to special circumstances; and thereby enlarge the discretion of judges, and approximate towards a mere system of arbitration, where the judgment is free from all regard to former rules and precedents. To confound equity, in the sense of our jurisprudence, with that of the ancient jurisprudence, and especially with the prætorian law, and throw all administrative justice into the same courts, cannot but ultimately subvert the stability of the ancient common law, and bring to pass the mischiefs which we have shown, in our first Report, to be inherent in the civil law practice.

These several considerations, we think, demonstrate the wisdom of retaining equity as a separate jurisdiction; as the new constitution has done. And we have presented them in this Report, both, because it is important that the General Assembly should be convinced of the expediency, not to say the necessity, of equity as a separate jurisdiction, and, therefore, lend a more willing ear to recommendations for the improvement of its procedure when they know it is to

be permanent; and that the public mind may be guarded against that plausible empiricism, which urges that justice is one, and should not have a divided jurisdiction. And, at the same time, the discussion of the various topics shows, the more clearly, the intrinsic nature of equity jurisdiction, which must be clearly understood, in order to judge correctly of the appropriateness of equity procedure, and the expediency of the recommendations which we shall offer for its amendment.

We have admitted, that mischief does result from the divided jurisdiction of law and equity. It is, therefore, proper that we should suggest some remedy. A remedy may be found in such a transfer or blending of jurisdiction as will render each Court competent to administer complete justice in the cases which come under its cognizance. Jurisdiction now exercised by Courts of Equity may be conferred upon Courts of Law; and jurisdiction now exercised by Courts of Law may be conferred upon Courts of Equity; to such an extent as to render both Courts competent to administer complete justice, without parties in the one Court being obliged to seek the aid of the other.—The number of cases, where parties may, at their option, resort to either Court, would, doubtless, thereby be increased. But this is not to be objected to; as there is now a large ground common to the jurisdictions and procedures of both Courts, with manifest advantage to the administration of justice. And when the procedures of both Courts are simplified, and the expenses reduced, the common ground of

jurisdiction may then be widened with greater advantage. The principle of rendering each Court able to administer full justice in all cases within its cognizance, without the assistance of the other, has been long acted upon in the legislation of the State. It, therefore, is only necessary to proceed in the same direction, until the jurisdictions between law and equity shall be completely adjusted by such changes as the experience of the Courts may, from time to time, find expedient. It does not, however, fall within the scope of our Commission to propose measures of adjustment between the jurisdictions of law and equity. Though it is proper that we should consider the subject in this incidental way in order that the General Assembly may see all the directions in which law reform is needed, and may also have intimations of how further reforms are to be effected in the future, though not now expedient, or perhaps practicable.

Having now considered the nature of equity jurisdiction, and shown the wisdom of preserving it separate from the jurisdiction of the law, we are prepared to enter intelligently upon the consideration of the peculiar mode of procedure used in Courts of Equity, and to determine what reforms are needed to make it more efficient in fulfilling the high purposes of justice in the peculiar class of cases which are of equity cognizance.

EQUITY PROCEDURE.

In order to get a clear and definite insight into equity procedure, it becomes necessary to advert to

its origin in England. The matters, litigated in Courts of Law, can all be resolved into simple causes of action that can be classified, and each class be stated in a simple formula called a *form of action*; as we have shown in our first Report. The system of common law procedure, therefore, begins with a simple formula presenting a single claim of one party against another. When, therefore, such matters arose, as those, which we have stated to be objects of equity jurisdiction, the common law furnished no adequate remedy. The person grieved, being thus without remedy at the common law, made his complaint, which could not be stated in any *form of action*, to the Lord Chancellor, whose office was the fountain of justice; and he, therefore, without common law process, or regard to common law rules of proceeding, as they were not applicable, compelled the opposite party or parties, to appear and be examined, either personally or upon written interrogatories, touching the matter complained of; and evidence being heard on both sides, without the interposition of a jury, the Chancellor decided *according to equity and good conscience*; because the matters of equity cognizance being of a nature more indeterminate, more modified by circumstances, than those of law, admitted of, indeed called for, a larger judicial discretion, a more ample application of the principles of natural justice, in deciding them.

According to the practice, which this statement indicates, a suit in equity proceeds in the following manner:

The party seeking relief addresses a petition, to the judge sitting in equity, stating his case with such allegations and charges as may be thought necessary; and praying for the specific relief which, he is advised by his counsel, ought to be granted, and generally for such other relief as the nature of the case may, in the judgment of the Court, require; and prays process against the defendants to compel them to appear and put in an answer. It is signed by the party or his counsel, and is filed with the Clerk of the Court. This petition is called a Bill.

In accordance with the prayer of the bill, the clerk issues a writ, under the seal of the Court, called a Subpœna, by which the defendant is required to appear and answer the bill.

The bill not only demands *relief*, but requires the defendant to make *discovery*, that is, to give answer on oath in respect of the several matters specifically stated and charged; and in the case of executors and trustees, and others administering property, to set forth accounts of the property or estate under their administration, and to set forth a list of the books, accounts and documents relating to the object matter of inquiry. With a view to this discovery, the bill contains what is called the *interrogating part*, in which the statements and charges are converted into a series of questions framed on the principle, that the defendant may be a dishonest man, disposed to answer evasively, and, therefore, suggesting modifications of the statements and charges to insure a direct and complete answer.

If the defendant appears, according to the requirement of the subpœna, the first thing to be done is to examine the bill; because the subpœna gives the defendant no intimation of what the object of the suit is, or what is required of him by the plaintiff. If it shall appear by the plaintiff's own showing on the face of the bill, that there is no case to warrant the interference of a Court of Equity, the proper course is, to demur to the bill for its insufficiency, and demand the judgment of the Court, whether the suit shall proceed at all or the defendant make answer thereto.—This mode of defence is called a Demurrer.

If the bill be sufficient in its statements and charges, to warrant the interference of equity, but the defendant knows matters, not appearing on the face of the bill, which afford a reason why the suit should be either dismissed, barred or delayed, the bill is met by a statement of these matters. Or if some matter stated in the bill, which is essential to the plaintiff's case, be false, this matter is met by a denial. This mode of defence is called a Plea. It reduces the cause to a single issue, and demands the judgment of the Court, whether the defendant shall be compelled to answer further.

If the defendant has no claim, or disowns any, to the subject of the demand made by the bill, he disclaims all right and title to the matter in demand, and prays the judgment of the Court that he be dismissed with an allowance of his costs. This mode of defence is called a Disclaimer.

Where neither a demurrer, nor a plea, nor a dis-

claimer is put in to the bill, the suit proceeds, in its more common course, by the defendant's answering generally the allegations and charges in the bill, and demanding the judgment of the Court on the whole case made on both sides. This mode of defence is called an Answer. The answer serves a double purpose: of giving responses to the interrogatories of the bill, and of bringing forward such other facts and circumstances as may be considered essential to the defence, either with reference to the matters in litigation, or to the costs of the proceedings. It must either admit, or traverse, or ignore all the statements and interrogatories of the bill.

When the answer is filed, the plaintiff may have the cause heard on the answer; in which case he admits the answer to be true in all respects. Or he may file a Replication, which is a general denial of the facts stated in the answer.

After the replication, the pleadings, according to modern practice, are ended; and the cause is said to be at issue.

The next step in equity procedure is, the taking of testimony. We must, however, postpone the consideration of this subject, until we have inquired and determined, whether equity pleadings, of which we have just given a general outline, need reform.

EQUITY PLEADINGS.

The first question which presents itself at this stage of our inquiry is, whether all the ancient modes of pleading, which we have mentioned, ought to be retained in equity procedure. The bill must of course

be retained; as it is obviously exactly suited to present an equity cause to the view of the Court, and to obtain from the defendant a discovery of whatever is needed to sustain the cause in equity and good conscience, that is within his knowledge. But, at first view, the four modes of defence, which we have exhibited, may seem needlessly to divide the ground of defence in equity causes. The comprehensive use, which the answer has acquired in Maryland practice, might suggest the notion that demurrers, pleas, and disclaimers may be dispensed with. But as these three forms of defence adduce matters, which are different in the nature of things, and have different effects in reason and justice, they must be retained in order to avoid confusion, and insure definiteness, in practice. That the disclaimer is necessary, is too obvious to need proof. There are, too, certain rights of defendants in equity, which cannot be adequately protected, except by demurrers and pleas. The cardinal purpose in equity procedure is to reach the conscience of the defendant. To this end, an answer from the defendant is the great object to be obtained by a suit in equity, as a mean towards a decree for relief. Equity pleadings therefore centre around the answer. The answer is what the plaintiff especially seeks, and what the defendant especially avoids. The demurrer and the plea are the modes of defence against being compelled to answer. The demurrer shows from the face of the bill, that the plaintiff is not entitled to an answer or discovery of the matters sought by him. And the plea shows the same thing,

either by stating new matter not contained in the bill, or by denying some of its essential facts. If the demurrer or plea be allowed by the Court, the defendant escapes an answer, which it is his great purpose to accomplish. For example: if a plaintiff sets out his right to an estate, and prays a discovery of some particular facts respecting the title, and the defendant, by plea, avers that he is a *bona fide* purchaser for a valuable consideration without notice, he will be protected by such plea, from the required discovery.—So where a plaintiff avers his right to a share in a certain trade as a partner, and as such calls for a discovery and an account; and the defendant denies, by plea, the fact of the partnership, he will be protected by such denial from the discovery and account. In both of these cases, it would be prejudicial to the defendant to make the discovery sought by the bill, either of the particulars showing defects in his title, or of the account of the condition of his business which the plaintiff avers is in partnership with himself. Therefore, the defendant pleads, so as to show the plaintiff has no right to the discovery, and thereby breaks up the whole case without injury to himself. But the function of a demurrer or plea, is not only to prevent a discovery which may be prejudicial to the defendant, but also to intercept, at an early stage, any cause which must ultimately end in nothing; and thereby save the expense and vexation, and delay which would be the result of putting in a full answer, and which, in most cases, would be followed by taking testimony, and a final hearing on the case as disclosed

by both parties.

These considerations, which could be exemplified by innumerable reported cases, and illustrated by the most various details of practice in equity, sufficiently show that all the present modes of pleading in equity should be retained. We, therefore, recommend that no change be made in the modes of pleading in equity. They have been devised by the most experienced chancery lawyers, to subserve the purposes of justice in the peculiar cases that are of equity jurisdiction; and have undergone such modifications, from time to time, as the exigencies of practical justice have suggested. They are, therefore, the very best modes, which the sagacious wisdom of those who, have been engaged in chancery practice for centuries, had been able to devise.

The next question which presents itself for our consideration is, whether the forms of equity pleadings can be simplified? For though the substance of the modes of equity pleadings be good, as we have shown they are, yet their forms may be defective, by being too technical.

THE FORMS OF EQUITY PLEADINGS.

In our first Report, we have shown, that most of the technicalities of the common law pleadings arise out of the forms of action. The forms of action are the roots from which spring all those subtle doctrines, which ramified through the system of common law pleadings, greatly to its detriment as a practical mean for administering justice. We, therefore, by abolishing the forms of action, were enabled to remove from

common law pleadings, all its obnoxious technicalities. In equity pleadings, there is nothing corresponding to the forms of action at common law.—Therefore it results, that equity pleadings are not encumbered by technicalities. Their vice is of an entirely different character. The vice of the common law pleadings is, that of logic degenerating into useless subtlety; the vice of the equity pleadings is, that of full statement degenerating into needless prolixity. While, therefore, the vice of the common law pleadings is that of form, the vice of the equity pleadings is that of matter. It is to the prolixity of equity pleadings, therefore, that our attention should be chiefly directed in any attempt to improve them.—This fact should be borne in mind as we proceed in the different parts of this Report.

OF THE BILL.

The frame of a bill, as established by the decisions in chancery and approved by elementary writers, is as simple as any device for the same purpose could be. It is simply a statement of the plaintiff's case with a prayer for relief. Nothing more is required by the well established principles of equity pleadings. The interrogating part of the bill, (which is so important in cases of fraudulent dealings by persons in a fiduciary character, and other cases where the plaintiff is in the dark, and it is necessary to probe the defendant's conscience in every way, to extort full information from him, and with access to his documents, to submit him to the most searching examination, and to compel him to explain and to

re-explain all his statements,) is no necessary part of a bill; and consequently should not be used, except where the case requires it. To use it, therefore, where it is not required, (and it is required in but a small proportion of the cases,) should be considered by the Courts as an abuse, and be visited with costs. The frame of a bill, therefore, needs no simplification. In theory it is as simple as it can be, and the practice should be made to conform to the theory. Legislation can be of no service towards securing this end; as the Courts have now ample control over the whole matter. The Courts should, therefore, prevent prolixity in bills, by having all the useless allegations in any bill struck out; and as about three-fifths of the cases are recorded, this would save much expense.

OF THE DEFENCE.

The forms, of the several modes of defence in equity pleadings, are nearly as simple as is compatible with efficiency in practice. To reject all form in proceedings in courts of justice would be destructive of the law as a science, and would introduce great uncertainty and perplexity in the administration of justice, by involving the merits of the cause in superfluous details and inartificial allegations, at once loose, obscure and misleading. Let us particularize!

OF THE DEMURRER.

The form of the demurrer is quite simple. In theory it is as simple as it can be made; with the exception, that it begins with what is called, a protestation, which is merely a reservation, that the defendant does not admit the facts of the bill to be true. This reser-

vation is of no avail in the case in which the demurrer is used, because the demurrer, *pro hac vice*, admits the facts to be true; and therefore, the only use, if any, of the reservation, is to prevent the admission from being used in another case. We therefore recommend that the protestation be disused, and that the admission implied in the demurrrer shall be of no avail in any other suit. See Recommendation (1) at the end of this report.

OF THE PLEA.

Pleas are of two kinds, as we have shown; pure pleas which rely wholly on matters dehors the bill, such as a release, and are affirmative in their form; and impure pleas, which consist mainly of denials of some substantial matter set forth in the bill, and are negative in their form. The form of the pure or affirmative plea is more complex. One great end of a plea, as we have shown, is to save the parties the expense of an examination of the witnesses at large, as would be the case if the answer were the only mode of defence. But the exigencies of equity cases require, that the negative plea should, sometimes, be supported by a special answer making a discovery as to all the special circumstances which are charged in the bill as evidence of the fact which the plea denies. For example: if a bill be brought for an account of the dealings and transactions of a partnership, charging a partnership and various transactions thereof, the defendant may deny that he is a partner; but such denial must be accompanied with an answer and a discovery, as to all the circumstances, specially charged

as evidence of the partnership. And by this negative plea, and particular answer which is merely subsidiary to the plea, the defendant is protected from a general answer disclosing his dealings. By this form of plea the defendant is protected, while the plaintiff is not deprived of his right of discovery as to the fact, which he must establish before he can be entitled to the general discovery. So justice is thus done to both sides. This mode of defence is, therefore, requsite to justice, and its form is as simple as practicable. Both sorts of pleas, however, begin with a protestation, as do demurrers. We, therefore, make the same recommendation in regard to them:—that the protestation be disused. See Recommendation (1.)

OF THE DISCLAIMER.

As the disclaimer is not often used, we will merely say, that we do not find it necessary to change its form; it being as simple as it need be. The simple assertion, that the defendant disclaims all right and title to the matter in demand is sufficient; though the formal words used in beginning and concluding an answer are generally, also, adopted in a disclaimer.

OF THE ANSWER.

The form of the answer is determined by the form of the bill. As the bill has a stating part and an interrogating part, so the answer consists of two parts: first the defence to the case made by the bill; and, secondly, the examination of the defendant on oath as to the facts charged in the bill, of which a discovery is sought, and to which interrogatories are usually

addressed. These parts are the body of the answer. The answer always begins with its title, specifying of which of the defendants it is the answer, and the names of the plaintiffs. After the title, the answer usually proceeds to reserve to the defendant all advantages, which might be taken by exception to the bill. This, however, is useless and should be omitted. So the body of the answer is generally followed by a general denial of the unlawful combination charged in the bill, and of all other matters therein contained. This is, also, useless and should be omitted. It is obvious from this analysis that the form of an answer is as simple as practicable.

OF THE REPLICATION.

A general replication, which is that generally used in more modern equity practice, is a general denial of the defendant's plea or answer, and of the sufficiency of the matter alleged in it to bar the plaintiff's suit, and an assertion of the truth and sufficiency of the bill. The same reservation of exceptions to the answer, as the answer contains of exceptions to the bill, is used in the replication; and may be omitted.

OF AMENDMENTS.

The policy of chancery pleadings is to bring out the whole case in the Bill and Answer; and not let the case run into lengthened pleadings as at common law. According, therefore, to present practice the pleadings close with the replication, when it is a general one, as it almost always is. In ancient practice a special replication was used to meet any new matter which the defendant might introduce into his

plea or answer. The consequence of this special replication, was a rejoinder, by which the defendant asserted the truth and sufficiency of his answer, and traversed every material part of the replication. And if the rejoinder disclosed any new matter, which required an answer, the plaintiff put in a surrejoinder, to which the defendant, in his turn, put in a rebutter. The inconvenience, expense, and delay of these proceedings occasioned an alteration in the practice. In the place of special replications, amendments of the bill have been substituted, by which the new matter formerly presented in a special replication and a surrejoinder is inserted in the bill; and the defendant can then put in a further answer. So that the bill contains the whole case of the plaintiff, and the answer, the whole defence of the defendant.

In Courts of Equity, mispleading in matter of form is never allowed to prejudice any party. And mistakes may be corrected, impolitic admissions suppressed, additional facts added, and all other things done which are needful to insure a hearing on the real and substantial merits of the case set forth in a Bill and Answer.

There is, however, one rule of practice restricting amendments that should be abrogated. The rule is, that any thing, which has occurred since the original institution of the suit, cannot be introduced into the bill by way of amendment; and that there must be a new bill, with a new subpœna, a new appearance, and a new answer, in order to bring such supplemental matter before the Court. As the plaintiff and

defendant are both before the Court litigating the matter in question, there can be no reason why the plaintiff should not be at liberty to show any thing which has occurred since the institution of the suit calculated to throw light on the matter in dispute, or which may affect the decree to be pronounced, without the formality, delay and expense of a new and distinct suit. We, therefore, recommend that the same power of amendment be given to the Court over matter which has occurred since the institution of the suit, as it has over that which occurred before. And that the plaintiff shall have liberty to state the supplemental matter by way of suggestion filed in the case, and the defendant shall have time and opportunity to shape his case, having regard to such new matter. See Recommendation (2.)

We shall show in the course of this Report, that some bills in equity ask for relief while others do not. According to the present practice, if a bill should contain a prayer for relief when it should not, it is open to demurrer on that account. It seems to us, that as the bill discloses, by its statements, what is the proper aid to which the plaintiff is entitled from the Court, that the mere fact that, by mistake, the plaintiff asks for aid to which he is not entitled, should not prejudice him in regard to the aid to which he is entitled. We, therefore, recommend that if a plaintiff shall, by mistake, ask for relief when he is not entitled to it, his bill shall not on that account be demurrable; but that the Court shall give such decree, order or aid as the case set forth in the bill will warrant. See Recommendation (3.)

We also recommend that immaterial allegations in any pleading, called, in technical language, impertinence, or any defect in the mere frame of any pleading in equity, shall not be ground for demurrer or exception. See Recommendation (4.)

OF THE DIFFERENT KINDS OF BILLS.

We have all along treated the subject of equity pleadings as if there were but one kind of Bill. We have confined our remarks to original bills praying for relief, and the defences applicable to such bills; because they are the most usual in Courts of Equity, and the principles of pleading governing them regulate all other bills and defences, subject to some exceptions and modifications, which it is not necessary to bring to the notice of the General Assembly. If, therefore, we had, at the outset, enumerated the different kinds of bills, we should have produced perplexity and confusion, by dividing attention between a multiplicity of objects, differing in peculiarities only, which it is needless to notice in the general survey of the system of equity pleading, that it behooves us to present, in order to show its excellence, and point out such improvements as may be needed. But we should, nevertheless, perform our duty very imperfectly, if we did not, at some stage of our Report, remark upon the different kinds of bills which the necessities of litigation in Courts of Equity render needful. For, otherwise, it might perhaps be surmised, that the bills which we had not mentioned are superfluous; or else that we did not so discern their relation to the general system of equity plead-

ings and practice, as to determine with certainty, whether they should be retrenched altogether, or simplified, or retained just as they are. To repel, therefore, every such criticism, and to show that our duty to examine every part, to the minutest particular, of equity pleadings, has been carefully performed we will remark upon the different kinds of bills, and indicate their purposes in equity procedure.

There are two great classes of bills, those which are original, and those which are not original. Original bills are those which relate to some matter not before litigated in the Court, by the same persons standing in the same interests. Bills not original are those which relate to some matter already litigated in the Court by the same persons, and which are either an addition to or a continuance of an original bill or both.

These two great classes of bills may each be divided into other classes.

Original bills are divided into those which pray for relief, and those which do not pray for relief. All bills may in a certain sense be said to pray for relief. But in the sense of Courts of Equity, such bills only are deemed bills for relief, which seek, from the Court in that very suit, a decision upon the whole merits of the case set forth by the plaintiff; and a decree which shall ascertain and protect present rights, or redress present wrongs. All other bills, which merely ask the aid of the Court against possible future injury, or to support or defend a suit in another court of ordinary jurisdiction, are deemed bills not for relief.

Original bills praying for relief may themselves be divided into two kinds: (1.) Bills praying the decree of the Court in regard to some right claimed by the plaintiff, in opposition to some right claimed by the defendant, or in regard to some wrong done in violation of the plaintiff's right. (2.) Bills of interpleader, where the person filing the bill claims no right in opposition to the rights claimed by the persons against whom the bill is exhibited, but prays the decree of the Court, touching the rights of those persons, for the safety of the person exhibiting the bill.

Original bills not praying for relief are of two kinds. (1.) Bills for discovery of facts resting in the knowledge of the party against whom it is exhibited, or of deeds, writings, or other things in his custody or power. (2.) Bills to examine witnesses *de bene esse*. And bills to perpetuate testimony.

Bills not original are divided into two classes. (1.) Bills for an addition to, or continuance of an original bill. (2.) Bills for the purpose of cross litigation, or of controverting, or suspending, or reversing some decree or order of the Court, or carrying it into execution.

It is at once apparent that all these different bills are determined in their characters by the different purposes for which they are exhibited; and consequently have a substantial and not a mere technical difference. They, therefore, subserve the purposes of justice; and they cannot be substituted by better devices. Some of the bills not original, called Bills of Revivor, are now of not so common use in Mary-

land, because of certain Acts of Assembly relating to the death and marriage of parties. So the cross-bill is not so often necessary, because of the Act of Assembly giving the defendant the power to examine the plaintiff on interrogatories. And our recommendation in regard to amendments touching matters occuring after a bill is filed, will diminish the use of supplemental bills. But we, after the maturest consideration, conclude that bills not original cannot be disused, and their purposes be accomplished by any mode of mere amendment. They must be retained.

As the defendant can demur to one part of a bill, and plead to another, and answer to a third; and as it is necessary that the respective parts to which the respective defences are pleaded, shall be particularly designated, we recommend that every bill be divided into paragraphs, numbered consecutively, and each paragraph containing as nearly as may be, a separate and distinct allegation or statement. This frame of a bill will also insure greater accuracy in its statements, and make it altogether more definite and intelligible. See Recommendation (5.)

We have gone thus thoroughly into the examination of equity pleadings; because the popular opinion esteems every part of equity procedure almost worthless; therefore, unless we had shown, by a careful analysis, the excellence of equity pleadings, the public would have been dissatisfied with our labors. It is in the practice of the Court of Equity, and not in the pleadings, that the great evils of this branch of administrative justice are to be found. We will now proceed to consider equity practice.

OF EQUITY PRACTICE.

Equity procedure naturally divides itself into two great branches, the pleadings in framing a suit, and the practice in conducting a suit. The pleadings are the established modes and forms in which the complaints and defences of the parties are brought before the Court; and the practice is the rules and orders prescribing the time and the manner in which every suit is to proceed from its institution to its termination. We now propose to review the practice.

Equity practice divides itself into many sections. That section which first claims our attention, is the mode of taking testimony in equity. We had arrived at this point in equity procedure, when we stopped to consider the pleadings. We will now return to it.

The ancient mode of taking testimony in chancery in England, was before Commissioners by written interrogatories upon which the witnesses were examined in private, none of the parties or their counsel or agents being present. The interrogatories were framed beforehand by counsel, without their knowing what witnesses would be adduced or what answer any witness would give to any particular question. The interrogatories were framed to meet the contingencies calculated to occur, and necessary to be provided for. And the cross examination was by written interrogatories to be propounded to witnesses whose examination in chief was not known. Such a cross examination it is very apparent was little else than a farce.

Though this mode of examination did perhaps

never prevail in Maryland in all its English strictness, yet many of its worst features are still retained in practice in our Equity Courts. The Act of Assembly of 1785, ch. 72, effected a great change in the chancery practice of Maryland. It is useless to enquire how much of this Act is declaratory only, and how much is introductory of change. By this Act the parties or their attornies, or agents are allowed to be present at the examination of the witnesses, and to have copies of each others' interrogatories; and after witnesses have been examined on one side, the other side can have an adjournment of the commission for the purpose of receiving additional interrogatories, proofs and witnesses, and giving each party a fair opportunity of adducing all his testimony. This is the law now. And though it is a great improvement on the ancient English mode of taking testimony, still it is extremely defective. We therefore propose to discuss the principles upon which it is founded, and then recommend such changes as the discussion may show to be expedient.

There can be no doubt, that the best mode of examining witnesses, is orally before the tribunal which is to judge of the effect of their testimony. And this is, in fact, the theory of the court of equity; for courts of Equity, as well as Courts of law, are based on the fundamental doctrine of the common law, that after all, in the last resort a jury is the great, peculiar and efficient tribunal for determining facts. And we confess, that after all the supposed new light, which, it is pretended, has shown jury trial to be obsolete,

we are of opinion, that the jury of twelve men, with the unanimous verdict, is the wisest, not only political, but judicial institution for the exercise of the function belonging to it in the common law, which has ever been established amongst men. The very diversity in thought, in knowledge, and in sentiment, of the jury, and the required unanimity with the superintending vigilance of the Court, insures a more thorough sifting of the facts, than any other possible form of tribunal. And it should be borne in mind, that the power of weighing facts, of that common kind which take place in every day transactions, is intuitive, requiring no systematic discipline in any scheme of established rules to perfect it. The transactions of every day constitute the best discipline possible to qualify men for judging of the force and meaning of ordinary facts. Before such a tribunal as a jury, it is impossible, that facts can get into anything like technicality,—fall under rules of artificial construction,—which they would be certain to do, in the long run, before a single judge sitting in causes where the same combinations of facts are constantly recurring. In complicated questions of fact, and these involving matter of feeling, such as *devisavit vel non* and in all cases of damages, the judgment of no one man can ever be so satisfactory as the verdict of an intelligent jury; and in our opinion, so good a measure of truth.

We, therefore, recommend that references of issues of facts to a jury, whenever the judge in equity may need it, be preserved as a part of the practice in equity as it now stands.

The present practice of taking testimony on written interrogatories, prepared beforehand by the counsel of the parties, and propounded to the witnesses by a Commissioner, who, by his clerk, takes down and records the answers, is, in our opinion, extremely defective. As the interrogatories cannot be leading, they are often drawn in such circumlocution, that the Commissioner has to translate them into his own language, before the witness can understand their import. And then the testimony of the witness is recorded, not in his own words, *ipsissima verba*, but in their substance as understood by the Commissioner; and it is then read to the witness for his assent, who often does not see clearly his own meaning in the new form of words, but is satisfied that it is better expressed, and, therefore, lets it pass. So that, in fact, the words of the written interrogatory are not the words propounded to the witness, and the words of the written deposition are not the words spoken by the witness. And yet the theory of written interrogatories and depositions is, that, by them, the Chancellor or Judge in equity gets the very words asked of the witness, and his very words in answer. This mode of examination is *theoretically* the nearest approach to oral examination before the judge, when practically it is the fartherest removed. It is theoretically one thing, and practically its opposite. It is, therefore, delusive, and ought to be disused, except where it cannot be dispensed with.

We propose, therefore, that as a substitute for written interrogatories, the witnesses shall be examined

in chief, and then cross-examined and re-examined, by the respective parties or their attornies, or agents, before a Commissioner, who, himself, shall have the right to ask any question, he may think fit, to elicit the truth from the witnesses. In this mode of examination the questions will be put to the witnesses so as to elicit the truth, and not in the formal words they are expected to swear to. The evidence shall be taken down by the Commissioner, not by question and answer, which overloads the proceedings with so much useless matter, but in the form of a narrative and read to the witness for his explanation or correction. If either party or his attorney or agent express a wish to the Commissioner, that the exact words of any particular question and the answer shall be written down, it shall be the duty of the Commissioner to do so. By this mode of examination, any advantage which may result from having the very words of the questions and answers, will be obtained. And all the disadvantages of the present mode, and of having the proceedings overloaded with useless matter, will be obviated. When the commission is not to be executed in the presence of the parties or their attornies or agents, as where the commission is to be executed out of the county, or out of the State, then the present mode must, from necessity, be observed.

The mode of taking testimony in equity proceedings in Maryland has already been much improved. Formerly it was necessary that the party, requiring the commission, should name four commissioners; and an order was then passed, that a commission should

issue to the persons named, unless the adverse party should name commissioners on his part, and strike from the list of the opposing party by a certain day. If he appeared, he was to strike two of the names from the list of the party applying for the commission, and to name four persons on his part, two of whom were in like manner to be struck by the opposing party; and the commission then issued to the remaining four authorizing them or any three or two of them, to examine all witnesses produced before them, by any of the parties. If there were several defendants, they might join in the commission separately, and then the plaintiff was to have two commissioners, and each defendant one. And if a defendant, after naming commissioners, refused to strike, the Court would strike for him. This clumsy, dilatory and expensive mode of appointing commissioners was formerly considered necessary to ensure a proper examination of witnesses in equity proceedings. But by Acts of Assembly, the commission may now be issued to two commissioners, and by consent of parties, to one. This right of the parties to issue the commission, by consent, to one commissioner, is liberal enough, and we do not propose to disturb it.

Besides this formal mode of taking testimony in proceedings in equity, there is another, less technical mode, by affidavits. The evidence taken in the formal mode just described, is that which is generally used at the final hearing of a cause. The evidence taken by affidavits is generally used about some interlocutory matter. The course both of practice and of

legislation in Maryland has been to extend the use of affidavits, and to lessen the necessity for the more dilatory and expensive testimony taken before a commissioner. By a practice which has grown up in Maryland, if upon an interlocutory petition and answer the parties are at issue, either party may, instead of having a commission, apply for an order allowing the parties to take depositions before a justice of the peace to be read at the hearing of the matter upon petition. The order usually requires three days' notice, of the time and place of taking the depositions, to be given to the adverse party. The most important accounts ever stated by the auditor may also be based upon depositions taken in this mode. The appointment and the discharge of a receiver, which involves rights and property of the greatest value and amount, is also determined upon affidavits. So too injunctions are granted upon affidavit, and formerly motions for a dissolution were disposed of solely upon the bill and the answer with the affidavit of the defendant. And now by the Act of Assembly 1835, ch. 308, the Court is authorized, upon application of any of the parties, to order testimony, in reference to the allegations in the bill, to be taken on behalf of all the parties in such form as it may direct, and on such terms, and under such regulations as to notice and otherwise as may be deemed equitable. It is usual to take these depositions before a justice of the peace. Now, the rights and property disposed of upon this sort of evidence, in these interlocutory matters, both in amount and interest, are quite as great as those de-

cided on formal depositions taken upon interrogatories before a Commissioner. Two thirds or more of the cases in equity in Maryland are merely administrative; and the matters proved are not admitted by the defendants only from want of knowledge, or because of infancy or coverture, the defendants are incapable in law of admitting them. In such cases affidavits are certainly as good as any other mode of proof. Surely, the rule which may be necessary for the one exceptional case ought not to be forced upon the hundred ordinary ones? The rule should be framed for the mass of the cases, and he modified to the exceptional one, by allowing a formal examination for it. And there is no reason, why the kind of evidence should differ, merely because the occasion for using it is or is not the final hearing of a cause. The great end is to have the evidence in the mode and form in which its truth is best guarranteed. One of our Chancellors, in speaking of the mode of taking depositions before a justice of the peace, to be used in equity proceedings, says: "This mode of collecting testimony, it is believed, is peculiar to our chancery proceedings, for I have met with no mention of any such practice in the English books. It is, however, not only in some respects the cheapest form of gathering proofs, but in many instances it greatly facilitates and expedites the progress of the cause; and the proofs are thus taken under all the safeguards which can in any manner insure fairness and fulness of evidence; that is, the special order of the Court, on oath, publicity, the right to cross ex-

amine, and a final responsibility. It is upon these grounds, that I think this mode of taking testimony deserves the continued sanction, approbation, and protection of this tribunal."

Depositions taken before a justice of the peace, as now practiced in Maryland in interlocutory matters, may, we think, be much more extensively used in equity proceedings than they are now, with great advantage to the practical administration of justice. We, therefore, recommend that when any suit or proceeding in equity shall be at issue, the plaintiff or his atttorney may, within such time as shall be prescribed by rule of Court, give notice to the defendant or his attorney that he desires the evidence, to be adduced in the cause, to be taken upon affidavit; and if the defendant or some one of the defendants, if more than one, or his attorney, shall not, within such time as shall be prescribed in that behalf by rule of Court, give notice to the plaintiff or his attorney, that he or they desire the evidence to be taken under a commission, the plaintiff and defendant respectively shall be at liberty to verify their respective cases by affidavit. And each shall give the other three days' notice of the time and place of taking his affidavits. This provision shall not, however, deprive either party of the right to a special order from the Court to take affidavits on interlocutory matters according to the mode now in practice, which we have mentioned. See Recommendation (7.)

It has sometimes been urged that testimony in equity should be taken *viva voce* before the judge who

is to decide upon its effect. This would interfere too much with the regular business of the Court. And, besides, the questions, which ordinarily come before Courts of Equity, do not so imperatively require the witnesses to be examined before the tribunal which is to decide upon their testimony, as those which come before Courts of Law. There is not often relief sought in a Court of Equity, where questions arise requiring evidence, that the acts of the parties, and the documents, which have passed between them, are not of such a nature as to render it extremely difficult for them to escape from the truth. Whenever cases of a different sort do occur, the issues of fact may be sent into a Court of Law to be tried before a jury. In order, however, to meet every species of case, we recommend that, in any suit or proceeding in any court sitting in equity, the Court (if it shall think fit,) may for its own satisfaction, summon by subpœna *ad testificandum* or *duces tecum* before it, and examine, or cause to be examined witnesses by word of mouth, and that either before or after the examination of the same or other witnesses in any other mode; and that notes of such evidence shall be taken down in writing by the judge or by such person, and in such manner as the judge of the Court shall direct. No such summons shall issue without the special order of the Court. See Recommendation (8.)

We also recommend that all evidence taken on interlocutory matter shall, when applicable, be used, at the hearing; and that the evidence taken in the earlier stage of the cause shall not be required to be taken

over. The repetition of the same evidence, in the course of proceedings in equity, is attended with much delay and additional expense without any benefit resulting from it. See Recommendation (9.)

By the late law reforms in England, the option of using affidavits in equity proceedings, in place of testimony taken in the old formal mode, has been allowed to suitors; and we have ascertained, from official sources, that nine-tenths or more of the equity causes have since been disposed of upon this form of evidence, to the entire satisfaction of suitors as well as those engaged officially in the administration of justice in Courts of Equity; which we will show more fully presently. That such will be the experience in Maryland, from such a practice, we cannot doubt. Such a practice would but follow out what has been long since practised by us in proceedings of the greatest importance in equity causes. And as by one of our recommendations, the Court has the authority to summon before it for examination any of the affiants, this will make them cautious about their affidavits.

OF PROCESS TO COMPEL AN APPEARANCE AND ANSWER.

We have thus far assumed, that the defendant in equity obeys the process of the Court, and pleads to the bill of the plaintiff, and that proofs are taken in support of both the complaint and the defence. We have, therefore, shown what the practice is in such circumstances. It now remains to show what the practice is, when the defendant does not obey the

process of the Court, but refuses to appear, or appears and refuses to answer.

By the ancient practice of the Court of Chancery in England, the writ of subpœna was considered essential to the exercise of the jurisdiction of the Court. By that writ, the party was compelled to come in, and submit to the jurisdiction. If he refused to appear, he was liable to the process of contempt, but the Court did not conceive that it had power to adjudicate against him in his absence, however wilful. Upon similar grounds, after he appeared, until the party put in his answer, the Court allowed its power to be paralyzed. And in later times, it was only after a long and ineffectual series of process for contempt, that the Court treated the plaintiff's bill as confessed, and procceded to decree in his favor. Till a late day, the chancery practice of Maryland was fettered by these ancient traditional rules and usages. They had become so familiar to the minds of lawyers, that they seemed almost essential conditions of proper practice in equity. Why a contumacious defendant, who refuses to appear to the authoritativc summons of a Court should, under no circumstanccs, have a decrce rendcred against him; and why, after he does appear, long and tedious successive proccsscs for contempt, must be gone through, before the bill shall be taken as confessed or admitted, might have had an answer in the fancies of the early jurisprudencc, but certainly whcn tested by the expediency of practical justicc, such rules and usages can appcar only as absurdities.

According to the ancient practice, if a defendant

of full age was regularly *summoned*, and failed to appear, at the Court to which the writ was returnable; or having appeared, failed to answer on or before the fourth day of the succeeding term, he was considered in contempt; and an attachment issued, as of course, under the great seal, to the sheriff of the proper county commanding him to attach the body of the defendant, so as to have him before the Court on the first day of the succeeding term, to answer the bill and the contempt. If the defendant, on this writ was returned *not est inventus*, an attachment with proclamations issued, as of course, to the sheriff commanding him to make proclamation, that the defendant appear before the Court at the return thereof, and in the mean time, that he attach the defendant, if he can be found, to answer the contempt. On the return of this writ, *non est and proclamated*, if the defendant still failed to appear and answer, the complainant was entitled to the process of commission of rebellion, sergeant at arms, and sequestration. This succession of tedious, expensive and absurd processes continued to be the mode of chancery procedure until the year 1785.

By the Act of Assembly 1785, ch. 72, if the defendant, who has been summoned, fails to appear, the complainant may have an attachment, then, an attachment with proclamations, and on the return of the latter writ, *non est and proclamated*, without suing out the commission of rebellion and sergeant at arms as required by the ancient practice, the bill may be taken pro confesso.

By this Act, if the defendant appears at the return of the subpœna, he must answer by the fourth day of the succeeding term. On his failure to answer, he is liable to attachment, and attachment with proclamations, and on the return of the latter writ, *non est and proclamated*, without suing out the commission of rebellion and sergeant at arms, the bill may be taken *pro confesso*.

By this Act, if the defendant is taken after appearance, upon any process of contempt, he may be brought into Court, and committed; and on his failure to answer, by the fourth day of the succeeding term, the bill may be taken *pro confesso*.

In each of these three instances, the Court may, instead of taking the bill *pro confesso*, order a commission to issue for the plaintiff to examine witnesses to prove the allegations in his bill; or examine the plaintiff on oath, upon interrogatories, to ascertain the allegations in his bill; and such decree shall be made in either case as the Court shall think just.

By the Act of 1799, ch. 79, if the defendant is attached for want of an appearance or answer, an order may be obtained, requiring him to answer by the fourth day of the succeeding term, and for want of an answer, the bill may be taken pro confesso; or the Court may direct a commission to issue for taking testimony; and shall decree according to the principles of equity.

By the Act of 1820, ch. 161, a still more summary mode, of compelling an answer and procuring a decree, is provided. According to this Act, if any

defendant, who has been summoned, shall fail to appear, or having appeared, shall fail to put in his answer within time, the Court is authorized and required on application of the complainant, to enter an interlocutory decree, and to issue an exparte commission for taking testimony to support the allegations in the bill; and upon the return of the commission, the Court shall make a final decree as if the defendant had appeared and answered.

And it is further provided by this Act, that whenever the bill shall charge any matter, as being within the private knowledge of the defendant, and shall pray a discovery; and an interlocutory decree shall have been entered, and the complainant shall satisfy the Court, by affidavit to be taken in open Court, and filed in the cause, that such matter does rest in the private knowledge of the defendant, and that there is reasonable ground for believing, prima facie, that such matter does exist, the Court is authorized and required, to order the bill, as to such matter, to be taken *pro confesso*, and to make a final decree as if such matter had been proved on a commission or admitted by answer.

In examining these Acts of Assembly, it will be discovered, that they make no provision for the case of a bill for discovery merely; neither do they provide for making, the decree *pro confesso*, evidence of the facts admitted, in any other cause, as they would be if admitted on answer. These technical or statutory confessions, bind the defendant only for the purposes of the suit. Though, therefore, these Acts seem to

furnish adequate remedy for relief in the cause itself, they fall short of reaching the entire evil caused by the default of the defendant, in depriving the plaintiff of evidence to which he is entitled by the principles of equity. We, therefore, recommend that in all cases where a bill for discovery merely is filed against a defendant of full age, and the subpœna issued thereon is returned summoned, and the defendant fails to appear, or if, after appearance, fails to answer within the time fixed by the rules or order of the Court, upon satisfactory proof by affidavit or otherwise, being produced to the Court that such subpœna was duly served, they may examine the complainant in open Court, or upon interrogatories, on oath, touching the truth of the allegations in the bill, and if from such examination, the Court shall be satisfied *prima facie*, that the allegations in the bill are true, then a decree shall be passed, which shall have the same effect in evidence or otherwise, as the answer of the defendant confessing all the allegations of the bill could have; or if the subpœna shall be returned summoned, and the defendant shall fail to appear, or, after appearance, shall fail to answer, an attachment of contempt may issue, and if the said attachment is returned served, and the defendant fails to appear or answer as the case may be, the Court upon being satisfied of the service of both subpœna and attachment, may pass a decree *pro confesso*, or if in such case the attachment is returned *non est inventus*, an attachment with proclamations may issue, and if the defendant shall fail to appear or answer as the case may be, the

Court, upon being satisfied of the service of the subpœna, may pass a decree *pro confesso*, without examining the complainant, in its discretion, and such decree, in either case, to have all the effect, in evidence or otherwise, that the answer of such defendant confessing all the allegations in the bill would have. See Recommendation (10.)

OF PROCEEDINGS TO SELL THE REAL ESTATE OF INFANTS.

The excellence which we have ascribed, in the previous part of this Report, to equity pleadings, is predicated of them solely as applied to a suit of hostile litigation. There is a large class of suits, which may be called administrative, to which such pleadings, as well as the ordinary practice in equity, are wholly inapplicable. And to this class of suits belong proceedings to sell the real estate of infants for their benefit and advantage under our Acts of Assembly. The special control and guardianship of infants, belongs, by the law of Maryland, to the Orphans' Courts of the respective counties, and of the city of Baltimore. But, nevertheless, the Courts of Equity exercise a general control over infants, and have exclusive authority to sell any interest they may have in real property. The several Acts of Assembly which have conferred this peculiar jurisdiction, have left it, for the most part, to be enforced through the old forms of equity procedure, or through forms equally as expensive and dilatory. If infants have real property which it will be for their benefit and advantage to sell, it can only be sold by means of a petition, as it is improper-

ly called, filed by the guardian or next friend of the infant, addressed to a Court of Equity praying for such sale. Upon the filing of such petition a subpœna issues requiring such infant to appear and answer the petition. When the sheriff returns the subpœna *summoned* which is usually done, as of course, without being served on the infant, a commission is, on application of the guardian or next friend, issued by the Clerk of the Court to a person, who is usually named by the guardian or next friend, authorizing such person to appoint a guardian to answer the petition for the infant, and to take his answer and return it to the Court. The Commissioner, therefore, usually appoints a person as guardian who never before heard of the infant; such guardian puts in an answer expressing total ignorance of the matters charged in the petition. And often the guardian does not see the infant at all; for though the law requires the commission to be executed in the presence of the infant, it is rarely done. Upon the return of the answer of the guardian to the Court, a commission then issues, at the instance of the guardian or next friend who filed the petition, to not less than three freeholders, who also are usually appointed by the Court upon the nomination of the guardian or next friend, to view, and ascertain by competent testimony the value of the land, and to determine, whether it would be for the benefit and advantage of the infant that it should be sold; and report their reasons to the Court. When this report is returned, the Court may examine witnesses and have other testimony in relation to the

matter; and if the Court is satisfied, it may decree the land to be sold, and may appoint a trustee to make the sale: but if the Court is not satisfied, that it will be for the benefit and advantage of the infant that the land be sold, the petition will be dismissed with costs.

It is sufficiently manifest, from this mere statement, that there is a great deal of absurdity about this proceeding. The petition is filed by one guardian, and is answered by another, who, in practice, is virtually appointed by the first. And the answer of the guardian is a mere declaration of ignorance of the whole matter; as the guardian, generally, has never before heard of the matter, or perhaps, of the infant himself. The subpœna is issued, and returned, without being served. It will naturally be enquired by the General Assembly, what is the meaning or use of a proceeding, seemingly, so idle? The Court of Appeals has answered the question, by telling us, that an infant's answer "is only for the purpose of making proper parties. * * * * * The guardian *ad litem* is so appointed as often to know nothing of the matter himself." Whereever, therefore, infants are to be made parties defendant to a suit, however amicable, a commission must issue and their answer be taken, by guardian, in the mode we have described; and the sole effect is, that thereby the infants can be considered as in Court. But the worst of the proceeding, which we have been delineating, is its extreme expensiveness. The Commissioner who appoints the guardian gets four dollars for it. Each Commissioner, who views the land, gets two dollars. The attorney,

who is necessarily employed to conduct so technical a proceeding, gets ten dollars appearance fee, and from twenty to forty dollars for preparing the papers and conducting the cause. The trustee gets a commission for selling the land. The sheriff and the clerk get, together, between twenty and thirty dollars. So that, in some few instances, the expenses are more than the property sells for.

It seems to us that nothing can be more preposterous than that a commission should issue to appoint a guardian to take his answer declaring entire ignorance of the whole matter, merely to make the infants parties to the suit. The means has no apparent adaptation to the end. None but lawyers, learned in the craft of equity procedure, could, for a moment, suppose that such a proceeding meant only to make the infant a party to the suit. And even enlightened lawyers, who understand the technical principles out of which the practice has grown, can only see in it, while they practice it, the idle ceremony of soothsayers who have lost faith in their mystery. This practice, therefore, even if it were not so expensive, should be abolished; and a practice, significant of the thing done, should be substituted for it.

The Court should, in respect of all matters and persons over which it has, what may be called an administrative jurisdiction, have the power to exercise a summary mode of proceeding, as so much more benefical to the suitor. It should, therefore, upon a mere petition, exercise its jurisdiction over all matters concerning infants which have been put by legislation

under its administrative control. The subpœna has always been considered essential to the exercise of the general jurisdiction of chancery; and the answer of the defendant, taken by a Commissioner, was also considered necessary to a decree. To make these cumbrous and expensive preliminary proceedings essential to the exercise of its jurisdiction in regard to matters concerning infants, is to ignore the fact, that the Court has the general guardianship of infants and also a special guardianship over the fee of their property; and should, therefore, exercise its authority, upon mere petition, according to all the analogies of equity procedure. The Act of 1816, authorizing the Courts of Equity to sell the real estate of infants where it is for their benefit, speaks of a petition as the mode of proceeding. But in fact it is not a petition, but a bill which prays for a subpœna to bring the infants into Court to answer, which a petition never does. A petition is presented to the Court either, in a cause already pending, or in regard to some person or matter over which it has administrative control; and consequently it never prays for a subpœna for parties. While, therefore, these matters concerning infants are proper objects for the summary proceeding by petition, and the Acts of Assembly call it a petition, yet the proceeding prescribed is in fact by bill, with its expensive incidents.

As the infant is under the special protection of the Court, in every suit, whether amicable or hostile, to which he is a party, it would seem clear, that the Court should, upon proper information, act for the

infant. And in all cases, when merely the consent of the infant is wanting to authorize a decree, that the Court should, upon proper information, order that the facts are admitted, as of course, and decree accordingly.

The question then arises, how is the Court to be informed. Is the mode, which we have described, the best that can be devised to secure the proper protection to the rights of infants. And these rights are various. Besides, for the purpose of selling the real property of the infant, the same cumbrous and expensive proceeding must be instituted, to raise money by mortgage, to improve his real property or to pay any charges, liens or encumbrances thereon; and where the property is situated in the city of Baltimore, and it would be to the advantage of the infant to exchange, or in particular estates, to demise it, the same proceeding must be instituted to effectuate these purposes. Now, can it be pretended, that the proceeding which we have described, is the best, that can be devised for effecting the salutary purposes intended to be accomplised by the several Acts of Assembly conferring this jurisdiction over the real property of infants? If the petition for the sale, or mortgage, or demise or exchange of the infant's property is preferred to the Court by the natural or testamentary guardian or next friend of the infant, under the oath of such guardian or next friend, supported by the affidavits of at least two persons, would it not be sufficient to authorize the Court to decree? If the judge suspected any thing wrong he could,

under the power which we have already recommended to be given him, summon the affiants or other witnesses before him and examine them orally. This would not be necessary once in a thousand cases. At all events this practice would afford more security than the present practice, and at one tithe of the expense.

This recommendation, to proceed in a summary way by petition and affidavits, has been fairly tried both in England and Ireland. The British Commissioners, in their Report on the process, practice and pleadings in chancery, made in 1852, in speaking of this subject say: "But the last and greatest change in chancery procedure is that introduced by the General Orders of Lord Cottenham, of April 1850. By these, in a great number of special cases, without any formal pleadings at all, by the filing of what is called a claim, heard summarily on affidavits, and if necessary, on counter-affidavits, the Court is enabled at once to pronounce a decree between the parties. Besides the specified cases, the Court is authorised, in every case in which it thinks fit, to permit a claim to be filed. The extent to which this new system has been used is shown by the number of claims filed. The Order came into operation on the 22d May, 1850, between which time and the 12th January, 1852, 1,969 claims have been filed in almost every variety of case; upon these, 863 decrees or orders have been drawn up; and 245 stand in the list for hearing. Of the remaining number by far the greater proportion have been disposed of by compromise or

otherwise. Some few are not yet set down to be heard. In a small number of the cases heard the Court has felt itself unable to deal satisfactorily with the matter by way of claim, and has left the parties to proceed by bill."

"In Ireland, in the the meantime, a more extensive and more systematie alteration had been effected by the Act to regulate the proeeedings of the Court of Chancery in that country, introduced by the present Master of the Rolls. By this, a plaintiff is enabled to proceed in every case by petition. Each party may obtain leave from the Court to file interrogatories for the examination of the other; and provisions are introduced for obtaining the testimony of witnesses unwilling to come forward and give evidence on affidavit. The plaintiff is at liberty, if he think fit, to proceed by bill—the defendant is at liberty to apply to the Court, if he shall see occasion, to direct the proceedings to be by bill, and the Court itself has the power to direct a bill to be filed, if it shall see occasion. We have ascertained that, from the time when this Act came into operation, to the 12th January, 1852, 1,252 suits have been commenced by petition; that 36 suits only been commenced by bill, including Bills of Revivor; that since the 1st May, 1851, there have been only seven bills filed, of which four were Bills of Revivor; that the defendants have in no case availed themselves of the power given to them to ask for a bill, and that the Court has in no case seen occasion to direct a bill to be filed."

"The substitute of summary procedure for the an-

cient forms of the Court whereever it has been adopted, has been acceptable to the suitors who have availed themselves of every change in that direction."

The Commissioners proceed to say: "In many cases the instrument called the claim and the writ of summons upon it are merely a useless form and expense. The real case is stated on the plaintiff's affidavit, which serves the purpose of a bill or petition; and the defendant's case is stated on his counter-affidavit, which serves the purpose of an answer. But whatever are the objections which have been made to claims, or the difficulties which have been felt with respect to them in some cases, we are satisfied that they have been practically of great benefit; and that in the numerous cases which have been decided upon claims, all the ends of justice have been practically attained at a small part of the expense, and with great saving of the time which would have been expended under the old system."

"We are of opinion (continue the Commissioners,) that the proper progress of Chancery Reform is in the same direction, that is to say, to substitute in every case which admits of it, the shortest and most summary process, with the least amount of preliminary written pleadings, and to bring the parties, by themselves or their counsel, to state their cases with as little delay as possible to the tribunal which has to decide." And all the reforms recommended by the Commissioners in their Report were in this direction; and they have been adopted by the British Parliament, and have proved salutary in practice.

We, therefore, recommend that the summary proceeding by petition and affidavits be adopted in the class of cases where a guardian or next friend applies for the sale of the property of infants. To effectuate this purpose we have re-cast the Acts of Assembly on the subject with such amendments and additions as are needed.

As the same principles apply to suits for the sale of any lands or tenements by any joint or concurrent owner, and some of the parties are of full age, and some are infants, and to cases where a person dies leaving real estate, and not personal estate sufficient to pay his debts, and the heirs or devisees or any of them are infants, and a suit is instituted by any of the creditors for the sale of the real estate to pay the debts, we recommend that in such suits or cases, without any subpœna being issued for the infant defendants, and without any appointment of a guardian *at litem*, the Court may upon proof of the facts in the petition or bill, either by affidavits, or other satisfactory evidence, decree against the infants. We further recommend, that in no case whatever, shall it be necessary to issue a subpœna for an infant defendant, nor to issue a commission to take his answer by guardian; but that the Court shall have power in all cases, where there is any proceeding in equity against an infant, whether resident or non-resident, to enter his appearance as of course; and to proceed in the case as if the infant had been regularly summoned, and his answer taken by guardian under a commission issued according to regular chancery

practice. We further recommend, that where, in any case to which an infant is a party, it becomes necessary, or it is advisable in the judgment of the Court, that the testimony should be taken by commission, that the Court shall enter the consent of such infant, as of course, for the issuing of the commission to such person or persons as the Court may think fit. And that the Court may in any case appoint a solicitor for the infant, where it is deemed necessary; to put in an answer and defend for the infant, as if he were of full age. See Recommendations (11—24.)

As by decisions of the Court of Appeals of Maryland, the 9th section of the Act of 1820, ch. 191, precludes a Court of Equity from selling the real estate of a person dying intestate when the heirs are all infants, for the benefit of such heirs, we recommend that such an estate be made liable to be sold by a Court of Equity, like any other estate in lands held by infants. We have, therefore, brought such estates within the provisions of the recommendations proposed by us on the subject. And in order to make the law more consistent, we recommend that the 9th section of the Act 1820, ch. 191, be repealed, and a section allowing the estate to be sold under that Act, when all the parties entitled are infants, be substituted for it. See recommendation (25.)

OF PROCEEDINGS TO LAY OFF DOWER.

In the first part of this Report, we have spoken of the importance, to the great purposes of administrative justice, of adjusting more fully the respective

jurisdictions of law and equity. And although, as we there have said, such adjustment does not lie within the scope of our commission, yet we feel ourselves authorized, whereever sueh adjustment has been attempted by legislation in regard to any particular objeet, to make that adjustment more effeetual, by reeommending a proeeeding for any case that experience has shown is not provided for. By the several Aets of Assembly giving the Courts of Equity concurrent jurisdiction, with the Courts of Law, over all elaims for dower, very great faeility has been afforded to elaimants of this very important right. But eases have occurred in practice, which show that this class of claimants require some little of coercive legislation to make them yield to the demands of justiee and right. It sometimes happens, that widows entitled to dower, who are in possession of the property of their deceased husbands, refuse to have dower laid off, and thereby drive the heirs at law, remainder men, or reversioners, to the dilatory, troublesome and expensive proeess of ejectment at law; the Court of Equity having, at present, no power for relief in such eases. We, therefore, recommend that where a widow is entitled to dower, and refuses or negleets, to take steps for having it laid off, for more than sixty days after the death of her husband, it shall be lawful for any person interested in the inheritance to file a bill against sueh widow for the purpose of having her dower laid off. And that it shall be the duty of sueh widow to file her answer at the term next sueceeding the term to whieh the subpœna is returnable,

and therein set forth whether or not she claims dower in such property. If she disclaims dower therein, such disclaimer shall operate forever as a bar to any claim by her for dower. If she claim dower, then the Court shall proceed to issue a commission, and in all respects proceed as is now provided by law in cases of bills for dower by parties entitled to dower. If the respondent shall disclaim dower, then it shall be competent for the Court to pass an order commanding her to deliver up the possession of the property to those entitled thereto in pursuance of said order, and upon failure of said respondent, to deliver possession of the property as required by such order, for ten days after service of such order upon her, it shall be the duty of the Court to issue a *habere facias possessionem* to the sheriff, commanding him to deliver possession of the property to the parties entitled to it. See Recommendations (26—27.)

OF INTERLOCUTORY PROCEEDINGS AND RULES OF COURT.

Equity Procedure is marked by regular steps, in the progress of a cause, from the filing of the Bill to the final Decree. These steps are regulated by petitions or motions and interlocutory orders, all performing their respective functions in the conduct of the cause. By some of these motions and interlocutory orders, the rights of the parties are disposed of, and by others the cause is only carried forward. From the orders, in which the rights of the parties are involved, there is a right of appeal; from those orders, which merely push forward the cause, there is no appeal. We

have carefully considered the present state of practice in regard to orders, which involve the rights of the parties; and we find nothing, which we think it expedient to change. Legislation has, from time to time, done much to liberalise this portion of the practice in equity, in which the evils were more obvious and more easily corrected than in the main branch of procedure, which we have considered in the body of this Report. The orders, which merely push forward the cause, are based upon, what are called, Rules of Court. These rules of Court originate in the authority of the Court itself, for regulating the course of litigation; and should not be rendered fixed by legislation. We, therefore, propose nothing for their amendment, but leave each Court, as heretofore, to regulate its own business. This discretion does not give a judicial control over the rules of law, but only over the time and manner of their application, which it is indispensible for the convenience of business that each Court should possess.

It may perhaps be thought by some, that we should have reduced equity practice to a code of rules. We think however, that but little consideration is needed to show the inexpediency of such a work. The rule of practice and the principle of equity upon which relief is granted are so often inseparable, that it is impossible to separate the practice from the great body of equity jurisprudence. Therefore, the practice cannot be embodied in a code of naked rules. The rules need the explanations of modifying circumstances. If every rule of practice were expressed in

separate propositions, and arranged into a code, no advantage would be gained by it. The present books of practice, with illustrative cases, and the explanations of commentators, afford a much easier, more certain and available guide in the conduct of equity causes than a code. We must therefore confine our reforms almost entirely to the mere modes of proceddure. These should be prescribed to the Court, and therefore be paramount to its authority; while the rules of Court should be left to the discretion of the Court, and be only restrictions upon the parties and not upon the authority of the Court itself. So well aware was Lord Bacon of the inexpediency of inflexible rules in equity practice, that, when like a Roman Prætor, he prescribed his celebrated ordinances for the conduct of business upon his taking his place in chancery, he headed them: "Ordinances made to be daily observed, saving the prerogative of the Court;" and by the 44th ordinance prescribes: "Where any order upon the special nature of the case shall be made against any of these general rules, there the register shall plainly and expressly set down the particulars, reasons and grounds, moving the Court to vary from the general use." Such is the nature of equity, that even the rules of practice must vary to suit special circumstances. The Court must be at liberty to vary the rules with the special circumstances. We must not prescribe one rule, which, like the bed of Procrustes, all cases must be made to fit, by cutting off their peculiar equities.

OF PRACTICAL FORMS.

We have prepared at the end of our Recommendations such practical forms as are necessary to carry out, and at the same time illustrate, the changes which we have proposed in equity pleadings and practice. We considered that a larger number of forms are not needed; as any solicitor in chancery can easily conform the precedents now in use to our recommendations, and to the examples we have given. To have prepared more forms would have encumbered the statute book, without any corresponding advantage in the practice of equity. See Recommendation (28.)

We close our arduous labors in law reform, with the hope that the community will experience an improvement in administrative justice, commensurate with the zealous and persevering efforts, with which we have obeyed the command of the General Assembly, to revise, simplify and abridge the rules of practice, pleadings, forms of convenancing and proceedings of the Courts of the State.

WILLIAM PRICE,
SAMUEL TYLER,
FREDERICK STONE,
Commissioners.

December 1855.

N. B. This Report and the First Report of the Commissioners have been prepared by Mr. Tyler, by arrangement with his colleagues.

RECOMMENDATIONS MADE IN THE FOREGOING

REPORT.

CHAPTER 1st.

OF DEMURRERS AND PLEAS.

1. The protestation against the truth of the matters contained in the bill by which demurrers and pleas in equity are in practice preceded, shall be disused; and the conclusion in another suit which they are intended or supposed to avoid, shall be as well avoided without, as with any such protestation.

OF AMENDMENTS.

2. The Court shall have the same power of allowing an amendment of a bill, by introducing matter which may occur after the institution of a suit, as it has now of allowing matter to be introduced which occurs before the institution of the suit. And the plaintiff shall be at liberty to state the supplemental matter by way of suggestion filed in the cause; and the defendant shall have time and opportunity to shape his case, having regard to such new matter.

3. If a plaintiff shall, by mistake, ask for relief when he is not entitled to it, his bill shall not, on that account, be demurrable; but the Court shall grant such decree or order, or give such aid as the case set forth in the bill will warrant.

4. Impertinence in any bill, answer, or other proceeding, or any defect in the frame of any bill, answer, or other proceeding in equity, shall not be ground for demurrer or exception. Provided always, that it shall be lawful for the Court to direct the costs occasioned by any impertinent matter introduced into any proceeding to be paid by the party introducing the same, upon application being made to the Court for that purpose.

OF THE FRAME OF A BILL.

5. Every bill of complaint or petition, in any Court of Equity in this State, shall contain as concisely as may be, a narrative of the material facts, matters and circumstances on which the plaintiff relies, such narrative being divided into paragraphs numbered consecutively, and each paragraph containing, as nearly as may be, a separate and distinct statement or allegation, and shall pray specifically for the relief which the plaintiff may conceive himself entitled to, and also for general relief; and if any interrogatories for the examination of the defendant are inserted in the bill, they shall be stated in separate and distinct paragraphs and numbered.

CHAPTER 2ND.

OF THE MODE OF TAKING TESTIMONY IN EQUITY.

6. The mode of examining witnesses and taking their testimony under any commission issued, for the purpose of taking testimony, out of any Court of this

State as a Court of Equity, shall be as follows: The witnesses shall be examined orally before the respective parties or their attorneys or agents, subject to cross-examination and re-examination before the Commissioner or Commissioners who themselves may ask any question they may think fit. The depositions shall be taken down in writing by the Commissioner or Commissioners, not ordinarily by question and answer, but in the form of a narrative, and when completed shall be read over to the witness for his approval or correction. Provided always, that in case either party, his attorney or agent, shall request it, the Commissioner or Commissioners shall put down any question and the answer in the very words of each, and this either on the examination in chief, or on cross-examination, or on both. Provided, also, that when the commission is to be executed beyond the jurisdiction of the Court from which it is issued, it may be executed according to the present practice.

7. When any suit or proceeding in equity shall be at issue the plaintiff or his attorney may, within such time as shall be prescribed in that behalf by rule of Court, give notice to the defendant or defendants or his or their attorney that he desires the evidence, to be adduced in the cause, to be taken upon affidavits; and if the defendant or some one of the defendants, if more than one, or his attorney shall not, within such time as shall be prescribed in that behalf by rule of Court, give notice to the plaintiff or his attorney, that he or they desire the evidence to be taken under a

commission, the plaintiff and defendant respectively shall be at liberty to verify their respective cases by affidavit. And each shall give the other three days' previous notice of the time and place of taking his affidavits. Provided always, that this provision shall not deprive either plaintiff or defendant of the right to a special order to take affidavits on interlocutory matters according to the present practice.

8. In any suit or proceeding depending in any Court sitting in Equity, the Court (if it shall think fit,) may summon by subpœna *ad testificandum* or *duces tecum* before it, and examine, or cause to be examined, witnesses by word of mouth, and that either before or after examination of the same or other witnesses by deposition under a commission or by affidavit; and notes of such evidence shall be taken down in writing by the judge of the Court, or by such person, and in such manner, as the judge of the Court shall direct. Provided always, that no such writ shall issue without the special order of the Court.

9. In any suit or proceeding depending in any Court of Equity, any evidence taken on interlocutory matter shall, when applicable, be used at the hearing; and the evidence taken in the earlier stage of the cause shall not be required to be taken over.

CHAPTER 3RD.

OF PROCESS TO COMPEL AN APPEARANCE AND ANSWER.

10. In all cases when a bill for discovery merely is filed against a defendant of full age, and the subpœna issued thereon is returned summoned, and the defendant fails to appear, or if, after appearance fails to answer within the time fixed by the rules or order of the Court, upon satisfactory proof, by affidavit or otherwise, being produced to the Court that such subpœna was duly served, the Court may examine the complainant in open Court, or upon interrogatories, on oath, touching the truth of the allegations in the bill, and if from such examination the Court shall be satisfied, *prima facie*, that the allegations in the bill are true, then a decree shall be passed which shall have the same effect, in evidence or otherwise, as the answer of the defendant confessing all the allegations of the bill could have; or if the subpœna shall be returned summoned, and the defendant shall fail to appear, or after appearance, shall fail to answer, an attachment of contempt may issue, and if the said attachment is returned served, and the defendant fails to appear or answer as the case may be, the Court, upon being satisfied of the service of both subpœna and attachment, may pass a decree *pro confesso*, or if in such case the attachment is returned *non est inventus*, an attachment with proclamations may issue; and if the defendant shall fail to appear or answer, as the case may be, the Court, upon being satisfied of the service of the subpœna, may pass a decree *pro con-*

fesso, without examining the complainant, in its discretion, and such decree, in either case, to have all the effect, in evidence or otherwise, that the answer of such defendant confessing all the allegations in the bill would have.

CHAPTER 4TH.

OF PROCEEDINGS TO SELL THE REAL AND PERSONAL PROPERTY OF INFANTS.

11. Where any infant is entitled to any real or personal property in this State, of any kind, solely, or in common, or jointly, or in coparcenary, or entitled to a reversion, vested or contingent remainder, or any executory devise in any such property, or any use, trust or equitable interest therein, the Court may, if it shall appear to be for the benefit and advantage of such infant, decree a sale thereof, if the provisions of the following sections are complied with.

12. No decree for sale shall pass under the preceding section but upon the petition on oath of the guardian or next friend of such infant and proof by the affidavits of two discreet and respectable witnesses; and the witnesses shall state in their affidavits the value and quantity of the property, and the facts and circumstances which show that it would be for the benefit and advantage of such infant, that a decree for a sale should be passed.

13. That in all cases where it shall appear to the

Court by proof, as provided in the preceding section, that it would be for the benefit and advantage of an infant to raise money by mortgage to improve his real property or to pay any charges, liens or encumbrances thereon, the Court may, on application of the guardian or next friend of such infant, decree the conveyance of any interest, estate or term of years of such infant in any lands or real estate, by way of mortgage, in such form and on such conditions as the Court may direct, and the Court may direct the guardian of such infant to execute such conveyance. The provisions of this section are to apply to the interest or estate which any infant may hold in common or jointly, or in co-parcenary with any person of full age, and to all interests or estates to which any infant may be entitled in reversion, remainder or otherwise, and may decree that the interest of the tenant of the particular estate, or the holder of the prior remainders, may be mortgaged with the consent of such tenant or holder.

14. When an infant is entitled to any lands or tenements or chattels real situated in the city of Baltimore or is entitled to any particular estate for life or for years, or otherwise, or remainder or reversion, or executory devise, or if any infant be entitled to any trust or use in or of such lands, real estate or chattels real, or the rents, issues and profits thereof, in all such cases the Court, on petition on oath of the guardian or next friend, and on being satisfied by proof as in

cases where a guardian applies for the sale of an infant's real estate, that it would be advantageous for said infant to demise such lands, real estate or chattels real, may decree that the same be demised for a term of years, renewable forever, or otherwise, and yielding such rent, and on such terms and conditions as the Court may direct: *Provided*, that where the infant is only entitled to a part of the estate, as tenant of the particular estate, or remainder man, or otherwise, all the owners of the other parts, so as to embrace the entire fee, if a freehold estate, or the whole term, if leasehold, assent to the passing of such a decree.

15. Any infant who may be presumptively or apparently for the time being entitled to any contingent or other remainder, or any executory devise, use or trust in any lands or chattels real, in said city, may claim a decree for a demise under the preceding section.

16. Any person of full age, apparently or presumptively for the time being entitled to any contingent or other remainder, reversion, or executory devise in the lands or chattels real, mentioned in the two preceding sections, may assent to a demise or a decree therefor on behalf of such estate to which he is so presumptively or apparently entitled.

17. Where the owner of the particular estate for life or years, or for other estate, is of full age, the

Court may, on his application, and with the consent of all the owners of the other parts of the estate, decree a demise. If the person whose consent is required to authorize a decree for a demise be an infant, or being of full age shall refuse to assent, the Court may, if such person be made a defendant, on considering the pleading and evidence in the case, determine whether a decree should be made, and decree accordingly.

18. The preceding sections to apply to cases where any or all of the defendants are non-residents, and such non-resident defendants may be proceeded against in the same manner as non-resident defendants in other cases. Provided, that non-resident infants, against whom their guardian or next friend may file a petition for the sale or mortgage, demise or exchange of their lands or property, shall be proceeded against as directed in cases where a guardian applies for the sale of such infants' real estate.

19. Upon the application of the guardian or next friend of an infant, the Court may, if it appears for the benefit and advantage of such infant, authorize and decree an exchange of real estate or chattels real in which such infant has any estate, interest, trust or property or benefit, where the same shall be situated in the city of Baltimore, for other real estate or chattels real, or interest, trust or property therein, also situated in said city; and the Court in decreeing

such exchange, may not require equality or sameness in the quantity or character of the estate or interests, and the Court may appoint trustees to execute the deeds necessary to carry such exchange into effect.

20. Where the real estate of an infant is sold upon the application of his guardian or next friend, the money arising from such sale shall be invested, as the Court shall direct, in the name of such infant, and the surplus interest, after deducting what may be necessary for the maintenance and education of such infant, shall also be invested as aforesaid, and such investments shall not be transferred except by order of the Court, and any transfer without such order shall be void.

21. No part of the principal arising from the sale of any real estate shall be applied to the maintenance of any infant, unless the Court shall consider it necessary and order the same to be done.

22. Upon the death of such infant, under age, intestate and without issue, the proceeds of such sale shall descend to be distributed, as the property or estate would if it had not been sold.

23. Where a suit is instituted in equity for the sale of any lands or tenements by any joint or concurrent owner, and some of the parties are of full age, and

some are infants; and where a person dies leaving real estate, and not personal estate sufficient to pay his debts, and the heirs or devisees or any of them are infants, and a suit is instituted by any of the creditors for the sale of the real estate to pay the debts: in such cases or suits, without any subpœna being issued for the infant defendants, and without any appointment of a guardian *ad litem*, the Court may upon proof of the facts in the petition or bill either by affidavit or other satisfactory evidence decree against the infants.

24. In no case whatever shall it be necessary to issue a subpœna for an infant defendant: or to issue a commission to take his answer by guardian; but the Court shall have power in all proceedings in equity against an infant whether resident or non-resident to enter his appearance as of course; and to proceed in the case as if the infant had been regularly summoned, and his answer taken by guardian under a commission according to the present practice. Provided always, that in any case to which an infant is a party, if it becomes necessary or advisable in the judgment of the Court that the testimony should be taken by commission, that the Court shall enter the consent of such infant as of course, for issuing the commission to such person or persons as the Court may think fit. And the Court may, in any case, appoint counsel for the infant who may put in an answer for the infant as if he were of full age, and defend for him.

SUBSTITUTE FOR THE NINTH SECTION OF ACT OF ASSEMBLY 1820, CH. 191.

25. That if the said Commissioners, or a majority of them, shall determine that the estate cannot be divided without loss and injury to all the parties, then they shall make return to the Circuit Court of their judgment, and the reasons upon which the same is formed, and the real value of the estate in current money, subject to the incumbrance if any thereon, and if the judgment of the Commissioners shall be confirmed by the Circuit Court, then in the said Court and before the expiration of the term next succeeding that in which the action of the Commissioners shall have been confirmed, the eldest son, child or person entitled, if of age, shall have election to take the whole estate, and pay to the others their just proportions of the value in money; and if the eldest child or person entitled refuses to take the estate, and pay to the others money for their proportions, then the next eldest child or person entitled, being of age, shall have the same election, and so on to the youngest child or person entitled, and if all refuse, or if all the parties entitled shall be minors, then the estate shall be sold by the said Commissioners, or a majority of them, for money or upon credit, and in the manner and agreeably to the terms and conditions which the Court, from which the commission issued, shall prescribe and direct, and no sale to be made shall be valid until ratified by said Court, and the purchase money shall be justly divided among the several persons interested, according to their respective titles to

the estate. This provision shall not be construed, to preclude a Court of Equity from selling the real estate of infant heirs upon the petition of their guardian, or next friend, where it will be for the benefit and advantage of such infants.

CHAPTER 5TH.

OF PROCEEDINGS TO LAY OFF DOWER.

26. Where a widow is entitled to dower, and refuses or neglects to take steps for having the same laid off, for more than sixty days after the death of her husband, it shall be lawful for any person interested in the inheritance to file a bill against such widow for the purpose of having her dower laid off. And it shall be the duty of such widow to file her answer at the term next succeeding the term to which the subpœna is returnable; and therein set forth whether or not she claims dower in such property. If she disclaims dower therein, such disclaimer shall operate forever as a bar to any claim by her for dower. If she claims dower, then the Court shall proceed to issue a commission, and in all other respects proceed as is now provided by law in cases of bills for dower by parties entitled thereto.

27. If the widow shall in her answer disclaim dower, then it shall be lawful for the Court to pass an order commanding her to deliver up possession of the property to those entitled thereto, on passage of said order; and upon her failure to deliver up posses-

sion of the property as required by such order, for ten days after service upon her of such order, it shall be the duty of the Court to issue a *habere facias possessionem* to the sheriff commanding him to deliver possession of such property to the parties entitled to the same.

CHAPTER 6TH.

OF PRACTICAL FORMS.

28. The forms which follow shall be sufficient, and may be used with such modifications as may be necessary to meet the facts of the case; but nothing herein contained shall render it erroneous or irregular to use interrogatories in bills.

BILL BY MORTGAGEE AGAINST MORTGAGOR FOR THE SALE OF MORTGAGED PREMISES.

I. To the Hon. M. N., Judge of the Circuit Court for ——— County.

The bill of complaint of A. B., of ——— County, shows:

First. That heretofore, to wit: On the —— day of ——, in the year ——, a certain B. H., of said county, being indebted to your orator, in the sum of —— dollars, to secure the payment of the same, did by his deed of that date, convey, to your orator and his heirs, certain real estate, lying in said county, and described in said deed; to which deed there is a condition annexed, that it be void on payment by the

said B. H. to your orator, of the said sum of money with interest from ——, on or before the —— day of ——, in the year ——; as will appear by a copy of the deed filed as part of this bill.

Second. And your orator charges that no part of the said sum of money, or the interest thereon has been paid, but the same is still owing to him; although the time limited for payment thereof, by the condition aforesaid, has passed, and payment has been duly demanded of the said B. H. To the end, therefore, that the said B. H. may answer this bill; and that the premises aforesaid, or so much thereof as may be necessary, may be sold for payment of your orator's claim with the interest; and that your orator may have such further or other relief as his case may require:

May it please your honor to grant your orator the writ of subpœna against the said B. H., commanding him to appear in this Court, at some certain day to be therein named, to answer the premises, and abide by and perform such decree as may be passed therein.

S. T.,
Solicitor for Complainant.

BILL BY CREDITORS AGAINST THE ADMINISTRATOR AND HEIRS AT LAW, SOME OF WHOM ARE INFANTS, OF A DECEASED DEBTOR, FOR THE SALE OF HIS REAL ESTATE.

II. To the Hon. M. N., Judge of the Circuit Court for ——— County.

The bill of complaint of A., B. and C., of ——— County, who sue both for themselves and all other creditors of D., late of said county, deceased, shows:

First. That a certain D., late of ——— County, deceased, was indebted to your orator A., in the sum of ——— dollars, on his certain bond, dated the —— day of —— in the year ——, and conditioned for the payment to your orator of the sum of —— dollars, with interest from the date thereof, on or before a day long since passed; and to your orator B., as executor of the last will and testament of one E., late of ——— County, deceased, in the sum of —— dollars, on a certain promissory note made to the said E., in his life time, dated the —— day of ——, in the year ——, and payable sixty days after the date thereof; and to one F., of ——— County, who has lately died intestate, and your orator C., has administered upon his personal estate, in the sum of —— dollars, for sundry matters chargeable in account. As by exhibits A. B. C. D. and E. filed as a part of this bill will appear.

(These exhibits should be the bond, and promissory note, or copies of them, a copy of the open account, and certificates of the grant of letters testamentary and administration to two of the complainants.)

Second. And your orators further charge, that the said D., being so indebted to your orators and to other persons, and having real and personal estate, died intestate, in the year ——, leaving G., I., K., L. and M., his children and heirs at law, of whom L. and M. are infants, under the age of twenty-one years.

Third. And your orators further charge that administration of the personal estate of the said D. has been granted by the Orphans' Court of ——— County to one P. of said county, who by virtue thereof has possessed himself of the said personal estate; but your orators are informed and believe that it will not be sufficient to discharge all the debts due by the said D., at the time of his death. And your orators are advised that any deficiency ought to be supplied by a sale of the real estate of the said D.; which real estate is situate in the first named county, and is described *in a deed from one K. F. to the said D., dated the —— day of ——, in the year ——, and recorded in Liber H. S., No. —, Folios —, one of the land records of ——— county, (or as the case may be.)*

To the end therefore, that the real estate of the said D., or so much thereof as may be necessary, be

sold for the payment of his debts; and that your orators may have such further or other relief as their case may require:

May it please your honor to enter the appearance, to this bill, of the said infant defendants L. and M., and to grant to your orators the writ of subpœna against the adult defendants G., I., K. and P., commanding them to appear in this Court, at a certain day, to be therein named, to answer the premises, and abide by and perform such decree as may be passed therein. S. T.,

Solicitor for Complainants.

PETITION BY A GUARDIAN (OR NEXT FRIEND,) FOR THE SALE OF THE REAL ESTATE OF INFANTS.

III. To the Honorable M. N. Judge of the Circuit Court for ——— County.

The petition of A., of ——— County, guardian, (or next friend,) of B., C. and D .of said County, infants under the age of twenty-one years, shows:

First. That the said B. C., and D., are seized as *tenants in common* of a parcel of land lying in ——— County, containing about —— acres, which is described in a deed from one E. to F. deceased, who was the father of said infants; which deed is recorded in Liber H .S., No. —, Folios —, one of the land records of ——— County.

Second. It further shows, that it will be for the benefit and advantage of said infants to sell said real estate.

Your petitioner therefore prays that said real estate be sold under the authority of this Court; and that such further or other relief may be granted as the case may require. A.,

Guardian for the Infants.

——— County.

On this —— day of ——, in the year ——, before the subscriber, a justice of the peace in and for said County, personally appears A., the person mentioned as guardian in the foregoing petition, and makes oath, that the matters stated in the foregoing petition, are true to the best of his knowledge and belief.

J. P.

AFFIDAVIT OF WITNESS IN SUPPORT OF PETITION OF A GUARDIAN OR NEXT FRIEND FOR THE SALE OF THE REAL ESTATE OF INFANTS.

IV. ——— County:

On this —— day of ——, in the year ——, before me, a justice of the peace in and for said county, personally appears L. of said county and makes oath, that he knows B., C. and D. children of F., late of ——— County, deceased, and that they are under twenty-one years of age; and also that he knows the land belonging to the said children, and that it contains about —— acres, and is worth about —— dol-

lars per acre; and that it will, in his opinion, be for the benefit and advantage of said infants that said land should be sold; *because the land is worn out by bad culture, and the improvements on it are out of repair, and that the dwelling house must be repaired to render it habitable; and there is no probability that the land will ever improve in value, (or as the case may be.)*

J. P.

DEMURRER TO THE WHOLE BILL.

V. The demurrer of H. to the bill of complaint of M. against him, exhibited in the Circuit Court for ——— County.

This defendant demurs to said bill, and for causes of demurrer shows:

First. That the complainant has not in his bill stated such a case as entitles him to any such discovery or relief as is thereby sought and prayed for, from or against this defendant.

Second. That if the matters stated do give the complainant any cause of complaint against this defendant, the same is triable and determinable at law and ought not to be enquired of by this Court as a Court of Equity.

Wherefore, and for other errors, this defendant demands the judgment of this Court, whether he shall

be compelled to make any further or other answer to the said bill; and prays to be hence dismissed with his costs in this behalf sustained.

F. S.,
Solicitor for Defendant.

COMMENCEMENT AND CONCLUSION OF PLEAS.

VI. The plea of A. to the bill of complaint of B. against him, exhibited in the Circuit Court for —— County.

This defendant for plea to the said bill pleads and avers:

First. That *(here state the matter of the plea, whether it be in abatement or in bar.)*

Wherefore, this defendant prays judgment of this Court, whether he shall be required to make any further or other answer to the said bill; and prays to be hence dismissed with his costs in this behalf sustained.

F. S.,
Solicitor for Defendant.

NOTICE BY PLAINTIFF THAT EVIDENCE BE BY AFFIDAVITS.

VII. A. vs. B. } In the Circuit Court for —— County.
No. — Equity.

Notice is hereby given to the defendant that the plaintiff desires the evidence, to be adduced in this

cause, to be taken upon affidavits. The — day of ——.

S. T.,
Solicitor for Plaintiff.

To F. S., Solicitor for Defendant.

COUNTER NOTICE BY DEFENDANT.

VIII. B. ads. A. } In the Circuit Court for —— County.

No. — Equity.

The defendant hereby gives notice to the plaintiff that he desires the evidence, to be adduced in this cause, to be taken under a commission. The — day of ——.

F. S.,
Solicitor for Defendant.

To S. T., Solicitor for Plaintiff.