University of Baltimore Law Review

Volume 14
Issue 1 *Fall 1984*

Article 2

1984

Merger of Law and Equity under the Revised Maryland Rules: Does It Threaten Trial by Jury?

Richard W. Bourne
University of Baltimore School of Law

John A. Lynch Jr.
University of Baltimore School of Law, jlynch@ubalt.edu

UNIVERSITY OF BALTIMORE LAW REVIEW

Volume Fourteen **Fall 1984** **Number One**

MERGER OF LAW AND EQUITY UNDER THE REVISED MARYLAND RULES: DOES IT THREATEN TRIAL BY JURY?

Richard W. Bourne†
John A. Lynch, Jr.‡

With the merger of law and equity effected by revisions to Maryland's Rules of Civil Procedure, adopted on July 1, 1984, the Maryland judiciary must define the scope of trial by jury to be permitted in the now merged civil actions. This article examines the federal and various state approaches and sets forth alternatives available to Maryland courts. The authors posit that Maryland's judges should define the scope of the jury trial right in the merged system by recognition of established equitable functions. The right to trial by jury should be preserved, not by blindly following the federal approach, but by applying Maryland's traditional limitations on equitable jurisdiction.

TABLE OF CONTENTS

† B.A., Harvard University; LL.B., University of Virginia; LL.M., Harvard University. Member, Virginia State Bar. Mr. Bourne is an Associate Professor of Law, University of Baltimore School of Law.

‡ B.A., St. Anselm's College; J.D., LL.M., George Washington University. Member, District of Columbia Bar. Mr. Lynch is an Associate Professor of Law, University of Baltimore School of Law. The authors wish to express their appreciation to Judith Ann Cross, Esquire, for her kind editorial assistance, and to Martha Kahlert, for her extraordinary patience at the word processor.

I. INTRODUCTION

It is the rare trial judge who has not, at some time in his judicial career, wished to dispense with jury trials in civil cases. When romantic notions about the contributions of juries[1] are tempered by experience in judicial administration, the civil jury may be legitimately regarded

1. *See* Brown, *The Law/Equity Dichotomy in Maryland*, 39 MD. L. REV. 427, 473-74 (1980).

as a burdensome constitutional luxury,[2] the costs of which must be lessened by restriction.[3] No doubt there are judges happy with the common sense justice of civil juries but are, nevertheless, wary of exposing its inner workings through resort to the special verdict.[4] Defending the federal civil jury,[5] Justice Rehnquist opined:

> Those who passionately advocated the right to a civil jury trial did not do so because they considered the jury a familiar procedural device that should be continued; the concerns for the institution of jury trial that led to the passages of the Declaration of Independence and to the seventh amendment were not animated by a belief that use of juries would lead to more efficient judicial administration . . . . Those who favored juries believed that a jury would reach a result that a judge either could or would not reach.[6]

Whatever one's regard of civil jury trials, it is necessary to acknowledge that with the adoption of the Revised Maryland Rules of Procedure (revised rules), which merge law and equity, the Maryland judiciary has been given an unprecedented opportunity, indeed, a responsibility, to define the scope of trial by jury.[7]

The combination of legal and equitable issues and claims for purposes of pleading and common adjudication entails the joining in one case of claims and issues, some of which are triable by jury and some of which are not.[8] For the first time, it is necessary for Maryland trial judges to determine whether a right to jury trial attaches to any part of

---

2. MD. DECLARATION OF RIGHTS, art. 23, provides in relevant part:
> The right of trial by Jury of all issues of fact in civil proceedings in the several Courts of Law in this State, where the amount in controversy exceeds the sum of five hundred dollars, shall be inviolably preserved.

This right has been subjected to the condition that it be properly demanded. *See* Bettum v. Montgomery Fed. Sav. & Loan Ass'n, 262 Md. 360, 277 A.2d 600 (1971); MD. R.P. 2-325(a), (b). *See also* Md. R.P. 343(a), (b) (1977). The revised Maryland Rules of Procedure, revised July 1, 1984, are hereinafter cited MD. R. P.. The former Maryland Rules of Procedure are hereinafter cited Md. R.P. (1977) (1977 denotes the most recent replacement volume of the Maryland Annotated Code of 1957 in which the rules appear).

3. Finding the societal costs of jury adjudication too high in the area of health care malpractice, the legislature encumbered the jury's fact-finding role in the Health Care Malpractice Claims Act, MD. CTS. & JUD. PROC. CODE ANN. §§ 3-2A-01 to -09 (1984). This has been held not to violate the right to trial by jury. Attorney Gen. v. Johnson, 282 Md. 274, 385 A.2d 57, *appeal dismissed*, 439 U.S. 805 (1978).

4. For an explanation of the special verdict, see MD. R.P. 2-522(c).

5. The seventh amendment to the United States Constitution preserves the right to trial by jury.

6. Parklane Hosiery Co. v. Shore, 439 U.S. 322, 343-44 (1979) (Rehnquist, J., dissenting).

7. MD. R.P. 2-301 provides: "There shall be one form of action known as 'civil action.'"

8. The right to trial by jury in civil cases guaranteed by the Maryland and federal constitutions applies only to actions at law. In Maryland there is no right to trial by jury in equity cases. Chase v. Winans, 59 Md. 475 (1883).

such cases and whether to fix the order of trial of the legal and equitable issues so as to preserve the availability of jury adjudication of legal issues.[9] Since separate law and equity courts no longer exist, it is no longer possible for a trial court to assume simply that there is a right to trial by jury if it is sitting as a court of law, and that there is no right to trial by jury if it is sitting as a court of equity.[10]

The merger of law and equity caused a protracted controversy in the federal courts regarding the scope of the right to trial by jury in civil cases and the need to protect that right through the order of trial.[11] The Supreme Court has taken a dynamic view of the interaction between merger and the traditional doctrine that equity will intervene only when the remedy at law is inadequate. The result has been a contraction of the historical scope of equity and an expansion of the right to trial by jury. The federal courts have generally adhered to the notion that "only under the most imperative circumstances, circumstances which in view of the flexible procedures of the Federal Rules [of Civil Procedure] we cannot now anticipate, can the right to a jury trial of legal issues be lost through prior determination of equitable claims."[12]

In a suit where legal and equitable claims or issues are combined, nothing compels the Maryland judiciary to contract the scope of equity. The jury's fact-finding role with respect to issues and claims which have historically been cognizable in courts of law might just as plausibly be restricted. Many of the other states which have merged law and equity have contracted the right to trial by jury by adjudicating suits in which legal and equitable claims or issues are combined as suits in equity.[13] Much in Maryland jurisprudence supports such an approach.[14]

This article examines the merger of law and equity in Maryland and considers possible judicial approaches to the scope of jury trial. It will also examine the experience in the federal and state courts as well as the relationship between the scope of equity and the right to jury trial in Maryland. Finally, the article will consider approaches to trial of actions involving both legal and equitable issues in light of federal and state experience and prior Maryland practice.

---

9. Such an issue arose under previous practice with Md. R.P. BF40 (1977) which permitted a court of law to issue an injunction as ancillary relief in an action at law. The jury's fact-finding role was protected in such a proceeding because the judge was bound by the jury's findings. Beane v. McMullen, 265 Md. 585, 291 A.2d 37 (1972).

10. The Advisory Committee note to MD. R.P. 2-301 provides: "The effect of this Rule is to eliminate distinctions between law and equity for purposes of pleadings, parties, court sittings, and dockets. It does not affect the right to jury trial."

11. McCoid, *Procedural Reform and the Right to Jury Trial: A Study of Beacon Theatres, Inc. v. Westover*, 116 U. PA. L. REV. 1, 15 (1967).

12. Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 510-11 (1959) (footnote omitted).

13. *See* F. JAMES, JR. & G. HAZARD, CIVIL PROCEDURE § 810 (2d ed. 1977).

14. *See* Brown, *supra* note 1, at 450.

II. CONSOLIDATION OF LEGAL AND EQUITABLE CLAIMS UNDER THE REVISED RULES: PERMITTED OR REQUIRED?

The elimination of the distinction between law and equity brings Maryland into line with the liberal federal policy concerning joinder of claims. For the most part, the joinder provisions of the Federal Rules of Civil Procedure (Federal Rules) are permissive.[15] Most of the joinder provisions of the revised rules also are permissive.[16] Unlike the Federal Rules, but like the previous Maryland Rules, the revised rules do not deem any counterclaims to be compulsory.[17] Other parts of the revised rules foster joinder of claims. The removal provision, which replaces former Rule 542, is no longer limited to actions at law.[18] Revised Maryland Rule 2-506(a) replaces former Rules 541(a)(1) and 582, two considerably different rules regulating voluntary dismissal in law

15. *See* FED. R. CIV. P. 13(b), (g), 14, 18, 20, 23, 24. Exceptions to this rule are 13(a), which provides for compulsory counterclaims, and 14(a), which requires a third party defendant to assert counterclaims against the third party plaintiff.

16. MD. R.P. 2-212(a) provides:

> All persons may join in one action as plaintiffs if they assert a right to relief jointly, severally, or in the alternative in respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences, and if any question of law or fact common to all these persons will arise in the action. All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative any right to relief in respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences, and if any question of law or fact common to all defendants will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief and against one or more defendants according to their respective liabilities.

MD. R.P. 2-303(c) provides:

> A party may set forth two or more statements of a claim or defense alternately or hypothetically. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as he has regardless of consistency and whether based on legal or equitable grounds.

See also MD. R.P. 2-331(b) (cross-claim against co-party), 2-331(c) (joinder of additional parties), 2-332(a) (defendant's claim against third party), 2-214(b) (permissive intervention).

17. MD. R.P. 2-331 provides:

> A party may assert as a counterclaim any claim that party has against any opposing party, whether or not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim. A counterclaim may or may not diminish or defeat the recovery sought by the opposing party. It may claim relief exceeding in amount or different in kind from that sought in the pleading of the opposing party.

MD. R.P. 2-332(c), however, requires a plaintiff to assert against the third party defendant a claim arising out of the transaction which is the subject matter of his claim against the third party plaintiff.

18. MD. R.P. 2-505(a).

and equity actions.[19] Former Rule 343, which regulated election for trial by jury in *actions* at law, has been replaced by Rule 2-325(a) which contemplates jury trial of legal *issues* in mixed legal and equitable suits.[20]

Although the revised rules facilitate consolidation of claims as never before, they do not require it. Since the consolidation of legal and equitable claims in the same suit poses the greatest threat to the scope of trial by jury, it is arguable that this threat can be avoided by not consolidating such claims. Thus, a plaintiff who asserts claims for specific performance of a contract and for damages against the same defendant arguably might protect the right to trial by jury with respect to the damages claim by filing separate suits. Likewise, a defendant in a suit for rescission of a contract who ordinarily would wish to counterclaim for damages for breach of contract might protect his right to trial by jury by asserting it in a separate action.

Viewing the rules in isolation, however, renders a distorted picture of a party's latitude with respect to consolidation of litigation in Maryland. The revised rules must be read in conjunction with the extraordinarily broad view taken by the Maryland appellate courts concerning res judicata. This doctrine, also referred to as direct estoppel,[21] was set out by the Court of Appeals of Maryland in *Alvey v. Alvey*:[22]

> [A] judgment between the same parties and their privies is a final bar to any other suit upon the same cause of action, and is conclusive, not only as to all matters that have been decided in the original suit, but as to all matters which with propriety could have been litigated in the first suit, where the court had jurisdiction . . . .[23]

It is quite clear in Maryland that a plaintiff must assert all claims arising out of a particular transaction against a particular defendant or be barred in a subsequent suit from asserting any claim not asserted in the first suit.[24] Up to this point, Maryland's view of res judicata is consis-

---

19. MD. R.P. 2-506(a) provides:
> Except as otherwise provided in these rules or by statute, a plaintiff may dismiss an action without leave of court (1) by filing a notice of dismissal at any time before the adverse party files an answer or motion for summary judgment or (2) by filing a stipulation of dismissal signed by all parties who have appeared in the action.

20. MD. R.P. 2-325(a) provides:
> Any party may elect a trial by jury of any issue triable of right by a jury by filing a demand therefor in writing either as a separate paper or separately titled at the conclusion of a pleading and immediately preceding any required certificate of service.

21. MPC, Inc. v. Kenny, 279 Md. 29, 32, 367 A.2d 486, 488 (1977).
22. Alvey v. Alvey, 225 Md. 386, 171 A.2d 92 (1961).
23. *Id.* at 390, 171 A.2d at 94.
24. Frontier Van Lines v. Maryland Bank & Trust Co., 274 Md. 621, 336 A.2d 778 (1975).

tent with the Restatement (Second) of Judgments (Restatement), which provides:

> When a valid and final judgment rendered in an action extinguishes the plaintiff's claim pursuant to the rules of merger or bar . . . the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose.[25]

To the extent the rule expressed in *Alvey* requires that the court must have jurisdiction of the claim not asserted for the bar to apply, it may be argued that, under former practice, a claim at law would not have been barred by a plaintiff's failure to assert it with a related claim in a prior equity action. While such a view is consistent with the Restatement,[26] no such protection from res judicata has ever existed in Maryland.[27]

It also appears that Maryland is moving towards requiring consolidation of factually related claims against multiple defendants. Applying res judicata to claims against defendants who were not parties to an earlier action because of the factual relationship of such claims to the action carries the doctrine beyond the Restatement view. The first indication of this tendency appeared in *MPC, Inc. v. Kenny*.[28] In that case the plaintiffs sued the defendant for contribution as a joint tortfeasor. The defendant had pushed his cousin through a glass door causing her personal injury. The plaintiffs were a builder and a supplier who had installed and supplied the glass door. They had been sued in an earlier action by the defendant's cousin for negligence and had settled with the plaintiff, permitting entry of a consent judgment.

---

25. RESTATEMENT (SECOND) OF JUDGMENTS § 24(1) (1982).
26. *Id.* § 26, comment c.
27. In Sterling v. Local 438, 207 Md. 132, 113 A.2d 389 (1955), the plaintiff, a former business agent of a union, sued the defendant union to have it enjoined from setting aside an election that the plaintiff had won. The court found the election to be invalid and held for the defendant. In a later suit, the plaintiff sought damages for the consequences of the later election in which he was replaced. Concluding that the elements of the prior equity action were the same as in the present action at law, the court held that the equity suit was conclusive as a direct estoppel of the action at law. In essence, this holding required the plaintiff to assert both legal and equitable claims in the first action, or lose the claim not asserted. Asserting the legal claim in the equity suit, however, would have deprived the plaintiff of trial by jury of that claim. Presumably, the plaintiff would have been barred in his action for damages even if he had been successful in his suit for injunctive relief.

    Sterling should have been decided on the basis of collateral estoppel, with the legal and equitable claims treated as separate claims. Collateral estoppel would have prevented relitigation of the validity of the plaintiff's election in the suit on a different cause of action. *See* MPC, Inc. v. Kenny, 279 Md. 29, 35, 367 A.2d 486, 490 (1977). The court in *Sterling* indicated that collateral estoppel was applicable on that basis. 207 Md. at 144, 113 A.2d at 394.
28. 279 Md. 29, 367 A.2d 486 (1977).

The defendant in the suit for contribution was not a party to the earlier suit by his cousin. He contended that the plaintiffs were barred from proceeding against him because they had not made him a third party defendant in the first suit.

The court, in rejecting res judicata as a bar of the plaintiffs' claim, decided that the evidentiary facts supporting the case of the personal injury plaintiff in the earlier suit and the case of the plaintiffs for contribution in the latter suit were different. The case against the defendant would center on the accident while the case against the plaintiffs in the prior personal injury suit centered on installation of the door. The court did not preclude the possibility of barring a later action because of an earlier failure to assert a third party claim.

This logic was recently applied by the court of special appeals in *Harbin v. H.E.W.S., Inc.*[29] In *Harbin*, the plaintiff sought damages for illegal eviction and wrongful interference with possession and enjoyment of property. Harbin previously sued Safeway for injunctive relief and damages with respect to the same property. Safeway impleaded two of the defendants in the second action as third party defendants, and Harbin did not assert claims against the third party defendants in the earlier action.

After conclusion of the first action, Harbin sued the two former third party defendants and another defendant. The trial court granted summary judgments for the former third party defendants on the basis of Maryland Rule 315(d)(3),[30] and granted a directed verdict to the third defendant. The Court of Special Appeals of Maryland held that the trial court should have dismissed the claim against the third defendant on the basis of res judicata, holding squarely that "even a nonparty to a previous action may assert res judicata where the cause of action is the same."[31] Finding that the cause of action was the same as to the third defendant, the court held that Harbin was barred by his failure to assert his claim in the first action even though the bar of Rule 315(d)(3) would not apply to a nonparty. The court stated in a footnote that: "Rule 315(d)(3) and the doctrine of res judicata share the common goal of putting an end to litigation by requiring litigants to bring all their claims in a single action."[32]

It appears from decisions such as *Alvey* and *Harbin* that any attempt to avoid difficulties concerning the scope of trial by jury by avoiding consolidation of claims arising out of the same facts, even against different defendants, is fraught with peril for plaintiffs. The lack

29. 56 Md. App. 72, 466 A.2d 879 (1983).

30. Md. R.P. 315(d)(3) (1977) provided:

> The plaintiff may not assert against the third party in a separate action, instituted after the third party is impleaded, any claim which arises out of the transaction or occurrence that is the subject matter of his claim against the defendant in the pending action.

31. Harbin v. H.E.W.S., Inc., 56 Md. App. 72, 81, 466 A.2d 879, 884 (1983).

32. *Id.* at 80, 466 A.2d at 883-84.

of a compulsory counterclaim rule in the revised rules ostensibly eliminates one of the most difficult problems confronted by the federal courts after merger: the requirement that a defendant assert a legal counterclaim in an equitable action. As indicated *infra*, before the merger of law and equity in the federal courts, the right to trial by jury would have been lost as to any legal counterclaim asserted in an equity action.[33]

It is not entirely clear that Maryland's counterclaim policy will provide much protection in this respect, however, because the courts have construed res judicata broadly concerning claims which may be asserted by defendants. In *Felger v. Nichols*,[34] the plaintiff sued his former lawyer for professional malpractice. The plaintiff previously had been sued by his lawyer for a legal fee, and defended himself on the grounds of inadequate legal services and excessive fees. The skill, fidelity, and diligence of the lawyer were at issue in both suits. The *Felger* court quoted from the holding in *Lebrun v. Marcey* that a judgment is res judicata "not only as to every matter which was offered to sustain *or defeat* the claim or demand, but as to any other admissible matter which might have been offered for that purpose."[35] The court held that either res judicata or collateral estoppel precluded relitigation of the attorney's skill in a malpractice action.

Singer v. Steven Kokes, Inc.[36] is a similar decision. The plaintiffs in *Singer* sued the builder of their house for negligence and breach of warranty in construction. The construction company had previously sued the plaintiffs to foreclose a mechanic's lien. The plaintiffs in the later action claimed and were awarded a credit against the lien because of a substantial number of construction defects.[37] Shortly after conclusion of the first suit, the plaintiffs brought an action alleging 141 additional defects.

The construction company moved for summary judgment on the basis of res judicata. The court granted the summary judgment, and held that "[o]ne aspect of direct estoppel is that a party must raise all defenses he has to a cause of action and once that action is concluded he cannot use a defensive matter as a basis for relief in a subsequent action between the parties."[38] Recognizing the apparent incongruity of such a notion in light of Maryland's lack of a compulsory counterclaim rule, the court held that if a defensive matter constituted a counterclaim, it was not barred simply by the failure to assert it:

> If a matter is not in the nature of a defense but constitutes a counterclaim, the general rule is that the party is not required

33. *See infra* note 68.
34. 35 Md. App. 182, 370 A.2d 141 (1977).
35. Lebrun v. Marcey, 199 Md. 223, 227, 86 A.2d 512, 514 (1952) (emphasis added).
36. 39 Md. App. 180, 384 A.2d 463 (1978).
37. Singer v. Steven Kokes, Inc., 39 Md. App. 180, 183, 384 A.2d 463, 465 (1978).
38. *Id.* at 182, 384 A.2d at 465.

> to assert the claim unless the subject matter is such an integral part of the issue being litigated that a judgment would necessarily negate the existence of facts essential to its maintenance.[39]

The application of res judicata to the plaintiffs in *Singer* is not particularly troubling. By asserting a claim for credit in the first action the plaintiffs were, in essence, asserting a counterclaim. They should have been required to claim relief based upon all discoverable defects in the first action. The holding that defensive matter must be asserted by a defendant or lost as a basis for relief is disconcerting in light of *Felger* and *Lebrun.* If a defendant is permitted to hold back only a counterclaim which does not raise defensive matter then he would generally be permitted to hold back only a counterclaim which would be permissive under the Federal Rules. If a counterclaim arises out of the same transaction or occurrence as the plaintiff's claim it is quite likely that it involves matter which constitutes a defense to the plaintiff's claim and, hence, must be asserted. Thus, res judicata creates in Maryland what is essentially a compulsory counterclaim under the Federal Rules.

This brief discussion of the joinder rules and the expanding policy of res judicata in Maryland indicates that parties will not be able to avoid increased consolidation of related legal and equitable claims in the same action. While some states have developed doctrines of waiver of the right to trial by jury when a legal claim is combined with an equitable claim,[40] such a rule would be harsh in Maryland where joinder of related claims by plaintiffs and defendants is becoming increasingly less discretionary.

III. THE EFFECTS OF MERGER OF LAW AND EQUITY ON TRIAL BY JURY: THE FEDERAL EXPERIENCE

In 1938, with the adoption of the Federal Rules of Civil Procedure, the federal system merged the law and equity sides of the district courts into a unified procedural system.[41] The federal rules grant par-

---

39. *Id.* at 182-83, 384 A.2d at 465.

40. *See* DiMenna v. Cooper & Evans Co., 220 N.Y. 391, 115 N.E. 993 (1917); *see also* PA. R. CIV. P. 1509(c) (in an equitable action, existence of an adequate remedy at law as a basis for transfer to law side must be raised in a preliminary objection or it is waived as a defense).

41. FED. R. CIV. P. 2 provides: "There shall be one form of action to be known as 'civil action.'" The original version of the Rules Enabling Act provided the basis for this merger:

> The [United States Supreme] [C]ourt may at any time unite the general rules prescribed by it for cases in equity with those in actions at law so as to secure one form of civil action and procedure for both: *Provided, however,* that in such union of rules the right of trial by jury as at common law and declared by the seventh amendment to the Constitution shall be preserved to the parties inviolate . . . .

ties the unfettered right to combine legal and equitable claims and issues in the same action.[42] The Rules Enabling Act specified that the right to trial by jury was to be preserved in the face of such merger.[43] The experience of the federal courts in accommodating the historic right to trial by jury in a merged system of jurisprudence provides substantial guidance to the Maryland judiciary because the federal civil jury trial right, like Maryland's, is viewed in concert with the historic scope of equity. The scope of equity in Maryland is largely the same as it was in the federal courts before the merger of law and equity. Furthermore, the jury trial issues faced in Maryland under the revised rules will be much the same as those faced by the federal courts. Merger in the federal courts, as under the revised rules in Maryland, presented unprecedented possibilities for the assertion of traditionally legal claims and issues before tribunals possessing equitable powers. There is limited support in Maryland jurisprudence for the vigorous jury trial policy ultimately adopted by the federal courts, but the questions faced today by the Maryland judiciary are nearly identical to those confronted by the federal courts since 1938.

A. Pre-Merger Law, Equity, and Trial by Jury in the Federal Courts

In the federal courts, as in Maryland,[44] the separation of law and equity courts was the principal procedural safeguard preventing chancery from eroding the right to trial by jury. The seventh amendment preserves the right to trial by jury which existed at common law,[45] subject to restrictions which were applicable in 1791, the year the amendment was adopted.[46] As the United States Supreme Court held in *Shields v. Thomas*:

> This provision, correctly interpreted, cannot be made to embrace the established exclusive jurisdiction of courts of equity, nor that which they exercise concurrent with courts of law; but should be understood as limited to rights and remedies peculiarly legal in their nature, and such as it was proper to assert in courts of law, and by the appropriate modes and pro-

---

Rules Enabling Act, ch. 651, § 2, 48 Stat. 1064 (1934) (current version at 28 U.S.C. § 2072 (1982)).

42. FED. R. CIV. P. 18(b). Before its amendment in 1966, the rule provided:
> The plaintiff in his complaint or in a reply setting forth a counterclaim may join either as independent or as alternate claims as many claims either legal or equitable or both as he may have against an opposing party . . . .

The current Rule 18(b) is substantially the same in this respect.

43. Rules Enabling Act ch. 651, § 2, 48 Stat. 1064 (1934) (codified at 28 U.S.C. § 2072 (1982)).

44. *See infra* text accompanying notes 183-218.

45. In Maryland, the jury trial right is preserved by MD. DECL. OF RTS. art. 23.

46. *See* Baltimore & Carolina Line v. Redman, 295 U.S. 654 (1935) (reservation on motion for directed verdict); Dimick v. Schiedt, 293 U.S. 474 (1935) (remittitur).

ceedings of courts of law.[47]

Equitable claims or issues may have arisen and resulted in removal of a legal claim from the law side,[48] but as long as the claim remained on the law side, there was a right to trial by jury.

From the earliest days of the federal judiciary there were other protections of trial by jury from the encroachment of equity. The first Judiciary Act provided "[t]hat suits in equity shall not be sustained in either of the courts of the United States, in any case where plain, adequate, and complete relief may be had at law."[49] If the claim was legal in character and the legal remedy was adequate, the claim could not be maintained in a court of equity.[50] When the Supreme Court adopted rules of practice in equity cases, it provided for transfer to the law side of actions erroneously initiated in equity.[51]

An early analysis of the restriction of equitable jurisdiction in the federal courts is contained in *Insurance Co. v. Bailey*.[52] The plaintiff, a life insurance company, refused to pay the proceeds of life insurance policies on the basis of alleged fraudulent misrepresentations in the application. The company sued in equity to prevent assignment of the policies and to have them cancelled. The Court referred to the Judiciary Act and noted that whenever a court of law is able to proceed to judgment which "affords a plain, adequate and complete remedy . . . the plaintiff must in general proceed at law, because the defendant, under such circumstances, has a right to trial by jury."[53] Since the insured had died, the Court determined that the insurance company, as a possible defendant in a later action at law on the policy, should be left to the assertion of a legal defense to a "purely legal demand."[54] In discussing instances in which equity might supplant an action at law, and hence trial by jury, the Court set forth a scope of equitable jurisdiction which is quite similar to that of Maryland.[55] The Supreme Court

47. Shields v. Thomas, 59 U.S. (18 How.) 253, 262 (1856).
48. Liberty Oil Co. v. Condon Nat'l Bank, 260 U.S. 235 (1922).
49. Judiciary Act ch. 20, § 16, 1 Stat. 82 (1789), *repealed by* Act of June 25, 1948, ch. 646, 62 Stat. 869.
50. United Copper Sec. Co. v. Amalgamated Copper Co., 244 U.S. 261 (1917); Fleitman v. Welsbach, 240 U.S. 27 (1916); Cates v. Allen, 149 U.S. 451 (1893); Scott v. Neely, 140 U.S. 106 (1891). In *United Copper* and *Fleitman* the solicitude for trial by jury thwarted the plaintiff from bringing suit at all. Both actions were shareholder derivative actions which, at that time, were cognizable only in equity. *Cf.* Ross v. Bernhard, 396 U.S. 531 (1970) (right to jury trial extends to stockholder's derivative suit with respect to those issues as to which the corporation would have been entitled to a jury trial had it brought suit).
51. R. PRAC. EQ. 22, 226 U.S. 654 (1912).
52. 80 U.S. (13 Wall.) 616 (1871).
53. Insurance Co. v. Bailey, 80 U.S. (13 Wall.) 616, 621 (1871).
54. *Id.* at 622-23.
55. The Court held that equity will intervene to "restrain irreparable mischief, or to suppress oppressive and interminable litigation or to prevent a multiplicity of suits . . . ." Equity will also act "to rescind written instruments in cases where they have been procured by false representations or by the fraudulent suppression of

reaffirmed this limitation on equitable jurisdiction in a similar factual context.[56]

When legal relief was not as suitable or complete as equitable relief, equity could intervene, even when the substantive issues involved were traditionally cognizable at law. In *Holland v. Challen*,[57] a plaintiff brought an action to quiet title to real estate pursuant to a Nebraska statute which expanded the class of plaintiffs able to sue in equity. The Court assumed that the defense was lack of equitable jurisdiction because the plaintiff's title had not been adjudged at law and because the plaintiff was not in possession of the real property. The Supreme Court noted that since the defendants were not in possession, an action at law would provide an inadequate remedy. The Court held:

> It is not an objection to the jurisdiction of equity that legal questions are presented for consideration which might also arise in a court of law. If the controversy be one in which a court of equity only can afford the relief prayed for, its jurisdiction is unaffected by the character of the questions involved.[58]

If the remedy in equity was in any way more suitable than the legal remedy, equitable jurisdiction attached to the controversy.[59]

Once equitable jurisdiction attached, equity was able to resolve all aspects of the controversy, whether such matters were already before the chancellor or whether it was necessary to enjoin the prosecution of other suits.[60] The operation of this principle, sometimes referred to as "equitable cleanup," may be seen in *American Life Insurance Co. v. Stewart*,[61] an action similar to *Insurance Co. v. Bailey*.[62] In *Stewart*, the life insurance company brought two suits in equity to cancel two insurance policies on the grounds of fraud in their procurement. The defendant beneficiaries moved to dismiss the bill for want of equity, and sued on the law side to recover on the policies. The parties stipulated that the equity case would be tried first, and the equity court ordered cancellation. The Supreme Court reversed the Tenth Circuit's dismis-

---

the truth," and "to enjoin such instruments where they operate as a cloud upon the title of the opposite party . . . ." 80 U.S. (13 Wall.) at 621-22. As to the scope of equitable jurisdiction based on an inadequate remedy at law in Maryland, see *infra* notes 245-81 and accompanying text.

56. Enelow v. New York Life Ins. Co., 293 U.S. 379 (1935).
57. 110 U.S. 15 (1884).
58. Holland v. Challen, 110 U.S. 15, 25 (1884).
59. *See* Walla Walla v. Walla Walla Water Co., 172 U.S. 1, 12 (1898).
60. In Camp v. Boyd, 229 U.S. 530 (1913), the Court upheld equitable jurisdiction to enjoin an action in ejectment. The ejectment action involved three lots, and the plaintiff in equity, defendant in ejectment, had legal title, hence a good defense at law, to only one lot. The need to resort to equity as to two of the lots permitted the court of equity to adjudicate the rights of the parties with respect to all three lots. *See* Greene v. Louisville & I. R.R., 244 U.S. 499, 520 (1917).
61. 300 U.S. 203 (1937).
62. 80 U.S. (13 Wall.) 616 (1871).

sal, which was based on the fact that the insurance company had an adequate remedy at law.[63]

At the time of the commencement of its equity action, the defendant in *Stewart*, unlike the defendant in *Bailey*, had no adequate defense at law. Under the policy terms in *Stewart*, requiring the insurance company to wait to assert its defense in an action at law would permit the beneficiaries to wait until the policy had become incontestable.[64] The Court also considered the possibility that the beneficiaries might not be present if the insurance company were required to wait to assert its defense to the policy.[65]

Significantly, the Supreme Court rejected the argument that the equity suits should have been dismissed once the beneficiaries sued at law. The Court held that: "the settled rule is that equitable jurisdiction existing at the filing of a bill is not destroyed because an adequate legal remedy may have become available thereafter."[66] The Court observed that the chancellor, *in his discretion*, could have held the equity suit in abeyance while the action at law proceeded. In this case, however, the beneficiaries had stipulated that possibility away.

This discretion to retain an entire controversy in equity, even when the remedy at law became adequate, gave the chancellor the power to determine whether trial by jury would be accorded to *any* part of the controversy. A party could lose the right to trial by jury by asserting a legal claim in a suit for equitable relief,[67] or by asserting a legal counterclaim in an equitable suit.[68]

The Law and Equity Act of 1915[69] permitted adjudication of equi-

63. American Life Ins. Co. v. Stewart, 300 U.S. 203 (1937), *reversing* 80 F.2d 600 (10th Cir. 1935), *on reh'g*, 85 F.2d 791 (10th Cir. 1936).
64. *Id.* at 212.
65. *Id.* at 213-14.
66. *Id.* at 215.
67. Frederick v. Surloff, 4 F.2d 589 (D.C. Pa. 1924).
68. American Mills Co. v. American Sur., 260 U.S. 360 (1922). In *American Mills*, the Supreme Court held that R. PRAC. EQ. 30, which made certain counterclaims compulsory, did not apply to legal claims. By asserting a claim at law in the plaintiff's suit in equity, the defendant was held to have waived any argument that the court lacked jurisdiction. It was later held that the *plaintiff* might demand a jury trial of such a claim. Clifton v. Tomb, 21 F.2d 893 (4th Cir. 1927).
69. Act of March 3, 1915, ch. 90, 38 Stat. 956, *repealed by* Act of June 25, 1948, ch. 646, 62 Stat. 996 provides:

> [I]n all actions at law equitable defenses may be interposed by answer, plea, or replication without the necessity of filing a bill on the equity side of the court. The defendant shall have the same rights in such case as if he had filed a bill embodying the defense of seeking the relief prayed for in such answer or plea. Equitable relief respecting the subject matter of the suit may thus be obtained by answer or plea. In case affirmative relief is prayed in such answer or plea, the plaintiff shall file a replication. Review of the judgment or decree entered in such case shall be regulated by rule of court. Whether such review be sought by writ of error or by appeal the appellate court shall have full power to render such judgment upon the records as law and justice shall require.

Id. § 274(b).

table defenses in actions at law in the federal courts. This primitive form of merger made the separation of law and equity less cumbersome. Under prior practice it was necessary for a defendant asserting an equitable defense to file a bill in equity in order to have the law action enjoined during the adjudication of the equitable defense.[70] As a result of the 1915 Act, the law court was able to try the equitable defense without transferring the case to equity. It was clear, however, that the law court tried such defense as a suit in equity, without a jury.[71] If any legal issue remained after resolution of the equitable defense, it could be tried by a jury;[72] but whether such issue was tried by jury or was "cleaned up" by the chancellor was decided by the chancellor.[73] Reposition in the chancellor of discretion concerning the availability of trial by jury in controversies involving legal and equitable issues was regarded as consistent with the seventh amendment because equity possessed such discretion at the time the seventh amendment was adopted.[74] The right to trial by jury was protected since the summary procedure was not considered appropriate unless, under prior practice, the inadequacy of the remedy at law would have justified the interposition of equity.[75]

B. Jury Trial and the Scope of Equity After Merger

Merger of law and equity into one civil action removed what had been the most stalwart protection of the right to trial by jury. Plaintiffs were required to combine related legal and equitable claims in the same action or suffer preclusion by res judicata of claims not asserted.[76] A compulsory counterclaim policy required a defendant seeking damages to counterclaim in a related equitable action.[77] In both cases, the rules required a party to assert a legal claim in a proceeding in which there was a basis for equitable relief. The rules, of course, permitted other forms of combination of legal and equitable issues, such as the joinder by a plaintiff of legal and equitable claims against different de-

70. Liberty Oil Co. v. Condon Nat'l Bank, 260 U.S. 235, 243 (1922).
71. Enelow v. New York Life Ins. Co., 293 U.S. 379 (1935). This procedure is not entirely unlike former Md. R.P. 342(d)(1) (1977) which permitted assertion of equitable defenses in actions at law by special plea. This rule does not grant courts of law in Maryland the power to administer relief which is purely equitable, such as cancellation or reformation of contracts. *See* Conner v. Groh, 90 Md. 674, 45 A. 1024 (1900).
72. Liberty Oil Co. v. Condon Nat'l Bank, 260 U.S. 235, 242 (1922).
73. *Id.* at 244.
74. *Id.* at 243.
75. Enelow v. New York Life Ins. Co., 293 U.S. 379, 384 (1935).
76. *See* Hennepin Paper Co. v. Fort Wayne Corrugated Paper Co., 153 F.2d 822 (7th Cir. 1946).
77. FED. R. CIV. P. 13(a); *see also* Lisle Mills v. Arkay Infants Wear, 90 F. Supp. 676 (E.D.N.Y. 1950) (jury trial right preserved as to counterclaim).

fendants,[78] permissive counterclaims by defendants,[79] cross-claims,[80] and third party claims.[81] Merger of law and equity confronted the federal courts with a choice: restrict the chancellor's discretion with respect to the order and mode of trial of actions in which legal and equitable claims were combined, or suffer a substantial, but probably unintended, erosion of the right to trial by jury. In *Beacon Theatres v. Westover*[82] and its progeny, the Supreme Court ultimately took decisive action to protect the right to trial by jury. As shown *infra*, however, the *Beacon* opinion may be read as distorting the historic concept of the right to trial by jury and the scope of equity in ways which would find little sanction in Maryland jurisprudence. Thus, Maryland lawyers may find the greatest guidance regarding the effect of merger on trial by jury in the federal cases decided after merger and before *Beacon*.

A few decisions in that period held that it was necessary to restrict the discretion of the chancellor in order to protect the right to trial by jury. In *Bruckman v. Hollzer*,[83] the plaintiff sought damages, an accounting, and various forms of injunctive relief for copyright infringement. The trial court submitted the action for damages to the jury and simultaneously tried the equitable claims to the extent practicable. The defendant contended that the plaintiff, by combining claims for legal and equitable relief in the same suit, had waived his right to trial by jury.[84] The court, however, saw a duty to preserve the right to trial by jury in the face of consolidation of legal and equitable issues provided by the rules. In *Bruckman*, the trial court protected the right by conforming its own findings to those of the jury with respect to issues common to the legal and equitable claims.

In *Leimer v. Woods*,[85] a suit by the Federal Administrator of Price Controls against a landlord under the Emergency Price Control Act of 1942,[86] the plaintiff sought an injunction, a restitutionary order, and a judgment for damages in favor of the United States. The court concluded that the damages relief sought was independent of the injunctive and restitutionary relief, and thus the defendant was entitled to a

78. FED. R. CIV. P. 20.
79. FED. R. CIV. P. 13(b).
80. FED. R. CIV. P. 13(g).
81. FED. R. CIV. P. 14.
82. 359 U.S. 500 (1959).
83. 152 F.2d 730 (9th Cir. 1946).
84. Bruckman v. Hollzer, 152 F.2d 730, 732 (9th Cir. 1946). The defendant relied on the opinion of Judge Cardozo in DiMenna v. Cooper & Evans Co., 220 N.Y. 391, 115 N.E. 993 (1917), which held: "[t]he rule is fundamental that where a plaintiff seeks legal and equitable relief in respect of the same wrong, his right to trial by jury is lost." *Id.* at 396, 115 N.E. at 994.
85. 196 F.2d 828 (8th Cir. 1952).
86. Acts of Jan. 30, 1942, ch. 26, tit. II, § 205, 56 Stat. 33; Act of June 30, 1944, ch. 325, tit. I, § 108(a), (b), (d), (e), 58 Stat. 640; Act of July 25, 1946, ch. 671, §§ 12, 13, 60 Stat. 676, 677; Act of July 30, 1947, ch. 361, tit. I, § 101, 61 Stat. 619 (formerly 50 U.S.C. App. § 925) (terminated June 30, 1947 pursuant to former 50 U.S.C. App. § 901).

jury trial. The court presciently noted that long range protection of the right to jury trial required a sympathetic judicial attitude. Where the legal and equitable claims involved coordinate issues, the legal issues should be tried first.[87] To the court, it was

> inexorably clear that any such union of equitable and legal claims in a complaint, under Rule 18(a), should not nakedly be employed as, or unconcernedly be permitted to become, an instrument for curbing or prejudicing the substantive and fundamental right of jury trial, as that right otherwise would exist in relation to a separate legal cause of action which has been joined in the complaint.[88]

In *Elkins v. Nobel*,[89] the inclusion of a claim to set aside a fraudulent conveyance in a suit for damages did not deprive the defendant of his jury trial right. The trial court decided to empanel a jury and then to take whatever additional evidence was necessary with respect to the fraudulent conveyance issue.

In these cases, priority was clearly accorded the jury adjudication in order to prevent prior equitable findings from becoming the law of the case.[90] These decisions before *Beacon Theatres*[91] do not reflect a constitutionally-mandated contraction of the scope of equity, but rather the sensitivity of a trial judge possessed of equitable powers to the right of trial by jury. Similar sensitivity with respect to the scope of equity may be found in decisions of the Court of Appeals of Maryland.[92]

Several lower court decisions in the post-merger, pre-*Beacon Theatres* period protected the right to jury trial in actions involving both legal and equitable claims by looking past the conflicting claims for relief and characterizing the actions as essentially legal. In such cases, a right to trial by jury was accorded primarily because the subject matter was such that a plaintiff would be entitled to trial by jury if only damages were claimed. This approach overlooked the well-established principle that equity was competent to entertain questions which could also be adjudicated in a court of law.[93]

In *Ransom v. Staso Milling Co.*,[94] the plaintiff brought an action for an injunction of a nuisance and for damages. Though claims for legal and equitable relief were combined, the district court refused to strike the jury demand and reasoned that

---

87. Leimer v. Woods, 196 F.2d 828, 834 (8th Cir. 1952).
88. *Id.* at 833.
89. 1 F.R.D. 357 (E.D.N.Y. 1940).
90. *See Bruckman*, 152 F.2d at 732.
91. 359 U.S. 500 (1959).
92. *See infra* notes 189-202 and accompanying text.
93. *See* Holland v. Challen, 110 U.S. 15, 25 (1884). Equitable jurisdiction over an otherwise legal subject matter has been called concurrent jurisdiction in Maryland. *See* Berman v. Leckner, 188 Md. 321, 327, 52 A.2d 464, 466 (1946).
94. 2 F.R.D. 128 (D. Vt. 1941).

> where the gist of the action is for money damages, which at common law would fall within a well recognized form of action, such as an action of tort for damage to property, or person, the case is for the jury if demand for jury is made, even though there has been added an incidental prayer for equitable relief.[95]

Characterizing the equitable relief as merely incidental may preserve the jury trial right, but it obviously involves a subjective form of analysis.[96] In *General Motors Corp. v. California Research Corp.*,[97] the plaintiff sought a declaration of the invalidity of the defendant's patent and injunctive relief against infringement suits. The defendant counterclaimed only for damages for infringement. The court noted that the defendant would have had a right to trial by jury if it had brought its claim as a plaintiff. The court held that the basic issues of infringement and validity of the patent were legal, and that they should be tried by a jury.[98]

To reach this decision, the court was forced to distinguish two patent infringement cases in which a jury had been denied in a manner which called into question the viability of the "basic issue" approach. The two decisions were *Bellavance v. Plastic-Craft Novelty Co.*[99] and *Beaunit Mills, Inc. v. Eday Fabric Sales Corp.*[100]

The *General Motors* court distinguished *Bellevance* on the basis that the plaintiff therein had sought an injunction and damages.[101] It distinguished *Beaunit* on the basis that neither party had sought damages.[102] Although the defendant in *Beaunit* had not sought damages, he had, in response to the plaintiff's claim for extensive injunctive relief, counterclaimed for a declaratory judgment that the patent was valid and infringed.[103] In both cases, the same "basic issue" as in *General Motors* had been raised. In *General Motors*, the court's holding protected trial by jury for a basic legal issue only when raised by the defendant in a claim for damages.

In *Ring v. Spina*,[104] the Second Circuit made a strong attempt to reconcile the right to trial by jury of legal issues with the liberal joinder provisions of the Federal Rules. In *Ring*, the plaintiff sought damages

---

95. *Id.* at 131.
96. Md. R.P. BF40 (1977) permitted a plaintiff to seek injunctive relief in an action at law without compromising the right to trial by jury. Beane v. McMullen, 265 Md. 585, 291 A.2d 37 (1972).
97. 9 F.R.D. 565 (D. Del. 1949).
98. *Id.* at 567.
99. 30 F. Supp. 37 (D. Mass. 1939).
100. 124 F.2d 563 (2d Cir. 1942).
101. General Motors Corp. v. California Research Corp., 9 F.R.D. 565, 567-68 (D. Del. 1949).
102. *Id.*
103. *Beaunit*, 124 F.2d 562.
104. 166 F.2d 546 (2d Cir. 1948).

and injunctive relief under the Sherman Act.[105] The court rejected the defendant's contention that the plaintiff had waived trial by jury by seeking both legal and equitable relief and held that

> the basic nature of the claim for damages for violation of the Anti-Trust Act to this complaint is, we think, quite clear. Such a claim, it is well settled, is triable by jury on timely demand of a party.[106]

A series of cases resorted to the basic issue test to prevent insurance companies from depriving insureds of trial by jury in actions for declaratory judgment to establish nonliability.[107] The results in these "inverted" suits represented an unwillingness by the courts to treat declaratory judgment actions as inherently equitable,[108] rather than any desire to restrict the traditional scope of equity in favor of trial by jury. This unwillingness was later vindicated by the Supreme Court.[109]

With the possible exception of cases involving land titles and declaratory judgments,[110] the basic legal issue analysis has little support in Maryland. Experience in states with merged systems which have adopted this mode of analysis to determine the availability of trial by jury indicates that trial judges are permitted discretion similar to that exercised in equity before merger.[111]

Many decisions in the post-merger, pre-*Beacon Theatres* period did not prevent trial courts, in their discretion, from denying a jury trial of traditionally legal issues in suits in which legal and equitable claims were combined.[112] Thus, a plaintiff who sued an insurance company on an annuity contract and combined alternative claims for damages and rescission and restitution was held to have waived trial by jury by invoking equity.[113] Trial by jury was also denied in suits by bankruptcy trustees who sought not only money judgments but also the setting aside of fraudulent conveyances.[114] When legal and equitable claims were combined, the trial court determined not only the order of

105. 15 U.S.C. §§ 1-2629 (1982).
106. Ring v. Spina, 166 F.2d 546, 550 (2d Cir. 1948).
107. *See* Johnson v. Fidelity & Casualty Co., 238 F.2d 322 (8th Cir. 1956); Dickinson v. General Accident Fire & Life Assurance Corp., 147 F.2d 396 (9th Cir. 1945); Pacific Indem. Co. v. McDonald, 107 F.2d 446 (9th Cir. 1939).
108. Johnson v. Fidelity & Casualty Co., 238 F.2d 322, 324-25 (8th Cir. 1956); Dickinson v. General Accident Fire & Life Assurance Corp., 147 F.2d 396, 397-98 (9th Cir. 1945); Pacific Indem. Co. v. McDonald, 107 F.2d 446, 446 (8th Cir. 1939).
109. Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 504 (1959). This is also true in Maryland. *See* Himes v. Day, 254 Md. 197, 206, 254 A.2d 181, 186 (1969).
110. *See infra* notes 233-37 and accompanying text.
111. *See infra* notes 371-75.
112. Note, *The Supreme Court, 1958 Term; V Federal Procedure*, 73 HARV. L. REV. 188-89 (1959).
113. Fitzpatrick v. Sun Life Assurance Co., 1 F.R.D. 713 (D.N.J. 1941).
114. Conn v. Kohlemann, 2 F.R.D. 514 (E.D. Pa. 1942); Williams v. Collier, 32 F. Supp. 321 (E.D. Pa. 1940).

the trial, but also whether trial by jury was permitted.[115] The Supreme Court did nothing to discourage such an approach.[116]

During this period the standards for exercising judicial discretion with regard to the mode of trial were undefined. Most cases after merger and before *Beacon Theatres* which considered the scope of equity with respect to the trial by jury did not recognize the threat to jury trial inherent in merger. For the most part, the strong equitable cleanup policy existing at the time of merger continued. Hence, there was undoubted erosion of the jury trial right by equitable encroachment. This process was abruptly checked in *Beacon Theatres* and subsequent decisions.

C. *The Pre-Eminence of Trial by Jury after* Beacon Theatres

In *Beacon Theatres v. Westover*,[117] the Supreme Court for the first time confronted the threat posed to the right to trial by jury by a merged system. *Beacon Theatres* dealt with the situation which posed the most egregious threat to trial by jury—the assertion of a compulsory "legal" counterclaim by a defendant in a suit in which the plaintiff sought equitable relief. The plaintiff, a movie theater operator, had contracted with film distributors for the exclusive right to show first-run films. The defendant owned a drive-in theater located eleven miles away from the plaintiff, and it notified the plaintiff that it considered contracts granting these exclusive rights to be an overt violation of the antitrust laws. The plaintiff alleged that this notification, as well as threats of treble damage suits against the plaintiff and its distributors, gave rise to duress and coercion, depriving the plaintiff of a valuable property right. The plaintiff sought a declaratory judgment that its agreements were not in violation of the antitrust laws and an injunction to prevent the defendant from initiating any action under the antitrust laws against the plaintiff and its distributors until final resolution of the pending litigation. The defendant, seeking treble damages, counterclaimed under the antitrust laws and demanded a trial by jury.[118]

The outcome of both the claim and the counterclaim depended upon the reasonableness of the exclusive rights granted to the plaintiff by the distributors which, in part, depended upon the existence of competition between the parties. The district court viewed the issues of the complaint as "essentially equitable," and ordered that these issues be tried by the court prior to jury determination of the validity of the counterclaimed charges of antitrust violations.[119] The Ninth Circuit

115. Institutional Drug Distrib., Inc. v. Yankwich, 249 F.2d 566 (9th Cir. 1957); Tamimura v. United States, 195 F.2d 329 (9th Cir. 1952); Orenstein v. United States, 191 F.2d 184 (lst Cir. 1951).
116. *See* Porter v. Warner Holding Co., 328 U.S. 395 (1946).
117. 359 U.S. 500 (1959).
118. Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 503 (1959).
119. *Id.*

Court of Appeals noted that trial of the plaintiff's claim, because it contained issues common to the defendant's claims, would operate either by way of res judicata or collateral estoppel so as to preclude both parties with respect to issues in the subsequent trial of the treble damage claim.[120] It was this prior resolution in equity of issues that a jury would necessarily consider in adjudicating the legal claim which would render meaningless the jury trial right. Yet this practice was perfectly consistent with pre-merger practice.[121]

The Supreme Court rejected the notion that resort by the plaintiff to the Declaratory Judgment Act[122] created such equitable jurisdiction.[123] The Court, however, viewed the complaint as "alleging the kind of harassment by a multiplicity of lawsuits which would *traditionally* have justified equity to take jurisdiction and settle the case."[124] The Court determined that the defendant was entitled to a trial by jury on the issues of the antitrust counterclaim for damages, and that he could not be denied this right by a prior determination of the plaintiff's claim.[125] Prior equitable adjudication of issues common to legal claims in actions with mixed legal and equitable claims was to be justified only under the new test of inadequacy of the remedy at law set forth in *Beacon Theatres.*

The concept of inadequacy of the remedy at law is, of course, a traditional prerequisite to equitable jurisdiction.[126] The Court held that this concept now had to be viewed in light of the post-merger ability of the federal courts to administer both legal and equitable relief and the availability of the Declaratory Judgment Act.[127] Although eq-

120. Beacon Theatres, Inc. v. Westover, 252 F.2d 864, 874 (9th Cir. 1958), *rev'd*, 359 U.S. 500 (1959). One might argue that according a collateral estoppel effect to findings would be incongruous in that, absent a determination under FED. R. CIV. P. 54(b), a judgment as to only part of a case should not be regarded as final, a requirement for issue preclusion. *See* C. WRIGHT, FEDERAL COURTS § 100A (4th ed. 1983). In accepting the conclusion of the Ninth Circuit that prior equitable adjudication of factual issues common to the legal counterclaim would preclude relitigation of such issues, the Court tacitly adopted the pragmatic approach of the RESTATEMENT (SECOND) OF JUDGMENTS. In some instances the Restatement permits factual findings which have not become the subject of a final appealable judgment to be conclusive. It notes: "In particular circumstances the wisest course is to regard the prior decision of [an] issue as final for the purpose of issue preclusion without awaiting the end judgment." RESTATEMENT (SECOND) OF JUDGMENTS § 13, comment g (1982). Whether or not the application of issue preclusion to these circumstances is logically tidy, the Supreme Court has unquestionably regarded it as applicable. *See* Parklane Hosiery Co. v. Shore, 439 U.S. 322, 335 (1979); Katchen v. Landy, 382 U.S. 323, 334 (1966).

121. *Beacon*, 359 U.S. at 517 (Stewart, J., dissenting). *See also* American Life Ins. Co. v. Stewart, 300 U.S. 203 (1937).

122. 28 U.S.C. §§ 2201, 2202 (1982). *See also* FED. R. CIV. P. 57.

123. *Beacon*, 359 U.S. at 504-05.

124. *Id.* at 506 (footnote omitted) (emphasis supplied).

125. *Id.* at 504.

126. *See supra* notes 50-60 and accompanying text.

127. *Beacon*, 359 U.S. at 506-10.

uity might have enjoined prosecution of an action at law by the defendant prior to merger,[128] such equitable interposition was now unnecessary. The plaintiff now was able to get a declaration of its legal position, and the defendant was essentially compelled to assert his antitrust counterclaim in the plaintiff's action. As there were no longer any circumstances which required equity to intervene, equity should not be allowed to preclude the issues in the claim triable by the jury. The flexibility of remedies made available to trial judges by merger, including the joinder provisions of the Federal Rules and the Declaratory Judgment Act, substantially curtailed the scope of equity[129] and permitted trial by jury in cases in which it would formerly have been precluded by equitable intervention.

Perceiving a need to protect the right to jury trial, the Court justified the subordination or curtailment of equity on the basis that there is no constitutional protection for trial by the court.[130] The Court cited *Scott v. Neely*[131] for the proposition that the right to trial by jury cannot "be impaired by any blending with a claim, properly cognizable at law, of a demand for equitable relief in aid of the legal action or during its pendency."[132] From "[t]his longstanding principle of equity," the Court concluded that:

> only under the most imperative circumstances, circumstances which in view of the flexible procedures of the Federal Rules we cannot now anticipate, can the right to a jury trial of legal issues be lost through prior determination of equitable claims.[133]

The conclusion reached by the Court in *Beacon Theatres*, however, was much broader than that justified by the equitable principle set forth in *Scott*. *Scott* involved a simple action for debt brought in a federal equity court, pursuant to a Mississippi statute which granted state chancery courts equitable jurisdiction to entertain actions by nonjudgment creditors to set aside fraudulent conveyances.[134] The plaintiff's suit was thus an attempt to effectuate a state statutory grant of equitable jurisdiction in a federal court. The Supreme Court found *federal* equity jurisdiction lacking:

> In the case before us the debt due the complainants was in no respect different from any other debt upon contract; it was the subject of a legal action only, in which the defendants were entitled to a jury trial in the Federal courts. Uniting with a demand for its payment, under the statute of Mississippi, a

128. *Id.* at 507.
129. *Id.* at 516-18 (Stewart, J., dissenting).
130. *Id.* at 510.
131. 140 U.S. 106 (1891).
132. *Id.* at 110.
133. *Beacon*, 359 U.S. at 510-11 (footnote omitted).
134. MISS. CODE § 1843 (1880) (current version at MISS. CODE ANN. § 11-5-75 (1972)).

> proceeding to set aside alleged fraudulent conveyances of the defendants, did not take that right from them, or in any respect impair it.[135]

The Court also referred to Section 16 of the Judiciary Act of 1789,[136] which precluded equitable jurisdiction where there was an adequate remedy at law. The Court's position was consistent with the equitable principle that "[i]n the absence of a statute, a simple contract creditor cannot, in general maintain a creditor's bill" without first obtaining a judgment at law.[137] The *Scott* Court did not hold that a jury trial could not be pre-empted by equitable adjudication when grounds for equitable intervention were present. Thus, *Scott* does not support the notion that, after merger, equity must be contracted to protect the right to trial by jury. Such a contraction *expands* the right to trial by jury. As noted *infra*, many states which have merged law and equity have not similarly restricted equitable power.[138] While the Court in *Beacon Theatres* may have misread *Scott*, it recognized that, after merger, the choice either to curtail equitable discretion or to curtail the right to trial by jury had to be made. Because jury trial is a constitutional right, the Court chose to curtail equitable discretion. The comment by the dissenters in *Beacon Theatres* that "[i]t is, of course, a matter of no great moment in what order the issues between the parties in the present litigation are tried . . . "[139] is a head-in-the-sand approach to the effect of merger on jury trial.

Perhaps *Beacon Theatres* is the simplest application of the Supreme Court's protective attitude toward trial by jury. The case involved two discrete claims, one of which, the antitrust claim, was triable by jury. The Supreme Court was not required to determine whether and to what extent a jury would be required in the trial of a particular claim with mixed legal and equitable aspects. The Supreme Court's next major decision in this area, *Dairy Queen, Inc. v. Wood*,[140] dealt with such a problem and extended the right to trial by jury in a more subtle context, in part, at least, on the basis of an even grosser distortion of *Scott*.

In *Dairy Queen*, the plaintiffs, owners of the trademark "DAIRY QUEEN," had made a franchise agreement with the defendant for use of its trademark. The plaintiffs were to receive most of their payments under the contract from fifty percent of the gross receipts of the defendant. Several years later the plaintiffs notified the defendant that the

---

135. Scott v. Neely, 140 U.S. 106, 110 (1891).

136. Judiciary Act ch. 20, § 16, 1 Stat. 82 (1789) *repealed by* Act of June 25, 1948, ch. 646, 62 Stat. 869.

137. 2 J. POMEROY, JR., A TREATISE ON EQUITABLE REMEDIES § 882 (1905).

138. *See infra* note 295.

139. *Beacon*, 359 U.S. at 514.

140. 369 U.S. 469 (1962).

defendant had breached the contract. The defendant, however, continued to use the trademark.

The plaintiffs sued, alleging a material breach in the contract and a default in payments under the contract. The plaintiffs alleged that failure to cure the breach constituted a cancellation of the contract and that the defendant's continued use of the trademark after the cancellation constituted trademark infringement. The plaintiffs contended that they lacked an adequate remedy at law. They sought temporary and permanent injunctions to restrain the defendant from future use or dealing in the franchise and trademark, an accounting to determine the exact amount of money owed by the defendant, and a judgment for that amount. They also sought an injunction pending the accounting to prevent the defendant from collecting money from Dairy Queen stores in the territory.[141] The defendant demanded a jury trial. The district court granted the plaintiffs' motion to strike the jury demand on the alternative grounds that the action was purely equitable and that whatever legal issues were raised were incidental to the equitable issues.[142] The Third Circuit Court of Appeals denied the defendant's request for a writ of mandamus to vacate this order.

Dairy Queen differed from *Beacon Theatres* in that neither party in *Dairy Queen* ostensibly asserted a discrete claim to which the right to trial by jury attached. The plaintiffs asserted claims for injunctive relief and an accounting, and the defendant did not counterclaim. Nevertheless, the defendant contended that "insofar as the complaint requests a money judgment it presents a claim which is unquestionably legal."[143] The Supreme Court agreed that the action, viewed either as an action for breach of contract or for trademark infringement, would be "subject to cognizance by a court of law."[144] Although the plaintiffs contended that their complaint was cast in terms of an accounting rather than an action for debt or damages, the Court held that "the constitutional right to trial by jury cannot be made to depend upon the choice of words used in the pleadings."[145]

The Court rejected the plaintiffs' assertion that equitable jurisdiction was established by its demand for an accounting. It held that in an action cognizable at law, the plaintiff seeking equitable jurisdiction of legal claims must be able to show that the accounts between the parties are of such a complicated nature that a jury, even with the help of a master,[146] cannot satisfactorily resolve them.[147] The Court noted

141. *Id.* at 475.
142. McCullough v. Dairy Queen, Inc., 194 F. Supp. 686, 687-88 (1961), *rev'd sub nom.* Dairy Queen, Inc. v. Wood, 369 U.S. 469 (1962).
143. *Dairy Queen*, 369 U.S. at 476.
144. *Id.* at 477.
145. *Id.* at 477-78.
146. *See* FED. R. CIV. P. 53(b) (in actions tried by jury, a master may be appointed when issues are complicated).
147. *Dairy Queen*, 369 U.S. at 478.

that an accounting would rarely serve as a basis for equitable jurisdiction.[148]

The Court noted common issues between the claim for injunctive relief and the legal claim for a monetary judgment, and followed *Beacon Theatres* by holding that only under the most imperative circumstances could trial of the legal issues be lost through prior adjudication of the equitable claims.[149] The Court again relied on *Scott*, citing it for the proposition that a court of equity could not take jurisdiction of a claim cognizable only at law when it is united in the same pleading with a claim for equitable relief.[150]

In this respect, however, *Scott* must be viewed in its factual context. Under established equitable principles, the contract claim in *Scott* was cognizable only at law, because it had not been reduced to judgment and was combined with a claim to set aside a fraudulent conveyance, ordinarily a post-judgment equitable remedy. It is one thing to posit that joinder of a claim for post-judgment relief cannot transform a legal claim into an equitable one; it is, in view of the historic scope of equity, quite another to say that joinder of a claim for an injunction with a legal claim does not justify equity in assuming jurisdiction over the whole case.[151] Again, truncation of the historic scope of equity was justified by the Court on the basis of the expanded powers of the district courts following merger.

To the extent that *Dairy Queen* prevented avoidance of trial by jury by blatant mischaracterization of actions for debt as actions for accounting, it was a sensible result. The extent to which *Dairy Queen* sifted out legal issues for prior trial by jury when, ostensibly, nothing but equitable relief was demanded, was novel.[152] Nevertheless, the policy of *Dairy Queen*, if somewhat historically anomalous, is clear: legal *issues*, not just discrete legal claims, must be tried first to a jury if the collateral estoppel effect of prior equitable adjudication will otherwise preclude the right to trial by jury.

This process was carried a major step further in *Ross v. Bern-*

148. *Id.* In *In Re* United States Fin. Sec. Litig., 609 F.2d 411, 424 (9th Cir. 1979), the court noted that accounting was a narrow and little used ground for establishing equitable jurisdiction. Accounting has not been construed so narrowly as a basis for equitable jurisdiction in Maryland. *See infra* notes 266-74 and accompanying text.

149. *Dairy Queen*, 369 U.S. at 472-73.

150. *Id.* at 471-72.

151. The Court held that the trial court could, consistent with the right to trial by jury, grant temporary injunctive relief pending final adjudication on the merits. *Dairy Queen*, 369 U.S. at 479, n.20.

152. Although Justice Story had held in Parsons v. Bedford, 28 U.S. (3 Pet.) 433, 447 (1830) that suits at common law for purposes of the seventh amendment were not limited to actions involving the common law forms but rather "suits in which *legal* rights were to be ascertained and determined . . . " (emphasis added), federal equity jurisdiction clearly extended to actions involving "legal" issues where there was an inadequate remedy at law. Holland v. Challen, 110 U.S. 15 (1884).

hard,[153] a shareholders' derivative suit. The *Ross* plaintiffs sued for damages, alleging that defendants were guilty of gross abuse of trust, willful misconduct, and gross negligence, and demanded a trial by jury. The district court held that only the issue of whether the plaintiff had standing to speak for the corporation had to be tried by the court. On an interlocutory appeal the Second Circuit reversed, holding that a shareholders' derivative action is entirely equitable, and that no part of it should be tried by a jury.[154]

From an historical perspective, the view of the Second Circuit with respect to the inapplicability of trial by jury in derivative actions was correct.[155] That court recognized the refusal at common law "to permit stockholders to call corporate managers to account in actions at law."[156] Equity had filled this void by permitting the development of the derivative action. The Supreme Court reversed. The majority noted that the derivative suit has two stages: 1) the equitable matter of standing of the plaintiff to represent the shareholders; and 2) the underlying legal claim asserted on behalf of the corporation. The Court held that the federal rules permitted the district court to entertain both claims.[157] The Court stated:

> It is no longer tenable for a district court, administering both law and equity in the same action, to deny legal remedies to a corporation, merely because the corporation's spokesmen are its shareholders rather than its directors.[158]

By contracting the scope of equity, the Court again focused on the nature of the issues rather than on historical procedural limitations. In determining the applicability *vel non* of trial by jury, the Court held "that the right to jury trial attaches *to those issues* in derivative actions as to which the corporation, if it had been suing in its own right, would have been entitled to a trial by jury."[159] Mandating a jury as to a legal corporate claim created a right that had not existed prior to merger. In dissent, Justice Stewart chided, perhaps legitimately, that the Court relied on an "ill-defined combination of the Seventh Amendment and the Federal Rules . . . to do what each was expressly intended not to do, namely to enlarge the right to a jury trial in civil actions brought in the courts of the United States."[160]

The Court stated in a footnote that whether an issue is legal is determined by pre-merger custom, by the remedy sought, and by the

153. 396 U.S. 531 (1970).
154. 403 F.2d 909, 912 (2d Cir. 1968), *rev'd*, 396 U.S. 531 (1970).
155. *See* United Copper Co. v. Amalgamated Copper Co., 244 U.S. 261 (1917); Fleitman v. Welsbach, 240 U.S. 27 (1916).
156. *Ross*, 396 U.S. at 534.
157. *Id.* at 539.
158. *Id.* at 540.
159. *Id.* at 532-33.
160. *Id.* at 543 (Stewart, J., dissenting).

practical abilities and limitations of juries.[161] The consideration of the third factor, the practical abilities of juries, introduced the notion that trial by jury might be denied in otherwise legal actions because the issues were too complex for a jury.[162]

As to what types of legal issues the right to jury trial attaches in a hybrid claim, the most significant guidance provided by the Supreme Court came in *Curtis v. Loether*.[163] This was a suit for damages and injunctive relief under the fair housing provisions of the Civil Rights Act of 1968.[164] The defendant demanded a trial by jury. The trial court denied the demand; the Seventh Circuit reversed.[165] The plaintiff contended that the seventh amendment did not apply to new causes of action created by congressional enactment.[166] The Supreme Court held that the suit was an action to enforce legal rights within the meaning of the seventh amendment:

> A damages action under the statute sounds basically in tort — the statute merely defines a new legal duty, and authorizes the courts to compensate a plaintiff for the injury caused by the defendant's wrongful breach . . . . [T]his cause of action is analogous to a number of tort actions recognized at common law. More important, the relief sought here — actual and punitive damages — is the traditional form of relief offered in the courts of law.[167]

In determining whether issues are triable by the jury by looking to the nature of the right and the remedy at common law, *Curtis* blunted criticism by Justice Stewart in *Ross* that post-*Beacon Theatres* decisions would swallow up equity:

> An equitable suit for an injunction, for instance, often involves issues of fact which, if damages had been sought, would have been triable to a jury. Does this mean that in a suit asking only for injunctive relief these factual issues *must* be tried to the jury, with the judge left to decide only whether, given the jury's findings, an injunction is the appropriate

161. *Id.* at 538 n.10.
162. A few federal districts have stricken jury demands because of the complexity of the issues. *See* ILC Peripherals Leasing Corp. v. International Business Machines, 458 F. Supp. 423 (N.D. Cal. 1978) (antitrust); Bernstein v. Universal Pictures, Inc., 79 F.R.D. 59 (S.D.N.Y. 1978) (antitrust); Radial Lip Mach., Inc. v. International Carbide Corp., 76 F.R.D. 224 (N.D. Ill. 1977) (trademark and patent infringement); *In re* Boise Cascade Securities Litig., 420 F. Supp. 99 (W.D. Wash. 1976) (securities). *But see In re* United States Fin. Sec. Litig., 609 F.2d 411, 431 (9th Cir. 1979) (the court refused to read such a complexity exception into the seventh amendment).
163. 415 U.S. 189 (1974).
164. 42 U.S.C. § 3612 (1982).
165. Rogers v. Loether, 467 F.2d 1110 (7th Cir. 1972), *aff'd sub nom.* Curtis v. Loether, 415 U.S. 189 (1974).
166. *Curtis*, 415 U.S. at 193.
167. *Id.* at 196 (footnote omitted).

remedy?[168]

Since *Curtis*, the lower federal courts have analyzed the remedy sought as well as the nature of the action in order to determine the applicability of the right to trial by jury.[169] There is no right to trial by jury if only equitable relief, such as injunction,[170] rescission,[171] restitution,[172] cancellation,[173] or foreclosure[174] is sought.

Under current federal practice, courts analyze the nature of the action and the remedy sought to determine the applicability of the right to trial by jury. Historically equitable procedures, such as class actions[175] and actions involving interpleader,[176] intervention,[177] and contribution[178] preliminary to the merits may be equitable, but the underlying issues and the relief sought are determinative of the jury trial issue at later stages of the lawsuit. Because there is no right to jury trial of claims against the United States, the Federal Tort Claims Act[179] presents a difficult question concerning that right when the United States is joined as a defendant with others.[180] Some courts consider the jury verdict as to other defendants as advisory regarding issues of fact relevant to the liability of the United States.[181] This practice has not been unanimously accepted.[182]

Analysis of the federal experience with merger indicates that Maryland's revised rules will present mixed legal and equitable claims in situations which have not heretofore been encountered. For the most part, the ultimate federal response in such situations has been to expand the scope of the jury trial right. Although this expansion has not been reflexive or without thought, a merged system does not re-

168. *Ross*, 396 U.S. at 549-50 (Stewart, J., dissenting) (emphasis in original).
169. Thus, in Gnossos Music v. Mitken, Inc., 653 F.2d 117 (4th Cir. 1981), the court held that the right to trial by jury attached to an action for injunction and minimum statutory damages for copyright infringement brought under 17 U.S.C. § 504(c) (1976) because the right was analogous to tortious interference with a property right, and the remedy was analogous to an action for debt. *Id.* at 120-21. In Barber v. Kimbrell's, Inc., 577 F.2d 216 (4th Cir.), *cert. denied*, 439 U.S. 934 (1978), the court used similar reasoning to find a trial by jury right with respect to damage claims under the Truth in Lending Act, 15 U.S.C. § 1640 (1982).
170. *See* Lulling v. Barnaby's Family Inns, Inc., 87 F.R.D. 720 (E.D. Wis. 1980).
171. *See* Skippy, Inc. v. CPC Int'l, Inc., 674 F.2d 209 (4th Cir. 1982), *cert. denied*, 459 U.S. 969 (1982).
172. *See* S.E.C. v. Asset Management Corp., 456 F. Supp. 998 (S.D. Ind. 1978).
173. *See* Chevron, U.S.A., Inc. v. Oubre, 93 F.R.D. 622 (M.D. La. 1982).
174. *See* Gefen v. United States, 400 F.2d 476 (5th Cir. 1968); Damsky v. Zavatt, 289 F.2d 46 (2d Cir. 1961).
175. 9 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2307 (1971).
176. *See* Pan Am. Fire & Casualty Co. v. Revere, 188 F. Supp. 474 (E.D. La. 1960).
177. *See* 5 J. MOORE, J. LUCAS & J. WICKER, MOORE'S FEDERAL PRACTICE ¶ 38.38[3] (2d ed. 1982).
178. *See In re* N-500L cases, 691 F.2d 15 (lst Cir. 1982).
179. 28 U.S.C. §§ 1346(b), 2671 (1982).
180. *See* Barron v. United States, 654 F.2d 644 (9th Cir. 1981).
181. *See* Poston v. United States, 262 F. Supp. 22 (D. Hawaii 1966).
182. *See* Wright v. United States, 80 F.R.D. 478 (D. Mont. 1978).

quire the expansion of the jury trial right merely because the Constitution preserves such a right. Merger may instead result in the expansion of the scope of equity, as has been the tendency throughout Maryland legal history.

IV. THE RELATIONSHIP BETWEEN EQUITY AND THE RIGHT TO TRIAL BY JURY IN MARYLAND

A. The Right to Trial by Jury

The division of law and equity acted as a guarantor of the right to trial by jury. In Maryland, this division never really served as an absolute protection. There has been limited power for a court of law to entertain equitable defenses, and there was considerable power in courts of equity to entertain strictly legal claims and grant monetary relief.[183] Prior to merger, however, there were limitations on the extent to which the law and equity courts could entertain claims within each other's jurisdiction. A merged system places legal claims and issues in tribunals capable of exercising equitable jurisdiction and equitable power.

There appears to be little Maryland authority compelling the courts to adopt doctrines comparable to those adopted by the Supreme Court in *Beacon Theatres*, *Dairy Queen* and their progeny to preserve the right to trial by jury as it existed at the time of the adoption of the Constitution. If there is no such authority, then the question arises whether Maryland trial judges must order proceedings involving both legal and equitable claims so as to prevent loss of the jury trial right. If trial judges do not respect traditional limitations on the scope of equitable powers and instead deem themselves to have the power to exercise untrammeled jurisdiction as chancellors over *all* hitherto legal claims, the adoption of the revised rules will result in considerable contraction of the right to trial by jury.

The issues decided in *Beacon Theatres* and *Dairy Queen* have not been squarely confronted by Maryland's appellate courts.[184] Nevertheless, some Maryland decisions indicate an intention to prevent undue encroachment by chancery on jurisdiction of courts of law and the right to trial by jury.

In an early decision, *Richardson v. Stillinger*,[185] the court of appeals demonstrated a keen awareness of the potential effect of the ex-

183. As discussed earlier, some consolidation of legal and equitable issues was permitted in federal courts by statute in the Law and Equity Act of 1915, Act of March 3, 1915, ch. 90, 38 Stat. 956, *repealed by* Act of June 25, 1948, ch. 646, 62 Stat. 996. *See supra* notes 70-74 and accompanying text.

184. A decision of the Court of Special Appeals of Maryland, Smith v. Edwards, 46 Md. App. 452, 418 A.2d 1227 (1980), *rev'd on other grounds*, 292 Md. 60, 437 A.2d 221 (1981), explicitly rejected the holding of *Dairy Queen*, that the right to trial by jury could not be avoided by resort to equity.

185. 25 Md. 326, 12 G. & J. 477 (1842).

pansion of equity jurisdiction on the right to trial by jury. The plaintiff therein sued in chancery to enforce a vendor's lien because of the defendant's default in payment of a note. The court reversed the trial court's judgment for the plaintiff on the basis that the plaintiff had an adequate remedy at law, an action on the note, and therefore had no need to resort to equity.

Recognizing the difficulty of determining when equity jurisdiction is appropriate,[186] the court asserted that actions at law were the superior method of trial "of most of the controversies between man and man."[187] The court also lauded the Federal Judiciary Act's limitation on equitable jurisdiction,[188] based on a desire to protect the right to trial by jury rather than a need to fastidiously keep the spheres of judicial administration separate and distinct. This desire is demonstrated by Maryland's approval of several Virginia decisions which protected the right to trial by jury by limiting the scope of equitable jurisdiction to situations where the legal remedy was inadequate.[189] One of the early Virginia decisions, *Turpin v. Thomas*, decried "the natural and progressive tendency of the jurisdiction of the chancery to encroach upon that of the common law courts . . . and thus . . . to lose the advantage of jury trial."[190] In 1842, the Court of Appeals of Maryland explicitly expressed its agreement with *Turpin*[191] in a decision that cannot be regarded as a construction of the current civil jury trial right, which did not appear in the Maryland Constitution until 1851.[192]

In *Johnson & Higgins v. Simpson*,[193] the court of appeals had an opportunity to consider the problem that later arose in *Beacon Theatres* and *Dairy Queen*. The plaintiff filed an equitable action for an accounting against the administratrix of an estate, who had asserted a legal action against the equity plaintiff to recover a claim of the estate. The equity plaintiff also sought to enjoin the action at law.[194] The equity plaintiff asserted that the accounts were too complex for the

186. *Id.*
187. *Id.* at 479-80.
188. *See supra* note 50. The Federal Judiciary Act precluded equitable jurisdiction where there was an adequate remedy at law.
189. *Richardson*, 25 Md. at 329, 12 G. & J. at 480.
190. 4 Va. 377, 380, 2 Hen. & M. 139, 146 (1808); *see also* Alderson v. Biggars, 4 Va. 952, 4 Hen. & M. 470 (1809).
191. *Richardson*, 25 Md. at 329, 12 G. & J. at 480.
192. Art. III of the Declaration of Rights of the Maryland Constitution of 1776 provided:

> That the inhabitants of Maryland are entitled to the common law of England, and the trial by jury, according to the course of that law . . . .

See 3 F. THORPE, AMERICAN CHARTERS, CONSTITUTIONS AND ORGANIC LAWS 1492-1508, 1686-87 (1909). This right to jury trial provision was regarded by the framers of the 1851 Constitution as subject to restriction by the Legislature. *Id.*
193. 165 Md. 83, 166 A. 617 (1933).
194. The executor's claim was based on services rendered by the deceased to the plaintiff in equity. The plaintiff in equity alleged that the deceased had juggled its books. *Johnson*, *id.* at 88, 166 A. at 619.

jury.[195] The defendant argued that her claim could be asserted only at law, where the Consitution entitled her to a trial by jury.[196]

Unfortunately, the court of appeals did not decide whether assumption of equitable jurisdiction over what was essentially a defense to a legal action would unconstitutionally infringe the equity defendant's right to trial by jury. The court held that "the suit having been begun at law, it should there remain . . . ."[197] Interestingly, the court foreshadowed Justice Black's *Beacon Theatres* analysis of the collateral estoppel problem created by separate legal and equitable adjudications of the same factual situation by asserting the untenable assumption that both determinations would be proper.[198] Although the *Johnson* decision protected the right to trial by jury by keeping the subject matter of the equity defendant's legal claim out of the equity court, its holding should perhaps be regarded as a statement that equity should not have exercised jurisdiction in this isolated instance.

Allender v. Ghinger[199] contains the strongest endorsement of the civil jury trial in Maryland jurisprudence. In *Allender*, the plaintiff was appointed to liquidate a bank. He sued the bank's shareholders in equity to collect the par value of the shareholders' stock. The Court of Appeals of Maryland held that resort to equity was not justified to avoid multiplicity because, although each shareholder was individually liable, new joinder rules eliminated the necessity of separate suits and hence rendered the remedy at law adequate.[200] The court stated that equitable jurisdiction was improper because the defendants would be subjected to a forum in which they would be deprived of a trial by jury.[201] Nevertheless, the *Allender* opinion strongly suggests that the respective spheres of law and equity may be altered in such a way as to limit the right to trial by jury far more than do the federal courts. After citing Mr. Justice Story as to the importance of trial by jury to the American people,[202] the *Allender* court cited with approval the old and little noted case of *Capron v. De Vries*,[203] which indicates the flexible nature of Maryland's right to trial by jury.[204]

In *Capron*, an equity court gave a deficiency judgment against a defendant who failed to pay the price bid for property at auction. Pursuant to a court order, the property was sold, and the purchase price

195. *Id.* The issue of the complexity of the accounts is similar to that raised in *Dairy Queen*. *See supra* notes 140-48 and accompanying text. The court in *Johnson* did not explicitly resolve the issue as to whether the accounts were sufficiently complex to give equity jurisdiction.
196. *Johnson*, 165 Md. at 89, 166 A. at 619.
197. *Id.* at 90, 166 A. at 619.
198. *Id.* at 89, 166 A. at 619.
199. 170 Md. 156, 183 A. 610 (1936).
200. *Id.* at 164-65, 183 A. at 614.
201. *Id.* at 167-68, 183 A. at 615-16.
202. *Id.* at 167, 183 A. 616 (citing Parsons v. Bedford, 28 U.S. (3 Pet.) 433, 446 (1830)).
203. 83 Md. 220, 34 A. 251 (1896).
204. *Johnson*, 165 Md. at 167, 183 A. at 616.

was less than that due from the defendant. The defendant argued that the equity court's granting judgment for the deficiency violated her constitutional right to trial by jury. The court rejected her contention and held:

> It can hardly be established that the legislature has not the power to enlarge the jurisdiction of equity. The system of equity jurisprudence has been of steady growth ever since its origin; sometimes by the effect of judicial decisions, and sometimes by statute law. It is difficult to see a reason why the legislature could not give it the jurisdiction to pass a decree for the payment of a sum of money which the court finds to be due from one suitor to another in a proceeding pending before it.[205]

Thus, either the legislature or an appellate court may contract the scope of the right to trial by jury by expanding the scope of equity.[206] Paying heed to *Capron*, *Allender* upheld the right to jury trial on the basis that no statute or judicial decision had broadened the scope of equity with respect to litigation of the subject matter involved. Thus, the jury trial right was not upheld simply on the basis that the right itself precluded resort to equity.

Allender becomes less a bulwark of the right to trial by jury when it is compared with a later related case, *Fooks Executors v. Ghinger*.[207] *Fooks* involved a claim in equity by the same receiver on the same basis as *Allender*. A decree had been entered and had become enrolled.[208] Since the court of appeals had ruled in *Allender* that equity lacked jurisdiction over such a suit, the appellant in *Fooks* asserted that the decree was void. The court indicated that it regarded the original claim by the receiver as legal,[209] and that the legislature could not fix the scope of equity to violate the constitutional right to trial by jury.[210]

---

205. *Capron*, 83 Md. at 224, 34 A. at 252.

206. Of course, the power of the legislature in this respect is not entirely unrestricted. In McCoy v. Johnson, 70 Md. 490, 17 A. 387 (1889), the court held that the legislature could not deprive suitors of the right to trial by jury with respect to legal rights by conferring the right to determine legal rights on courts of equity. *Id.* at 492, 17 A. at 387. The case, however, involved only the issue of title to land, and the plaintiff did not invoke any of the well-established bases for resort to equity when essentially legal rights are at issue. *Id.*

207. 172 Md. 612, 192 A. 782 (1937).

208. The court noted that a bill of review ordinarily must be filed within the time permitted for appeal. *Fooks*, 172 Md. at 617, 192 A. at 784. *See* MD. R.P. 625 (1977). The bill was filed in 1936 by the defendant's executor; the decree sought to be reopened had been entered in 1934. *Fooks*, 172 Md. at 616-17, 192 A. at 784.

209. *Fooks*, 172 Md. at 623, 192 A. at 787.

210. *Id.* at 625, 192 A. at 788. The court of appeals correctly perceived the intent of the framers of Maryland's constitutional right to trial by jury. It was placed in the Constitution in 1851 to protect the jury trial right from encroachment by the legislature, as indicated by the Proceedings of the Maryland Constitutional Convention of 1851.

Prior to 1851, the Declaration of Rights provided for trial by jury "subject

Nevertheless, the court saw the boundary between when a chancellor may and may not entertain suits involving legal rights as so hazy that any decree in an action inappropriately entertained should be voidable rather than void. As the court noted:

> The limits of the respective jurisdictions of those two sides of the same court are fixed by the ordinary common-law distinction between courts of law and courts of chancery. Those limits are in many instances so vague and shadowy that if the validity of the decree of a circuit court in its capacity as a court of chancery were to depend in every case upon the fact that according to the ordinary practice of the court the power to enter the particular decree was not within its equity jurisdiction, although within its general jurisdiction, its judgments and decrees would lack finality and certainty, rights depending upon them must necessarily be illusory and uncertain, and litigation endless.[211]

The court in *Fooks* simply recognized that the right to trial by jury protected by the United States Constitution is one which existed at the time of the adoption of the Maryland Constitution.[212] That right attached to a spectrum of actions at law which, in certain instances, might have been entertained in equity. *Preservation* of the right to trial by jury, as opposed to *extension* of the right, in the face of any procedural reforms requires attentiveness to the situations in which the right has been limited by accepted equitable encroachments.

The respect of the court of appeals for the right to trial by jury in the face of its oft-stated respect for established equitable encroachments on legal actions is demonstrated in *Impala Platinum Ltd. v. Impala Sales, U.S.A., Inc.*[213] In that case, the plaintiff brought an action at law against two defendants for payment of the price of goods sold and delivered. One of the defendants counterclaimed, praying for an accounting, an equitable remedy, as well as punitive damages,[214] which

---

nevertheless to the revision of, and amendment or repeal by the Legislature of this State . . . . " MD. CONST. art. 3 (1776) (current version at MD. CONST. art. 5).

Part of the discussion pertaining to the addition in 1851 of the ancestor of the current civil jury trial provision reads as follows:

> Mr. CONSTABLE added that the Legislature had the express right to repeal the whole of this article, and they had constantly exercised the power to modify it. He had little fear of any inroad upon trial by jury; but he should prefer to have it in the Constitution rather than to have it left to the Legislature.

DEBATES AND PROCEEDINGS OF THE MARYLAND CONSTITUTION, 1850-1851, 676 (1851).

The decision in Capron v. DeVries obviously indicates that the 1851 provision has not been construed to preclude contraction of the right to trial by the Legislature. *Capron*, 83 Md. at 224, 34 A. at 252 (1896).

211. *Fooks*, 172 Md. at 625-26, 192 A. at 788.
212. *Id.*
213. 283 Md. 296, 389 A.2d 887 (1978).
214. *Id.* at 299, 389 A.2d at 890.

are not recoverable in equity.[215] The defendant's counterclaim was based in part upon the existence of a confidential relationship among the parties. Such a relationship has traditionally provided justification for the interposition of equity.[216]

After a jury verdict for the defendant on the counterclaim, the plaintiff, who had sued at law initially, argued on appeal that the suit was not triable to a jury because the defendant had injected equitable claims and issues into the case. There is ample support in Maryland for the proposition that once equitable jurisdiction attaches, a court of law has no further role to play.[217] When the plaintiff objected to trial by jury in the trial court, however, the defendant was granted leave to strike from the counterclaim all relief prayed other than damages. As to the defendant's reliance on a fiduciary relationship, the court viewed it as akin to equitable estoppel, which is cognizable at law and in equity.[218] Clearly, the court disregarded established equitable notions which might have permitted the trial court to dispense with the jury.

Decisions such as *Impala Platinum* and *Allender* recognize the ability of chancery, in appropriate cases, to narrow the scope of law. They also offer an important message to trial judges grappling with the unprecedented consolidation of legal and equitable claims which the revised rules permit: the Maryland judiciary has often guarded the right to trial by jury against such equitable encroachment.

B. Established Equitable Encroachments Upon the Jurisdiction of Courts of Law

The right to trial by jury has been best protected by a generally assiduous effort by the Maryland judiciary to maintain the separation of legal and equitable jurisdiction and to keep legal and equitable claims in the appropriate sides of the courts. The Maryland Rules have allowed limited consolidation of legal and equitable issues. Defendants at law have been permitted to assert equitable defenses[219] and separate trials of legal issues have been permitted in equitable actions.[220] There

215. *See* Superior Constr. Co. v. Elmo, 204 Md. 1, 102 A.2d 739 (1954).
216. *See infra* notes 245-65 and accompanying text.
217. *See infra* notes 245-54 and accompanying text.
218. Md. R.P. 342(d) (1977) permitted special pleas on equitable grounds in actions at law.
219. Md. R.P. 342(d) (1977). This rule did not permit a law court to grant equitable relief such as rescission of a contract. *See* Conner v. Groh, Doub & Co., 90 Md. 674, 45 A. 1024 (1900). It did enable a defendant to defensively assert matters that might entitle him to relief in equity. *See* Jameson v. Citizens Nat'l Bank, 130 Md. 75, 99 A. 994 (1917); Williams v. Peters, 72 Md. 584, 20 A. 175 (1890). Allowing such defenses sometimes eliminated the need for a subsequent equitable proceeding, and, indeed, the availability of such a procedure may narrow the scope of equity by making the remedy at law adequate. Mountain Lake Park Ass'n v. Shartzer, 83 Md. 10, 34 A. 536 (1896).
220. Md. R.P. 502 (1977). This device was not limited solely to trial by the court of equitable issues in actions at law. It has also been used to resolve legal issues in

was even some authority for a chancellor to refer factual issues in equity for trial by jury, although the practice fell into disuse and was eventually abolished by former Maryland Rule 517.[221] Strangely enough, consolidation of legal and equitable claims has not been entirely unknown.[222]

Professor Brown has very ably described the scope of equity in Maryland as predicated on two bases: (1) substantive rights which are regarded as of equitable origin, and (2) cases in which rights of legal origin exist but in which the legal remedy is "inadequate, incomplete or uncertain."[223]

1. Substantive Equitable and Legal Classification of Actions

Where "substantive" equitable rights are involved, the applicability of the right to trial by jury may be resolved by a look at Maryland legal history. In some instances, the legislature or the court of appeals has simplified the inquiry by classifying certain actions as equitable by statute or court rule.[224] Such power is apparently not without limits.[225] Sometimes, then, the applicability of the right to trial by jury may be determined by a court's analysis of the action's historical pedigree.[226]

---

actions in equity. *E.g.*, Irvine v. Montgomery County, 239 Md. 113, 210 A.2d 359 (1965) (municipal immunity); Beach v. Mueller, 32 Md. App. 219, 359 A.2d 232 (1976) (dictum) (*res judicata*). Use of the procedure is entirely discretionary with the trial court. A. S. Abell Co. v. Skeen, 265 Md. 53, 288 A.2d 596 (1972).

221. Md. R.P. 517 (1977) provided:

> The practice heretofore existing of transferring issues of fact arising in an action in equity to a court of law for an advisory verdict by a jury is hereby abolished. All such issues shall be determined in the equity court in accordance with the existing equity practice, without a jury.

This policy is carried forward in MD. R.P. 2-511(d).

222. *See* Surrey Inn v. Jennings, 215 Md. 446, 138 A.2d 658 (1958) (single opinion by trial court in related law and equity cases); Finch v. Hughes Aircraft Co., 57 Md. App. 190, 469 A.2d 867 (1984); H.A. Knott Ltd. v. Poppleton Place Assoc., No. 83224045/L9593 (Cir. Ct. Balt. City filed Aug. 12, 1983); Fidelity & Deposit Co. v. Poppleton Place Assoc., No. 83209052 (Cir. Ct. Balt. City filed July 28, 1983) (consolidated with H.A. Knott Ltd. v. Poppleton Place Assoc. by order of court of Dec. 13, 1983). *But see* Creamer v. Helferstay, 294 Md. 107, 448 A.2d 332 (1982) (disapproving of such consolidation, at least to the extent it would involve a court of law administering equitable relief).

223. Brown, *supra* note 1, at 428; Baltimore Sugar Ref. Co. v. Campbell & Zell Co., 83 Md. 36, 53, 34 A. 369, 371 (1896).

224. *E.g.*, MD. CODE ANN. art. 16, § 5 (1981) (alimony); Md. R.P. W72b (1977) (mortgage foreclosure).

225. *Compare* McCoy v. Johnson, 70 Md. 490, 17 A. 387 (1889) (discussed *supra* note 206) *with* Pernall v. Southall Realty, 416 U.S. 363 (1974) (legislative determination that statutory eviction proceeding should be tried without a jury unconstitutional).

226. *See* McCoy v. Johnson, 70 Md. 490, 17 A. 387 (1889). The federal courts have a similar process. In Pernell v. Southall Realty, 416 U.S. 363 (1974), the Supreme Court declined to accept a legislative determination that statutory eviction could be tried without a jury. In Katchen v. Landy, 382 U.S. 323 (1966), the Court allowed a related legal claim to be cleaned up by equity, in part because of the historic characterization of bankruptcy proceedings as equitable. In Curtis v. Loether, 415 U.S. 189 (1974), the Supreme Court characterized a civil rights ac-

There is support in Maryland for such an analysis of historic categorization of actions. Discovery was once almost exclusively the province of equity.[227] At a very early stage, Maryland adopted discovery provisions in actions at law.[228] The court of appeals has consistently held that the creation of an adequate discovery remedy at law has not ousted equity jurisdiction over bills of discovery.[229] Nevertheless, the court has also held that discovery alone will not support equitable jurisdiction; there must be some other basis on which equity may exercise jurisdiction.[230]

Of course, the classification of actions as legal is a substantive as well as an historical inquiry.[231] It does not appear that the Maryland courts would extend the right to trial by jury to actions which did not exist at the time of the adoption of the Constitution.[232] Maryland decisions have expressed a very clear preference for adjudicating actions

---

tion for damages as legal, in part because of the close analogy to a common law action in tort.

227. *See* F. JAMES & G. HAZARD, CIVIL PROCEDURE § 6.1 (2d ed. 1977).

228. For instance, 1801 Md. Laws ch. 74, § 6 provided:

> The said courts shall have power, in the trial of actions at law, on motion made at the first court after the appearance court, supported by affidavit, that the same is not intended for delay, and due notice thereof being given, to require the parties to produce copies, certified by a justice of the peace, of all such parts of all books or writings in their possession or power as contain evidence pertinent to the issue, or to answer any bill for discovery only which may be filed by the second court after the appearance court, in cases and under circumstances where they might be compelled to produce the said original books or writing, or answer such bill of discovery by the ordinary rules or proceeding in chancery; and if a plaintiff shall fail to comply with any such order to produce such books or writings, or answer such bill of discovery, it shall be lawful for the said courts, on motion, to give the like judgment for the defendant as in cases of nonsuit; and if a defendant shall fail to comply with such order to produce books or writings, or to answer any bill for discovery only, it shall be lawful for the said courts, on motion as aforesaid, to give judgment against him, her, or them, by default; provided, that any plaintiff or defendant may, in compliance with any rule for producing extracts of such books or papers, bring into court the original books or papers.

229. *See* Spangler v. Dan A. Sprosty Bag Co., 183 Md. 166, 36 A.2d 685 (1944); Zalis v. Orman, 175 Md. 100, 199 A. 877 (1938); Union Passenger Ry. v. Mayor and City Council of Baltimore, 71 Md. 238, 17 A. 933 (1889). In *Union Passenger Ry.*, the court held that, even when the legislature gives jurisdiction to law courts of matters traditionally heard in equity, equity is not ousted. *Union Passenger Ry.*, 71 Md. at 241, 17 A. at 934 (citing Barnes v. Crain, 33 Md. 311, 315, 8 Gill 391, 398 (Md. 1849)). Such a holding would not inappropriately restrict the right to trial by jury because law jurisdiction over such matters did not exist at the time the Constitution was adopted.

230. *See* Johnson v. Bugle Coat, Apron & Linen Serv., 191 Md. 268, 60 A.2d 686 (1948); Becker v. Frederick W. Lipps Co., 131 Md. 301, 101 A. 783 (1917).

231. Actions at law to which a right to trial by jury would attach are comprehensively described in 1 POE'S PLEADING AND PRACTICE §§ 71-275A (H. Sachs, Jr. 6th ed. 1970).

232. *See* Impala Platinum Ltd. v. Impala Sales (U.S.A.), Inc., 283 Md. 296, 320, 389 A.2d 887, 901 (1978).

with respect to land titles in courts of law. The preference that this substantive area be adjudicated at law is so strong that it diminishes remedial considerations that otherwise might confer equitable jurisdiction.

This may be seen in *Finglass v. George Franke Sons Co.*,[233] in which the plaintiff sought to enjoin an adjoining landowner from closing off an alley. The court of appeals affirmed the trial court's dismissal of the bill because of a lack of equitable jurisdiction, and stated that: "[u]nder the settled practice in this state, the dispute of title should be litigated at law."[234] Although the plaintiff adverted to the need for drainage through the alley in support of its claim for equitable relief, the court held that "[t]here was no evidence that whatever drainage might pass through was now obstructed in any way, and there was no appearance of necessity for immediate equitable interference."[235] The court also indicated that subsequent equity proceedings would be unnecessary because the law court could grant an injunction at law as an ancillary remedy.[236] Absent extraordinary circumstances,[237] actions involving title to land usually have been heard on the law side with a right to a trial by jury.

2. Equitable Classification Based on Procedural Considerations

Although equity may supplant jurisdiction of courts of law if there is any basis for equitable relief, the Court of Appeals of Maryland has attempted to limit the applicability of equitable relief to specific circumstances. Maryland appellate decisions in this area are not always easily reconcilable because of the role the facts of each case play in equity jurisprudence. The notion that equity will not act if there is an adequate remedy at law was established very early in Maryland.[238]

In *Bachman v. Lembach*,[239] the plaintiff sought in equity to recover the contents of a safe deposit box from the joint custodian. The defendant contended that equitable jurisdiction was lacking because the legal

233. 172 Md. 135, 190 A. 752 (1937).
234. *Id.* at 136, 190 A. at 752.
235. *Id.* at 137, 190 A. at 753.
236. *See* Diener v. Wheatley, 191 Md. 690, 62 A.2d 783 (1948); Schultz v. Kaplan, 189 Md. 402, 56 A.2d 17 (1947); Smith v. Shiebeck, 180 Md. 412, 24 A.2d 795 (1942); Mountain Lake Park Ass'n v. Shartzer, 83 Md. 10, 34 A. 536 (1896). *But see* Waring v. National Sav. & Trust Co., 138 Md. 367, 114 A. 57 (1921) (equity court could declare deed invalid as ancillary remedy in suit for enforcement of lien created by deed of trust).
237. In Smith v. Shiebeck, the plaintiffs sought injunctive relief to compel the defendants to remove a fence from what the plaintiffs contended was a public road. Although the court enunciated the general rule discussed above, it allowed the plaintiffs to proceed in equity because they had no other convenient means of access to their farm. *Smith*, 180 Md. at 415, 417, 24 A.2d at 798, 799.
238. *See* Richardson v. Stillinger, 25 Md. 326, 12 G. & J. 477 (1842); Waters v. Howard, 1 Md. Ch. 80 (1847).
239. 192 Md. 35, 63 A.2d 641 (1949).

remedies of replevin, trover, and money had and received were adequate. The court agreed, holding that the chattels sought did not have unique value. The plaintiff claimed that equity was necessary to prevent a multiplicity of actions because more than one person might purloin the contents of the box. The court responded that the avoidance of multiplicity of actions is not an independent ground of equitable jurisdiction.[240] The court held that the issue of multiplicity had to be considered in light of the recently enacted joinder rules which would have permitted the plaintiff to join his claims against more than one defendant[241] and which narrowed the scope of equity: "In considering whether discretion should be exercised to avoid a multiplicity of suits, we cannot disregard the fact that the issue here could be decided in a single action at law."[242] *Bachman* and the discovery cases[243] suggest that the "inadequate remedy at law" requirement for equitable jurisdiction retains dynamism in Maryland similar to that accorded the parallel federal notion in *Beacon Theatres* and *Dairy Queen*.[244]

If the established right to trial by jury is to be preserved in the face of unprecedented litigation of legal claims by tribunals possessing equity powers, judges must recognize that equity may assume jurisdiction over legal claims only in cases in which the legal remedy is deemed to be inadequate. This may be seen in several specific areas where equity has intervened to adjudicate what substantively may be regarded as legal rights.

a. Confidential Relationships

Equity has frequently intervened to alleviate the consequences of fraud or the abuse of a confidential relationship. Fraud has been regarded as particularly within the competence of equity,[245] although law courts have the authority to try issues of fraud.[246] Equity has interposed itself in the context of relationships ranging from employer/employee[247] and agent/principal,[248] to those in the context of the adminis-

240. *Bachman*, 192 Md. at 41, 63 A.2d at 643. Multiplicity certainly is a significant factor concerning the existence *vel non* of equitable jurisdiction. *See infra* notes 276-78 and accompanying text.

241. 192 Md. at 42, 63 A.2d at 644 (citing GRPP, III, 2(a), (d)) (current versions at MD. R.P. 2-303(c), 2-212(a)).

242. *Bachman*, 192 Md. at 43, 63 A.2d at 644.

243. *See supra* note 230 and accompanying text.

244. *See supra* note 114 and accompanying text.

245. *See* Nagel v. Todd, 185 Md. 512, 45 A.2d 326 (1946); Spangler v. Dan A. Sprosty Bag Co., 183 Md. 166, 36 A.2d 685 (1944); Chase v. Gray, 134 Md. 619, 107 A. 537 (1919).

246. *See* Anderson v. Watson, 141 Md. 217, 232, 118 A. 569, 574 (1922); National Park Bank v. Lanahan, 60 Md. 477 (1883).

247. *See* Spangler v. Dan A. Sprosty Bag Co., 183 Md. 166, 36 A.2d 685 (1944); Anderson v. Watson, 141 Md. 217, 118 A. 569 (1922).

248. *See* Dormay v. Doric Co., 221 Md. 145, 156 A.2d 632 (1959); Baltimore Sugar Ref. Co. v. Campbell & Zell Co., 83 Md. 56, 34 A. 369 (1896); *see also* Finch v. Hughes Aircraft, 57 Md. App. 190, 469 A.2d 867 (1984) (joint venturers).

tration of estates[249] and property of minors.[250] For the most part, equitable intervention in such instances is not based on the essential nature of the rights asserted in actions based on such relationships. Rather, it is based on the ability of equity to provide remedies unavailable at law, such as injunction, the imposition of a constructive trust, cancellation, rescission of a contract, or accounting. Frequently, the inadequacy of the legal remedy arises from a vulnerability of one of the parties to the relationship.

The Court of Appeals of Maryland has not permitted invocation of fraud in a purported confidential relationship to sidestep courts of law in all cases. This is demonstrated in *Johnson v. Bugle Coat, Apron & Linen Serv.*.[251] In that case, the defendant agreed to sell linen and other restaurant supplies to the plaintiff. The defendant was required to keep records on the amount of goods delivered and to issue statements each month to the plaintiff. The plaintiff alleged that one of his employees and two of the defendant's employees had engaged in a scheme to shortchange the plaintiff and that the defendant had refused to make a true account of the linens actually delivered. The plaintiff's bill sought discovery, monetary relief, and general relief.

The court questioned whether a relationship existed between the parties that would make equitable jurisdiction appropriate: "The relation of laundry and customer, or bailor and bailee, unlike that of guardian and ward, attorney and client, or principal and agent, is not usually a confidential relation, but in a particular case it conceivably may be."[252] The court's view of the relationship of the parties in *Johnson* indicates the flexibility of equitable jurisdiction. It is obvious that more than overreaching in a buyer-seller relationship must be alleged to confer equitable jurisdiction. The court in *Johnson* continued: "The butcher, the baker and the candle-stick [maker] do not occupy a fiduciary relation toward every customer who is too busy or too careless (whichever way he may properly be characterized) to count his change."[253] Because the alleged scheme was perpetrated by employees of both parties, the court was unconvinced that the susceptibility of the plaintiff *vis à vis* the defendant justified equitable interference.

Further, even assuming the existence of a confidential relationship, the court saw no inadequacy of the remedy available at law. The only equitable relief sought was discovery. The court held that, where there is no other ground of equitable jurisdiction asserted, a bill of discovery

249. *See* Turk v. Grossman, 176 Md. 644, 6 A.2d 639 (1939); Boland v. Ash, 145 Md. 465, 125 A. 801 (1924).
250. *See* Barnes v. Crain, 33 Md. 311, 8 Gill 391 (1849).
251. 191 Md. 268, 60 A.2d 686 (1948).
252. *Johnson*, 191 Md. at 276, 60 A.2d at 689.
253. *Id.* In Anderson v. Watson, 141 Md. 217, 118 A. 569 (1922), the court stated that such relationships "embrace both technical fiduciary relations, and those informal relations which exist wherever one man trusts in and relies on another." *Id.* at 234, 118 A. at 575.

has been superseded by an adequate, complete, and sufficient remedy at law.[254] Thus, the refusal to exercise equitable jurisdiction in *Johnson* was upheld based on the lack of obvious unfair advantage in the relationship of the parties and the lack of any apparent need for a peculiarly equitable remedy.

The demonstration of either, however, may form the basis of equitable jurisdiction. In *Wagner v. Shank*,[255] a demonstration of gross injustice against the plaintiff by justices of the peace at the behest of the defendant conferred equity jurisdiction. The defendant had fraudulently obtained hundreds of virtually *ex parte* judgments, including one against the plaintiff, from two justices of the peace in Frederick County. After the plaintiff learned of the defendant's baseless claims, he was falsely informed by one of the justices of the peace that the action would be dismissed. He therefore did not assert his defense at law. Judgment was later entered, and the plaintiff filed in equity to enjoin execution of the judgment. The court agreed with the defendant's contention that a party generally cannot rely upon equity to protect him from an action at law when he could have asserted his defenses at law. The court held, however, that:

> [t]his rule in terms recognizes the doctrine, which is equally well settled, that where a party is not in fault by failing to use reasonable diligence, and is prevented from defending the action at law, by fraud or accident, or the acts of the opposite party, equity will lend its aid and give relief . . . .[256]

In *Wagner*, both oppressive fraud and the need for an injunction, an equitable remedy, supported equitable interference with an action at law. The court admitted, however, that the general rule is that equity should not interfere with legal actions.

In *Spangler v. Dan A. Sprosty Bag Co.*,[257] the decedent's executor, his wife, and the corporation he controlled sued a corporate employee who allegedly diverted funds from the corporation. The plaintiffs sought an accounting, an injunction, and a constructive trust as to property allegedly purchased with diverted funds. According to the court, when there was a need to trace such allegedly purloined funds, and when the plaintiffs' claim to property was not based on legal title,[258] declaration of a constructive trust might be necessary because of the inadequacy of the remedy at law. Likewise, equity might intervene when the contract was between parties who bear a relationship to each other which may be conducive to unfair advantage; the remedy at law may be completely inadequate, even considering the ability to defend

254. *Johnson*, 191 Md. at 278, 60 A.2d at 690.
255. 59 Md. 313 (1883).
256. *Id.* at 318.
257. 183 Md. 166, 36 A.2d 685 (1944).
258. *See* Turk v. Grossman, 176 Md. 644, 668, 6 A.2d 639, 651 (1939).

on equitable grounds. Only equity may cancel or reform a contract[259] and enforce it as reformed by decreeing payment of the plaintiff's loss.[260]

Two instances in which equity has supplanted legal actions in contract demonstrate the inquiry the Court of Appeals of Maryland has used in this area. In *Conner v. Groh*,[261] the plaintiff sought to cancel a contract to purchase a hardware store based on allegedly fraudulent representations of the seller about the volume of business. Although the court of appeals conceded that law and equity had concurrent jurisdiction over questions of fraud and misrepresentation, it noted that law lacked the power to reform a contract procured by fraud. It held that in permitting a defendant to make a plea on equitable grounds in an action at law, the legislature did not intend to provide law courts with the power of cancellation or reformation of contracts.[262] The court stated that since the instrument involved was under seal, all questions of evidence and pleading before a law court must be determined by reference to the contract "*as presented to the Court . . . .*"[263]

In *Baltimore Sugar Refining Co. v. Campbell & Zell Co.*,[264] the plaintiff had purchased boilers from the defendant under two separate contracts. The plaintiff sought in equity to declare the latter contract null and void, to compel the defendant to restore monies paid by the plaintiff, and to enjoin the defendant from prosecuting any suit at law with respect to the latter contract. Although the plaintiff sought two remedies which were not available at law, the court, in upholding the appropriateness of equitable jurisdiction, emphasized the relationship between the parties. The plaintiff alleged that the defendant had bribed the plaintiff's purchasing agent, upon whom the plaintiff was dependent for selection of the boilers. The court commented:

> in a case where fraud is superadded and practiced by agents of the innocent principal, and a fraudulent design secretly accomplished by the other principal through the corrupt instrumentality of unprincipled agents, there ought to be, we think, but small doubt as to the Court which should take cognizance of it.[265]

The plaintiff sought rescission and the return of monies paid under both contracts because of the underlying fraud. The latter contract was the subject of an action at law in another court. Defense of such action

259. *See* Baltimore Sugar Ref. Co. v. Campbell & Zell Co., 83 Md. 36, 56, 34 A. 369, 372 (1896).
260. *See* Maryland Home Fire Ins. Co. v. Kimmell, 89 Md. 437, 441, 43 A. 764, 765-66 (1899).
261. 90 Md. 674, 45 A. 1024 (1900).
262. *Id.* at 683, 45 A. at 1026.
263. *Id.* (Emphasis in original).
264. 83 Md. 36, 34 A. 369 (1896).
265. *Id.* at 55, 34 A. at 372.

would provide no remedy as to the earlier contract, which had been fully performed by the plaintiff.

b. Accounting

The equitable action of accounting appears to have been a remedy most frequently permitted in Maryland in actions involving confidential relationships.[266] Equitable interposition has usually been based on the need for information of one of the parties to such a relationship rather than the complexity of the issues for resolution by a jury.[267] Regardless of the increasing ability of an action at law to adjudicate complex issues, the court of appeals has held that an accounting will generally be appropriate when the rights of a party to some sort of joint enterprise or confidential relationship "can be determined only by reference to accounts or information kept in possession of [the other party]."[268]

In *Silver Hill Sand & Gravel Co. v. Carozza*,[269] the plaintiff gave the defendant a license to mine sand and gravel on its land. The defendant agreed to keep records and issue statements of accounts to the plaintiff. The plaintiff brought an action for discovery and accounting against the defendant. The court of appeals treated the relationship of the parties as a fiduciary relationship rather than as that of buyer and seller. The court emphasized that the defendant had expressly undertaken to keep all records and to make monthly accountings.[270] This undertaking obviously meant that the plaintiff lacked the information to determine whether it had received appropriate payment for all the sand and gravel mined by the defendant. Further, the court highlighted the indefinite duration of the parties' agreement, which raised the possibility of a multiplicity of actions, as a basis for assuming equi-

266. *See supra* notes 139-41 and accompanying text. The Supreme Court held in Dairy Queen v. Wood, 369 U.S. 469 (1962) that in order to justify an accounting, a party must show that the accounts are of such a "complicated nature" that only a court of equity may satisfactorily unravel them. *Dairy Queen*, 369 U.S. at 478.

267. In view of the availability of the aid of a master for the jury under FED. R. CIV. P. 53(b), the Supreme Court suggested that resort to accounting would rarely be appropriate. *Dairy Queen*, 369 U.S. at 478. As long ago as 1922, the Court of Appeals of Maryland suggested much the same thing about the complexity of accounts as a justification for resort to accounting:

> under the decisions of this court "great complication" and "difficulty in the way of adequate remedy at law," when used in connection with an accounting in equity, may be taken to mean such an action as a court of law, with the aid of all the legal machinery at its command, is unable to solve so as to do substantial justice between the parties.

Anderson v. Watson, 141 Md. 217, 234, 118 A. 569, 575 (1922). *See also* Johnson & Higgins v. Simpson, 165 Md. 83, 116 A. 617 (1933). *But see* Turk v. Grossman, 176 Md. 644, 6 A.2d 639 (1939).

268. Goldsborough v. County Trust Co., 180 Md. 59, 61, 22 A.2d 920, 921 (1941). *See* Legum v. Campbell, 149 Md. 148, 131 A. 147 (1925).

269. 184 Md. 226, 40 A.2d 311 (1944).

270. *Id.* at 230, 40 A.2d at 312.

table jurisdiction.[271]

Contrasting *Silver Hill* with the decision in *Becker v. Frederick W. Lipps Co.*,[272] which was distinguished by the court in *Silver Hill*, is instructive with respect to exercise of equitable discretion in accounting. In *Becker*, the plaintiff alleged that it had agreed to purchase the defendant's entire output of empty barrels for one year and that the defendant had failed to deliver as promised. Although the plaintiff asserted in its bill that it had no means of ascertaining the number of barrels produced by the defendant during the period of the contract, the court held that such information could be made available to the plaintiff in an action at law.[273] Also, as the contract period had expired, there was no possibility, as there would be in *Silver Hill*, of a multiplicity of actions.

It is apparent that the most important factor for a court of equity to assess in determining whether an accounting is appropriate is whether the accounts upon which the plaintiff's right depends are controlled by the opposite party. If they are, it appears an accounting will be awarded.[274]

c. Multiplicity of Actions

The ability of equity to alleviate multiplicity is, of course, based on its ability to act *in personam*. Unlike law courts, equity courts may enjoin individuals before them from proceeding with other litigation. Whether equity acts to enjoin parties from proceeding in another pending suit or acts to preempt another suit, it may afford complete relief.[275] The exercise of this form of equitable jurisdiction may be seen in two cases involving significant public issues, *County Commissioners v. Mayor & City Council of Frederick*[276] and *Wells v. Price*.[277] In *County Commissioners*, Frederick City officials brought an action in equity against Frederick County to recover the city's share of a tax on bonds which had been illegally collected by the county. The court of appeals concluded that leaving the city to its remedy at law would require it to sue the individuals from whom the county had collected the tax and who, in turn, would institute actions against the county. The court held that equity could "require the county to account directly with the city, which is ultimately entitled to the money."[278]

In *Wells*, the State's Attorney for Baltimore City sued the warden

271. *Id.*
272. 131 Md. 301, 101 A. 783 (1917).
273. *Id.* at 307, 101 A. at 784-85.
274. Boland v. Ash, 145 Md. 465, 125 A. 801 (1924). *See* Goldsborough v. County Trust Co., 180 Md. 59, 22 A.2d 920 (1941).
275. *See* McKeever v. Washington Heights Realty Corp., 183 Md. 216, 37 A.2d 305 (1944); Gibula v. Sause, 173 Md. 87, 194 A.2d 597 (1937).
276. 88 Md. 654, 42 A. 218 (1898).
277. 183 Md. 443, 37 A.2d 888 (1944).
278. 88 Md. at 664, 42 A. at 222.

of the Baltimore City jail in equity to prevent him from releasing prisoners in conformity with statewide law rather than in accordance with the more restrictive local law. Although it indicated that the issues in the suit might be resolved in a multitude of *habeas corpus* proceedings, the court of appeals held that equity could act to prevent such a multiplicity of litigation. The court also noted the public interest may justify equitable intervention.[279]

Given the ability of the circuit courts under the revised rules to entertain both legal and equitable claims, it is likely that multiplicity will be rendered obsolete as an independent basis of equitable jurisdiction.

The cases predicating equitable jurisdiction on the inadequacy of remedies at law demonstrate a sensitivity to the preservation of the distinction between law and equity. If the right to trial by jury is to be preserved under the new pleading regime, trial judges should restrict adjudication of legal claims in equity to those situations existing under prior practice. Maryland decisions have long indicated that the chancellor has considerable discretion in determining when he may act in equity.[280] Law and equity have been separated "not by a line, but by a borderland under the dominion of the Chancellor."[281] It is unlikely that the procedural reform is intended to encroach upon this discretion, but exercise of equity should be tempered by an awareness of the potential effects of unprecedented consolidation of legal claims and issues on the right to trial by jury.

V. ALTERNATIVES FOR MARYLAND TRIAL COURTS IN ACTIONS UNDER THE REVISED RULES

The discussion of the preceding section indicates how Maryland's courts have dealt with jury trial rights in lawsuits involving both legal and equitable elements. As stated earlier,[282] Maryland's rules by and large guaranteed the right to jury trial in actions filed on the law side of the circuit courts[283] and denied the right when a claim was filed on the equity side.[284] It was as if one entered Maryland's courts of general jurisdiction[285] through two doors, one marked "law," the other "eq-

279. 183 Md. at 451, 37 A.2d at 872 (1944).
280. *See* Hilleary v. Crow, 1 H. & J. 337 (1804).
281. Devlin, *Jury Trial of Complex Cases: English Practice at the Time of the Seventh Amendment*, 80 COLUM. L. REV. 43, 107 (1980).
282. *See supra* text accompanying note 183.
283. Md. R.P. 343 (1977).
284. After the abolition of advisory juries in equity, see Md. R.P. 517 (1977), the court of appeals held that there was absolutely no provision for use of a jury to resolve questions of fact in a court of equity. Impala Platinum Ltd. v. Impala Sales (U.S.A.), 283 Md. 296, 389 A.2d 887 (1978); Village Books, Inc. v. State's Attorney, 263 Md. 76, 282 A.2d 126 (1971), *cert. denied*, 418 U.S. 930 (1974).
285. Ruddy v. First Nat'l Bank, 48 Md. App. 681, 683, 429 A.2d 550, 551, *aff'd*, 291 Md. 275, 434 A.2d 581 (1981). There are, of course, exceptions to the circuit

uity," and once inside, the jury trial question was resolved on the basis of which door one had used for entry.

The revised rules attempt to eliminate the procedural distinction between law and equity[286] and to secure the right to jury trial on "any issue triable of right by a jury."[287] Supplanting the "nature of the action" test with an issue oriented test does not eliminate the significance of initial characterization, because many factual issues are neither "legal" nor "equitable" in the abstract, but may be characterized only in terms of the context in which they arise.[288] It is fair to say that a factual issue is "legal" only if, in some sense, its determination would be material to the grant of the kind of relief law courts historically are authorized to grant. In this sense, whether a contract was made would be a "legal" issue in an action for damages for breach, but not "legal" in an action to enforce the contract by way of injunction or specific performance, since these remedies historically were available only in equity.[289]

Except in easy cases like the preceding, for a variety of reasons, characterization of issues as "legal" or "equitable" in a merged system is extremely difficult. First and foremost, the historic division between law and equity is itself frequently obscure.[290] Second, many of the historic procedural bases for assertion of equitable jurisdiction over what appear to be claims for essentially legal relief have diminished over time[291] and, after merger, could be viewed as having been entirely eliminated.[292] Finally, a host of actions and remedies unknown in the

---

court's jurisdiction. *See generally* C. BROWN, INTRODUCTION TO MARYLAND CIVIL LITIGATION 5-14 (1982).

286. MD. R.P. 2-301.

287. MD. R.P. 2-325(a).

288. *See* F. JAMES & G. HAZARD, CIVIL PROCEDURE § 8.11, at 387-88 (2d ed. 1977), where the authors, after conceding that mutual mistake is virtually always an equitable issue and that negligent driving is a legal one, point out that many issues are not inherently equitable or legal but instead are "like chameleons which take their color from surrounding circumstances."

289. *Id.* at 372, 376.

290. *See generally id.* at 17-18, 351-59. The overlap between law and equity in the eighteenth century led Blackstone to note that while bills in equity always indicated the inadequacy of legal remedies,

> he who should from thence conclude that no case is judged of in equity where there might have been relief at law, and at the same time casts his eye on the extent and variety of the cases in our equity reports, must think the law a dead letter indeed.

3 W. BLACKSTONE, COMMENTARIES *434.

291. For example, only in equity could a party be competent to testify, multiple parties and claims be easily joined, and discovery be had. Reforms, some going back to the nineteenth century, have long since eliminated equity's monopoly over party testimony, liberal joinder, and discovery.

292. The basic justification for extension of equity jurisdiction into legal matters rarely had much to do with antipathy to jury trial. Rather, the goal was usually to alleviate hardships and inefficiencies the trial system engendered. *See* Levin, *Equitable Cleanup and The Jury: A Suggested Orientation*, 100 U. PA. L. REV. 320 (1951). Once the necessity for the invention of cleanup has been eliminated by merger, much of the justification for an expanded equity jurisdiction disappears.

eighteenth and early nineteenth centuries virtually defy rigid historic categorization.[293]

In many cases, law courts have not been able to adjudicate equitable issues because of their inability to administer equitable relief.[294] When equity courts adjudicated legal claims, they generally did so without the aid of a jury. If tradition is to be followed regardless of the changed picture created by merger, any combination of legal and equitable claims would permit a trial court to adjudicate the entire case without a jury. The Supreme Court has prevented this in the federal courts through the doctrine in *Beacon Theatres* and *Dairy Queen.* Many states, however, with merger rules similar to Rule 2 of the Federal Rules of Civil Procedure, rules which preserve jury trial similar to Federal Rule 38, and constitutional jury trial provisions have rejected the *Beacon* position.[295] The Maryland judiciary must now decide

293. This would include administrative actions, statutory claims, and special remedies like those in declaratory judgment acts. For federal cases holding such claims not legal, see, e.g., Katchen v. Landy, 382 U.S. 323 (1966) (plenary claims in bankruptcy held inherently equitable); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (administrative determination of back pay and reinstatement not legal); Luria v. United States, 231 U.S. 9 (1913) (statutory suits to cancel naturalization certificate not triable to a jury). For cases holding such claims subject to jury trial, see, e.g., Pernell v. Southall Realty, 416 U.S. 363 (1974) (statutory summary eviction); Curtis v. Loether, 415 U.S. 189 (1974) (Fair Housing Act damages action). For discussion of the declaratory judgment remedy, see Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959).

294. *See* Creamer v. Helferstay, 294 Md. 107, 448 A.2d 332 (1982). *See also infra* note 360. *But see* Md. R.P. BF40 (1977).

295. *See* Federal Lumber Co. v. Wheeler, 643 P.2d 31 (Colo. 1981); LaFrance v. LaFrance, 127 Conn. 149, 14 A.2d 739 (1940); Summers v. Martin, 77 Idaho 469, 295 P.2d 265 (1956); Hill v. Jessup, 139 Ind. App. 467, 220 N.E.2d 662 (1966); Hindman v. Shepard, 205 Kan. 207, 468 P.2d 103 (1970), *appeal dismissed, cert. denied sub nom.* Morse v. Hindman, 401 U.S. 928 (1971); Rognrud v. Zubert, 282 Minn. 430, 165 N.W.2d 244 (1969); Linville v. Wilson, 628 S.W.2d 422 (Mo. App. 1982); Sanguinetti v. Strecker, 94 Nev. 200, 577 P.2d 404 (1978); Miles v. N.J. Motors, Inc., 44 Ohio App. 2d 351, 338 N.E.2d 184 (1975); Rowell v. Kaplan, 103 R.I. 60, 235 A.2d 91 (1967); Skoglund v. Staab, 312 N.W.2d 29 (S.D. 1981); Ranta v. German, 11 Wash. App. 104, 459 P.2d 961 (1969); Davidek v. Wyoming Inv. Co., 77 Wyo. 141, 308 P.2d 941 (1957); COLO. CONST. art. II, § 23; CONN. CONST. art. 1, § 19; IDAHO CONST. art. 1, § 7; IND. CONST. art. 1, § 20; KAN. CONST. Bill of Rights § 5; MINN. CONST. art. 1, § 4; MO. CONST. art. I, § 22(a); NEV. CONST. art. I, § 3; OHIO CONST. art. I, § 5; R.I. CONST. art. 1, § 15; S.D. CONST. art. 1, § 21; WYO. CONST. art. I, § 9; COLO. R. CIV. P. 2, 38; CONN. GEN. STAT. ANN §§ 52-91, 52-97 (West. Cum. Supp. 1984); IDAHO R. CIV. P. 2, 38; IND. (TRIAL) R. 60-202, 60-238; MINN. R. CIV. P. 2, 38.01; MO. R. CIV. P. 42.01, 69.01; NEV. R. CIV. P. 2, 38; OHIO R. CIV. P. 2, 38; R.I. R. CIV. P. 2, 38; S.D. COMP. LAWS ANN §§ 15-6-2, 15-6-38 (1967); WASH. SUPER. CT. CIV. R. 2, 38; WYO. R. CIV. P. 2, 38. A few states have adopted a rule similar to that of *Beacon Theatres. See* Poston v. Gaddis, 335 So. 2d 165 (Ala. Civ. App.), *cert. denied*, 335 So. 2d 169 (Ala. 1976); Shope v. Sims, 658 P.2d 1336 (Alaska 1983); Cheek v. McGowan Elec. Supply Co., 404 So. 2d 834 (Fla. Dist. Ct. App. 1981); Harada v. Burns, 50 Haw. 528, 445 P.2d 376 (1968); Evans Fin. Corp. v. Strosser, 99 N.M. 788, 664 P.2d 986 (1983); Landers v. Goetz, 264 N.W.2d 459 (N.D. 1978); Int'l Harvester Credit Corp. v. Pioneer Tractor & Implement Co., 626 A.2d 418 (Utah 1981); Merchants Bank v. Thibodeau, 143 Vt. 132, 465 A.2d 258 (1983).

whether — or to what extent — to restrict the power of the chancellor to decide a whole case without a jury any time there is any basis for equitable relief. As seen above, the federal system expanded the right to trial by jury in order to preserve it. As examples discussed below will demonstrate, not all states have made that choice. As discussed above, there is some support in Maryland precedents for either choice.

The remainder of this article will consider various problems likely to be encountered with the right to trial by jury after merger. Consideration will first be given to the problem of characterization of "issues" in a merged system which appears to make the right to trial by jury turn on the nature of the issue at stake. This will be followed by a discussion of multi-claim lawsuits containing both legal and equitable elements.

A. Characterization of Issues as Legal or Equitable

Since the right to jury trial is secured for any "issue triable of right by a jury,"[296] it is instructive to consider how one might go about characterizing issues. Frequently, recurring examples of such problems arise in claims for declaratory judgment, in actions affecting title to land, and in actions posing fraud issues.

1. Declaratory Judgment Actions

The modern declaratory judgment action was unknown at common law.[297] Maryland cases have indicated that law and equity enjoyed concurrent jurisdiction to grant the remedy.[298] Here, as elsewhere, courts have had to determine whether the remedy was sought as a substitute for a remedy traditionally available only in an action at law or bill in equity. The decision whether to honor a jury trial demand hinges upon this prior determination.[299]

Precisely how the determination is made varies. Opinions of several federal courts of appeals, after *Beacon Theatres, Inc. v. Westover*,[300] are instructive of the federal view. These cases hold that a declaratory judgment will be characterized as legal if, but only if, it appears from the facts that legal type relief would be possible at the

296. MD. R.P. 2-325(a).

297. *See* E. BORCHARD, DECLARATORY JUDGMENTS 399 (2d ed. 1941). There were, of course, always equitable actions which were primarily declaratory, e.g., the bill in equity to cancel a written instrument, to remove a cloud in title, to impress a trust on legal title, or to render a divorce. This fact, together with the fact that both kinds of claims require the exercise of discretion, has led many students of the law to consider declaratory relief essentially equitable; but the courts have steadfastly refused to so hold.

298. Himes v. Day, 254 Md. 197, 254 A.2d 181 (1969); Shultz v. Kaplan, 189 Md. 402, 56 A.2d 17 (1947).

299. *See* Note, *Right to Trial by Jury in Declaratory Judgment Actions*, 3 CONN. L. REV. 564 (1971) (listing the various kinds of actions in which the issue had to be determined).

300. 359 U.S. 500 (1959). For a discussion of this case, see *supra* notes 114-33 and accompanying text.

time of the lawsuit. Thus, in a school desegregation case, the inclusion of a request for a declaratory remedy does not authorize a jury trial.[301] Similarly, in a suit for a declaratory judgment construing an oil and gas lease, followed by a counterclaim for possession of the property on account of breach of the lease constituting termination, the court treated the action as a reverse equitable bill for cancellation, not as a reverse claim for ejectment. Because the lease itself provided no automatic provisions for termination, the defendant had no immediate right to possession until the court cancelled the lease. Therefore, no jury trial was authorized.[302] Also, in a suit for a declaratory judgment that plaintiff was entitled to produce and market its product because defendant's patent was invalid or did not cover plaintiff's product, the court characterized the claim as equitable because no act of infringement had occurred, and hence, legal damages or accounting would be unavailable.[303]

On the other hand, where the legal remedy is deemed present and adequate, such defensive use of the declaratory judgment act will be characterized as legal. In *James v. Pennsylvania General Ins. Co.*,[304] the insurer sought a declaration that the liability policy was invalid because its reinstatement had been procured by a fraudulent predating of the application for renewal. The court stated that the question was whether the action was in truth an inverted suit at law on the policy, and that the court would characterize the action as legal if defense to such a legal action would provide an adequate defense for the insurer. Since the claim for liability was pending and would be brought to trial within a year, and proof regarding fraud was largely documentary and there was little risk of crucial evidence disappearing over time, the court overruled arguments that delay of the presentation of the insurer's defense of fraud until the claim on the policy could be finally litigated would be prejudicial. The court therefore held that the insurer's remedy at law would be adequate.[305] Furthermore, if one of the issues set out for resolution in the declaratory judgment action is inherently legal, as for instance, slander of title in a patent infringement suit[306] or mental incapacity of a party to the contract in a declaratory action for rescission of an insurance contract,[307] the court will grant the right to jury trial.

There is language in *Beacon Theatres, Inc. v. Westover*[308] which suggests that courts must go much further in order to protect trial by

301. Robinson v. Brown, 320 F.2d 503 (6th Cir. 1963).
302. Kerr-McGee Corp. v. Bokum Corp., 453 F.2d 1067, 1071-72 (10th Cir. 1972).
303. Shubin v. United States Dist. Court, 313 F.2d 250 (9th Cir. 1963).
304. 349 F.2d 228 (D.C. Cir. 1965).
305. *Id.* at 232.
306. Inland Steel Products v. MPH Mfg. Corp., 25 F.R.D. 238 (N.D. Ill. 1959).
307. Massachusetts Mut. Life Ins. Co. v. Hardwick, 118 F. Supp. 485 (E.D. Tenn. 1953).
308. 359 U.S. 500 (1959).

jury. *Beacon*'s holding — that factual issues common to the claim and counterclaim regarding the reasonableness of the operator's practices should be triable of right to a jury — is itself not radical.[309] But two of the Court's rationales were radical. First, the Court found that the declaratory judgment act provided a *legal* remedy which "necessarily affects the scope of equity."[310] Second, it suggested that the fact that the jury trial right is constitutional warrants a requirement that judicial discretion, "wherever possible, be exercised to preserve jury trial."[311]

Few decisions since *Beacon* have followed either of these lines of thought. In Alabama, the courts have held that where the underlying facts indicate that a legal remedy may become available to one of the parties, jury trial as of right is available;[312] but these courts have declined to extend the right to cases where the only conceivable alternative relief would be equitable.[313] In Florida, the supreme court has indicated that doubtful questions regarding the distinction between law and equity should be resolved in favor of jury trial because of the fundamental guaranty of the state constitution;[314] but this court has declined to characterize all declaratory judgment actions as inherently legal.[315]

A few courts are more restrictive than are the federal courts. In *Lazarus v. Village of Northbrook*,[316] the Supreme Court of Illinois was

309. Arguably the district court's characterization of the declaratory judgment action as essentially equitable was erroneous; it just as easily might have been characterized as an effort to cut off the antitrust claimant's right to jury trial by winning a race to court. *See* F. JAMES & G. HAZARD, CIVIL PROCEDURE § 8.10, at 385 (2d ed. 1977). The decision went further, of course, by eliminating the trial judge's discretion to try the equitable issues first when such trial might conclusively establish an issue of fact on a common legal claim presented by the lawsuit. *Beacon Theatres*, 359 U.S. at 508 (overruling American Life Ins. Co. v. Stewart, 300 U.S. 203, 215 (1937)).

310. *Beacon Theatres*, 359 U.S. at 509. As James and Hazard have pointed out, the logic of this part of *Beacon* would make all declaratory judgment actions triable by jury. F. JAMES & G. HAZARD, CIVIL PROCEDURE § 8.10, at 385-86 (2d ed. 1977).

311. *Beacon Theatres*, 359 U.S. at 510. The democratic value choice implicit in this kind of argument may well have caused the Court's subsequent "legal" characterization of the accounting claim in Dairy Queen v. Wood, 369 U.S. 469 (1962), discussed *supra* at notes 134-45 and accompanying text. It may also have led the Court to abandon the historical characterization of shareholders' derivative suits as triable exclusively in equity in Ross v. Bernhard, 396 U.S. 531 (1970) (discussed *supra* at notes 146-54 and accompanying text).

312. *See* Sherer v. Burton, 393 So. 2d 991, 991-92 (Ala. 1981). *But cf.* Shubin v. United States Dist. Court, 313 F.2d 250 (9th Cir. 1963) (where the federal court declined to treat as legal a future claim as to which no damages had been inflicted or suffered).

313. *See, e.g.*, Burnham v. City of Mobile, 277 Ala. 659, 174 So. 2d 301 (1965).

314. Hollywood, Inc. v. City of Hollywood, 321 So. 2d 65, 71 (Fla. 1975).

315. *See id.* at 73. In *Hollywood*, the court characterized as legal the tax assessor's bill for declaratory and equitable relief against alternative claimants to land. The court explained that the suit sounded in ejectment because it would likely lead to ouster of a party in possession of property. *Id.* at 71-72.

316. 31 Ill. 2d 146, 199 N.E.2d 797 (1964).

confronted with an action for declaration of invalidity of a zoning ordinance as applied to plaintiff's property. The complaint contained a prayer for injunctive relief but indicated that it was filed at law. The defendant asked for a jury trial. The court stated that, when a declaration alone is sought,

> the right to trial by jury must be determined by an examination of the disputed issues and an appraisal of their predominant characteristics as indicating the appropriateness of legal or equitable relief. But when, as is ordinarily the case, relief in addition to the naked declaration of rights is sought, the nature of that relief determines the right to a trial by jury.[317]

The court therefore denied jury trial. Ohio's courts show a marked willingness to subordinate parallel claims for legal relief to those for equitable relief and thus to deny jury trial rights as to all claims.[318] Ohio refuses to treat defensive actions for declaratory relief of nonliability of an insurance policy as legal unless that claimant has reduced his claim to judgment and is actively seeking payment.[319] Both the Illinois and Ohio approaches risk the loss of jury rights in many actions which, but for the statute, the right would probably be available.

Maryland case law regarding the declaratory judgment, while scant, appears to follow the federal cases. The Court of Appeals of Maryland has construed the Declaratory Judgment Act as vesting in the circuit courts the power to render a substituted noncoercive remedy for what might have been available at law or in equity;[320] the circuit court must look to the underlying circumstances to ascertain whether, prior to the act, legal relief would have sufficed or, alternatively, whether special factors would warrant the intervention of equity.[321] When a plaintiff sought to involve an earlier declaratory judgment act which deprived parties of the right to jury trial, the court of appeals refused him the right because he had an adequate remedy at law, and suggested that to do otherwise would conflict with the constitutional right to jury trial.[322]

---

317. *Id.* at 148, 199 N.E.2d at 799.

318. *See, e.g.*, Miles v. N.J. Motors, Inc., 44 Ohio App. 2d 351, 338 N.E.2d 784 (1975) (court discharged debtors from a series of cognovit notes and subordinated debtors' requests for declaratory relief to their claim for injunctive relief to compel defendant to comply with debtors' rights and sell repossessed vehicles at public sales).

319. *See, e.g.*, Republic Indem. Co. v. Durell, 105 Ohio App. 153, 151 N.E.2d 687 (1957).

320. Himes v. Day, 254 Md. 197, 206, 254 A.2d 181, 186 (1969).

321. *Id.* at 207, 254 Md. at 186 (action is substitute for action for breach of contract, and thus legal). *See* Schultz v. Kaplan, 189 Md. 402, 408, 56 A.2d 17, 19-20 (1947) (action is in the nature of ejectment, and hence legal).

322. McCoy v. Johnson, 70 Md. 490, 17 A. 387 (1889).

2. Title to Land

As a general matter, Maryland case law has tended to characterize claims of title as legal. In *Diener v. Wheatley*,[323] the court of appeals reaffirmed the rule that disputed issues of land title must be tried at law before injunctive or other equitable relief could issue from a court of equity. In *McCoy v. Johnson*,[324] the court of appeals denied the plaintiff a right to sue in equity to remove a cloud on title where the defendant had record title but the plaintiff was in possession and could vindicate his claim through defense to an action at law for ejectment. In so doing, the court restricted the Declaratory Judgment Act of 1888, which provided an apparent statutory basis for pursuing this kind of claim in equity, and stated that because title presents questions of legal rights, the statute was "broader perhaps than the legislature intended . . . for it is clear [that] . . . the Constitution guarantees to suitors the right of trial by jury, and this right the Legislature cannot abridge or take away."[325]

On the other hand, in Maryland it seems settled that, generally, one who has title and is in possession must proceed in equity to vindicate his title. The *McCoy* case conceded as much. Ejectment would not avail where the defendant had not dispossessed plaintiff,[326] and trespass would not lie where damages would be insubstantial.[327] The same result would follow if the defendant's beclouding acts would give him no present claim of right but might provide one in the future under an implied grant or adverse use,[328] or if no present right to possession is at stake, as in the case of an action to construe a future lease.[329] Finally, under bifurcated procedures, equity would entertain an action for injunctive relief to remove an obstruction where no reasonable claim of adverse title could be asserted,[330] but otherwise equity deferred to law, where jury trial rights might be secured, to determine issues of title.[331]

In *Finglass v. George Franke Sons Co.*[332] and *Smith v. Shiebeck*,[333] the court of appeals was confronted with claims for equitable relief to enjoin obstructions to the plaintiffs' use of property. In each case, the defendant asserted a colorable legal right to enforce the obstruction. In *Finglass*, the court of appeals refused to uphold equitable jurisdiction,

323. 191 Md. 690, 62 A.2d 783 (1948).
324. 70 Md. 490, 17 A. 387 (1889).
325. *Id.* at 492-93, 17 A. at 387.
326. Rosenthal v. Donnelly, 126 Md. 147, 94 A. 1030 (1915).
327. Homewood Realty Corp. v. Safe Deposit and Trust Co., 160 Md. 457, 154 A. 58 (1931).
328. *Id.*
329. *Cf.* Shultz v. Kaplan, 189 Md. 402, 56 A.2d 17 (1947).
330. Smith v. Shiebeck, 180 Md. 412, 418, 24 A.2d 795, 799-800 (1942).
331. *Id.*; Diener v. Wheatley, 191 Md. 690, 62 A.2d 783 (1948).
332. 172 Md. 135, 190 A. 752 (1937).
333. 180 Md. 412, 24 A.2d 795 (1942).

and noted that law could render complete relief by issuing an injunction ancillary to its judgment regarding title.[334] Five years later, in *Smith*, the same court upheld equity jurisdiction under similar facts.[335] The apparent distinction between the two cases was that in *Finglass* there was no need for immediate action because the use in question, drainage, was not presently obstructed,[336] while in *Smith*, the defendant's fence constituted a present obstruction to the plaintiff's right of access to the property, and thus, immediate intervention of equity was warranted.[337]

Arguably, the distinction drawn between *Finglass* and *Smith* is too narrow. In *Cooper v. Williams*,[338] under facts identical to those in *Smith*, the Illinois Court of Appeals declined to deprive the defendant of his right to jury trial on the issue of title.[339] In a merged system, the right to jury trial should turn on whether one of the parties is seeking, at least in part, legal relief, and not on a judicial characterization of what relief would be considered "primary" and in what court the relief would have been sought in a bifurcated system of courts.

This method of analyzing the question of how to characterize actions may limit other Maryland precedents aside from *Smith*. In *Waring v. National Savings Trust Co.*,[340] a bank sought to enforce a lien and to declare void the defendant's tax sale deed because the defendant, as the mortgagor, had failed to pay the tax arrearages on the property and because of irregularities in the tax sale. The court held that since the primary goal of the suit was to enforce the lien, the action properly lay in equity; therefore, the court could issue as subsidiary relief the necessary declaratory judgment.[341] In *Waring*, since both parties stipulated to all the facts and thus left no issues of fact upon which reasonable jurors could differ, the decision to deny a jury trial was proper. In merged proceedings, however, it would be improper to deny the right to jury trial on the ground that the legal relief sought is subsidiary to that sought in equity. The justification for equitable cleanup is the convenience and necessity of avoiding a multiplicity of actions; because merger eliminates the possibility of multiplicity, the justification disappears.[342]

Another case which illustrates a proper limitation of the right to jury trial is *Gibula v. Sause*.[343] In that case, the parties mutually agreed

334. *Finglass*, 172 Md. at 137, 190 A. at 753.
335. *Smith*, 180 Md. 412, 24 A.2d 795 (1942).
336. *Smith*, 172 Md. at 136-37, 190 A. at 752-53.
337. *Smith*, 180 Md. at 422-23, 24 A.2d at 801.
338. 60 Ill. App. 3d 634, 376 N.E.2d 1104 (1978).
339. *Id.*
340. 138 Md. 367, 114 A. 57 (1921).
341. *Id.* at 379-80, 114 A. at 61-62.
342. *See* Levin, *Equitable Cleanup and the Jury: A Suggested Orientation*, 100 U. PA. L. REV. 320, 339 (1951).
343. 173 Md. 87, 194 A. 826 (1937).

to abandon a contract for the sale of realty, with the plaintiff-purchaser surrendering possession to the defendant-seller and the defendant-seller taking possession. The plaintiff sued to get his money back. Although noting that the plaintiff had an adequate remedy at law to sue for money had and received, the court allowed the action to lie in equity because the plaintiff's action was based on a prayer for rescission of the contract.[344] The court of appeals then authorized the court sitting in equity to award the payback order.[345] The jury trial issues were not significant since there was little dispute as to the facts of the case. The *Gibula* court's justification of equitable cleanup should be tempered by recognition that there were no disputed factual questions, nor was there a jury demand involved therein.

3. Rescission and Restitution based upon Fraud

In Maryland, it has long been the law that only a court of equity could reform or rescind a contract,[346] and that once equity granted such relief, it could award additional relief.[347] In a reformation action, it is not clear precisely why juries could not hear parol evidence as to the intended agreement and then enforce the contract as intended. In cancellation actions, it is even less clear why juries should be unable to hear claims of fraud, since juries are authorized to consider such matters when awarding affirmative damages for deceit.[348] Rescission is essentially a defensive doctrine employed to void a contract or deed in order to prevent its enforcement at law.[349] Although cases speak of rescission as affirmative in nature, it is essentially a declaratory remedy defining the status of the parties.[350] While adhering to the position that a defendant at law may not be precluded from asserting grounds for

344. *Id.* at 93-94, 194 A. at 828-29.
345. *Id.* at 94-95, 194 A. at 828-29.
346. *See* Creamer v. Helferstay, 294 Md. 107, 448 A.2d 332 (1982); Connor v. Groh, 90 Md. 674, 45 A. 1024 (1900); Ridgley v. Beatty, 222 Md. 76, 159 A.2d 651 (1960).
347. Gibula v. Sause, 173 Md. 87, 194 A. 826 (1937) (rescission); Aetna Indemnity of Baltimore, S.P.E. & C. Ry. Co., 112 Md. 389, 76 A. 251 (1910) (reformation); Maryland Home Fire Ins. Co. v. Kimmell, 89 Md. 437, 43 A. 764 (1899) (reformation); Baltimore Sugar Ref. Co. v. Campbell & Zell Co., 83 Md. 36, 34 A. 369 (1896) (rescission).
348. *See* Appel v. Hupfield, 198 Md. 374, 84 A.2d 94 (1951); Loyola Fed. Sav. & Loan Ass'n v. Trenchcraft, Inc., 17 Md. App. 646, 303 A.2d 432 (1973).
349. *See* Cook, *Equitable Defenses*, 32 YALE L.J. 645, 649-50 (1923). The justifications for intervention of equity have included the prematurity of the law action, the ability of the client to delay it for tactical reasons, and the desirability of avoiding a multiplicity of legal actions. *See* F. JAMES & G. HAZARD, CIVIL PROCEDURE 367-68 (2d ed. 1976) and authorities cited therein.
350. In Baltimore Sugar Ref. Co. v. Campbell & Zell Co., 83 Md. 36, 34 A. 369 (1896), the plaintiff purchased faulty equipment on the basis of false representations of the defendant and of the plaintiff's engineers whom the defendant had bribed. The court of appeals held that equity could award damages ancillary to a decree cancelling the contract. In response to defendant's argument that the remedy at law was fully adequate, the court stated that the legal remedy was incomplete because only equity could finally annul the agreement. This is not self evident.

rescission in equity,[351] Maryland courts have wavered as to whether these defenses are also fully available in an action at law,[352] and have left unclear whether such defenses should be tried to a jury or to a judge if they are available at law.[353]

Merger may have a limited influence on this problem. Where legal relief is sought, fraud as a basis for reformation or rescission may be triable to the court or to a jury. The traditional justifications for refusing jury trial in an action for rescission based on fraud is that equity did not have juries, and that fraud was an inappropriate issue for jury determination.[354] This rationale is severely undermined in a court using united procedures. Indeed, an action for rescission could be characterized as an effort to obtain a declaratory judgment of the unenforceability of a contract, an inverted action at law.

Maryland's courts may well adhere to history by characterizing issues of fraud and mistake when used for purposes of reformation or rescission as essentially equitable. Even if Maryland's courts take this stance, the equitable cleanup which has historically swept away the right to jury trial on subsequent issues relating to legal type relief would not necessarily be applied.[355] The essential justification for equitable cleanup lay in the cost, delay and inconvenience of a separate

---

For a later, equally mystifying decision, see Stirup v. Warfield, 104 Md. 530, 65 A. 346 (1906).

351. *See* Ridgley v. Beatty, 222 Md. 76, 159 A.2d 651 (1960); Connor v. Groh, 90 Md. 674, 45 A. 1024 (1900).

352. Fraud appears to be available as a defense at law. *See* Stiegler v. Eureka Life Ins. Co., 146 Md. 629, 127 A. 397 (1925); McGrath v. Peterson, 127 Md. 412, 96 A. 551 (1916). *But see* Ridgley v. Beatty, 222 Md. 76, 159 A.2d 651 (1960) (casting doubt on the proposition that fraud is available as a defense at law as well as on the issue of whether mutual mistake of fact is a defense which may be asserted at law). The court of appeals has recently held that mutual mistake may not be asserted as a defense at law. Annapolis Mall Ltd. Partnership v. Yogurt Tree, Inc., 299 Md. 244, 473 A.2d 32 (1984).

353. In Stiegler v. Eureka Life Ins. Co., 146 Md. 629, 127 A. 397 (1925), the court of appeals suggested that, in cases of fraud, an insurance company could alternatively file a bill in equity to cancel a policy, or raise the fraud issue defensively in an action on the policy. *Id.* at 639-41, 127 A.2d at 401-02. The court indicated in dictum that if fraud were asserted defensively in the law action, the issue would be triable of right to a jury. *Id.* at 639, 127 A.2d at 400. Without addressing the jury trial issue, other cases have strongly suggested that fraud is a legal issue when raised defensively in an action at law. *See* McGrath v. Peterson, 127 Md. 412, 96 A. 551 (1916); George v. Farmers' & Merchants' Nat'l Bank, 155 Md. 693, 142 A. 590 (1928). *Compare George* and *McGrath* with Liberty Oil Co. v. Condon Nat'l Bank, 260 U.S. 235, 242 (1972).

354. Frequently, other jurisdictions have refused to allow equitable defenses to acting on written instruments to be raised before juries out of fear that they might be too quick to upset the security of transactions these instruments were designed to foster. *See* Coleman v. Coleman, 208 S.C. 103, 37 S.E.2d 305 (1946); McCormick, *The Parol Evidence Rule as a Procedural Device for Control of the Jury*, 41 YALE L. J. 365 (1982). The holding of Connor v. Groh, 90 Md. 674, 45 A. 1024 (1900), that reformation and cancellation are not equitable defenses which must be raised in a law action, may be based on such fears.

355. *See supra* note 347.

action at law in a bifurcated legal system.[356] Merger eliminates this justification, and thus the right to jury trial should be available in subsequent proceedings leading to legal type relief.

This is not to say that fraud might never be triable entirely in equity. Where determination of the fraud issue would lead to purely equitable relief, there is no need to consider ordering a jury trial.[357] Where equitable relief is sought and its determination might foreclose the granting of legal relief, however, the judge should decline to order trial of the equitable issues to the court first,[358] lest he eviscerate the right to jury trial.[359]

B. Actions Containing Separate Claims for Legal and Equitable Relief Involving Common Issues

1. Simultaneous Claims by a Plaintiff for Legal and Equitable Relief Involving Common Issues

The prior Maryland Rules of Procedure did not generally sanction the combination, cumulatively or in the alternative, of legal and equitable claims. Former Rule BF40, however, permitted a plaintiff to join an ancillary claim for injunction to a claim for legal relief.[360] That rule

---

356. *See* Levin, *Equitable Cleanup and the Jury: A Suggested Orientation*, 100 U. PA. L. REV. 320 (1951).

357. This would be true whether the object of the suit were to obtain truly affirmative equitable relief, such as an injunction, the setting aside of judgments procured by fraud, or the establishment of a constructive trust to trace stolen property, or whether it was merely to obtain rescission. An interesting example of the latter type can be found in Powell v. Kaplan, 103 R.I. 60, 235 A.2d 91 (1967). In *Powell*, plaintiff had obtained a loan in consideration of his conveyance of a half-interest in the property to the defendant's wife. When she declined to convey the property back, the plaintiff sued for rescission and damages for usuary. The court declined to honor a jury trial demand after it concluded that plaintiff's failure to allege any payments of principal or interest failed to afford any right to legal relief.

358. *See* Cheek v. McCowan Elec. Supply Co., 404 So. 2d 834 (Fla. App. 1981); Landers v. Goetz, 264 N.W.2d 459 (N.D. 1978); Warner v. Kittle, 280 S.E.2d 276 (W. Va. 1981).

359. For examples of cases in which this occurred, see Hiatt v. Yergin, 152 Ind. App. 496, 284 N.E.2d 834 (1972); Hill v. Jessup, 139 Ind. App. 467, 220 N.E.2d 662 (1966); Farwell v. Neal, 40 Mich. App. 351, 198 N.W.2d 801 (1972); Johnson v. Johnson, 272 Minn. 284, 137 N.W.2d 840 (1965); Linville V. Wilson, 628 S.W.2d 422 (Mo. App. 1982); Weintraub v. Krobatsch, 64 N.J. 445, 317 A.2d 68 (1974); Miles v. N.J. Motors, Inc., 44 Ohio App. 2d 351, 338 N.E.2d 184 (1975); Ranta v. German, 1 Wash. App. 104, 459 P.2d 961 (1969).

360. Md. R.P. BF40 (1977) provides:

> In an action at law a party either in his original pleading or at any time after the commencement of the action (whether before or after judgment) may claim, in addition to any other demand which may be enforced in such action, that a writ of mandamus or injunction, or both, be issued.

This rule derives from previous statutes enforced in such cases as Superior Constr. Co. v. Elmo, 204 Md. 1, 102 A.2d 739 (1954) and Dundalk Holding Co. v. Easter, 215 Md. 549, 137 A.2d 667 (1958). The rule does not authorize trial courts to issue non-injunctive equitable relief, such as the imposition of a trust, Zimmerman v.

has been construed to require the claim for legal relief to be tried first and the chancellor to follow the factual findings of the jury, thus avoiding bifurcated proceedings.[361] Rule BF40 was used to provide injunctions as well as damages in actions involving continuing trespasses,[362] wrongful discharge,[363] and disparagement of business and property rights.[364] It is not clear whether this rule may have permitted a plaintiff to claim relatively minor legal relief with a more involved and burdensome "ancillary" claim for equitable relief and have the jury findings on the legal claim control the outcome of the equitable claim. The more established notion, as discussed *supra*, is that equity may decide all claims, even legal claims, if there is any basis for equitable adjudication.[365]

Rule BF40 provided a model for regulating the order of trial of suits in which the plaintiff combines legal and equitable claims. It treats such situations in a manner very similar to *Beacon Theatres* because the rule requires that the jury claim be tried first and that the jury adjudication control facts common to the equity claim. Application of the policy in Rule BF40 to forms of equitable relief such as rescission and specific performance, or *requiring* a trial judge in all cases where legal and equitable claims are combined to try the legal claim first would entail a substantial restriction of the scope of equity in Maryland.

Other jurisdictions have handled the problem of the order of legal and equitable claims joined by a plaintiff in different ways. Some states have taken a position similar to *Beacon Theatres* that, in certain in-

---

Garfinkel, 144 Md. 394, 124 A. 919 (1924), although it arguably would suffice to authorize specific performance in an action at law. *Cf.*, Grant v. Katson, 261 Md. 112, 274 A.2d 88 (1971) (in an action at law, court ordered injunctive relief to protect the plaintiff's property from flooding).

361. Beane v. McMullen, 265 Md. 585, 291 A.2d 37 (1972); Beane v. Prince George's County, 20 Md. App. 383, 315 A.2d 777 (1974).

362. *See, e.g.*, Grant v. Katson, 261 Md. 112, 274 A.2d 88 (1971); Dundalk Holding Co. v. Easter, 215 Md. 549, 137 A.2d 667 (1958).

363. *See, e.g.*, Jenkins v. Wm. Schuderberg-T.J. Kurdle Co., 217 Md. 556, 144 A.2d 88 (1958).

364. *See, e.g.*, Warren House Co. v. Handwerger, 240 Md. 177, 213 A.2d 574 (1965).

365. Surrey Inn, Inc. v. Jennings, 215 Md. 446, 138 A.2d 658 (1958) (the plaintiff's request for equitable relief where he has no colorable right to it cannot serve as a basis for equity jurisdiction). If for some reason equity would not first intervene, as where there is yet insufficient evidence of irreparable harm or where title is in question, Finglass v. George Franke Sons, Co., 172 Md. 135, 190 A. 752 (1937), a plaintiff would be compelled to sue at law, thus assuring the possibility of jury trial for legal issues while eliminating the need for bifurcated proceedings. Moreover, where equity could not provide some of the relief requested, *cf.*, Superior Constr. Co. v. Elmo, 204 Md. 1, 104 A.2d 581 (1954) (equity will not afford punitive damages), it may be that the plaintiff can proceed in equity only at the risk of being forced to have elected to surrender his claim to legal relief. *See* 3 POE'S PLEADING AND PRACTICE 334 B (6th ed. H. Sachs 1975). Whether a law court might have refused to entertain a claim for equitable relief which significantly dwarfs a legal claim is unclear.

stances, the right to trial by jury must be preserved through the order of trial of the claims.[366] The view of *Beacon Theatres*, however, has been rejected by many state courts which have considered the issue. Some simply have held that any plaintiff who joins legal and equitable claims thereby waives his right to have a jury decide the issues necessary to equitable relief.[367] Since a plaintiff in Maryland may be compelled by the rule against splitting causes of action to join transactionally related claims,[368] such a waiver policy would be harsh.

More numerous are cases which deny jury trial on the basis of traditional principles of equitable cleanup. These courts hold that once equity has properly taken jurisdiction of a case, it may, at its discretion, decide legal issues without a jury. This is true not only among those few jurisdictions retaining a separation of law and equity,[369] but also among those in which some degree of merger has been accomplished.[370] Like some federal courts prior to *Beacon Theatres*, a substantial number of state courts have conditioned loss of the jury trial right on a judicial determination that the action as a whole is regarded

366. *See, e.g.*, Pacific Western Oil Co. v. Bern Oil Co., 13 Colo. 60, 87 P.2d 1045 (1939) (error to deny defendants' jury trial demand in action to enjoin defendants from removing oil from plaintiff's land and for damages for oil already removed); Miller v. Carnation Co., 33 Colo. App. 62, 516 P.2d 661 (1973) (plaintiff entitled to jury trial on common issues in action for injunction and compensatory and punitive damages for nuisance); Landers v. Goetz, 264 N.W.2d 459, 462 (N.D. 1978) (plaintiff entitled to jury trial when seeking decree quieting title against one defendant and damages against others for false representations).

After the merger of law and equity in 1973, Massachusetts took a similar view. MASS. R. CIV. P. 38, Reporters Notes (1973). Vermont has also adopted this view in dicta. Merchants Bank v. Thibodeau, 143 Vt. 132, 465 A.2d 258 (1983). In First National Bank of Commerce v. Baker, 142 Ga. App. 870, 237 S.E.2d 233 (1977), the Georgia court held that *statutory* right to trial by jury must be protected in an action to foreclose a security interest in a mobile home and combined with a writ for possession of the mobile home. Nevada may permit the same result although the issue of sequence of the claims appears discretionary. Sanquinetti v. Strecker, 94 Nev. 200, 577 P.2d 404 (1978) (trial judge upheld in ordering jury trial on issue of whether plaintiff should get damages, and then ordering cancellation of the deeds in question).

367. A New York statute suggests that there is no waiver of jury trial rights on legal claims joined with equitable ones that do not arise out of the same transaction. N.Y. CIV. PRAC. LAW § 4102 (McKinney 1963). The New York courts apparently believe, however, that a plaintiff who joins transactionally related claims, such as a claim for specific performance and damages, thereby waives his right to jury trial on any issues in the case. See L.C.J. Realty Corp. v. Back, 37 A.D.2d 840, 326 N.Y.S.2d 28 (1971) (dictum). Since lawyers are likely to be strongly motivated to join multiple claims only when they are transactionally related, the rule has the effect of mandating waiver in virtually all such cases. *See also* PA. R. CIV. P. 1509(c).

368. *See supra* Part I.

369. *See, e.g.*, Getty Ref. & Mktg. Co. v. Park Oil, Inc., 385 A.2d 147 (Del. Ch. 1978) (action for debt, to set aside a fraudulent conveyance and to pierce a corporate veil).

370. *See, e.g.*, Linville v. Wilson, 628 S.W.2d 422 (Mo. Ct. App. 1982) (action for injunction against trespass and for actual and punitive damages).

as "essentially equitable" or that the legal issues are "incidental" to the equitable issues.[371] Defining the term "incidental" can be difficult. A few courts define it narrowly, protecting jury trial when the legal and equitable remedies sought are cumulative and denying jury trial only when the legal remedy sought is in the alternative.[372] Occasionally a legal claim will be regarded as incidental when it is dwarfed by the equitable relief sought.[373] Other jurisdictions leave substantial leeway to the plaintiff or the trial judge to characterize the action as essentially legal or essentially equitable.[374] Too often, the way this discretion is

371. *See, e.g.*, LaFrance v. LaFrance, 127 Conn. 149, 14 A.2d 739 (1940) (claims for injunction against business interference and $1500 damages characterized as fundamentally equitable); Summers v. Martin, 77 Idaho 469, 295 P.2d 265 (1956) (action to rescind a contract for exchanging land and damages characterized as equitable because primary and ultimate relief sought was rescission and restoration of property); Hiatt v. Yergin, 152 Ind. App. 497, 284 N.E.2d 834 (1972) (claim for $500,000 damages held incidental to demands for specific performance of contract to sell stock, accounting, and injunction against payment of wages); Miles v. N.J. Motors, Inc., 44 Ohio App. 2d 351, 338 N.E.2d 784 (1975) (consumer class action for injunctive relief to compel sale of autos and declaratory judgment discharging plaintiff's obligation on cognovit notes held primarily equitable because legal claims subordinate).

372. In Miller v. Carnation Co., 33 Colo. App. 62, 516 P.2d 661 (1973), a nuisance claim for injunction and compensatory and punitive damages was held essentially legal because the damages were sought as a cumulative rather than as an alternative remedy. *See* Kaitz v. Dist. Court, 650 P.2d 553 (Colo. 1982).

373. Although the Connecticut statute which merges law and equity provides that "whenever there is any variance between the rules of equity and . . . of the common law . . . the rules of equity shall prevail . . . ." CONN. GEN. STAT. ANN. § 52-1 (West Cum. Supp. 1982), the Connecticut courts have characterized as essentially equitable only those actions in which damages are sought in the alternative or as a supplement to equitable relief. *See* Berry v. Hartford Nat'l Bank & Trust Co., 125 Conn. 615, 7 A.2d 847 (1939). The *Berry* court indicated that an action seeking specific performance or damages in lieu thereof or an action for accounting, reconveyance of property and damages would be essentially equitable. An action for damages for trespass and for an injunction against its continuance, an action to set aside an insurance policy award and for damages for loss under the policy and an action for damages and to set aside a conveyance as fraudulent would not be essentially equitable. In Dick v. Dick, 167 Conn. 210, 355 A.2d 110 (1974), the court held that an action to set aside a conveyance, to establish a constructive trust and for specific performance and damages was essentially equitable. In LaFrance v. LaFrance, 127 Conn. 149, 14 A.2d 739 (1940), the plaintiff alleged violation by the defendant of an injunction issued in a prior action and sought an injunction of interference with his business and damages. The court denied the defendant's jury demand because, although $1,500 in damages had been claimed, it was clear that "the fundamental purpose of the action was against the continuance of the defendant's conduct in conspiring to avoid the court's restraining order." *Id.* at 153, 14 A.2d at 741.

374. *See, e.g.*, Ledford v. Wheeler, 620 P.2d 903 (Okla. Ct. App. 1979) (decision whether to allow seller bifurcated trial to protect jury trial right to damages claim was discretionary, and trial court did not err in refusing bifurcation where paramount issue was rescission); Skoglund v. Staab, 89 S.D. 470, 312 N.W.2d 29 (1981) (plaintiff's claim for damages dependent upon outcome of his claim for specific performance; decision of trial judge denying jury trial upheld as discretionary); Sweeney v. Happy Valley, Inc., 18 Utah 2d 113, 417 P.2d 126 (1966) (trial judge's decision to characterize contract action seeking accounting and in-

exercised reveals a strong judicial bias against trial by jury.[375] In many instances, a legal claim is regarded as incidental because the decision with respect to it is dependent upon the resolution of an equitable claim which requires affirmative relief.

The boundaries of the court's classification of an issue as "incidental" are elusive, and appellate courts do not appear inclined to disturb the discretion of trial judges as to whether to permit trial by jury. Under such a regime, the hostility of some trial judges to jury trials may be cause for concern. In *Lakeman v. La France*,[376] for instance, the plaintiff sued a physician for malpractice and sought to circumvent the statute of limitations by showing knowing concealment of the injury by the physician. The court held that since the plaintiff was seeking affirmative equitable relief — estoppel of the doctor from asserting limitations — the plaintiff had no right to trial by jury on the issue of fraud. The court did not reach the question of whether the plaintiff could have a jury trial on the malpractice issues, but cases like *Ledford v. Wheeler*[377] suggest a negative answer.

Thus, in determining the degree of protection it will extend to the right to trial by jury in an action in which the plaintiff has combined legal and equitable claims for relief, the Maryland judiciary has essentially three choices. It may protect the right to trial by jury by ordering trial of the jury case first when the order of trial may make a difference. Second, it may treat joinder of legal and equitable claims as a waiver of the right to trial by jury. Finally, the Maryland judiciary may protect or dispense with the right to trial by jury in its discretion depending upon whether it characterizes the action as essentially equitable or essentially legal. If the factual bases for the legal and equitable claims are not closely related, of course, the trial court may order separate trials in any order without consequence to the jury trial right of any party.

The selection of any of these approaches should be made in light of four important principles. The first principle is Maryland's constitution *preserves* the right to trial by jury as it existed at the time of the adoption of the constitution *vis à vis* the scope of equity.[378] Second, the

---

junction as equitable will not be interfered with unless there is patent error or abuse of discretion); Coleman v. Highland Lumber, Inc., 46 Wash. 2d 549, 283 P.2d 123 (1955).

375. *See, e.g.*, Anderson v. Whipple, 71 Idaho 112, 227 P.2d 351 (1951) (action for possession and rents, as well as to quiet title against other defendants, held to be primarily equitable); Hiatt v. Yergin, 152 Ind. App. 497, 284 N.E.2d 834 (1972) (claim for $500,000 in damages held incidental to claims for specific performance, accounting and injunction); Town of Hampton v. Palmer, 99 N.H. 143, 106 A.2d 397 (1954) (action for entry against possessory defendant and to quiet title held essentially equitable); Miles v. N.J. Motors, Inc., 44 Ohio App. 2d 351, 338 N.E.2d 784 (1975).

376. 102 N.H. 300, 156 A.2d 123 (1959).

377. *See supra* note 374.

378. *See supra* notes 185-99 and accompanying text.

scope of equity has historically been measured with due respect to the importance of the right to trial by jury.[379] Third, the scope of equity is necessarily limited by the principle that equity will not intervene where the remedy at law is full, expeditious and adequate.[380] Finally, it has been recognized that the scope of equity in Maryland may be expanded by statute or judicial decision.[381] As a matter of common sense, the Maryland judiciary should consider the efficacy of separate treatment of legal issues and the impact on judicial economy of expanding the right to trial by jury by applying it in situations in which equity would traditionally have cleaned up. There is no reason why Maryland *must* expand the right to trial by jury in the wake of merger at a time when its suitability for the pressures of modern litigation has been called into question.[382] On the other hand, it would be reasonable to re-examine the appropriateness of resort to equity and equitable cleanup in light of the post-merger remedial powers of Maryland's trial courts.[383]

With these factors in mind, it would be useful to consider how trial of claims might be ordered in actions in which various legal and equitable claims are asserted.

a. Suits to Enjoin Interference with a Business Relationship and for Damages

In *Warren House Co. v. Handwerger*,[384] the plaintiff, a corporation which operated a motor inn and shopping arcade, filed a bill in equity seeking to enjoin seven individuals from uttering false and malicious statements about its business. The plaintiff alleged that such statements were made with the intent to injure, but it did not allege the existence of a conspiracy or other concerted effort among the individual defendants to injure the plaintiff's business. The court of appeals upheld the trial court's decision to sustain the defendants' demurrer on the basis that no wrong such as conspiracy, coercion or intimidation was sought.[385]

Assume, however, that a plaintiff alleges a fact situation similar to *Warren House*, but also alleges the presence of a conspiracy and seeks an injunction and damages. The fact situation bears some resemblance to *Beacon Theatres*. The existence of a conspiracy would be a common

379. Allender v. Ghinger, 170 Md. 156, 183 A. 610 (1936).
380. Superior Constr. Co. v. Elmo, 204 Md. 1, 104 A.2d 581 (1954); Bachman v. Lambach, 192 Md. 35, 63 A.2d 641 (1949); Johnson v. Bugle Coat, Apron & Linen Serv., 191 Md. 268, 60 A.2d 686 (1948).
381. Capron v. DeVries, 83 Md. 220, 34 A. 251 (1896).
382. *See supra* note 154 and cases cited therein.
383. Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959); *see supra* notes 122-24 and accompanying text. This factor has also been regarded as relevant with respect to the scope of equity in Maryland. Bachman v. Lembach, 192 Md. 35, 63 A.2d 641 (1949).
384. 240 Md. 177, 213 A.2d 574 (1965).
385. *Id.* at 179, 213 A.2d at 575.

element to the claims for injunction and damages, and the federal policy would require that the action for damages be tried first. A federal trial court would not be prevented, however, pending trial by jury of the damages claim, from granting preliminary injunctive relief.[386] A state court which accords a right to trial by jury in mixed actions only if the action is essentially legal might well regard the claim for injunctive relief as predominant and deny a right to trial by jury.[387]

The Maryland judiciary has demonstrated a high regard for trial by jury, and Maryland courts have historically limited equitable intervention to situations in which the legal remedy is inadequate. Therefore, if a party demands a jury trial under the revised rules, the trial court should try the damages claim first. Although the injunctive relief might not be regarded as ancillary, trial of the legal claim first is consistent with the spirit of former Rule BF40. The trial court could then enter final injunctive relief in a manner consistent with the factual findings of the jury. A Maryland trial court might also enter an interlocutory injunction to alleviate the effects which the delay of a trial by jury might occasion.[388] Assuming that equity will preclude trial by jury only where there is some inadequacy of the remedy at law, it seems highly unlikely, given the ability of trial courts to grant provisional relief, that a claim for injunction that is joined with a legal claim should ever be tried first. This is particularly true if punitive damages are sought. If the plaintiff prevailed with respect to the injunctive relief, a second trial would be necessary since equity may not award punitive damages.[389] This reasoning is also applicable to situations in which the plaintiff seeks damages and an injunction for nuisance or for continuing trespass. In such cases, a result similar to that in *Beacon Theatres* is obtained under established Maryland principles.

b. Suits Joining Claims for Specific Performance and Damages

The ability of a court of equity to decree specific performance is a significant remedial advantage over a court of law. This remedy is largely limited to contracts involving land[390] and unique chattels.[391] If a claim for damages is joined with one for specific performance, the damages are generally sought in the alternative or for the recoupment of incidental losses for wrongful detention. In either event, states generally hold that there would be no right to trial by jury.[392] Since the right to damages would involve issues common to entitlement for specific performance, the analysis under *Beacon Theatres* and its progeny

386. FED. R. CIV. P. 65(a).
387. *See* LaFrance v. LaFrance, 127 Conn. 149, 14 A.2d 739 (1940).
388. *See* Md. R.P. BB70c (1977).
389. Superior Constr. Co. v. Elmo, 204 Md. 1, 102 A.2d 739 (1954).
390. Popplein v. Foley, 61 Md. 382 (1884).
391. Berman v. Leckner, 188 Md. 321, 52 A.2d 464 (1947).
392. *See supra* notes 372, 373.

would require that the damages claim be tried first. Where the equitable grounds for specific performance are strong, such a result would be ridiculous. In such a case, the plaintiff would only want substantial damages if specific performance were denied; the value to the plaintiff of incidental damages for wrongful detention would be dwarfed by the value of performance. A jury could not efficaciously adjudicate a claim for specific performance because such an adjudication involves consideration of factors uniquely within the province of the chancellor.[393]

Maryland has regarded cases of specific performance as justifying the interposition of equity. Once equitable jurisdiction attached, the chancellor was permitted to award damages if specific performance was denied.[394] Under the revised rules, if the court denies specific performance despite finding a breach of contract, it should not be compelled to hold a separate jury trial as to damages. The need for specific performance provides equitable jurisdiction, and nothing under the revised rules cures the inadequacy of the damages remedy. In this instance, the merger of law and equity should provide no limitation on the ability of equity to "clean up" the claim for damages.

One caveat to this approach seems appropriate. The plaintiff should be required early in the proceeding to demonstrate strong grounds for believing that the specific performance remedy will issue and that whatever damages are awarded will likely be incidental. Discretion to order jury trial of common issues should be freely exercised when either of these conditions cannot be met. Analysis of the jury trial issue posed by joinder of a claim for specific relief for return of unique chattels[395] and a claim for damages for conversion of chattels which are not unique illustrates the point. The facts surrounding the acquisition of the chattels by the defendant might well be common to both claims. In the federal courts, the claim for conversion should be tried first. A simple claim for return of chattels might not involve significant discretionary considerations. In such a case, the legal relief would not be alternative, and deference for trial by jury would require the trial judge to submit the claim for damages to the jury. The jury's findings as to the conversion claim would bind the judge as to that issue but not as to whether the specific items must be recovered.

c. Suits Joining Divorce Related Claims with Actions at Law

A question arises as to how a trial court should order the trial of a suit in which the plaintiff joins a claim for a limited divorce on the

393. *See* Linthicum v. Washington, B. & A. Elec. R.R. Co., 124 Md. 263, 92 A. 917 (1915) (court denied specific performance on the basis that the injury to the defendant would be greater than the benefit to the plaintiff).

394. *Id.*

395. Berman v. Leckner, 188 Md. 321, 52 A.2d 464 (1947), involved a suit by an administrator d.b.n. of an estate to recover personal property. The unique property involved was a painting alleged to be worth $300,000, and various heirlooms.

basis of cruelty of treatment or excessively vicious conduct[396] with a claim for damages for assault and battery. Joinder of such claims in the same suit would be novel. In an action for divorce and child custody, it has been held that an equity court lacked jurisdiction to order child support to which the parties had not agreed, and that such support would have to be sought in an action in assumpsit at law.[397]

It may strongly be contended that permitting claims not strictly related to divorce, property distribution and child custody to be included in suits involving domestic relations is unsound judicial administration. It may be preferable to confine claims related to domestic relations to separate court divisions, as is done in the Family Division of the District of Columbia Superior Court.[398] The mixture of claims triable by jury to historically equitable domestic relations actions[399] may inject inappropriate elements of delay and interference with equitable discretion. It must be noted that the Maryland legislature has endowed chancery with jurisdiction over matters pertaining to alimony,[400] divorce[401] and disposition of marital property.[402] It is doubtful that the legislature specifically intended to preclude the right to trial by jury as to such matters because it is unlikely that the legislature considered that these claims might have been combined with claims triable by jury. Nevertheless, it has been established in Maryland that the legislature may fix the scope of equity in such a way as to narrow the scope of trial by jury.[403]

In the action combining a claim for divorce based upon cruelty and a claim for damages for assault and battery, the same conduct may well be the basis for both claims. If such is the case, the rule of *Beacon Theatres* would require that the assault and battery claim be tried first. The chancellor would then be bound by the jury's finding in deciding the issues involved in the divorce action. It may be argued that any rule which requires legal claims to be tried prior to the divorce claims constitutes an affront to the legislative grant of divorce jurisdiction to equity.[404] In any event, in order to avoid unseemly delay, the divorce claim should be tried first. If punitive damages are claimed for assault and battery, the trial judge as chancellor should not clean up the as-

396. *See* MD. FAM. LAW CODE ANN. § 7-102 (1984).
397. Kemp v. Kemp, 287 Md. 165, 411 A.2d 1028 (1980).
398. D.C. CODE ANN. § 11-1101 (1981).
399. *See* McAlear v. McAlear, 298 Md. 320, 469 A.2d 1256 (1984).
400. MD. ANN. CODE art. 16, § 1 (Supp. 1983). See MD. FAM. LAW CODE ANN. § 11-101 (1984) for current version.
401. MD. ANN. CODE art. 16, § 24 (Supp. 1983). See MD. FAM. LAW CODE ANN. § 7-103 (1984) for current version.
402. MD. CTS. & JUD. PROC. CODE ANN. § 3-6A-01 to -07 (1984). See MD. FAM. LAW CODE ANN. §§ 1-201, 7-102, 7-103, 8-201, 8-213 (1984).
403. Capron v. DeVries, 83 Md. 220, 34 A. 251 (1896).
404. Such jurisdiction was conferred by 1841 Md. Acts, ch. 262 (1842) (MD. CODE ANN. art. 16, §§ 24, 25 (Supp. 1983)). See MD. FAM. LAW CODE ANN. § 7-103 (1984) for current version.

sault and battery claim. If such a claim is not precluded by the findings of the court in the divorce claim, a separate trial by jury should be held.[405]

A variation of this problem would arise in an action in which the plaintiff joins a claim for absolute divorce[406] and property disposition[407] with a claim for conversion of property subject to disposition by the court. *Beacon Theatres* would require that the conversion action be tried first to the jury. In Maryland, however, according priority to the jury claim with a consequent preclusive effect as to the property disposition flies in the face of the legislative determination that equity should determine ownership of marital personal property and severely undermines the power of the court to divide the property expeditiously.[408] The trial judge, as chancellor, could not award punitive damages for conversion, although such damages do not appear to be readily available in an action for conversion.[409] If the findings of the trial judge do not preclude such damages, a separate trial may be held. Subordinating the legal claim where there is a clear legislative grant of equitable jurisdiction prevents any delay caused by jury adjudication which would interfere with the legislative intent of expeditious adjudication.

Consideration of these factual possibilities indicates that the rigid rule of *Beacon Theatres* does not always yield the best results. It would be preferable for the post-merger Maryland judiciary to order trial of claims to protect trial by jury except in cases where equitable intervention has traditionally been regarded as essential.

C. *Actions Involving Legal and Equitable Claims Asserted by Different Parties*

The former Maryland Rules of Procedure permitted defendants to assert any claims they had against an opposing party,[410] to assert transactionally related cross-claims against co-parties[411] and to implead third party defendants, without any apparent limitation as to whether such additional claims are legal or equitable. Because of the rigid historic dichotomy between law and equity, there is some doubt as to whether a law court could entertain an equitable claim or an equity court could entertain a legal claim filed by a defendant.[412] There is

405. MD. R.P. 2-503(b).
406. MD. FAM. LAW CODE ANN. § 7-103 (1984).
407. MD. FAM. LAW CODE ANN. §§ 1-201, 7-102, 7-103, 8-201, 8-213 (1984).
408. MD. CTS. & JUD. PROC. CODE ANN. § 3-6A-03(b)(1); *cf.* Katchen v. Landy, 382 U.S. 323 (1966) (post-*Beacon* case in which the Supreme Court appears to have authorized equitable cleanup of legal claims relating to the bankrupt's estate in order to effectuate the congressional scheme for expeditious resolution of bankruptcy proceedings).
409. Bender v. Bender, 57 Md. App. 593, 471 A.2d 335 (1984).
410. Md. R.P. 314a (1977).
411. Md. R.P. 314b (1977).
412. *See* Brown, *The Law/Equity Dichotomy in Maryland*, 39 MD. L. REV. 427, 472

evidence that if a defendant were to respond to an equitable claim with a legal counterclaim, equity would clean up the whole case without affording the defendant a right to jury trial as to the counterclaim.[413]

In merged systems, the response to the issue of preservation of the right to trial by jury in this situation is varied. After *Beacon Theatres*, it seems clear that no matter what type of relief is sought first or is thought to predominate, a federal court must accord the parties the right to jury trial on all issues common to the claim and the counterclaim.

A number of states have taken a similar viewpoint. In *Western Community Cemetery v. Lewis*,[414] the plaintiff initially filed an unlawful detainer action. The defendant counterclaimed in equity to quiet title. The plaintiff then dismissed his detainer claim and counterclaimed for ejectment. The Florida court held that, since resolution of either claim would be tantamount to adjudication of the other, the ejectment claim must be tried first.

Other states have also followed *Beacon Theatres* in this respect.[415] Still others, using less sweeping rationales than *Beacon Theatres*, have attempted to secure jury trial rights in counterclaim situations. The Supreme Court of Arkansas, which retains separate law and equity divisions, has held that it was error to transfer an action for ejectment to chancery following assertion by the defendant of an equitable claim because such transfer would allow the defendant to oust courts of law from jurisdiction over claims of title.[416] In Ohio, where courts have discretion to characterize actions as essentially legal or essentially equitable, the Supreme Court of Ohio upheld the defendant's right to trial by jury on a counterclaim for breach of contract in an action by the plaintiff to foreclose a mechanic's lien.[417] Alabama has held that a jury

---

(1980) (equity may not entertain claims at law by the defendant). Of course, law could entertain equitable defenses, Md. R.P. 342d1 (1977), including set-offs and transactionally related recoupment, which were always available at law, *see* C. CLARK, CODE PLEADING § 100, at 634-36 (2d ed. 1947), and which could be asserted in Maryland under a plea to the general issue. At law, if a defendant wished to assert a non-transactionally related defense, or wished to obtain an affirmative judgment, he had to do so by way of counterclaim. E. J. Smith Constr. Co. v. Burton, 262 Md. 62, 277 A.2d 84 (1971); District Agency Co. v. Suburban Delivery Serv., Inc., 224 Md. 364, 167 A.2d 874 (1961). In equity, where joinder rules have historically been liberal, setoffs asserting what are essentially legal claims are commonplace. *See, e.g.*, Singer v. Steven Kokes, Inc., 39 Md. App. 180, 384 A.2d 463 (1978).

413. *See* Vulcan Waterproofers, Inc. v. Maryland Home Improvement Comm'n, 253 Md. 204, 211, 252 A.2d 62, 66 (1969) (dictum).

414. 293 So. 2d 373 (Fla. App. 1974); *see also* Barth v. Florida State Constructors Serv., Inc., 327 So. 2d 13 (Fla. 1976).

415. *See* Harada v. Burns, 50 Haw. 528, 445 P.2d 376 (1968); Evans Financial Corp. v. Strasser, 99 N.M. 788, 664 P.2d 986 (1983); Landers v. Goetz, 264 N.W.2d 459 (N.D. 1978); Dugan v. Jones, 615 P.2d 1239 (Utah 1980); Merchants Bank v. Thibodeau, 143 Vt. 132, 465 A.2d 258 (1983) (dictum).

416. Rice v. Rice, 206 Ark. 937, 175 S.W.2d 201 (1943).

417. Carl Sectional Home, Inc. v. Key Corp., 1 Ohio App. 3d 101, 439 N.E.2d 915

must try legal issues in a suit for specific performance of construction of a house in which the defendant counterclaimed for the plaintiff's refusal to pay increased construction costs caused by changes in the plans.[418]

Many other courts permit equity to clean up the legal issues, thus dispensing with trial by jury of legal claims or counterclaims. A few courts simply hold that, once any equitable claim is filed, the entire case becomes subject to exclusively equitable adjudication.[419] A larger number of jurisdictions limit equitable cleanup to subsidiary[420] or dependent[421] legal claims or provide that the determination of jury trial rights is within the discretion of the trial court.[422] Still others adhere to

---

(1981). The Ohio rule may be based on statutes which preserve the right to trial by jury on issues of fact necessary to recover money or to obtain specific real estate. *See* Romanowski v. Dziedzicki, 35 Ohio App. 384, 172 N.E. 446 (1930).

418. Poston v. Gaddis, 335 So. 2d 165, 167 (Ala. Civ. App.), *cert. denied*, 335 So. 2d 169 (Ala. 1976). The court noted that damages had been sought as an alternative rather than as an incidental remedy. More broadly, it relied on *Beacon* for the proposition that, with the consolidation of legal and equitable claims, it is no longer necessary for equity to try incidental damages. Subsequently, the Alabama Supreme Court held that equitable issues in mixed claims should not be submitted to a jury. Finance, Inv. and Rediscount Co. v. Wells, 409 So. 2d 1341 (Ala. 1981).

419. *See, e.g.*, Grandon v. Ellingson, 259 Iowa 514, 144 N.W.2d 898 (1966) (action involving contract for sale of stock which provided for return of stock and restitution of deposit on failure to obtain loan; the court held that equity, having been invoked to order specific performance of return provision, could adjudicate defendant's legal counterclaim for damages); Kuhlman v. Cargile, 200 Neb. 150, 262 N.W.2d 454 (1978) (equity, having been invoked to declare a constructive or resulting trust over land held by defendant, can clean up counterclaim for damages for breach of contract); *see also* Farmers Bank & Trust Co. v. Ross, 401 N.E.2d 74 (Ind. App. 1980); First Nat'l Bank v. Clark, 226 Kan. 619, 602 P.2d 1299 (1979).

420. *See, e.g.*, Anderson v. Whipple, 71 Idaho 112, 227 P.2d 351 (1951) (no jury trial right on defendant's claim for damages and plaintiff's claim for possession and rents where plaintiff also sought to quiet title against adverse claimants); Fogelstrom v. Murphy, 70 Idaho 488, 222 P.2d 1080 (1950) (in action to foreclose a mortgage and appoint a receiver for plaintiff's property, no right to jury trial on counterclaim for damages for appointment of receiver because primary relief sought was equitable); *cf.* Carl Sectional Home, Inc. v. Key Corp., 1 Ohio App. 3d 101, 439 N.E.2d 915 (1981) (in action to foreclose mechanic's lien in which defendant disputed the amount of materials furnished and counterclaimed for breach of contract, the court held that the right to jury trial obtains where predominant relief sought is money damages). In Colorado, if the initial action is fairly characterizable as essentially equitable, subsequent claims brought by others will be tried without a jury. *See, e.g.*, Federal Lumber Co. v. Wheeler, 643 P.2d 31 (Colo. 1981) (action to foreclose lien; no trial by jury although all parties agree).

421. *See, e.g.*, Skoglund v. Staab, 312 N.W.2d 29 (S.D. 1981) (in action for specific performance of contract of sale and damages, and counterclaim for expenses and attorney's fees, the court held there was no right to jury trial on defendant's counterclaim or plaintiff's claim for damages because outcome of both is dependent upon the outcome of the specific performance claim).

422. *See* Johnson v. Johnson, 272 Minn. 284, 137 N.W.2d 840 (1965) (in action for accounting involving affairs of family business, trial court's denial of right to jury trial upheld).

the traditional view[423] that a defendant, by filing a legal counterclaim to a bill in equity, waives whatever claim to jury trial he may have had.[424] In such jurisdictions, it is by no means clear that a plaintiff has no jury trial right on a defendant's counterclaim.[425] With the advent of compulsory counterclaim rules,[426] the waiver theory has generally collapsed,[427] except with regard to permissive counterclaims.[428] New York, which does not have a compulsory counterclaim rule, has abrogated the waiver theory by statute.[429]

Experience in the federal and state courts thus demonstrates several possible approaches for trial of actions involving claims by different parties seeking legal and equitable relief. The rule of *Beacon Theatres* would require that the legal claim be tried first to a jury if it involves factual issues common to the equitable claim. Another approach would require the trial judge to protect the trial by jury if the case is essentially legal. A third approach would treat assertion of a legal counterclaim in an action begun in equity as a waiver of the right to trial by jury. A variation or combination of the latter two approaches would determine the applicability of the right to trial by jury on the basis of the nature of the first claim asserted.

Experience in the federal courts before *Beacon Theatres* indicates

---

423. This view was set forth in American Mills Co. v. American Surety Co., 260 U.S. 360 (1922), where the defendant counterclaimed for contractual damages in an action filed by the plaintiff to set aside the contract based on fraud. Obviously, this view has been invalidated by *Beacon Theatres*.

424. Savings Bank of New London v. Santaniello, 130 Conn. 206, 33 A.2d 126 (1943); Rosenberg v. Rosenberg, 276 Pa. Super. 203, 419 A.2d 167 (1980); Aiken Mortgage Co. v. Jones, 197 S.C. 245, 15 S.E.2d 119 (1941); Mortgage Assoc., Inc. v. Monona Shores, Inc., 47 Wis. 2d 171, 177 N.W.2d 340 (1970).

425. Indeed, the early federal cases held that plaintiffs did have such a right. American Mills Co. v. American Surety Co., 260 U.S. 360 (1922).

426. Most such rules are modeled on FED. R. CIV. P. 13(a) which provides:

> A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. But the pleader need not state the claim if (1) at the time the action was commenced the claim was the subject of another pending action, or (2) the opposing party brought suit upon his claim by attachment or other process by which the court did not acquire jurisdiction to render a personal judgment on that claim, and the pleader is not stating any counterclaim under this rule 13.

427. *See, e.g.*, Morgantown v. Royal Ins. Co., 169 F.2d 713 (4th Cir. 1948), *aff'd.*, 337 U.S. 254 (1949); Hightower v. Bigoney, 156 So. 2d 501 (Fla. 1963); Landers v. Goetz, 264 N.W.2d 459 (N.D. 1978).

428. Colorado does permit waiver in these circumstances. *See* Miller v. Dist. Court, 154 Colo. 125, 388 P.2d 763 (1964); *see also* Citizens State Bank v. Duus, 154 Mont. 18, 459 P.2d 696 (1969).

429. *See* N.Y. CIV. PRAC. LAW § 4102(c) (McKinney 1963). The counterclaimant waives his right to jury trial if he joins his claim for legal relief with a transactionally related claim for equitable relief. *In re* Lacon's Estate, 38 Misc. 2d 869, 296 N.Y.S.2d 711 (1968).

that application of a test which determines applicability of the right to trial by jury based upon the essential nature of an entire action is quite unpredictable.[430] The waiver theory has a superficial appeal in a jurisdiction such as Maryland which does not have a compulsory counterclaim rule. Ostensibly, a defendant in a suit by a plaintiff to rescind a contract would not be required to counterclaim for damages. Given the expansive view of *res judicata* in the Maryland decisions discussed in Part I, the defendant would be well advised to assert his claim if it involves the contract the plaintiff is seeking to have rescinded. Nevertheless, adoption of the rule in *Beacon Theatres* might inappropriately restrict the scope of equitable adjudication and expand the availability of trial by jury. Again, consideration of a few hypothetical situations may be useful.

1. Actions Involving a Suit to Foreclose a Mechanic's Lien and a Counterclaim for Breach of Contract

In the case of *Singer v. Steven Kokes, Inc.*,[431] the plaintiffs' suit against a builder of their home for negligence and breach of warranty was held to be barred by the judgment in a prior action by the builder to enforce a mechanic's lien.[432] The contractor in the earlier action had sued to establish and enforce a mechanic's lien when the buyers refused to release the final draw on the construction mortgage. In that first action, the buyers were allowed a credit against the lien for alleged construction defects and for alleged untimely completion of the house. They were barred by *res judicata* from maintaining a second suit based on an allegation of additional defects. The Court of Special Appeals of Maryland clearly treated the assertion of the claim in the first action as tantamount to a counterclaim.[433]

Under the revised rules, a defendant in an equitable action to foreclose a mechanic's lien may assert a counterclaim against a contractor for breach of contract in performing the construction or furnishing materials despite the legal character of such a claim.[434] A question arises as to whether assertion of such a claim would entitle the defendant to a trial by jury and whether a trial judge would be required to order trial of claims so as to protect the right to trial by jury.

Under *Beacon Theatres*, since resolution of the same issues would determine whether the contractor is owed money or whether he is liable in damages to the other contracting party, the breach of contract claim would generally have to be tried first to the jury. If a jury trial could

430. *See supra* notes 93-106 and accompanying text.
431. 39 Md. App. 180, 384 A.2d 463 (1978); *see supra* notes 38-42 and accompanying text (discussion of pre-*Beacon* merger right to jury trial).
432. The establishment and enforcement of a mechanic's lien was governed by Md. R. P. BG70-77 (1977). The statutory basis for these rules was MD. REAL PROP. CODE ANN. § 9-101 to-114 (Supp. 1983).
433. *Singer*, 39 Md. App. at 183, 384 A.2d at 465.
434. MD. R.P. 2-303(c).

not be held promptly, application of the rule of *Beacon Theatres* to this situation would clearly frustrate the policy of the legislature that such liens be adjudicated promptly.[435] Again, attentiveness to established Maryland principles concerning the scope of equity provides a more sensible answer than does a rigid rule such as *Beacon Theatres*. Since the legislature has established equitable jurisdiction over a suit to enforce a mechanic's lien,[436] the right to jury trial should yield to the need for expeditious adjudication in equity. The claim to enforce the lien should be tried first, even if it resolves some of the issues involved in the counterclaim.

It is possible, of course, that the counterclaim may exceed the amount sought in the claim to establish the lien. Thus, even an adverse resolution of the contractor's lien claim may not establish the amount of contract damages owed by the contractor. Since equitable jurisdiction was appropriately assumed in the first instance, the chancellor would retain discretion to resolve the remaining issues or to order a separate jury trial of the remaining issues under his established cleanup powers.[437]

With respect to this first hypothetical situation, resort to the traditional scope of equity yields a result more consistent with the legislature's intent than would the rule of *Beacon Theatres*.

2. Actions Involving a Claim to Quiet Title and Legal Counterclaims

One who is in peaceable possession of land is able to maintain a suit in equity to quiet or remove any cloud from the title when his title is denied or disputed.[438] This remedy has been created in equity because of the inadequacy of the remedy at law: one in possession was not entitled at common law to maintain an action in ejectment.[439] Early American equitable principles permitted such an action only against a defendant who was seeking to establish legal title by repeated

435. MD. REAL PROP. CODE ANN. § 9-106(b)(3) (Supp. 1983) provides that, if the court cannot determine from the pleadings and affidavits that the lien should attach, it shall establish an interlocutory order which "[a]ssigns a date for the trial of all the matters at issue in the action, which shall be within a period of six months." The purpose of the statute is to "encourage construction by ensuring that those who contribute work or materials to the construction of a project [are] compensated." Note, *Maryland's Mechanic's Lien Law*, 6 U. BALT. L. REV. 181, 193 (1976) (footnote omitted).

436. MD. REAL PROP. CODE ANN. § 9-106(d) (1981) provides: "Until a final order is entered either establishing or denying the lien, the action shall proceed to trial on all matters at issue, as in the case of any other proceedings in equity."

437. *See* Katz v. Simcha Co., 251 Md. 227, 246 A.2d 555 (1968). The exercise of cleanup jurisdiction over all claims in the action could be analogized to the summary equitable jurisdiction which federal bankruptcy courts may exercise over claims asserted in bankruptcy proceedings in furtherance of the congressional purpose of expeditious adjudication. Katchen v. Landy, 382 U.S. 323, 329-30 (1966).

438. MD. REAL PROP. CODE ANN. § 14-108 (1981).

439. Romney v. Steinem, 228 Md. 605, 180 A.2d 873 (1962).

actions of ejectment and against whom the plaintiff had been successful in at least one action at law.[440] It must also be borne in mind, however, that the Maryland courts have expressed a strong preference for adjudicating land titles at law.[441] Part of this preference has been based on a clear desire to preserve the right to trial by jury.[442]

Assume that, in an action to quiet title by a plaintiff in possession, the defendant counterclaims for ejectment or trespass *quare clausum fregit*. The issue becomes whether trial of the claims should be ordered to preserve the right to trial by jury on issues common to both claims. In both an action for ejectment and an action for trespass, the issue of title to realty may be determined.[443] The assertion of a legal counterclaim which would allow the issue of title to be tried, as is now permissible under the revised rules, would provide the plaintiff with an adequate remedy at law. When the remedy at law is adequate, equity has been reluctant to intervene,[444] in part because of the right to trial by jury. Thus, where the counterclaim has the effect of creating an adequate remedy at law for the plaintiff, it should be tried first to the jury.[445] Any additional equitable relief may be ordered by the trial court consistent with the jury's findings. According priority to trial by jury of the legal claim of trespass would permit adjudication in that proceeding of any claim for punitive damages.

If a legal counterclaim by the defendant in an action to quiet title does not raise the issue of title, it would not create an adequate remedy at law with respect to the plaintiff's claim. Such a counterclaim would probably not involve factual issues common to the plaintiff's claim. In such a case, prior adjudication of the equitable claim by the court would not serve to preclude the jury trial right of the legal claim. Thus, the order of trial would not be an issue of great consequence.

3. Suits Involving a Claim for Accounting and a Claim for a Legal Remedy

In *Johnson & Higgins v. Simpson*,[446] a company president's contract of employment provided that his estate was to be paid one year's

440. Wehrman v. Conklin, 155 U.S. 314, 321-22 (1894).
441. *See supra* notes 233-37 and accompanying text.
442. McCoy v. Johnson, 70 Md. 490, 17 A. 387 (1889).
443. Gore v. Jarrett, 192 Md. 513, 64 A.2d 550 (1949).
444. *See supra* notes 185-98 and accompanying text.
445. Of course, the mere designation of a counterclaim as one for ejectment does not necessarily make it so. In Kerr-McGee Corp. v. Bokum Corp., 453 F.2d 1067 (10th Cir. 1972), the plaintiff, a lessee of uranium mining land, brought an action for declaratory judgment with respect to certain provisions of the lease. The lessor counterclaimed for ejectment under state law on the basis that the lease had been terminated because of the lessee's breach. The defendant demanded a jury trial. The court rejected this demand. Although the claim was styled in ejectment, the court determined that the defendant was actually seeking cancellation of the lease, a claim in equity.
446. This controversy involved two separate suits and two separate appeals. The first,

salary in the event of his death while in the employment of the company. Following the president's death, the employer refused to pay the death benefit. The president's administratrix sued for breach of contract. One of the company's special pleas was that the president had failed to perform his duties faithfully and diligently as agreed, in that he had embezzled a considerable sum of money. The company elected to treat the contract as having been rescinded by this conduct.[447] The company then filed a bill to enjoin the administratrix's prosecution of the action at law on the basis that an accounting was necessary. The company so contended on the basis that the president "had so juggled the books that it was impossible for the jury to determine with certainty the true state of the accounts between it and [the president]."[448] As discussed previously,[449] the Court of Appeals of Maryland held that accounting was not appropriate, partly because the party seeking the accounting controlled the records and partly because adjudication of the issues common to both actions, whether the president had embezzled money and thus had not faithfully performed his duties, would preclude the company's right to trial by jury in the action at law.

Under the revised rules, the company could have counterclaimed for an accounting in the administratrix's contract action. The issue would then have been whether it would be appropriate for the trial court to try the contract action to a jury to preserve the jury trial right. If the employer's liability depended upon faithful performance of the employee, *Beacon Theatres* and *Dairy Queen* would require that the legal claim be tried first. Although Maryland has permitted equity to preclude the right to trial by jury when there is an inadequate remedy at law, the Court of Appeals of Maryland has recognized that the availability of discovery in an action at law may eliminate the need for an accounting.[450] Under the facts of *Johnson & Higgins*, the trial judge is faced with the choice of whether law or equity will decide the critical factual issues. In deciding whether preclusion of the jury trial by equity is appropriate, the trial court should limit equitable adjudication to instances where the remedy at law is inadequate. Using such analysis, the trial court would order a jury trial, reaching the same result as in *Dairy Queen* and preventing the claim for accounting from serving as a basis for sidestepping trial by jury.

---

an action at law, is reported at 163 Md. 574, 163 A. 832 (1933). The second, an action in equity, is reported at 165 Md. 83, 166 A. 617 (1933).

447. 163 Md. 574, 163 A. 832 (1933). An earlier verdict was set aside on a motion for new trial.

448. *Johnson & Higgins*, 165 Md. at 88, 166 A. at 619.

449. *See supra* notes 193-98 and accompanying text.

450. Johnson v. Bugle Coat, Apron & Linen Service, 191 Md. 268, 60 A.2d 686 (1948); *see supra* notes 251-54 and accompanying text.

D. Actions in Which Adjudication of Equitable Issues is a Prerequisite to Adjudication of Claims Triable by Jury

Under the new merged procedure, it will be necessary for Maryland to decide the extent to which the right to trial by jury will be preserved in actions in which a traditionally equitable issue or issues must be resolved before legal issues may be tried. This question may arise in actions in which essentially legal rights are asserted in proceedings of equitable origin, such as a class action, interpleader or a shareholders' derivative suit. It may also arise when a plaintiff seeks an equitable remedy as a prerequisite to obtaining legal relief, such as an action to reform a contract and for damages on the contract as reformed.

The revised rules accommodate the right to trial by jury on an issue-by-issue basis. Revised Rule 2-325(b) more closely resembles Federal Rule 38(b)[451] than did former Maryland Rule 343(a), in that Rule 2-325(b) contemplates trial by jury of particular *issues* rather than actions. The "action" orientation of the former Maryland Rules did not entirely preclude resolution at law of issues which were of equitable origin. The discovery rules supplant the need for bills of discovery in equity. Former Rule 342(d)(1) permitted assertion of equitable defenses in actions at law, thereby eliminating the need for a bill in equity to enjoin prosecution of the action at law.[452] While the matter was not entirely free from doubt, it appeared that the trial judge regulated procedural questions concerning equitable defenses in actions at law,[453] and the jury in some instances was able to adjudicate issues related to the equitable defenses.[454]

As discussed *supra*, equity once had the power to refer disputed factual issues to law courts for trial by jury.[455] In addition, Maryland practice has mandated transfer from equity to law of various questions of fact.[456] The former Maryland Rules continued this practice in a few

---

451. FED. R. CIV. P. 38(b):
> Any party may demand a trial by jury of any *issue* triable of right by jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be indorsed upon a pleading of the party. (Emphasis added).

452. Mountain Lake Park Ass'n v. Shartzer, 83 Md. 10, 34 A. 536 (1896).

453. For instance, a trial judge may have to decide whether an equitable defense may be asserted without a special plea. *See, e.g.*, McGrath v. Peterson, 127 Md. 412, 96 A. 551 (1916).

454. *See* Stiegler v. Eureka Life Ins. Co., 146 Md. 629, 127 A. 397 (1925) (the court held that a question of fraud in the inducement of a life insurance policy may be triable to a jury in an action on the policy filed after the incontestability period has run as long as the insured has notified the insurer of an intent to treat the contract as void and has proffered the premium within the incontestability period).

455. *See supra* note 221.

456. *See* E. MILLER, EQUITY PROCEDURE 292-93 (1897). These included questions of

instances.[457]

These traditional practices provide some guidance as to whether, under the revised rules, Maryland will protect the right to trial by jury as to legal claims which must be tried after equitable issues. Preservation of the right to trial by jury in such actions requires a separate jury trial of legal issues after the equitable issues have been resolved rather than equitable cleanup of the legal claims.

The case for a separate trial is strongest when legal claims are asserted in historically equitable actions which are essentially joinder devices. These actions include class actions, intervention, interpleader, subrogation, and receivership. In such actions, there are preliminary questions which must be resolved by a court of equity, such as the appropriateness of suit for class action treatment[458] or whether a party may intervene in a suit.[459] In *Allender v. Ghinger*,[460] discussed *supra*, the Court of Appeals of Maryland held that the mere fact that a receiver had been appointed in equity to pursue claims of a defunct corporation's creditors against its stockholders did not deprive the stockholders of their right to trial by jury of the receiver's claims.[461]

Although the Maryland courts have not addressed the issue, it appears that the former Maryland Rules, which explicitly provided assignees[462] and subrogees[463] the opportunity to maintain actions at law, strongly indicate that the right to trial by jury would obtain in such cases. The same could be said of legal claims asserted in class actions and through intervention since the former Maryland Rules pertaining to such devices were applicable to both law and equity actions.[464] On the other hand, the former rules strongly suggested that there was no right to trial by jury as to interpleader actions[465] which are strongly

---

debt, *vel non*, prior to setting aside fraudulent conveyances, issues of fact in attachment proceedings under decrees in equity, issues of *devasit vel non* in will contests and declaratory judgments. Miller also noted that in actions by judgment creditors of a corporation against its debtors, the debtors had a right to trial by jury.

457. *See* Md. R.P. F5 (1977), which mandated that equity transmit cases of attachment to courts of law when a jury trial had been demanded. *See also* Md. R.P. W75b (1977) which provided the plaintiff in a foreclosure action with the option of obtaining a deficiency decree or pursuing his remedy at law. Md. R.P. BU73 (1977) provided that, if a party seeking interpleader asserted a claim to one of the claimants, any claimant other than the interpleading party could demand a jury trial. Upon such demand, the court transferred the action to a court of law for separate trial under Md. R.P. 515 (1977). The Maryland interpleader rule is now MD. R.P. 2-221.

458. *See* FED. R. CIV. P. 23(a).

459. *See* FED. R. CIV. P. 24(a), (c).

460. *See supra* notes 199-202.

461. *See also* National Park Bank v. Lanahan, 60 Md. 477 (1883); Dillon v. Conn. Mut. Life Ins. Co., 44 Md. 386 (1876).

462. Md. R.P. 240 (1977).

463. Md. R.P. 243 (1977).

464. Md. R.P. 208, 209 (1977).

465. Md. R.P. BU70 (1977) authorized interpleader actions, and Md. R.P. BU74 (1977)

rooted in equity.[466]

The United States Supreme Court confronted this problem in *Ross v. Bernhard*,[467] which involved a shareholders' derivative suit. Although that action's equitable heritage reflects the rigidity of common law joinder rules,[468] such actions are also rooted in the law of trusts and fiduciary relations.[469] It is quite plausible to view the entire claim, rather than simply the issue of the shareholder's ability to represent the corporation,[470] as equitable. So viewed, there would be no right to trial by jury. Nevertheless, the Court in *Ross* treated the shareholders' derivative action as a simple joinder device and held broadly that, since the federal rules mandated trial by jury of legal issues, there would be a right to trial by jury as to factual issues regarding liability and damages in suits seeking legal relief.[471]

Maryland cases like *Allender v. Ghinger*[472] employ reasoning which is almost identical to that of *Ross*. Such cases support the view that the applicability of the right to trial by jury is determined by the nature of the issues rather than the pedigree of the proceeding in which they are asserted. The revised rules, however, are not supportive of such a view. For example, the revised interpleader provision, Rule 2-221(c), provides a trial by jury for those issues "triable of right by a jury." This rule could be construed as continuing the policy of former Rule BU73, which provided for trial by jury only when demanded by the defendant as to a claim by the plaintiff. The limited extension of the right to trial by jury might be regarded as an exclusion of such right with respect to all other aspects of the interpleader suit.

Allender and *Ross* suggest that, in actions in which equitable issues must be resolved first, it is appropriate to have the trial judge resolve

---

provided that "proceedings subsequent to the entry of the interpleader decree shall be according to the usual procedure in equity." Md. R.P. BU73 (1977) provided the right to jury trial to *defendants* in interpleader actions in which the plaintiff has, in addition to seeking relief from possible multiple liability, asserted a claim to the property or against one or more of the defendants. The origins of the Rule BU73 jury trial reservation are obscure. It is clear that under traditional equity practice, interpleader would not lie in such circumstances. *See* E. MILLER, EQUITY PROCEDURE 824-25 (1897). It is possible that rulemakers felt that, in such circumstances the plaintiff should be held to have waived right to jury trial by seeking the aid of chancery, but that the defendants should not be divested of jury trial rights in what amounts to a reverse action at law. If so, BU73 represents a limited effort to restrict equitable cleanup.

466. H. GINSBERG, EQUITY JURISPRUDENCE AND PROCEDURE IN MARYLAND 166 (1928).

467. 396 U.S. 531 (1970). *See supra* notes 146-54 and accompanying text.

468. 9 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2307 (1971).

469. *See* Prunty, *The Shareholder's Derivative Suit: Notes on its Derivation*, 32 N.Y.U. L. REV. 980 (1957).

470. *See* FED. R. CIV. P. 23.1.

471. *See supra* notes 150-54 and accompanying text.

472. 170 Md. 156, 183 A. 610 (1936); *see also* Bachman v. Lembach, 192 Md. 35, 63 A.2d 641 (1949) (relief sought was not in its *nature* equitable because sole purpose is recovery of misappropriated jewelry and cash).

such issues and then to have the jury hear the balance of the case. It is clear that Maryland's courts have limited *Allender* to situations in which a narrow procedural determination must be made. When the equitable relief required is more substantial, many cases indicate that once equity has assumed jurisdiction it may clean up the balance of the action.

The clearest lines of such cases are those involving cancellation[473] and reformation of contracts.[474] In this area, a fairly rigid separation of law and equity has been maintained. Historically, a defendant could not defend an action at law on a contract or instrument because of fraud or mutual mistake. He was instead limited to bringing a bill in equity for rescission or reformation. While fraud was available in Maryland as an equitable defense to an action at law,[475] mutual mistake was not.[476] It was long held that relief such as rescission or reformation was available only in equity and may not be ordered by a judge at law.[477] Once the case was in equity, the chancellor, having granted rescission, might also order restitution "damages" without honoring a demand for jury trial.[478] In reformation actions, the court of appeals has consistently held that the equity court, having reformed the contract, did not need to transfer the parties to law on triable issues of liability and damages but could instead provide full relief.[479]

This sort of cleanup was not limited to rescission and reformation cases. In a long line of cases, the court of appeals upheld the power of equity, once it entertained a claim for discovery and accounting,[480] to grant damages relief.[481] Although the court of appeals held that discov-

473. *See* Creamer v. Helferstay, 294 Md. 107, 448 A.2d 332 (1982); Ridgley v. Beatty, 222 Md. 76 n.1, 159 A.2d 651 n.1 (1960); Gibula v. Sause, 173 Md. 87, 194 A.2d 826 (1937); Conner v. Groh, 90 Md. 674, 45 A. 1024 (1900); Baltimore Sugar Ref. Co. v. Campbell & Zell Co., 83 Md. 36, 34 A. 369 (1896).

474. *See* Aetna Indemnity Co. v. Baltimore, S. P. & C. Ry. Co., 112 Md. 389, 76 A. 251 (1910); Maryland Home Fire Ins. Co. v. Kimmell, 89 Md. 437, 43 A. 764 (1899).

475. *See* Stiegler v. Eureka Life Ins. Co., 146 Md. 629, 127 A. 397 (1925); McGrath v. Peterson, 127 Md. 412, 96 A. 551 (1916).

476. Annapolis Mall Ltd. Partnership v. Yogurt Tree Inc., 299 Md. 244, 473 A.2d 32 (1984).

477. Creamer v. Helferstay, 294 Md. at 114, 448 A.2d at 336; Ridgley v. Beatty, 222 Md. 76, 159 A.2d 651 (1960); Connor v. Groh, 90 Md. 674, 45 A. 1024 (1900).

478. *See* Gibula v. Sause, 173 Md. 87, 194 A. 826 (1937) (court held that while an action for money had and received was ordinarily the appropriate remedy for the return of purchase money, equity would order such relief where equitable jurisdiction had attached); Baltimore Sugar Ref. Co. v. Campbell & Zell Co., 83 Md. 36, 34 A. 369 (1896) (court held that equity is not divested of jurisdiction in a case where the legal relief becomes adequate).

479. Aetna Indemnity Co. v. Baltimore, S. P. & C. Ry. Co., 112 Md. 389, 76 A. 251 (1910); Maryland Home Fire Ins. Co. v. Kimmell, 89 Md. 441, 43 A. 764 (1899).

480. *See supra* notes 266-74 and accompanying text (circumstances in which an action for discovery and accounting is appropriate).

481. *See, e.g.*, Dormay Const. Corp. v. Doric Co., 221 Md. 145, 156 A.2d 632 (1959); Spangler v. Dan A. Sprosty Bag Co., 183 Md. 166, 36 A.2d 685 (1944); Legum v. Campbell, 149 Md. 148, 131 A. 147 (1925).

ery alone may not be the basis of a resort to equity,[482] it did not restrict accounting as a basis for resort to equity to nearly the same degree as did the Supreme Court in *Dairy Queen*.[483]

The cleanup of legal claims in these lines of authority was predicated less upon such legal claims being subsidiary than upon the notion that such cleanup fosters judicial economy. The avoidance of bifurcated proceedings, with their increased costs and delays, was a constant theme. Fundamental to this sort of equitable cleanup were judicial notions of what constitutes affirmative equitable relief, combined with a relatively rigid view that once equity jurisdiction attached, it may not be ousted by subsequent events.

A review of Maryland cases involving actions in which resolution of traditionally equitable issues is necessary before adjudication of claims which might otherwise be triable by jury reveals that two approaches may be justified. Where the basis of equitable relief is one of the joinder devices, such as a class action or interpleader, the approach of the Supreme Court in *Ross* has sound and sufficient justification in Maryland practice. The issues in a class action should be triable by jury if they would be so triable in individual suits by the class members. The issues raised by an intervenor's claim are triable by jury if they would be so triable had they been raised by the intervenor as an original plaintiff or defendant.

Where the basis of equitable jurisdiction is a particular remedial competence of equity, such as rescission, cancellation or specific performance, the question is more difficult. Maryland has demonstrated a willingness to take a hard look at the bases for equitable jurisdiction, such as discovery, accounting, and multiplicity, in light of expanded procedures in actions at law. Maryland practice has not heretofore required a separate jury trial as to additional, nonequitable relief. The use of equitable cleanup in these situations, however, was either justified by the need to avoid bifurcated proceedings or to hasten the final resolution of the case.

This latter view may be examined in light of the facts of *Damazo v. Wahby*,[484] a suit in which the defendant sought, *inter alia*, to have a fraudulent conveyance set aside.[485] The plaintiff was a real estate broker who had procured a purchaser for Willowbrook, a corporation owned by the defendants. In a previous action, the plaintiff had obtained a judgment for a commission against the corporation.[486] The plaintiff contended that Willowbrook had transferred a note to the de-

482. *Cf.* Perlmutter v. Minskoff, 196 Md. 99, 75 A.2d 129 (1950).
483. *See supra* notes 139-41.
484. 269 Md. 252, 305 A.2d 138 (1972).
485. A creditor whose claim has matured may maintain an action under MD. COM. LAW CODE ANN. § 15-209 (Repl. Vol. 1983). This statutory right has been held not to deprive a creditor of his right to have a fraudulent conveyance set aside in equity. Lipskey v. Voloshen, 155 Md. 139, 141 A. 402 (1928).
486. Damazo v. Wahby, 259 Md. 627, 270 A.2d 814 (1970).

fendants, rendering it insolvent. Testimony revealed that the defendants had transferred the note to another corporation which it owned and which, in turn, pledged the note as collateral for a loan. The trial court, however, entered judgment against the defendants for the amount of the plaintiff's commission.

On appeal, the defendants argued that a personal judgment could not be entered against them in an action to set aside a fraudulent conveyance. The court held that such a judgment against the transferee was proper so long as it was sought in the complaint.[487] Speaking of the broad powers exercisable by the chancellor, the court held that:

> where the transferee allows or causes the property to depreciate in value or parts with the property without sufficient consideration or puts it beyond the reach of the court, equity will not allow itself to be frustrated but will adapt itself to the exigencies of the case and will enter a money judgment if this will achieve an equitable result.[488]

Clearly, equity possesses broad cleanup power with respect to fraudulent conveyances.

No question as to the right to trial by jury was raised in *Damazo*. If the defendants had demanded a jury trial as to the claim against them by the plaintiff for personal judgment, the issue would have been whether a separate trial by jury would be required under the revised rules after the trial court determined that it could not satisfy the plaintiff's claim by setting aside the fraudulent conveyance. Given the broad sweep of powers available to a court in such a suit,[489] the court of appeals would not be likely to re-evaluate the appropriateness of affirmative equitable relief in such a case. It seems that such a re-evaluation would preclude the chancellor from deciding the entire case once equitable jurisdiction has attached. Indeed, it was established long ago that once equitable jurisdiction attached, it would persist until the debt was satisfied, regardless of the availability of any action at law.[490] Thus, a separate jury trial as to a claim for a personal judgment would be held only at the chancellor's discretion.

With this final category of actions, as with the two preceding categories, resort to established Maryland procedure rather than federal post-merger practice would often yield a result less than fully protective of the right to trial by jury.

---

487. *Damazo*, 269 Md. at 256, 305 A.2d at 141.
488. *Id.* at 257, 305 A.2d at 142.
489. For example, MD. COM. LAW CODE ANN. § 15-210(b)(1), (2) (Repl. Vol. 1983) permits injunctive relief or the appointment of a receiver in the case where a claim has not matured.
490. Atlantic Lumber Corp. v. Waxman, 162 Md. 191, 159 A. 593 (1932).

VI. CONCLUSION

In certain cases, the merger of law and equity presents a threat to the right to trial by jury. The federal courts have met this threat in ways which expand the right to trial by jury. In Maryland, equitable intervention has long presented a similar threat. The Maryland courts have for the most part responded to this threat by limiting equitable jurisdiction to cases in which it is clearly needed. Once equitable jurisdiction had attached, however, equity often decided the whole case in order to foster judicial economy. Economy considerations may sometimes be less acute in a merged system than in a bifurcated system, but they do not entirely disappear. Fidelity to the historic right to trial by jury after merger demands not blind subservience to *Beacon Theatres*, but a common sense attentiveness to Maryland's established limitations on the appropriate exercise of equitable jurisdiction.