The Law/Equity Dichotomy in Maryland

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One of the more difficult tasks the Maryland litigator faces has certainly been the search to find the ever elusive demarcation between law and equity. The historically rooted dichotomy immediately confronts the litigant: Where can or must I sue, at law or in equity? The "vague and shadowy" boundary, marked out by the seemingly simple maxims of equity, can surely undermine an attorney's confidence when he needs it most, at the beginning of litigation. Its uncertainties can also distract from a party's rational choice as to which forum offers greater strategic advantages.

This Article attempts to unravel much of the mystery that lurks behind the rules of this outmoded dual court system. Part I is primarily descriptive of the existing Maryland law that defines the bounds of law and equity subject matter jurisdiction. A catalogue is provided of numerous claims and remedies and the appropriate side for their resolution. Part II examines several principles peculiar to this dual court system that provide ancillary insight into its present day functioning. The picture thus drawn in the first two Parts is shown in Part III to indicate several clear trends that have increasingly operated to undermine what should be a party's constitutionally protected right to a jury trial. Part III also considers the meaning of the constitutional guarantee of a jury trial and reexamines the vitality of that guarantee in light of principles that require a jury trial in Maryland today in all cases in which it existed in Maryland in 1776. It is concluded that equity's dramatic expansion of the past two centuries in Maryland may well run afoul of the jury guarantee in several respects. Many of these

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conclusions are not only applicable to today's dual system. They will continue to pose difficult queries even after the anticipated merger of law and equity.

I. THE BOUNDS OF LAW AND EQUITY JURISDICTION

A plaintiff choosing to file suit in Maryland must first evaluate his claim and possible remedies in light of the oblique criteria which delineate law from equity. If at least one of the plaintiff's claims or one of his remedies is recognized by the equity courts, he can choose to sue in equity. If a plaintiff makes no claim or requests no remedy recognized as within equity's power, suit must be at law. For a limited number of claims or remedies, however, concurrent jurisdiction exists; a plaintiff can choose between suing at law or in equity.

Because the law courts existed first and equity arose to supplement them when proven inadequate, a party must look first to law as the forum for resolving a legal dispute. If he has a full and adequate remedy at law, he must generally seek relief in a law court and equity cannot act. The Maryland courts and General Assembly have nevertheless defined three somewhat overlapping areas in which the equity side of a trial court in Maryland is empowered to hear and resolve a case. The first area includes cases in which the substantive right presented by the plaintiff is one that had not originally been recognized as existing in law, or conversely, "is itself of equitable origin." A standard example would be an equitable action for breach of a fiduciary duty. The second and most significant area of equity jurisdiction is composed of cases in which a legal right exists, but the legal remedy for that right is inadequate, incomplete or uncertain. The traditional example in this category is equity's power to decree specific performance where a damage remedy would be inadequate. In a final category of cases, although both the right and remedy are recognized at law, the Court of Appeals has decreed that jurisdiction resides concurrently in both law

3. See text accompanying notes 85 to 94 infra.
7. See, e.g., 1 J. Pomeroy, supra note 5, § 157.
and equity.\textsuperscript{10} Thus, for example, a fraud claim can be brought in either law or equity.\textsuperscript{11} The sections below explore each of these areas.

\section*{A. \textit{Substantive Equitable Claims}}

Deciding which claims fall into the equity courts' subject matter jurisdiction requires categorization of the substantive nature of the party's affirmative claims. Equity courts long ago recognized on a case by case basis certain claims upon which relief could be granted, in spite of, or perhaps due to, the law side's failure to do likewise. In Maryland the list thus formulated through judicial development has been expanded significantly by statutory enactments of the General Assembly and rules of procedure promulgated by the Court of Appeals.

Equity courts traditionally recognized rights concerning claims based upon: (1) fraud;\textsuperscript{12} (2) mistake;\textsuperscript{13} and (3) breaches of fiduciary, trust, or confidential relationships.\textsuperscript{14} Claims based upon these substantive rights can be brought in and resolved by a court of equity.\textsuperscript{15} Although typically enumerated as separate modes of action, a considerable overlap exists among these claims. The Court of Appeals' definition of "fraud" bears this out: "all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust or confidence justly reposed, and which are injurious to another, or by which an undue and unconscientious advantage is taken of another."\textsuperscript{16}

In earlier days, equity also developed a host of other actions. It created, for example, a set of purely equitable estates and interests that could be protected by suits filed within its jurisdiction. Pomeroy has listed examples of these equitable rights as historically including express or implied trusts, married women's separate property, equitable

\begin{itemize}
\item \textsuperscript{10}\textit{E.g.}, Legum v. Campbell, 149 Md. 148, 150, 131 A. 147, 148 (1925) (law and equity have concurrent jurisdiction over claims for accountings); Gott v. Carr, 6 G. & J. 309, 315 (1834) (law and equity have concurrent jurisdiction over questions concerning fraud). \textit{See generally} Baltimore Sugar Ref. Co. v. Campbell & Zell Co., 83 Md. 36, 53, 34 A. 369, 372 (1896).
\item \textsuperscript{11}\textit{E.g.}, Gott v. Carr, 6 G. & J. 309, 315 (1834).
\item \textsuperscript{12} \textit{See}, \textit{e.g.}, Watkins v. Stockett, 6 H. & J. 435, 444 (1823).
\item \textsuperscript{14} \textit{See}, \textit{e.g.}, Wegner v. Rosinski, 232 Md. 43, 49–50, 192 A.2d 82, 86–87 (1963); Turk v. Grossman, 176 Md. 644, 673, 6 A.2d 639, 652–53 (1939); Farmer v. O'Carroll, 162 Md. 431, 44, 160 A. 12, 18 (1932).
\item \textsuperscript{15} Because law has also recognized claims of fraud and breach of a fiduciary duty, such actions could also be brought at law. \textit{See} text accompanying notes 91 to 93 \textit{infra}.
\end{itemize}
interests resulting from the doctrine of conversion, equitable interests arising from mortgages and pledges, equitable liens, and assignees' equitable interests which were not assignable at law. As is shown below, many of these equitable rights have now been codified, with equity retaining jurisdiction by legislative decree.

Scattered throughout the Maryland code can be found a miscellany of unrelated claims that the General Assembly has decreed are to be resolved by courts of equity. These include:

(a) actions brought to enforce arbitration awards or agreements to submit a dispute to arbitration;
(b) adoption proceedings;
(c) divorce, alimony, and annulment proceedings;
(d) child support, custody, guardianship, legitimation, maintenance and visitation proceedings;
(e) paternity suits;
(f) petitions for the exercise of "general superintending power" over trusts;
(g) actions brought by a surety of a sheriff, deputy sheriff or collector of taxes for the appointment of a trustee to give relief for the failure of these officers to make financial collections as required by their jobs;
(h) petitions for the distribution of the property of a charitable or religious corporation that has been dissolved;

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17. 1 J. POMEROY, supra note 5, §§ 151–169.
19. See id. § 3–601.
25. See id. § 127.
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(i) proceedings to enforce or determine the validity of a mechanic's lien;

(j) challenges to the involuntary confinement of a person in a state mental institution;

(k) suits to quiet title;

(l) bills to partition real property;

(m) petitions for the sale of specified ownership interests in real property and

(n) petitions for a sale to enforce a vendor's or other equitable lien.

The scattering of these grants of equity jurisdiction, with in some instances little understandable basis for the allocation, makes the plaintiff's choice of the correct forum often a difficult task. The Court of Appeals' creation of equity jurisdiction pursuant to its rulemaking power poses a similar obstacle.

The rules promulgated by the Court of Appeals governing procedure in the Maryland courts system require that various additional actions be resolved on the equity side of a trial court. These include:

(a) actions to foreclose a mortgage;

(b) actions for the sale of a burial ground;

(c) petitions for the appointment of a personal or property guardian for a child or a disabled person.

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27. See Md. Ann. Code art. 59, § 15(a) (1979). If the petitioner exercises his right to a jury trial, the action would be transferred to law. See id. § 15(c).


35. See Md. R.P. R71(a), R70(a), and Committee Note. Equity has traditionally had jurisdiction over guardians. See, e.g., Barnes v. Crain, 8 Gill 391 (1849); Swan v. Dent, 2 Md. Ch. 111 (1847). If the petition seeks to appoint a personal guardian for a disabled
The lack of a coherent logic to this listing clearly requires counsel bringing the more unusual of these actions to review this listing prior to filing suit.

B. *Equity Jurisdiction Based upon an Inadequate Legal Remedy*

In numerous situations in which the rights sought to be enforced have traditionally been rooted in actions at law, equity will nevertheless have jurisdiction if law cannot provide an adequate remedy. To be adequate a legal remedy must be complete.

[It] must obtain the full end and justice of the case. It must reach the whole mischief, and secure the whole right of the party in a perfect manner, at the present time and in the future; otherwise, equity will interfere and give such aid as exigency of the particular case may require.\(^42\)

\(^36\) Md. R.P. BH71. See also Md. ANN. CODE art. 16, § 123 (1973) ("Chancery" Article).

\(^37\) Id. X70.

\(^38\) Id. Y72.

\(^39\) Id. Y72.

\(^40\) Id. A2d 900 (1964); In re Easton, 214 Md. 176, 133 A.2d 441 (1957).

\(^36\) Id. A2d 900 (1964); In re Easton, 214 Md. 176, 133 A.2d 441 (1957).

Furthermore, the adequate remedy must be one that grants relief against the defendants before the court in the case in question; a remedy involving nonparties has not been deemed adequate.\textsuperscript{43} This rule is most frequently applied when damages, the traditional legal remedy,\textsuperscript{44} will not appropriately remedy a plaintiff's harm. Thus, if a plaintiff seeks return of a unique heirloom or work of art, for which money damages would be no substitute, upon proof of the claim equity will specifically order the defendant to restore the item to the plaintiff.\textsuperscript{45} Likewise, when the injury resulting from a nuisance cannot be adequately compensated by damages, equity has jurisdiction to issue injunctive relief.\textsuperscript{46}

Contract actions are usually remedied by damages and therefore resolved on the law side.\textsuperscript{47} Damages have been deemed an inadequate remedy, however, where they "would be practically impossible of ascertainment."\textsuperscript{48} If damages are inadequate, equity can remedy a breach of contract by an injunction restraining the breach,\textsuperscript{49} an order for specific performance,\textsuperscript{50} an accounting and a disclosure,\textsuperscript{51} or cancellation, rescission, or reformation of the contract.\textsuperscript{52}

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To determine the adequacy of a legal remedy, a court may look beyond the ability of damages to make a party whole and also consider the adverse party's financial ability to fulfill the legal remedy. Thus, even where damages theoretically provide an adequate remedy, equity can still issue an injunction, unless the adverse party satisfifies the court, by posting a bond or otherwise, that he has sufficient resources to pay any probable damages. Such considerations may also allow equity to order specific performance in a breach of contract action.

A legal remedy may also be judged to be inadequate if a multiplicity of actions would be required to achieve its legitimate result. Equity can therefore entertain an action to restrain a series of trespasses, rather than require the plaintiff to sue at law each time a trespass occurs. The Court of Appeals, however, "has never flatly decided that the avoidance of a multiplicity of suits is an independent ground of equitable jurisdiction." Moreover, modern permissive joinder rules can help avoid

53. Md. R.P. BB76, which replaces former section 98 of article 16 of the Maryland Annotated Code, provides in full:

A court shall not refuse to issue an injunction on the mere ground that the applicant has an adequate remedy in damages, unless the adverse party shall show to the court's satisfaction that he has property from which the damages can be made, or shall give a bond in such amounts as may be determined by the court and with such surety as may be approved by the clerk, to answer all damages and costs that he may be adjudged to pay to the applicant, by reason of the alleged wrong. The first such provision was enacted in Act of April 4, 1888, ch. 260, 1888 Md. Laws 413. See generally Bartlett v. Moyers, 88 Md. 715, 720, 42 A. 204, 206 (1898) (where defendant's property ample to meet damage award, injunction denied). Cf. Frederick County Nat'l Bank v. Shafer, 87 Md. 54, 39 A. 320 (1898) (section not intended to authorize injunctions to enforce payment of debts; damages and debt distinguished). 54. See Md. Ann. Code art. 16, § 169 (1973); Pattison v. Brydon, 150 Md. 575, 582, 133 A. 328, 330–31 (1926).


multiple suits, thus making special equity aid in this area less necessary.\textsuperscript{58}

Although it is the generally stated principle that acts that may be criminally prosecuted have an adequate remedy and therefore cannot be enjoined, the rule has its exceptions.\textsuperscript{59} If the acts "would operate to cause an irreparable injury to property or rights of a pecuniary nature," equity may maintain jurisdiction and grant injunctive relief.\textsuperscript{60} Because criminal prosecution in such an instance generally takes place after an illegal act has been completed and, therefore, after the harm has been suffered, it would generally be inadequate to prevent the injury complained of.

Decedents' estates are normally fully administered by the orphans' court.\textsuperscript{61} Nevertheless, in the special circumstances when that court cannot afford an adequate remedy, resort may be had to a court of equity to permit complete justice to be done.\textsuperscript{62} Issues that may be resolved in equity include construction of a will,\textsuperscript{63} enforcement or resolution of a trust,\textsuperscript{64} granting of an accounting,\textsuperscript{65} appointment of a receiver,\textsuperscript{66} and resolution of a claim of fraud.\textsuperscript{67}

Equitable jurisdiction premised on an inadequate legal remedy is not merely limited to cases in which there is an already existing

\textsuperscript{58} See Md. R.P. 313; Warren House Co. v. Handwerger, 240 Md. 177, 180, 213 A.2d 574, 575 (1965). Modern permissive joinder rules, exemplified by federal rules of civil procedure 18 and 20, to which Maryland's rule is very similar, allow unlimited joinder of claims and liberal joinder of parties. At common law only claims falling within the same form of action and parties with joint interests (who for the most part had to be joined) could be joined. These restrictive rules did not serve well in the complicated litigation of an industrial age, and the more liberal notions of equity prevailed, even in jurisdictions, such as Maryland, where law and equity remained separate. See generally 6 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1581 (1971); 7 id. § 1651 (1972).

\textsuperscript{59} See, e.g., Clark v. Todd, 192 Md. 487, 492, 64 A.2d 547, 549 (1949); Dvorine v. Castelberg Jewelry Corp., 170 Md. 661, 668, 185 A. 562, 565 (1936).

\textsuperscript{60} Clark v. Todd, 192 Md. 487, 492, 64 A.2d 547, 549 (1949) (criminally illegal oyster dredging can be enjoined). Accord, Adams v. Commissioners of Trappe, 204 Md. 165, 171, 102 A.2d 830, 833 (1954) (acts violative of municipal ordinance can be enjoined); Ruark v. Engineers' Union, 157 Md. 576, 592, 146 A. 797, 803–04 (1929) (dicta).


\textsuperscript{64} See, e.g., Noel v. Noel, 173 Md. 147, 152, 195 A. 315, 322 (1937); Woods v. Fuller, 61 Md. 457, 459 (1884).

\textsuperscript{65} See, e.g., Segafoose v. Hospelhorn, 179 Md. 325, 18 A.2d 193 (1941).

\textsuperscript{66} See, e.g., Chestertown Bank v. Perkins, 154 Md. 456, 140 A. 834 (1928).

\textsuperscript{67} See, e.g., Bachman v. Lembach, 192 Md. 35, 63 A.2d 641 (1949); Boland v. Ash, 145 Md. 465, 125 A. 801 (1924).
traditional equitable remedy. Equitable principles and remedies are deemed to be "broad and comprehensive and their application is not to be denied merely because of a new subject." Thus, the mere absence of precedent will not bar an equity court from granting appropriate relief. Indeed, a basic equity maxim is that "equity suffers no right to be without a remedy." In one instance, for example, the Court of Appeals held that the legislature's failure to pass a bill permitting the expungement of arrest records did not preclude an equity court from granting the same relief, if appropriate on the facts of the case before it.

Further broadening equity's power to handle cases in which the legal remedy is inadequate is a recent change in the notion of the substantive limits of equity's power. Although the chancellor's discretion was traditionally viewed as existing only to protect property rights, rather than personal rights, that distinction has now been eroded, and recently equity has also exercised jurisdiction to protect personal and civil rights.

Equity has jurisdiction to hear a case as long as an equitable remedy is properly requested. The Court of Appeals' handling of Dormay Construction Corp. v. Doric Co., a dispute over commissions on land sales contracts, provides an example. Plaintiff filed a bill in equity seeking "an accounting, discovery through examination of the defendants' books, an injunction against dissipation of funds, and a monetary decree." It could not, of course, have been argued that the contractual right presented was equitable in nature; nor was it alleged that plaintiff

70. Wells v. Price, 183 Md. 443, 452, 37 A.2d 888, 893 (1944) (equity can enjoin warden from wrongfully releasing prisoners).
73. Niner v. Hanson, 217 Md. 298, 308, 142 A.2d 798, 802 (1958) (reinstatement to labor union).
74. See Doe v. Commander, Wheaton Police Dep't, 273 Md. 262, 273, 329 A.2d 35, 42-43 (1973) (expungement of criminal arrest record); Adams v. Commissioners of Trappe, 204 Md. 165, 171, 102 A.2d 830, 834-35 (1954) (dictum on civil rights; case involved abatement of public nuisance); Downs v. Swann, 111 Md. 53, 64, 73 A. 653, 656 (1909) (dicta) (restraint on police circulation of arrested defendant's photograph).
75. 221 Md. 145, 156 A.2d 632 (1959).
76. Id. at 148, 156 A.2d at 634.
possessed an equitable lien. Consequently, in answering the defendants' challenge to the existence of equity jurisdiction, the court focused upon the equitable nature of the remedies requested. The court initially noted that the plaintiff's allegations fell short of claiming defendants' insolvency, thus no equity jurisdiction arose from this source. Because no sound basis for injunctive relief was set forth, the court refused to rest equitable jurisdiction on this traditional remedy. The Maryland rules now provide for adequate discovery in actions at law, and the need for an equitable discovery remedy could not, therefore, by itself, support equity jurisdiction. The plaintiff's request for an accounting, however, did state a legitimate claim for an equitable remedy, and accordingly would support equity jurisdiction. As long as there exists one nonfrivolous ground upon which to sustain equity jurisdiction, the court held, transfer to law is improper, and the jurisdiction of equity cannot be ousted.

C. Concurrent Jurisdiction

Several claims or remedies in which equity and law have concurrent jurisdiction have been recognized. In these cases a plaintiff can sue on either side of the court and remain there for the full resolution of the

77. Id. at 151, 156 A.2d at 636.
78. Id. See text accompanying notes 53 & 54 supra.
79. 221 Md. at 151, 156 A.2d at 636. A request for an equitable remedy cannot serve as the basis of equity jurisdiction where the party has no right to the remedy. See Tidewater Express Lines, Inc. v. Freight Drivers & Helpers Local 557, 230 Md. 450, 456, 187 A.2d 685, 688 (1963); Surray Inn, Inc. v. Jennings, 215 Md. 446, 453, 138 A.2d 658, 662 (1958).
80. See, e.g., Md. R.P. 401, 417, 419. Although earlier cases upheld the need for discovery as a predicate for equitable jurisdiction, see Bachman v. Lembach, 192 Md. 35, 42–43, 63 A.2d 641, 644 (1949); Johnson v. Bugle Coat, Apron & Linen Service, Inc., 191 Md. 268, 278, 60 A.2d 686, 690 (1948), they were decided before the development of modern discovery options.
81. See 221 Md. at 151–52, 156 A.2d at 636–37; accord, Perlmutter v. Minskoff, 196 Md. 99, 75 A.2d 129 (1950); Bachman v. Lembach, 192 Md. 35, 42, 63 A.2d 641, 644 (1949).
82. See Nagel v. Todd, 185 Md. 512, 517–18, 45 A.2d 326, 328 (1946); Goldsborough v. County Trust Co., 180 Md. 59, 61, 22 A.2d 920, 921 (1941).
83. 221 Md. at 153, 156 A.2d at 637. But see Johnson & Hoggins, Inc. v. Simpson, 165 Md. 83, 166 A. 617 (1933) (existence of complex accounting that jury allegedly could not understand was insufficient ground to transfer to equity). It is difficult to understand from the Dormay case why the information available through discovery would not be tantamount to an accounting, thus providing an adequate remedy at law for this relief also.
84. 221 Md. at 152–53, 156 A.2d at 637; accord, Spangler v. Sprosty Bag Co., 183 Md. 166, 175, 36 A.2d 685, 689 (1944); Legum v. Campbell, 149 Md. 148, 150, 131 A. 147, 148 (1925).
suit. Apparently, whichever side first attains jurisdiction can keep it. Courts of law and equity have concurrent jurisdiction over requests for a declaratory judgment or an accounting, issues of fraud, and breaches of a fiduciary or confidential relationship.

Cases concerning a breach of a fiduciary duty are sometimes included within the "fraud" category. Justice Story wrote that courts of law and equity have concurrent jurisdiction over cases of "fraud, accident, and confidence." He classified situations in which "some special confidential or fiduciary relation between the parties affords the power and the means . . . of exercising undue influence over others," as "constructive fraud" and therefore within this concurrent jurisdiction. However, such a finding of "fraud" or "constructive fraud" is not always necessary. As long as the possibility of abuse of the trust or confidence of a fiduciary relationship exists, equity may assume jurisdiction. Thus, in Chase v. Grey, a deceased woman's estate claimed that the defendant had married the decedent, knowing that she was senile, in order to obtain unfairly her money. In disposing of the case, the Maryland Court of Appeals stated: "Where the bill shows, — as it does in this case, — that the defendant by an abuse of a fiduciary relationship has secured the possession of another's money a Court of Equity has concurrent jurisdiction with courts of law to pass a pecuniary decree for the recovery of the money."

88. See Maskell v. Hill, 189 Md. 327, 337, 55 A.2d 842, 846 (1947); Wilhelm v. Caylor, 32 Md. 151, 154 (1870).
91. 1 J. Story, supra note 42, § 76. See Boreing's Lessee v. Singery, 4 H. & McH. 398 (1799).
93. 134 Md. 619, 107 A. 537 (1919).
94. Id. at 623, 107 A. at 538 (citing 1 J. Pomeroy, Equity Jurisprudence § 186 (4th ed. 1918)).
II. CORRELATIVE JURISDICTIONAL DOCTRINES

Selecting and remaining within the appropriate court will be primarily governed by the above jurisdictional guidelines. Attention must nevertheless be paid to several other rules that modify these general precepts. Some of these ancillary doctrines further define equitable jurisdiction. A bill cannot be filed in equity, for example, unless its amount in controversy exceeds a certain minimum. Assuming the financial prerequisite has been met, in certain instances after equity jurisdiction has attached, equity can maintain its power over a case even though equitable remedies are no longer appropriate. Thus, equity can at times grant damage relief.

If a case is brought on one side of the law/equity boundary but should have been filed on the other, attention must be paid to the procedures available to raise such an error and the appropriate remedy to be applied. When such an error goes undetected until the case is on appeal, the question arises whether an objection and remedy will lie at that late date.

A. Equity's Amount-in-Controversy Requirement

Maryland courts of equity are forbidden by statute to "hear, try, determine or give relief in any cause, matter or thing wherein the original debt or damages does not amount to twenty dollars." Bills of complaint in which the potential injury is valued at less than $20 must therefore be dismissed. This rule would also, of course, require dismissal of bills that pose no controversy at all, at least none with pecuniary value.

95. See text accompanying notes 99 to 111 infra.
96. See text accompanying notes 112 to 116 infra.
97. See text accompanying notes 117 to 121 infra.
98. See text accompanying notes 136 to 138 infra.
100. See, e.g., Smith v. Wells, 106 Md. 526, 528, 68 A. 134, 135 (1907) (bill to restrain collection of $7.92 debt); Kuenzel v. Mayor of Baltimore, 93 Md. 750, 751, 49 A. 649, 650 (1901) (bill to restrain collection of $7.32 in taxes); Reynolds v. Howard, 3 Md. Ch. 331, 333 (1850) (suit concerning unpaid taxes of less than "1201 pounds of tobacco or five pounds and one penny in money").
101. See Baumohl v. Columbia Jewelry Co., 209 Md. 278, 285, 120 A.2d 830, 833 (1956) (twenty dollar amount in controversy requirement barred equity jurisdiction of suit brought by life tenant of trust the assets of which consisted of worthless stock; plaintiff could suffer no pecuniary loss no matter what trustees did).
In accumulating the $20 damage amount in a particular action the plaintiff can rely upon the indirect costs that he would incur if relief were denied him. Thus, the damage amount of a bill filed to restrain the holding of an allegedly illegal referendum would be the plaintiff's share of the amount by which taxes would have to be raised to defray the costs of the election. If that increment — the amount of additional individual tax liability of the plaintiff — is less than $20, equity cannot grant the plaintiff relief. As a practical matter, because an incremental increase in an individual's tax liability caused by specific governmental action will usually be small, an individual taxpayer's suit challenging the legality of a governmental expenditure will often be barred.

If one plaintiff's possible damage, or in the above example, his additional tax liability, were less than $20, he nevertheless could bring suit by joining other taxpayers to raise the aggregate additional tax liability to $20. Drafting the suit as a taxpayer class action would therefore be one way to surmount equity's damage amount requirement.

102. See Sun Cab Co. v. Cloud, 162 Md. 419, 427, 159 A. 922, 925 (1932); Kenneweg v. County Comm'rs, 102 Md. 119, 129, 62 A. 249, 253 (1905).
104. See Sun Cab Co. v. Cloud, 162 Md. 419, 427, 159 A. 922, 925 (1932). See Stovall v. Secretary of State, 252 Md. 258, 263–64, 250 A.2d 107, 110 (1968) (Sun Cab rule implicitly affirmed through rejection of petitioners' contention that no pecuniary harm need be alleged in taxpayer class actions). Cf. Purvis v. Forrest St. Apts., 286 Md. 398, 403, 408 A.2d 388, 390–91 (1979) (In determining the amount in controversy for the purpose of deciding whether an appeal from the district court to the circuit court should have been de novo or on the record, plaintiff landlord's claims for rent and for the value of the right to possession were combined. "Where a plaintiff has several different claims, it is the aggregate of the value of all claims which determines the amount in controversy.").
105. Sun Cab Co. v. Cloud, 162 Md. 419, 427, 159 A. 922, 925 (1932). This ruling is at variance with the federal subject matter jurisdiction rule that generally precludes aggregation to achieve an amount-in-controversy limit. See Zahn v. International Paper Co., 414 U.S. 291 (1973); Snyder v. Harris, 394 U.S. 332 (1969). Sun Cab Co. was decided before the adoption of Maryland's class action rule in 1961, but was, nevertheless, what would now be called a taxpayer class action. In Sun Cab Co. taxpayers sought to prevent allegedly fraudulent petitions from forcing a referendum on a taxicab licensing act. In answer to the argument that the damage to the taxpayers filing the bill was less than equity's jurisdictional amount, the court said, "[W]hen a suit is instituted by one or more taxpayers in representation of all, the case is quite different. The amount involved and sought to be protected is then the total amount of loss to taxpayers, or the total amount which may be wrongfully expended." 162 Md. at 427, 159 A. at 925.

The relevance of Sun Cab Co. to the question of aggregation in a non-taxpayer class action has been challenged in litigation now pending before the Court of Appeals. In Pollokoff v. Maryland Nat'l Bank, 44 Md. App. 188, 407 A.2d 799 (1979), petition for cert. granted, (Apr. 4, 1980) (No. 152), plaintiffs challenged certain bank rules on passbook savings interest. The suit was framed as a class action, with many small individual claims aggregated to meet the circuit court's jurisdictional amount. The Court of Special Appeals
The Maryland cases fail to provide solutions to numerous other problems that can arise in attempting to evaluate this rarely-raised requirement. What, for example, if there is a close question as to whether $20 is in controversy? Must a hearing on this issue occur prior to equity's acceptance of jurisdiction? The damage amount requirements imposed on plaintiffs in the federal system usually are deemed met by a plaintiff's allegation of such harm, unless it appears "to a legal certainty that the claim is really far less than the jurisdictional amount." This liberal view has the effect of presuming that the jurisdictional amount is met and placing the burden upon the defendant to show its absence.

affirmed the trial court's granting of defendant's preliminary motion to dismiss, agreeing that Zahn and Snyder should be taken as persuasive authority on the interpretation of Maryland's class action rule, since it is very similar to the federal rule. Indeed, the two class action rules are "not dissimilar," Johnson v. Chrysler Credit Corp., 26 Md. App. 122, 127, 337 A.2d 210, 213 (1975), although the federal rule spells out in greater detail limitations on the device's use. The federal cases precluding aggregation were not, however, based on the class action rule. They were based on an interpretation of the amount in controversy provision of the federal subject matter jurisdiction statute, 28 U.S.C. § 132 (1976), and on Congress' long-standing acquiescence. The Court in Snyder, for example, acknowledged that it was "linguistically possible" to interpret "matter in controversy" as permitting aggregation. 394 U.S. at 338. It declined, however, to abandon "a judicial interpretation of congressional language that has stood for more than a century and a half." Id. Because the jurisdictional statute had been amended many times over that period, the Court reasoned that Congress, being aware of the judicial interpretations refusing aggregation, had chosen to adopt this meaning for the statute. Id. at 339. Accord, Zahn, 414 U.S. at 302.

In determining the subject matter jurisdiction of various state courts, analogies to cases involving the jurisdiction of federal courts should be drawn cautiously, if at all. Not permitting aggregation in the federal court simply sends the class action to the state court. Not permitting aggregation to meet a jurisdictional amount in a state court may deprive litigants of the class action device altogether.

107. The federal rule does not actually shift the burden of proof. The plaintiff retains the burden of proving the jurisdictional amount is met, but his allegation suffices unless challenged. If challenged, he must prove that it does not appear to a legal certainty that the requirement is not met. 14 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3702, at 372-74 (1976). Further, the liberal rule does not apply in injunction cases, in which the amount in controversy does not ultimately depend on the result of trial but may more often be objectively determined. See, e.g., Hague v. Committee for Industrial Org., 307 U.S. 496, 507-08 (1939) (Roberts, J., concurring).

Making a jurisdictional amount determination based on the pleadings avoids both the necessity of a pre-trial proceeding — which would often equal in scope the full trial — to determine the actual amount in controversy, and the waste of judicial resources that would result from dismissing a complaint after a full trial where the damages did not measure up to the amount claimed. These considerations apply most forcefully in damage actions. In an injunction case the amount in controversy may often be provable without reaching the merits of the claim. Nonetheless, the cases suggest that Maryland equity courts will not place a heavy burden of proof on plaintiffs. In Sun Cab Co. the Court of Appeals seemed to presume the jurisdictional amount was met by a bill alleging loss to taxpayers that would be caused by holding an unauthorized referendum. 162 Md. at 427,
The Maryland cases imply, but do not specifically require, that the amount in controversy is to be viewed from the plaintiff's perspective, that the harm to him must exceed $20.108 It would therefore be immaterial that an action, if successful, could cause the defendant $20 worth of harm or hardship.109

Finally, it is unclear whether the statute would be met by a plaintiff who has incurred a harm incapable of valuation, for example, the temporary denial of the right of free speech. Because most would agree that such a right is so fundamental and precious as to far exceed twenty dollars in value, although a precise figure could not be affixed, an injunction to protect such a right surely should lie in equity.110 If the

159 A. at 925. See also Cityco Realty Co. v. Slaysman, 160 Md. 357, 356–66, 153 A. 278, 282 (1931) ("Where the bill on its face failed to show that the value of the land was below the jurisdiction of the court, it was incumbent upon the defendants, if they proposed to rely upon that fact, to bring it to the attention of the court by some appropriate pleading."); Kenneweg v. County Comm'rs, 102 Md. 119, 129, 62 A. 249, 253 (1905) ("Has the appellant shown on the face of his bill of complaint such a pecuniary interest in the subject matter of this contestation as to give a Court of equity jurisdiction?").

108. See Baumohl v. Columbia Jewelry Co., 209 Md. 278, 285, 120 A.2d 830, 833 (1956); Sun Cab Co. v. Cloud, 162 Md. 419, 427, 159 A. 922, 925 (1932); Smith v. Wells, 106 Md. 526, 68 A. 134 (1907); Kenneweg v. County Comm'rs, 102 Md. 119, 62 A. 249 (1905); Kuenzel v. Mayor of Baltimore, 93 Md. 750, 49 A. 649 (1901); Reynolds v. Howard, 3 Md. Ch. 331 (1850). Cf. Purvis v. Forrest St. Apts., 286 Md. 398, 403 n.3, 405, 408 A.2d 388, 391 n.3, 391–92 (1979) (action by landlord in which court included both rent and value of possession in "amount in controversy" for purpose of deciding form of appellate review; court measured value of possession from landlord's point of view but hinted that defendant-tenant's harm might be relevant in appropriate case).

109. There is no settled rule in the federal system. Glenwood Light & Water Co. v. Mutual Light, Heat & Power Co., 239 U.S. 121 (1915), is generally taken as supporting a rule that the jurisdictional amount is measured solely from the plaintiff's viewpoint. The case does not, however, preclude other rules. Lower federal courts have taken divergent positions, though one court has said "it is well settled that in determining the amount-in-controversy, reference to either party's situation is appropriate." Senate Select Comm. on Presidential Campaign Activities v. Nixon, 366 F. Supp. 51, 60 (D.D.C. 1973). See generally 14 C. WRIGHT, A. MILLER & E. COOPER, supra note 107, § 3703.

110. In Kenneweg v. County Comm'rs, 102 Md. 119, 62 A. 249 (1905), the court held that failure to meet equity's jurisdictional amount barred a taxpayer's bill to enjoin an allegedly unauthorized election, but the right not to be taxed for the support of unauthorized elections does not rise to the level of the right to free speech. The only other insight the Maryland cases give on this subject is the following language in Sun Cab Co. v. Cloud, 162 Md. 419, 427, 159 A. 922, 925 (1932) (emphasis added):

The property loss to them, or the loss of civil rights, which according to our rules must be established as a foundation for the interposition of a court of equity, may be small, when apportioned among them. Probably the loss to any one taxpayer in any such proceeding seldom amounts to twenty dollars, the minimum of the debt or damage which a court of equity may consider.

This remark may suggest that damage to civil rights, like damage to property rights, must be measured in pecuniary terms. The case, however, did not, any more than Kenneweg, involve deprivation of a fundamental, personal constitutional right. Sun Cab Co., like
statute were interpreted otherwise, a host of basic rights would be without judicial protection, a result not likely envisioned by the General Assembly when enacting the amount-in-controversy requirement.

The benefit of the $20 requirement to Maryland's equity system is open to question. Although inflation has lessened its significance, it could force a party to forego judicial resolution of a controversy with a small financial value, but of significant worth in principle. It would bring about this result without serving any clear purpose. Because of the arbitrary amount, it is doubtful that the jurisdictional amount rests upon a legislative desire to ensure adversariness of a party's position, as federal standing requirements proclaim to do. Indeed, the fact that most counsel are unfamiliar with the rule gives it the potential of serving as an unexpected spoiler that could unfairly deny the claim of an otherwise deserving litigant. As a practical matter, however, as the paucity of case authority indicates, the rule's relevance to a legal dispute should be rare. Indeed, this infrequent application alone may be reason enough for its legislative repeal.

B. Equity's Residual Jurisdiction

It is well established that once equity properly obtains jurisdiction it may retain it even though subsequent events leave nothing in the case but traditionally legal rights or remedies:

[When a court of equity has once rightfully assumed jurisdiction, it will retain its jurisdiction in order to settle all questions that might

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Kenneveg, concerned a bill to enjoin an election. See also Kelley, Piet & Co. v. Mayor of Baltimore, 53 Md. 134, 139 (1880).

In most instances in the federal system statutes have eliminated the jurisdictional amount as a prerequisite to federal protection of constitutional rights. In the few situations in which the jurisdictional amount still obtains, some federal courts have been liberal, while others have been strict. Compare Spock v. David, 502 F.2d 953 (3d Cir. 1974) (political candidates denied access to military reservation met amount in controversy requirement by offering unchallenged testimony that an alternative means of communication with persons on the reservation would cost more than $10,000) with McGaw v. Farrow, 472 F.2d 952, 954 (4th Cir. 1973) (action for declaratory judgment and injunctive relief arising from denial of permission to use military base's chapel for memorial services dismissed because jurisdictional amount could not be measured in "dollars and cents"). See generally Comment, The Jurisdictional Amount in Controversy to Enforce Federal Rights, 54 Tex. L. Rev. 545 (1976).

111. See, e.g., Flast v. Cohen, 392 U.S. 83, 99–100 (1968). But see Aberdeen & Rockfish R.R. v. S.C.R.A.P., 422 U.S. 289 (1975) (preserving "actual harm" requirement for standing but allowing it to be satisfied by an actual harm so slight and attenuated as to cast doubt on whether standing defined by this test could serve the purpose articulated in Flast). Rather, it seems clear that the purpose of rules like Maryland's is simply to avoid playing a game not worth the candle. In a case in which he noted that a jurisdictional
arise out of the subject in controversy and give the complainants complete relief, even in those respects in which it would not have had jurisdiction originally, thereby preventing a number of conflicting proceedings concerning the same subject.\textsuperscript{112}

Thus, in this situation an equity court can render a money judgment for compensatory,\textsuperscript{113} but not punitive,\textsuperscript{114} damages. It can also grant relief to a defendant.\textsuperscript{115}

Absent any special reason for a trial at law, such as entitlement of a party to a jury trial, this rule of practicality avoids unnecessary delay and judicial inefficiency that would be incurred if a transfer to law were required. Nevertheless, although this "clean up" result is sensible, it flies in the face of the elaborate theories constructed to demark the bounds of equity jurisdiction in the first instance. It is perhaps another pragmatic modern adaptation to circumvent what today has become an outmoded distinction in the system of civil justice.\textsuperscript{116}

C. Transfer to Law or Equity

Because the line that separates law from equity is archaic and confusing, it is not unlikely that many actions that should be filed in law will improperly be filed in equity, and vice versa. Although at one time a case filed on the wrong side of the law/equity dichotomy could


\textbf{114.} \textit{See} Prucha v. Weiss, 233 Md. 479, 483-84, 197 A.2d 253, 255, \textit{cert. denied}, 377 U.S. 992 (1964); Superior Constr. Co. v. Elmo, 204 Md. 1, 26, 104 A.2d 581, 588 (1954). This long-standing and almost universal rule is based on the notion that an equity court is a "court of conscience" and "will permit only what is just and right with no element of vengance." \textit{Id.} at 20, 104 A.2d at 585.

\textbf{115.} \textit{See} Vulcan, Inc. v. Maryland Home Improvement Comm'n, 253 Md. 204, 211, 252 A.2d 62, 66 (1969) (defendant granted right to inspect plaintiff's records). While the relief granted the defendant in \textit{Vulcan} was equitable in nature, language adopted by the court in dictum and the rationale behind the rule (to avoid unnecessary duplication) suggest that equity has residual power to decide a defendant's legal counterclaim as well. \textit{See id.}

\textbf{116.} The law side also has certain "clean-up" powers. It can give writs of mandamus or injunction. Md. R.P. BF40.
have been dismissed.\textsuperscript{117} Maryland rule 515, which provides the current, simple remedy for correcting such a mistake, now requires that the court transfer the case to the appropriate side.\textsuperscript{118} Rule 515 avoids the unfortunate results of dismissal. Compelling the plaintiff to sue anew at law wastes time and money.\textsuperscript{119} Furthermore, if in the interim the statute of limitations has run, the plaintiff will be deprived of his basic right, solely due to his improper sojourn through law or equity.\textsuperscript{120}

The Court of Appeals is, with the rule, attempting to minimize the number of traps posed by the law/equity division, thus reducing the importance of the distinction. Today a dismissal could only result from filing on the wrong side if a party were not "entitled to some relief or remedy" on the other side, thus, in essence, not stating a claim upon which any relief could be granted.\textsuperscript{121}

A bill filed in equity or a declaration filed at law is presumed to have been filed on the proper side of the law/equity division unless the defendant shows otherwise.\textsuperscript{122} A defendant desiring to rebut this presumption and challenge the plaintiff's jurisdictional choice has been permitted to do so by a demurrer or by raising the defense specifically in

\textsuperscript{117} See, e.g., Yule v. Crowley, 249 Md. 260, 261, 239 A.2d 87, 88 (1968); Perlmutter v. Minskoff, 196 Md. 99, 75 A.2d 129 (1950). One of the statutory predecessors to rule 515, Md. Ann. Code art. 75, § 125 (1951), provided that such an improperly filed case "may, in the discretion of the judge presiding in the court" be transferred to the appropriate side. Transfer, therefore, was not mandatory and dismissal often resulted. See Summerson v. Schilling, 94 Md. 591, 607, 51 A. 612, 613–14 (1902).

\textsuperscript{118} See Port City Constr. Co. v. Adams & Douglass, Inc., 260 Md. 585, 593, 273 A.2d 121, 125 (1971); Moore v. McAllister, 216 Md. 497, 511, 141 A.2d 176, 184 (1958). Rule 515(a) currently provides in full:

Where it shall appear that the plaintiff is or may be entitled to some relief or remedy, but not in the particular court, or on the side of the court in which the action is brought or the relief is prayed, the plaintiff shall not on that account be nonsuited or the action dismissed; but the action shall be transferred by an order to such proper court to docket, either of equity or law, in the same county, as the nature thereof may require, or, if the action is within the exclusive jurisdiction of the District Court then to the District Court sitting in the same county and upon such terms as to the payment of costs as the court may order.

Md. R.P. 515(a). Many years ago the federal system underwent the same transformation, from dismissing claims brought on the wrong side, to merely transferring them. See 2 Moore's Federal Practice § 2.051(1) (2d ed. 1979). In Baltimore City the transfer would be between one of the common law courts of the Supreme Bench and one of the two equity courts, the Circuit Court and Circuit Court No. 2.


\textsuperscript{120} Cf. Yule v. Crowley, 249 Md. 260, 262, 239 A.2d 87, 88 (1968) (weekend not counted in determining timeliness of request for transfer; court said in dictum that 1961 amendment making transfer mandatory was in recognition of substantial hardship that could result from refusal to transfer).

\textsuperscript{121} See Md. R.P. 515(a); Yule v. Crowley, 249 Md. 260, 262, 239 A.2d 87, 88 (1968).

\textsuperscript{122} See Shryock v. Morris, 75 Md. 72, 76, 23 A. 68, 70 (1891).
his answer or plea. A motion to transfer would also seem an appropriate tool for this same purpose.

If the defendant fails to raise the issue in any of these manners, it will be deemed waived and the court can resolve the dispute, regardless of its proper law/equity label. A judgment in such a case will be enforceable and will not be deemed void.

In Moore v. McAllister, the Court of Appeals cautioned that a trial judge need not raise the equity/law defect on his own. Because a "waivable" right is at stake, it will often be inappropriate for the trial judge to raise the issue sua sponte, at least, it would appear, if a colorable issue coming within that side's jurisdiction is posed. Thus, in Moore, where the defendant raised no objection to equity's jurisdiction, where the defect in equity jurisdiction was the existence of an adequate remedy at law, and where the bill of complaint alleged irreparable injury, the court said, "the chancellor will abuse his discretion when he raises the lack of jurisdiction on his own motion and dismisses the case." The logic of Moore would also apply to a sua sponte order to transfer. By discouraging a court-initiated transfer, the Court of Appeals has again minimized the significance of the law/equity distinction.

If the court deems a transfer appropriate, it may transfer the case at any time before the jury retires or, in a nonjury case, before a final

123. Moore v. McAllister, 216 Md. 497, 505, 141 A.2d 176, 181 (1958); Shryock v. Morris, 75 Md. 72, 76, 23 A. 68, 70 (1891). A demurrer has been the usual method of raising the defense. See, e.g., Pennsylvania v. Warren, 204 Md. 467, 105 A.2d 488 (1954); Dalton v. Real Estate & Imp. Co., 201 Md. 34, 50, 92 A.2d 585, 593 (1952); Spangler v. Sprosty Bag Co., 183 Md. 166, 175, 36 A.2d 685, 689 (1944). Conceptually, a claim that a case should be heard at law, rather than in equity, or vice versa, is akin to those procedural defenses that may be raised by a motion raising preliminary objection under rule 323. That rule's failure to list a law/equity objection, however, precludes the use of this more logical tool.


128. See id. at 512, 141 A.2d at 184. In Mayor of Landover Hills v. Brandt, 199 Md. 105, 85 A.2d 449 (1952), in which no objection to equity jurisdiction was filed, the Court of Appeals noted, sua sponte, that the case should have been filed at law. It nevertheless ignored this mistake and went on to resolve the merits, affirming the decree. Id. at 107–08, 85 A.2d at 450–51.

129. 216 Md. at 512, 141 A.2d at 184.
judgment is entered. These deadlines also apply to the time for filing a motion to transfer. Thus, in one nonjury case a motion for transfer filed two days after the entry of a judgment nisi was deemed timely. The transferring order must direct the plaintiff to amend his original pleading within a specified time to conform to the requirements of the side to which the case is transferred. The pleading requirements and rules of that side will thereafter govern the case. The court may also make the transfer contingent upon the payment of costs thus far incurred.

D. Challenging Law/Equity Jurisdiction on Appeal

If a party poses a timely objection to a case's being tried at law or equity, two questions are raised: When may he take his appeal and will the issue be reviewable as a practical matter in the Court of Appeals?

Initially it is clear that due to the final judgment rule an order transferring or refusing to transfer a case from law to equity, or vice versa, is not immediately appealable. Instead, if such an order is to be assigned as error, absent an exceptional circumstance, appeal must await the entry of final judgment in the case.

Even after a timely appeal has been perfected, however, the Court of Appeals has shown great reluctance to alter the trial court's law/equity choice. Whether the court will afford a remedy for an improper law/equity placement has turned on whether a remand of the case would be otherwise necessary due to an error independent of the law/equity issue. Thus, when it has appeared on appeal that a remand is necessary for other purposes, but the case belongs on the opposite side of the court than where it was tried, the Court of Appeals has remanded

130. Md. R.P. 515(b). Rule 515(b) provides: "Such transfer may be made at any time, in an action at law, before the jury retires to consider its verdict, or in an action at law without a jury and in an action in equity before the final judgment is entered."


132. Id.

133. Md. R.P. 515(c). Rule 515(c) provides:

If a transfer be ordered pursuant to this Rule, the court in its order shall direct the plaintiff to amend the pleadings within the time provided by said order to conform the action to the course of the court to which the same has been ordered transferred. Thereafter, subsequent pleadings shall be filed to bring the action to issue within such times as are provided by these Rules.


135. Md. R.P. 515(a). Rule 515(a) is quoted in note 118 supra.
with directions to transfer to the proper side. If no other ground for a remand exists, however, the Court of Appeals has ignored the law/equity error, and proceeded to resolve the merits. This reaction, which ignores for some purposes the law/equity distinction, indicates that an appellant will have little chance of success in appealing the grant or denial of a law/equity transfer. At the very least, to be successful on such a claim harm would have to be established. Thus, for example, an improper transfer from law to equity could deprive a party of his right to a jury trial. If no jury trial is demanded, however, or if the transfer is from equity to law, most often no deleterious effect will result from the transfer, thus making the issue "harmless error," and nonreviewable.

This response therefore underscores the significant discretion vested in the trial judge's initial law/equity ruling. Absent a special situation, it is almost nonreviewable.

III. The Impact of Equity's Expansion on a Party's Right to a Jury Trial

A. The Trend Toward Equity's Expansion

The developments outlined above display certain trends in the manner in which Maryland's highest legislative and judicial bodies have tended to view the law/equity dichotomy. In their most significant form they reveal a marked expansion of equity jurisdiction, with a concomitant diminution of the traditionally sacred right to a trial by jury.

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138. It might be, however, that an improper transfer from equity to law would deprive a party of, for example, a presumption available at equity, but not at law, see, e.g., Mullan v. Mullan, 222 Md. 503, 506-07, 161 A.2d 693, 695 (1960) (shifting burden in equity fiduciary breach suit), and thereby significantly alter the outcome of the case.

139. The decline of the jury's power has also been effected on other fronts. The creation of the following modern and unquestionably efficient procedures that take decisionmaking power from the jury has minimized the jury's role, but each has withstood constitutional scrutiny: summary judgment, Fletcher v. Flournoy, 198 Md. 53, 61, 81 A.2d 232, 235 (1951); the directed verdict, see Frush v. Brooks, 204 Md. 315, 324, 104 A.2d 624, 627-28 (1954); new trial orders, Conklin v. Schillinger, 255 Md. 50, 64-65, 257 A.2d 187, 194-95 (1969); and remittitur orders, Turner v. Washington Suburban Sanitary Comm'n, 221 Md. 494, 502-03, 158 A.2d 125, 130 (1960). Resort to a jury demand has also been made more difficult by strict rules regarding timeliness of demand, Md. R.P. 343 (b) & (c); posting security, see Haney v. Marshall, 9 Md. 194, 209-10 (1856); and exhaustion of administrative remedies, see Attorney General v. Johnson, 282 Md. 274, 284-85, 385 A.2d 57, 63 (1978); Steuart v. Mayor of Baltimore, 7 Md. 500, 512 (1855).
The case law shows a less than tolerant attitude on the Court of Appeals' part toward rigidly and technically preserving the significance of the law/equity dichotomy in practice. In spite of the constitutional and legislative restraints that formerly bound the court's flexibility, the court has done much to minimize the importance of the distinction and thereby reduce the artificial pitfalls that its intricate rules can pose to Maryland litigants.

Much of the dismantling of the law/equity barrier has been brought about by the procedural rule changes outlined in Part II above. Thus, if a suit is mistakenly brought on the wrong side of the law/equity demarcation, and a timely objection is raised, the appropriate judicial response is no longer to dismiss the case; today it will merely be transferred to the appropriate side. If a party files on the wrong side, but no timely objection is raised, no remedy will be given, and that branch of the court will continue to maintain jurisdiction over the dispute, regardless of its proper law/equity label. Finally, even a correctly based and timely objection to law/equity jurisdiction will do little ultimately to derail a case. The Court of Appeals has ignored such mistakes and made the issue essentially nonreviewable on appeal.

The distinction between law and equity has further been modified by an expansion in many directions of the bounds of both jurisdictions, thereby creating a growing area of overlapping jurisdiction. Thus, for example, injunctions can now be obtained at law, while monetary decrees can often be obtained in equity. This increase in overlapping jurisdiction has significantly broadened a plaintiff's chances to avoid a jury trial. The Court of Appeals and Maryland litigants seem to have assumed, without directly confronting the issue, that by properly framing his complaint as a bill in equity, the plaintiff can cut off a defendant's right to a jury trial. Once equity properly takes jurisdiction, it can retain it; in equity, of course, there is no right to any form of

140. See text accompanying notes 163 to 170 infra.
141. See text accompanying notes 117 to 135 supra.
142. See text accompanying notes 112 to 116 supra.
143. See text accompanying notes 136 to 138 supra.
144. A plaintiff can now sue for damages at law and request injunctive relief as an ancillary remedy. See Md. R.P. BF40-BF43; Prucha v. Weiss, 233 Md. 479, 484-85, 197 A.2d 253, 256, cert. denied, 377 U.S. 992 (1964). On one unique occasion in 1793, due to the chancellor's disqualification as an interested party, an equity case was heard by a law court (known as the "General Court"), which granted injunctive relief. See Quynn v. Staines, 3 H. & McH. 128 (1793).
Thus, in a case in which a plaintiff has the choice of suing on either side, his choice of equity, so the case law assumes, fully negates the defendant's ability to obtain a trial by jury. No concern seems thus far to have been shown for the fact that had the defendant been sued at law or had he initiated the action, his right to a jury trial could have been invoked as of right. A race to either side of the courthouse then seemingly determines the presence or absence of a constitutionally protected right.

This result has been further encouraged by the growth of equity's independent jurisdiction. As has been shown, equity will have jurisdiction as long as the plaintiff requests one nonfrivolous form of equitable relief. Counsel seeking to avoid a jury trial, for example, may interest his client in seeking, along with his basic damage remedy, a less necessary equitable remedy, such as an accounting, and thereby rid his client of the prospect of having to tell his story to a jury of his peers. Skillful draftsmanship should not make this jury-free result too difficult for a plaintiff to obtain.

An equally significant expansion in equity jurisdiction is the result of developments begun by statute in 1888 and now effected by the Court of Appeals in rule BB76. Ordinarily, if damages would adequately serve a plaintiff, he was supposed to be confined to an action at law. Rule BB76 and its predecessors, however, modified this basic concept by permitting suit in equity and issuance of injunctive relief, in spite of the adequacy of money damages, unless the defendant can satisfy the court, generally by posting a bond or pointing to attachable property, that he will be able to satisfy any judgment obtained in the case. Thus, an "adequate remedy at law" now means not just that damages will make the plaintiff whole, but also that his damages remedy can, to a certainty, be realized. This security requirement obviously puts added pressure on any defendant who seeks to vindicate his right to a jury trial; apparently, a propertyless defendant can get a jury trial only by posting security. Rule BB76 thereby adds to a plaintiff's arsenal of tools to avoid this often (from his perspective) strategically disadvantageous mode of trial.

These equity-expanding rules work to help a plaintiff outmaneuver a defendant seeking a trial by his peers. A recent court rule has further disadvantaged the defendant by abolishing the advisory jury. Once strongly encouraged for the chancellor's use as being "far superior to a trial by any one person," even if that one person were a judge, the advisory jury was the last chance for a jury trial of a defendant who found himself within equity's jurisdiction.

The demise of the right to a jury trial has primarily come about through oversight. No Maryland litigant appears to have pursued his right to a jury trial in spite of these enlarged equitable doctrines, at least not to the point of a reported decision. The case law has almost always been developed by one side attempting to stay within equity's borders, while the other side seeks to derail and delay the case by asserting the adequacy of legal remedies. Rarely, if ever, has the party opting for the law side sought to support his contention by reference to his constitutionally-based jury trial right.

The flexibility occasioned by equity's expansion in Maryland has, no doubt, many attractive benefits. It has enabled litigants to avail themselves of a broader variety of remedies, thereby permitting the court to better fit the remedy to the wrong. In many instances this freedom has surely added to the attainment of more just results, enhancing in the long run the public interest. But this judicial improvement has come without any awareness in Maryland of its impact on a party's constitutional right to a jury trial. It would more closely approach the ideal to achieve a system that could garner the best of equity's ad hoc justice with law's traditional equalitarian safeguard.

B. The Continued Significance of the Law/Equity Dichotomy

The law/equity dichotomy continues to be significant. It gives many plaintiffs a choice as to whether they wish their cases heard by a jury. It also presents other choices to a litigant about to sue in the Maryland court system. A trial before a judge, sitting as a chancellor in equity, poses certain unique, countervailing, strategic advantages over a trial

151. Md. R.P. 517. Rule 517 was adopted in 1961. The federal system still retains a rule for the advisory jury. See Fed. R. Civ. P. 39(c). For an examination of this development in Maryland, see text accompanying notes 195 to 252 infra.


153. But see, e.g., Silberstein v. Massachusetts Mutual Life Ins. Co., 189 Md. 182, 55 A.2d 334 (1947) (upholding decree cancelling life insurance policies where evidence that insured knew of her illness before application was hardly substantial enough to justify judge's confidence in his ability to assume factfinding duties traditionally thought best served by juries).
on the law side. Equity in numerous instances has softened the harsher aspects of trials at law by altering substantive rules in order to "do complete justice." Thus, for example, jurisdiction over a fraud action founded upon an alleged breach of a fiduciary duty resides concurrently in law or equity.\textsuperscript{154} If brought at law, the burdens of proof and persuasion follow the usual rules and are imposed upon the plaintiff.\textsuperscript{155} If the same case is brought in equity, however, the case law demands that, after the plaintiff has established the existence of the fiduciary relationship, fraud will be presumed, and therefore the burden of disproving fraud shifts to the fiduciary defendant.\textsuperscript{156} This significant strategic advantage could encourage such a plaintiff to forgo a jury trial at law.

Another familiar example of differing law and equity approaches is the variance between law's statute of limitations and equity's doctrine of laches. At law, the statute of limitations is, of course, of fixed and definite duration.\textsuperscript{157} At equity, however, the defense of laches is not fixed but turns on the equities of the situation and therefore could be more or less than the duration of the comparable statute of limitations.\textsuperscript{158}

Another example of differing decisional rules dependent upon the law/equity dichotomy can be found in the doctrine of "part performance." Partial but not complete performance of the terms of a contract may give rise in certain situations to specific legal rights. Thus, for example, the operation of the Statute of Frauds could be prevented upon a showing of "part performance" of the contract.\textsuperscript{159} In Maryland, however, this doctrine has no applicability to law actions; the doctrine of "part performance" has only been applied in actions seeking equitable relief.\textsuperscript{160}

\textsuperscript{154} See text accompanying notes 89 to 94 supra.
\textsuperscript{155} See Mullan v. Mullan, 222 Md. 503, 507, 161 A.2d 693, 695 (1960).
\textsuperscript{157} See Md. Crs. & Jud. Proc. Code Ann. § 5–101 (1980). Section 5–101 prescribes a three-year limit for civil actions at law unless the Code provides otherwise. Sections 5–102 to 5–108 provide different time periods for various actions. While the time for filing an action is fixed, some leeway is provided by statutes and case law doctrine relating to when the period is to begin running. See id. § 5–201 (extending time for persons under legal disability); § 5–202 (excluding time between debtor's filing petition in insolvency and dismissal of petition); § 5–203 (in cases of fraud, statute begins running only when fraud should have been discovered); Harig v. Johns-Manville Prods. Corp., 284 Md. 70, 394 A.2d 299 (1978) (discovery rule); Vincent v. Palmer, 179 Md. 365, 19 A.2d 183 (1941) (continuation of events theory).
\textsuperscript{160} See Kline v. Lightman, 243 Md. 460, 221 A.2d 675 (1966); Hamilton v. Thirston, 93 Md. 213, 48 A. 709 (1901).
Finally, of course, each side continues to have a monopoly on issuing certain remedies. Specific performance, for example, is exclusively an equitable remedy and cannot be obtained at law.\textsuperscript{161} Punitive damages, on the other hand, may be awarded at law, but generally not in equity.\textsuperscript{162}

The likely merger of law and equity will not automatically eliminate the significance of these and other distinctions between the two. Merger will, rather, require careful consideration of which practices of each side ought to be, or constitutionally must be, preserved. Although the language of Maryland's constitution assumes a trial court system divided into law and equity,\textsuperscript{163} the division is nowhere mandated by that document.\textsuperscript{164} Subject to the limit imposed by the basic state constitutional right to a jury trial,\textsuperscript{165} the General Assembly is fully empowered to define the respective jurisdiction of the law and equity courts.\textsuperscript{166} It has not yet acted directly to abolish the distinction, though it has taken indirect steps toward merger. The first change in Maryland's historical distinction was signaled in 1939, when the legislature handed the power to define the respective practice and procedure of law and equity over to the Court of Appeals to exercise in its discretion pursuant to its rulemaking duties.\textsuperscript{167} More recently, the legislature approved a


\textsuperscript{163} Sections 28 and 29 of article IV of the Maryland Constitution allocate the judicial power of the various branches of Baltimore's Supreme Bench between the circuit courts, which "shall have exclusive jurisdiction in Equity," and the several other branches, which are allocated jurisdiction of cases at law. The constitution also specifically grants the Court of Appeals the power to promulgate equity court rules. Md. Const. art. IV, § 18.

\textsuperscript{164} See, e.g., Fooks' Ex'r s v. Ghingher, 172 Md. 612, 625, 192 A. 782, 788, cert. denied, 302 U.S. 726 (1937).

\textsuperscript{165} See text accompanying notes 178 to 181 infra.

\textsuperscript{166} See Fooks' Ex'r s v. Ghingher, 172 Md. 612, 625, 192 A. 782, 788, cert. denied, 302 U.S. 726 (1937).

\textsuperscript{167} The substantially equivalent predecessor to § 1–201 of the Courts and Judicial Proceedings Article, which now gives the Court of Appeals rulemaking power, was enacted as part of Act of May 11, 1939, ch. 719, 1939 Md. Laws 1521. The relevant language of this Act remained the same until 1973: "Such general rules [as the Court of Appeals was empowered to enact] may, if the Judges of the Court of Appeals deem it advisable, unite the practice and procedure in actions at law and suits in equity so as to secure one form of civil action and procedure for both." Md. Code Ann. art. 26, § 25 (1973) (repealed by Act of Aug. 22, 1973, ch. 2, § 2, 1973 Md. Laws, 1st Sp. Sess. 389).
proposed constitutional amendment abolishing the distinction between the Supreme Bench and the Baltimore City circuit courts.\textsuperscript{168}

The Court of Appeals long ago declared, however, that until the legislature altered the status quo, the court would adhere to "the ordinary common law distinction between courts of law and courts of chancery."\textsuperscript{169} Thus, not only have the courts refused to extinguish unilaterally the distinction between law and equity, they have also refused the invitation, "in order to do justice in [an individual] case," to "ignore" the difference between law and equity.\textsuperscript{170} Whether the recent changes alter the status quo enough to satisfy the Court of Appeals remains to be seen. It seems likely, however, that the venerable judicial dichotomy's days are now surely numbered.\textsuperscript{171} It is inefficient, duplicates administrative costs, engenders confusion and contributes no appreciable benefit to the rendering of justice. Merger of law and equity by the Court of Appeals through its rulemaking power can reasonably be expected in the near future.

Although merger will do much to modernize Maryland's civil justice system, it will still not resolve all of the complexities that the centuries-old division has posed. Even after the adoption of a single form of action, a perplexing question remains: When does the right to a jury trial — constitutionally protected for all actions traditionally brought at law — exist? As the post-merger federal case law has demonstrated,\textsuperscript{172} the historical impact of the law/equity division will still be felt in resolving the judge or jury trial issue.

168. Act of April 4, 1980, entitled "The Judiciary Department — Supreme Bench Consolidation." An earlier expression of legislative willingness to see law and equity merged is found in Act of May 1, 1939, ch. 719, 1939 Md. Laws 1522, which enlarges the respective jurisdictions of the Supreme Bench and the city circuit courts to accommodate a unified system in the event that the Court of Appeals mandates merger. The same section exists today, Md. CTS. & JUD. PROC. CODE ANN. § 1–502 (1980), although the Court of Appeals' power to unify law and equity, formerly referred to as a power "hereinbefore conferred upon it," Act of May 11, 1939, ch. 719, 1939 Md. Laws 1522, is now referred to as a power conferred by "the Constitution and by § 1–201(a) [the rulemaking power section which traces back to ch. 719, 1939 Md. Laws]," Md. CTS. & JUD. PROC. CODE ANN. § 1–502 (1980).


171. Indeed, the General Assembly has nudged the Court of Appeals in the direction of merger by enumerating its rulemaking powers as including rules regarding "unification of practice and procedure in actions at law and suits in equity, so as to secure one form of civil action and procedure for both." Md. CTS. & JUD. PROC. CODE ANN. § 1–201(a) (1980).

Merger, if anything, will only put a more practical focus on this problem. Maryland practitioners today, when confronted by a case at least partially sounding in equity, appear to have assumed a trial by jury was beyond their reach. Although the jury trial right is arguably not legally affected by the change, a merger would at least readdress practitioners' attention to the broader possibilities of the jury demand. This long-neglected right in the Maryland civil court system might once again expand outward toward the broad bounds, outlined below, that have been permitted it by the Maryland Constitution.

The retention of dual concepts of substantive rights should be without justification after a law/equity merger. The Court of Appeals could surely hold, for example, that the burden of proof should shift against a fiduciary regardless of the law or equity label that is given the breach of trust claim. Thus, if merger were to attempt to minimize the results of historical fortuity, the extension of equitable principles to all cases litigated under a unified system would be most desirable. Because the jury trial right distinction finds its roots at a constitutional level, however, it cannot so easily be judicially overlooked.

C. The Constitutional Basis for the Jury Trial Right

A century and a half ago, Justice Story, upon whose writings the Maryland Court of Appeals has constantly relied, declared that "the trial by jury is justly dear to the American people. It has always been an object of deep interest and solicitude, and every encroachment upon it has been watched with great jealousy." While many have been

174. See text accompanying notes 277 to 285 infra.
175. The Court of Appeals has hinted that the abolition of the law/equity distinction could justify a uniform burden of proof rule. See Mullan v. Mullan, 222 Md. 503, 507, 161 A.2d 693, 695 (1960). See also F. JAMES & G. HAZARD, CIVIL PROCEDURE § 8.3, at 359 (2d ed. 1977).
176. See text accompanying notes 178 to 185 infra.
skeptical of the value of this basic common law right,\(^7\) it remains today as a standard method by which the judiciary is aided in its search for truth in resolving the factual aspects of the legal disputes of our citizenry.

The authors of Maryland’s constitution and Declaration of Rights evinced a serious intent to preserve a party’s common law right to a jury trial. The major guarantee of this right in a civil case filed in a Maryland state court is section 6 of article XV of the constitution: “The right of trial by jury of all issues of fact in civil proceedings in the Courts of Law of this State, where the amount in controversy exceeds the sum of five hundred dollars, shall be inviolably preserved.” Although other constitutional provisions enforce this same right,\(^8\) none has been interpreted to add any substance to the section just quoted.\(^9\)

The seventh amendment’s somewhat analogous jury trial guarantee in the United States Constitution\(^1\) is of no direct application to the status of the right in Maryland. It preserves the right to a jury trial in the federal system only, and does not apply to Maryland\(^2\) or the other

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180. Article 5 of the Maryland Declaration of Rights provides, in part: "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, and to the benefit of such of the English statutes as existed on the Fourth day of July, seventeen hundred and seventy-six . . . . " Article 23 of the Declaration of Rights provides a general guarantee of due process of law: "That no man ought to be taken or imprisoned or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or, in any manner, destroyed, or deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the land." The reference to "judgment of his peers" has been held to mean trial by jury. See Wright v. Wright, 2 Md. 429, 452 (1852).

A separate constitutional provision assures jury trials in eminent domain proceedings: "The General Assembly shall enact no law authorizing private property, to be taken for a public use, without just compensation, as agreed upon between the parties, or awarded by a Jury, being first paid or tendered to the party entitled to such compensation." Md. Const. art. III, § 40.

181. See A. Niles, Maryland Constitutional Law 343 (1915). But see text accompanying notes 191 to 248 infra (preservation of "referred to law" procedure), and Md. Decl. Rts. art. V, quoted in note 180, supra (setting July 4, 1776 as the "preservation" date).

182. "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of common law." U.S. Const. amend VII. It is the sixth amendment right to a jury trial in criminal cases that has been made applicable to the states through the fourteenth amendment’s due process clause. See Duncan v. Louisiana, 391 U.S. 145 (1968).

The federal courts' interpretations of the seventh amendment have nevertheless been relied upon by the Maryland courts of appeal as persuasive authority. Historically, jury trials were only available in actions at law. Consequently, because Maryland's constitution and Declaration of Rights only preserve the right as it existed at common law upon that document's enactment in 1776, there is no constitutionally protected right to a jury trial on the equity side today. The Court of Appeals has left no doubt, however, that section 6 of article XV preserves "unimpaired the ultimate historical right as it existed at the time of our separation from the mother country." An understanding of when a party is entitled to a jury trial therefore requires an historical inquiry on a case by case basis as to when the right to a jury trial existed in 1776.

D. The Constitutional Implications of the Jury Right's Demise in Expanded Equity

Many of the claims categorized in Part I of this article as now being within equity's subject matter jurisdiction, and consequently immune from a jury demand, need reevaluation in light of Maryland's

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The Maryland Constitution and Declaration of Rights were enacted in November 1776, shortly after this country's declaration of independence from England. See A. Niles, supra note 181, at 1. Article V of the Maryland Declaration of Rights, however, sets the preservation date as July 4, 1776, upon the declaration of the nation's independence. See note 180 supra.
constitutional preservation of the jury trial right as it existed in 1776. In several of these situations, history arguably indicates that the jury right indeed did exist at that time, and therefore, although the Maryland bench and bar may have lost sight of the possibility, it must be honored for litigants posing these claims today. A broad variety of situations exists for which this historical analysis could be attempted. This Article will not undertake, however, so expansive, and perhaps insolvable, a task. Instead, inquiries will be advanced into several distinct areas, viewed from Maryland's present separate law/equity system as well as from that of the expected merger of these systems in the near future.

The remainder of the Article will first attempt a more extensive analysis of the right of a Maryland litigant in equity to have factual disputes referred to law for a jury's resolution. Extended treatment of this situation seems appropriate due to the general failure of other commentators to develop this possibility and due to the enormity of the consequences which such an historically rooted right could pose to modern Maryland equity practice. The Article will next hazard a view as to the right to a jury trial in Maryland in actions which in 1776 had to be filed in law but which may now be brought in equity due to legislative expansion of that jurisdiction. Finally, primarily with an eye to Maryland's expected merger of law and equity, the jury trial right in cases combining law and equity claims will be explored. This Article's conclusion from each of these separate inquiries is that the breadth of the right to a jury trial in Maryland may thus far have been seriously underestimated. This democratic device, once seen by the colonists as a safeguard against the "enemies of the popular will," may well be available on many occasions that in Maryland have heretofore gone unnoticed.

1. The Right to Have Factual Disputes in Equity Resolved by a Jury at Law

In 1776, when Maryland and the other colonies were proclaiming their independence and establishing the constitutional safeguard of the jury trial, it was standard practice in England, as well as in Maryland, for the chancellor in equity to refer for resolution disputed issues of fact

192. See, e.g., F. James & G. Hazard, supra note 175, §§ 8.2–.10.
193. See id. § 8.7.
194. See Beale, Equity in America, 1 Cambridge L.J. 2, 23 (1921).
to the law courts for a jury trial. As Alexander explains the Maryland practice, which was developed from England's "feigned issue" procedure, if it appeared upon the hearing of a cause in equity that a contested factual dispute should be resolved, the chancellor would frame the issue, direct which parties should be viewed as plaintiff and defendant, and then refer the parties and the issue to a law county court for a trial by jury. After a trial conducted by a law judge according to the usual procedures at law, the jury verdict, along with any questions of law to be resolved, would be certified to the chancery court. The law court would further state whether it was satisfied with the jury's verdict. Upon return of the certificate, if the losing party should ask for and be granted a new trial by the chancellor, the issue, perhaps reframed, would be sent back to the law court. If no new trial were permitted, the chancellor would then apply the jury's verdict and resolve all other issues of the case. Although, according to Alexander, that verdict was not binding on the chancellor, other authorities indicate that in the 18th century he was greatly restricted in his ability to reject the jury's verdict.

The English practice of factual resolution in equity at or prior to 1776 is open to some dispute. Chesnin and Hazard have asserted that the court of chancery in the 18th century almost never attempted to resolve factual disputes and instead routinely referred them to law for a jury trial. Only in the 19th century, state Chesnin and Hazard, did the chancellors begin to refer issues to law juries as a matter of "discretion" and not "routine."

195. See T. Alexander, Practice of the Court of Chancery 174–76 (1839). An alternative procedure to accomplish these same ends permitted the equity court to stay its proceeding while the parties instituted a suit at law to resolve the factual issues. See Ringgold v. Jones (Md. Ch. 1803), quoted in 1 Bland 88–91 n.(h) (1857).
197. See T. Alexander, supra note 195, at 175.
199. See text accompanying notes 205 to 208 infra. Alexander's view of the scope and definition of the standard "referral to law" procedure was undoubtedly colored by his 1839 vantage of the judicial system. By that point, 63 years after the freezing of the jury trial right, equity was in the process of considerably expanding its powers, and thereby diminishing the jury trial right. Accordingly, his assumptions and views might similarly have been enunciated without concern or regard for this mandate. He might well have been describing an 1839 phenomenon, rather than its 1776 counterpart.
200. See generally Chesnin & Hazard, supra note 196, at 1003–05.
201. Id.
202. Id. at 1000.
Langbein has unearthed, however, numerous instances of independent equity factfinding during the 18th century.\textsuperscript{203} The Chesnin and Hazard English precedent, he asserts convincingly, was limited to cases involving the execution of a will, which was beyond equity's subject matter jurisdiction after 1727.\textsuperscript{204}

Langbein's view of equity factfinding is, for the most part, closely similar to that evidenced by early 19th century Maryland cases. Where a significant dispute as to fact existed, referral to a jury at law was a common equity practice.\textsuperscript{205} But where the evidence, viewed in light of the proper burden allocation, was one-sided, the chancellor would resolve the facts himself and decree accordingly.\textsuperscript{206} Langbein further notes that the chancellor could order new trials if dissatisfied with the verdict.\textsuperscript{207} With less than convincing case law support, he goes a step further and asserts that the law jury's verdict was "advisory only" to the extent that equity reserved the right to reject it and enter a contrary order as opposed to merely ordering a new trial.\textsuperscript{208} He admits, however, that this course of action, if it indeed existed, was extremely rare.\textsuperscript{209} Referral to common law trial was therefore equity's regular device for resolution of significant factual disputes in 17th and 18th century England.\textsuperscript{210}

Other English authorities, relied upon by the Maryland courts, hint that far less discretion existed in 18th century English equity than Langbein supposes. In \textit{Revel v. Fox},\textsuperscript{211} for example, Chancellor Hardwick in 1751 confronted a factual dispute as to whether two defendants who had lived together for three months were married. Upon consideration of the proper mode of resolving the factual dispute, the chancellor unqualifiedly declared, "both defendants denying it on oath, and insisting on trying it, it must be tried; for a jury are the proper judges of fact."\textsuperscript{212}

\textsuperscript{204} Id. at 1623–24.
\textsuperscript{205} Id. at 1625.
\textsuperscript{207} Langbein, supra note 203, at 1627.
\textsuperscript{208} Id. at 1627–28. With two exceptions, see id. at 1628 & n.40, Langbein's cases do not distinguish between the power to require a new trial and the power to ignore completely a law jury's verdict in a referred case.
\textsuperscript{209} Id. at 1628.
\textsuperscript{210} Id. at 1629.
\textsuperscript{212} 2 Ves. Sr. at 270, 28 Eng. Rep. at 174.
Similarly, in *Peake v. Highfield*, Lord Eldon, after reviewing English precedent back into the early 1700's, declared that he had the power to determine if an instrument was forged. Because, however, the defendant and a witness had sworn that the instrument was properly executed, "it would be too much for me to make at once a decree in favor of the Plaintiff; an issue must be directed to try, whether the deed in question is the deed . . . it purports to be." Thus, his actions also define the right's limitations when confronting adequately controverted evidence.

Little reference to equity's procedure of "directing an issue" has been found in the sparsely reported Maryland 18th century case law. A 1796 reported case refers to an issue having been directed by the chancellor to be tried in the general court for the Western Shore; no meaningful discussion of the necessity for this procedure was made, however. The first preserved discussion of equity's directed issue procedure in Maryland appears to have occurred in 1801 in the case of *Hilleary v. Crow* before Chancellor Hanson. *Hilleary* brought to the chancellor a dispute as to the value — measured in pounds of crop tobacco — of ten acres of land. Although the chancellor viewed the crop value to be "inconsiderable," he had doubts "concerning the proper method of ascertaining that value." He accordingly suggested that, instead of sending to law an issue as to the value, both parties agree to have the court's auditor take evidence, value the land, and then make a recommendation to him to which exceptions could be taken.

When the parties failed to agree to this suggestion, the chancellor exercised his proclaimed power to order that the auditor determine the factual issue. The chancellor announced that although he had "never entertained any doubt" of his power to decide "all questions of fact which arise in this Court," it had "always been the practice to refer important questions of laws and fact to the decision of a Court of law and a jury." The reason for the traditional practice of referring factual

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216. 1 H. & J. 542 (1801 & 1802).
217. Id. at 543.
218. Id. at 543–44.
219. Id. at 544.
220. Id.
221. Id.
issues to a jury, he stated, was that "the trial by jury is justly considered as far superior to a trial by any one person whatever on written depositions..."222 In this case, however, due to "the low value of the subject of inquiry," the chancellor ordered a reference to the auditor, rather than sending an issue to a law jury.223 His decree was affirmed without opinion by the Court of Appeals.224

Two other early cases considering trial of factual issues in equity should be noted. *Ringgold v. Jones*225 was a creditor's suit against an estate, brought in equity, which raised issues of the factual validity of various claims against the deceased. One of the issues presented to Chancellor Hanson in this 1803 case was: "When claims are objected to on one part, and persisted in on the other part, the question is, in what manner shall it be tried."226 The chancellor found several disadvantages to a trial by jury in the instant case. A jury trial on each disputed claim, he reasoned, would be impractical, possibly exhausting the estate through court expenses.227 Further, it would be difficult to determine the proper parties for the issue.228 The Chancellor emphasized, however, that "in all cases where a claim depends on a single fact, or facts, strongly litigated, and of difficult investigation, the Chancellor conceives, that in some manner an issue ought to be tried."229

As an example of a proper instance for a jury trial of an issue, the chancellor's dicta suggested:

> For instance, [if] a bond is exhibited with an affidavit of no payment, &c.; payment is alleged; but no receipt is produced; or if a receipt is produced, there is an allegation of forgery. In such a case, an issue may be sent out to be tried between the claimant and the

222. *Id.*
223. *Id.* The chancellor's decision could be interpreted in many ways. It may have been an attempt to arrive at a practical accommodation of efficiency with the time and effort involving jury trial right. The strictness of the prevailing "referral at law" rule might have required a written opinion to justify an avoidance of its commands. Hence, the "general rule," which Hilleary sets forth and lauds, might well have been the standard without exception in 1776, while Hilleary's exception, developed by the case law method, came a quarter of a century later. Although extrapolating case progression in this fashion is fraught with risk, this scenario is well within possibility.
224. *Id.*
225. The decision in *Ringgold* was issued on May 2, 1803, and is reported as footnote (h) in 1 Bland 88–91 (1857), a collection of cases decided in Maryland's early chancery court.
226. *Id.* at 89.
227. *Id.*
228. *Id.* at 89–90.
229. *Id.* at 90.
party alleging; if the said party chooses to be considered as plaintiff on the trial of the issue.\textsuperscript{230}

Because of various deficiencies in the objecting creditor's proof, the chancellor declined in \textit{Ringgold} to order an issue resolved at law, but granted the creditor "further time for establishing his claim."\textsuperscript{231}

At issue before Chancellor Bland in 1828 in \textit{Fornshill v. Murray}\textsuperscript{232} was the legitimacy of children of an allegedly bigamous marriage. Citing English precedent,\textsuperscript{233} the chancellor acknowledged that such a factual issue is usually resolved by "making up an issue" and having it tried to a jury.\textsuperscript{234} He went on to note an exception to this rule, however:

But it is not indispensably necessary, in any case, that the Chancellor should have any fact determined by a jury. It is only when he entertains a reasonable doubt as to the fact, and when it depends on evidence the weight of which can be better estimated by a jury, or where the testimony is very obscure and contradictory, if he thinks fit that the Chancellor, for the information of his own conscience, may have recourse to this auxiliary mode of obtaining it.\textsuperscript{235}

In \textit{Fornshill}, however, because "the proof [primarily depositions] [was] so clear and demonstrative," leaving "not the smallest room for a doubt upon the subject," the chancellor declared, "I hold it to be my duty to pronounce an immediate decree."\textsuperscript{236}

As clues to the status of a party's right in 1776 to have issues in equity cases tried at law, these Maryland cases of a few decades later establish what at least can be viewed as a rough outline of this procedure's earlier contours. It appears that, because a jury's resolution

\begin{itemize}
  \item \textsuperscript{230} \textit{Id.}
  \item \textsuperscript{231} \textit{Id.} at 91. The practically minded chancellor could be seen as cutting out another new "exception to the rule" as it might have previously existed in the 18th century. See note 223 \textit{supra}.
  \item \textsuperscript{232} 1 Bland 479 (1828).
  \item \textsuperscript{234} 1 Bland at 485.
  \item \textsuperscript{235} \textit{Id.} The Chancellor's English precedent for this course of action was Short v. Lee, 2 Jac. & W. 464, 496, 37 Eng. Rep. 705, 717 (1821), and Peake v. Highfield, 1 Russ. 560, 38 Eng. Rep. 216 (1826). \textit{Short} seems to have held that when a party requests reference of a factual issue to a law jury, but his case is without much factual support, the chancellor need not send the question to a jury at law, but may resolve it himself, thus avoiding exposing the other party "to the expense or risk of an issue." 2 Jac & W. at 496, 37 Eng. Rep. at 717. \textit{Peake} is discussed at note 213 and accompanying text \textit{supra}.
  \item \textsuperscript{236} 1 Bland at 485.
\end{itemize}
of fact was viewed as far superior to that of a chancellor, reference to a
law jury was the preferred method at the turn of the century of
resolving factual issues in equity. Although the chancellor had the
acknowledged power to resolve factual disputes, that power was
employed in the face of a request for a jury resolution only where
factfinding would prove to be an easily accomplished and more practical
task: where no reasonable doubt as to the facts existed, as in Fornshill;
or where the costs of a referral to law for a jury trial measured against
the low amount in controversy would make a reference economically
inefficient, as in Hilleary and Ringgold. When a dispute existed as to
which reasonable minds could differ and the existing documentary
evidence would not clearly resolve the conflict, however, reference to a
jury at law was the required mode of resolving facts.

The early Maryland case law further suggests that a failure of the
equity court to refer an issue to a law jury could be reviewed for an
abuse of discretion. The Court of Appeals at least entertained a claim of
error in 1835 predicated upon the chancellor's refusal to refer an issue.
Although it upheld his choice to resolve the factual issue himself of
whether and how a deed was fraudulently transferred to avoid creditors,
the court did not doubt the appellant's right to obtain review of this
decision. The apparent right to such review would therefore indicate
that a party had an enforceable right to restrict the chancellor's
independent factfinding.

The early cases also made clear that the jury's verdict on a referred
issue was not binding on the chancellor; it merely served to "inform

237. "Evidence in equity was produced largely by sworn pleadings and written
depositions taken upon written interrogatories." F. JAMES & C. HAZARD, supra note 175, at
357, and authorities cited in id. at 326 n.26. Thus, while the chancellor's more indirect
methods of factfinding, which precluded a full appreciation of witness demeanor, could
have greatly contributed to this view, see Hilleary v. Crow, 1 H. & J. 337, 339 (1801), the
"superiority of trial by jury" was perhaps also due to its more democratic basis. Beale has
noted that at the time of the American Revolution judges, who had been appointed
through royal governors by the Crown, were often regarded, although perhaps more in the
northern than southern states, "as tools of the King and as enemies of the popular will." Beale, supra note 194, at 22-23. Oral testimony became part of equity proceedings in
Maryland in 1890. See Act of Mar. 11, 1890, ch. 86, 1890 Md. Laws 72. Certainly by that
time popular resentment against the King had died down.

238. In addition to the above cited cases, see Chase v. Winans, 59 Md. 475, 479 (1883)
(referral should only be made "where the proof before the judge creates doubt, by reason of
conflict, doubtful credibility of witnesses, or where, from a mass of circumstances, it may
be difficult to draw a proper conclusion.").


240. Id.

and satisfy [his] conscience" of the correct version of facts.\textsuperscript{242} The chancellor appears not to have had unfettered discretion, however, in rejecting the verdict. Instead, the jury's verdict "in all doubtful cases" was "entitled to great consideration, and should be sustained, unless against the absolute convictions of the court to the contrary.\textsuperscript{243} This ability to reject a jury's findings thus appears to have no greater breadth than a trial judge at law has had to enter a judgment notwithstanding the verdict or to order a new trial.\textsuperscript{244} Consequently, it appears that the jury's role in Maryland was far more than merely the advisory one that Langbein suggests existed in England.

As the century unfolded, both in England\textsuperscript{245} and in Maryland equity courts asserted progressively greater independence to try factual issues without a jury at law. Eventually this development reached the point, as is the practice in Maryland today, where the reference to law has become nearly nonexistent. By 1883 the Court of Appeals was stressing that referral of issues to law, although the "better rule," was not a party's right, but a practice remaining within the chancellor's discretion.\textsuperscript{246} Indeed, no Maryland appellate cases appear to have found such an abuse of discretion.

In 1961 the Court of Appeals, by enacting rule 517, totally eliminated this diminishing role.\textsuperscript{247} It mandated that "issues of fact arising in an action in equity . . . shall be determined in the equity court in accordance with existing equity practice, without a jury."\textsuperscript{248} In suggesting an end to what had become an "ancient" and "seldom-used practice," the Rules Committee tendered its view "that modern equity procedure renders this practice neither useful or desirable, and that its abolition will eliminate a possible source of considerable delay and expense in equity actions.\textsuperscript{249}

\textsuperscript{242} T. ALEXANDER, supra note 195, at 174. See, e.g., Chase v. Winans, 59 Md. 475, 479–80 (1883); B. BARROLL, CHANCERY PRACTICE 167 (1869).
\textsuperscript{243} Hoffman v. Smith, 1 Md. 475, 489 (1852).
\textsuperscript{245} See Chesnin & Hazard, supra note 196, at 1009–10.
\textsuperscript{246} Lichtenberg v. Sachs, 200 Md. 145, 157, 88 A.2d 450, 455 (1952) (upholding chancellor who refused to refer issues to law); Borssuck v. Pantaleo, 183 Md. 148, 154, 36 A.2d 527, 530–31 (1944) (upholding chancellor who referred issues to law); Chase v. Winans, 59 Md. 475, 479 (1883).
\textsuperscript{247} "The practice heretofore existing of transferring issues of fact arising in equity to a court of law for an advisory verdict by a jury is hereby abolished." Md. R.P. 517.
\textsuperscript{249} Md. R.P. 517 note.
The Rules Committee's laudable concern for cost and efficiency appears to have overshadowed what should have been its fundamental focus: the guarantees of the Maryland Constitution and Declaration of Rights, which cannot be ignored due to mere inconvenience. Because the parties to a civil action in Maryland state trial court are entitled to a jury trial as that right existed in 1776, the foregoing historical development lends great credence to the argument that a party in equity today nevertheless has a right to a trial by a jury at law on all seriously controverted issues of fact. At the very least, rule 517's complete abolition of the referral procedure should be subject to serious constitutional challenge.

2. The Right to a Jury Trial in Actions Originally Existing at Law But Brought into Equity After 1776

The expansion of equity jurisdiction throughout the 19th and 20th centuries can be observed from one perspective by the definition given to


252. It would be unconvincing to claim that the jury trial right was preserved in Maryland only for actions brought at law, not, as here, as an adjunct to claims brought in equity. Although article XV, § 6 of the Maryland Constitution could arguably be open to such an interpretation, article V of the Maryland Declaration of Rights clearly preserves the right to a jury trial according to the course of the English common law as it existed on July 4, 1776. That "course" has been set forth above.

Langbein's assertion, applying to the resolution of this issue in jurisdictions other than Maryland, that the referral procedure was merely discretionary and therefore not a "right," see Langbein, supra note 203, at 1627, seems also to provide no damper to the notion of an existing entitlement to a jury resolution of fact. Regardless of the labels placed on the chancellor's behavior, it clearly became the practice to refer issues to law. If the chancellor once had the power absolutely to refuse such a referral, he undermined that ability over time by acting otherwise. Thus it is unnecessarily esoteric to define the degree of entitlement to a jury trial by equity's view that it could, in principle, refuse the requested referral, when in practice it did not. The development by a court of standardized rules for exercising its discretion, should give rise to a right in a party to expect that pattern of discretion.

Furthermore, while the jury right has permissibly been modified by the development of efficient modern procedures, such as summary judgment and the directed verdict, see note 139 supra, the right to a referral to law can well be viewed as no mere incident to a jury trial right, but the right itself, and thus beyond the reach of judicial nullification. Abolition of the referral procedure would not be affecting "mere matters of form and procedure but [the] substance of [the] right." Walker v. New Mexico & S. Pac. R.R., 165 U.S. 593, 596 (1897).

Finally, although it might be a practical result, the fact that an expanded jury right might be undesirable from an efficiency standpoint should have no bearing on the constitutional issue, which, for better or worse, appears to be historically absolute. See Dairy Queen, Inc. v. Wood, 369 U.S. 469, 471 (1962).
"inadequate remedy at law" by the courts and legislatures, thus enabling plaintiffs to bypass more readily the law courts and sue in equity. This development surely was rooted upon valid and defensible considerations. More flexible and protective remedies were sought for plaintiffs where the law side had failed to develop them. One of law's shortcomings, at least from a creditor's perspective, was its inability to produce an immediately enforceable decree. Unlike equity, which could order the defendant to do or refrain from an act, law's orders had no element of immediate personal coercion. A judgment in law, for example, merely declared a defendant's liability to the plaintiff for a certain amount of damages; it did not require its immediate payment.253 Remedies at law were therefore inadequate in the sense that they provided no guarantee that a judgment could be satisfied.

The states began by statute to remedy this perceived shortcoming. The Maryland legislature, for example, in 1888 decreed that claims that previously had seemed adequately resolved in actions for damages at law could now be remedied by an injunction in equity, unless the defendant posted a bond or otherwise displayed his ability to satisfy a judgment for damages.254 Thus, an "inadequate remedy" was deemed one which failed to secure fully the plaintiff's right to recover a damage award. Maryland rule BB76 provides the current counterpart to this development.255

Supreme Court case law interpreting the dictates of the federal seventh amendment, which the Maryland Court of Appeals has generally viewed as persuasive,256 casts doubt upon the ability of such a rule to deprive a defendant of his jury trial right. Scott v. Neely257 was one of the Supreme Court's leading premerger jury right cases. The plaintiff in Neely sought in an equity action to subject the defendants' property, in advance of any judgment obtained at law, to the satisfaction of an allegedly unpaid simple contract debt. A Mississippi state statute had created such a right for creditors and permitted it to be enforced in equity, despite the existence at law of an action for damages.258 Although


255. Rule BB76 is quoted in note 53 supra.

256. See, e.g., Conklin v. Schilling, 255 Md. 50, 66, 257 A.2d 187, 195 (1969). This result is not surprising. The words of section 6, article XV of the Maryland Constitution closely parallel those of the seventh amendment.

257. 140 U.S. 106 (1891).

258. Id. at 108-09.
in no way inhibiting Mississippi's ability to expand the jurisdiction of its equity courts in this fashion, the Supreme Court refused to permit the use of such a new remedy in a federal trial court in a way that would deprive the defendant of his traditional right to trial by jury of such an issue.

After noting the seventh amendment's mandate that preserves the right to a jury in suits where that right existed at common law, the Court held:

In the Federal courts this right cannot be dispensed with, except by the assent of the parties entitled to it, nor can it 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. Such aid in the Federal courts must be sought in separate proceedings, to the end that the right to a trial by a jury in the legal action may be preserved intact.\textsuperscript{259}

The Court therefore ruled that because an action for debt upon a contract was legal in nature, thus entitling defendants to a jury resolution of its factual issues, the plaintiff's uniting of the Mississippi equitable remedy with that claim could not divest defendant of his jury trial right.\textsuperscript{260}

The \textit{Neely} Court went on to delineate some of those actions traditionally cognizable at law in which its ruling would protect the right of a jury trial. These included actions "which seek to recover specific property, real or personal, with or without damages for its detention, or a money judgment for breach of a simple contract, or as damages for injury to person or property."\textsuperscript{261} The Court declared: "Demands of this kind do not lose their character as claims cognizable . . . only on the law side, because . . . equitable relief in aid of the demand at law may be sought in the same action."\textsuperscript{262}

The \textit{Neely} holding was predicated on the constitutionally based (seventh amendment) right to a jury trial and statutorily required separation of law and equity at that time.\textsuperscript{263} Despite the existence in

\textsuperscript{259} \textit{Id.} at 109-10.
\textsuperscript{260} \textit{Id.} at 110. \textit{Accord}, Cates v. Allen, 149 U.S. 451 (1893).
\textsuperscript{261} 140 U.S. at 110.
\textsuperscript{262} \textit{Id.} at 110-11.
\textsuperscript{263} \textit{See} Dairy Queen, Inc. v. Wood, 359 U.S. 469, 471 (1962). In a probable overstatement of \textit{Neely} and the United States Constitution, the Supreme Court in 1893 summarized \textit{Neely} as follows:

It was there shown that the Constitution of the United States, in creating and defining the judicial power of the general government, had established the distinction
Maryland of both requirements, the Court of Appeals, without considering the constitutional implications, has traditionally treated such an unsecured damages claim as triable in equity. The operation of rule BB76, however, closely parallels the Mississippi procedure invalidated in the federal system in Neely. Because such a claim could only, if requested, have been tried at law to a jury in 1776, it can convincingly be argued under the Neely logic that rule BB76, by conditioning a party's right to a jury trial upon the posting of security, violates article XV, section 6 of Maryland's constitution.

The same result should befall other Maryland remedies that may now be brought in equity regardless of the adequacy of a damage remedy. By statute, for example, specific performance of a contract may now be granted in equity, in spite of the adequacy of a damage remedy, unless full security for a damages judgment is posted by the defendant. Similarly, by statute, a "court of equity may decree a sale to enforce a vendor's lien or any other equitable lien although the lienor may have an adequate remedy at law." Because equity in 1776 could not assume jurisdiction and grant relief if an adequate legal remedy existed, these statutory expansions of equity jurisdiction would likewise face serious challenge if a jury trial were requested in such an action.

It is consequently clear that, while equity's expansion in the 19th and 20th centuries has promoted greater efficiency and flexibility in Maryland's judicial system, this development may not be enjoyed without paying a heretofore unrealized price. If it is interpreted to deny parties jury trial rights that they would have held in 1776, it surely violates Maryland's constitutional jury guarantees.

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between law and equity, and that equitable relief in aid of demands cognizable in the courts of the United States only on their law side could not be sought in the same action. . . .


264. See note 269 infra. Maryland rule 503 appears to prevent the consolidation of law and equity claims.


266. See Md. Ann. Code art. 16, § 169 (1973) (defendants need not post bond if they can convince the court that they have sufficient property to satisfy a judgment).


268. See generally text accompanying notes 42 to 46 supra.
3. The Jury Trial Right After Merger in Mixed Claims

At present in Maryland law and equity claims cannot be consolidated. Instead, a party must bring a mixed action at equity, whose "clean up" power will permit it to supplement equitable remedies with legal ones. Because a jury cannot be had in equity, this result has thus far been presumed to deprive the defendant of his right to a jury trial. When law and equity are eventually merged in Maryland, a jury trial demand will no longer be so easily ignored.

In *Beacon Theatres, Inc. v. Westover*, the Supreme Court held that a defendant could not be denied his right to a jury trial on all issues under his antitrust counterclaim for damages merely because the plaintiff had styled its action as an equitable one. The plaintiff had sought a declaratory judgment that its actions were not violative of the antitrust laws and an injunction to prevent the defendant from instituting any antitrust actions. Defendant counterclaimed for antitrust treble damages and timely demanded a jury trial. The trial court viewed the plaintiff's issues as equitable and ordered them tried first; any remaining issues, including defendant's counterclaim, were later to be tried by a jury. This would, as a practical matter, have split defendant's antitrust claim, requiring the court to try part of it and a jury the rest.

In reversing the lower court, the Supreme Court held that a merging of legal and equitable claims and issues made possible by the federal law/equity merger and by liberalized joinder rules could not deprive a party of his right to a jury trial on issues cognizable at law. Instead, except "under the most imperative circumstances," all issues triable as of right to a jury must first be tried by a jury, while equitable issues would thereafter be tried to a judge, thus not depriving a party due to prior adjudication and collateral estoppel of his right to a jury trial. As support, *Beacon Theatres* quoted and relied upon *Neely*, discussed above.

269. Rule 503, which provides for consolidation of claims, specifically provides that it does not "authorize the consolidation or joint trial of law actions with equity actions, or vice versa." Md. R.P. 503. In Washburne v. Hoffman, 242 Md. 519, 219 A.2d 826 (1966), the Court of Appeals observed that rule 503 fails to prohibit joinder; thus, if the parties' consent is obtained, joinder may be possible. *Id.* at 523 n.3, 219 A.2d at 828 n.3.
270. See text accompanying notes 112 to 115 supra.
272. *Id.* at 504.
273. *Id.* at 508.
274. *Id.* at 509–11.
275. *Id.* at 511.
276. *Id.* at 510. See text accompanying notes 251 to 263 supra.
Assuming enactment of a merged system in Maryland, *Beacon Theatres* and its progeny, if followed by the Maryland Court of Appeals, should considerably broaden a party's right to a jury trial on issues of law that now are being resolved by equity courts without a jury. One standard instance that surely would be affected is a party's present ability to remain in equity without a jury as long as one nonfrivolous equity remedy is requested. The previously discussed case of *Dormay Construction Corp. v. Doric Co.* is a prime example. The *Dormay* plaintiff sued in equity in a dispute arising out of land sales commissions for, *inter alia*, an accounting and a "monetary decree." Although the action was basically one for contract damages, due to the plaintiff's need for the equitable remedy of an accounting, the Court of Appeals upheld equity jurisdiction. This result therefore precluded the defendant from demanding a jury trial, as he could if a suit for damages had been brought at law. Under *Beacon Theatres'* reasoning there can be little doubt but that such a jury demand would have to be honored in a merged system. Indeed, this result was later required by the Supreme Court in *Dairy Queen, Inc. v. Wood*, in which the plaintiff, not too dissimilarly from that in *Dormay*, had sought, *inter alia*, an accounting and a monetary judgment. The Court held that because the complaint requested a money judgment claimed due under a contract, it presented "a claim wholly legal in nature." Consequently, the defendant's jury trial demand should have been honored. This logic would surely encompass the *Dormay* type of cases in Maryland.

A similar, although not entirely identical, situation would arise if a plaintiff brought suit solely for equitable relief, but the defendant counterclaimed for legal relief. Would the defendant be entitled to a jury trial on his legal claims, which indeed might underlie the plaintiff's claim too? In Maryland today such a defendant need not counterclaim, but could instead commence another suit at law in which a jury could be

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278. 221 Md. 145, 156 A.2d 632 (1959). See text accompanying notes 75 to 84 supra.

279. 221 Md. at 153, 156 A.2d at 637.


281. Id. at 475.

282. Id. at 477.

283. Id. at 479.
had. Indeed, because legal and equitable claims cannot be consolidated, he may be precluded from filing a legal counterclaim. In the federal system, prior to merger, the filing of such a counterclaim was deemed a waiver by the counter-plaintiff of his right to a jury trial. Equity would therefore maintain jurisdiction over the counterclaim, unless the plaintiff (counter-defendant) objected to such a loss of his right to jury on the counterclaim. After merger a legal counterclaim could be consolidated with an equitable claim, and, it would seem, be tried to a jury, if either party so chose, directly under the *Beacon Theatres* precedent.

A final situation now existing in Maryland adds an additional perspective to these possibilities. As has been noted, concurrent jurisdiction exists in fraud actions; a plaintiff may sue either at law or equity in a fraud claim. If a plaintiff today files a bill alleging fraud in a Maryland equity court, can this choice of forum deny the defendant his right to jury trial? Because fraud actions were also cognizable at law, the defendant could, had the action been filed at law, have had a trial by jury. Would a court’s refusal to honor his jury trial demand in an equity action today deny him an historical right he possessed in 1776?

After merger the answer to this query surely moves in the direction of requiring the jury trial. In a somewhat analogous Supreme Court case, *Simler v. Conner*, the plaintiff had sought declaratory relief to determine his liability under a contingent attorney fee contract with his lawyer which he claimed was the product of fraud. Although such a claim today might be viewed in Maryland as one for fraud seeking reformation of the contract, the Supreme Court held in this postmerger case that "the case was in its basic character a suit to determine and adjudicate the amount of fees owing to a lawyer by a client under a contingent fees retainer contract, a traditionally 'legal' action."

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284. Maryland has no compulsory counterclaim rule. See *Mo. R.P. 314(a)(1)*. Full preservation of the jury right in any second suit should require the equity court in the first suit to stay its trial, thereby avoiding any collateral estoppel effect, until the law issues in the second case were resolved.

285. Cf. *Mo. R.P. 503* (provides for consolidation of claims but says specifically that it is not meant to allow joint trial of law and equity actions), discussed in note 269 *supra*.


287. *See id. at 365–66; Chase Nat'l Bank v. Sayles, 30 F.2d 178 (D.R.I. 1927).*

288. It might be argued, however, that, should Maryland maintain its rule making all counterclaims permissive, the counter plaintiff’s ability to sue elsewhere and obtain a jury would make *Beacon Theatres* distinguishable.

289. *See text accompanying notes 154 to 156 *supra*.


291. *Id. at 223.*
Consequently, a jury trial could be demanded in the federal system. Thus, to the Court, the right to a jury trial after merger turns on the nature of the underlying claim, rather than the words the plaintiff has used to describe it.\textsuperscript{292}

The developments just analyzed, if followed by the Maryland Court of Appeals, as would seem reasonable, would do much to revitalize the right to a jury trial in a unified judicial system, one which makes no subject matter jurisdiction distinction between law and equity.

IV. Conclusion

This Article, in addition to providing a general roadmap for a treacherous journey through the law and equity sides of Maryland's trial courts today, has shown that "the line between Courts of Equity and Courts of Law is not as sharply defined as it once was."\textsuperscript{293} Much of the blurring of this distinction has been caused by equity's expansion, since the jury trial was constitutionally preserved two centuries ago, into areas traditionally reserved for the law courts. Surprising to the observer of this development, however, no qualms appear to have been voiced in the reported case law about its radical consequences. This passive acceptance should be unexpected in light of the sacred\textsuperscript{294} role traditionally granted the jury right: "Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care."\textsuperscript{295} It is further surprising in light of the strategic role that the jury can play in achieving victory for a litigant. As Moore has noted, "the jury has stood as protection of the small against the powerful and wealthy. The sympathy and human understanding of the jury has often infused the breath of life into the cold and otherwise lifeless rule of law."\textsuperscript{296}

The unquestioned acceptance of the blurring of jurisdiction, but not of the procedural and substantive rights available in each system, has resulted in a generous windfall for Maryland plaintiffs. By giving a plaintiff a broad jurisdictional choice of where to sue, the expansion of

\textsuperscript{293} Bartlett v. Moyers, 88 Md. 715, 718, 42 A. 204, 206 (1898).
\textsuperscript{294} See, e.g., Va. Const. art. 1, § 11: "That in controversies respecting property, and in suits between man and man, trial by jury is preferable to any other, and ought to be held sacred." This language, attributed to George Mason, has been in the Virginia Constitution since 1776. 1 A. Howard, Commentaries on the Constitution of Virginia 244 (1974).
\textsuperscript{295} Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 501 (1959) (Black, J.) (quoting Justice Sutherland writing for the Court in Dimick v. Schiedt, 293 U.S. 474, 486 (1935)).
\textsuperscript{296} 5 Moore's Federal Practice ¶ 38.02[1], at 17 (2d ed. 1979).
equity has enabled him unilaterally to decide in many instances if he
wants or does not want a jury trial. This solicitousness for a plaintiff's
inghts to choose his forum is uncharacteristic of Maryland's attitudes
toward the balance of plaintiff-defendant power. Because the plaintiff's
initial ability to forum shop by picking the time, place, and posture of
his legal confrontation grants him a significant strategic advantage, in
many other respects Maryland's rules understandably provide greater
than usual safeguards for a defendant in order to minimize or offset the
inherent strategic advantages enjoyed by a plaintiff.\footnote{297}

Despite this strong concern to counterbalance the advantages of a
plaintiff's ability to pick a forum, Maryland's case law has yet to
confront the legal significance of the strategic imbalance posed by the
plaintiff's broad discretion to choose law or equity. Considering the close
scrutiny and concern that the Court of Appeals has paid to other
procedural rules that have threatened to advantage unfairly one party
to a suit,\footnote{298} this form of inequality, especially when influenced by a
constitutional guarantee, can soon be expected to be rectified.

\footnote{297. Many jurisdictions, for example, have mandatory counterclaim rules. Thus, after
the plaintiff has exercised his discretion and picked his forum, a defendant is forced to
bring all related claims he may have against the plaintiff or risk forever waiving them.
Maryland's failure to recognize the mandatory counterclaim, see Md. R.P. 314(a)(1), frees
the defendant of the strategic quandaries often imposed by such a rule. He can thereby gain
the same forum-shopping advantages by bringing his claim elsewhere at the time of his
choosing.

Of similar consolation to a defendant was Maryland's constitutional provision
permitting a defendant at law to remove any case filed against him to another forum once
as of right. Although this constitutional provision has recently been nullified as
conflicting with fourteenth amendment equal protection, see Davidson v. Miller, 276 Md.
54, 344 A.2d 422 (1974), its demise may be temporary and in no way challenged the basic
policy of extending a significant benefit to a defendant who has an unwelcome forum
foisted upon him. Although today removal can be had only upon a showing of good cause,
see \textit{id.} at 83–84, 344 A.2d at 439–40, if permitted it can be to any county regardless of
original venue limits. Thus, a defendant can obtain a forum that a plaintiff could not have
obtained on his own. Furthermore, although a plaintiff can in many instances choose to
litigate a case in the district court, a defendant can nullify that choice by demanding a
Ann. § 4-402(e) (1980).

\footnote{298. See Perkins v. Eskridge, 278 Md. 619, 366 A.2d 21 (1976); Davidson v. Miller, 276
Md. 54, 82, 344 A.2d 422, 438–39 (1974) (where practical effect of Maryland constitutional
provision was to deny Baltimore City civil law litigants the same right of removal as other
state civil law litigants, the Court of Appeals held the provision unconstitutional on
federal equal protection grounds).}